

1-1-1983

## The Image of Justice and Reform of the Criminal Law in Early Nineteenth-Century England

Randall McGowen  
*University of Oregon*

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Legal History Commons](#)

---

### Recommended Citation

Randall McGowen, *The Image of Justice and Reform of the Criminal Law in Early Nineteenth-Century England*, 32 Buff. L. Rev. 89 (1983).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol32/iss1/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

# THE IMAGE OF JUSTICE AND REFORM OF THE CRIMINAL LAW IN EARLY NINETEENTH-CENTURY ENGLAND

RANDALL MCGOWEN\*

INTRODUCTION . . . . .	89
I. METHODOLOGICAL CONSIDERATIONS . . . . .	90
A. <i>Historiography and the "Progress" of Law Reform</i> . . . . .	93
B. <i>The Social Meanings of the Image of Justice</i> . .	96
II. THE MEANING OF THE GALLOWS . . . . .	99
A. <i>The Reform Argument</i> . . . . .	99
B. <i>The Conservative Response: Discretion and Human Authority</i> . . . . .	101
C. <i>Discretion and Humanity</i> . . . . .	103
D. <i>Discretion and Social Unrest</i> . . . . .	105
E. <i>Reform and the Politics of Authority</i> . . . . .	107
F. <i>The "Abuse" of Personal Justice</i> . . . . .	110
G. <i>The Authority of the Middle Class</i> . . . . .	112
H. <i>A Dangerous Sympathy</i> . . . . .	113
I. <i>The Lesson of the Law</i> . . . . .	115
III. THE MEANING OF THE TRIAL . . . . .	117
A. <i>The Judge as Friend</i> . . . . .	118
B. <i>The Lawyer as Advocate</i> . . . . .	120
CONCLUSION . . . . .	123

## INTRODUCTION

The subject of this Article is the early nineteenth-century English debate over the adequacy of the criminal law as it then existed. The debate arose among Members of Parliament over the wisdom of prescribing the death penalty for a long list of offenses. Given the renewed demand for employment of the death penalty in our society, the examination of an earlier debate would seem to

---

\*Professor of History, University of Oregon. I would like to thank Joan Scott, Doug Hay, Judy and Ken Greenberg, Duncan Kennedy, Fred Konefsky, Stan Pierson, and Dick Stein for their comments and encouragement during the writing of this Article.

be timely.<sup>1</sup> Yet, this Article does not support or attack any position held in the current debate. As will be seen, the terms and emphasis of the nineteenth-century discussion were quite different from those prevailing today. The most persuasive arguments for change at that time were grounded in the special circumstances of English political and social life. The danger of appropriating any easy "lessons" from the earlier controversy must therefore be recognized. Rather, this Article is a contribution to the effort to understand the nature of legal change. The following analysis seeks to be historically specific, while drawing upon insights derived from structuralism and theories of ideology in order to deepen our understanding. Insofar as this account has significance for current concerns, it directs us to reflect more deeply upon the political and cultural sources and meanings of the recent demand for the death penalty.

### I. METHODOLOGICAL CONSIDERATIONS

Traditional interpretations of criminal law reform during this period can be summarized under three headings: legal-intellectual, humanitarian, and class interest. The legal-intellectual accounts involve an explanation of change in terms of specific doctrinal debates and their related intellectual reference (for instance the influence of Bentham on legal thought).<sup>2</sup> Reform, in this view, occurred for reasons internal to legal discourse and practice. The humanitarian approach explains the attack on the death penalty in terms of a popular revulsion against the cruelty and irrevocability of death.<sup>3</sup> In turn, the class perspective has produced the search for the economic interests that were served by legal reform; in this instance reform is explained by appeal to the desire of property holders to have better security for their property.<sup>4</sup> These are undoubtedly over-simplified characterizations, but such simplifications have been the rule in the discussion of legal change. The disparities between these positions point out a perplexing problem for historical explanation: how to remain faithful to the intellectual content of a controversy while recognizing the cultural and social

---

1. See generally E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975).

2. See generally 1 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* (1948).

3. See R.K. WEBB, *MODERN ENGLAND 177-80* (1974).

4. J. Palmer, *Evils Merely Prohibited*, 3 *BRIT. J.L. & Soc'y* 1-16 (1976).

sources of conflict and change.

The central issue in the debate over capital punishment in early nineteenth-century England was the discretion exercised by judge and crown in deciding whether or not to carry out a capital sentence. To its defenders, the exercise of some degree of personal judgment in awarding punishment was necessary and desirable. The Whig reformers challenged the uncertainty in the operation of the law created by this discretion and suggested that personal whim played too large a role in determining punishment. Both sides appealed to legal principles and philosophical theories in defending their positions. Stated in these terms, the controversy has a familiar ring; we are inclined to see it as one more instance of a perennial debate over the amount of judicial discretion desirable in a legal regime.

Legal-historical accounts of these criminal law debates usually succumb to this temptation. The result is an analysis that is inadequate for two related reasons. First, the issue of discretion was never fully developed in these debates in strictly legal terms. The failure was not simply an intellectual shortcoming on the part of the participants. Discretion more often appeared as a side issue, taking up less time than the discussion of the claims of humanity or certainty as principles of punishment. It did, however, figure more prominently in the appeals made to what might be called the theater of justice and the listener's common sense. These vivid and often impassioned appeals focused and simplified this heated political dispute. Consideration of this rhetorical element leads to a second point: by invoking an image of justice, people appealed to wider beliefs and feelings about what constituted justice. Here they brought their own experience to bear; they offered up their own integrity and authority as evidence. In an appeal to the imagination, the philosophical issues were infused with life. In examining this image of justice, we get closer to the participants' unarticulated understanding of the right order for society.

The image of justice expressed far more than a political party's position. The debate was neither a matter of weighing the benefits of one form of justice over another, nor one of being swept along by some powerful intellectual current, but rather one of choosing between two forms of life. This is not a randomly chosen expression. The contest was not merely over what form justice should take; the question was framed by appeals to the form of

social life people felt the country had developed and should develop. Any decision necessarily combined what were at once prudential and visionary considerations.

The argument over discretion provides us with the key to understanding the underlying structure of the early nineteenth-century debate over the criminal law. The term "structure" too, is deliberately chosen as a way of describing how different influences operated upon each other and weighed upon the participants in these debates. It is a heuristic device (however great the dangers of using such a contested term) for helping us to understand the systematic interrelationships among such varied things as value, feelings, ideas, perceptions, and social experiences. For in these debates we discover a consistent relationship between internal points of the argument and references to the social world. These various relationships accumulate into one particular image of great force and conviction. This image is raised at a similar point in a number of different arguments, and it is employed repeatedly in the same way. It represents an appeal not just to ideas but to social reality, in however refracted a form. To view a situation in a certain way is to have already a certain kind of solution in mind. The image expresses a summary of the debate and a demand to resolve it on the basis of what one "knows" to be true.

We are still left with the problem of explaining the change that occurs during these years. How, for instance, do we explain the process whereby the traditional meanings of discretion were invalidated and repressed as a part of the triumph of newer judicial forms? We can only begin to answer such a question when we see that the issue of discretion involved conceptions of justice, forms of social life, and ways of applying power. Discretion was the point at which wider social and political issues intersected with specific notions of justice. When the participants most fully evoked the theme of discretion they did so in highly charged appeals to the listener's imagination. Such an appeal was not accidental; by appealing to the common sense of their audience speakers hoped to resolve the conflict. People spoke in terms of specific issues, but their enthusiasm was generated by a seldom articulated sense of relation to deeper concerns. It was the shift from one structure of understanding and values to another that made the debate so bitter and yet made its resolution possible.

The methodological challenge offered by these debates is to

enrich our understanding of the "reasons" people acted as they did in particular circumstances. Meanings do not operate in some phenomenological stratosphere, but rather emerge from interactions between experience and interpretation of the social world. For this reason, the identity of a class and the character of ruling class domination are complex creations, arising in part from conscious decisions and in part from the action of forces only half understood by the actors. To some extent these debates offer us an example of actors consciously manipulating ideas in hopes of shaping what others saw. Yet, these same people provide ample testimony of the varied demands they felt were operating on them. They desired to be consistent and coherent, both intellectually and morally. They felt the force of legal tradition and the constraints placed upon them by the requirements of judicial administration. They also faced a society which presented them with unsettling conflicts and profound challenges.<sup>5</sup> To allay the uneasiness they felt and to express the hopes they had for the future, these Members of Parliament used ideas and images already available in their society. Thus there was a relationship, however complex and heterogeneous, between the structure of their responses and the structure of the social world they confronted. This relationship cannot be deduced in advance; it can only be explored in detail as it emerged in definite historical circumstances.<sup>6</sup>

### A. *Historiography and the "Progress" of Law Reform*

The character of modern criminal justice in England was formed during the first decades of the nineteenth century. With the mitigation of the criminal law,<sup>7</sup> the rise of the prison as the primary form of punishment,<sup>8</sup> and the creation of a professional

5. See E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS 603-710* (1963); See also A. BRIGGS, *THE MAKING OF MODERN ENGLAND 184-235* (1965).

6. My approach here is indebted to R. WILLIAMS, *MARXISM AND LITERATURE* (1977); R. KEAT & J. URRY, *SOCIAL THEORY AS SCIENCE* (1975); A. GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY* (1979); R. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* (1976); A. MACINTYRE, *Causality and History*, in *ESSAYS ON EXPLANATION AND UNDERSTANDING* 137-58 (Manninen & Tuomela eds. 1976); and in a special sense to two "classics," K. MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* (1975), and L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1968).

7. See generally 1 L. RADZINOWICZ, *supra* note 2.

8. See generally M. IGNATIEFF, *A JUST MEASURE OF PAIN* (1978).

police,<sup>9</sup> a major extension of state power and a transformation of the image of justice occurred. In the standard accounts of the period these measures have assumed a self-explanatory character. Such reforms as the moderation of the criminal law and the provision of defense counsel rights have been offered as evidence of "the march of intellect"<sup>10</sup> and the powerful "current of humanitarianism" at work in the early nineteenth century.<sup>11</sup> The Whigs, who championed reform, have been described as impelled by a spreading democratic spirit, by a more rational attitude towards government, and above all else, by a more "humane" social vision.<sup>12</sup> The explanation of legal change by reference to "an age of reform" appeals to popular assumptions about the nature of social progress. The historians of the law have validated the arguments first offered by the reformers themselves, often in terms just as glowing and self-congratulatory.<sup>13</sup> In this way, past and present have collaborated to produce a "progressive" account of reform which lends legitimacy to existing judicial arrangements.

These kinds of assumptions appear most clearly in Leon Radzinowicz's *History of English Criminal Law*. Radzinowicz chronicles for us every phase of the reform movement, from its early intimations in the eighteenth century to its culmination in the 1830s. His volume on the death penalty is informed by one idea—that the gallows represented an inefficient and inhumane form of punishment.<sup>14</sup> This observation is so obvious to him that he pauses in wonder before thinkers and politicians who for so long resisted the "truth." The opponents of change are portrayed as simple reactionaries, blinded by self-interest or prejudice from seeing the value of new institutional forms.<sup>15</sup> An industrializing Eng-

9. See N. GASH, MR. SECRETARY PEEL 500-06 (1961); see generally 2 L. RADZINOWICZ, *supra* note 2.

10. A. BRIGGS, *supra* note 5, at 216; 13 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 266-68, 403 (1952).

11. C. PHILLIPSON, THREE CRIMINAL LAW REFORMERS 156 (1975); D. COOPER, THE LESSON OF THE SCAFFOLD 27-44 (1974).

12. R.K. WEBB, *supra* note 3, at 177-80 (1980); H. PERKIN, THE ORIGINS OF MODERN ENGLISH SOCIETY 287-89 (1972).

13. C. PHILLIPSON, *supra* note 11, at 320-32. John Langbein, in a recent article, has also adopted such a naively "presentist" perspective, describing "the legendary proponents of reform" as offering "manifestly sensible" proposals. J. Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 115 (1983).

14. 1 L. RADZINOWICZ, *supra* note 2, at 318, 531-33.

15. *Id.* at 513-17; C. PHILLIPSON, *supra* note 11, at 280; J. Langbein, *supra* note 13, at

land was faced with the crisis of a rising tide of criminal activity which proved that traditional measures for preserving order were outmoded. Radzinowicz describes the reformers as groping towards some definitive answer to the complicated problem of law enforcement, as if they were scientists searching for a law that would resolve some natural riddle. He waits impatiently for the discovery of the modern mix of mild punishments, professional police, and reformatory discipline to emerge.

Within this framework of assumptions, historians have nominated various candidates for the distinction of contributing most to the reform effort. Among the Whig lawyers, Samuel Romilly was the first to propose in Parliament an extensive mitigation of the severity of the law.<sup>16</sup> Henry Brougham gained a wide audience for reform through his articles in the *Edinburgh Review*.<sup>17</sup> Robert Peel, the Tory Home Secretary, appears in most accounts as the sensible politician who contributed administrative skill and political caution to offset the intemperate zeal of men like Romilly. Norman Gash and Radzinowicz have written of their admiration for Peel because he was far-sighted enough to link the reform of criminal law with the introduction of the new police.<sup>18</sup> Behind these politicians stood the imposing presence of Jeremy Bentham, a man whose intellectual powers seemed to dominate the age. Bentham offered a withering critique of the principles of eighteenth-century justice and proposed an alternative vision characterized by its unrelentingly logical conclusions. Most of the Whig lawyers were in communication with Bentham, and even Peel admitted admiration for him. Certainly, a strong case can be made for the argument that Bentham was the fountain from which reform drew its strength.<sup>19</sup>

Yet, this argument about personalities and ideas somehow misses the point. Douglas Hay has prepared the way for a more sophisticated analysis by his sensitive description of the multifaceted character of the eighteenth-century legal system. The

---

115.

16. P. MEDD, ROMILLY 210 (1968).

17. C. PHILLIPSON, *supra* note 11, at 237-332; T. Ford, *English Criminal Law Reform During and After the Napoleonic Wars*, 7 *ANGLO-AM. L. REV.* 243, 243-70 (1978).

18. N. GASH, *supra* note 9, at 329-30; J.E. COOKSON, *LORD LIVERPOOL'S ADMINISTRATION* 303-04 (1975).

19. C. PHILLIPSON, *supra* note 11, at 124-25, 233-34; E. HALEVY, *THE GROWTH OF PHILOSOPHICAL RADICALISM* 54-75 (1966).



logic of the gallows lies in its relationships to power and the shape of class society. "The criminal law," Hay observes, "was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose from property and in turn protected its interest."<sup>20</sup> So persuasive is Hay's account, that instead of sharing Radzinowicz's impatience for reform, we are left to marvel that so logical a system of justice, so intimately linked to existing political arrangements, could so quickly be overthrown in the early nineteenth century.

### B. *The Social Meanings of the Image of Justice*

Even a casual reading of the parliamentary debates over reform suggests an explanation of change that challenges the traditional accounts at almost every turn. The opponents of reform were reactionaries, but in a more profound sense than is usually attributed to them. Benthamite language was employed in the debate over reform, but it did not provide the most persuasive arguments for change. Peel, Brougham, and Romilly all had important parts to play in the dispute, but the outcome was not a matter of one side simply convincing the other. Ultimately, the issue in dispute was not how to secure the greater efficiency of the criminal justice system, but how to present a more pleasing image of justice. The desire was not just to reduce crime but to secure wider support for the legal order. Both eighteenth-century and nineteenth-century politicians were determined to sustain the idea that law "was subject not to the whim of a capricious individual but to a set of prescriptions that bound *all* members of the polity."<sup>21</sup> Radzinowicz supposes that reform of the criminal law awaited the reasonable administrative arrangements of better prisons and police. On the contrary, the challenge to older principles of justice prepared the way for and justified the introduction of new forms of state power.

Between 1808, when Samuel Romilly inaugurated his campaign for the mitigation of the criminal law, and 1836, when a bill was passed granting defense counsel the right to address juries in

---

<sup>20</sup> D. Hay, *Property, Authority, and the Criminal Law*, in *ALBION'S FATAL TREE* 25 (1975); see also *AN UNGOVERNABLE PEOPLE* 14 (J. Brewer & J. Styles eds. 1980).

<sup>21</sup> *AN UNGOVERNABLE PEOPLE*, *supra* note 20, at 14.

felony cases, a debate took place which challenged eighteenth-century notions of justice and propounded a new conception of the judicial process. In this debate, both sides appealed to justice as a form of instruction, teaching lessons to a wider public. Lord Holland, a Whig supporter of criminal law reform, expressed his conviction that while the judicial process sought the truth in individual cases, another consideration was that truth should be arrived at in a "manner satisfactory to the public."<sup>22</sup> In eighteenth-century England, the image of a paternal judge presiding over a compassionate inquest into the details of individual cases seemed "satisfactory." To this the advocates of reform opposed the image of an impersonal judge who refereed the clash of competing lawyers and followed the prescriptions of a more sharply defined criminal code. For the ultra-Tories who defended the former position, the discretion of the judge operated to legitimate a hierarchical and deferential society.<sup>23</sup> This mode of justice positively reinforced both the idea and experience of personal relationships based upon inequality.<sup>24</sup> In contrast, the Whigs who argued for reform sought to realize a more formal equality that would sustain belief in the operation of an impersonal and impartial rule of law. The eighteenth-century criminal law had promised justice, but in a drama that vividly taught the lessons of hierarchy and place. The advocates of reform were eager to overturn any practice that might create the impression that inequality influenced the operation of the law.

These two opposing interpretations of criminal justice were not merely opinions held by competing political parties; they represented two conflicting ideological constructions of the forms of state power. Each form of justice, it will be argued here, acquired its coherence from a particular understanding of the existing state of class relations. The transformation from one form to another was a result of a growing uneasiness with the image of aristocratic justice and of a desire to suit the image of justice to a society where a public, *both* middle and lower class, was putting forth new claims to be heard. The early nineteenth century was a time of

---

22. 35 PARL. DEB. (3d Ser.) 231 (1836).

23. See E.P. THOMPSON, *Eighteenth-century English Society: Class Struggle Without Class?*, 3 SOC. HIST. 133, 133-65 (1978); E.P. THOMPSON, *Patrician Society, Plebeian Culture*, 7 J. OF SOC. HIST. 382, 382-405 (1974).

24. See Hay, *supra* note 20, at 17-63; see also E.P. THOMPSON, *WHIGS AND HUNTERS* (1975).

turmoil and violence in England. The Whig lawyers who advocated reform were peculiarly situated both with respect to the law and the public so as to feel most acutely the urgency for action. Their task was the delicate one of challenging a form of justice without revealing the full limits of a class-bound law. This task was in part facilitated by a developing sense of a kind of incommensurability between the two positions which manifested itself as the debate went on. The triumph of liberal notions of justice necessarily involved the reinterpretation of aristocratic judicial practice so that it appeared to produce injustice.

Various proposals for the mitigation of the criminal law were justified by appeal to contemporary intellectual movements, including Whig political ideas, Benthamism, and standard Enlightenment concepts. A central contention of this Article is, however, that the impulse for reform emerged from and was shaped by the class position and experiences of Whig politicians. No reform "program" existed in advance, deduced from some rigid ideological structure already in place. For the most part, the coherence of various reform measures appeared only after the fact. The logic of reform efforts lay in the interaction of individuals possessing a certain stock of ideas and images with particular circumstances. This is another way of saying that the situation in which the "left" Whigs found themselves did more than provide a motive and occasion for action; it also suggested certain remedies. If the ideas they employed were structured, they echoed the structure of a particular social world. The specific experience of social relations was not incidental to the creation of the reform measures, but in various ways helped to constitute those measures.

The task of providing a complete account of the social relationships involved in even so limited a reform as that discussed here would be a daunting one. But the interaction of class and ideological structures can be well enough revealed by reference to the parliamentary debates. These debates were usually conducted at a high level of philosophical abstraction. Participants in the debates often misrepresented both existing arrangements and the arguments of their opponents. Such claims as they made should not be mistaken for a true description of the operation of justice in the early nineteenth century. Misrepresentation and things said obliquely are, however, the substance of this Article and the key to its method. They are revealing in their own right. The speeches of

the Whig reformers were studded with references to class. Speakers asked their listeners to imagine themselves as part of a lower class public "listening" to trials or "watching" an execution. Their images provoked anxiety by suggesting the presence of a restless and potentially hostile public. They warned of the dangers of a divided ruling class. The one thing they did not need to refer to was popular unrest since these debates took place against a backdrop of Luddism and Peterloo, Cato Street and the Bristol riots. They self-consciously employed a highly charged language which linked "discretion" and "mercy" to the discredited principles of aristocratic government, while promising "true" justice founded on the more democratic principles of "certainty" and "humanity."<sup>25</sup> These images and phrases were put forth as a way of allaying class hostility and restoring belief in the law. This Article seeks to capture the attitudes of the lawmakers through their own words and to argue that their understanding of the nature of class relations provided reasons which help us to explain their political actions.

## II. THE MEANING OF THE GALLOWES

### A. *The Reform Argument*

In practical political terms, the debate over the severity of the criminal law began in 1808 when Samuel Romilly proposed the abolition of the death penalty for stealing privately from the person.<sup>26</sup> The speech in which he moved this measure contained a full analysis of the inadequacy of the existing law. He presented arguments that were to be repeated with remarkable consistency for the next thirty years, not only by himself but by all the major Whig critics of the law's severity. For Romilly the evils in the contemporary judicial process originated in the frequency with which death was prescribed by law for a wide variety of offenses. Since the law was far too rigorous to be carried out in all cases, it had become necessary to create some form of mitigation. The solution that had emerged in the eighteenth century was the frequent em-

---

25. The debate over "discretion" and "certainty" did not end with the reforms of the 1830s. Yet, when discretion again became an issue it did not emerge in the same form and certainly not in the context of a defense of aristocratic justice. *But see* L. Radzinowicz & R. Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288, 1288-99 (1979); D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710-13 (1976).

26. 11 PARL. DEB. (1st Ser.) 397 (1808).

ployment of the royal pardon. The consequence of this action, Romilly argued, was to produce a "total change . . . in the nature of that which is considered as the most valuable prerogative of the crown; the prerogative of shewing mercy."<sup>27</sup> Instead of choosing the occasional object of mercy, the judges and ministers were now engaged in selecting who was to be executed. They did this as personal habit and prejudice dictated, not on the basis of any settled principle or rule. One judge might punish the most frequent offender, another the offense he regarded as most serious, while a third always recommended the condemned as fit objects for mercy.<sup>28</sup> Judicial discretion had grown ominously; Romilly feared that justice had come to seem the product of individual will.<sup>29</sup>

Romilly argued that the evils arising from this practice were manifold. The operation of the law created total uncertainty about the punishment for any given offense. People convicted of the same crime were punished in very different ways, and widely different offenses had the same punishment attached to them.<sup>30</sup> The public had no way of discovering the true reason for a particular outcome. The judges, he said, had created a "lottery of justice."<sup>31</sup> When a sentence was pronounced it was far from clear that it would be carried out. When a person was finally executed it was often not on account of the specific offense for which he was convicted, but because of personal reputation or government policy. Thus, there was no clear lesson offered to the public. Most disturbing to Romilly was the idea that the jury was not involved in making the crucial determinations in the case. He "thought the discretionary power at present granted to the judges highly dangerous, and such as no men would desire to be vested with."<sup>32</sup> The Whig critique of the law was that the existing judicial process was uncertain, unjust, inefficient, and potentially tyrannical.

---

27. *Id.*

28. *Id.* at 398-400.

29. *See id.* at 397-98; *see also* 2 MEMOIRS OF THE LIFE OF SIR SAMUEL ROMILLY 336-37 (Shannon ed. 1971).

30. 11 PARL. DEB. (1st Ser.) 397 (1808).

31. 19 PARL. DEB. (1st Ser.) 12 app. (1811).

32. 15 PARL. DEB. (1st Ser.) 370 (1810).

### B. *The Conservative Response: Discretion and Human Authority*

The task of answering an analysis which fundamentally challenged the existing system of law was taken up for the most part by the judges and law officers of the Crown.<sup>33</sup> No one rose to defend the severity of the law as such, though some argued that such severity was a necessary reserve to justice. The more usual defense offered was based less on the necessity of death than on the wisdom embodied in existing practice. Although William Windham was not a law officer, he was a dedicated foe of all innovation and had learned from Burke to distrust criticism of English institutions. To him the threat was that if Romilly's "principles were to be adopted, and all discretion taken away, there would be an end to that most amiable and endearing attribute of majesty, the power of extending mercy."<sup>34</sup> Windham linked the principle of discretion to the essence of monarchical government, for it was the unique power of the king to deflect the full execution of the law.<sup>35</sup> The royal prerogative did not overturn the law, since the Crown could not impose a more severe punishment. But the wise mitigation of the law was the suitable occupation of the king. According to one judge, the pardon "holds up the sovereign to the subject in the most favorable light," and thereby bound the sympathies of the people to the government.<sup>36</sup> The solicitor general, Thomas Plumer, remarked in an 1810 debate that the reform of the criminal law aimed at discrediting "the whole body of the criminal law," and tried "to cut up by the root all discretion in the judges."<sup>37</sup> The Tories found it to their advantage to argue that Romilly dealt in dangerous abstractions, despite his claim that he desired only piecemeal reforms. Beneath Romilly's pleasing "theories," they detected a program to undermine royal power.<sup>38</sup> Windham thought such philosophical schemes for perfecting human society had produced such evil in France that England should be protected from

33. On the political role of the judges, see E. HALEVY, *ENGLAND IN 1815*, at 25-32 (1968).

34. 15 PARL. DEB. (1st Ser.) 372-73 (1810); 2 ROMILLY, *supra* note 29, at 322; 3 ROMILLY, *supra* note 29, at 71-72.

35. 15 PARL. DEB. (1st Ser.) 372 (1810).

36. REPORT FROM THE SELECT COMMITTEE ON THE CRIMINAL LAW RELATING TO CAPITAL PUNISHMENT 47 (1819) [hereinafter cited as SELECT COMMITTEE REPORT].

37. 15 PARL. DEB. (1st Ser.) 373 (1810).

38. See 16 PARL. DEB. (1st Ser.) 775 (1810); 19 PARL. DEB. (1st Ser.) 22 app. (1811).

the contagion:

He could not help looking with an eye of jealousy on all such visionary schemes, which had humanity and justice for their ostensible causes. What had we witnessed within the last twenty years? Had not the French Revolution begun with the abolition of capital punishments in every case; but not till they had sacrificed their sovereign, whom they had thus made the grand finale to this species of punishment.<sup>39</sup>

Tory defenders of the law challenged the theoretical and moral claims made by the Whigs. They doubted that any significant measure of certainty could ever be established in the award of punishments. Each individual case was unique. It would be naive and unjust to attempt to force individual considerations into a precise scale of offenses and punishments. Given this, the Tory Prime Minister Perceval asked, where could the discretion that must inevitably belong to the law best be placed? His immediate response was that "if discretion were to be left in any quarter, he did not know where it could more safely be vested than with the judges."<sup>40</sup> They were more reliable in their exercise of a discretionary power than any jury could ever be because they were the repository for the wisdom and humanity of the English judicial process. When one considered what description of persons composed juries, it was "obvious" that they were more susceptible to movements in popular sentiment. The judges were the bedrock upon which the institution of justice rested. Davies Giddy spoke for many Tories: "When the House considered the manner in which the judges, . . . for many years past, were selected from a description of person against whom no reflection could lie, he was persuaded that it would be evident the discretion could no where be better placed."<sup>41</sup> The usual route to judicial eminence was through service as a law officer of the Crown, and this apprenticeship assured the judge's loyalty in troubled times. Juries embodied a more democratic principle that rendered them less reliable. They were not "enlightened enough to discern and decide upon the actual merits, upon a comprehensive view of all the circumstances of each case."<sup>42</sup>

---

39. 16 PARL. DEB. (1st Ser.) 768 (1810).

40. 15 PARL. DEB. (1st Ser.) 373-74 (1810).

41. 16 PARL. DEB. (1st Ser.) 767 (1810).

42. *Id.* See also E. HALEVY, *supra* note 33 at 114-15. On discretion and deference, see Parliamentary Select Committee, *Report from the Select Committee on Criminal Laws*, 24 Q. REV., 195, 239-40 (1820-21).

### C. *Discretion and Humanity*

The defenders of traditional judicial arrangements were especially stung by the charges that the existing laws were inhumane. After all, *they* were defending the mercy that was the centerpiece of justice; the reformers sought to remove mercy by substituting “mechanical” certainty. Judicial discretion and mercy were inextricably linked. Discretion, Windham argued, “arises out of the nature of things; it may, possibly, be productive of some inconvenience; but it is an inconvenience to which mankind must submit.”<sup>43</sup> It was also an “inconvenience” that provided the occasion for so noble a virtue as mercy. Yet Romilly now aimed to overthrow discretion and to challenge necessity. An inflexible and invariable code of punishments would leave little room for mercy: “Modern legislators, convinced of their own omniscience, are fully able to provide for every possible contingency; with them discretion is useless; and the words pardon and mercy, are, for the sake of humanizing our national character, to be abolished: but not with my consent . . . .”<sup>44</sup> For Windham there was too much inhumanity in the “humanity” of the law reformers, who struggled to fit multifaceted human existence into prescribed categories. He saw social revolution in the efforts to abolish “the words pardon and mercy.”<sup>45</sup>

The benign and personalized character of current practice was emphasized by Colonel William Frankland in 1811 in one of the most sustained defenses of the law. He took Romilly’s five proposals for reform that year as clear proof of a program to transform “the whole system of the law.”<sup>46</sup> He, on the other hand, was content with the balance that “the British system” had achieved, “a system full of mercy, though seemingly severe.”<sup>47</sup> He argued that as a practicing magistrate he was better informed about the actual operation of the law: “I do not mean their mere bearings and workings in courts of justice: but how they operate upon the mind; how they interweave themselves with manners; how they school and educate the rising generation; how they form character—And they do

---

43. 19 PARL. DEB. (1st Ser.) 63 app. (1811).

44. *Id.* at 59 app.

45. *Id.*

46. *Id.* at 615.

47. *Id.* at 616.



form character—national character.”<sup>48</sup>

Frankland voiced other fears as well. Reform would operate to limit the contact between what he called the “moral code” and the law by allowing no room for the operation of practical moral judgment. Such moral judgment was exercised by individuals, not dictated by law. Reform would make justice more mechanical, and thereby less moral. “Nothing is entrusted to wise and good men,”<sup>49</sup> Frankland observed of the reforms. “Even pardon is excluded from the theories of those speculators, who considering pardon as a dispensing with the law, would tear this jewel from the British crown.”<sup>50</sup> The beauty of the British system was that the “human law” was “qualified in its application by the moral law, so that it falls with severity on those only, who, morally speaking, are fit objects of it.”<sup>51</sup> Judges served as the sanction against the tyranny of mere laws. Yet what was this mechanical principle of certainty that was meant to displace the morally grounded law?

Frankland believed that any practical thinker would realize that certainty depended upon an implausible series of events: certainty of detection, quick prosecution, good evidence, and “clearness of understanding” on the part of judges and jury.<sup>52</sup> This was too much to expect. Human laws could never be perfect and could not perfect human action, but human institutions could work reliably, balancing and compensating for human imperfections. Severe laws, wide judicial discretion, and mercy constituted a system that was wise; it was a system based on experience and history, not speculation. Such a system was in harmony with English character. Small gradations of punishment only enfeebled moral judgment and inhibited freedom, thus destroying the free and “manly” character of English life.<sup>53</sup> Frankland concluded by borrowing the language of the Whig law reformers to condemn their efforts:

The system which attempts to affix prespectively an exact punishment to an exact offense, antecedently endeavoring to define every shade of distinction which a case may receive from its circumstances, trusting nothing to the discretion of the wise and the good, and thus presumptuously making the human code all in all hardens men’s hearts, and destroys all moral

48. *Id.* at 617.

49. *Id.* at 627.

50. *Id.*

51. *Id.* at 627-28.

52. *Id.* at 632-33.

53. *Id.*

sentiments.<sup>54</sup>

The central figure in the Tory version of justice was the judge. He was the human "governor" who kept the judicial system in balance. One attorney general, Charles Wetherall, expressed the view that a code of laws could not but be cold and harsh, but the judges were actuated by feelings of tenderness and "humanity."<sup>55</sup> Judges such as Lord Eldon and Lord Ellenborough hastened to add their own testimony to support this view.<sup>56</sup> They bitterly resented what they saw as attacks upon their conduct. Ellenborough sought to show that the judges were conscientious in their fulfillment of their legally prescribed role. They presided over trials in a spirit of moderation, warned against vindictive prosecutions, reminded the jury of its duty, and presented the defendant's case in the strongest possible light. When necessary, they could also recommend "the royal mercy."<sup>57</sup> In answer to examples of injustice offered by the opposition, the defenders of the law presented cases where the strict execution of the law had properly been set aside in the interest of mercy. Garrow cited the case of one poor prisoner, an industrious tailor, who stole a piece of wood to make stools of it for his sick children:

Such was the feeling of the judge, after having heard all the heart-rendering circumstances, that he instantly and rapidly said to the prisoner—"I hope your appearance here will be of no detriment to you hereafter—it ought not to be—you have suffered much already—go hence, and bless the laws which have enabled the judge to exercise some discretion on your case."<sup>58</sup>

It was with such cases in mind that Wetherall said that he favored the humanity of Lord Ellenborough over "all the speculative writers, the Voltaires and Rousseaus included."<sup>59</sup>

#### D. *Discretion and Social Unrest*

The debate over the criminal laws took place against a background of civil unrest. The years between 1808 and 1836 were some

54. *Id.* at 646.

55. 25 PARL. DEB. (1st Ser.) 374 (1813).

56. See 19 PARL. DEB. (1st Ser.) 112-13 app. (1811).

57. See *id.* at 121-22 app. Tenterden asked in 1832 why a punishment so seldom inflicted should not be praised for its effectiveness rather than condemned. 13 PARL. DEB. (3d Ser.) 986 (1832).

58. 24 PARL. DEB. (1st Ser.) 569 (1813).

59. 25 PARL. DEB. (1st Ser.) 373 (1813).

of the most turbulent in English history. They saw the conclusion of the war against France, the industrial unrest associated with Luddism, various movements for parliamentary reform, the Peterloo Massacre, the Cato Street conspiracy, the Swing riots, and the alarms surrounding the passage of the Reform Bill.<sup>60</sup> The criminal statistics, first collected in 1805, revealed a rising flood of indictable offenses. Their number grew from 4,605 in 1805 to 18,107 by 1830.<sup>61</sup> The two periods when agitation over the criminal laws was most intense were the years before 1822 and the years of the Reform Bill crisis, 1830 through 1832. The former period included what E. P. Thompson has called "the heroic age of popular Radicalism."<sup>62</sup> Both were periods of severe economic dislocation.

The Tories, for obvious reasons, did not feel that these were times in which one should criticize or seek to disarm justice. Judicial discretion was a powerful weapon in the hands of the government for securing the good order of the country.<sup>63</sup> In the debate over the question of establishing a committee to investigate the operation of the criminal laws in 1819, this Tory alarm was clearly expressed. Castlereagh attempted to control the inquiry by linking it to a study of secondary punishments. But the Whig Mackintosh successfully called for a separate investigation by a committee heavy with the advocates of reform.<sup>64</sup> In the debate, Castlereagh found himself on the defensive in trying to vindicate the English system of law. He sought to show "that as it was the policy, so it had also been the practice to administer that law, not in justice only, but in mercy."<sup>65</sup> He cautioned that others must

abstain from viewing our criminal code abstractly—to abstain from presenting it to the public as possessing a sanguinary character which did not belong

60. For a survey of the extent of these "disturbances," see generally E.J. HOBSBAWM & G. RUDE, *CAPTAIN SWING* (1968). For a more traditional account, see F. DARVALL, *DISTURBANCE AND PUBLIC ORDER IN REGENCY ENGLAND* (1934).

61. See V.A.C. GATRELL & T.B. HADDEN, *Criminal Statistics and Their Interpretation*, in *NINETEENTH CENTURY SOCIETY: ESSAYS IN THE USE OF QUANTITATIVE METHODS FOR THE STUDY OF SOCIAL DATA* 392 (E.A. Wrigley ed. 1972).

62. E.P. THOMPSON, *supra* note 5, at 603; A. BRIGGS, *supra* note 5, at 208; H. PERKIN, *supra* note 12, at 209-10.

63. In the 1820s Peel undertook to consolidate the criminal laws and in the process mitigated some of their severity. He was careful, however, to leave the discretion of the judges untouched. See N. GASH, *supra* note 9, at 486-87; see generally 1 L. RADZINOWICZ, *supra* note 7, at 567-77 (unequal application of reformers).

64. 39 PARL. DEB. (1st Ser.) 751 (1819).

65. *Id.*

to its practice—to abstain from dwelling on those severe inflections that he might find in its theory, but which he would never find in its execution.<sup>66</sup>

To graduate punishments would “deprive mercy of that province in which it was at present exercised so much to the public advantage.”<sup>67</sup> The pardon was not employed to correct some mischief in the law; “mercy” was a regular principle of social relations.<sup>68</sup> A note of desperation entered Castlereagh’s speech as he watched the tide of legal reform advance:

[H]e once more begged to deprecate any attempt on this subject to influence the passions of the multitude, by persuading them, that instead of living, as it had been represented to them by their ancestors they lived, under a mild and merciful government, they were to learn for the first time that the law of England was the most sanguinary code on earth . . . .<sup>69</sup>

### E. *Reform and the Politics of Authority*

While the Tories often mentioned their troubled times, the advocates of reform seldom referred directly to popular unrest. Instead, they remained persistent in their advocacy of reform in the face of the most alarming predictions. Yet, in private, Sydney Smith wrote to Lord Grey in 1819 to recommend “anything that would show the government to the people in some other attitude than that of taxing, punishing, and restraining.”<sup>70</sup> Criminal law reform was a logical and convenient issue for the Whigs. The attack on judicial discretion was consistent with the historic Whig advocacy of the rule of law, and a sensitivity to the popular perception of justice had been inherited from the Wilkite movement of the 1760s.<sup>71</sup> In a period when Tory repression was created by law officers and the courts were employed in politically motivated prosecutions, the arguments for mitigation of the criminal code provided a way to criticize the government.<sup>72</sup> The emotions associated with

66. *Id.*

67. *Id.*

68. Hay, *supra* note 20, at 40-49.

69. 39 PARL. DEB. (1st Ser.) 753 (1810).

70. 1 THE LETTERS OF SYDNEY SMITH 341 (N. Smith ed. 1953).

71. AN UNGOVERNABLE PEOPLE, *supra* note 20, at 136, 146, 149, 157-58, 160, 169-70.

72. The opposition was quick to accuse the government of causing needless suffering when large numbers of condemned were left in Newgate awaiting the outcome of appeals “to the fountain of mercy.” The government was portrayed as failing in its duty to decide quickly on the fate of so many unhappy persons. The unpopular Prince Regent also was criticized for failing to attend to “the most solemn act of royalty.” 18 PARL. DEB. (1st Ser.) 831-33 (1811); 11 PARL. DEB. (2d Ser.) 902-10 (1824); 38 PARL. DEB. (1st Ser.) 960 (1818); 33

this issue were such that criminal law reform was one of the few topics that united a badly splintered party. Criminal law reform was an issue on which the ministers were uniquely vulnerable, both on moral and utilitarian grounds.<sup>73</sup>

Above all, these measures spoke of the traditional Whig preoccupation with public opinion. The Tories accused them of appealing to the "factious and unreasonable clamor" out of doors,<sup>74</sup> but Francis Horner saw reform as a way of challenging the popularity of the "democratic" party.<sup>75</sup> Humanitarian issues in general offered the basis for "a broad political alliance" of the middle and lower classes,<sup>76</sup> but the law was a special area of concern. As one prominent Whig expressed the sentiment, it was not "enough that a system of criminal law should be really just and impartial; it ought to be fully impressed on the minds of the people that it was so."<sup>77</sup> The Whigs assumed in debate that they had a deeper understanding of social change and so a better remedy for social unrest.<sup>78</sup> If the problem with ensuring loyalty to the law on the part of the public arose from too severe a punishment and too much judicial discretion, then the solution was to diminish the severity and radically circumscribe discretion. As James Mackintosh pointed out, timely reform of the criminal law had helped to increase Napoleon's popularity.<sup>79</sup> At a time when the social order was being challenged by political radicals, Whig law reformers reinterpreted the issue of legitimacy in their own terms and offered their own solutions.

The popularity of criminal law reform came in part from its

PARL. DEB. (1st Ser.) 418-20, 536-40 (1816); 35 PARL. DEB. (1st Ser.) 404-08, 503-05 (1817).

73. See A. MITCHELL, *THE WHIGS IN OPPOSITION, 1815-1830*, at 15, 21, 121 (1967); M. ROBERTS, *THE WHIG PARTY, 1807-1812*, at 110-40 (1939); 2 ROMILLY, *supra* note 29, at 391; 16 PARL. DEB. (1st Ser.) 834 (1810). It is striking that even in the face of Luddism the government felt compelled to apologize for creating a new capital statute; see 21 PARL. DEB. (1st Ser.) 810-11 (1812); see also J. MERIVALE, *A BRIEF STATEMENT OF THE PROCEEDINGS IN BOTH HOUSES OF PARLIAMENT UPON AMENDMENT OF THE CRIMINAL LAW 20-21* (1811).

74. 39 PARL. DEB. (1st Ser.) 837 (1819).

75. 2 MEMOIRS AND CORRESPONDENCE OF FRANCIS HORNER 11, 89 (L. Horner ed. 1853)(letter to Dugald Stewart, Esq.).

76. R. ZEGGER, *JOHN CAM HOBHOUSE: A POLITICAL LIFE, 1819-1852*, at 167 (1973); accord A. ASPINALL, *LORD BROUGHAM AND THE WHIG PARTY* 31, 42 (1927); D. Rapp, *The Left-Wing Whigs: Whitbread, the Mountain and Reform, 1809-1815*, 21 J. BRIT. STUD. 35, 35-61 (1982).

77. 11 PARL. DEB. (2d Ser.) 186 (1824).

78. See J. CLIVE, *MACAULAY, THE SHAPING OF THE HISTORIAN* 134-38 (1975).

79. 2 MEMOIRS OF THE LIFE OF SIR JAMES MACKINTOSH 57-58 (R. Mackintosh ed. 1836).

being defined as a constitutional issue. A government policy of repression of radical political movements cast the Whigs in the role of defenders of traditional English liberties. Lord Holland expressed this connection when he voiced his anxiety that the criminal law involved "the mere exercise of a discretionary power." He was, he said, "unwilling to vest, in such frequent instances, a power over the lives of their fellow creatures, in any individuals, however highly he might respect them."<sup>80</sup> Lord Lansdowne believed such discretion led to abuse, was not sanctioned by statute, and was a power dangerous to the constitution.<sup>81</sup> Horner reported that "[i]n the best works on jurisprudence it had always been laid down as a principle, that although the quantum of punishment might sometimes be left to the discretion of the judges, the description of it should always be regulated by the law."<sup>82</sup> Yet present practice "substituted the exception for the general rule."<sup>83</sup> Indeed, one could argue that the jury was no longer a defense of English liberties. Whigs emphasized that recent innovations had undermined the ancient purity of trial by jury. Romilly pointed out that openness and publicity in judicial proceedings had been sacrificed.<sup>84</sup> For Mackintosh the discretionary system was "at variance with the first principles of free government . . . none of the facts or circumstances on which the life or death of man depends were ever known to the mere spectators of those public proceedings and solemn trials."<sup>85</sup> Instead life and death depended upon an investigation by a "secret body."<sup>86</sup> The Evangelical Thomas Fowell Buxton found it ironic that "the people of England," who prided themselves "upon nothing so much as that we are governed not by will, but by law," had to be "protected from the rigor of our own law by the interference of the ministers of the Crown."<sup>87</sup>

---

80. 20 PARL. DEB. (1st Ser.) 298 (1811). See generally A. Kreigel, *Liberty and Whiggery in Early Nineteenth-Century England*, 52 J. MOD. HIST. 253 (1980).

81. 19 PARL. DEB. (1st Ser.) 115 app. (1811).

82. 27 PARL. DEB. (1st Ser.) 247-48 (1814).

83. *Id.*

84. 19 PARL. DEB. (1st Ser.) 12, 76 (1811).

85. 24 PARL. DEB. (2d Ser.) 1039 (1830).

86. See *id.* at 1040; see also 17 PARL. DEB. (3d Ser.) 170 (1833).

87. 39 PARL. DEB. (1st Ser.) 813 (1819).

### F. *The "Abuse" of Personal Justice*

The advocates of reform tried to make clear that they did not complain of mercy, but rather of the way in which the prerogative of mercy was abused. The fact that it was so frequently necessary to have recourse to mercy meant that the laws lacked humanity. Certainty, impartiality, and equality before the law, were attributes of a well-regulated system of laws. A striking characteristic of the criminal law debate was that both sides shared a common description of the current process of the law. They might have long disagreements over the significance of criminal statistics, but they agreed that judicial discretion was the operative principle of the system. Where they differed so sharply was over the value to be attached to such discretion—whether it met the requirements of justice and utility. This disagreement was starkly revealed in 1823 in an exchange between Mackintosh and the home secretary, Robert Peel. According to Mackintosh:

[T]he selection of a particular case for punishment depended upon circumstances the most fluctuating and unsteady; such, perhaps, as the particular temper and opinions of the judge, the peculiar necessity which might exist for making a single example in some particular district, or the importunities which might be made to the judge for the purpose of protecting property, on his leaving the assize town. All these were circumstances which might influence the administration of justice at the particular moment, but which, considered with reference to general principles of criminal law, he could not but regard as a complete abomination. That the life of a man should depend on a temporary or local policy, on the necessities of a particular district, or the interests of particular classes, was a principle utterly inconsistent with justice and humanity, and tending to confound all our notions of right and wrong.<sup>88</sup>

Mackintosh believed that individual right stood above social necessity, especially insofar as some individual judge presumed to determine necessity. Yet eighteenth-century writers had praised just those aspects of judicial process Mackintosh now condemned. Eighteenth-century justice had emphasized personal elements, the personal discretion vested in the judge, the personality of the defendant, the individual characteristics of the crime, and the peculiar situation of the community. Peel admitted that "[i]t might be hard to say to a man, that his life should be valued at a particular rate, depending upon local or temporary expediency. But this was

---

88. See 9 PARL. DEB. (2d Ser.) 411 (1823).

the very reasoning upon which law was founded."<sup>89</sup> An execution might well be a necessary measure in a time of social discontent, while mercy might more properly be awarded in peaceful times. This was not unjust; it was a recognition of the wider context within which justice operated.<sup>90</sup>

A basic argument for reform maintained that the mitigation of the law was not only unjust but inefficient; increasing uncertainty both enfeebled law enforcement and provided an incentive to criminals. The severe laws caused the public to refrain from prosecution and conviction of the accused. They feared the responsibility of taking a human life. Quite simply, prosecutors and jurors did not trust the judges in their promise to act mercifully. Mackintosh argued that the public did not see the use of the pardon as a part of the normal operation of the law, but rather interpreted it as a symptom of the profound disorganization of justice itself. Its most alarming aspect was that human life depended on mere human discretion and not the certainty of established rules.<sup>91</sup> The frequent appeal to mercy was not taken as a justification for the existing system, but a reason for its overthrow. This interpretation prevailed despite the explicit denials of those who exercised discretion. The very actions of the judges were described as more dispositive of their dislike of severity, despite their testimony to the contrary.<sup>92</sup>

---

89. *Id.* at 424.

90. *Id.* Thus, the testimony of both Mackintosh and Peel lends support to Hay's description of eighteenth-century judicial policy. Langbein's criticism of Hay confuses the relationship between belief and practice, and in a related sense, between theory and empirical evidence. Langbein appeals to common sense; the criminal law was only concerned with criminals, and we all *know* criminals are "marginal" citizens. Therefore, the ruling class could only have had a slight interest in the criminal law. The criminal justice system "was primarily designed to protect the people." J. Langbein, *supra* note 13, at 105. He proves his case by examining a range of cases which, for the most part, concern people who were not of the ruling class. What Langbein's article reveals to us is the danger of deducing belief from behavior, for then we run the risk of imposing our perception and values upon the past in our construction of the facts. Langbein's "common sense" makes it difficult to understand the intensity of the early nineteenth-century debate over the criminal law. Both conservatives and reformers believed that a *system* of justice existed. Neither side was in doubt that the criminal law was important. It was seen as a form of instruction to *all* of society about the legitimacy of constituted authority. Langbein's claim as to the peripheral character of the criminal law would have amazed individuals as diverse as Eldon, Bentham, Romilly, and Wilberforce. *Id.* at 119.

91. See 39 PARL. DEB. (1st Ser.) 783-84 (1819).

92. See 24 PARL. DEB. (1st Ser.) 564-65 (1812-13).



### G. *The Authority of the Middle Class*

The advocates of reform pounced on every irregularity in the practice of the law as they hammered away at the theme that the criminal law was illogical, impractical, and ineffective. Since current practice was based upon the normality of a distinction between law and practice, ludicrous examples were easy to find. Witnesses for reform cited one case where judge and jury cooperated to value five ten pound notes at thirty-nine shillings.<sup>93</sup> In a case where a drawer was broken open and a five pound bank note taken, the jury returned a verdict of theft against the accused, but not in a dwelling house, which would have been a capital offense.<sup>94</sup> The jury thus implied "that the note and the man were accomplices—the note breaks open the drawer, passes through the doors, finds its way into the street, and there is met by the prisoner."<sup>95</sup>

The advocates of reform made much of such pious perjury as a way of demonstrating that evasions of the law could not be normal practice. From such episodes they built a case for the unpopularity of the laws. Juries revolted against carrying out the law, and even judges conspired in such abuses. That remarkable bit of propagandizing, the 1819 report of the Select Committee in the Criminal Law (the result of Castlereagh's defeat), repeatedly sought testimony that people refused to prosecute because of the severity of the law.<sup>96</sup> When the Tories responded that the failure to prosecute sprang from a variety of different motives, such as time or expense, the Committee sought to prove that such failures had only "honourable" sources.<sup>97</sup> Indeed, the advocates of reform were engaged in a double task. First, they had to support their charges against the law by their own testimony and that of the numerous petitions they submitted. Second, they had to answer Tory charges that this reluctance to carry out the law was a shirking of their duty to society. They responded by an appeal to humanity as the

---

93. See 5 PARL. DEB. (2d Ser.) 945 (1921).

94. *Id.* at 946.

95. *Id.*

96. SELECT COMMITTEE REPORT, *supra* note 36, at 26.

97. The Report concluded that there was a marked reluctance to prosecute because of the severity of the laws. Actual testimony before the Committee was ambiguous. Some witnesses reported no reluctance to prosecute; others disagreed, but only after considerable prodding by the questioner. Still others gave different reasons for the supposed reluctance to prosecute. See SELECT COMMITTEE REPORT, *supra* note 36, at 26-27, 29, 50, 54, 86, 113.

higher justification for their actions. They did not doubt the humanity of the judges, but they found such personal discretion unreliable. So in deference to a more noble sentiment, the cherishing of human life, they refused to prosecute. Thus, the equation which linked severity of the laws with uncertainty of punishment was not only convincingly proved, but also justified.

#### H. *A Dangerous Sympathy*

Underlying the arguments about the inefficiency and unconstitutionality of the judicial process was a more fundamental criticism. The fatal flaw in the existing system was its lack of accord with popular sentiment. Mackintosh believed it "one of the greatest evils which can befall a country when the criminal law and the virtuous feeling of the community are in hostility to each other."<sup>98</sup> The result was that the law could not be enforced without tyrannical measures. "[P]rosecutors, witnesses, counsel, juries, judges, and the advisors of the Crown" all conspired to prevent justice from being carried out.<sup>99</sup> In fact, the discretion of the people had risen up to limit the discretion of the judges.<sup>100</sup> The proof of this charge was before everyone's eyes. Members of Parliament reported their reluctance to prosecute, and Mackintosh had the signatures of bankers, merchants, jurors, and other respectable members of the community. The well-organized petitioning campaigns among the middle class provided the incontrovertible evidence the law reformers needed.<sup>101</sup> "Is it fitting," Mackintosh asked, "that a system should continue, which the whole body of the intelligent community combine to resist, as a disgrace to our nature and nation?"<sup>102</sup>

There was always a double edge to the Whig interpretation of popular attitudes. The reluctance to prosecute was a symptom of the disordered state of law, but it was also a kind of threat of what

98. 39 PARL. DEB. (1st Ser.) 784 (1819); see also 5 PARL. DEB. (2d Ser.) 930 (1821) (Buxton's argument that "[o]ne presumption runs throughout the whole of our law; namely, that it will be enforced by the people").

99. 39 PARL. DEB. (1st Ser.) 789 (1819).

100. MERIVALE, *supra* note 73, at 34. For further evidence of the popular hostility towards judges, see E. BULWER-LYTTON, CLIFFORD, (1830) (painting a bleak portrait of English justice and of a cruel judge). For Tenterden's angry reaction to such usurpation on the part of juries, see 6 PARL. DEB. (3d Ser.) 1181 (1831).

101. 39 PARL. DEB. (1st Ser.) 81-84 (1819) ("this disinclination to enforce the law . . . extends to the learned judges").

102. *Id.* at 789.

would happen if reform was not forthcoming. How else could one interpret petitions from jurors which reported their unwillingness to see capital sentences returned? A petition in 1831 from 1,100 current and potential jurors in Middlesex seemed to condone pious perjuries.<sup>103</sup> Middle class opinion was expressing a refusal to participate in aristocratic justice both in principle and for practical reasons. There was little enthusiasm for discretionary principles of government which excluded the middle classes, and there was concern about lower class reactions to severity. This opinion also represented itself as something like a natural force. For Buxton it was a power which "annuls and abrogates" the law.<sup>104</sup> The Whig attorney general, William Horne, alluded to a "human feeling" which "was beyond legislative control, and could not be trifled with."<sup>105</sup> Such ideas were used by the 1819 Committee as justifications for examining merchants and bankers rather than judges about the effects of the law; the practical authority of the former was greater. The judges could only express their own desire to cling to power, while the respectable middle class represented a wider and more disinterested force.<sup>106</sup>

The ultimate sanction for reform was the attitude of the people themselves. George Sinclair called upon Parliament to bow to the verdict of a superior tribunal: "[By this] I mean the verdict of public opinion, which has loudly and unequivocally pronounced upon the penal code, as it stands in the statute book, a sentence of

103. 6 PARL. DEB. (3d Ser.) 1172-76 (1831). It is important in this context to note that juror qualifications had been reformed by Peel in 1825. See 12 PARL. DEB. (2d Ser.) 966-72 (1823). The petitioning campaign was well organized. During 1831 and 1832, as part of Basil Montagu's and William Allen's campaign for law reform, one reprint of William Meredith's 1777 speech on the criminal law went through five editions for a total of 145,000 copies. The pamphlet was only one of a number that were distributed by the Society for the Diffusion of Information on the Subject of Capital Punishment. It contained detailed instruction for the collection and submission of petitions.

104. 39 PARL. DEB (1st Ser.) 812 (1819).

105. 14 PARL. DEB. (3d Ser.) 970 (1832); see also THE HOLLAND HOUSE DIARIES, 1831-40, at 195 (A. Kriegel ed. 1977) (citing Brougham's observation that "the feelings of the pious, the tender, and the just portion of Mankind have always and will always revolt at all disproportionate severity and above all at capital punishments for offences created entirely by the artificial laws of society").

106. 5 PARL. DEB. (2d Ser.) 966-67 (1821) (Mackintosh here "would take the liberty of saying . . . that he would prefer the testimony of bankers and merchants to the mere declarations of the learned gentlemen"); see also SELECT COMMITTEE REPORT, *supra* note 36, at 9; MERIVALE, *supra* note 73, at 23-24.

indignant condemnation."<sup>107</sup> At times, public opinion appeared in Whig arguments not just as a force of which a wise ruler took account, but as a source of legitimate authority to which legislators were bound to listen. The reason for the confusion was that the Whigs did in fact refer to two "publics." One was a middle class "public" composed of bankers and merchants who were reluctant to prosecute. The other "public" was more obscurely referred to by the 1831 Middlesex petition: "Where public opinion does not go along with the laws, the persons who suffer under them are regarded as the victims of legislative tyranny or judicial caprice, and not as criminals, whose doom has been pronounced by the voice of dispassionate justice."<sup>108</sup> This more inclusive "public" went by the name of the "people," and it was for their "benefit," ultimately, that the law existed. Justice was a lesson offered to them.

### I. *The Lesson of the Law*

Prudence dictated then that legislators study what lessons were being learned by the people. Here the Whigs found cause for alarm. England had a code

which turns the tide of popular feeling into the most pernicious channel in which it can possibly run; since it enlists the general sympathy on the side of the malefactor, and transfers the indignation of the people from the crime against which it ought to be directed, to the law by which that crime may be punished.<sup>109</sup>

In a dangerous way the law created "martyrs."<sup>110</sup> As proof, the advocates of reform reported the testimony of prisoners that even they accepted the necessity of death in cases of violence, but they rebelled against hanging for property offenses. The radical William Ewart made the fateful connection: "A too severe Criminal Code, then, produced a set of men ever ready to act as the advanced-guard of anarchy and of revolution."<sup>111</sup> In an age of social unrest, the Whigs made clear their belief that the task of the law was not repression but winning the loyalty of the people. Current practice embittered its victims without creating a feeling of awe in its spectators. Sentencing fifty or sixty to death when only three or four

107. 39 PARL. DEB. (1st Ser.) 904 (1819).

108. 6 PARL. DEB. (3d Ser.) 1172-76 (1831).

109. 39 PARL. DEB. (1st Ser.) 905 (1819).

110. *Id.*

111. 11 PARL. DEB. (3d Ser.) 951 (1832).

would actually be executed created an idle "mockery," a mere formality, degrading the character of the law itself.<sup>112</sup> Such justice did not frighten the vicious, but it did create the impression among the people that justice was accidental. Far from being a defense of society, the Whigs believed that the criminal law had become a threat to stability.

Certainty and true justice would be produced by arranging the laws so that everyone knew exactly what would happen to someone who acted in an illegal manner. The psychology was sounder; it represented the clear association of act and punishment. The public image was also more satisfactory. The trial was simply a setting for the determination of guilt or innocence. The convicted individual would in a literal sense have brought down the punishment on his own head, because he knew in advance the exact consequence of his actions. For this to be true, it was necessary that the action and not the character of the accused be on trial. The goal was to rout the personal from the courtroom, whether in the shape of the judge or the accused. Romilly wanted to avoid any suggestion that justice depended on personal whim or emotional factors.<sup>113</sup> William Grant, the only judge to support one of Romilly's motions, wanted a system where pardons were the great exception, not the rule. For him, acceptable discretion did not include discretion "going to life or death, but merely of proportioning the gradations of a certain sort of punishment to the gradations of crimes."<sup>114</sup>

The object of reform was to remove any hint that either judge or minister chose the victims of the law. According to Romilly, a well-defined code would show that there was "no selection of objects for punishment, in those who administer the law; the law itself has made the selection."<sup>115</sup> Justice would no longer weave together personal relations on the basis of patronage in a hierarchical society; the law would draw its strength from the fact that it represented the sentiments of society. Mackintosh said his object was "to make the laws popular, to reconcile public opinion to their en-

---

112. 39 PARL. DEB. (1st Ser.) 841 (1819); *see also* 25 PARL. DEB. (1st Ser.) 376-77 (1813) ("in not more than one case in twenty was the sentence carried into execution").

113. 16 PARL. DEB. (1st Ser.) 778-79 (1810). Discretion had also provided a resource for the accused, so in a sense certainty was meant to disarm the defendant. *See AN UNGOVERNABLE PEOPLE*, *supra* note 20, at 19.

114. 16 PARL. DEB. (1st Ser.) 770 (1810).

115. 19 PARL. DEB. (1st Ser.) 22 app. (1811).

actments, and thus to redeem their character."<sup>116</sup> The legitimacy and the effectiveness of the law both derived from the consent of the public, not in any narrow legislative sense, but as a kind of emotional sanction.<sup>117</sup> The law was "the great bond of society; the point at which authority and obedience meet most nearly."<sup>118</sup> The absence from the Whig argument of any demand for a new police takes on meaning here. The Whigs did not want to increase the power of government; they believed that reuniting sentiment and law was all that was needed.<sup>119</sup> The popularity of the law would ensure that prosecutions and convictions were forthcoming, and the certainty of conviction would powerfully deter criminals. As a result, life, liberty and property would all be more secure.<sup>120</sup>

### III. THE MEANING OF THE TRIAL

The struggle to create a new meaning for justice included more than a reduction in the severity of the criminal law. The rise of the prison was a part of this movement.<sup>121</sup> But the most important and immediately related was the proposal to grant defense counsel the right to address juries. In England during the early nineteenth century, defense counsel had the right to address legal questions arising during the trial and to cross-examine witnesses, but in felony cases counsel was denied the right to summarize the case for the accused before the jury.<sup>122</sup> An anomaly in the law was that defense counsel had that right in cases of treason and misdemeanor. In 1821, Richard Martin, a frequent advocate of humanitarian causes, proposed that this right be extended to the accused in the case of felonies.<sup>123</sup> He suggested that giving prisoners such a right was based on propositions "so self-evident" that they did not require argument.<sup>124</sup> The present practice was "inconsistent" with the supposed benevolence of English practice.<sup>125</sup> Mackintosh supported the bill, saying that it would only provide safeguards to the

---

116. 39 PARL. DEB. (1st Ser.) 797 (1819).

117. *Id.*

118. *Id.* at 798.

119. See GASH, *supra* note 9, at 313; see also CLIVE, *supra* note 78, at 92-95.

120. SELECT COMMITTEE REPORT, *supra* note 36, at 99.

121. See IGNATIEFF, *supra* note 8, especially chs. 5-6.

122. See 9 PARL. DEB. (2d Ser.) 200 (1824).

123. 4 PARL. DEB. (2d Ser.) 945 (1821).

124. *Id.*

125. *Id.*

accused already found reasonable in treason trials. It struck him as peculiar that defense counsel should be permitted the right of addressing juries in misdemeanors, but not in a trial in which someone's life was at stake.<sup>126</sup>

### A. *The Judge as Friend*

In opposition to this reform stood one of the most venerable beliefs of the English law: "At present, the court was counsel for the prisoner," and it did not appear "that within the last century any disadvantage had resulted."<sup>127</sup> Once again the personal authority of the judge was established as the sanction to see that justice was done to the accused. One Tory reported that he knew of no "case in which the judge did not act as counsel for the prisoner."<sup>128</sup> As with the discretion exercised in the award of punishment, the belief that the judge was the prisoner's counsel created a connection between the judge and the accused which reinforced deference. Not surprisingly, John Copley, the future Lord Lyndhurst, had only the highest praise for the existing mode of establishing truth in a criminal trial:

Nothing could be conceived more impartial, cool and considerate than the proceedings in courts of criminal justice. There could be no course more entirely favorable to the development of the truth. The greatest order, no extraordinary excitement, temperate, candid inquiry, by parties almost wholly disinterested—these were the aspects which were presented in a criminal trial.<sup>129</sup>

All proceedings took place under the observant and skilled eye of the judge. Some Tories admitted that a prejudice existed in such circumstances in favor of the accused, but this was grounds for congratulation. The accused was encouraged to put his reliance in the wise and humane consideration of the judge. It was open to all to "observe that presiding spirit of humanity, as active as it was benevolent, which from the bench itself, when the life of the accused was risked, so frequently tended to rebuke the severity of the law."<sup>130</sup> Overly eager prosecutors were warned by the judge "to

---

126. *Id.* at 1512-14.

127. *Id.* at 945.

128. *Id.* at 946.

129. 11 *PARL. DEB.* (2d Ser.) 206 (1824).

130. *Id.* at 190.

offer a plain, colorless statement of the case."<sup>131</sup> The judge was entrusted with the task of ensuring that no hint of vengeance infected the proceedings.

Tory defenders of the existing judicial process argued that the consequence of permitting defense counsel to address the jury would be fatal to the mood of solemn, compassionate investigation.<sup>132</sup> The courtroom thus transformed would become the setting for endless petty disputes as competing lawyers sought advantage for their case. Trials would become occasions when lawyers tried to flatter their vanity or enhance their reputations. Truth would be lost in the confusion of other motives, and the defendant would become a pretext. Prosecutors would necessarily become harsher in their charges and more unrelenting in pressing their cases. The judge would cease to be protective of the accused, perhaps finding it necessary to act against the defendant after a highly emotional appeal to the jury had been offered by defense counsel. The jury itself would be suspicious of any defense presented by so suspect a source as a skilled lawyer.

In sum, the Tory argument was that the change would work utterly against the accused.<sup>133</sup> The reform would be a special hardship for the poor, since they could not afford the more skillful lawyers. The defenders of existing practice never tired of asserting that their arrangements were the more solicitous of the well-being of the poor. Charles Burrell attested that he had seen judges question witnesses on behalf of the accused, advise them how to plead, and often counsel them to withdraw a guilty plea when he saw them about to damage their own cases.<sup>134</sup> To expand the role of defense counsel would destroy that special relationship. He, for one, "was of [the] opinion that this Bill would operate unfairly between rich and poor."<sup>135</sup> Inequality would be more exposed for being stripped of the protective benevolence of the judge.

The image offered by the courtroom was a primary concern of the defenders of existing practices. The present situation presented a picture of soothing mildness: "In a Criminal Court the impres-

---

131. *Id.*

132. *Id.* at 191-93 ("The proposition . . . [would] change the sober floor of a court of justice into an arena for two ingenious combatants").

133. *Id.*

134. 29 PARL. DEB. (3d Ser.) 362 (1836).

135. *Id.*; see also *id.* at 359.



sion produced was, that every one concerned in it appeared to be engaged in a desire to produce an acquittal."<sup>136</sup> Guilt had to be so overwhelming "as to take away almost all possibility of innocence before a conviction could be obtained."<sup>137</sup> The reform proposed would remove the prisoner from his privileged position above the fray.<sup>138</sup> Several magistrates supported the truth of this picture with their own testimony. One justice reported that "he had never seen an instance in which the person presiding in a Court of Justice . . . did not consider himself Counsel for the prisoner, and who did not consider it incumbent to enter into every point that tended to exculpate the prisoner."<sup>139</sup> Several other magistrates seconded this assertion.<sup>140</sup>

What especially frightened the foes of change were the consequences for the judge's role of permitting defense counsel such an expanded sphere. It was bound to happen that "judges would lose the high reputation" they presently enjoyed.<sup>141</sup> "[T]he authority of the judge would be despised," said one critic of reform.<sup>142</sup> He added that "the jury would be exposed to the corruptions of the worst arts of the forum; they would be studiously placed in opposition to the judges; they would be flattered, or threatened, or deceived into the usurpation of an irresponsible power, subversive of the laws, and formidable equally to innocence and to guilt."<sup>143</sup> Such language called up images of revolution; for the Tories, the judge's authority protected society from the anarchy or tyranny of the public both within and without the courtroom.

### B. *The Lawyer as Advocate*

The advocates of full privileges for defense counsel employed the same kinds of arguments as had been directed against judicial discretion in other contexts. For instance, George Lamb pointed to

136. 16 PARL. DEB. (3d Ser.) 1199-1200 (1833).

137. *Id.* at 1200.

138. *Id.* (According to Poulter, "giving to a prisoner full defence by Counsel . . . would drive him from the high vantage ground he now occupied, and bring him down into an arena of contention upon facts").

139. 29 PARL. DEB. (3d Ser.) 357 (1835).

140. *Id.*

141. 36 SECOND REPORT FROM THE ROYAL COMMISSION ON CRIMINAL LAW 105 (1836), [hereinafter SECOND REPORT 1836]; see also 35 PARL. DEB. (3d Ser.) 171-72 (1836).

142. SECOND REPORT 1836, *supra* note 141, at 105.

143. *Id.*

the wide diversity of attitudes expressed by judges towards the accused as proof of the precarious nature of the defendant's rights. There were too many cases where a judge let a particularly strong feeling against the accused influence his behavior.<sup>144</sup> Mackintosh was adamant that "the safety of the prisoner . . . not [be] left to the casual feelings of a judge."<sup>145</sup> Some radicals sought to link the reform to a history of efforts to limit government power and executive abuse. They saw the denial of full protection by counsel as part of the "same system" which "inflicted torture on the prisoner, in order to extract from his own mouth evidence against him."<sup>146</sup>

Yet, once again the most consistent argument for reform was that current practice created an image of "hardship" for the accused. As Lamb described it, "[e]very unlearned person who attended our criminal courts was struck by the unfairness of our present practice."<sup>147</sup> He called upon his listeners to imagine the situation of the accused, uneducated, afraid, and faced with the charge of a skilled prosecutor while on trial for his life. After listening to the brilliant summation of the circumstantial evidence against him, the prisoner turned to his counsel for help in refuting the insinuations against him, only to be told by the judge that his lawyer could do nothing to help him. "[T]he multitude in the court were satisfied that any thing but justice had been done."<sup>148</sup> Since trial by battle had been abolished because of its gross inequality, Lamb wondered how "a more absurd custom still" could continue, "that which subjected every person prosecuted for felony to undergo the conflict of superior intellect, of eloquent competition, without the means of fairly encountering it by the aid of counsel to speak in their defence."<sup>149</sup>

144. 11 PARL. DEB. (2d Ser.) 185 (1824). Lamb, after illustrating the case of a judge who *did* act as prisoner's counsel, goes on to describe another judge who failed to serve the prisoner in this way. The prisoner in the latter case himself told the judge that "if he had been, as the law contemplated, his counsel, he would not have put such a question" to the prisoner. *Id.*

145. *Id.* See also Twiss's concurring remarks in 15 PARL. DEB. (2d Ser.) 610-13 (1826).

146. 24 PARL. DEB. (3d Ser.) 160-61 (1834).

147. 11 PARL. DEB. (2d Ser.) 182 (1824).

148. 15 PARL. DEB. (2d Ser.) 595 (1826); see also 11 PARL. DEB. (2d Ser.) 210-13 (1824) (Lushington's account of a jury being "led step by step to a persuasion of the guilt of the party accused"). Sydney Smith recalls the plight of an innocent prisoner, who, opposed by a "wealthy prosecutor," faced almost certain conviction for a crime he did not commit; SELECTED WRITINGS OF SYDNEY SMITH 239-40 (W.H. Auden ed. 1956).

149. 15 PARL. DEB. (2d Ser.) 596 (1826).

The lesson of the trial seemed to be the oppressive nature of English justice. In the same manner as the severe laws, this situation helped to defeat the ends of justice by creating a dangerous sympathy between the spectator and the accused. "[A]s the prisoner was placed on trial under great and evident disadvantage, there was often an undue leaning in his favour."<sup>150</sup> The point of giving defense counsel the right to address the jury was not primarily to protect the accused. It was to defeat the unnatural sympathy that acted too frequently to set the guilty free.

As was the case with capital punishment, which was not entirely abolished, so a law in 1836 gave defense counsel the right to address the jury, while leaving prosecutors with the last word.<sup>151</sup> The cost of a lawyer still remained beyond the means of many of the poor. Reform, however, need not be complete in order to accomplish its main purpose. A Tory had warned that the debate over counsel "was not to be treated as a common parliamentary discussion—it was a philosophical discussion of a very important nature."<sup>152</sup> This was a perfectly accurate description of the debates. What had once been called "a pure administration of justice,"<sup>153</sup> was labeled by a Whig attorney general in 1835 "a scandal."<sup>154</sup> John Campbell went on to cite the necessity of vindicating "the law of England from a deep and disgraceful stain."<sup>155</sup> After the bill was passed in 1836, Brougham could not help exulting because "in the course of this debate they had at last got rid of the fiction so contrary to the fact, 'that the judge was counsel for the prisoner.'"<sup>156</sup> Such a notion had not been a fiction to judges in the eighteenth century. The fact that even Lords Lyndhurst and Wynford announced their conversions during the course of debate helps measure the extent of the capitulation before a new understanding of the judicial process.<sup>157</sup>

150. *Id.* at 627.

151. 35 PARL. DEB. (3d Ser.) 1248-49 (1836).

152. 29 PARL. DEB. (3d Ser.) 360 (1835).

153. *Id.* at 498.

154. *Id.* at 500.

155. *Id.*

156. 35 PARL. DEB. (3d Ser.) 186 (1836); see also 2 C. NEW, THE LIFE OF HENRY BROUGHAM TO 1830, at 306-07 (1961).

157. 34 PARL. DEB. (3d Ser.) 765, 771 (1836).

## CONCLUSION

The debate over the criminal law represented a minor but still significant episode in the political life of early nineteenth-century England. That it has not generally been deemed central may arise from the fact that the battle was fought by a rear guard against ideas that had already invaded the citadel. The Tories who fought to preserve the royal prerogative of mercy and judicial discretion were those most concerned in the exercise of that discretion; the judges and law officers of the Crown. Yet, as Eldon's declining influence in the 1820s revealed, the ultra-Tories were a people increasingly left behind by their own party.<sup>158</sup> Such Tories as Eldon and Ellenborough occupied a strategic place in the House of Lords where they could obstruct reform, but they could not forestall it indefinitely, any more than they could block Catholic Emancipation or the Reform Bill. The speed with which change came and the total rejection of the argument of mercy, suggest that some major shift in opinion had already occurred. Discretion was not merely rejected; the claims made about its nature were no longer understood.

Advocates of reform enjoyed striking success in setting the terms of the debate. What had once been accepted as the course of the law—severity combined with mercy—was now reinterpreted as a symptom of the breakdown of the judicial system. Whig reformers self-consciously appealed to the sentiments of a middle class public against the spirit of the laws.<sup>159</sup> They no longer believed in looking for mercy from a judge; they wanted to find humanity in the laws. The complaint was that the judges no longer reflected and responded to the sentiments of the people, and so justice was disordered.

By focusing on the severity of the law and not on the practice of mercy, as the Tories wanted to do, Romilly and Mackintosh dis-

---

158. See A.S. TUBERVILLE, *THE HOUSE OF LORDS IN THE AGE OF REFORM 177-80*, 186-88, 213-15 (1958).

159. When one Tory suggested that a reform measure should be dropped because the judges opposed it, a Whig responded that it was not the lawyer but the "satisfaction to the people of England" that was the "chief ground of the motion." 15 *PARL. DEB.* (2d Ser.) 604 (1826). When told that he was advocating reform before there was a public demand, Thomas Denman replied that it was necessary to anticipate the public's reaction and so "avoid the popular discontent." *Id.* at 632. See also *SELECTED WRITINGS OF SYDNEY SMITH*, *supra* note 148, at 238 (wholesale hangings would have continued "if juries had not become weary of the continual butchery, and resolved to acquit").

credited not just the severity of the laws, but the system of justice which operated on the basis of those laws. This explains why a major portion of the debate centered on the question of who spoke speculatively and who spoke from practical experience. What the advocates of reform ultimately succeeded in doing was to refute the charge that they were mere theoreticians. The practical knowledge and authority of the judges was replaced by that of merchants, industrialists, and middle class radicals. The humanity which the judges claimed in their practice was credited by the Whigs not to any mercy inherent in the operation of justice, but to the coincidence of bad laws, public opinion, and the demands of the judge's own natural humanity. The final indignity for the judges was that their own discretion was counted against them.

The central feature of early nineteenth-century reforms of law and practice was the attempt to create an image of impersonal justice. Personal benevolence was no longer the guarantor of justice for the accused. A new meaning had been given to the judge's obligation to secure "the attainment of impartial justice."<sup>160</sup> Lawyers were the prominent figures in the reconstructed drama of the courtroom; out of their noisy contest would emerge fairness as well as truth. The clash of the advocates would also obscure social inequality and give "a greater character of fairness to the trial."<sup>161</sup> Severity was to be replaced by a certain and graduated series of punishments, so that people would look to the character of the offense rather than the life of the accused. Under a system of punishments in harmony with popular feelings, there was "no sympathy for a delinquent if his life is spared, which is a great thing to accomplish."<sup>162</sup> The impulse behind this series of reforms was succinctly summarized by Mackintosh: "[L]aws should not only be just, they should appear to be just; they should not only not be unequal, they should be above the suspicion of inequality."<sup>163</sup>

By the early nineteenth century there were sufficient grounds for believing that the operation of justice was not "above the suspicion of inequality." The law's severity attracted opprobrium, and the judge's discretion focused such hostility upon the government. Moreover, the Whigs were aware that the rise of large industrial

---

160. SECOND REPORT 1836, *supra* note 141, at 17-18.

161. *Id.* at 79. See also SELECTED WRITINGS OF SYDNEY SMITH, *supra* note 148, at 254.

162. SECOND REPORT 1836, *supra* note 141, at 81.

163. 9 PARL. DEB. (2d Ser.) 408 (1823).

towns had made impossible the kind of personal relations upon which eighteenth-century justice had been founded. Criminal justice was precarious because it had alienated both the middle and the lower classes. The Whigs were no more democratic than the Tories, but they sought reforms that would give justice a more pleasing appearance. Romilly and Mackintosh did not share the alarm felt by the Tories because they enjoyed the conviction that they possessed the formula for reinvigorating the law. For them reform was prudent; it was not revolutionary.

Both sides in the debate over the criminal law tried to define the form of justice. They often spoke of sympathy for the accused and of the protection of English liberties. Both expressed concern about how the public viewed the process of justice. Both sought legitimacy for and security through the laws. Where the Whigs and Tories differed was over how these goals were to be attained. During the years of debate over reform by Parliament, the principles of aristocratic justice were also under attack. The radical Ewart linked the two campaigns; the old criminal laws "were the weeds of the Statute book, and showed the corrupt soil from which they sprung, a legislature which represented not the wants and wishes of the people."<sup>164</sup> He went on to add that "[i]t was wise, in a free Constitution, to show confidence in the people for whom it existed."<sup>165</sup> By 1832, political wisdom suggested that aristocratic justice provoked unnecessary animosity for the law. By the transformation of the criminal justice system, the Whig politicians sought to sustain the belief that England did not depend on individual discretion but upon the impartiality of a law that arose from the wishes of the people.

---

164. 11 PARL. DEB. (3d Ser.) 950 (1832).

165. *Id.*

