STATE, LAW AND PROSECUTION: THE EMERGENCE OF THE MODERN CRIMINAL PROCESS 1780-1910

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ABSTRACT

This thesis deals with the emergence of the modern criminal process in England between 1780 and 1910 . It seeks to investigate this period from a standpoint which regards this development of the criminal process as intimately related to its internal structure and self-understanding . This is understood to occur through transformations in institutional structures produced by both the practices of the elements within it, and changes in the theoretical conceptualisation of the structure of the criminal process. The character of these developments, and the tendencies which they evince, are seen to be generally negative from the perspective of a theory of society which is intimately connected with an interest in emancipation. The relation between law, state and democracy is seen to be an essentially problematic one which does not conform to the ideas of progress, equality or liberty but to the maintenance of the survival of a social system which is seen as constantly at risk from a threatening environment of individuals whose obedience to the structure of the social order must be obtained continuously.

The thesis is the result of original research which draws upon both original and secondary sources. The methodology used in writing the thesis is a combination of historical analysis and theoretical perspectives. There is a focus upon modern developments and it is hoped that the thesis will inform current debate on the future of the c riminal process.

The thesis is divided into four main chapters which concentrate upon particular parts of the criminal process in both their specificity and in their relation to the system and society as a whole. The first deals with the development of the institutional autonomy of the " New Police ", during the nineteenth century, setting it in the context of the system of local governance. The second examines the system of prosecution describing the failure to institute a system of public prosecution and the predominance of the " New Police " as prosecutors in a system which remained private merely in form. The third deals with the position of the defendant during this process of transformation in the criminal process and presents its evolution as one which accorded with internal systemic considerations of the criminal process, and not as one which could be seen as the unfolding of the concept of freedom, equality or universality. The fourth deals with the creation of the Court of Appeal in 1907 which is seen, not as the institutional embodiment of justice, but as the product of the internal concerns of the Home Office Criminal Department with the systemic coherence and legitimacy of the criminal process.

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INTRODUCTION

Between 1780 and 1910 a gradual change was made in the existent criminal process producing the basis for the emergence of the modern system. The period marked a decisive transformation not merely in conceptions of the nature of crime, criminality and punishment, but also in the structure and operation of the elements of the criminal process itself. This period takes on an even greater centrality once attention is turned to the nature of its links with the present system - the conceptualisation of the history of the modern criminal process.

This dual centrality shapes the configuration of the critical investigation of this period by this thesis. It conceives the interrogation of the conceptual and material foundations of, and developments within, the criminal process during this period as a process which is intimately connected with an assessment of the importance of the past for the present. Therefore, underlying this investigation is an attempt to understand the truth of the past through an evaluation of the nature and character of the emergence of this criminal process.

From this flows the attendant need to specify the conception of the relation between the person seeking to critically engage with the past, the process of interrogation and the form of the past or tradition. Hence, in order to break with the notions of the spontaneous origin of social facts and the sealing off of the present from the past it is necessary to define the theoretical premises by which ' common sense ' understanding is to be replaced. The affirmation of the capacity of the past to shape the present in this thesis is founded on a form of hermeneutic philosophy of the social sciences.

This philosophy of the social sciences is predicated upon the idea that understanding is always situated within history and is a process in which the individual

or group is always oriented by and, therefore always part of the tradition, both as the repository of the past and as the medium through which the understanding of the past is transmitted. This transmission of the past is not one in which the interpreting subject(s) simply accept the tradition passively, for the search for the truth of the tradition leads to a modification of that tradition. It is the result of the ' fusion of horizons ' between the initial perceptions and assumptions flowing from the individual's or group's situation within history and the reformulation and redefinition of these as a result of an active interrogation or encounter with the object. It is a process of

" mediating its truth-claims with our changed historical circumstances and even assessing its values in the light of other norms and principles that we have inherited from it. We need not agree with it in the substantive sense that we embrace its views but simply in the sense that those views are an integral part of our own self-understanding whether we agree with them or not. " 1

This ' situated ' nature of understanding is the foundation for the difference between the social sciences and the natural sciences. The objects of study of the social sciences are not independent, self-contained objects in which a neutral language of observation, similar to that of the natural sciences, is capable of being generated which would, as a method, produce the capacity for objective judgement. Access to the ***social*** world cannot be one guided by controlled observation and a notion of its inherent reproducibility as this carries with it the presumption of the infinite interchangeability of the observing subject. Rather, it is an engaged, participatory relation within a tradition :

" a communication in which the understanding subject must invest a part of his subjectivity, no matter in what manner this may be controllable, in order to be able to

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1. G. Warnke, *Gadamer: Hermeneutics, Tradition and Reason* (California: Stanford University Press, 1987), p.106

meet confronting subjects at all on the intersubjective level which makes understanding possible. " 2

The essentially interpretative practice of the subject means that it cannot be reduced to, or adequately reflected in the observation of facts and the confirmation of theoretical hypotheses - the paradigm of the measurement of nature:

" [W]e cannot speak of an object of research in the human sciences in the sense appropriate to the natural sciences, where research penetrates more and more deeply into nature. Rather, in the human sciences the interest in tradition is motivated in a special way by the present and its interests. The theme and area of research are actually constituted by the motivation of the enquiry. Hence historical research is based on the historical movement in which life itself stands and cannot be understood teleologically in terms of the object into which it is enquiring. Such an object does not exist at all in itself. Precisely this is what distinguishes the human sciences from the natural sciences. " 3

This distinction places the social(human)sciences on a foundation in which the past retains a surplus of meaning. The relation between past and present is a potentially fluid one in which the truth of the tradition is a product of the ' fusion of horizons ' of subject(s) and the tradition. The validity of the tradition rests on a contingent consensus in which the truth of the past is never entirely fixed but is always capable of moving to a new integrated understanding. It is this ' openness to history ' which entails a constant mediation of past and present within understanding. An ' openness to history ' is at the same time the premise for the question of the relation to the past. It concerns the reflection upon history and hence the evaluation of that history as sedimented in tradition.

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2. J. Habermas, ' Some Difficulties of the Attempt to Link Theory and Praxis ', in *Theory and Practice* trans. J. Viertel (London:Heinemann, 1974), p.11
3. H-G. Gadamer, *Truth and Method* (London:Sheed and Ward, 1975), p.253. Quotation from W. Outhwaite, *New Philosophies of Social Science:Realism, Hermeneutics and Critical Theory* (London:Macmillan, 1987), p.65-66

The reflection upon and evaluation of the past of the modern criminal process as embodied in the developments and changes in the criminal process between 1780 and 1910, undertaken here, flows from this hermeneutic approach to the philosophy of the social sciences. However, it seeks to go beyond a simple methodological broadening and elucidation of human historical consciousness by stressing that the process of evaluation is not a disinterested one for what is sedmented in the past and transmitted into the present in the form of the consensus as to its meaning is inextricably linked to the structure of society. In other words, a critical evaluation of the past is not motivated by merely technical or practical interest in knowledge for it cannot dissociate itself from a critical theory of society.

As such, it represents a rupture with a concept of history in which events are connected together under a notion of progess[4] conceived as

" the progress of mankind itself(and not just advances in men's ability and knowledge). Secondly,..[as]something boundless, in keeping with the infinite perfectability of mankind. Thirdly, progress..[as]something that was regarded as irresistible, something that automatically pursued a straight or spiral course....The concept of historical progress of mankind cannot be sundered from the concept of its progression through a homogeneous, empty time. A critique of the concept of such a progression must be the basis of any criticism of the concept of progress itself. " [5]

It seeks to disconnect this period from this form of interpretation which subsumes it under a concept of progress in which it is accorded the status of mere data. For, this effects a reduction in the capacity of the past to influence the present by confining it to a role in which it can only confirm the efficacy of the present structure and operation of the institutions of the criminal process. The past becomes an ordered succession of

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4. As examplified by L. Racinowicz and R. Hood in their four volume work *A History of the English Criminal Law* (London/Oxford: Stevens/Clarendon Press,1958-1990)
5. W. Benjamin, ' Theses on the Philosophy of History ' in H. Arendt ed. *Illuminations* (London:Fontana, 1973)

events in which human relations within society become reified thereby blurring the distinction between them and the unfolding of things which compose the realm of nature.

This thesis offers an interpretation of the period 1780 to 1910 which seeks to reveal that these understandings of the tradition rather than facilitating discussion and understanding of the past actually inhibit it by their failure to see that the direction of the past is guided within a context of social interaction in which domination and social power are its central determinants. It is this deeper level which this thesis attempts to penetrate in order to restore the ' fullness ' of the past. For, it views the interest in interpretation as one guided by an interest in emancipation whereby it breaks with the reduction of the

" meaning of complexes objectified within social systems to the contents of the cultural tradition. Critical of ideology, it asks what lies behind the consensus, presented as a fact, that supports the dominant tradition of the time, and does so with a view to the relations of power surreptitiously incorporated in the symbolic structures of the systems of speech and interaction." 6

This interpretation of the development of the criminal system between 1780 and 1910, guided by a theory of society with practical aims, breaks its examination of this process of evolution into four chapters. It aims to elucidate both the dynamics which drove the transformation of the criminal process and the systemic values embedded within and reproduced by the institutions arising out of this transformation.

The first chapter deals with the development of the " New Police " during the nineteenth century setting this development within the wider structure of governance of which they were a part. It does this to enable the question of control and

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6. J. Habermas, ' Some Difficulties in the Attempt to Link Theory and Praxis ', in *Theory and Practice* trans. J. Viertel (London:Heinemann, 1974), p.12

introduction of the " New Police " to be seen as one determined by the relations between the state and locality. The inability of the state to implement a system of direct, central control over the " New Police " during the period between 1835 and 1855 was finally accepted in the County and Borough Police Act 1856 in which the Home Office, as the institution of the state, was placed in an essentially ' background role '. The possibility of a system of national policing, directed from London by the Home Office, in which the control of the " New Police " rested solely on the relation between the Chief Constables and the Home Office was thereby excluded. The " New Police " were, therefore, to evolve during the latter part of the nineteenth century as an integral element in the structure of local governance of the counties and boroughs. Policing practice and operation were to be the product of the interaction between the " New Police " and the Watch Committees in the boroughs and the magistracy in the counties. This structure of control meant that the " New Police " were utilised as an instrument for the application of the norms generated within this system of local governance. This system was predicated upon both the exclusion of the working-class movement [7]from a participatory role within it and their concomitant characterisation as the permanent threat to the existence of this system. Hence, the " New Police " were utilised in the surveillance, discipline and prosecution of these threatening groups. This context of local governance was also to be the site where the " New Police " were to develop into an increasingly autonomous social system during the latter part of the nineteenth century. This process was to result in the decreasing control of the localities over the operation and implementation of norms by the " New Police " and with this went the increasing ability to act relatively autonomously within society. This capacity was enhanced by the dominance of the " New Police " in the practice of law enforcement and the prosecution of offences in which the spread of law over society, the decision to prosecute and the construction

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[7]. Working class movement takes the same definition as that of E.P. Thompson, *The Making of the English Working Class* (London: Penguin, 1991)

of the case against the accused was now determined by a logic orientated by the institutional concerns and systemic values of the " New Police ".

The second chapter focuses on the developments within the system of prosecution during this period. It charts the rise of the " New Police " during the first half of the nineteenth century to a position in which they were conducting the majority of criminal prosecutions. This is seen to be a result of the failure of the Seventh and Eighth Reports of the Criminal Law Commissioners to change the dynamics of the criminal process. This position of the " New Police " is then described within the context of the attempts, between the mid 1850s and early 1870s, to establish a system of public prosecution which would remove the " New Police " from the conduct of prosecutions and confine them to that of the collection and evidence and witnesses. The failure of these attempts is presented as being tied to the increasing legitimacy of the " New Police " in this role which is given legislative recognition in the 1879 Prosecution of Offences Act. With only minor modifications in 1884 and 1908 this was the basis for the modern system of prosecution. These developments are viewed as producing a situation in which the prosecution of offences is dependent upon the " New Police " since they are in exclusive control of the building of the case against the accused. This, in turn, is seen to undermine the validity of the claim that the trial and the rules of legal evidence are themselves sufficient to exercise control over these activities of the " New Police " and hence to place doubt on the ability of the trial to be the sole site of guilt determination by its capacity to nullify an asymmetrical relations of power in the pre-trial proceedings.

This wider conceptual legacy of the developments and debates over the system of prosecution is dealt with in the third chapter which concentrates upon the position of the defendant in the transformations in the criminal process during this period. The dominant conception and characterisation of the defendant is seen to flow from the Criminal Law Commissioners Report of 1836 on the representation of defendant.

This altered the foundation of the defendant's position from one based entirely upon judicial discretion to one based on a system of articulated rules of evidence and procedure, but this changed form of expression did not alter the defendant's position as an object of prosecution produced by the asymmetrical distribution of social power in the criminal process. This is seen in the other reforms and developments within the criminal process at this period, ending with the Criminal Evidence Act of 1898, which clearly reveal this underlying systemic logic as the determinant of the defendant's position. These systemic values are further revealed through an examination of the Poor Prisoner's Defence Act 1903 in which they are confronted by opposing position which views the defendant's position in terms of rights. The failure of the rights based conception is viewed as demonstrating not only the strength of these systemic values in the sense of their embeddedness within the criminal process, but also the way in which they determine the limits of the possible terrain of debate by the continued projection of the trial as the sole site of guilt determination. The efficiency of the criminal process is what guides the demarcation of the position of the defendant with the parallel neglect of the need to consider the control and review of police practice.

Systemic values are also held to be both the origin and the determinants of the establishment of the Court of Appeal in 1907 dealt with in the fourth chapter. This institutional addition to the criminal process is viewed as entirely the product of the institutional needs of the Home Office and its conception of its role within the criminal process. By an examination of the presentation of the events in the Committee Reports on the miscarriages of justice in the case of Adolf Beck and George Edalji it shows that ' public ' concern was not transformed into recommendations for the creation of a Court of Appeal but merely into the need for certain adjustments in the existing system. This relegitimation of the existing system meant that the impetus and perspective which was to orientate any change in the appellate procedure in the criminal process was to be determined by the concerns of the internal, institutional elements of the criminal process. In this instance it was to be the Home Office whose

increasing self-consciousness of its overloaded administrative role coupled with the ease with which events in the criminal process could extend themselves into ' political ' questions led it to create the Court of Appeal. An examination of the legislative framework of the Court an analysis of the 1909 case of (R v Gowlett)[8] seeks to show that the same institutional role previously played by the Home Office in the exercise of the Perogative of Mercy is adopted by the Court of Appeal from its inception. In other words, that the practical aim underlying the creation and operation of the Court of Appeal is a simple institutional adjustment geared to the more effective generation of the legitimacy of the criminal process through a consistent willingness to give a postive construction to both the trial process and police practice.

[8].*Criminal Appeal Reports*, Vol.1 1909, pp.204-5, 238-40

CHAPTER ONE

THE CHANGING STRUCTURE OF LOCAL GOVERNANCE AND ENFORCEMENT OF CRIMINAL LAW: THE DEVELOPMENT OF THE " NEW POLICE "

This chapter charts the emergence and development of the " New Police " into an increasingly autonomous institution during the nineteenth and early twentieth centuries. The failure of all attempts to institute a completely centralised, state directed and controlled structure of governance and operation for the " New Police " means that the emergance of their institutional autonomy has to be traced through an examination of the system of local governance within which they were placed. The " New Police " were confronted by an initial position in which they were the creation, servant and instrument of a system of local governance and it is the reconfiguration of these institutional relations which forms the basis for the generation of an increasing institutional autonomy free from external regulation and intervention. The unfolding of this process had led, by the beginning of the twentieth century, to the evolution of the " New Police " into a social system which enforced the norms of criminal law solely in accordance with an internally determined set of criteria and goals within which the individual accused was represented as an entity against whom a conviction was to be secured, and, whose recognition, in terms of the procedures of investigation, collection of evidence and witnesses, varied in accordance with the attainment of this goal.

The first section concentrates upon the system of law enforcement which entered the nineteenth century. It describes the practices and interrelation between the parish constables, night watch and Prosecution Associations and sets these elements within the wider social order. The second section deals with the introduction of the " New Police " into this system and shows that the establishment of the Metropolitan Police

in 1829 and the centralised structure of control which it enacted was to be the exception for the rest of England where it was to be an element of local governance under local control. The challenged posed by Chartism to this modified structure of local governance and the inadequacies that it revealed are dealt with in the third section together with the County Police Act 1839/40 which extended the capacity to establish " New Police " forces into the counties. It describes the continuing problems that the Home Office, as the representative of the institutions of the state, had in trying to ensure the universal adoption of the " New Police " by the localities and the increasing emphasis upon adjustments to the local structure of law enforcement in conformity with the maintenance of high degree of local autonomy and control. The initial growth of the " New Police " within this structure of local governance is dealt with in the fourth section where the decline of the agents of law enforcement of existing system is described together with the problems that the " New Police " encountered in their relations with the localities. These problems find articulation in the Select Committee Reports on the Police of 1853 which along with the Bill of 1854 represent the final attempt to introduce a system of national system of control, and administration of the " New Police ". The failure of the 1854 Bill marks the end of the attempts by the State, in the form of the Home Office, to take a central and dominant position in the structure of control of the " New Police ". It is replaced by a new policy of an indirect and facilitative role for the State coupled with the recognition of a substantial degree of local control as encapsulated in The County and Borough Police Act 1856 which is dealt with in the fifth section. This presents the 1856 Act as the producing the basic structure and parameters in which subsequent developments were to take place by the removal of the last vestiges of the ' old system ' of law enforcement and the placing of the " New Police " within a local structure of governance. This reinforced the ascendancy of the " New Police " over the ' old system ' which had begun with the transformation of the magistracy by Jervis's Acts of 1848 which is dealt with in the sixth section. This transformation is linked to a wider change in which the legal order is separated from society; and; the position of the

magistrate confined to the purely legal realm of the trial and rendered ' passive ' with the removal of their capacity to enforce the law directly in the social environment. The increasing autonomy of the " New Police " in the later nineteenth century is traced in the seventh section through an examination of the unfolding of the centralising tendencies of the 1856 Act; the generation of the preconditions for autonomy through the activities of Chief Constables and a changing relation between the state and the " New Police " ; and; their growing institutional self-identity through the evolution of a durable, perceptual framework within which self-initiated, institutional action upon the surrounding environment was possible. The content of this perceptual framework is dealt with in the eighth section with the examination of the character, structure and concentration of the practices of law enforcement. The ninth section deals with the position of the " New Police " as a collectively organised system of prosecutors in a private form of prosecution and the concentration of social power that resulted from this. The final section describes the occlusion of this structural imbalance at the foundation of the criminal system in the Royal Commission on the Metropolitan Police 1908.

The Unreformed System 1750-1828

Apart from various minor adjustments by statute 9, the system that entered the nineteenth century had remained virtually unchanged during the eighteenth century. The " Old System ", as it was increasingly characterized with the advent of the " New Police ", was without any central, state direction and was very much a localized entity. It operated as a result of the purely individual initiatives of the three main elements of law enforcement - the parish constables, Prosecution Associations and night watches.

The system of parish constables provided the most territorially consistent and generalized form of social control and law enforcement during this period. They were

9. See, for the details of these, D. Hay and F. Snyder, ' Using the Criminal Law, 1750-1850: Policing, Private Prosecution and the State ', in D. Hay and F. Snyder ed. *Policing and Prosecution in Britain 1750-1850* (Oxford: Oxford University Press, 1989)

elected to the office (though it was possible for those elected to appoint and remunerate a deputy if they did not wish to act), unpaid and rotated annually. However, by the 1830s parish constables were commonly holding the post for a number of years, and, many of them continued to practice a trade during their tenure of the post. Phillips' [10], historical examination of the Black Country between 1835-60, suggests that the conventional view of parish constables as ineffective, inefficient, ignorant and illiterate has to be revised. In the Black Country, the role of parish constable came to be defined as applicable to persons of certain class positions. The majority were literate and drawn from the social classes of farmers, in rural parishes, and, artisans and tradesmen in the towns. This position assumed a place within a collection of other social roles occupied and maintained to the exclusion of lower social classes. The social prestige and respectability of the position was a combination of the initial class position of the parish constables and the competence and capability developed within the role itself. This enabled them to ' feed-in ' individuals into the legal system without incident, and, ensured their control over the pre-trial stages of arrest and committal.

The lack of any collective identity or operation among parish constables meant that the scale of their operation remained small, domestic and essentially reactive. Many of them, as in the Black Country, operated from their own houses and detained prisoners in them. This amplified their connection and intimate reaction with the community over which they had the discretion to enforce the law. For, the social space in which they carried out their law enforcement function was composed of tight, stable communities where the perpetrators and events became widely known. This allowed public disturbances to be quickly broken up; and; where the parish constable was not called to the event while it was happening, because of the nature of the crime itself - theft, robbery and burglary - the perpetrators were usually identified or described.

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10. D. Phillips, *Crime and Authority in Victorian England: The Black Country 1835-1860* (London: Croom and Helm, 1977), chapter 3.

Since the office itself was an unpaid one, its source of income came from costs and fees gained from the legal system, and, the person who sought the assistance of the parish constable. The likelihood of assistance, therefore, came to rest on whether the person had money or property. The relation between each victim and each parish constable was a unique and singular one dependent upon the discretion of the particular parish constable. It actively discouraged the development of the preconditions for the collective organisation and practice of parish constables; as a result, the individual nature of prosecution at this period was mirrored in the independence of the parish constable from any type of collective mentality or organisation. The system of parish constables subsisted within a wider system of social control which was predicated upon the maintenance of large amounts of discretion, fluidity and flexibility of action.

Prosecution Associations were established in both urban and rural areas. Initially, they flowed from the activism of magistrates, but later property-owners, without these public offices and roles within the criminal process, were the dominant force behind their creation. These later creations reflected a local interconnection between this perceptual framework of ' crisis ' and a local incident, or, outbreak of crime. In the 1740s they were founded to enforce the game laws, but, from the 1760s they adopted a broader focus - the prosecution of felons. Phillips [11] looks upon the period between the 1770s and 1780s as evidence of a period of crisis, symbolised in their formation in large numbers. This perception of crisis was created by the agglomeration of a number of elements. Growing concern by provincial and metropolitan magistrates about the inadequacies of the social control matrix of parish constable, prosecution and punishment found expression in the work and ideas of Sir John Fielding. His attempts to improve and regulate the system of policing, as articulated through the schema in the General Preventative Plan (1772-3 and 1775) corresponded to the search for an effective, measured and unified system of social

11. D. Phillips, ' Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England 1760-1860 ', in D. Hay and F. Snyder ed. *Policing and Prosecution in Britain 1750-1850* (Oxford: Oxford University Press, 1989)

control. The arguments within the Plan coupled with the spread of his criticisms of the existing system began to shape the behaviour of the government and property-owners in so far as they crystallized into theoretical schemas for the perception and evaluation of this system.

It was the dissatisfaction with the protection conferred, by the existing system of law and order, upon property, which provided the enduring impetus for the formation of these Associations to which the appearance of further ' crises ' could only but strengthen. However, Associations were the product of private initiative few of them sought to establish their own potential for law enforcement, by recruiting a body of people to do this. Their sphere of operation remained firmly local, though there were a few attempts at covering a larger territory they rarely came to anything and were exceptions. The dominant type of Association usually covered only a relatively small area [12]. This territorial localism of the Associations was tied to the social order of which they were a product. The aristocracy, gentry and clergy, who formed the dominant groups, exercised a form of highly personalised power based upon its visibility which meant that to remain effective it had to be confined to fairly small areas. Therefore, with the circumscription of the area of operation of Associations, came, not simply a lack of a challenge to the existing form of social power and system of law enforcement, but also a set of organisations through which this could be enhanced by the local aristocracy, gentry and clergy taking an active role in their creation.

The Associations offered their members two types of assistance. The first, concerned attempts to detect and apprehend suspected offenders where the Association would react by printing hand bills and placing adverts in local newspapers offering a reward for information which led to conviction for the offence. They would also use their money to enable people to search for stolen goods and the offender [13].

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12. See D. Phillips, ibid, p. 134
13. See D. Phillips, ibid, p.138

Those who apprehended suspects would often be given rewards and payments for time and trouble.

The second, applied where the member had managed to detect and apprehend the suspected offender. Here the solicitor of the Association would take over and ensure that the suspect was committed for trial before a magistrate. The expense of preparation and conduct of the case was borne by the Association. This cost was sought to be recovered from the county rate, at the end of the trial, but, it barely covered half the total cost with the rest having to be taken out of the fund that had accrued from member's subscriptions.

The majority of Association funded prosecutions concerned thefts. The normal route for these suspects committed for theft was to be tried on indictment at the courts of Quarter Sessions or Assizes. However, this did not prevent Associations making use of the expansion in the range of the courts of summary jurisdiction, from the 1820s, where they felt that the other route was not proving effective enough. For summary conviction offered the advantage to those who prosecuted, of a quicker and cheaper form of legal process in which one only had to convince a magistrate of the guilt of the suspect. Moreover, they were not adverse to dealing with and obtaining convictions for more serious offences where members were subject to them. With the outbreaks of unrest in the early 1820s and during the 1830s rural Associations responded by offering rewards for persons convicted of arson.

The effectiveness of these Associations is difficult to establish, as Phillips points out, because the information in their records does not allow one to calculate the ratio of convictions to offences reported - the ' clear-up rate '. However, Phillips suggests that Associations were not, locally, responsible for many prosecutions per year, but that taken nationally they:

" prosecuted large numbers of people, and were responsible for securing many severe sentences. " 14

The boroughs and larger towns, particularly those which had grown up during the Industrial Revolution, also produced modifications to the system of social control which entered the late eighteenth and early nineteenth centuries. This was the consequence of the essentially reactive role of parish constables, and a reluctantly reactive role at that, which, in the context of the changing nature of the social order was perceived as lacking the necessary visibility and coverage which regular patrolling provided. They responded to the system's perceived inadequacies by establishing bodies of paid watchmen, who were funded from the rates, and were employed to patrol the streets of the borough and industrial towns, especially at night. Rural night watches were also set up, though more intermittently, during the 1820s and 1830s, in response to rural ' disturbances ' which became particularly prevalent in the 1830s - the era of ' Captain Swing '.

The Emergence of The " New Police "

The establishment of the Metropolitan Police, by the then Home Secretary Robert Peel, in 1829 meant that the tenability and acceptability of a perspective which sought change the existant system of social control was reinforced by the operation of the new body of police which provided a constant reminder of, and possible model for, any attempted change outside London. The Metropolitan Police operated within a structure in which their activities and practices were only subject to the authority and guidance of the Home Office not to any system of local governance. This represented a radical break with the previous systems and structures of law enforcement by the clear definition and demarcation of roles, and, spheres of competence and operation. The Home Office, as a particular institutional element of the state, was projected as residing at the centre of political power with the Metropolitan Police as the

14. D. Phillips, ibid, p.144

collectivity responsible for the organisation and implementation of the demands and pressures of law enforcement addressed to the central power of the state. There was, under this presentation, a strict separation of politics and administration in which the action of the Metropolitan Police was tied to the norms of Parliamentary legislation. These ' inputs ' propounded by a separate and superior institution were to be the premises of action of the Metropolitan Police which were merely to be continuously applied in social reality. However, from starting as the model which could become generalized gradually throughout England and Wales it ended as the model in a different sense - an ideal, exceptional entity specifically tailored to the situation of the Metropolis.

The creation of the " New Police " in the boroughs outside London was to be a product of a broader scheme concentrating on reform of the totality of the municipal structure of governance. The Municipal Corporations Act 1835 initiated the conditions for the emergence of the " New Police ". It was part of an attempt to consolidate the power, at the local level, of the new political order produced by the expansion of the electoral franschise under the Reform Act of 1832.

The new political order, at borough level, was to be to be maintained by producing a limited ratepayer's democracy in which the new property owners - merchants, manufacturers, shopkeepers and tradesmen - became the dominant groups in this electorate and were the social groups from which the members of the new borough councils were drawn. The electorate excluded the majority of small householders and the whole of the working class whose housing was not rated. These Municipal Corporations were empowered to appoint watch committees who were, in turn, to appoint the men and draw up the regulations for the running of the force. The Home Office was to have no direct, interventionist role in borough policing; it was simply to receive quarterly reports about pay, appointments and regulations. The legislation itself did not provide a clear, specific definition of the areas of competence

and jurisdiction of corporation, watch committee and magistrates. Both the establishment and operation of the " New Police " was to be left entirely in the control of the boroughs themselves and determined by the interaction between these elements at local level.

The Whig Government in 1835 assumed, during the formulation of this measure, that the social order could continue to be maintained by local initiative, policy and control without the need for direct control from centralizing state institutions through the imposition of a consistent centralization and universalization of the " New Police ". It was simply presumed that borough councils would share the same perspective as the framers of the legislation and would therefore establish " New Police " forces as part of a national force without need for the explicit formulation of these decision-making premises.

Once established, the Watch Committees acted from a perspective which in no way considered the police force in their borough to be part of, or, founded upon an idea of a national, professional police force. The borough forces were developed within a perceptual framework which saw them as integral element of ***local,borough*** governance evolving solely in accordance with the maintenance of a low borough rate and the Watch Committees' assessment of the priorities of policing policy.

This profound divergence in the conceptualisation of the role, purpose and identity of the " New Police " between the boroughs and the institutions of the state, in particular the Home Office, undermined the ability of the Municipal Reform Act 1835 to implicitly transfer, through a structure of complementary expectation, the state's premises in regard to the " New Police ". The capacity of the state to enforce its conception of the " New Police " rested on its ability to intervene in the boroughs. Under the Act, the Home Office had little scope for intervention directly or indirectly since it bore no part of the expense of this borough force, and possessed no machinery

of inspection, it was without an effective means whereby boroughs could be compelled to provide forces to a uniform standard. Formalisation and centralisation of the role and function of the " New Police " had been felt to be both unnecessary and impracticable to achieve the goals of the state in regard to establishment of the conditions for the emergence of the a national police force. Yet, the failure of the boroughs to accept the these premises for the conception of the " New Police " meant that there was little, within the terms of the Act, that the state could do to re-establish its authority as power-holder. The dynamic of police reform was to be driven by the capacity of the state to achieve a national form to the " New Police " despite the resistance of the localities.

The " New Police " and Social Control

This local focus to police reform meant that the establishment of borough forces was slow, inadequate and lacked efficient organisation and operation. Despite the passing of the Municipal Reform Act 1835 very few boroughs had, by the time of the initial emergence of the Chartist movement, established a police force capable of coping with these disturbances. It was only in Liverpool, Bristol, Newcastle, Hull, Manchester and Birmingham that there existed a sufficient force either to dispense with the need for military assistance, or, at least minimise it. Therefore, what confronted the Chartists was a slightly modified version of the form of social control which had established itself during the mid to late eighteenth century.

The increasingly organised mass social unrest of this period - a direct challenge to the social order - exposed the ' old system's ' incapability to deal with this type of disorder. The further development of the " New Police ", and their extension to the Counties (under the County Police Act 1839/40), was intimately related to the social and political situation between the 1830s and 1840s.

The unrest of the 1830s and 1840s was a product of both the economic conditions in which the rural and urban lower classes found themselves, and, the attempts to install a new social order principally through the disciplinary mechanism of the New Poor Law of 1834. Both of these developments were filtered through an increasingly class conscious atmosphere which led, in the 1830s, to the formation of the Chartist movement. Chartism represented a particular articulation of far longer and deeper evolution of working class identity, constituted in opposition to the totality of social conditions in which they were placed, through the ideas of political radicalism 15. This complex of ideas centred around the belief that the intellectual and moral development of the individual, necessary to attain a society based upon the free exercise of reason, could only be achieved by the removal of political and economic inequalities.

This foundation of Chartism in 1839 led to the specific demands set out in the Six Points of the Charter (universal suffrage, vote by secret ballot, annual parliaments, the abolition of property qualifications for members of parliament, members of parliament to be paid by the state and equal electoral districts). The Six Points were more than merely ' political ' demands conceived within, and, wishing to retain the established society

" the demand for manhood suffrage had a totally different significance for Chartism than for the Reform League in 1866.....The Charter was directly concerned with class and power, whereas the mid-Victorian radicals perceived the problem in terms of the more abstract categories of reform and progress. Demanding the vote.....the Chartists saw political democracy as a means to a shift in power relations. " 16

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15. On this, see G. Steedman Jones, ' Rethinking Chartism ', in G. Steedman Jones, The Languages of Class: Studies in English Working Class History 1832-1982 (Cambridge: Cambridge University Press, 1983), 90-178

16. Trygave F. Tolfsen, *Working Class Radicalism in Mid-Victorian England* (London: Croom and Helm, 1976), p.85

Substantial change was the aspiration of the Chartist movement which underpined the plurality of versions of Chartism which existed within it. This change was aimed at social transformation in which the working class were to exercise control over their existence with the concomitant elimination of all forms of deference and subordination 17. For this to be achieved universal suffrage had to be introduced in order to establish a form of popular sovereignty capable of overcoming the political domination of the propertied classes.

Chartism contested the view of bourgeois consciousness that political domination had been made rational and that the social preconditions for this political order - the laws of political economy - were a ' natural order '. With the combination of economic ' crises ' and disciplinary mechanism of the New Poor Law the competitive social order, operating in conformity with political economy, could no longer maintain sufficient legitimacy for the guarantees of equality of opportunity to secure private property, or, open access to participation in the political realm. Conflicts which had subsisted in this private economic sphere spread, under Chartism, into the public sphere.

It was this public, political character of Chartism with its demands for substantial change which manifested itself predominantly in meetings and demonstrations, that confronted the existing system of social control. Chartism, being a predominantly urban movement meant that it was mainly the boroughs that experienced the movement directly. However, the industrial villages and towns within the counties, and, rural parts of South Wales were also affected by Chartism.

It was the magistracy, with the local forces available to them, who confronted the Chartist movement in the early spring of 1839. For, each locality and the

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17. See, for more detail on this and the attempt to create within the Chartist movement a prefigurative reflection of this, Eileen Yeo, ' Some Practices and Problems of Chartist Democracy, ' in J. Epstein and D. Thompson ed. *The Chartist Experience: Studies in Working Class Radicalism and Culture, 1830-1860* (London:Macmillan, 1982), 345-380

apparatus which had evolved within it to maintain social order, bore the prime responsibility to direct and organise the response to Chartism. The magistracy, on the whole, sought the intervention of the state through military assistance and repressive legislation. The Home Office, dependent upon the magistracy for a view of the events throughout England and Wales, was flooded with anxious reports and pleas for intervention from a magistracy who portrayed the situation as one close to breakdown.

This anxiety stemmed from their assessment of the forces locally available to deal with the phenomena of Chartism. These they saw as inadequate, and, lacked confidence in their ability to maintain order with them. Many borough authorities had too few policemen to deal with the disturbances. Magistrates tried to supplement them by enroling special constables, but this proved to be a difficult task as the local inhabitants, in the main, refused to co-operate. Even where they were enroled they proved largely ineffective against the pressure of popular unrest. There was, therefore, little that the magistrates felt that they could do as the elements which composed the

" permanent civil force was inadequate both in quality and size, and there were not enough troops regularly stationed in the large manufacturing area of Lancashire and Yorkshire to supply the means of dealing with any large-scale outbreak " [18]

Parish constables, the other main element in the ' old system ', were incapable of dealing with this type of ' disorder ' and unrest. The small, independent and domestic scale of their operation meant that the parameters of their practice, was an essentially reactive one. Their lack of a preventative role and collective mode of organisation caused them to be overwhelmed by the outbreaks of violence and large-scale public disorder of Chartism.

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18. F.C. Mather, *Public Order in the Age of the Chartists* (Manchester: Manchester University Press, 1959), p.227

Initially, the Home Office gave advice when consulted and sent down members of the Metropolitan Police to assist. They did not direct operations nor augment the resources of the localities. Eventually, in the late spring of 1839, the Home Office took more direct action. This was confined to enhancing the existing machinery of social control either by instructing the various elements in the system as to the practices they should adopt, or, by supplementing it in order to improve its normal operation [19]. This was sufficient to engender greater activity on the part of the magistracy such that Chartism was for a time, in the late summer of 1839, removed from public view.

Despite the seeming success, the Whig Government passed the County Police Act 1839/40 in order to implant a Rural Constabulary force to establish an immediate, uniform and supply a suitably large, permanent civil force to dispense with the need for a civilian role for the army. The immediate demands of the situation interlocked with a wider and more profound change in the attitudes and definitions of order and criminality which formed a constellation around a consensus between Chadwick, the rural gentry and the Government, in the 1830s, that rural England should have a police force. However, a wider project, on the part of Chadwick and others, which sought a police force which would fit into a Benthamite foundation for the operation of the state, law and society was rejected, despite the carefully tailored evidence of the Royal Commission on the County Constabulary(produced under Chadwick's guidance 20), in favour of a combination of local and central control over the new county constabulary.

Control over the " New Police " was not given to the parishes but placed with the magistrates at Quarter Sessions. They were to fix the size of the police force and had the power to appoint and dismiss the Chief Constable. Once the Chief Constable

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19. F.C. Mather, *Public Order in the Age of the Chartists* (Manchester: Manchester University Press, 1959), p.229

20. See, for more detail on this, *Stanley H. Palmer, Police and Protest in England and Ireland, 1780-1850* (Cambridge: Cambridge University Press, 1988)

had been appointed, however, he was to have absolute rights of appointment over the composition of the force within the numerical limits set by the magistrates. The Home Office was to play a more active role by producing the rules and regulations as to the organisation, pay, clothing and equipment of the county constables. The cost of this new force, like its counterpart in the boroughs, was to be borne locally by the county ratepayer's.

The County Police Act 1839/40 became effective after the first major surge of Chartist activity had ebbed. It was not until its re-emergance in 1842 with the burgeoning number of strikes in the Northern, industrial areas, which increasingly began to take on a political character, that the system had to confront Chartism again. This confrontation revealed that little had changed even with the extension of the capacity to develop a " New Police " by the County Police Act.

Local magistrates were as equally hesitant as boroughs to embrace the " New Police ". The rural gentry remained totally at variance with any notion of a centralized, national force controlled from London. They still remained wedded to a modification of the existing, local system of social control rather than dramatic new reform, and, were reluctant to bear the cost of this ' new ' force. The optional character of the County Police Act meant that very few counties had, by resolution of Quarter Sessions, decided to establish a " New Police " force, and, even where this was the so their size was small. For, since the county ratepayer's had to bear the cost of the force, the landowners in the counties (many of whom were also magistrates) had an interest in maintaining a low county rate. Moreover, since the ' new ' force had a county basis those in rural districts perceived themselves to be bearing the largest share of the cost. They were

" remote from industrial unrest but heavily rated on account of the large amount of landed estate situated within them,[and] would be footing the bill for the

maintenance of public order in the relatively distant manufacturing towns and villages, where property of high rateable value was more scarce " [21]

The Home Office lacking any direct means, under either the Municipal Reform Act or the County Police Act, to intervene to push boroughs and counties into adopting, or, maintaining sufficient police forces was forced to supply Metropolitan Police or the army to areas experiencing Chartist unrest. Even the policy of refusing initial requests for assistance was only successful in a few cases.

The Rebecca Riots in 1843 exemplified this position of the Home Office. Requests to the Home Office asking them to dispatch Metropolitan Police to the areas of South Wales experiencing the disturbances were, at first, refused. The Home Office replied by stressing the duty of magistrates to adopt the County Police Act and/or swear in special constables. The magistrates, however, continued to request assistance, and, the Home Office eventually sent 50 Metropolitan Police to the area. There was little they could do, and, later detachments from the army were sent in. This assistance, by the Home Office, was meant to be perceived by the magistracy as of an exceptional nature with the linked expectation, that it would lead to the establishment of a ' new ' police force. The counties ignored this Home Office reasoning and were content to retain the local situation unchanged once order was restored. There seemed no reason to contemplate the introduction of the " New Police " with some magistrates going as far as rejecting any responsibility for the expense of the detachments of the Metropolitan Police sent to them [22].

After this and other similar experiences the Home Office tried to ensure the adoption of the " New Police " by the threat of withdraw of the military from the affected areas. This had only a very limited success as did the circular sent to the

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21. F.C. Mather, *Public Order in the Age of the Chartists* (Manchester: Manchester University Press, 1959), p.131

22. See L. Radcinowicz and R. Hood, *A History of English Criminal Law and its Administration from 1750*, Vol. 4 ' Grappling For Control ' (London: Stevens, 1968), pp.252-253

boroughs with populations over 20,000 which did not have a sufficient ratio of police to population. For, although the circular warned of the imminent withdraw of troops who had been stationed in small detachments throughout the country, only 14 of the 38 recipient boroughs were persuaded to increase their forces.

This resistance by both boroughs and counties, despite the explicit threat to implement decisions outside the legislative framework of both Acts, demonstrated the continuing inability of the state to effect the transmission of its conception of the " New Police " into the decision-making premises of magistrates or Watch Committees. Perceiving itself unable to overcome this resistance the state altered the nature of its response to the object of transforming the structure and level of operation of law enforcement. It turned to a policy of modification of the existing system of parish constables throughout the later 1840s with last piece of legislation in 1850 [23]. The superintending constable system which emerged from this combination of legislation met with much greater successs as it retained a large degree of local control over the patrolling force. It was adopted by many magistrates and rural gentry in the counties who had rejected the county police scheme.

The system of social control which entered the 1850s, prior to the County and Borough Act of 1856, was one produced by compromise in which alteration of the system of social control was tied to a demand that institutional change should not remove the control of the localities. Local affairs while of concern to the state were not to be in the domain of actions of the institutions of the central state. The role of the state was to be limited and enhancing not all-embracing and determinant.

From the 1830s up to the 1856 County and Borough Police Act the role of the state was characterised by this form of ' existence in the background '. This led to a pattern in which the adoption of the " New Police " and the removal of the ' old '

23. This is comprehensively dealt with in R. D. Storch, ' Policing in Southern England before the Police: Opinion and Practice, 1830-1856 ', in D. Hay and F. Snyder ed. *Policing and Prosecution in Britain 1750-1850* (Oxford: Oxford University Press, 1989)

system of parish constables, night watch and Prosecution Associations was particular and contingent product of a diverse number of essentially local responses. However, the diversity of this response was more marked in the counties than the boroughs since the boroughs ***had*** to establish a supervisory Watch Committee under the Municipal Corporations Act 1835.

The Growth of the " New Police "

The character of the legislation dealing with both borough and county ensured that " New Police " forces were established in accordance with ***local*** imperatives and perceptions. This lack of central, formalised, state control was coupled with maintenance and continued existence of the elements of the ' old system '. The " New Police " were confronted with a social space in which they had to gain ascendency and acceptance through active competition and other strategies. It was they who had to ' break-in ' to the control exercised by parish constables over prosecutions if they were to be in a position to be more than a body which dealt with public order. This process, by which the police forces attained this object, was a gradual one as it had to be achieved through wresting control from private prosecutors, Prosecution Associations and parish constables.

Parish constables were, apart from the magistracy, the major element in the ' old system's ' structure of law enforcement. It was their role and practices which visibly and publicly defined the parameters of legality and illegality under the ' old system '. The decline of the parish constables was one of the central factors in the ascendency and growth of the " New Police ". It was in many areas a conflictual process with an active struggle for dominance between the parish constables and the " New Police " 24. The 1830s and 1840s saw only a minimal change in the structure of

24. As was the case in the Black Country with conflicts between the " New Police " and parish constables over the right to use lock ups and other facilities as shown by D. Phillips, *Crime and Authority in Victorian England: The Black Country 1835-1860* (London: Croom and Helm, 1977), pp. 75-81

control over prosecutions [25] since the police themselves were in a process of establishing the parameters of their own operation, and, their coherence as a societal institution. It was not until the 1856 County and Borough Police Act that the predominance of the " New Police " and the disappearance of the parish constables was finally ensured.

Prosecution Associations initially opposed the " New Police " as a needless and costly addition to crime control. Yet, the disturbances of the 1830s and 1840s jolted many property owners out of this opposition to the " New Police " as it became obvious that the system of social control, of which they had in any event sought to modify themselves, was inadequate [26]. Acceptance of the ' New ' police led Prosecution Associations to modify themselves in accordance with the changed situation. Many disappeared or formally dissolved themselves. While others remained seeking to establish an intimate relation between themselves and the police as had existed between them and parish constables. This was done by paying fees, expenses and rewards to constables and this seems to have been a widespread practice during the 1840s and 1850s, extending even to senior members of the police force. Yet, many Chief Constables set themselves against this from the inception of their forces, or, were forced to do so by the revelation of this practice which had developed to the extent of pecuniary inducements being offered to policemen to bring forward charges. The co-existence of Prosecution Associations and the police was a short one as the police were part of the reform of the ' old system ' which the prosecution association, despite being a modification to it, still represented. As the ' New ' police achieved a degree of stability and certainty in their operation they took on more fully the practice of investigation and apprehension of offenders ***and*** the organisation and conduct of the prosecution of those offenders whom they had already apprehended. It

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25. Parish constables in the Black Country were still actively pursuing their practice of law enforcement as late as 1847, ibid, pp.78-79

26. See evidence of George Matthews, Solicitor and Clerk and Treasurer of the Caistor Association for the Prosecution of Felons in *First Report of Select Committee on the Police*, Parl. Papers 1852-1853 Vol. XXXVI, p.78 and more generally R. D. Storch, ' Policing Southern England before the Police: Opinion and Practice, 1830-1856 ', pp.250-1.

was this ability to move from arrest to prosecution which removed the major reasons for the existence of Associations, and, through the active capacity of the police to apprehend offenders and prevent offences being committed by their regular patrols the Associations ceased to be a central element in the process of prosecution [27].

Financial constraints of ratepayer's finance proved the most enduring and permanent problem for the " New Police ". While the Chief Constables of County forces had greater autonomy then their borough counterparts, in terms of policy and appointment of men, they were united in their dependence upon local, ratepayer's finance for their operation. Budgets were tightly controlled to keep down expenses and maintain a low county rate. Most Chief Constables had to become ' cost conscious ' since they were held financially responsible for the force in their determinations over the number of men to be recruited and maintained, and, the allocation of men throughout their area. Prior to the Act of 1856, stringent local financial control of police activities meant that Chief Constables found it extremely difficult to conduct the activities of their forces with any degree of continuity, consistency or stability in the early years. Many forces were under-funded which caused some Chief Constables to engage in dubious financial practices in order to keep their forces going [28].

The ratepayer's became the polices' public on whom their existence and legitimacy rested. The police rate was seen as unpopular, and, therefore, maintained at a low level. This could not but effect the amount of police wages and the establishment of police retirement funds (Superannuation funds). Wages were set at a level where it was just possible to get recruits who were literate. This proved to be insufficient to bring large numbers of applicants, and, even when recruits joined it was only in the last decade of the nineteenth century that pensions became a regular

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27. On this process of decline see D. Phillips, ' Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England, 1760-1860 '

28. See B. Weinberger, ' The Police and Public in Mid-Nineteenth Century Warwickshire ', in V. Bailey ed. *Policing and Punishment in Nineteenth Century Britain* (London: Croom and Helm, 1981)

expectation of service. While the " New Police " offered security of employment the low pay and harsh discipline prompted many constables to leave the force. Drunkenness was also a major problem with many constables dismissed, on account of it, during this period.

The autonomy that this new system of local control conferred by the powers of Watch Committees under the 1835 Act and magistrates under the County Police Act 1839/40 was deeply felt, and, led to the maintenance of a size of force that was numerically weak so that it was easily controllable by these local bodies. It was the independent boroughs in the counties, particularly rural areas, where the greatest problems arose. The small size of the borough force had led many of these boroughs to ask the County for assistance during periods of unrest, but they refused to amalgamate their forces with those of the County [29]. By the time of the Select Committee Report on the Police in 1853 the relations between county and borough police forces were bad. All the evidence pointed to strained relations and a marked lack of co-operation with county forces claiming that boroughs would not help them, and, since these areas were inadequately policed they became the location for criminals who then moved into the counties to commit crime. Even some boroughs themselves were aware of the isolated, disjointed system of policing which had developed by the late 1840s and early1850s [30].

This fragmented pattern which characterised the early growth of the " New Police " became the subject of renewed Parliamentary interest when Palmerston became Home Secretary in 1852. Palmerston sought the advice of Chadwick whose secret recommendations were similar to those made in the Constabulary Report of

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29. See the evidence of Henry Thompson, Mayor of Andover(p.32) and John Reynolds Beddome, Senior Alderman of Romsey(p.38) in the *First Report of the Select Committee on the Police*, Parl. Papers **1852-1853** Vol. XXXVI

30. This was clearly articulated by John Reynolds Beddome, in ibid, p.38, who, while admitting that the system of policing in Romsey was inadequate said that the Watch Committee were unwilling to deal with the situation because of the fear that this would lead to amalgamation with the county force and the law of borough control and the exercise of municipal autonomy. This refusal had led many members of the local property order to desert the town ' because our police is so bad; it is infested with beggars '.

1839. For him, local control should be swept away and the borough forces amalgamated with those of the county who, in turn, would be formed into a national police supervised from London from a newly created " Police Office "- the Irish Constabulary and Metropolitan Police were the models to be emulated in the provincial legislation. Formalisation and Centralisation of the role and operations " New Police " was the object of this schema. It would firmly define the relation between the " New Police " and the state, in the institution of the Home Office, as the sole origin of the control and articulation of norms and values. These would be implemented by the " New Police " in the localities so that power would ' flow ' from the Police Office as power-holder to the " New Police " forces as power-subjects through the transmission of these norms and values.

Chadwick's plan did not make Palmerston legislate directly upon its contents. He sought to create a more ' objective ' articulation for the need for change and through the institutional mechanism of a Select Committee on the issue.

The Select Committee Reports of 1853

The Select Committee on the Police of 1853 created both the legitimacy for reform, and, sought to define and pre-determine the nature and parameters of reform by its comparative portrayal of the failings of the ' old ' system and its attempted modifications, and, the success of the " New " forces where they had been adopted. The dissatisfaction with control by Watch Committees, and, in some cases with Quarter Sessions magistrates in the counties points to an underlying purpose to guide the proposals towards both centralisation, and, greater autonomy for the office of Chief Constable.

Borough police and their system of local control by Watch Committees; the system of parish constables; and; the emergent system of the 1840's up to 1850, of

forces of parish constables with superintending constables were the subject of severe criticism by the evidence given to the Select Committee.

Parish constables were seen as inactive [31], because being drawn from the locality in which they operated they were viewed as under the influence of the neighbourhood leading to partiality in their enforcement practices. Moreover, since a number of them who were selected were still undertaking other employment during their period in the office then they only devoted time to their duties if they were sure that it would lead to the detection of the offender. For, any time given over to constabulary duties was time taken from their other occupation or work and would lead to the loss of money unless compensated by the certainty of conviction of the alleged offender whom they would have to expend time to apprehend. Therefore, these was a tendency for parish constables only to take an interest in crime if the party could make available funds for the process of detection, apprehension and trial. There were also allegations that parish constables had a pecuniary interest in the continuance and increase in crime since the constable received no money if the commission of crime was prevented then the tendency would always be to adopt a purely reactive role towards crime.

Detection and pursuit were undertaken within the total discretion of the ***each*** parish constable with the unreformed, unmodified parish constable lacking a preventative role of a regular, consistent and collective policy of suppression involving a number of persons acting together. Even after a person had been arrested the activities of parish constables at the trial were criticised. With the knowledge that the prosecutor could get his costs of conducting the prosecution from the court some parish constables tended to artificially inflate their costs by various devices such as utilising many witnesses for which costs would be incurred, and, managing their cases

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31. This description of parish constables is an amalgamation of the evidence of Sir William Heathcote, ex-Chairman of Hampshire Quarter Sessions, pp. 23-24; William Hans Sloane Stanley, Magistrate in Hampshire, p.26; Captain John B.B. McHardy, Chief Constable of Essex, p.56; James Parker, ex-clerk of indictments and Solicitor in Chelsmsford and London, pp.64-65 in *The First Report of the Select Committee on the Police*, Parl. Papers **1852-1853** Vol. XXXVI

so that they were kept to the last part of the court's sitting so as to increase the expense of witnesess by keeping them longer before they gave evidence at trial.

The system of superintending constables adopted by the County Police Act, were presented as flawed and incapable of changing the basic inefficiencies of the parish constable. Superintending constables were to supervise parish constables and attempt to engender a preventative policing role by ensuring a more collective organisation and set of practices. The superintending constable was portrayed as having a large area to cover in the county which necessitated a selectivity in his activities. The efficiency of the force still rested on parish constables and there was seen to be an enduring conflict of interest between the professional, salaried, superintending officer and the elected, non-waged, fee and cost reliant parish constable. The superintending officer was dependent upon the parish constables for information which enabled the parish constables to retain their ability to act independently. The frustration that this caused to superintending constables is expressed by a superintending constable of Buckinghamshire who stated that there was

" no chance of detection; you do not receive information often for two days....the parish constable happens to be out for a considerable time, and sometimes constables are very careless in giving information. " 32

Parish constables and the superintending constable system, which they increasingly came to operate under, were seen as inefficient and incapable of approaching the standard of the " New Police ", where they had been adopted under the County Police Act 1839/40. The superintending constable system, established by many counties who were opposed to the adoption of the " New " police, under the County Police Act, was viewed by those giving evidence as having achieved little practical improvement in the ' old ' parochial system centred upon the parish

32. *First Report of the Select Committee on the Police*, Parl. Papers **1852-1853** Vol. XXXVI, p.71

constable. The public affirmation of the inefficiency of the parish constable and the superintending constable system was vital to the legitimacy of the " New Police". For it was these systems that were the main ' competitors ' with the " New Police", and, hence the avowal of their incapacities could only strengthen both the " New " forces acceptance and the likelihood of the promotion of the " New Police" by the Government. The capabilities of the " New Police" were strongly affirmed in the hope that local forces' initiatives and practices would lead to legislation to make it mandatory to establish the " New Police ".

It was not merely the inefficiencies of the ' old ' system and the small borough forces which were a focus of attention, it was also the question of the type and location of control over the " New " forces. The question of local management of the " New Police " figured most prominently in the minds of the Chief Constables of both County and Borough Forces. It was the system of local control in the boroughs that was the subject of the greatest criticism. There were complaints that it involved a number of competing jurisdictions, particularly between the Watch Committees and the magistrates as to the power of dismissal 33. Not only was this viewed as causing uncertainty, but the professional concerns of the Chief Constable, were being submerged in these local institutional conflicts. The Chief Constables' recommendations of appointment and promotion were being ignored by the Watch Committees as was the effect of reinstatement by the Watch Committee of constables dismissed by the magistrates.

Borough control, as a whole, was looked upon with disfavour as the working of the police was seen to depend upon a fluctuating body of people which led to a lack of stability and continuity of control and policy towards appointments. The fact that members of the Watch Committee were also local politicians led to allegations of lack independence due to their dependence on ' public ' opinion. Moreover, there

33. See evidence of John Dunne, Chief Constable of Norwich, in Ibid, pp.123-128 who alleged that his recommendations of appointment and promotion were ignored by the Watch Committee, and, that the Watch Committee had reinstated constables dismissed by magistrates.

were allegations that premises belonging to publicans, brewers and spirit merchants were very rarely the subject of police attention when they served on the Watch Committee 34.

The general view was that control should be removed from Watch Committees and placed with the Chief Constables in order to ensure the efficiency of the force and allow ' professional ' rather than ' political ' considerations to be dominant. The response of Chief Constables to the idea of a national force which would overcome these difficulties by moving the locus of control to London and thereby solve the problems of borough and county jealousy and conflict, those of conflict between Watch Committees and magistrates in the boroughs and the lack of control of Chief Constables was less enthusiastic with disagreement as to the necessity for a national system of policing 35.

However, what this displays is a definite attempt to discredit the system of local control which had arisen under the Municipal Corporations Act 1835, and, to try and point to the necessity of a reduction in the degree of local control over the police. The fact that the need for central control was not strongly and coherently articulated in the evidence led the Bill of 1854 to attempt to institute a system of compulsory policing with a stronger and more direct role for the Home Office in the governance of the police. This, in turn left the appointment of Chief Constables to a national framework of rate-payer financial boards who would replace both the Watch Committees in the boroughs and the magistrates in the counties.

The 1854 Bill represented the last attempt to institute a clearly centralised, national police force in which local control over policing practice and operations

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34. As alleged in the evidence of Thomas Heagren Redin, Govenor of Carlise County Goal who had previously served five-and-a-half years in the Essex Constabulary and four-and-a-half years in the Liverpool Borough Force attaining the position of second-in-command in ibid, pp.95-97

35. Compare the evidence, in ibid, of Captain William Harris, Chief Constable of Hampshire, in favour(p.22); and; Captain John B.B. McHardy, Chief Constable of Essex, who objects to centralisation(p.53)

would have been minimised and confined within clearly defined parameters. Its failure ended a period in which the state had attempted, on numerous occasions and by various means, to ensure the establishment of a system of policing in which the Home Office was to be placed directly and transparently at its apex. The policing structure of the Metropolitan Police was no longer to provide the source for a ' programme ' of transformation of the ' old ' system of social control. The idea of policing outside London was to remain embedded within the framework and dynamics of local government. The County and Borough Police Act 1856 recognised the legitimacy of the established framework of local governance of the police produced by the Municipal Reform Act 1835 and the County Police Act 1839/40. It also sought to increase the efficiency of the policed within this framework and by this action was to be the first important move in the increasing autonomy of the " New Police ".

The County and Borough Police Act 1856

The " New Police " were now placed, conceptually, as an integral element of the local structure of governance. This local structure of governance, with its high degree of control and supervision over the " New Police ", was now attributed with an a priori legitimacy. The possibility for state intervention within this system only opened when the adequacy of this system's internal operations was placed in doubt. It was only when local government was obviously failing that central government was conceived to have a capacity for involvement. This circumscription of the state's possibilities also entailed a redefinition of the purpose of that state intervention. Centralism and localism were no longer two radically distinct paradigms of control. Both had become means to be flexibly utilised in attaining the goal of maintaining the predominance of property within this local structure of governance.

" Centralisation was justified and expanded, because it could provide direction to the localities. Government was to extend the moral partnership between the state

at Whitehall and the counties: Grey [the Home Secretary who introduced the 1856 Act] felt that through compromise he could complement each move towards centralisation with a corresponding increase of authority for the local authorities. Concessions were made to these local bodies, or legislation encouraged them to act on their own initiative, based once again on the assumption that they could manage their own affairs best. " [36]

This change in the conceptualisation of the relationship between the Home Office and the governance of the localities meant that the 1856 Bill was far less radical than the one of 1854. Despite this, Grey found the localities resistant on the issue of Home Office intervention in the " New Police ". The boroughs perceived the measure as overt state intervention which would decrease local autonomy and control over the " New Police ". In order to ensure a greater role for the Home Office,Grey adopted a flexible approach reducing the directly interventionist role proposed for the Home Office until sufficient numbers of M.P.s were prepared to give it their support.

" Clause 6, " the backbone of the Bill ", was excised. The Government thereby forfeited its power to establish rules over pay and clothing or to frame a set of general regulations; all that remained was a prohibition of constables' fee taking. Clause 5, giving the Home Office the right to direct the police in the performance of their duties, was also stricken. The original requirement that the heads of the county and borough forces report at the will of the Home Secretary (Clause 8) was diluted to the requirement that they present him with an annual statement of crime (Clause 14). The Home Secretary's right to require counties to be divided into police districts (Clause 2) was softened by requiring affected county ratepayer's to petition for this districting. " [37]

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36. David Smith, ' Sir George Grey at the Mid-Victorian Home Office ', *The Canadian Journal of Social History* 19, (1984), 361-386 (p.367)
37. Stanley H. Palmer, *Police and Protest in England and Ireland 1780-1850* (Cambridge: Cambridge University Press, 1988), p.515.

The 1856 Act, after these concessions, was to ensure the reconciliation of competing claims of local and central government by maintaining the ability of local government to provide law and order coupled with the state's contribution to this goal reduced to providing the background conditions for its attainment. Indirect methods were to be used ensure the efficiency, consistency and coherence of the " New Police " by the incorporation of new and important centralising characteristics. An Inspectorate for the Police was to be established and these Inspectors were to examine the efficiency of local forces on an annual basis. This entailed the Inspectorate in the consideration of the provision of police stations, charge rooms and cells for each local force as well as the ratio of police to population. If deemed ' efficient ' the local borough or county would be entitled to payment of one-fourth of the cost of pay and clothing of the force out of central government. The effect of these Reports by the Inspectorate was to make the system of policing a national issue by providing a means for the comparative assessment of local forces with pressure able to be placed on those forces which appeared weak.

The Act also formalised the nature of the " New Police " themselves by delineating the career structure for the force, establishing superannunation funds and forbidding constables to either work for a fee or to take any other employment while they were in the police force. This sought to distinguish and articulate the institutional identity of the " New Police " within a framework of local governance and control. The 1856 Act, rejecting the possibility of a national police independent of the local authorities, created a system which meant

" only the abandonment of totally free choice in the provinces, and suggested that policemen might act beyond the area defined by a rate levied to pay for their services. " 38

38. Carolyn Steedman, *Policing The Victorian Community: The Formation of English Provincial Police Forces, 1856-80* (London:Routledge, 1984), p.27.

It was intended to be a more effective method to encourage a greater degree of uniformity in the number of police employed by the boroughs and counties. In this way the " New Police " would have a structure of operation similar to that of

" reformatory schools....part of the regular machine for the maintenance of law and order...to be maintained..by funds contributed by all, like our prisons, penitentiaries and workhouses. " [39]

The effect of the Act was to make permanent an essentially indirect role for the Home Office in the area of policing. The Municipal Corporations Act and County Police Act were confirmed as the enduring structures of governance of the police for the duration of the nineteenth century. The enforcement of criminal law was now to be the sole concern of the " New Police " with the 1856 Act marking the end of the continued existence and persistence of those elements of the 'old ' system. This recognition of the legitimacy of the police, by the Act of 1856, entailed their acceptance as part of the local system of control in which they acted as both the protection for the local property order and in an administrative capacity for the magistracy and Watch Committees. The " New Police " were local police acting at the behest of the local property order within a locally controlled financial structure. The nature of their practices and operations in the enforcement of law were to be developed within the context of as interaction between the local perceptions of social order, the extent of local control and the activities of the Chief Constables.

The relations between the Chief Constables and the system of local control was to be the focus for the development of the police as a social system during the rest of the nineteenth and early twentieth centuries. The autonomy so clearly desired by the Chief Constables was to be slowly produced as a result of these practices and interactions between them and the Watch Committees and Quarter Sessions magistrates. The 1856 Act, by the provision of central government finance and the

39. Sir George Grey in *The Times*, 18 January 1856 quotation from Steedman, ibid, p.27.

establishment of the Inspectorate, created space in the previous total dependence of the " New Police " upon local ratepayer's finance and many forces had their numbers increased thereby producing forces which now began to exceed many localities' ability to completely control policing policy.

The beginnings of the preconditions for the development of police autonomy were located in the ascendancy of the police as the dominant agents of social control, and, as the body increasingly responsible for the management of prosecutions as opposed to private prosecutors, prosecution associations and magistrates. The magistracy was the other central element which the police had to gain ascendancy over in order to achieve the status of the dominant agents of social control. Unlike the parish constables and prosecution associations it was directly and uniformly produced by Parliamentary legislation in the form of Jervis's Acts of 1848/9.

The Transformation of the Magistracy

The magistracy occupied a central position in the social and legal order of the ' old ' system. They formed the link between the localities and the institutions of the state in the maintenance of order and the provision of information. The movement for reform of the role of magistrates had initially surfaced during the period 1825-1828, but little, in the form of legislation, had been achieved. In the face of the challenge of Chartism they, as part of the ' old ' system had been severely tested with the institutions of the state, particularly the Home Office, being called upon to play an actively interventionist role.

In 1848 the Attorney General introduced four bills setting out to remould the magistracy. These Bills related to the two main practices of magistrates - processing people charged with indictable offences, and, conducting summary trials. This was

supplemented with legislation regulating the holding of Special and Petty Sessions, and, the protection of magistrates for acts done in the execution of their office.

These measures were presented by the Attorney General, in his speech to Parliament, as simply rendering assistance to the magistracy by clarifying the law upon which the magistracy operated and performed its duties. The first Bill and second Bill collected together and condensed into a single source all decisions and statutes concerning, respectively, the function of committing offenders chargeable with indictable offences and the trial of summary offences. He stressed that these two Bills introduced nothing new the

" object had been simply to collect together the enactments and decisions forming the existing law upon these heads. " 40

The third bill, provided the opportunity for magistrates to hold their summary trials and committal proceedings in specially constructed buildings, paid for out of the county rate, so that the previous venues - commonly public houses - would be replaced with specifically legal places for the holding of Special and Petty Sessions. Also, the magistrates' clerk paid was to be paid by salary with an agreed scale of fees to be universal throughout England, to be established through discussion between the magistracy and the Home Secretary.

The last Bill was constructed to provide for the protection of magistrates in their decision-making free from consequences. Only if the party challenging the validity of the decision could prove that malice was the motivation behind the particular magistrate's decision was any action likely to succeed.

The totality of the change was presented as both unexceptional, technical and not ' political ' and, therefore, these

40. Parliamentary Debates, HC(3rd ser.), col. 3 February 3rd, 1848, The Attorney General

" matters not being subjects of political importance might not be interesting to many, and, unaided by hon. Gentlemen on both sides of the House, he(the Attorney General) could not hope to succeed in this undertaking....[but]he trusted [that he] should have the assistance for which he looked. At all events, he felt that he was taking a step in the right direction. " 41

This presentation and explanation of these Acts' effects masked the fundamental change which they entailed. These reforms connected, amplified and reinforced a broader and more fundamental change in the position of the magistrate. The magistrate embodied a personalised, demonstrative authority in the ' old ' society in which social position and judicial role overlapped. Law and society had a vital and indissoluble link in the figure of the magistrate who symbolised the natural origin and truth of law and society. Life in human society was expressed in terms of natural law in which legal/social relations were intertwined and undifferentiated. In the realm of practice it centred around the activity of paternalism in which a degree of reciprocality and responsibility was recognised by all those taking up positions in the social order. This practice of paternalism took place within an essentially discretionary framework in which rank in the social order was intimately connected to the amount of discretion which could be exercised.

The magistracy subsisted in a legal system lacking a clearly articulated separation from the surrounding social order, and, in which the operation of that legal system itself remained highly fluid due to its dependence, for a case to come to trial, upon the interconnection of a number of decisions to utilise the law. The system was one of private prosecution in which the decision to invoke the law was one based upon an individual rationale of calculation of effectiveness and cost. The decision to invoke the law was as uncertain as the premises upon which the decision at the trial was made, and, the relation of Petty and Special Sessions to the higher courts, especially courts of Assize and Quarter Sessions.

41. Ibid, col.3

Within this system the magistrates were able to adopt, if they chose to, a pro-active stance. This meant that they had a role in which the decision to invoke the law, by beginning the process of prosecution, was combined with the ability to make law through the making of decisions at the trial. Therefore, the distinction between the trial and the pre-trial process was essentially blurred with procedural certainty and differentiation dependent upon and inscribed within magisterial discretion.

The degree of intervention in the pre-trial process was again dependent upon the individual magistrate it could amount simply to pressuring the parish constable to take up the complaint of an individual, or, helping in the preparation of the complainant's case. However, he could actually investigate the matter himself and arrest the individual or individuals he considered responsible for the offence. He would then conduct the prosecution of those arrested by him.

The processing of offenders by the magistracy at Petty and Special Sessions was an equally discretion-bound procedure. The nature of the examination of the suspect by the magistrate or bench of magistrates before committal for trial, for an indictable offence at a higher court, was entirely dependent upon the practice adopted by the magistrate(s). It could be confined to merely eliciting the issues in order to define the parameters of the case, but it could equally be geared to establishing the guilt of the defendant by questioning, with the form of questioning, often producing a confession.

This role in specifically criminal matters was one element in a wide variety of otherwise social and administrative practices. The magistracy was at once embedded in the social order and differentiated from it such that the role was capable of the particular form of practice required by paternalism. This wider social role had become the focus of criticism by landowners in the early nineteenth century through discontent over the operation of the system of Poor Relief. The system was seen to

be too expensive from the amount of county and parish rates demanded for it to function. This was compounded by the view that it was a system founded on the practice of paternalism in which there was little control over expenditure and too much discretion, since the magistrates had an appellate function in the system of Poor Relief, with a predominant tendency to satisfy the expectation of recipients of poor relief [42].

The New Poor Law 1834 led to the de-differentiation of the magistracy by their incorporation into boards of poor law guardians.

" as ex-officio members....they were thereby incorporated into a body of diverse property owners,[and] they were no longer in an independent position to thwart ratepayer's inclinations had they wished to do so. " [43]

With this incorporation went the generation of a new system of expectational structures and a social order based upon a concern for efficiency and effectiveness. This change brought about by the Poor Law signalled a fundamental restructuring of the social order, particularly in rural areas, in which the position and function of elements in the ' old ' system were modified or removed.

The position and function of the magistracy, therefore, changed with this more general movement. Their social and administrative powers were stripped away with the process being quicker and more dramatic in rural areas than in urban, metropolitan

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42. See, for more detail on this, A. Brundage, ' The Landed Interest and the New Poor Law: a reappraisal of the revolution in government ', *English Historical Review* 88, (1972), 27-48; P. Dunkley, ' The Landed Interest and the New Poor Law: a critical note ', *English Historical Review* 89, (1973), 836-841; A. Brundage, ' The English Poor Law and the Cohesion of Agricultural Society ', *Agricultural History* XLVII, (1974), 405-417; P. Dunkley, ' Paternalism, the Magistracy and Poor Relief in England, 1795-1834 ', *International Review of Social History*, XXIV, (1979), 371-397; P. Dunkley, ' Whigs and Paupers: The Reform of the English Poor Laws, 1830-4 ', *Journal of British Studies*, 10, (1981), 124-149; W. Apfel and p. Dunkley, ' English Rural Society and the New Poor Law: Bedfordshire, 1834-47 ', *Social History*, 10, (1985), 37-68; P. Mandler, ' The Making of the New Poor Law Redivivus ', *Past and Present* 117, (1987), 131-157.

43. W. Apfel and P. Dunkley, ' English Rural Society and the New Poor Law: Bedfordshire, 1834-47 ', Social History 10, (1985), 37-68 (p.49)

and industrial areas. Their role became one set within purely legal parameters as a result of this process. It is at this juncture that Jervis's Acts of 1848/49 become intelligible as an integral part of this process of redefinition the magistracy.

The first two bills, by clarifying the position with regard to the committal of indictable offences and the trial of summary offences, remove the discretionary and fluid operation of the magistracy. The malleable distinction between trial and pre-trial stages as well as the ease with which the judicial role became one of prosecution was now firmly prevented. The magistracy were now to have an exclusively judicial role with the practices of the ' old ' system, in which a proactive approach could be adopted, removed. The pre-trial process in the committal of indictable offences was clearly demarcated as a preliminary inquiry with the object being simply the gathering of information from witnesses, prosecutor and defendant to establish whether there was a case and whether it should be set down for committal for trial.

In regard to summary offences, the process of clarification was linked to the containment of magistrates' decision-making abilities. The mass of unsystematised, summary offences, constituting the operational space of the magistracy in regard to the trial of criminal offences, allowed wide scope for the exercise of discretion. The gaps, blanks or ' loopholes ' in the area of criminal jurisdiction provided express devices through which the legal order could be made to conform to the demands of the social order of paternalism in which order was imposed through a method of individual, singular incursions from above. In this way, law was still intrinsically linked to society and it is this relation that this legislation sought to sever.

The process of setting out the parameters of the magistrates' summary jurisdiction established an explicitly rule-bound jurisdiction. This firmly differentiated the magistrates from the surrounding society and produced a separate legal order which was characterised by its intimate relation to change and contingency and not

upon the maintenance or symbolisation of an unchanging natural order of reciprocal relations. This was done indirectly by establishing a central supervision over magistrates' clerks who were to be paid by the state on an uniform scale of fees. This would create a stable, salaried position for the role of magistrates' clerk to it be filled by those who had received training as a solicitor. Therefore, to strengthen this position was to strengthen the influence of a legal perspective upon the magistracy. For, it was he who advised them on points of law and hence provided them with the legal structure in which their decisions were made.

This disembedding of the magistracy from the social order and social system of which they had been an integral element was to be further accentuated by the provision which sought to set up specifically constructed buildings for the holding of Special and County Sessions. This was to be the symbolic complement to the differentiation of law and society pursued in the realm of practice and procedure of the magistracy. The increasing specificity of function of the magistracy was now to take place at a specifically legal site.

This concentration and reduction of the magistracies' role carried out by this legislation shifted the parameters of its operation onto a positive law basis. The space of summary jurisdiction was now one in which the process, procedure and substantive law basis of summary jurisdiction and the committal to trial for indictable offences were clearly demarcated. This was to increase the ability of these courts to process large numbers of decisions by making the decision-making process itself essentially procedural.

With this legislation, however, the ability to invoke the law was lost by the magistracy. They were now confined to decision-making. Magistrates' courts now become dependent upon the surrounding social system for the introduction of cases. It is at this juncture that the phenomenon of feeding cases into the legal system

becomes separate from decision-making within the legal system. This function of decision-making now becomes the legitimate terrain and basis for the definition of the role of the magistracy. Hence the trial, in turn, comes to be defined as the sole site of guilt determination, and, therefore clearly differentiates and defines itself from, and in regard to, the pre-trial process. The collection of evidence and witnesses prior to the trial ceases to be the legitimate concern of the magistracy as does the conduct of prosecutions themselves.

This contraction and reduction of the role of magistrates to purely reactive, judicial role coupled with the decline in the importance of the parish constables and prosecution associations allowed the " New Police " a growing, uncontested space in which to take control of the management of prosecutions and the maintenance of social order of which it formed a part.

The Development of the Police into a Relatively Autonomous Social System during the Later Nineteenth Century

Acceptance of the police, after 1856, was as an integral part of the local framework of society under the guidance and control of Watch Committees and magistrates. The latter part of the nineteenth century was to be the period in which the police began to develop, in this context, the preconditions for their evolution into a relatively autonomous social system.

a)The Unfolding of the Centralising Tendencies of the 1856 Act: The Activities of the Inspectorate

The 1856 Act had created an Inspectorate whose responsibility it was to ensure that the principles of policing efficiency became local reality. The Inspectorate were elements in a modified administrative structure in which it was proposed that the

Home Office would hold a greater degree of authority than had it held before. The effectiveness of this administrative structure rested on their aptitude and inclination to enforce its principles. They had to mark out a sphere of influence which would entail a break with the notion of an uninterrogated power of local authorities. For, it was the decline of this conception of local authority which would be the basis for any transformation in the structure of governance and with it the generation of a greater space for the development of autonomy for the " New Police ".

The three Inspectors had an independent status and lived and operated within one of the three regions to which they were assigned. The Inspectorate began with an initial affinity between their perceptions and those of the counties and boroughs on the role of the " New Police ". Both saw the " New Police " as part of a system of local government within their areas. This accounted for the early success of their attempts to increase the number of " New Police " employed by the localities. The Inspectorate simply stressed the capability of the " New Police " as an instrument of local governance and their ability to undertake administrative functions44. By 1857, therefore,

" all counties but one, and the great majority of boroughs, had efficient forces." 45

Problems remained, however, with the small boroughs with populations of under 5,000 who had been excluded from the central government grant under the 1856 Act, particularly in the NorthWest(Lancashire, Cheshire and NorthWest Derbyshire) and the West(Somerset, Devon and Cornwall), as the Inspectorate could only seek to persuade them to amalgamate with the county force. By 1870 this continued to be a problem, but had ceased to be one of national significance.

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44. For a detailed account of the early workings of the Inspectorate see Carolyn Steedman, *Policing the Victorian Community: The Formation of English Provincial Police Forces, 1856-1880* (London: Routledge, 1984),pp.38-41.

45. H. Parris,' The Home Office and the Provincial Police in England and Wales, 1856-1870 ', *Public Law* (1961), 230-255 (p.230)

The efforts of the Inspectorate throughout the late 1850s and 1860s rendered the majority of forces 'efficient'. By lifting the police out of an exclusively local structure of finance it encouraged the localities to employ more police constables, since they no longer had to bear the total cost to their employment, and, in turn, made the police forces themselves recipients of a guaranteed, stable source of finance tied to considerations other than the amount of the county or borough rate. This increasing financial stability produced the conditions for the development of a self-consciousness of their operation and encouraged the autonomous formulation of both the identity and policy of the " New Police ". The basic foundations for its emergence were already in place since the police, as an organisation, had been set up as a ' new ' entity in response to the failings of the ' old ' system and were therefore already differentiated, in terms of form, from the existing social roles and positions of the existant social order.

b)Increasing the Preconditions for the Development of Autonomy: The Activities of the Chief Constable with the Local Structure of Governance and the Changing Definition of the Relation Between the State and the " New Police "

It was the position of the County Chief Constables that enabled the fullest development of these preconditions because of the nature of the local structure of governance within which the county forces operated. The system of control by magistrates at Quarter Sessions remained unchanged by the 1856 County and Borough Police Act, and, the subsequent legislation of the 1880s. Chief Constables had been drawn from army officers with military experience which meant, in the context of mid-Victorian society, that they came from gentry families.

Their social statues and standing was reinforced under s.6 County Police Act 1839 by the specific, legislative recognition of their office. With no elected element in the system of county government until 1888 a space for the development of the

autonomy of the Chief Constable was thereby created. His control over policy and appointment was far greater than that of his borough counterpart. The social and legal status of the Chief Constable led to a greater acceptance and approval of the police and their activities from the outset. Therefore, even the limited capacity for scrutiny and control was not fully exercised. From the mid-nineteenth century County Chief Constables were in a situation in which they could operate with an

" effective autonomy that could later, when reinforced by a developing sense of themselves as possessors of professional expertise, be transmogrified into the ideology of constitutional independence. " 46

Along with this developing practice of independence went, as an integral element, a strengthening of the links between the Home Office and the County Chief Constables. The duty to provide information to the Home Office under the 1856 Act broadened out and became more interactive with frequent, direct contact between the Home Office and the Chief Constables. This effectively undermined the small amount of local control that the magistrates had , and, it had become so embedded that even the

" formation in 1888 of Standing Joint Committees, evenly divided between councillors and magistrates, as police authorities, made little difference. " 47

The Borough police forces were in a different situation from the outset. They were under a far more rigorous system of local control - the Watch Committee. The Watch Committees had considerable powers of control over their police forces with the ability not only to determine policy, but also to sack any member of the force including the Chief Constable. However, this potential for strict local control was increasingly unutilised as the nineteenth century progressed. Smaller boroughs, from

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46. L. Lustgarten, *The Governance of the Police* (London: Sweet and Maxwell, 1986), p.42
47. L. Lustgarten, *The Governance of the Police* (London: Sweet and Maxwell, 1986), p.42

the inception of their forces were consensual in their approach to the control of the local force through careful selection of the Watch Committee members [48]. Local control in this framework was more a matter of establishing a stable , expectational framework between the Watch Committee and Chief Constable than a policy of direct and constant intervention in the running of the force. With the small boroughs this was as much as self-conscious decision on the part of the Watch Committee as it was of the social environment in which policing took place. Crime although always to be found was not of the nature or magnitude of the larger industrial and urban areas which necessitated the type of ' engaged ' policing typical of these areas.

Local government in the large urban and industrial municipalities was a far more consciously felt and important entity. Municipal politics in these areas entailed a definite and distinctive municipal policy. Within this policy the issue of control over the police was an important element. It led to firm and vigilant control over the police by the Watch Committees coupled with particular emphases upon police practices. In the city of Liverpool during

" the first eleven years of the force [1836-47], the constraints, and direction by the Watch Committee were severe. A sub-committee of the Watch met daily to supervise police operations. During the first five years, the Watch issued an average of one order a week for the direct payment of police officers." [49]

This rigorous nature of control was, however, only to be characteristic of the early period of the Watch Committee. The expansion in local government activities and areas of competence created an administrative system far more complex and demanding than that of the earlier period. Control of the police now became one element within a far wider administrative framework. This was symbolised by the changing functions of the Watch Committee which was made responsible for the

48. For example, see the Evidence of George Kitson, magistrate for Somerset and ex-Mayor of Bath, to the *Select Committee on the Police, First Report*, Parl. Papers **1852-3** Vol. XXXVI p.143.
49. M. Brogden, *The Police: Autonomy and Consent* (London: Academic Press, 1982), p.62

general control and organisation of the city in which the police were a component. The change in the form of local government in the mid-nineteenth century interweaved itself with a change in the type of control exercised over the police. The police had become an accepted part of local government and this foundational legitimacy led to a decline in direct control with the establishment of a set of patterns and practices of police operation which provided a stable and uncontested domain of mutual expectations. The general direction of the force gradually transferred itself from the Watch Committee to the Chief Constable with intervention by the Watch Committee becoming an exceptional practice.

With these developments went the preconditions for the development of the doctrine of independence though in a less visible and direct form than that of the County Forces. Independence from the Watch Committees was achieved through a combination of strategic elements deployed by the Chief Constables in their dealings with the Watch Committee. Chief Constables of borough forces, in large urban and industrial areas, utilised operational discretion to avoid clear directives from Watch Committees where the force saw duties to be opposition to occupational practice. It was this knowledge of police practice, opposed to the fallibility lack of experience of a political perspective, which underpined this resistance to and avoidance of the interventions and directives of the Watch Committees in the later nineteenth century.

These bases of resistance of Chief Constables in both boroughs and counties were reinforced by the changing legislative definition of the relation between the " New Police " and the state from the late 1860s onwards. This redefinition entailed a shift in the role of the " New Police " from that of carefully supervised agents of local magistrates and Watch Committees to that of agents of the state. The legislation was to place its implementation directly with the " New Police " without any role or position within it for the magistracy or Watch Committee. This had the effect of loosening the relation between the structures of local governance the " New Police "

and their status as an administrative instrument for the realisation of the norms of the local ratepaying community [50]. This loosening was enhanced by the increase in the proportion of central government finance available to local forces under the Police Expenses Act 1874 which now made the state responsible for one-half of the total cost of clothing and wages.

This enabled the development, during the nineteenth century, of an independent space for police practice increasingly freed from local control. With this, came the components and preconditions for the doctrine of police independence and managerialism. For, independence from local control can become articulated as independence from any social class or political foundation. Hence, the position of Chief Constables becomes an impartial, bureaucratic and administrative role-type whose demands for wider and greater powers simply conform to the assessment of internal organisational needs. It was only to finds its ' public ' articulation and discursive existence after the First World War when the combination of an increased Home Office role and dominance, after the police strikes of 1918/1919, and, the response to the post First World War political situation cemented the relation between the Home Office and Chief Constables, and, their independence from local control [51].

The evolution of the distinction of the " New Police " from other public officials on the ground of the former's lack of need to be controlled by representatives of the ' public ' enabled the " New Police " to operate with an increasingly wide ambit of decision-making and parameters of practice. This necessitated the heightened ability to both process and determine the value of information in order to produce a stable position in which decision-making could take place in accordance with the systemic imperatives of the " New Police ". This, in turn, demanded that the practice

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50. This legislation consisted of the *Wine and Beer House Act 1869, The Habitual Criminals Act 1869, The Prevention of Crimes Act 1871, The Licensing Act 1872, Explosives Act 1875, The Adulterated Foods Act 1875.*

51. See, for a detailed description and analysis of this, L. Lustgarten, *The Governance of the Police* (London: Sweet and Maxwell, 1986)

of information processing be one governed by preferences built into that practice which would prestructure the

" perception of choices, the way of posing questions, incentives to explore, preferences and so forth. " [52]

It was the shared perceptual framework of norms and values developed with the " New Police " , during the nineteenth century, which provided the possibility for this stable, system specific abstraction from the surrounding social environment.

c)The Maintenance of The Identity of the " New Police ": The Evolution of a Durable, Perceptual Framework

The norms and values developed within the police force were a product both of the military model of organisation and discipline imposed upon and structuring the relations between members of the force, and, the perceptual framework or ' personality structure ' evolved in response to and interaction with the social environment which surrounded the police.

This military model of organisation and discipline sought to re-educate the recruited constables. It was to do this by producing, through this type of discipline and training, a durable, internalised set of norms and values which were the crystallisation of the influences brought to bear both within and without the police forces. That military models were utilised is due to the fact that a total break is sought with the recruit's previous social situation, perceptions, practices and expectations and their substitution with those of the police. A process of desocialisation and resocialisation is simultaneously at work seeking to produce a new

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52. N. Luhmann, *The Differentiation of Society* (Columbia: Columbia University Press, 1982), p.172.

set of perceptions and practices while simultaneously having to deal with the pre-existing perceptions and practices of the recruits.

For this process to be effective, this imposition of norms and values which structures thought and practice needed to be maintained by the recruits themselves through self-discipline and self-censorship. The extent to which this is unconscious is the measure and extent of the internalisation of these norms and values. Furthermore, not only must this be unconscious, but the very process of imposition of a set of ***particular*** values must be ' forgotten ' so that both the thought and practice of the recruits takes place

" in the illusion of freedom and universality. " [53]

This process of internalisation had led, by the 1860s, to the emergence of this durable disposition in police constables. The Police Service Advertiser, established in 1860, testifies to the extent to which constables themselves regarded each other as sharing common conditions, views and situations. After only a year in publication, it

" concentrates solely on police matters.....While the policemen were generally drawn from below the artisan class, clearly the professional policemen saw himself as having risen to a position of respectability, with the hopes of rising further through hard work, dedication and sobriety." [54]

It was at this period that constables themselves began identify and articulate a set of values and norms which they regarded as natural and universal. This lack of remembrance of the social conditions of their imposition reflected their strong internalisation. The arbitrariness of their inculcation was now perceived as the constitution of a ' professional ' police.

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53. P. Bourdieu, *Reproduction in Education, Society and Culture* trans. R. Nice (London: Sage Publications, 1990),p.40

54. C. Emsley, *Policing and its Context 1750-1870* (London: Macmillan, 1983), p.85

The break between social class position and role as constable began to manifest itself clearly with the position of constable leading to the self-identification of the individual, through the process outlined above, with the set of values and norms of the police force rather than those associated with their initial class position. This self-identification reflects both the total internalisation of the values, constraints and disciplinary mechanisms of the training procedure and their transformation into virtues or laudable character traits - the subsumption and determination of the practices and thoughts of the constable by that system.

The values and norms of the police force, allowed to develop and crystalise more strongly, after the 1856 Act, were a historical and material product of the influences exercised upon the police. It is there norms and values which the system of discipline, based upon a military model, sought to inculcate in constables by producing a set of dispositions within them. These norms and values were then continuously reproduced and perpetuated in the future by their embeddedness in the individual and collective practices of both policemen and the police as a social system.

These norms and values were the amalgamation of the perceptions of the " New Police" themselves and the ' public ' to which they were, or, felt themselves to be accountable - Watch Committees or magistrates. They were the product of the changed sensibility and definition of crime and social order which occurred in the early years of the nineteenth century. It was a redefinition of social order which entailed the utilisation of the police in a number of areas outside a strictly criminal law context. This was the process which established the content of the norms and values the " New Police ".

The Police and the Definition of Criminality

The " New Police " were created as one element of a more general and wide-ranging apparatus that was to implement the fundamental change in sensibility in which a new perception of the lower classes and social order had been produced. This transformation in the dominant perceptual framework was tied to the increasingly obvious inadequacy of the elements of the paternalist structure of local governance in the maintenance of societal cohesion - the active creation of consent to the legitimacy of the existing social order and the property system on which it was based. This sense of inadequacy extended, during the first two decades of the nineteenth century, into the realisation that these elements of the existent local social order could not merely be adapted or adjusted to achieve the revitalisation of the system of local authority. Profound transformation in this structure of governance was necessary to ensure the social system's continued survival.

a)Making the Break with the ' Old ': The Redefinition of the Working Class under the New Poor Law 1834, and the Emergence of the " New Police " in a Central Position in its Implementation

The first practical implementation and institutional embodiment of this was the New Poor Law of 1834. This Poor Law Amendment Act changed dramatically the old system of outdoor relief which supplemented wages and whose criteria was based upon the number of children in each household that claimed relief. It abolished this system of outdoor relief , except for medical assistance, to any able-bodied person who now claimed relief. Assistance was now concentrated upon indoor relief in the form of the workhouse where those seeking assistance would have to pass the workhouse test. Parishes, the previous administrative unit for the ' old ' system of relief, were to lose their control by being grouped into poor law unions over which a Central Poor Law Board would exercise supervision.

The New Poor Law unions and boards of guardians were, in the main, composed of ratepayer's representatives of rural parish farmers.This had the effect of unifying the property order allowing a rapid implementation of the new legislation, the dismantling of the ' old ' institutions and the construction programme for workhouses - the central disciplinary institution of the ' new ' system.

" Once formed, moreover, the new boards of guardians proved to be far more proficient at economising than scattered overseers had been in the period of transition from old to new systems. In virtually every area of administration - the hiring of union personnel, the auditing of accounts, the operation of workhouses, and the examination of pauper rolls - relief of the ratepayer's, rather than the destitute, constituted the guiding principle upon which policy was decided and implemented. " 55

This unity also manifested itself in the delocalization of the New Poor Law administration coupled with its depersonalization. The areas covered by the New Poor Law unions exceeded any comparable community area, and, thereby became the new location for the administration and its interaction with the poor. The process of territorial expansion was tied to a centralisation of administration and reduction in the number of officials who had previously been employed under the ' old ' system. Poor relief was no longer to be a result of the regular interaction of elements of the social order under the expectation of reciprocity and accountability.

The nature of administrative interaction under the New Poor Law was collective and increasingly professional based upon relieving officers and workhouse masters whose very roles were created by the new legislation, and, hence bore no relation to existing roles which were embedded in the ' old ' social order. These new roles were predicated upon the evolution of a policy and norms of action by a

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55. W. Apfel and P. Dunkley, ' English Rural Society and the New Poor Law: Bedfordshire, 1834-47 ', *Journal of Social History* 10 (1985), 37-68 (p.49)

corporate management board. With this disappeared the limited notion of reciprocality and mutuality embedded in an appellate procedure which, while seeking to evoke both fear and gratitude, still enabled an appeal to be made against decisions of parish vestries to magistrates.

The application procedure for relief changed with the ' old ' system of facing two or three landowners, or, a group of farmers and tradesmen in the parish church being replaced with a tightly organised and regular gathering. The prospective applicant now faced a body

" sworn to economy and dedicated to workhouse discipline (if needs be), many of them unknown, drawn from areas beyond the village, and attended by clerk, relieving officer, workhouse master and the rest of the panoply of union servants. Even the physical difficulties of making an application could be fairly formidable, certainly more so than prior to 1835, since the poor in outlying parishes were miles from the towns in which board meetings were held. " 56

The New Poor Law was the first, radical break and transformation of the ' old ' system. It rejected its supporting ideas of reciprocity and accountability by asserting the primacy of property rights over customary rights and the shifting the responsibility for the pauper from the community to that individual's family. Members of society were now placed in social space in which only property ownership and capital accumulation were recognised. With this re-orientation of the foundations of social space to strictly economic practices went a concomitant redefinition of the position of the lower classes. Working-class poverty was no longer seen as a contingent occurrence which gave rise to a right, exercisable against the community, not merely to subsistence, but also to labour at a fair rate of pay and rehabilitation at public expense if the ability to work was lost. It was now viewed as the inevitable result of immorality and indecent habits.

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56. Ibid, p.57

The initial theoretical articulation of this altered perceptual schema was the Christian Political Economy of Malthus, Paley, Sumner, Copelston, Whately and Chalmers 57. Within this schema the market of labour and capital, freed from the impediments produced by the ' old ' system of poor relief, was to impose a life of trial and discipline in which the pressures of scarcity, competition and inequality created the essential conditions for intellectual, moral and spiritual development. These pressures of the market would bring forth, through the exigencies imposed on the individual, the innate economic orientation of behaviour which subsisted in each individual. The operation of this self-regulating economic sphere established the necessary entwinement of prudence, moral virtue and physical comfort. This constellation was to remain at the centre of the dominant perspective despite the increasing transformation of its foundation from religion to science during the later nineteenth century. The internal transformations of the dominant perspective during the nineteenth century, therefore, did not produce or evolve a definition of the relation between the individual and the state outside this moral ideology. The distinction between ' deserving ' and ' undeserving ' poor remained the constant concern and overrode all considerations of individualism and collectivism.

The implementation of this distinction was to be produced by the creation of:

" a local bureaucracy answerable to the Commissioners at Somerset House. The Poor Law Amendment Act[1834]legislated a new pool of union officers into existence, whose responsibility it was to see that the principles of less eligibility for relief became local realities. Ultimately, the efficacy of the New Poor Law rested on their ability and inclination to enforce its principles. " 58

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57. See Boyd Hilton, *The Age of Atonement: The Influence of Evangelism on Social and Economic Thought 1785-1865* (Oxford:Clarendon Press, 1991); A.M.C. Waterman, ' The Ideological Alliance of Political Economy and Christian Theology 1789-1833 ', *Journal of Ecclesiastical History* XXXIV, (1983), 231-44; P. Mandler, ' The Making of the New Poor Law *Redivivus* ', *Past and Present* 117,(1987), 131-157

58. P. Harling, ' The Power of Persuasion:Central Authority, Local Bureacracy and the New Poor Law ', *English Historical Review* 107,(1992), 30-53(p.31)

The central positions in the effective implementation of the system in the localities were the workhouse master and relieving officer. In many of the Poor Law Unions there was a preference for the employment of total strangers with military, police, or prison experience who would operate in these ' managerial ' roles with efficiency and be unaffected by any relationships of patronage that might remain. They were to ensure the regularity of relief practice and reduce the Poor Rate.

The effectiveness of ex-Metropolitan Police constables employed as relieving officers in some Unions which led some in the modified structure of governance to recommend the expansion of their use and the potential for the integration of the " New Police " and the Poor Law Unions. As The Chairman of the Towcester Union pointed out, the position enabled relieving officers

" to make themselves personally acquainted with the wants, habits, companions and pursuits of each applicant, by this means to obtain personal knowledge of every vicious character and thus afford every facility to detect every crime committed in the union...Under proper regulations, I conceive their might be an efficient body of Police throughout the country, without expense to Government " [59]

However, this potential institutionalisation within the Poor Law Unions of discipline, surveillance and law enforcement went unrealised. The attempts to a establish a national system of policing on this foundation ended in failure[60] along with the many other local ' experiments ' in policing between 1830 and 1856. The confirmation of the exact position of the " New Police " in the transformed system of local governance came with the County and Borough Police Act of 1856. It was to be as the instrument of the Watch Committees and magistrates - the local authority in the

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59. J.T. Pinkard to London Police Commissioner, 1 June 1835, *Public Records Office File MH 12/8879* quotation from A. Brundage, ' The English Poor Law of 1834 and the Cohesion of Agricultural Society ', *Agricultural History* XLVIII (1974), 405-417 (p.414)

60. See, for a detailed analysis of these developments R. D. Storch, ' Policing Southern England before the Police: Opinion and Practice, 1830-1856 ', pp.252-3 in D. Hay and F. Snyder ed. *Policing and Prosecution in Britain 1750-1850* (Oxford: Oxford University Press, 1989)

boroughs and counties - and with this went the firm definition of their role in the New Poor Law.

The New Poor Law acted as the final element in the growth of a ' free market ' in labour, but its creation also marked the end of the ability to stabilise the lower class within the unit of the parish through the social practice of paternalism. The freedom of the lower classes to sell their labour also entailed the freedom of movement outside the local community. It was a freedom which was also seen to have the potential to initiate and cycle of indiscipline and degeneracy.

" [It] began with rural labourers breaking contracts, deserting their families and becoming tramps or migrants to a life of precarious urban employment. When this failed them they took to begging and petty crime and, if challenged, took advantage of the vagrancy laws to have themselves repatriated to their parish of settlement at rate-payer expense, only to begin the cycle once again when opportunity offered. This disturbing pattern of behaviour was being perceived by the 1820s as a full-blown crisis of labour discipline, with implications for the ordering of society. " 61

The " New Police " were to be employed in the supervision of those members of the working-classes who were mobile and unsettled. They were to classify these individuals in accordance with the binary moral schema of ' deserving ' and ' undeserving '. This was to be done through their control of the ' way-ticket system ' in which the destitute person who lacked a place of permanent residence or settlement were issued, every time they entered a county, with a pass which detailed the place were they intended to obtain work and the system of casual wards that existed along their route. This occurred at different times with the police being utilised in this role only in the late 1860s and 1870s in Birmingham 62 whereas this role had been allotted

61. M.J.D. Roberts, ' Public and Private in Early Nineteenth Century London: The Vagrancy Act of 1822 and its Enforcement ' *The Journal of Social History* 13, (1988), 273-94 (pp.281-2)
62. See B. Weinberger, ' The Police and Public in Mid-Nineteenth-Century Warwickshire,' in V. Bailey ed. *Policing and Punishment in Nineteeth Century Britain* (London: Croom and Helm, 1981)

and adopted by the Essex County Police in the 1840s 63. By 1880, 37 counties were employing the " New Police " in this role with these members of the working-classes required to apply at the police station for a casual ward admission ticket. In practice, this meant that in every town or village the casual ward was constructed next to the police station so that when they entered they were directed by patrolling constables to the police station where the station sergeant determined whether they were ' respectable ' or ' criminal ', and this classification sent them either to the casual ward or led to their retention at the police station for further inquiries.

This practice of examination, identification and distinction generated a continuous reinforcement of the ' threat ' that the vagrant posed to the ' community '. The durability of this classification within the organisational practices and perceptions of the " New Police " was evident from the characterisation of these members of the working class by the Chief Constable of Chester in his evidence to the Eighteenth Annual Report of the Poor Law Board:

" estimated roughly, I am decidedly of the opinion that 75% of them ***never*** work, but spend their time tramping from union to union " 64

These views of the Chief Constables determined and reflected the attitudes and policy of the force itself in regard to the practices of intervention, control and surveillance of the casual working class.

The location of the police in this role was determined by the system of local governance. They were the administrative agency responsible for the implementation of the norms generated within local county and boroughs politics. The content of these norms were fixed by a ' public ' founded on the rateable value of the

63. See L. Radcinowicz and R. Hood, *A History of the English Criminal Law* Vol. 4 (London: Stevens, 1968)
64. *Eighteenth Annual Report of the Poor Law Board* Parl. Papers **1866** Vol. XXXV p. 7. Quotation from Carolyn Steedman, *Policing the Victorian Community: The Formation of the English Provincial Police, 1856-1880* (London: Routledge, 1984), p.58

individual's property. Payment of rates determined both the composition of this ' public ' and the nature of the relationship between them and the system of local governance. It rested on a quasi-contractual foundation in which the rate-paying ' public ' paid for the provision of services which would confer a benefit upon them as part of this 'community '.

The construction of this ' community ' was predicated upon the exclusion of non-rate-payers from the public sphere of local politics. Those placed on the outside of this ' community ' were rejected as outgroups and attributed with negative characteristics in opposition to the ingroup of the ' community ' which was unquestioningly accepted and imbued with positive characteristics. It was a perceptual schema which imposed hierarchical ordering on reality - a division it into ingroups and outgroups - where group interaction within the societal whole was one in which ingroups are dominant and outgroups are subordinate and this is viewed as inherently correct, just and necessary. The dominance of the ingroup is a position which is constantly under threat from these outgroups who always seek to challenge and overcome its continued authority and control. The continued reproduction of the dominant position of the ingroup depends upon the maintenance of the outgroups in a subordinate position, and, since the threat is located in an active group, readily identifiable in reality, then this ' evil ' has to be

" attacked, stamped out, or segregated wherever it is found, lest it contaminate the good." 65

The threat to the ' community ' is also the perpetual capacity for culture and society to fall back into nature and the chaos of improvidence, irresponsibility and immorality 66. Culture must be wrested from Nature and it is in this process that the

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65. T.W. Adorno et. al., *The Authoritarian Personality (Abriged Edition)* (London: W.W. Norton and Co., 1982), p.6

66. See on this, for the early Victorian Period, B. Hilton, The Age of Atonement: The Influence of Evangelism on Social and Economic Thought 1785-1865 (Oxford: Clarendon Press, 1991) and its continuance, despite now being founded on the premises of ' science ' E.P. Hennock, ' Poverty and

respectable community is distinguished. The property order was culture without nature and those outside were nature unbounded by culture in whom rested these impulses antagonistic to society[67]. Everything from personal hygiene and appearance to traditional recreation practices was the subject of this determination to distinguish nature from culture. The " New Police " were to be utilised by the local structure of governance to ensure this protection and segregation. Chief Constables clearly and publicly concentrated the parameters of police policy in accordance with the sensibilities of those to whom they were most directly accountable.

b)Enacting the Defintion of the Respectable: The " New Police ", Public Order and the Constitution of an Institutionally Produced Social Outlook

This split between Nature and Culture entailed a necessary re-ordering of perceptions of social space, daily life and ' public ' and ' private '. For, it was based upon a radical break with a notion of community predicated upon a sphere of commonality in which an

" equilibrium of tolerance, mutual support and interests...had maintained the illegalities of different social strata side by side. " [68]

The rejection of this formed the basis for the manifestation of the distinction and separation of classes. With it went a concomitant move away from the communal and the customary to the legal.

" Standards, once the concern of ' the community ' to define and defend on a basis of informal consensus, are now selectively appropriated by public authorities on

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Social Theory in England: The Experience of the 1880s ', *Social History* 1, (1976), 67-92; and a differing conception of the role of the state R. Vorspan, ' Vagrancy and the New Poor Law in Late Victorian and Edwardian England ', *English Historical Review* 92 (1977), 59-81

67. On this see J-P. Sartre's *Critique of Dialectical Reason* Vol. 1 trans. A. Sheridan-Smith (London:Verso, 1985), pp.735-780

68. Michel Foucault, *Discipline and Punish: The Birth of the Prison* trans. A. Sheriden (London: Penguin, 1987), p.273

grounds of public security and good order, and compliance is to be enforced..by official agents of the state...And, second, there is the attempt, made necessary in some degree by this extension of state regulation, to redefine or, perhaps, sharpen the distinction between the ' public ' and ' private ' spheres of activity - to identify the boundaries of ' public ' space. " 69

It was to be the " New Police " whose activities would form the protective barrier around the new ' community ' of the Victorian property order and its conception of social space .

The implementation by the " New Police " of these norms of the new ' community ' had as its central, foundational element the Vagrancy Act 1824 s.4. It allowed the police to stop (with the ***possibility*** of arrest and charge) anyone displaying a criminal intent. Therefore, the person stopped did not have to be in the process of actually committing an offence. There only had to be an intent to commit an arrestable offence. Subsequent legal clarification demanded two acts to substantiate a definition of intent but there was no necessity for these two acts to be separated in time nor to be of differing types. As a result,

" Simple loitering in the street was in itself sufficient to demonstrate to a magistrates' court that ***intent*** was present. Intention rather than action was penalised under the sus clause. " 70

This gave the " New Police " a wide and unfettered ability to intervene in the social environment which they patrolled. Each encounter between the police constable and any individual in the social environment always took place within an asymmetrical structure of interaction based upon the police constable's ability to utilise these

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69. M. J. D. Roberts, ' Public and Private in Early Nineteenth Century London: The Vagrancy Act of 1822 and its Enforcement ', *The Journal of Social History* 13, (1988), 273-94 (p.290)
70. M. Brogden and A. Brogden, ' From Henry III to Liverpool 8: The Unity of Police Street Powers ', *The International Journal of the Sociology of Law* 12, (1984), 37-58 (p.38)

powers. The operation of the stop is predicated upon embodiment and enactment of a practical, perceptual filtering of the social environment by the police constable. It is governed by a strict socio-logic in which its use increases with the ascription of unrespectable status to the individuals encountered 71.

The purpose of this activity of the " New Police " was to enforce a particular usage and definition of public space and engage in a constant process of surveillance of working-class areas and recreational activity.

" This involved, on the one hand, the ' opening ' of the street to fully ' public ' use - the redefinition of ' communal ' space as ' socially neutral ' space. It also involved..the displacement of these communal activities which might have taken place there and, by weakening communal control over local space, it undermined communal ability to ' police ' the area according to any implicit consensual standards which might vestigially remain. Instead, policing was to become a professional responsibility, with a bias towards protection of formalised rights to use and enjoyment of fully public(or fully private)space. And those who, like children, adolescents and the casualty employed, use public space for recreation or fringe economic activity, become subject to the direct discipline of the police and the magistrate's court. Those activities which public authorities, rate-payers, commercial interests and moral guardians agreed to tolerate and encourage were gradually transferred from public space to specialised and more controllable venues - covered markets, theatres, swimming baths and the like. " 72

The maintenance of this definition of community, public space and social order by the " New Police " led to their control over the streets and neighbourhoods of urban and industrial areas and the villages and towns in the counties. They were to endeavour to maintain certain standards of behaviour in these ' socially neutral ', '

71. See, for more detail on this, M.Brogden and A. Brogden, Ibid, pp.41-2
72. M. J. D. Roberts, ' Public and Private in Early Nineteenth Century London: The Vagrancy Act of 1822 and its Enforcement ', *Journal of Social History* 13, (1988), 273-94 (p.293)

public ' spaces by the use of street powers which were strengthened, amplified and extended by the legislation of the1860s-1870s dealing with public houses, (Wine and Beer House Act 1869 and the Licensing Act 1872), and habitual criminals and vagrants (Habitual Criminals Act 1869 and the Prevention of Crimes Acts 1871). Legislation of the late 1860s and early 1870s extended and broadened the parameters of police supervision, regulation and control, placing the police in a visibly central role in the enforcement of law. These increased parameters and possibilities for intervention and regulation strengthening both the powers of the individual constable and the potential homogeneity of outlook of the police force. For, it was through the daily application of the categories of the legislation - vagrant, habitual criminal etc. - that the central tenets or ' nuclear ideas '- within the perceptual framework of the members of the police force were continually reinforced.

This crystalised into a structure of perception with these ' nuclear ideas ' sucking in other, additional opinions and views leading to the formation of a broader ideological system. The system as a whole provided the rationale for the particular ideas within it, and, turned towards the social environment, was the way in which the police force gained knowledge of that environment. It was this system which determined police action through the application of the norms and values within it to the social environment. This system was not closed for it had the ability to adapt through the perception of the effectiveness of policies of enforcement. In this sense the system was open, cognitive and capable of learning through the transformation which took place at the level of the type of intervention or regulation to be adopted. However, the foundational system of norms and values which justify that intervention were very resistant to fundamental change. This complementary resistance and flexibility of the ideological structure was the condition for the development of a relatively autonomous ideological system capable of self-initiated action upon the social environment.

The concentration of law enforcement in the hands of the " New Police " and the increasing loosening of the controls over this process by the structure of local governance placed the " New Police " in a position in which their clear demarcated role as the administrative agency responsible for the implementation of the norms adumbrated by local politics became blurred. With this developed the possibility to utilise these norms of policy and legislation instrumentally in accordance with dictates of their own assessment and definition of the goal of law enforcement.

The Police as Prosecutors

The specific recognition of their participation in the legal system - as the principal body responsible for prosecutions - had already occurred by the time the Select Committee Report on the Public Prosecutor in 1856. By the 1870s, this role had ceased to be a perceived as a problematic one with the collapse of the final attempts to institute a system of public prosecution in which the " New Police " would have been excluded from the actual conduct of prosecutions [73]. This left the " New Police " to operate in a system of prosecution which had maintained its private form. The maintenance of this form together with the fact that the initial emergence of the " New Police " had taken place within a structure of local governance in which they were conceived as the servants of the local property order led to the formation and articulation of the view that the policeman had no more powers than the individual in society.

By the 1880s, it had become a firmly established perspective having transmitted itself into James Fitzjames Stephen's *A History of the Criminal Law of England.* The police were categorised as public officers acting in their capacity as private persons since the system of prosecution is one which is left entirely to private decisions made by individuals. Therefore, the

73. This is dealt with in the following chapter on the system of prosecution.

" police in their different grades are no doubt officers appointed by law for purpose of arresting criminals; but they possess for this purpose no powers which are not also possessed by private persons...in a word, with some few exceptions, he may be described as a private person paid to perform as a matter of duty acts which, if so minded, he might have done voluntarily. " 74

The characterisation of the police as private individuals brought with it the concomitant denial, or, occlusion of the collective social power of the police reproduced both within the police force itself, and, in the daily encounters between the police constable(s) and citizens. Not only was society merely slightly modified by these police constables, but the powers they themselves possessed represented only exceptions to their general identity with the position and interaction between individual citizens outside the institutions of the state in the malleable space of civil society.

The private prosecutorial form reinforced this perception since it rested on the functional differentiation between trial and police practice. This defined the police role as one entailing the collection of evidence and gathering together of witnesses with the trial being presented as the sole site where guilt or innocence is determined through the presentation of evidence by prosecution and defendant. The mediation and interaction between these two functionally distinct elements of the legal system came through the rules of criminal evidence, and, the ability of police practice, which elicited information, to be transposed into categories of criminal evidence. These was, as a result, little scrutiny or perception of the need to inquire into the conduct of the police in the gathering of evidence for the presentation of a case.

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74. Sir James Fitzjames Stephen, *A History of the Criminal Law of England* Vol. 1 (London: Macmillan, 1883), p.497. Stephen presented this development as one which had gone almost unnoticed with the gradual change in the position of the magistracy who had become ' preliminary judeges, and the duties which they originally discharged devolved upon the police, who had never been trusted with any special powers for the purpose of discharging them. It was thus by a series of omissions on the part of the legislature to establish new officers for the adminstration of justice as the old methods of procedure gradually changed their character, that English criminal trials gradually lost their lost their origins as public inquiries, and came to be conducted in almost the same manner as private litigations '.

This ignored the fact that what was being created was the definition and transposition of police practice into legal evidence through the active creation by both parties of its parameters and boundaries. It was in this context that the issue of ' confessions ' and to a lesser extent ' identity parades ' and ' identification evidence ' generally emerged. For, they were practices which were increasingly utilised to obtain evidence by the police of these offences. Their judicial acceptability as forms of practice which generated evidence was the acceptance of these practices as modes of conviction. For, the very production of these types of evidence came from police control over the system of prosecution.

Police control over the system of prosecution meant that in this societal institution were concentrated the dynamics and nature of law enforcement. The conceptual split between the trial and police was incapable of acknowledging that with this concentration of the task of law enforcement went the question of the logic of this practice of enforcement, namely, the social conditions of production of the assembly of evidence and determination of its content by the " New Police ".

Thus it ignored the antagonism which subsisted at the root of police practice of law enforcement. Law enforcement differed from the observance of law in that it was not in itself normative action since it sought the maintenance of law/reintroduction of legality. The efficiency and effectiveness of this practice was based on the extent to which it succeeded in the universalisation of the observance of law. This, in turn, meant that efficiency was rationalised in terms of the achievement of concrete results not in terms of the implementation of given rules or the compliance with established routines. The premises of police action were transformed from rules into resources, that is, they became dependent upon the criteria of instrumental suitability to the fulfilment of this concrete task of law enforcement. Therefore,

" the primary criterion for judging actions and decisions internal to the administration; the inputs which are sought after and used depend upon these projected administrative outcomes. Efficiency is no longer defined as the ' following of rules ', but as the ' causing of effects '. " 75

The operation of the practice of law enforcement in accordance with this goal-rational mode of action created a permanent antagonism between attaining the conviction of the accused individual and the treatment of the individual accused. Since the goal was law enforcement then the attribution of the criteria of efficiency was dependent upon the attainment of the conviction of the individual accused. The efficient implementation of this task entailed a concomitant belief in the guilt of the ' suspect ' and the concentration in the conduct of the investigation upon assembling enough material to ensure the proof of ***that*** ' suspects ' guilt. Investigative strategies were geared to the construction of the strongest case possible against the ' suspect '. The subordination of the investigative strategies of the " New Police " to this goal of law enforcement entailed the necessary denial of the importance or credibility of any evidence which might place doubt upon the guilt of the ' suspect '.

This structural problem produced by the concentration of law enforcement in the hands of the police could not be conceived within the descriptive classification of the dominant perspective centring upon the division of the criminal process into the stages of pre-trial and trial in which the latter was the only one of conceptual importance. The degree to which this had become embedded and unquestioned is reflected in the perception in the1908 Royal Commission on the Duties of the Metropolitan Police that when the accused entered the police station

" the curtain, so to speak, drops behind him, and no one knows what takes place within the station except the Police and the accused person. It is only the

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75. Claus Offe, *Disorganised Capitalism: Contemporary Transformations of Work and Politics* ed. J. Keane (Oxford:Polity Press, 1985), p.305

following day, when the accused comes before the Magistrate that the curtain lifts and day light is let in. That is the system. " 76

The Royal Commission on the Metropolitan Police1908: The Definition of Police Practice in Relation of Charging the Suspect as a Purely Executive Function

The Royal Commission's activities[77] were focused upon the was in which the police dealt with ' street offences ', namely, those offences which were defined exclusively by the police themselves and were prosecuted summarily by magistrates. This represented the first, major investigation into this area of the criminal law and police practice, and, the Commission drew their terms of reference widely, establishing their focus as a question of

" whether the operation commencing with arrest and leading up to prosecution in the police court are or are not properly performed by members of the Force, which

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76. *Royal Commission on the Duties of the Metropolitan Police*, Vol. 1, Parl. Papers **1908** (Cd.4165), Vol. L, p.84.

77. The Royal Commission set out its terms of reference in section 6 (p.3) of the Preface to the Report:" It appeared to us that our inquiry resolved itself into two general questions:-
1. What are the duties to the police in dealing with cases coming within the three classes of offence[drunkenness, disorder and solicitation] just referred to?and
2. In what manner are those duties discharged by the police?
The interpretation of the first question presented no difficulty, but that of the second was not so easy. Construed in the most restrictive sense it might be said to involve simply an inquiry into the method according to which the police discharge their duties. Construed in a more extensive sense it might be deemed to involve an inquiry into the manner in which those duties are discharged - well or ill, properly or improperly, and efficiently or inefficiently.

That the latter was the construction placed on the Terms of Reference by Your Majesty's Principal Secretary of State for the Home Department seemed certain, since he had laid before us for our consideration papers in relation to the cases in which misconduct was alleged against divers police constables and as to which he himself had caused inquiry to be made.

We, therefore, came to the conclusion that it was our duty not simply to make an inquiry into the form and method according to which the police discharge their duties but to make an inquiry of a broader kind raising the question whether the officers and constables of the Metropolitan Police Force discharge their duties honestly and efficiently and in such a manner as to deserve the public confidence."

forms the principle topic of our Inquiry, [and, therefore] it becomes necessary ***to consider what the duty of the police in regard to each stage of the process is.*** " 78

This meant that police practice, when the defendant was taken to be charged at the police station, was to be an integral part of the Commission's investigation. It was in the charge room that the decision to prosecute the individual, arrested by the constable on patrol, was taken. The Commission's approach, and the conclusions that they drew form their investigation of this stage fo the process explicitly rearticulated the externality and lack of importance of these procedures to the determination of guilt or innocence at the trial: including the propriety and competency with which they were carried out.

a)The Charge Room: The Committees' Construction and Definition of Police Practice

The individual arrested by the constable would be taken back to the police station where he/she would then be taken to the charge room. Here the arresting constable(s) would state to the station Sergeant or Inspector the offence on which a prosecution should be brought against the individual whom he had arrested. The duty Inspector, or, station Sergeant would then decide whether the individual should be charged with the alleged offence, and, whether he/she should be detained further at the police station after having been charged.

The evidence of the London magistrates about this stage of the process, which was received by the Commission as providing the parameters of perception of police practice, characterised this function carried out by the Inspector/station Sergeant as an executive function and not as a judicial one.

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78. *Royal Commission on the Duties of the Metropolitan Police*, Vol.1, Parl. Papers **1908** (Cd.4165), Vol. L, p.45. My emphasis.

" His duty is partly for his own protection before accepting a charge that there is a prima facie case that the prisoner has committed some offence punishable by law, and it is no part of his duty to try the question whether the allegations of the arresting officer are true or not. " [79]

The Inspector/station Sergeant followed the Regulations set out in the ' Instruction Book for the Government and Guidance of the Metropolitan Police Force '[80] when exercising this function of taking or refusing charges, and the magistrates were all of the view that the content of these Regulations were satisfactory and that the practice of Inspectors/station Sergeants was proper. There was, therefore, no need for any reform,or, alteration of these Regulations.

The definition of this practice of taking or refusing the charge as executive was linked to the maintenance of the dominant perceptual schema in which the trial was the sole site of guilt determination. For, if this practice was characterised as judicial it would mean that there was site of guilt determination which existed outside the trial, and, hence that the trial could not be presented in a pre-eminent position and that police practice would be seen to have a direct effect upon the determination of the guilt or innocence of the defendant at the subsequent trial. This, in turn, would demand some form of external supervision of scrutiny of police practice in order to ensure it background institutional legitimacy. The exercise of this function cannot, therefore, be anything other than a simply formal procedure whose criteria are set out in the Regulations

Once this practice is characterised as executive then the conditions which ensure the propriety of its exercise have to be sought within the institutional practices and structure of the police themselves. The Commission view that the police as a social institution in which there is free, occupational mobility with those of humble

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79. *Royal Commission on the Duties of the Metropolitan Police*, Vol. 1, Parl. Papers **1908** (Cd.4156), vol. L, p.83.

80. The structure and content of this Instruction Book are set out in the Royal Commission Report.

rank capable of rising to the highest rank. There are, on this view, very few temptations to deviate from the Regulations because, if they are adhered to, then the constable stands the chance of promotion. With this construction of the institutional occupation structure then those who do not obey the Regulations are seen to be exceptions. This then allows those who do not obey the Regulations to be presented as deviant individuals whose ' radical defects of character ', or, ' lack of intelligence ' are the origin of this deviancy.[81] The occurrence of deviancy is, therefore, incapable of refuting the institutional legitimacy of the police because it is the product of isolated, individual acts and not a particular instance of the institution's general mode or logic of operation. This, then, finds its conclusion in the statement that the spirit and letter of police instructions were out properly and that instances of misconduct were " extremely rare " [82]

b)The Defendant in the Charge Room: The Commission confirms the Defendant as an Object of Prosecution

When the individual who had been arrested was brought to the police station he/she was taken to the charge room where the constable told the station Sergeant/duty Inspector of the events which led to the arrest, and, the constables' opinion that the individual should be prosecuted. If the individual arrested made a statement during the process of charging this was supposed, under Regulation 198,

" to be accurately written down at the time by the officer on duty and reported to the magistrate who hears the case. " [83]

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81. See under heading ' Checks on Police Action ', *Royal Commission on the Duties of the Metropolitan Police*, Vol. 1, Parl. Papers **1908** (Cd.4156) Vol. L, p.113
82. Ibid, p.115
83. Regulation 198, in the ' *Instruction Book for the Government and Guidance of the Metropolitan Police Force* ' 1900, quotation from the *Royal Commission on the Duties of the Metropolitan Police*, Vol.1, Parl. Papers **1908** (Cd.4156), Vol. L, p.116

This was supposed to be the practice which the police followed in relation to statements made by the defendant. However, the Commission found that in reality statements were only recorded where the individual was charged with an indictable offence. Where the individual was to be dealt with summarily no statement that the individual made on her/his own, or, in response to the reading of the charge over to the individual was recorded by the Inspector or other officer.[84]

The Commission were, therefore, directly presented with evidence of both the consistent, institutional disregard for the Regulations which were supposed to govern and reflect the practice of the police and the police carrying out a practice which contradicted the characterisation of this stage of the process as being incapable of affecting the subsequent trial. The individual charged, was being treated, by the police, as a mere object of prosecution. The supposedly consistent and universal application of Regulation 198, was in fact subordinated to the type of offence with which the individual was charged. It rested in the exclusive discretion of the duty Inspector/station Sergeant who was carrying out the decision as to whether the individual should be charged, and, with what offence(s).

The Commission's response was to reaffirm the dominant, trial centred perspective upon the criminal process. They desired that:

" the magistrates shall be afforded evidence of what was said by the prisoner in the charge room which is as complete ***as possible***. We are not concerned...whether adherence to the Regulation [198] in question would tell in favour of the person charging or of the person charged, and are thinking only in the ***interests of justice***. "
[85]

84. *Royal Commission on the Duties of the Metropolitan Police*, Vol. 1, Parl. Papers **1908** (Cd.4156), Vol. L, p.116
85. Ibid, p.117. Emphasis added.

With this approach, the trial remained the sole site of guilt determination, whose decisions were based upon the evidence presented. Since this institution and its practices were seen to operate according to rules of evidence which were distinct and detached from both the prosecution and the defence it equated the proceedings of the trial with the enactment of ' justice '. In order for this conceptualisation of the importance of the trial to remain in place the police had to be shown to be incapable of influencing the outcome of the trial process. This the Commission did by viewing the Regulation which governed this practice as a formal rule to which police practice simply had to adhere in order to ensure that the proceedings in the charge room were without both an asymmetrical relation between the police and the individual accused, and, that the statements made by the accused were recorded.

However, this was based on the presumption that the Police Regulations were rules of a quasi-juridical type which were more or less consciously mastered by the police , and, therefore, that the Regulations represented the objective structure and regularities of police practice. This, in turn, rested on the further presumption that the police practice of law enforcement obeyed the same logic as the observation of legal norms by the public at large. The Commission presumed that the social world of the police operated according to the Regulations and that police practice could be explained by stating the explicit Regulation in accordance with which it was allegedly produced. The codification of police practice by means of the Regulations which, by formalisation, gave it a logical coherence and an explicit normativity was conflated by the Commission with the discipline and normalisation of police practice. The symbolic order of the Regulations became, in the view of the Commission, the reality of police practice. The Commission failed to comprehend that a rule is ***not*** effective by itself as it depends upon an interest in obedience and this interest for the police was supplied by the institutional definition of their practical goals in which the substantive criminal law and the Regulations simply a means to an end. It, thereby, ignored the goal-rational nature of police practice which placed the substantive criminal law and

the Police Regulations in a necessarily subordinate and contingent position as potential resources for the achievement of institutional goals.

By constructing this as a simple matter of conformity to rules the Commission presumed that this in itself was sufficient to produce ' justice ' at the trial. It did not consider how this conformity was to be produced, but merely assumed that it would take place with the articulation of its necessity in the Royal Commission Report. Furthermore, within their view, there was already an indication that a certain variability in this rule conformity was acceptable in that the statements made by the defendant should be provided to the magistrate in as full a form ***as possible***. With this, a space was already created for the operation of the purely systemic considerations of the police. No new, external form of control over police practice was necessary as it had already been defined as an executive function at this stage, and, the background legitimacy of the police of which the Regulations were its public presentational form provided the means for the Commission to assert the capacity for the self-regulation of police practice.

The Commissions' assumption of the self-regulation of the police was tied to the projection of police practice form arrest to prosecution as an essentially disinterested process. Yet, the success of a prosecution depended upon the police building a case against the individual accused. Therefore, not only were the relations between the police and the individual accused essentially antagonistic, but were asymmetrical in that an individual accused confronted an institution whose goal was the enforcement of law through arrest and prosecution. The goal for the police was a successful trial in which the accused was found guilty, or, pleaded guilty her/himself. From the outset the individual accused was an object of prosecution to be processed by the police and sent for a trial in which the police had an overwhelming interest in the conviction of the defendant. In this situation, the substantive criminal law and Police Regulations were treated only as part of an environment in which police

interventions in society follow their own institutionally defined conditions of effectiveness.

Conclusion

The relative autonomy of the " New Police " from the structure of local governance, developed during the later nineteenth century, became the condition for its emergence as the major, collective agent of social control, and, with this, ascendancy within the legal system. By the end of the nineteenth century this process had led to the evolution of the " New Police " into a central social institution straddling both the social order and the legal system. Alongside this, came a concomitant development of the judicial view of the police as an unexceptional, legitimate and natural element in the criminal process. The dominance of this projection of the criminal process meant that there was felt to be little need for consistent or demanding external scrutiny of the construction of the case against the accused through the practices of the collection of evidence, witnesses and charging of the suspect.

CHAPTER TWO

THE DEVELOPMENT OF THE SYSTEM OF CRIMINAL PROSECUTION: THE DECLINE OF PRIVATE PROSECUTION TO A MERE FORM

This chapter charts the attempts made in the nineteenth century to establish a system of public prosecution, controlled by public prosecutors, to replace that of the system to private prosecutions. The initial failure or these attempts, in the earlier part of the century, left the system of private prosecution to develop and change according to a very different dynamic. By the time of the establishment of the Office of Director of Public Prosecutions, under the Prosecution of Offences Act 1879, these changes had become accepted as both legitimate and not in need of a type of reform based upon a replacement with a scheme of public prosecution.

The first section outlines the dynamics of the system of private prosecution which entered the nineteenth century. The second section deals with the The Criminal Law Commissioner's reconceptualisation of the criminal process through their interpretative relation to the Common Law ' tradition ' of the existent system. It seeks to show the divergence between the Commission's activities and Bentham's project of legal transformation conceived as a severing of the realms theory and practice in Bentham's project. Despite this divergence, the section seeks to show the importance of the Commission's activities for the articulation of the dominant perceptual schema from within which all subsequent attempts at the reform of the system of private prosecution would be articulated. With the failure of the Commission's Reports to find legislative expression the third section describes the evolution of the criminal process according to the internal dynamics generated by the changes in the reach of the criminal law, the development of the " New police " and other agents of prosecution. These developments, which led to an increasing police dominance in the prosecution of offences became the subject of concern in the 1850s with the Select

Committee on the Public Prosecutor and Phillimore's Bill seeking to redefine the police role and institute a system of public prosecution. This is dealt with in the fourth section which outlines these attempts to reconfigure the criminal process. The fifth section describes the growing legitimacy of the police in their role as prosecutors between the 1850s and 1870s with the failure of the attempts in the 1850s to establish a system of public prosecution. The section seeks to show that this growing legitimacy prevented the implementation of the subsequent attempts in the early 1870s to establish a system of public prosecution. The sixth section deals with the Prosecution of Offences Act 1879 which established the Office of the Director of Public Prosecutions. It views this Act and the role it created as essentially a legislative expression and recognition of results of the development of the criminal process by this period, particularly the position of the police. The final section deals with the minor modifications to the position and parameters of operation of the Director of Public Prosecutions in 1884 and 1908 as the system of prosecution entered the twentieth century.

The Private Nature of Prosecution

The system of prosecution that entered the nineteenth century, and formed the material on which all attempts at reform were formulated was one in which prosecutions were conducted privately. The action of the criminal process was dependent upon the activities of magistrates and private prosecutors for placing suspected offenders in the courts and obtaining their conviction for those offences at trial. The pivotal role in the system was that of the magistracy who represented a functional differentiation from the generality of the rural ruling class. This differentiation, however, marked only a formal independence from the existing social order. The role remained tied to the social class from which it evolved and the role itself was guided by the discretionary and highly personalised politics of the paternalism of the late eighteenth and early nineteenth centuries.

The activism of individual magistrates determined the parameters of their role. This produced a situation in which the criminal process existed upon a very small number of extremely active magistrates to whom the majority of pre-trial and trial elements were attributable. The activities of the magistrates were part of a criminal process which was composed of spheres of overlapping discretion. Therefore, to be effective, the activism of magistrates had to coincide with a decision or practice of activism on the part of parish constables or watchmen. Since the magistracy lacked the power of compulsion over either of these groups this could only be done by persuasion with all the contingency of agreement that implied as it usually only applied to single offences rather than to broader policies. Hence the activism of the magistracy could be amplified to confined depending upon the uncertain co-operation of the parish constables or watchmen.

The pattern of magisterial practice was one of singular, individual incursions into a criminal process whose certainty of operation depended upon the decisions of other elements within it. Nevertheless, due to the concentration of power in the role of the magistrate a decision to intervene remained extremely effective however limited the territorial extent and range of that activism. The ability to pursue investigations; collect evidence; persuade constables, watchmen and victims of crime into action; issue warrants; question suspects and gather information from surrounding areas by corresponding with other magistrates and goalers in other counties provided the preconditions for the success of this activism.

The development of these practices could do little when confronted by the fact that prosecution was vested entirely in the discretion of private individuals. Magistrates were functionally incapable of conducting all prosecutions themselves, and watchmen and parish constables only ' fed-in ' cases to be tried when financial considerations of the case determined that the rate of remuneration would be satisfactory. As a result,

" not only assaults, but virtually all thefts and even some murders were left to the general public. That meant that responsibility for the initial expense and entire conduct of the prosecution was thrown on the victim or his or her family. In the eighteenth century even sedition cases were often left to local magistrates or private citizens....And there was no assurance at all that the vast majority of offences would be prosecuted competently to conclusion. " 86

The criminal process lacked a universal and complete range of coverage over the social order which it presumed to regulate and control. Because of its highly personalised and discretionary composition the operation of the criminal process from investigation to conviction appeared as an obvious and overtly particularistic mode of practice. The social construction and determination of a case was visibly inscribed and enacted in the criminal process as an integral part of its very operation. This flowed from the vesting of the system's discretion in roles which were still tangibly linked to the social class positions form which the occupants had come.

The evolution of this system was reinforced by the structure of criminal offences and the form of intervention by Parliament, through legislation, in the criminal process in both substantive and procedural law. Summary jurisdiction at Petty and Special Sessions had a very limited sphere of operation at the beginning of the nineteenth century being jurisdictionally competent to deal with only a few offences. The majority of offences were defined as only capable of being tried on indictment and were dealt with by Courts of Quarter Sessions or Courts of Assize. Theft, the most commonly charged offence was rarely given a jurisdictional definition which allowed it to be tried other than at Quarter Sessions or Assize.

Both Courts of Quarter Sessions and Assize were located in the county town which presented the potential prosecutor with the additional cost of travel to the

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86. D. Hay and F. Snyder, ' Using the Criminal Law, 1750-1850: Policing. Private Prosecution and the State ', in D. Hay and F. Snyder ed. *Policing and Prosecution in Britain 1750-1850* (Oxford: Oxford University Press, 1989), p. 24

actual trial and subsequently for sentencing. This had to be added to the initial cost of ' getting up ' the case which entailed gathering witnesses and any other necessary evidence, copying and filling documents with the court charged according to a scale of court fees, putting the case in the hands of a solicitor or even counsel, or, alternatively paying a parish constable to undertake the case with the consequent cost of making up the discrepancy between the costs gained from the court and the parish constable's assessment of the actual cost of his activities [87].

This structuration of the position of the potential prosecutor meant that only those with property and money were capable of contemplating prosecution. Even here the costs and other difficulties of the criminal process prompted many into a privately initiated, but collective response in the form of Prosecution Associations [88]. This modification still left the overall configuration of the criminal process intact in which the initiation of a prosecution would, in many cases, be a preparatory bargaining position in which a subsequent compounding of the prosecution was the result. Many potential prosecutors were deterred not only by the economics of instigating a prosecution but by the fear of retaliation and reprisal should they proceed with a prosecution, or, as a result of intimidation of prosecution witnesses.

The Parliamentary response to this situation was a limited one. It was only in the later decades of the eighteenth century that these matters became the subject of attention resulting in legislation which provided state finance, in the form of legal costs, to those who carried a prosecution through to conclusion [89] .

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87. See, for a more detailed description of the problems which faced potential prosecutors in the Black Country in the early nineteenth century, D. Phillips, *Crime and Authority in Victorian Britain: The Black Country 1835-1860* (London: Croom and Helm, 1977)

88. See D. Phillips, ' Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons 1760-1860 ', in D. Hay and F. Snyder ed. *Policing and Prosecution in Britain 1750-1850* (Oxford: Oxford University Press, 1989)

89. See, for a comprehensive description of this legislation, D. Hay and F. Snyder, ' Using the Criminal Law, 1750-1850: Policing, Private Prosecution and the State ', in Ibid.

This legislative intervention was unable to overcome the structural difficulties of the criminal process as the attempt at increasing the coverage of the criminal law, through the enhancement of the economic position of the prospective prosecutor, failed to have any serious effect since the amount of money provided, through legal costs which could be reclaimed, was insufficient to produce the desired effect. The system of private prosecution was, as a result, tacitly accepted as a basis of the criminal process. As the parliamentary response, during the eighteenth century remained tied to reactive, unstructured intervention this system was allowed to develop and strengthen itself thereby lodging itself firmly within the amorphous ' tradition ' of Common Law.

The Criminal Law Commissioners; The Emerging Critique of Private Prosecution from a Critical Survey of a Criminal Law Based on the Common Law.

The initiation of a ' programme ' of reform, in which the totality of the criminal process, was its object, can be precisely located in the speech given by the Lord Chancellor, Brougham, in 1828. Changes had been initiated before this, with Peel and Russell at the Home Office, but this represented the first, coherent articulation of a normatively grounded basis for a project of reform. It was Brougham who established the Royal Commissions charged with criminal law reform which continued to produce reports until the 1840s.

These Reports were seen, by subsequent historiography, to mark a profound break with the ' old order ' symbolising the transition form an arbitrary, aristocratic system to that fitted to the emerging bourgeois modernity of Victorian England [90].

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90. This is the interpretation given to them by Holdsworth in his History of English Law(London:Methuen, Sweet and Maxwell, 1965), Vol. IX, pp. 143-163. This period was also to be subsumed under the term Benthamite, by Dicey in his *Law and Public Opinion*, near the end of the nineteenth century, in contradistinction to what he saw as the growing collectivism and state intervention characteristic of the later nineteenth century (the 1880s onwards) in which he was writing.

The main impetus and theoretical foundation for this aspect of the reform movement was seen to come from the theoretical output of Jeremy Bentham whose position - the increasing insertion of legal and jurisprudential issues within a much wider political and economic framework - marked a radical break with the past. The theorisation of the interrelation of law, sovereignty and the state; coupled with a mechanistic, materialist conceptualisation of the ' springs of human action ', which Bentham put forward, represented a profoundly different articulation of the nature and dynamics of society 91.

While Bentham began with a study of punishment this quickly led him to an investigation of actual and potential legislative principles and policies. This, however, led to the tabulation of all possible forms of human social behaviour and the circumstances which are capable of constituting offences and, hence, the expansion of Bentham's project and theoretical system.

" A critique of criminal jurisprudence or a plan for a penal code would soon cease to suffice as an embodiment of Bentham's intellectual ambitions. Nothing less than a complete social science - a system of morals as well as legislation - would do. " 92

Bentham remained vehemently opposed, throughout his life, to the Common Law system which he regarded as the origin of the problems which burdened and undermined the effectiveness of the criminal process 93. The Code as a form, was to be the basis and ground for the branches of criminal and civil law as distinct from the notions of tradition and community which had played this function in the Common

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91. See Nancy L. Rosenblum, *Bentham's Theory of the Modern State* (Harvard:Harvard University Press, 1978) and Douglas G. Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to his Utilitarianism* (Toronto: University of Toronto Press, 1977) both of whom see Bentham as a self-conscious theorist of the modern state who rejected the previous tradition of political philosohy.

92. D. Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism* (Toronto: University of Toronto Press, 1977), p.100

93. See Gerald G. Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986)

Law system. The Code, among other elements, was to be the system which replaced this inherently flawed ' tradition ' whose claims to natural justice and consent he regarded as suspect both in theory and practice. It would represent a complete refashioning of the criminal law without regard for ' tradition ' or ' ancient law ' with the object of creating a general, compendious, uniform, scientific and practical body of law.

" In a map of the law executed upon a such a plan [Code] there are no terrae incognitae, no blank spaces; nothing is at least omitted, nothing unprovided for: the vast and hitherto shapeless expanse of jurisprudence is collected and condensed into a compact sphere which the eye at a moment's warning can traverse in all imaginable directions. " 94

Central to the project of Codification was the delimitation of the spheres of action of the state and the judiciary in order to allow the emergence of a private sphere freed from the interference of public authority. The state was to be the sole locus of sovereignty as the sole source of law, through legislation. The basis of this sovereignty was itself founded upon law in which state functions were to be bound to general norms. State interventions outside this normatively guaranteed framework were not conceived to be unjust, but as interfering with and hampering the rational calculation of individuals as commodity owners. The possibility of the reproduction of society rested upon the maintenance of a background of calculable and stable expectations which demanded the specification of jurisdictional areas and legal formalism as two essential elements of the state. This meant that codification was an integral part, not only of Bentham's legal theory, but also his political theory. Hence, the importance Bentham attached, by means of codification, to replacing the whole system of operation of the Common Law 95.

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94. Jeremy Bentham, *Of Laws in General* in H. L. A. Hart ed. *Collected Works of Jeremy Bentham* (London, 1970), p.236

95. See Gerald G. Postema, *Bentham and the Common Law Tradition* (Oxford:Oxford University Press, 1986).

Bentham's project, however, did not find practical embodiment in the recommendations of the Commissions. This divergence was apparent from the very inception of this ' programme ' as attested to by Bentham's rejection of Brougham's speech on legal reform in the Westminster Review 1829[96]. The Common Law was retained, but in a modified form. This separation of Bentham's project from the activities and recommendations of the Commissions, caused the bifurcation of that project into the divergent realms of theory and practice. The link between the Commissions and Bentham related solely to a shared interpretative horizon in which codification became unhinged from its integral place within Bentham's project. It was here that the split between Bentham and Benthamism emerged.

Bentham's overarching critique of the traditional criminal process was transposed, within the Parliamentary system, into a pragmatic, political practice aimed at revamping the ' traditional ' system. Benthamism, and those who sought to follow his ideas as Benthamites, was not the some as Bentham's project. The perceptual schema he had formulated was re-orientated toward reform rather than radical transformation.

This re-orientation of Bentham's project was part of a more general resistance of the dominant classes' mental structures to the full acceptance of Bentham's project. This produced a constellation, or, coexistence of Benthamite ideas and the models of behaviour inherited from the *ancien regime.* It found its most coherent theoretical expression in the entwinement of Christianity and political economy in the first half of the nineteenth century. Christianity, the dominant form of thought and identity of the collapsed *ancien regime*, sought to understand and find meaning in the changing conditions of human life - the advent of *industrial* capitalism.

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96. *The Westminster Review, xi, (1829), 448.* This is pointed out by Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford:Clarendon Press, 1991), pp.192-3

" during the first half of the nineteenth century, the British were extremely ambivalent in their attitude to the unprecedented economic growth around them...a mood of ' change and decay ' vied with exhilaration and patriotic optimism. The fact that Britain was perceived to be the only industrialising country,..the fact that ' time ' was conceived as following a cyclical course which might easily just as easily lead backward as forward: all this meant that the supreme question, not always susceptible to a clear-cut answer, was whether to applaud and encourage, or lament and stifle, this process of economic and industrial growth. " 97

The entwinement of Christianity and political economy was not the simple survival of elements of ideology that was once firmly situated in the social totality of the *ancien regime*, and now were dysfunctional and unsituated in reality. Christianity did not represent the mere remnants of a previously active ideology, but the repository of

" a preserved identity, of intangible and deeply rooted structures, the most authentic expression of collective temperaments. " 98

Therefore, the radical break with the previous political and legal thought, which Bentham's theory represented, never achieved this effect in the mental structures of those in politics, and, hence in the overall conceptualisation of society and the object of the reform ' programme '.

The Commissions did not present or see themselves as engaged in a dramatic process of creation and change in the criminal system. It was only a matter of altering what was already in existence in order to realise its potential which was hampered by the operation of the present, unreformed system. The Common Law was to be enabled to find its ' natural level ' by these adjustments and then left to evolve and

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97. Boyd Hilton, *The Age of Atonement: The Influence of Evangelism on Social and Economic Thought 1785-1885* (Oxford:Clarendon Press, 1991), pp.65-6.
98. Michel Vovelle, *Ideologies and Mentalities*, trans. Eamon O' Flaherty (Oxford: Polity Press, 1990), p.9.

develop in conformity with its ' natural tendencies '. For common lawyers it provided a system which would allow them to conceptualise the development of the criminal law in the form of rules, but the substance of the Common Law system would be retained. The criminal law was to be translated in to a system of rules which would replace the existing method of inferences, and the substantive offences had to be clearly defined so that obedience to the law would be based upon a prior public knowledge of that law. At his point, there emerged, through this definition of the Common Law in terms of rules, a change in the source of law. Law now meant commands from a single source - the state - which , through legislation, determined the nature and character of the substantive criminal law. The criminal law was now projected as more than an amorphous system which redressed wrongs. It now firmly defined and delimited system which was to act as an instrument with which to maintain and reproduce society.

However, this was the limit of the Commission's effect upon the criminal law. That they would not go further, becomes explicable form the composition of the Commissions themselves.

" The Commissioner's included one judge, Justice Wrightman, as well as, Henry Bellenden Ker, Thomas Starkie, Andrew Amos and John Austin. The last three were all academic lawyers, but only Austin, professor of jurisprudence at London University, was a disciple of Bentham. Starkie and Amos lectured on the Common Law and both were traditional common lawyers.[Austin later resigned, in disgust, at the limitations of the Commission] " 99

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99. Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford:Clarendon Press, 1990), p.202. **Andrew Amos** (1791-1860), lawyer and professor of law. Educated at Eton and Trinity College, Cambridge. Called to the Bar by the Middle Temple and joined the Midland Circuit building up a large arbitration practice. From 1826 until his appointment to the Criminal Law Commission, he became auditor of Trinity College, Cambridge; Recorder of Oxford, Nottingham and Banbury; Fellow of London Univeristy. " Amos's political and philosophical convictions were those of an advanced liberalism qualified by a profound knowledge of the constitutional development of the country and of the sole conditions under which the public improvements for which he longed and lived could alone be hopefully attempted." *Dictionary of National Biography* (Oxford:Oxford University Press, 1959-60), Vol.I, p.367. **John Austin** (1790-1859), the first appointment to the chair

It is this limitation of Bentham's project to the realm of the almost purely formal, analytical method which corresponds to the separation between theory and practice in that project, at the level of Parliamentary politics [100]. The separation between form and content in Bentham's jurisprudence, made by the Commission formed the interpretative basis for all the subsequent operations of the Commissions.

a)The Criminal Law Commissioner's Seventh Report: Establishing the Relation to the Common Law Tradition

The seventh report, although dealing with substantive criminal law - offences - is of interest as it sets out the principles with which the Commission operated and the foundations upon which the criminal law ought, in their view, to rest.

The Commission retains from Bentham only the idea of the centrality of the state, sovereignty and the subordinacy of other social institutions to the state. This retention determines the critical aspect of their operation as it is these ideas which shape their conceptualisation and interpretation of the historical development of the criminal law. The problems which this interpretation identifies are founded upon the lack of state directed intervention and the ascendancy of the judiciary which has come to supplant the state in the practice of enunciating legal principles which underlie specific law and rules [101]. This, in turn, is seen as a potential threat to the sovereignty

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of jurisprudence at London University 1828. Army service followed by work as a barrister starting at the Inner Temple in 1818. Becomes acquainted with James Mill and John Stuart Mill and forms an intellectual circle with them and others. 1826 appointed by the Council of London University to the chair of jurisprudence. Begins his first course of lectures in 1828 after two years study in Germany. 1832 publishes ' The Province of Jurisprudence Determined '. 1833 appointed to the Criminal Law Commission. Resigns in 1834. **Charles Henry Bellenden Ker** (1785-1871) barrister at Lincoln's Inn 1814, conveyancing counsel to the Courts of Chancery, later becomes Recorder of Andover. **Thomas Starkie** (1782-1849) educated at Clitheroe grammar school and St. John' College Cambridge. Lincoln's Inn BAr 1810 and the nothern circuit, K.C. at Lancaster and Q.C. at Westminster Hall. 1823 Downing Professor of Law at Cambridge. " Originally a tory in politics, Starkie afterwards became a liberal, and in that interest unsuccessfully contested the representation of the borough of Cambridge in 1840" Dictionary of National Biography, Vol.XVIII, p.998.

100. See on this W. Thomas, *The Philosophical Radicals: Nine Studies in Theory and Practice, 1814 - 1841* (Oxford: Oxford University Press, 1979)

101. *The Seventh Report of the Commissioners of Criminal Law*, Parl. Papers **1843** Vol. XIX, p.10

of the state which rests upon its sole, exclusive right and authority to pass law. Furthermore, it is only the state which is capable of remedying this problematic situation as only it alone can render this area of law systematic through the form of a Digest. It is the Commission which will facilitate this reassertion of the state's centrality within society as the systematic formulation of the mass of different written sources and the multiplicity of precedents and principles emanating form the process of judicial decision-making will

" convince all ranks of your Majesty's subjects that the laws are founded on just principles, having regard to the protection of all, and equally binding on all, and consequently to impress the duty and impress the habit of obedience. " 102

The substantive criminal law needed to be accessible to the public and set out in intelligible language this ' political ' legitimacy was overlain by the demand for coherence within the system of substantive law tied to the need to simplify and make more practical. These principles were to find symbolic expression and textual unity in a Digest of newly coherent law expressed in a compact body of rules accessible to all.

The content and import of these principles becomes clear when they are turned to the question of their interpretative and transformative practice with regard to the existing criminal process now conceived as ' tradition '/'ancient law '. The Commission's self-imposed purpose of retaining, through rearticulation and reformulation, the ancient law appears when the Report turned to the examination of the ' present state of law in England '. They begin by legitimating the ' tradition ' by its value as a rich source of law whose richness related to the number of useful principles which it contained. However, this amassed wealth within the tradition was incapable of realisation or utilisation due to its lack of expression in a systematic body of rules (Digest). This was the result of the historical development of the criminal law which

102. *The Seventh Report of the Commissioners of Criminal Law*, Parl. Papers **1843** Vol. XIX, p.4

had suffered from long and continuous ' legislative neglect '. This was manifested in a lack of concern with the systematic and coherent formulation of the criminal law and a plethora of individual pieces of legislation passed in accordance with perceptions of threatening disorder or specific types of crime. This created a mass of authorities which conflicted with each other and with the general rules which had evolved within the ' tradition '. These authorities, despite the context in which they were developed, were regarded, by the Commission, as a useful basis form which to start their examination for they simply lack the coherence of a systematic expression.

They viewed their task as one which demanded adherence to the principles enshrined in both ancient and modern law, and, the retention of the language in which those principles were expressed. With this body of law retained they would simply make the language more intelligible. The Commissioners are clear as to the reasons for that

" We have acted in this respect under the conviction that the rejection of ancient and accustomed forms of expression, terms of well-known and familiar application, for new ones, can rarely, if ever, be attended with proponderating advantages. " 103

The legitimacy of the ' tradition ' or ' ancient law ' rested upon its concrete, empirical existence rather than its conformity with a set of ideas or values of which it was held to be the embodiment.

What was aimed at was an accommodation and readjustment of the existing elements not the wholesale rejection of ' ancient law 'and the reformulation of substantive criminal law premised upon the freedom conferred by a radical break with tradition. Here the principles are merely tools for reform rather than elements of a programme that seeks to implement a perspective which demands that reality be

103. *The Seventh Report of the Commissioners of Criminal Law*, Parl. Papers **1843** Vol. XIX, p.2

judged and changed in accordance with its criteria. Rather than a Code a Digest is to be the product which was to reduce and encapsulate the criminal law in 24 Chapters.

The application and extent of the principles underlying the Digest were only to apply to indictable offences with summary offences not included or subjected to scrutiny except where they also happen to be indictable offences. The Commissioner's choice to concentrate solely on indictable offences, thereby leaving out of consideration the whole of the summary jurisdiction, was tied to the rejection of any Code type orientation in regard to this area of substantive law. They were quite aware that his would not resemble the scientific brevity, and, regard for order and arrangement of Bentham's Code. Their task was merely to " digest systematically the existing body of Criminal Law ". They chose to do this because of their rejection of a Code on the grounds that it was more advantageous to adopt the form of a Digest compared with the limitations of a Code. The limitations of a Code related, for them, to its general and abstract terminology which would lead to practical difficulties of application of the newly codified law. These would only be surmounted by the enactment of " subsidiary supplementary laws " which, by their very enactment, would be in contradiction with and hamper the idea of a complete and self-contained body of law formulated in a single Code.

This characterisation of the nature of a Code and the process of codification was necessitated by their prior decision to hold back from a thorough going critique and transformation of the ' ancient law ' which distanced them from Bentham's orientation towards ' tradition '. What was intended by the Commission was the utilisation of certain elements from Bentham's theory for the practical reformulation of the existing system.

By this process what was sought to be achieved was the fixing of the state as the institutional entity which confers a cohesive unity on society through the

presentation of the state as the legal state which produces abstract, formal laws. These are systematically expressed and form the basis for the peace and security of individuals through their relation with them. This unifying function of the state is also premised upon the isolation of the state from individuals in society. The state is placed ' outside ' society as a legal person/collective actor and counterposed to a society composed to private needs and interests. This separation is the condition for the attribution of action to the state since it is necessary for it to have a freedom of will independent of any causal interconnection with society. It is this combination of unification and isolation which, while creating the Digest of criminal law, leaves the prosecution under the control of private individuals over whom the state has no effective control other than by their initial definition as legal subjects. Hence this

" double function of isolating individuals and representing the unity is reflected in the internal contradictions in the structure of the state: contradictions between the private and the public, between political individuals/persons and the representative institutions of the people/nation, even between private and public law, between political liberties and the general interest, etc. " [104]

b)The Criminal Law Commissioner's Eighth Report: The Contradictions of the Commission's Interpretative Schema when Confronted with Criminal Procedure

This tension becomes apparent when the Commission turns to the subject of criminal procedure in their eighth report. The Commission views the Digest, produced by the seventh report, as only concerning itself with the general provisions of the criminal law. This concern with substantive law is seen to exclude consideration of what it sees as the ' minute details ' of actual court practice which has evolved its own rules. The perspective which it adopts towards them is even less interventionist than in regard to its posture towards the substantive criminal law. These rules are simply to

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104. N. Poulantzas, *Political Power and Social Classes* (London: New Left Books/Verso, 1973), p.134

be sanctioned by the legislature as to do otherwise is seen as overburdening the Digest by enlarging it to an inconvenient size. Therefore,

" the spirit of the statute....leaves the court itself the framing of its own rules of practice...deeming the principle a good one that such a court is best able to ascertain what rules of this kind will best answer the ends of justice. The same practice applies to the practice of the inferior courts, subject to the condition that their rules should be sanctioned by the superintendence and authority of some higher court. " 105

Given the state's control over substantive law and the compositional demands of the ' Digest form ' the courts are left a space of institutional autonomy within which to enact and create rules of practice. The institutional separation and demarcation of the realms of the state and judiciary are now tied to the control of the state over substantive law and the control of the judiciary over procedural practice.

This separation was not an absolute one due to the link between substantive law and criminal pleading. The connection is held, by the Commission to be an intimate one which renders the consideration of criminal pleading highly expedient and leads the Commission to give an outline of the formal aspects of criminal procedure from the preliminary proceedings up to the trial itself. This is important as it lays out the stages of this process and critically assesses the elements of which they are composed. The sections which are of essential importance relate to the framing of the formal charge and the principles relating to the trial.

The first chapter, on the preliminary proceedings, deals with aspects of procedure prior to the framing/finding of the principle accusation or charge. The Commission sees the possibility of the ineffectiveness of the legal system if no action or practice intervenes before the actual formal charging of the accused. Without any

105. *The Eighth Report of the Commissioners of Criminal Law*, Parl. Papers 1845 Vol. XIV, p.165

means of confining, identifying or ascertaining the whereabouts of the accused they are unlikely to be ' fed-in ' to the criminal process at all. This would then undermine the capacity of the criminal law to penetrate its social environment, and, hence, its concrete operation and existence. The practical implications of this led the Commission to recognise the legitimacy and necessity of arrest with or without warrant and preliminary inquiry before the magistracy to ascertain whether there is sufficient ground for the proceedings. The Commissions indicates that it is desirous of a situation in which the process of effecting an arrest be under the control of the magistracy based upon the granting of a warrant of arrest. The condition of issue of this warrant would be to demonstrate to the magistrate, on oath, a reasonable case for ' restraint of liberty '. The magistracy were to be, in the Commission's schema, the regulatory frame over the system of private prosecution through the conferral upon them of absolute discretion to issue warrants for arrest [106]. It was this functional specialisation of the magistracy which led, in turn, to the conceptualisation of the criminal process as divided into classes of persons who performed different and distinct duties within it. The Commission viewed the criminal process as delegating

" the duty of framing a criminal charge to one class of persons, the deciding upon the truth of that charge to a second, and frequently that of adjudication to a third class[except in summary offences where the second and third are combined in the magistracy]. Such a distribution renders it indispensably necessary that the charge should contain such a distinct allegation of precise offence committed.....and such statement of facts as is sufficient to show that those concerning which inquiry is made, and evidence given, are the same with those on which the charge, if true is founded. " [107]

This separation of functions entails the separation of charge and evidence so that to charge a person is not sufficient by itself to ensure a conviction. Evidence on

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106. *The Eighth Report of the Commissioners of Criminal Law*, Parl. Papers **1845** Vol.XIV, pp. 166-168

107. Ibid, p.168

the basis of facts is required to further substantiate and determine the validity of the charge. Therefore, there is a need to collect evidence and witnesses for this purpose, but this process is carried out by a separate person or persons from both the process of charging and adjudication. The differentiation and specialisation that this creates in the criminal process has the consequence of dividing it into elements whose unity is conferred by a notion of coherence predicated upon a schema of definition and systematisation of function. Its unity and legitimacy is thereby located in an external source. This external source is the formal schema which overlays the criminal process and confers its sense of efficacy.

The extent to which this notion of coherence is formal is clearly revealed when the Commission come to deal with these principles relating to the trial. When the Commission broaches the subject of evidence it quickly separates rules of procedure from rules of evidence. To the Commission, the

" principles and rules of evidence on civil and criminal cases are substantially the same, it would, we conceive, be inconvenient to incorporate them with these rules of procedure....We have, therefore, limited the Digest to the course of the proceeding as regards the order of proof, and general rules which regulate the oaths and number of witnesses. " 108

The dichotomy between procedure and evidence flows from the formal and abstract level on which the Commission operates, and, reaffirms this level as the one upon which the systematic consistency of the criminal process is to be both conceived and practically established. Methods of evidence collection and the control over the process of that collection disappear from consideration and fall outside the scrutiny and definition of the Commission's project. Since the sphere of the Digest relates to a view of the criminal process founded upon the horizon of pleadings and order of proof the informational dependence of these forms upon evidence is neglected insofar

108. *The Eighth Report of the Commissioners of Criminal Law*, Parl. Papers **1845** Vol. XIV, p.178

as it is a concrete process of the gathering and formulation of factual material needed to substantiate the pleading.

The limitation of the Commission's focus to this perspective relates to its wider purpose of re-establishing and re-asserting the dominance of the state. The decline which the state had suffered because of its ' legislative neglect ' of the criminal law was to be halted and its pre-eminence refounded through the enactment of the Digest. However, because of the constraints of form of the Digest structure, the state's capacity for intervention remains located at this formal level of the conferral of unity on the criminal process. As a result, it has no control over the developmental tendencies and practices of the elements of the criminal process which its schema had demarcated.

This becomes obvious when the Commission turns to the practical issue of the prosecution of offenders. The effective prosecution of offenders, and with it the reach of the criminal law itself, is of the ' highest importance ' for the Commission. They recognise that private prosecution forms the basis of the criminal process, and, that this is not only natural but

" it seems more particularly incumbent upon him...than any other member of society. " 109

The Commission was aware, however, that the actual situation was far from effectual. The conditions confronting the private prosecutor were recognised as ' irksome, inconvenient, and burdensome ' and deterring many form starting a prosecution, or, leading them to conduct the case inadequately.

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109. *The Eighth Report of the Commissioners of Criminal Law*, Parl. Papers **1845** Vol. XIV, p.184

" Hence it happens but too often, that prosecutions are conducted in a loose and unsatisfactory manner, from want of the means and labour essential to a just and satisfactory inquiry. " 110

Furthermore, the ideally conceived private prosecutor, irrespective of the structural constraints within which he/she operated, was also far from being realised in many cases. Private prosecution meant individual, unchallengeable, subjective assessments of the prospect and nature of prosecution. This led many to engage in ' bribery, collusion and illegal compromises.' The private orientation of prosecution also meant that there was no notion of public, societal or state interest in prosecution with the result that it frequently occurred that with no person able to be called upon to prosecute the alleged offence could not be dealt with by the criminal process.

This assessment of the situation led the Commission to the conclusion that

" The direct and obvious course for remedying such defects would consist in the appointment of public prosecutors....We apprehend that a remedy cannot be provided without effecting a change in the administration of criminal justice so extensive as to require the greatest caution and consideration...we are not at present prepared to recommend any specific course. " 111

Whatever course the legislature would take the Commission directly and specifically recommended that public funds should be made available for prosecution as inadequate remuneration resulted in inadequate prosecutions.

These criticisms of the private prosecution system issue from the Commission's view of law as a creation of the state(as opposed to social contract theories /natural rights theories) and, therefore, that the legal system is one which is

110. *The Eighth Report of the Commissioners of Criminal Law*, Parl. Papers **1845** Vol. XIV, p.185
111. *The Eighth Report of the Commissioners of Criminal Law*, Parl. Papers **1845** Vol. XIV, p.185

based upon positive law. Coupled with this, and its essential compliment, is the ascendant and dominant position of the state which is the sole guarantor of the continued existence of the society conceived as a social order in conformity with the principles of peace and security. It is the maintenance of these conditions which provides the stable background conditions for the formation of an expectational environment in which social interaction between individuals can take place. The state acts, through legislation, to enable individuals to achieve their objects thereby empowering them, but on condition that this does not interfere with the objects of others, or, come into conflict with the background conditions of peace and security which represent the conditions of possibility for the existence of society and social action within it.

The system of private prosecution, for the Commission, has come into conflict with these background conditions when individuals succumb to bribery, collusion and illegal compromises, or, when due to lack or financial means or legal advice they are incapable of pursuing a prosecution adequately. For, these events undermine the effectual prosecution of offenders and, therefore, the administration and reach of the criminal law. Since the criminal law attempts to uphold and reinforce societal stability, its ineffectiveness hampers the state's position as guarantor of a ' law-based ' society.

The Commission by operating with a theoretical perspective where state, positive law and a realm of negative liberty are the guiding perspective, coupled with, the radical separation of court practices from rules of procedure; concentration on pleadings as its orientation; and; the separation of evidence from rules of procedure creates a conceptual framework which focuses upon the system from the perspective of ***prosecution***. The goals of peace and security were the objects to be produced by the reformed system of criminal law through the punishment of crime and the efficiency and legitimacy of the criminal process was to be adjudged by these criteria.

The existence of the defendant as a concrete entity in itself irreducible to these categories disappears within this conceptual schema. It becomes a position within a system pre-structured in its operational imperatives.

Although these Reports were not the subject of any legislation, and, hence the criminal process was not reformed in accordance with its principles they remained important. They remained the source and basis upon which all subsequent attempts at reform, throughout the century, were based. This is the case even with those schemes in the 1870s as the perspective for reform which they put forward is consciously viewed and articulated as representing various modifications to this initial perspective.

The constitution of these Reports as the source and origin of the theoretical foundation and justification, of the various projects designed to institute a system of public prosecution, resulted from the Report's combination and articulation of state, law and the sphere of negative liberty. These elements represented the modified, but nonetheless critical perspective form which the existing system of criminal law could be interrogated. This was a conception in which law, as a positive system of rules, formed an external framework of fixed, public rules which established order and co-ordinated the pursuit of individual claims and aims. It did not actively determine or define the common good, but merely provided the conditions for each individual's pursuit of a conception of the good. Law became legislation which represented commands of the state and were cause of social order and regularity not a description of it.

Social instability rested, on this view, upon the absence of fully public standards and lack of assurance. Law, as a system of rules, would act as a focus for individual judgements. On this view, law became a transparently obvious creation of society and an instrument whereby social relations would be both constituted and sustained. It no longer sought to protect an existing social order, or, project its

eternal origin and existence. The validity of law now became its existence as an expression of will which were commands from a publicly recognised source, namely, the state. They would be issued according to ' formalities ' which would guarantee their authenticity.

Within this social order, formed and sustained by positive law, the individual was constituted as an empowered social actor pursuing his object through an assessment of the surrounding social environment based upon a calculation, or, judgement of the likelihood of the fulfilment of their expectations. Social control, from this perspective, had an intrinsically individual orientation as the practice was not state inspired or carried out through designated agents as is evident in the Commission's Reports. It was seen as a ' natural ' and ordinary attribute of social interaction in which some disputes needed to be settled through the legal process. This sphere of societal expectation and interaction was the fundamental creation and basis of the system of positive law in which

" no single political concept such as liberty, sovereignty, or even political society could be adequately understood in its isolation from the web of reciprocal relationships of command and obedience binding men together in any social group. " 112

As these ideas, taken from within the theoretical scheme of Bentham's political and jurisprudential project, became the discursive terrain of the programme of public prosecution, in the nineteenth century, so their coherence and validity ceased to rest on their internal, theoretical unity and meaning. The centre of this coherence and validity moved to more directly political considerations in which the theoretical notion of systematic, logical linkage of elements disappears to be replaced by the degree to which they are accepted. This uncritical, unreflective acceptance is then founded

112. D. Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to his Utilitarianism* (Toronto: University of Toronto Press, 1977), p.92

upon the wider social and political conditions in which it operates and exists. The lack of legislative activity on the basis of these Commission Reports was the condition which enabled the evolution of this process.

Development According to an Internal Dynamic: The interaction of police, other agents of law enforcement/prosecution and changes in the reach of the criminal law.

From the 1830s to the 1860s the police increasingly replaced the ' old ' system of law enforcement predicated upon parish constables, active magistrates and hired watchmen. As a result of their developing ascendancy, during this period, the police came to hold a prominent position in the conduct of prosecutions with their expanding share of the total field of prosecutions. The 1853 Select Committee Report on the Police was the first governmental recognition of this development with evidence being taken from Chief Constables themselves as to the effects that their forces have had(supplemented by the supporting evidence of magistrates and landowners), and, the obstacles that they perceive to be hindering their effectiveness and implementation of policy 113. This process of achieving ascendancy was an active one on the part of the police since their ability increase their share of prosecutions depended upon placing themselves within a competitive relation with the existing elements of the ' old ' system - parish constables, Prosecution Associations and private prosecutors. The nature and form of that competition varied with parish constables the focus of the most direct and conflictual interaction. Private prosecutors too were not immune from direct forms of police activity with the police being prepared to bring to the attention of the court private prosecutors claiming expenses for legal representation which they never employed 114.

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113. *The First Report of the Select Committee on the Police*, Parl. Papers **1852-3** Vol. XXXVI, particularly the evidence of Captain William Charles Harris, Sir William Heathcote, F. King and Robert Baker

114. See the evidence of William Oakley to the *Select Committee on Public Prosecutors*, Parl. Papers **1856**, Vol. VII, p.382

This competitive posture whose aggressiveness was determined by the intensity of the perception of threat posed, was overlain by the changes in the structure of the criminal process in the 1840s and 1850s by the Juvenile Offenders Acts and the Criminal Justice Act 1854. These Acts allowed certain indictable offences to be tried summarily and led to an expansion in the number of cases coming before the courts 115. This made the task of private prosecution easier and gave the police more scope for action.

The expansion, consolidation and re-definition of the summary jurisdiction carried out in the late 1840s and early 1850s coupled with the growing prominence of the police began to cement a relationship between magistracy and the police force based upon mutual assistance and the establishment of a stable expectational environment between them. The police gave direct assistance to the magistracy which confirmed their legitimacy in terms of both their existence and the facility with which they carried out their assigned tasks 116.

With the creation and operation of the police the system of private prosecution became the subject of indirect state intervention which transcended the purely financial provision of prosecution costs. The practice grew up, and became more embedded with each repetition, of applying for legal advice and expert assistance from the Home Secretary. It began with the Commissioners of the Metropolitan Police applying in cases of murder, manslaughter and assault with deadly weapons. This practice was complemented by the Metropolitan magistrates applying directly to the Home Office for legal advice where, in important cases, no attorney appeared for the Crown. This led to the need for these prosecutions to be conducted by someone with legal expertise which was at first fulfilled by magistrate's clerks with the government

115. See, for a description and analysis of the effects of these changes in the Black Country, D. Phillips, *Crime and Authority in Victorian Britain: The Black Country 1835-1860* (London: Croom and Helm, 1977)

116. See the evidence of James Parker, clerk of indictments, who sought the assistance of the County Chief Constable in the preparation of indictments enabling them to be prepared more throughly and quickly in *First Report of the Select Committee on the Police*, Parl. Papers **1852-3** Vol. XXXVI, p.64

paying the additional expenses out of public funds. This was replaced in the mid-1830s by the direct intervention of a public official in the form of the Solicitor to the Home Office who was assigned to assist the police. The abolition of this governmental position, in 1841, led this activity to be transferred to the Treasury which adopted the practice of conducting prosecution in cases of murder, manslaughter, vicious assaults and other cases involving the ' public interest ' in the Metropolitan Police District. Gradually, the Treasury expanded its sphere of operation and began to conduct important prosecutions of the same character in the country at large 117.

There was, therefore, an expanding system of ' police-led ' prosecutions, at first, based in London, and, then, extending to the rest of the country. This established, from early in the nineteenth century, a firm link between the Home Office and the Police. That system, moreover, was dependant upon the police activation since they became its sole source of information with the choice to provide it, and initiate the process of Treasury assistance, rested exclusively with them. The Treasury was placed, within this structure of interaction, in a purely reactive role rather than a proactive one. The nineteenth century was this expanding system become more and more embedded while attempts were made to institute a universal, state-controlled public prosecution system.

The Attempt at Reform: Phillimore's Bill and the Select Committee Reports on the Public Prosecutor 1854-1856

The ascendancy of the police as the dominant agency of prosecution had by the 1850s come to be both the subject of attention and concern by Parliament. Various local initiatives had been developed during the 1840s in response to what was seen as

117. See evidence of Horatio Waddington, Undersecretary of State at the Home Office, in the *Report of the Select Committee on Public Prosecutors*, Parl. Papers **1854-5** Vol. XII, pp.168-169

police malpractice, and, an excessive and uncontrolled exercise of prosecutorial discretion and power.

The debate over the police and their legitimate role centred upon the issues of costs, deals struck with ' low ' attorneys and their general presence as prosecutors at the trial. The response of Liverpool and Leeds (which directly followed Liverpool's example) to this situation was to establish a system of local, public management of prosecutions controlled by the Municipal Borough Council. The system developed in Liverpool consisted of the magistrates binding over the Chief Constable to prosecute the case. This, however, was merely formal as the process of binding over marked the transference of the case to the Town Clerk who then managed the prosecution from that point onwards 118. The concern which this change sought to satisfy was the agreements which police constables and attorneys were making under the terms of which police constables would take fees from the attorney in return for the police constable giving him a retainer. In other words, to guarantee a steady and sure supply of business for these attorneys. Since the basis of prosecution still rested upon costs and the amount that could be extracted from the court there was an enormous incentive to conduct frivolous prosecutions and increase the number of witnesses for the prosecution in order to swell the total costs of prosecution. Alternatively, prosecutions could easily be conducted and brought to a successful conclusion against people who could be brought within the terms of the growing body of criminal law which sought to deal with specific social groups such as vagrants, prostitutes, beggars and the ' idle ' poor 119. The ease with which this could be done opened up the possibility and facilitated the framing of false and/or malicious prosecutions.

The exponents of public prosecution or control over the system of police prosecution sought to confine the police to a role of gathering evidence and witnesses

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118. See the evidence of Thomas Ellis, Recorder of Leeds, in The Report of the Select Committee on Public Prosecutors, Parl. Papers **1854-5** Vol. XII, pp. 33-34

119. See, for the practice of maliciously/falsely prosecuting people under the Vagrancy Act 1824 as ' tramps 'in Wales, Cheshire, Gloustershire and Staffordshire, D. Jones, *Crime, Protest, Community and Police in the Nineteenth Century* (London: Routledge, 1982), p.196

the validity and strength of which would be assessed at trial. The desire to confine the police to this role stemmed from a framework which perceived arrest, charge and trial to be distinct and distinguishable stages carried on by different elements within the criminal process. It was this differentiation which maintained the utility , coherence and legitimacy of the criminal process and de-differentiation by the accumulation of functions by one element, namely the police, threatened this. This separation of elements found its origin in the Report of the Commissioners on the Criminal Law whose views had become the dominant way in which the criminal process was conceived. It projected, due to its location of law in the operation of the state rather than in concepts of natural law or social contract, a purely formal unity of the legal system itself whose substantial validity rested solely upon the exclusive capacity and ability of the state to issue commands in the form of law.

These commands sought to maintain a situation of peace and security in which individual social actors could pursue their particular objects. Peace and security was achieved by the criminal law providing clear, publicly accessible substantive laws of which all citizens would be aware and, therefore, cognisant of the sphere of society within which they could operate freely without undermining the very basis of that society. This realm of action was negatively constituted in that its very existence was a result not of a substantive and unalterable right, but of being the contingent remainder left after the framing of society within and by the commands of the state through law. Hence, individuals subsisted within a field of ' negative liberty ' whose very basis and continuance rested upon an always uncertain future of state activity.

Any concentration of social power outside and independent of the state which, under the framework of the Benthamite interpretative horizon, is to be the sole source of social power, through positive law, represents both a challenge and an illegitimate entity. It is exactly under these terms that the police were conceived. However, this illegitimacy extended only to the role which they had come to adopt within the

criminal process as prosecutors. For, they owed their creation to the state either directly as in the case of the Metropolitan Police, or, indirectly by legislation which devolved power on groups to establish police forces (Municipal Reform Act 1835, County Police Acts 1839/40 and the County and Borough Police Act 1856).

Their contribution to the maintenance of security and peace was not in dispute as was attested to by the evidence of the 1853 Select Committee Report on the Police, and further reiterated at various points in the Report from the Select Committee on the Public Prosecutors [120]. What was, however, was their role as prosecutors which was sought to be removed by the definition and strict confinement to the collection of evidence and the gathering of witnesses. This accorded with a conceptual division between the notions of ' legal ' and ' non-legal ' in which ' legal ' was exclusively determined by the search for truth at the trial, and, the conduct of the case up to that point by the legal profession. This confinement of the police was entwined with an assertion fo the nature of their legal existence, through positive law, namely as subordinate officers in the administration of public justice whose form and content is to be determined by within the institutions of the state not by the police. Prosecutions conducted by the police were engendering a situation in which the administration of justice was being determined by them rather than by the imperatives of the state - the centre and condition of possibility of society.

This perception of a threat, from the police, to this societal configuration is very clear from the Select Committee Report on Public Prosecutors of 1854/5. Yet, the articulation and content of that threat varies with the position which the person giving the evidence held within the criminal process. The pattern is of a gradual widening out and generalisation of the threat as the position the person holds becomes more prominent and important. Magistrates, magistrate's clerks and prosecution

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120. See the evidence of Mr. Francis Hobler, Solicitor in the City of London, p.141; Horatio Waddington, Undersecretary of State at the Home Office, p.160; Mr. Horace Avory, Clerk of Indictments on the Home Circuit, p.186; The Right Honourable Lord Campbell, Lord Chief Justice, p.73 in *The Report of the Select Committee on Public Prosecutors*, Parl. Papers **1854-5** Vol. XII

solicitors perceived the threat to be towards the role they themselves played in the criminal process with this threat being made more universal by its assertion as a challenge to the criminal process itself. It was the Attorney General and the Undersecretary of State at the Home Department who, because of their position within and representation of the institutions of the state, located and assessed the threat, posed by the police as prosecutors, to be against the criminal process considered as an entity in itself.

" policemen should be kept strictly to their functions as policemen, as persons to be apprehended, and to have the custody of prisoners, and not as persons who are to mix themselves up in the conduct of prosecutions....As it stands now, I believe there is often injustice done and a great deal of dissatisfaction produced....I think one should endeavour, as much as possible, to make the administration of justice find its immediate response of satisfaction in the minds of the persons who observe what is going on...., therefore, I certainly am very strongly of the opinion, that prosecution would be more satisfactorily conducted if we had someone to intervene between the apprehension of the prisoner and the bringing of the case of court." [121]

The solution sought was to confine the police to the ' non-legal ' realm within which they were seen to be carrying out legitimate and effective activities. The removal of their presence within the ' legal ' realm had the consequence of denying the ' legal ' character of police action and, therefore, the scrutiny of that activity itself. For, this denial operated to place the police on the same perceptual terms as private persons who, through directly suffering from the activity of another(s), seek a remedy by means of the criminal law. Police practices of evidence collection and gathering of witnesses were thereby conferred with a competence and legitimacy as a result of the prior definition of the legitimate function of the police, in this ' non-legal ' realm, of which these practices represented the concrete fulfilment.

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121. Evidence of Sir A. Cockburn, Attorney General, in *The Report of the Select Committee on Public Prosecutors, Parl. Papers* **1854-5** Vol. XII, p.195

The development and crystallisation of this perceptual outlook in the Report which conceived the role and activity of the police in this way would have produced a system of public prosecution which would have reproduced, on a national scale, that system of prosecution which had evolved under local control in Liverpool and Leeds during the 1840s. It was these systems which the Committee sought to gain both an understanding and an evaluation of their advantages since they represented the only concrete instances of systems of prosecution not determined by private prosecutors. The response of these cities to the system of private prosecution and the attendant conceptualisation of both that system, and, the one which they replaced it with displayed the way in which this perception of the police, and, the changes in the system of prosecution which it engendered rendered the police increasingly unproblematic.

The system in both Liverpool and Leeds had, by the time of the Select Committee Report, developed into a situation in which all cases were submitted to the Town Clerk responsible for managing prosecutions after the case had been brought by the police to the magistrate's court and it had been committed for trial by the magistrate(unless it was an important case such as murder, manslaughter etc. in which instance the Town Clerk would have the case submitted to him before committal). It was at this point that the police ' dropped-out ' of the prosecution process and the Town Clerk would conduct the case either himself, or, by attorneys employed by the borough council. Control over the police in these systems was conceived and defined by the necessity to secure the exercise of discretion over the conduct of prosecutions. The Town Clerk, therefore, replaced the police as the element who now exercised this discretionary power of conducting prosecutions. The police were now placed outside the legal system, as defined by this perspective, since they no longer appeared in the role of prosecutor at the trial.

This disappearance of the police from the role of visible prosecutor confined the ambit, and hence, legitimacy of the role of the police to that of the collection of evidence and the gathering of witnesses. These were not to be the subject of scrutiny themselves as this adjustment to the system of prosecution was founded on a notion of control focused exclusively upon the severing of the roles of prosecutor and collector of evidence flowing, as it did, from the desire to strengthen the legitimacy and efficiency of the system of prosecution. The Town Clerk and his attorneys now conducted the prosecution, and, as the evidence of Henry Walter, the Town Clerk of Liverpool, made clear this was not a disinterested process

Q.2795 " Are you the judge of the evidence which is requisite?- I am, and I also draw all the indictments."

Q.2799 " There are certain cases I suppose which you do not prosecute, because the evidence is insufficient?- Very few; the prisoners are very frequently committed on more than one case, and I select the best case. "

Q.2800 " Supposing a man is brought before you with only one charge, and you think the evidence insufficient, you dismiss the case I suppose?- No, I suggest on the brief there is not sufficient evidence, but it still goes before the grand jury. " 122

Since this role was no longer played by the police, who were characterised as having a personal interest in conviction, it was now projected as one underpined by the desire to establish the truth. Here disinterested ' professional ethics ' is counterposed to a police ' practice ' which seeks conviction. As Henry Walter affirmed in reply to the Committee:

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122. Evidence of Henry Walter, Town Clerk of Liverpool responsible for managing criminal prosecutions, in *The Report of the Select Committee on Public Prosecutors*, Parl. Papers **1854-5** Vol. XII, p.235

Q.2805 " You are actuated simply by a desire to ascertain the truth, and not to procure a conviction?- Certainly. " [123]

However, what was never questioned or alluded to was the fact that the nature and logic of this notion of truth remained entirely dependent upon information with which to initiate a prosecution. The Town Clerks did not collect or gather information since this was not defined as a ' legal ' activity and, therefore, within the parameters of their operation. It was the police, removed from their role as prosecutors, and located and defined as responsible for the ' non-legal ' task of information collection, who were the element who provided the information to the Town Clerks. Their role as prosecutors had been removed, but not their control over the information which made a prosecution possible and on which the Town Clerks were dependent. This control over information, exercised by the police, was not thought to be problematic as it was incapable of recognition under the conceptual schema within which this system had been produced. Due to the fact that the case of the prosecution was seen to be made out by the Town Clerk, this conceptualisation of the criminal process portrayed the police as engaged in a simple, uncomplicated and unremarkable process in which, due to the attribution of these characteristics to the process of collection, the material which was accumulated was perceived as a mass of information from which the Town Clerk would select and thereby establish the basis for the case for the prosecution. That the Town Clerk's ability of select, and the selections that would be made, could already be structured or predetermined by the nature of the process of collection, under the control of the police, was never something capable of being thought from this perspective.

A concomitant product of this perspective was that the police practice in the collection of this mass of information then became something which, since it was characterised as unproblematic in itself, did not need any ' legal ' attention directed towards the process by which it was obtained. For, this characterisation of the

123. Ibid, p.235

progress of a prosecution meant that if only attained the status of ' legal ' when the accused appeared before the magistrate as Thomas Ellis, Recorder of Leeds, made clear

Q.215 " As I understand, the preliminary examinations take place always at the police office?- Yes; that is to say it is in the same building as the police office; it is really in the court. "

Q.216 " By police officers?- Not the preliminary examinations upon which the prisoner is bound over. The examinations which I see are those which go on before the magistrate; the police get the heads of them; I suppose they must take down memoranda for their own information; they are not technical documents. " 124

It was the evolution of the system in Liverpool and Leeds, with its accompanying conceptualisation which projected a particular ' resolution ' of the issue of the legitimate placing and parameters of activity of the " New Police ", which represented, for the Select Committee of 1854-5, the realisation of a scheme of public prosecution, albeit at a local level. This, with the other evidence collected by the Select Committee, was formed, by Phillimore(an M.P. and member of the Select Committee) in 1855, into a Bill to establish a system of public prosecution which was to be the solution to the role of the police. They had, by assuming the role of prosecutors, rendered their status problematic as this activity was seen as an interference with the aims of the criminal process. The police had a degree of visible social power which needed to be reduced

" The Crown, indeed, was the nominal prosecutor, but the consequence was that we gave to policemen, to a class amongst whom were to be found some of the most hardened and profligate of mankind, and over whom incessant vigilance was requisite to prevent flagrant and cruel abuses of their authority, we gave to these men

124. *The Report of the Select Committee on Public Prosecutors*, Parl. Papers **1854-5** Vol. XII, p.35

an unlimited power of pardon and connivance; and we entrusted them with an authority which in every country but England was regulated with as much anxiety as the functions of the Judge himself. " 125

Phillimore's Bill failed to be enacted as legislation, but the issue of public prosecution continued to subsist within the frame of political concerns. Its collapse had placed the issue directly on the terrain of Parliamentary concerns. This was formalised and institutionalised by the appointment of another Select Committee on Public Prosecutors which gave its report in 1856. The inquiry was divided into three areas of investigation: the state of the system of conducting criminal cases and its failings, the state of the system where public prosecution operates and the assessment of proposals of reform submitted to the Committee 126. The evidence was from the same persons who had given evidence to the earlier Select Committee and led the 1856 Committee to conclude that

" Your Committee are unanimous in thinking that the state of things referred to in the foregoing evidence is greatly defective, and urgently requires amendment. " 127

The plan of amendment recommended by the Committee consisted of the appointment of a national network of agents who were to prepare and conduct the pre-trial proceedings. These agents were to be attorneys of not less than 7 years standing who were to be paid a government salary and not allowed to engage in private practice. They were to have both a reactive and proactive role instituting proceedings where no steps had been taken to prosecute, or, take over a prosecution which had already been instituted. These agents were then to choose the counsel to conduct the case at the Quarter Sessions or Assizes. Supervision of the district agents was to be the duty of the Attorney General as, in the Committee's view

125. *Parliamentary Debates*, H.C. (3rd. ser.), col. 1651 (1855) John George Phillimore
126. *The Report of the Select Committee on Public Prosecutors*, Parl. Papers **1856** Vol. VII, p.349
127. Ibid, p.354

" any scheme for conducting public prosecutions should centre in the Attorney-General, as the state prosecutor, we recommend that these advising counsel [appointed on the basis of having had 10 years experience to the same area as each district agent] should be instructed to communicate with and act under the directions of the Attorney-General, forming, as it were, the staff of that officer in the administration of Criminal Justice. " 128

Private interest was, under the existent system, in control of the process of prosecution with the administration of justice structured by the self-regarding behaviour of individuals. The validity of the state, as condensed in the concept of sovereignty and the rule of law, was being subverted by this accretion of social power within the sphere of individual action. The state, as conceived from within the conceptual framework of Benthamism, was the only entity which could make the law through the process of legislation. Its ability to make law entailed its ability to be conceived as sovereign, and, this law based state operated in a society which it governed, by the use of law, to attain the fundamental background conditions and guarantees of peace and security encapsulated in the notion of social order. The social order was threatened by those acts designated by criminal law as offences. It had to be prevented by punishment which would nave the effect of deterring both the individual offender from the commission of subsequent criminal acts, and, all potential offenders who would realise that because of the pain that would be inflicted upon them, should the actually carry out a criminal act, they should avoid committing those considered acts. The practical medium through which offence and punishment were to be joined was the criminal process. It was the operation of this which determined the degree of realisation of the Benthamite rationale of punishment and social order. The most essential interests of society were embedded in this process - its validity in Bentham's terms.

128. Ibid, p.355

The control, by private prosecutors, over the initiation of prosecutions threatened the conceptual and practical coherence of this Benthamite perspective. The failure to apply sanctions when norms were violated undermined the ' habit of obedience ' which formed the empirical link between validity as a system of norm creation, under the principle of sovereignty, and as efficacy - the maintenance of effective order. The ' habit of obedience ' is undermined in the individuals who initiate prosecutions, and, in those who are accused of the violation of norms since they go unpunished under a system which leads to the private individual seeking only her/his particular satisfaction through the criminal process. Prosecution was an essentially pragmatic operation - a position from which a subsequent bargaining position would be strengthened rather than a determined and unswerving desire to bring the accused to trial and for that person to be punished.

Yet, despite this continuing Benthamite foundation of the demands for a system of public prosecution the practical configuration of the 1856 scheme attested to the increasing severance between theory and practice. The Benthamite project, already reduced in its impetus by the redefinition of its aims by the Criminal Law Commissioners during the 1830s and 1840s, now subsisted within a political context in which compromise determined its operation. The clarity of Bentham's link between theory and practice was overturned by a political pragmatism in which reality was no longer to be the terrain for the realisation of that theory. The theory now subordinated itself to a reality made resistant through the recognition of interests necessitating the tempering of the process of the unfolding of the central direction of the state.

The interests recognised as forcing a compromise in the otherwise centrally controlled and administered plan of public prosecution were those of the legal profession, particularly barristers (counsel), who were to be employed by the district agents to conduct cases. The Committee were unwilling to concentrate the conduct

of prosecutions at the trial in the hands of the advising counsel to be appointed under the scheme [129]. A ' compromise position ' was to be achieved in which barristers engaged in private practice were still to be an integral part of the new system. The Bar, which organised, unified and articulated the collective identity of barristers, was seen by the Committee as an group who were to be recognised within the proposed scheme by the retention of a significant element of private social power. The plan faltered at thorough-going change based upon complete replacement of a private prosecution system with that of a state prosecution system. The changes at a local level, wrought by the boroughs of Liverpool and Leeds, in the system which had so impressed the Committee of 1854-5 now ceased to be the model to be directly implemented on a national scale.

The attenuation and blunting of the Benthamite project - so clear in the 1856 Committee's plan - was one aspect of the evolution of the public prosecution issue. The other was the way in which the issue led to a particular conception of the criminal process itself in which gaps and lack of comprehension tended to crystalise in an increasingly permanent framework in which misrecognition became the basis for the conception of the operation of certain elements of the criminal process. Many of these were to remain to dominate subsequent conceptions of the criminal process despite changes in the orientation of the project of prosecution.

The Committee Report rearticulates the need to deal with the presence of the police as prosecutors and propounds the solution in the form of public prosecution. The process involves redefinition of the divide between legal and non-legal which is to be concretely enacted by the removal of the police from the role of prosecutors, and, their replacement by district agents and barristers. The police are now placed firmly in the non-legal category outside the legal system thereby having overcome the problem that the police posed within this perspective. The identity of the criminal process now

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129. *The Report of the Select Committee on Public Prosecutors*, Parl. Papers **1856** Vol. VII, pp.355-356

entails a self-description which does not include the police. However, it failed to conceive that this very process of differentiation of criminal process from the police entailed not its independence from them, but simply a perceptual transformation in their interrelation. For, the criminal process remained dependent upon the police for the introduction of people into the criminal process, and, the information on which their subsequent trial would be based. The inability to conceive this interconnection rendered benign the practices of arrest, charge, evidence collection, gathering witnesses and the questioning of the accused engaged in by the police. This was to be an enduring element of the subsequent conception of the police despite the changes in the nature of the criminal process in the 1870s.

Another enduring element, which emerged in the Report, was the way in which the summary jurisdiction was understood and projected. The Report itself represented reaffirmation of its neglect by the Criminal Law Commissioners in the 1830s and 1840s. Summary jurisdiction was defined by the 1856 Report as an area in which little intervention would be necessary as the magistrate would have little difficulty in dealing with it. They were not considered to be offences capable of challenging the underlying social conditions of security and peace, but were simply irritating interruptions which could be dealt with without difficulty. It was here that the ' ideology of triviality ', identified by McBarnet as an integral part of the modern conception of summary jurisdiction [130], had its origin and became increasingly embedded during the nineteenth century. It rested upon the projection of indictable offences as both more prominent and numerous. Yet, this projection had been cut loose from any conformity with reality by the mid-1840s and 1850s with the reforms in summary jurisdiction. These led to an expansion in the numbers of people prosecuted, and, an increasing preference among prosecutors to utilise the summary jurisdiction as opposed to the indictable jurisdiction. As Thomas Puckle, Chairman of Quarter Sessions at Newington, told the Committee in 1856

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130. D. McBarnet, *Conviction: Law, State and the Construction of Justice* (London: Macmillan, 1983)

" How many prisoners, on average, do you try in the Quarter Sessions? Up to last year, we have tried something bordering on a thousand annually; but now it is reduced, I think, more than one half, in consequence of the summary jurisdiction of the magistrate in cases of felony. " 131

Trial by jury was already a universalist pretension with this two-tier system in place in which the majority of cases were dealt with before a magistrate of group of magistrates.

The failure of the Committee's Plan to become enacted by Parliament left the criminal process to develop in accordance with the dynamic generated by the interaction among its elements. The issue of public prosecution ' dropped-out ' of the Parliamentary view of the next sixteen to seventeen years and with it the focus upon the police and their role within the process of prosecution. Over this period the tentative pattern of relations between the elements of the criminal process became stable, stronger and systematic. Pivotal to this stabilisation and strengthening of the evolutionary potential of this interactive system was the relation between the magistracy and the police.

Jervis's Acts 1848/9 had, along with the charges in the substantive law relating to summary jurisdiction, both expanded and concretely defined the parameters of operation of the magistracy. This was the point at which magistrates themselves felt obliged to confirm the legal/non-legal self understanding of the criminal process. They self-consciously affirmed their ' legal ' role and identity with a concomitant emphasis on the ' non-legal ' role played by the police. This extended to a denial that the police actually took down evidence from witnesses or the defendant which would subsequently be utilised for prosecution purposes.

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131. *The Report of the Select Committee on Public Prosecutors*, Parl. Papers **1856** Vol. VII, p.373

" the practice is, that nothing is entered upon the charge sheet, or at the station-house, except the bare charge, that no evidence at all is taken down at the police station; that the first time any evidence at all is taken down is at the police court....I have never heard of such a practice of taking down evidence at the police station. " 132

It was the legal system, as defined and encompassed by those elements placed under the ' legal ' category of ' evidence '. Police ' information was not, and would never be, considered to be ' evidence ' without external confirmation of this conceptual status through the form of the preliminary examination. It was the magistrate, therefore, who was responsible for actively conferring this status upon police ' information '. This process, tantamount to transposition and translation of one form into another, was to be the practice through which relations between magistrates and police were to assume regularity; a set of stable, mutual expectations and legitimacy.

It was clear however, that the willingness of the magistracy to transpose ' information ' into ' evidence ' rested upon the attribution, by them, of the notion of sufficiency to that information. This notion was merely a threshold which the ' information ' had to pass. Hence, the ascription of insufficiency to police ' information ' did not necessarily mean that the case for the prosecution would fail.

" it frequently happens that...when a case is brought before the justices, the justices say, ' This evidence is very weak; have you any other evidence to strengthen the case?' The policeman or the constable, or who ever is in charge of the case, says, ' Yes, if you will give me a remand for a subsequent day, I can produce it.' " 133

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132. Evidence of Horace Avory, Clerk of Indictments on the Home Circuit, in the *Select Committee Report on Public Prosecutors*, Parl. Papers **1854-5** Vol. XII, p.186

133. Evidence of William Foote, Attorney, in the *Select Committee on Public Prosecutors*, Parl. Papers **1856** Vol. XII, p.242

It is this type of relationship, developed between the police and magistracy, meant that should the case be one for trial on indictment a firm prosecution case would already have been established at the preliminary examination. The idea that the preliminary examination should scrutinise the adequacy of the prosecution case became the joint effort, between magistracy and police, to construct an adequate case for the prosecution. This then made it more certain that the cases' actual trial would end in a conviction at the Court of Quarter Sessions ar Assizes. The success of these cases meant that the legitimacy of the police as prosecutors, at this level, would be enhanced and strengthened by a continuing and uninterrupted flow of convictions on the basis of a strong prosecution case. For, the successful transposition of ' information ' to ' evidence ' entailed the sole basis upon which the courts interpreted the adequacy and legitimacy of the prosecution case and hence the prosecutor.

The filtering by the magistracy of police ' information ' before sending the case for trial on indictment ensured that the prosecution case had already become ' legal' in that Chairman of Quarter Sessions and Judges at Assizes regarded the case as being sent to them by magistrates and hence having lost nay direct contact with the police who were now involved, but not responsible for the case. This ' legalisation ' ensured a favourable view of the case by Chairmen and Judges in which it was unlikely that is would not end in a conviction. The Chairman of Quarter of Sessions at Newington was adamant that magistrates did not send cases on which there would not be a conviction

" I hardly ever saw a case which, looking at the deposition before the magistrates, I thought ought not to have been sent, or where I did not think there was a very good case. " 134

134. Evidence of Thomas Puckle, Chairman of Quarter Sessions at Stoke Newington(London) in the *Select Committee on Public Prosecutors*, Parl. Papers **1856** Vol. VII, p.374-375

This typification of cases which entered Quarter Sessions and Assizes meant that the issue or even possibility of police malpractice never entered the cases. As a result, police activities were not seen to be in need of scrutiny as their ' information ' was easily transformed into ' evidence ' demonstrating the legitimacy of their practices, and, the assurance of that legitimacy by the preliminary examination of the magistrate. This examination meant, to those of Quarter Sessions and Assizes, that cases were only begun with this examination and were not in the control of the police, defined as outside the ' legal ' system, but under the control of the magistracy - an element of the ' legal ' system. Police activity was again rendered unproblematic for another part of the ' legal ' system who when faced with the question of police misconduct denied that it occurred, or, protested ignorance on the basis that

" these things may be constantly occurring; but they are not brought to the attention of the court. " 135

This left police practices to develop according to the temporal and social trajectory of an cognitive social system securing its identity by differentiation from its social environment and reinscribing that difference as the self-identity of its operations 136. With this went the characterisation, by the police of crime, criminals and the practices, procedures and resources necessary to deal with them.

While, this was a process of evolution largely outside the public perception it was not one which was outside the knowledge of the institutions of the state, particularly the Home Office. The link between the Treasury Solicitor and the Metropolitan and County Forces had already been alluded to and continued to develop during this period into an increasingly normal and unremarkable practice. Contact with the Home Office centred around the requests for extensions to police powers or changes in the police role. Until the 1856 County and Borough Police Act

135. Evidence of Thomas Puckle, Chairman of Quarter Sessions at Stoke Newington(London) in the *Select Committee on Public Prosecutors*, Parl. Papers **1856** Vol. VII, p.375
136. As set out in the previous chapter.

it took the form of representations about establishing a national force as a compliment to the army [137]. With the passing of the 1856 Act a national police force was legislatively produced. It put an end to such plans and desires of Chief Constables, and, with the emerging national character (but not control) of the police came an attendant change in the communications sent to the Home Office. They were now to centre upon the perceptions of the threats posed by the social environment and the extra powers or equipment that might be necessary to deal with this [138].

The Re-emergance of Public Prosecution: The Failure of Attempts at Reform Confronted with the Legitimacy of the Police as Prosecutors in the 1870s

Public Prosecution re-entered the political system, as an issue, in the 1870s with the Bills of 1872 and 1873 which again attempted to establish a system of centrally directed public prosecution. The Bill of 1873 had had to be withdrawn because of too much business in that Parliamentary session. The issue was, however, considered by the Judicature Commission who, in their Fifth Report were to consider the advisability of appointing a public prosecutor.

The Committee were unanimously of the view that a public prosecutor should be appointed. There should be one Chief Public Prosecutor in London with sufficient staff who would direct subordinate public prosecutors in the different districts. The public prosecutor was not to involve himself with matters that where

137. See the evidence of Captain W. C. Harris, Chief Constable of Hampshire, in the *First Report of the Select Committee on the Police*, Parl. Papers **1852-3** Vol. XXXVI, qq. 166 and 217 and the evidence of Captain McHardy, Chief Constable of Essex, in the *Second Report of the Select Committee on the Police*, Parl. Papers **1852-3** Vol. XXXVI, Appendix No. 7, p.154

138. As examplified by the issue of giving the police arms in response to a perceived increase in armed burglary in the 1870s and 1880s see C. Emsley, ' The thump of wood on swede turnip: Police violence in Nineteenth Century England ', *Criminal Justice History*, 6, (1985), pp. 125-49

" as a ***general rule***, all cases that are proper subjects at all, are proper cases to be conducted by a Public Prosecutor. " 139

This statement encapsulates the re-definition of the project of public prosecution which had occurred between the 1850s and 1870s. Whilst the proposed schemes of the 1850s did not envisage total coverage by Public Prosecution, since they excluded summary offences, the conception of public prosecution was one which was articulated as the opposite of and replacement for the system of private prosecution. By the 1870's this had changed. Public prosecution was now conceived as something to ameliorate the flaws of the private prosecution system not to replace it. Public prosecution was now to enhance the present system where this was felt to be necessary otherwise the system was to be left alone. As the Commission stressed at the outset of its Report, it did not conceive its task to encompass the question of

" whether of not any improvement could be made in the present course of administering criminal justice in England; but had considered the scheme for Public Prosecutors as applicable to the ***existing*** criminal procedure. " 140

This meant that the parameters of public prosecution as practice and concept were to be circumscribed by the recognition and acceptance of the perogative of the Crown and the powers of the Attorney-General as representing it, and, that there was to be no interference or diminution in the powers of private persons to bring prosecutions. Any public prosecution system would be established and exist concurrently with the present procedure, and, if it operated effectively then private prosecutions would decline 141 and eventually cease to be instituted.

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139. *The Fifth Report of the Judicature Commission*, Parl. Papers **1874** Vol. XXVI, p.320. My emphasis.
140. *The Fifth Report of the Judicature Commission*, Parl. Papers **1874** Vol. XXVI, p.319. My emphasis.
141. Ibid, p. 320

The Commission's characterisation of the existing system of conducting prosecutions indicates the reason for the diminution in scope and dynamic of the project of public prosecution. The Commission, for analytic purposes, divided the conduct of prosecution into four stages: the investigation to establish whether a crime has been committed and, if so, who possibly could have committed it and whether there are any grounds for charging any individual; the conduct of the case before the magistracy after the individual has been charged where it will be decided whether to commit the person for trial, and whether if they are to be committed whether they are to be released on bail, or remanded in custody until the trial; the conduct of the case after committal but before the trial, and the trial. They recognised that all four stages were, under the present system, conducted either by the police or private individuals who could also obtain the assistance of attorneys and counsel [142].

The Commission regarded the first two stages as legitimately carried out by the police. They did not perceive any problem with the police being engaged in these practices and only recommended that intervention might be necessary in order to afford assistance to the police in these tasks [143]. Little was said about the third stage with the main objection to the existing system seen to be at the trial stage. Here, there was to be found

" an objection to allowing conduct of the case at the trial to remain in the hands of the police. The police are in a great many cases important witnesses, and when a prosecutor is also a witness, there is a risk of this ***becoming biased*** in his testimony. There is reason to fear that in some cases the police are ***really biased*** in their evidence, and it is quite certain that the counsel for the defence very often impute such bias to them. It is therefore desirable that prosecutions should not be conducted at trial by the police. " [144]

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142. Ibid, p.320
143. Ibid, p.321
144. Ibid, p.321.Emphasis added.

The tone and approach to the existing system, and, the police presence and activity within it differs markedly from the analysis and recommendations of the Reports of the 1850s. There, the very presence of the police as prosecutors was in itself illegitimate. Their legitimacy was to be based upon the definition of their role as ' non-legal ' with the ' legal ' role taken over by public prosecutors. The police were to be constituted as outside the legal system. Only in this way was the criminal process to be established on a secure basis in which the discretionary power of prosecution was located within the purview of the institutions of the state, through the centrally organised system of public prosecution.

Now, the police were included as an unremarkable element in the legal system, as covered by the process of conducting a prosecution. They were seen as an integral part of it with this recognition based upon a purely empirical notion of legitimacy very different from that articulated, and, underlying the Reports of the 1850s. The presence of the police as the dominant prosecuting element within the criminal process compared with private prosecutors, parish constables and Prosecution Associations also provides the criteria for their acceptability - mere, observable existence becomes legitimacy.

The definition/control perspective of the 1850s is replaced with a strategic-pragmatic calculation of the effectiveness in each of the stages of prosecution in the existing system. Police prosecutions are known to take place and the fact that they take place no longer appeared to mean that they were a priori wrong. They were simply capable of being made less effective due to the conflation of the roles of prosecutor and witness that a police prosecution entailed which opened up the possibility of an imputation of bias in testimony. This possibility was also the possibility of the reappearance of the question of legitimacy of the police and their practices. The institutionalisation and routinisation of the police and their practices - their normality - depended upon this lack of questioning.

Yet, it was the combination of roles entailed in a police prosecution which was seen as increasingly straining the ability to maintain the legal form of private prosecution premised as it was upon a split between the roles of policing and prosecution. The introduction of public prosecutors would reduce the police, at trial, to the role of witnesses thereby placing them in the same formal position as a private prosecutor. With the removal of the police as witness/prosecutor their collective identity, organisation and practice would no longer have visible, legal expression thereby enhancing the projection of them as similar to the individual citizen with the only difference being that they were merely doing continually and concentratedly where any other private individual would do intermittently.

This represented the majority view of the Judicature Commission with a minority view constituted by the Lord Chief Justice of England, Lord Cockburn. This minority view is instructive for its reiteration of the theoretical foundation for public prosecution, but also the way in which the memorandum has within it a number of contradictions which reflected the extent to which even those who still advocated a system of public prosecution, issuing from Benthamite principles, were affected by the developments with the existing system of prosecution. Essentially, this concerned the dominance over the conduct of prosecutions and the extent to which this was no longer an issue of substantial concern in itself. it had now merely become a practical question of adjusting the existing system to increase its efficiency.

The memorandum began by stating that every crime committed is not simply an injury to the individual affected by it but also one against the state. Given this effect of crime when an offence had been committed

" it ought not to be left to the will or the ability of an individual to institute a prosecution, but such prosecution should be instituted by, and on behalf of the state, through its appointed officer; in other words by the Public Prosecutor. " 145

The present system, on the view of the Lord Chief Justice, by leaving the prosecution to the individual injured meant that prosecutions were conducted according to the interests of these individuals alone without regard for the interests of the state. Many offences were left unpunished , or, if pursued failed from lack of money, legal knowledge or care on the part of the prosecutor.

This represents a standard Benthamite view of the system of private prosecution consistent with the outlook of the Reports of the 1850s. Following this initial concordance a similar system , to that of the 1850s, would seem to be the logical outcome of this perspective. However, it is a measure of the extent to which this theoretical horizon had become separated form a determined, coherent reforming practice that this was no longer its logic. These principles were now subordinate to a socio-logic of recognition of the legitimacy of the existing system and the role of the police within it.

This is exemplified by the characterisation of the conduct of larceny cases in the existing system in the memorandum. These are seen as case in which the

" proofs are clear, and may be collected without difficulty. The evidence it got up, and the witnesses are got together, and brought in the first instance before the magistrate, and afterwards before the court by the local policeman. The evidence having been given, the prisoner is in the first place committed, and the evidence

145. *The Memorandum of the Lord Chief Justice of England on the Advisability of Appointing a Public Prosecutor* in the *Fifth Report of the Judicature Commissioners*, Parl. Papers **1874** Vol. XXIV, p.325

having been repeated on the trial, a verdict of guilty is pronounced, the prisoner receives sentence, and justice is satisfied. " 146

This is seen as an uncomplicated practice which is unproblematic moving as it does form arrest to conviction without difficulty. It is, therefore, a type or class of cases which can be categorised as simple, namely, the process of prosecution moves from its inception with an uninterrupted rhythm. So impressed is Cockburn with this type of case that

" if all offences were of the simple class just referred to, there would be but little necessity for any material alteration in the present system. " 147

it is the more difficult case in which detection and proof are more problematic that the Public Prosecutor is needed to actively intervene.

This active intervention is called for in order to overcome these difficulties of proof of that the case for the prosecution does not collapse because of lack of expertise. The degree of intervention is to be dependent upon the difficulty of the case, or, rather the difficulty of securing a conviction.

" What is wanted is the superintendence, control, and direction, whenever required, fo a superior capacity and judgement. " 148

These functions of the Public Prosecutor depended upon the supply of information form eh police and Cockburn's scheme was to place a duty upon the police as soon as a crime had been committed, or, a person apprehended to report this to the Local

146. *The Memorandum of the Lord Chief Justice of England on the Advisability of Appointing a Public Prosecutor* in the *Fifth Report of the Judicature Commissioners*, Parl. Papers **1874** Vol. XXIV, p.325
147. Ibid, p.325
148. *The Memorandum of the Lord Chief Justice of England on the Advisability of Appointing a Public Prosecutor* in the *Fifth Report of the Judicature Commissioners*, Parl. Papers **1874** Vol. XXIV, p.326

Public Prosecutor. Magistrate's clerks were to transmit the depositions taken at committal proceedings immediately to the Local Public Prosecutor with any remarks that might appear to the clerk to be called for.

The legitimacy of the police in the conduct of simple cases, including their prosecution, that makes the nature of Public Prosecution very different form that envisaged in the 1850s. As Cockburn stated

" I have a high opinion of the police in general. " [149]

Legitimacy of the police was no longer at issue as they were now seen as an integral part of the prosecution process. The practice fo prosecution was the focus of attention, and, it was here that Public Prosecution was to find its domain of operation. It was to enhance the operation of the police to ensure that the case for the prosecution was conducted adequately, namely, that the model of progress of a larceny case was to be adopted as the ideal for all prosecution cases. The movement from charge to conviction was to be made swift, unproblematic and normal since any impediment to this process interfered with the effectiveness of the administration of the criminal process.

The police now seen to embody the interests of the state in so far as they carried out the practice of prosecution with efficiency. It was the adequacy of their practice in the process of prosecution which was to be regulated by the Local Public Prosecutor as their divergence from this standard entailed the failure of the realisation of the state's interests in the administration of the criminal process.

The " New Police " were regularly conducting prosecutions through the bringing of complaints and their binding over to conduct prosecutions by magistrates. This was accepted by the all concerned in the Judicature Commission what was at

149. Ibid, p.325

issue was the maintenance of a particular projection of the criminal process despite this reality. The existence of the police was no longer problematic, as it had been in the 1850s, for the Benthamite project had largely collapsed as a dynamic, driving force in politics. It remained as a repository of concepts which informed and lay behind the dominant political discourse, but ceased to have a direct, determining effect upon political practice. The years between 1850 and 1870 had seen the development of a set of interlocking practices within the existing criminal process between the police magistracy and magistrate's clerks which and become routine and quasi-institutional. It was the embeddedness of these practices which the Judicature Commission recognised even in the minority report of Lord Cockburn. The Commission's validation of these practices was evidenced by the change in tone and purpose of the project of instituting a system of Public Prosecution. Validation was also tied to these practices' efficiency in the realisation of the interests of the state, through the administration of case for the prosecution.

These proposals along with the Bill of 1873 found little strong or widespread support outside Parliament. During the Parliamentary recess in 1873 the Government circulated copies of the amended 1873 Bill to Judges in the Common Law Courts and to Courts of Quarter Sessions. The judges were either in favour of public prosecution in terms of it being means for the more effectual instigation and conduct of prosecutions by the police, or, were opposed to it as it was unnecessary given the effective operation of the present system [150].

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150. See Letters of the Judges to the Secretary of State on the Public Prosecutors Bill, in the First Appendix of the *Fifth Report of the Judicature Commissioners*, Parl. Papers **1874** Vol. XXIV, p.326. Baron Bramwell and Mr. Justice Mellor both support the idea of public prosecution seeing it as a useful addition to the work carried out by the police and magistrate's clerks(pp. 333-334). Baron Cleasby sees public prosecution as of doubtful assistance in the majority of cases where ' either the prisoner pleads guilty, or the case is clear, and proved by a few witnesses, and no care is required in getting up the case ' (p.335). Only the magistrate should decide whether a public prosecutor is necessary in any particular case otherwise expensive and inappropriate procedures and machinery would be introduced. He rejects the capacity of the public prosecutor to control the police saying that the ' police would be more influenced by being impressed by the Magistrates and the Judge with the duty of dealing with every case fairly, and not because thery are in a case, making it a point to carry it through, and so to achieve success. ' (p.335)

Replies form Quarter Sessions were all unfavourable to the ideal of public prosecution. They believed that the existing system of prosecution was perfectly capable of achieving the required concordance between the interests of the state and the practical operation of the criminal process. All that was required in their view were a few minor adjustments to the present system. Public prosecution was an unnecessary and expensive idea for

" the excellence of the police, and the tried experience of the police magistrates and their clerks, render the introduction of Public Prosecutors unnecessary, whilst the large number of cases(many of them of the simplest description) committed for trial would entail an expenditure heavy out of all proportion to the benefits which would accrue. " 151

The system of prosecution as it had developed with the police coming to play the dominant role in the conduct of prosecutions coupled with the judicial examination, committal or dismissal of the accused by the magistrates, assisted by their clerks, had become the accepted and sedimented process whereby what the courts would treat as crime was constructed and constituted. This was a specific articulation of wider acceptance of the legitimacy of the police which the

" policeman came to epitomise(for virtually the entire middle class) security and order, and his assumption of the decisions to charge, investigate and direct the prosecution of most offenders gradually became the English practice....English policemen, sometimes bobbies in court, usually Chief Constables instructing their police solicitors, evidently stepped into the post, quietly, and as part of the long process by which the English police became part of the national landscape in the second half of the nineteenth century. The policed society came to be perceived as the normal society. And the prosecuting constable, or the solicitor acting for him

151. The Correspondence of Mr. E. H. Leycester Penryhn, Chairman of Surrey Quarter Sessions in the *Public Prosecutors Bill: Correspondence between September 1872 and December 1878 with suggestions on the Bills of 1872 and 1873*, Parl. Papers **1875** Vol. LXI, p.541

under the supervision of a Chief Constable, came to be taken for granted as part of the efficiently functioning modern state. " [152]

It was this legitimacy, of the police, magistrates and magistrate's clerks, now unquestioned and unproblematic, which ended any further attempts, after the collapse of the Bills of 1872 and 1873, to introduce a system of Public Prosecution into the English criminal process. The development and evolution of the ' unreformed ' criminal process had now become an intrinsic part of the Victorian social order.

The Prosecution of Offences Act 1879: The Legislative Recognition of Police Dominance within the Projected Ideology of Private Prosecution.

The Prosecution of Offences Act 1879 established the office of the Director of Public Prosecutions who was to supervise and intervene in the system of private prosecution. The Act, and, the proposed activities and sphere of operation of the Director of Public Prosecutions, was not intended to establish a system of public prosecution as envisaged by the Bills and Committee Reports of the 1850s and 1870s.

Far from being a change to the system of prosecution, as had developed by the late 1870s, it was, in reality, little more than the legislative recognition, definition and regulation of these very developments. This was explicitly accepted by the framers of the legislation in the Parliamentary debate over the Bill of 1879.

Asherton Cross, the Home Secretary of the time, articulated the sentiments underlying the Bill's nature and objectives. Beginning with the Lord Chief Justice's Memorandum, to the Judicature Committee of 1874, favouring the introduction of system of public prosecutors on the premise that every offence is an injury not simply to the individual directly affected, but to the community or state, Cross did not deny

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152. D. Hay and F. Snyder, ' Using the Criminal Law, 1750-1850: Policing, Private Prosecution and the State ', in D. Hay and F. Synder ed. *Policing and Prosecution in Britain 1750-1850* (Oxford: Oxford University Press, 1989), pp. 46-47

the validity of this argument(though, he was seemingly unaware of its more contradictory nature in view of its setting within the other statements of the Memorandum - see above), and, characterised it as the type of argument founding a proposal to establish a

" complete scheme of public prosecution by a Public Prosecutor, and it is a scheme to effectuate which several Bills have already prepared; but I am bound to say that I can not recommend the House to face the expense of carrying such a scheme into practice. I look upon that as an extreme view - as a perfect scheme; but I am not prepared to take the responsibility of asking the Hose to adopt the expense which would be incurred by it, and I do not think that the results would be equal to the expenditure...Admitting that all these crimes are offences against the State...I am bound to say, looking at the administration of the law of this country...that, in the vast majority of cases, the present system works quite well enough for all practical occasions. I do not propose, therefore, in the scheme...to interfere in the ordinary and usual run of criminal prosecutions, either at Quarter Sessions or with the Petty cases at the Assizes; but if this scheme is carried into effect, I believe that, without interfering with the machinery at present existing, the general tone and conduct of cases will be raised, and that the standard of the conduct of cases throughout the country will be equalised....the wisest course to adopt...is only to take up prosecutions when it is ***absolute necessary***, in cases of remarkable fraud, or where otherwise a failure of justice would occur, and also in every case where prosecutions would be put an end to collusively. " [153]

The system of prosecution, as it evolved during the early to mid nineteenth century, was now to be left untouched apart from a limited ' supervisory ' role on the part of the institutions of the state, through the activities of the Director of Public Prosecutions. Its evolution was now given retrospective legitimacy by this decision,

153. Parliamentary Debates, HC(3rd ser.), 14th March, cols. 973-976 (1879), Sir Asherton Cross, Home Secretary.

by Parliament, not to overhaul it according to the residual criteria from the exhausted project of Benthamite inspired reform. These criteria themselves were now seen as an ideal from which the activities of societal institutions and the practice of their reform could now routinely diverge.

This divergence, in the case of the existing system of prosecution, rested upon its perceived effectiveness in which ' interference ' was unnecessary because

" as a rule, the present system works remarkably well. Prosecutions go on before the magistrates and are undertaken by the police, and then go to Quarter Sessions or Assizes, and are directed by the magistrate's clerks or solicitors in the various localities. No one complains of the conduct of ..prosecutions. " 154

There was need only for some degree of mild supervision which contained the ability, if necessary, to institute prosecutions. The limits of state, law and prosecution were firmly set by this process of establishing the office of the Director of Public Prosecutions.

The state, basing its legitimacy upon the concept of sovereignty, defined itself by its exclusive ability to make law through Parliamentary legislation. By the 1870s, it had lost, form that Parliamentary system, an expansionary dynamic with regard to the system of prosecution, or, what is was essentially equated with, the administration of justice. The prosecution system, with the acknowledged and unproblematic presence of the police as prosecutors within it, was left to operate according to the logic produced by the interaction of the elements which composed it.

With the affirmation of its legitimacy by the state came the reinforcement of that logic, and, the tacit acknowledgement that the decision to prosecute, and, hence

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154. Parliamentary Debates, HC(3rd ser.), 14th March, col. 981(1879), Sir John Holker, Attorney General.

the sociological validity of the criminal part of the law rested in the exclusive control of the police. That this was tacit is attested to by the maintenance of the description of the prosecution system as private. It was at this point that the term private prosecution ceased to have any basis in reality and moved to the level of ideology. This move, and its continued projection, made this an element within an ideological frame whose function was to act as the central organising principle whose acceptance acted to ' pull-in ' further elements of the ideology. It did more than simply mask the concentration of social power, in the hands of the police, by the typification of the police as merely a different form of private citizen. With its acceptance came the construction of ordinary citizens as empowered actors, and the notion that social regulation is not state-inspired or carried through designated state agents(the police), but is an ordinary attribute of social relations in which some disputes need to be settled through the legal system.

The change itself, envisaged and enacted by the 1879 Act, was merely an addition to the operation of the Treasury Solicitor whose role in the system of prosecution had begun in the early nineteenth century with the Metropolitan Police and increasingly assumed a ' national ' focus of action(see above). The Act created a the position of Director of Public Prosecutions to split the making of decisions to prosecute and the actual carrying out of prosecutions. The Director would make the decisions and the Treasury Solicitor would carry them out. This practice lasted only until 1884 when, as a result of the Report of the Committee Appointed to Inquire into the Office of the Public Prosecutor 1884, the functions of the Director of Public Prosecutions and Treasury Solicitor were amalgamated in the office of the Treasury Solicitor.

The Report itself, is also important for what it reveals about the workings of the Director of Public Prosecutions during this period. Sir John Maule, the person appointed to fill the role of Director of Public Prosecutions, exercised an important

potential through the self-defintion of his role by virtue of the interpretation of the parameters of his discretionary powers of intervention provided under the Act.

Maule defined his ' rule of operation ' of the Director of Public Prosecutions to the Committee, as being

" to give advice in cases of importance and difficulty to justices of the peace, and to Chief Officers of Police, who may apply for his advice in such cases, and to other persons in his discretion, subject to any special instructions which he may receive from the Attorney-General."[155]

He did not perceive the need for any extension to the rules, as he defined them, as the ordinary machinery for conducting prosecutions was sufficient and applicable. It was only where this proved inadequate that his intervention would be called for, or, he would conceive himself as legitimately countenancing his intervention. To do otherwise would be merely

" taking out of the hands of other people, and putting into the hands of those whom I am authorised to instruct, duties which are capable of being sufficiently provided for already. " [156]

The existing system was, therefore, to be left to proceed according to its own logic and not to be the subject of the routine, regular and widespread intervention of the Director of Public Prosecutions. As Maule himself pointed out

" The seventh section of the ' Prosecution of Offences Act 1879 ', contains this material restriction with regard to my interference: ' Nothing in the Act shall interfere

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155. Evidence of Sir John Blosset Maule Q.C., incumbent D.P.P., in the *Report of the Committee Appointed to Inquire into the Office of the Public Prosecutor*, Parl. Papers **1884** Vol. XXII, p.317
156. Evidence of Sir John Blosset Maule Q.C., incumbent D.P.P., in the *Report of the Committee Appointed to Inquire into the Office of the Public Prosecutor*, Parl. Papers **1884** Vol. XXII, p.317

with the right of any person to institute, undertake, or carry on any criminal proceeding '. Therefore, as long as, people elect to carry on their own prosecutions, I have no legal right to intervene or interpose, and it only when they apply to me, and I learn in that way that they wish for my interposition, that that interposition is well-founded or warrantable. " 157

This very narrow conception of the possibilities and necessity of intervention was compounded by Maule's view that only ' important ' cases that is, cases of special difficulty or magnitude were initially matters for consideration with intervention on the grounds of compassion or charity firmly excluded 158. This self-definition of intervention as ' special ' and ' exceptional ' was reinforced by the characterisation of the police as the major and normal prosecution agency ' on top of ' the system of private prosecution who would intervene where a serious offence had been committed, but the injured party lacked the means to conduct the prosecution 159. The presentation of the police within the ideology of private prosecution by Maule was tied to the fact that the practice of the Director differed little for the relationship which had evolved between the Treasury Solicitor and the police.

" In principle, I understand, that the present practice does not differ at all form the former practice of the Home Office; it is only that from your having more leisure and greater means of carrying it out, the thing is more fully and completely done than it could be when it formed part of the general business of the Home Office - Yes. " 160

This meant that the predominant relation between the Director and the police was that of giving advice to the police, when they requested it, on evidence and witnesses. A circular was sent to all the heads of the police forces stating that advice

157. Ibid, p.318
158. Ibid, p.319
159. Ibid, p.320
160. Evidence of Sir John Blosset Maule Q.C., incumbent D.P.P., in the *Report of the Committee Appointed to Inquire into the Office of the Public Prosecutor*, Parl. Papers **1884** Vol. XXVI, p.318

would be given on application. This was merely the recognition of the practice which had already existed, and, with it went the concomitant recognition of the informational dependency of the Director on the police. This informational dependency was also perceived directly by the Director, despite the limited prosecutorial role which he proceeded to exercise, as an institutional relation which the police would maintain due to the belief, on the part of the police that the prosecution would be taken out of their hands

" They do not particularly desire to make applications which may have the result of transferring their bone to another dog? - Yes, that is very true. " 161

The policy of the police was to ask for advice only in cases where they felt themselves unable or uncertain in the execution of the case for the prosecution. These were cases of evidential or legal difficulty usually concerning cases outside the ' normal ' process of prosecution since the substantive offence required a small amount of evidence usually from the policeman or policemen, and, was tried before magistrates alone. This policy strengthened the tendency of the Director to adopt the narrow self-definition since this practice had established itself prior to the creation of his office by the Act.

His role as ' supervisor ' of the existing system was made entirely reactive in this situation of an informational dependency. It was limited to achieving a greater degree of efficiency in prosecution under the existing system, rather than any more dramatic reorientation, or, change in the dynamics of the process of prosecution, and the extent to which even this could be produced was entirely dependent upon the regularity and consistency with which he was consulted. Regulation was what the Director himself self-consciously operated under rather than exercised over the existing system of prosecution.

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161. Ibid, p.324

The Acts of 1884 and 1908: Change as Mere Adjustment

The Prosecution of Offences Act 1884, embodying the recommendations of the 1884 Report, amalgamated the offices of Director of Public Prosecutions and Treasury Solicitor. There remained a firm continuity of outlook and policy between Maule and his replacement, in the newly amalgamated position, Sir Augustus Stephenson. By now, however, there had become a further self-consciously articulated limit to the exercise of the powers of intervention - financial cost.

" The Director of Public Prosecutions has or ought to consider not only (when a discretion is left to him)what prosecutions he should undertake, and their efficient conduct, but also the expenditure of public money involved in his action. It is much easier to spend public money than to save it, and with the expectations entertained by a portion of the public, who look upon him as ' the Public Prosecutor ', whose duty it is, or ought to be, to prosecute in all cases, as to the effect of the Director's action under the new statute, the Director, unless his hands are strengthened by the regulations in the interests of the economy, will not only have every inducement to spend public money, but will have great difficulty in resisting the pressure of private persons seeking to save their pockets at the public cost by taking up cases ' for the proper conducting of which the ordinary mode of prosecution ' is sufficient. " 162

The interests of economy, namely, the theory of political economy was now to govern the operation of the new, amalgamated office. Efficiency and legitimacy were combined through the mechanism of the expenditure of public money. This process of expenditure, determined by a notion of cost-effectiveness tied to the interests of the tax-paying, property-owning public, was so strongly inscribed as the guiding principle

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162. Letter from Augustus Stephenson to the Attorney General, Lord Chancellor and Chancellor of the Exchequer in *Prosecution of Offences Acts 1879 and 1884 including a Copy of a Return showing the working of the Regulations made in 1886 for carrying out the Prosecution of Offences Acts 1879 and 1884, with statistics setting forth the Number, Nature, Cost and Results of the Proceedings instituted by the Director in accordance with those Regulations from the 11th day of June 1886 to the 31st day of December 1886*, Parl. Papers **1887** Vol. LXVII, p.146

that it had effected a diminution of even the very limited interventionist perspective developed by the previous Director of Public Prosecutions. The accent was now on the giving of advice in the conduct of a prosecution. The advantage of this was that it did not involve any cast of the public. As Mr. Cuffe, the Assistant Solicitor who had the principal share of applications made to the new Director and working with the new Regulations (1886) governing the office's operation, admitted

" I myself, finding from experience the usefulness of this course, have adopted it frequently of late. It involves little less trouble than prosecuting to the heads of the Department, who deal with the matter, but as against taking the case up, it saves money and the time of clerks. " 163

With this characterisation of the dominant type of practice engaged in, by the Department, form among the options of taking up the case and carrying on the process of prosecution, giving advice, and, giving assistance by way of contributions to counsel's fees or the expense of expert witnesses, came the admission that the Director was

" not, and is not intended to be, a Public Prosecutor, in the popular sense of the word, and in the sense in which it is used in most foreign countries. " 164

The role of the Director was firmly established as an element of the process of prosecution which was entirely reactive with its reaction dependent upon its utilisation by the police. That reaction itself was very unlikely to involve the actual ' take-over ' of the prosecution by the Director's office. It would instead, in the majority of cases be confined to advice which overcame the difficulty experienced by the police, magistrates and magistrates' clerks which had prevented it form immediately following the path of an ' ordinary ' prosecution. The Director's activity became simply the re-

163. Memorandum of Mr. Cuffe in Ibid, p.172
164. Memorandum of Mr. Cuffe in Ibid, p.172

formulation of these cases so that they would be quickly re-inserted into this ' ordinary ' system in which the case for the prosecution would move, without incident, from arrest to conviction.

The only subsequent change to the Office of Director came with the Prosecution of Offences Act 1908. It was necessitated by the amount of legal business having to be conducted by the Treasury Solicitor's Department, and, the Director having to defend appeals in the Court of Criminal Appeal established in 1907. Practically, it led to the re-division of Treasury Solicitor and Director of Public Prosecutions into separate roles undertaken by separate persons who would conduct civil and criminal business respectively. The re-division prompted, as it was, by internal pressures, did not lead to any change in the practices and conceptualisation of those practices on the part of the newly re-created Director. Continuity was maintained with the development of the Office, from 1879 onwards, now forming the unquestioned background knowledge which determined the way in which policy, and, the concrete practice informed by it was formulated and enacted.

Conclusion

These minor adjustments, of 1884 and 1908, confirmed and re-asserted the confinement fo the institutions of the state to the enactment of substantive law. The enforcement of these legislative decisions - the administration of ' justice ' - was separate and had a centre of gravity outside the direct control of those institutions. The police, as the dominant enforcement agency, were responsible for the maintenance of law - the reintroduction of legality. It was their practices of enforcement which were seen as creating the conditions for the observance of law through the expected level of enforcement of substantive criminal law. This concentration of the potential to enforce the substantive law, through the discretion to prosecute, in the hands of the police was not regarded as being in itself at all

problematic, or, worthy of consideration once the legitimacy of the police themselves had been accepted after the 1850s. Control over the police was not really necessary and was made even less so by the dominant ideological projection of the police as a different form of private prosecutor. It only became an issue when the police decided to exercise the discretion to prosecute which in itself represented only a part of police activity orientated towards enforcement. Even here the issue only became prominent when the type of substantive offence charged required a quantity of evidence exceeding a threshold which would normally be satisfied by the police themselves. The gradual, but continual expansion of summary jurisdiction ensured that this was increasingly rare with this jurisdiction's expedited procedure and growing familiarity between magistracy and police.

Alongside the attempts to institute a system of public prosecution throughout England and Wales, in the nineteenth century, developed a system of prosecution increasingly dominated by the police in which the activities of the institutions of the state took a relatively unobtrusive role. This developing relation between the Home Office, Treasury Solicitor and Chief Constables became the basis for the Office and activities of the Director of Public Prosecutions as enacted in 1879 and subsequently adjusted. It was this Act which, by its recognition of these developments, legitimated them and formally defined the modern mode of prosecution. The dominance of this mode of prosecution and with it the growth, embedding and ascendancy of the police largely shaped the basis of state action itself in the nineteenth century.

With the acceptance of this mode of prosecution came the establishment of a certain configuration and concentration of social power and its denial under the ideology of private prosecution. The exercise and dynamics of this social power, particularly that of the police, and the effect upon those subject to it extending form ' stop and search '(in reality an arrest) to prosecution never became, except tangentially, the focus of attention let alone attempted legislation. The legitimacy of the police role

in prosecution, as established in the nineteenth century, and confirmed by the 1879 Act conferred a concomitant legitimacy upon police activity. These was little need, therefore, to raise the question of the activities of enforcement conforming to an externally imposed normative framework and the nature of that imposition and control. Moreover, silent throughout this whole period are the interests and perspectives of the defendant who disappears as a substantive issue one the question of public prosecution comes to focus exclusively upon the system of prosecution and its effectiveness in obtaining convictions.

CHAPTER THREE

REMOULDING THE OBJECT OF PROSECUTION: THE POSITION OF THE DEFENDANT IN THE CRIMINAL PROCESS DURING THE NINETEENTH AND EARLY YEARS OF THE TWENTIETH CENTURIES

This chapter examines the position of the defendant during the period in which the criminal process was affected by substantial changes. These changes produced the basis for the further development and evolution of the criminal process, and, established, as an intergral part of this, a firmly demarcated position of ' defendant ' which any person ' fed-in ' to the criminal process, by the decision to prosecute, would immediately assume. This more rigorous ' fixing ' of the position of the defendant was part of wider project of alteration and restructuring of the criminal process, in which discretion and the relation between criminal law and society were to be profoundly rethought and reshaped. This project was dominated by the concern to make the criminal process more efficient. This concern flowed from a perspective which was a matrix composed of disciplinary, systemic and efficiency values in which the defendant assumed a place as an object to be processed. The trial was to be the predominant and critical site for this processing with those activities which brought the defendant to trial and the evidence which was to be the basis for the determination of her/his guilt being regarded as pre-trial practices which could have no impact upon the outcome of the trial itself. These pre-trial practices came to be ones which were increasingly carried out by the " New Police " as an integral part of their evolution and development during this period. This resulted in the legal system's disengagement from controlling and reviewing police practice which was to be the exclusive determination of whether the person was to be ' fed in ' to the criminal process as a defendant. The period, as a whole, marks a fundamental change in the operation and structure of the criminal process. yet, it is a change which manifests itself in the introduction, maintenance and reproduction of a fundamentally disciplinary practice.

The first section deals with the position of the defendant in the criminal process at the beginning of the nineteenth century. It outlines the procedure that confronted the defendant, which depended on what the defendant was charged with, and the dynamics of the trial procedure itself and its interrelation to the type of authority and social power that was exercised during this period. The changes to this system, along with the perceptual schema which underlay it, are set out in the second section. Here, specific attention is given to the 1836 Commission Report on the representation of the defendant by counsel insofar as it reveals this more general perspective, and, its concentration on the conceptualisation and characterisation of the position of the defendant. The third section deals with the reality and nature of the criminal process in the early to mid nineteenth century. It focuses on the results of both this reform process, and, the other attendant reforms and developments within the wider criminal process in order to establish the reformed system's logic and the position of the defendant in relation to it. The fourth section deals with the 1898 Criminal Evidence Act which gave the defendant the capacity to become a competant witness able to give evidence in her/his defence case. This is presented as part of the earlier ' programme ' of reform and as its essential completion. The section seeks to demonstrate that the Act itself had no dramatic impact on the criminal process, in terms of a marked expansion or contraction of the defendant's position or capacity, because of the nature of the development of the criminal process (particularly the expansion of summary jurisdiction) during the preceding part of the nineteenth century. With this completion of the ' programme ' of reform the basis for, and parameters of, the development of the modern criminal process were laid. It is within this context that the Poor Prisoner's Defence Act 1903, is considered, in the fifth section, as it represents the first coherently articulated confrontation between the system imperatives of this reformed criminal process and an emergant discourse which conceives the defendant's position in terms of rights. The success of the system imperative perspective in this debate, and, its shaping of the Poor Prisoners Defence Act 1903, is tied to the projection of the trial as the incarnation of ' justice ' through

its sole and exclusive determination of the guilt of the defendant and the consequent neglect of police practice.

The ' Old ' System: Criminal Procedure and Trial in the final period of Ancien Regime England

The type of trial procedure into which the defendant was placed, during the later eighteenth century, rested upon the characterisation of the defendant's alleged offence by the substantive criminal law. The substantive criminal law - an admixture of common law and statute - operated with a binary scheme of classification offences. They were either felonies or misdemeanours. Felonies covered those offences regareded as being more serious, and, misdemeanours those of a less serious nature.

a)Felony Trials

Felonies had to be prosecuted formally and justices of the peace, acting as examining magistrates, were to ensure that the trial of a defendant could occur by either committing the defendant to goal or by binding over the defendant to appear in court when the trial was to be held. Also, justices of the peace would bind over any witnesses who were felt to be important, to give evidence at the subsquent trial. The trial itself would take place either at Quarter Sessions or Assize Courts both of which had judges and juries as an integral part of their trial procedure. These trial procedures placed the defendant within a highly discretionary framework in which prosecution and the nature of ' legal ' evidence were entwined, intermingled and regulated by a wider social logic.

The complainant related his/her description of the ' events ' and this was supported in its material particulars by any wintesses bound over to testify by the examining magistrate. The trial judge would intervene in the course of this process in

order to produce a clear and certain narrative of the alleged ' events '. At the conclusion of the prosecution case the defendant was asked by the trial judge whether he/she had anything to say about the case set out in the prosecution narrative as a whole, or, whether he/she had any questions of address to any of the prosecution witnesses.

It was extremely rare for the defendant to challenge the validity of this narrative. For, the defendant was in a weak position within the trial:

" The impression given by the printed accounts of trials, however, it that few prisoners put up a very vigorous defence. Everything was against their doing so in an unfamiliar and overwhelming setting and after a long confinement [in the county gaol ro house of correction awaiting trial] in which they had no necessary knowledge of the precise charge against them. It was of course especially difficult for those who had confessed to the crime before the examining magistrate, in particular when the magistrate was in court to certify to the authenticity of the confession and that it had been given and read to the accused before he signed it. Examining magistrates were not often in court, but confessions were still introduced with devastating effect by prosecution witnesses. Perhaps even more difficult to surmount was the direct evidence of an accomplice. By the mid eighteenth century such evidence was normally thought to be insufficient in itself to convict....But point was still perhaps open to dispute: at least there are cases reported in the printed accounts of the Surrey Assizes(though they are not of course official or necessarily complete)that suggest that some judges allowed juries to convict on the unsupported testimony of accomplices. " [165]

The ***formal*** validity of the prosecution case was, therefore, established with rapidity by this trial procedure. This ' formal guilt ' was then confirmed or rejected by

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165. J.M. Beattie, ' Crime and the Courts in Surrey 1736-1753 ', in J.S. Cockburn ed. *Crime in England 1550-1800* (London:Methuen, 1977), 156-176(p.166). See, for a more detailed account, Beattie's *Crime and the Courts in England 1660-1800* (1986)

an interrogation of the character of the defendant. Formal aspects of criminal procedure were not firmly distinguished from social proximity and relations of rank with the result that character witnesses were of central importance to any defendant's case. This ' character ' of the defendant was, in reality, defined by her/his place within the community and her/his behaviour within it. The situation of the defendant, within the social hierarchy of the communities of the *ancien regime*, was the source which was regarded with the most attention, and, had the greatest effect within the trial and upon sentencing. For, they confirmed that the defendant was of ' good character ', but this confirmation, because of the nature of the social order, did not rest upon the content of the information itself, rather upon the social status of the character witness himself. The higher the social status of the defendant's character witness(es) the greater the likelihood that their ' good character ' would be confirmed (as well as the greater likelihood of the trial judge treating the witness and their evidence as credible) as it demonstrated, in a social order in which authority and knowledge of the community were located in the highly personalised ***substance*** of authority of the person in the position of clergy, magistracy and gentry, that their ability to remember the defendant attested to defendant's status as a respected member of the community. Respectability meant individual traits of regular employment, hard work and honesty coupled with a recognition and demonstration of her/his support for the wider social order by deference to these individuals whose personalised authority embodied the social power exercised and reproduced at the level of the community.

A lack of place in the community, or, ' bad character ' within a community(as an essential element of the prosecution case) acted as the confirmation of ' formal guilt ' of the defendant, hence, their ' real ' guilt.

" infinitely worse off was the man who had no witnesses at all, no one to establish his place within a community, to give him roots. A vagrant could expect little mercy if the case against him seemed at all clear; nor could a man who had given

his neighbours trouble, especially if the prosecution had made a point of his bad reputation in developing the case against him. " [166]

That this was the logic reproduced by these trial procedures was a result of the relation between the trial judge and the jury. The prosecutor entered the legal framework in which, to establish a case, a wrong had to be alleged for which a remedy was sought. The prosecutor had no rights conferred by common law or statute, which were capable of being infringed by the alleged actions of a defendant, for this would have presumed a concept of legal personality which was alien in the eighteenth century. The law was maintained not by action based upon rights subsisting prior to or as an integral part of a coherent, unified and universal legal system, but was the result of the specific determination of the trial itself. The allegation of the wrong was to be redressed by the court thereby creating law, through its decision, after the ' event ' had occured.

The trial, therefore, dealt with the task of definition raised by the allegation of the offence. The allegation of the offence was not, itself, a problem.

" The problem lay.....in showing that a wrong had occured, which required the production of correct and convincing evidence. Thus, the law lay in the correct allegation of a wrong and in the remedy produced by the court. " [167]

This meant that the trial judge assumed the dominant role in this process of law-making. The parameters of this judicial power were highly discretionary reflecting the nature of social power and the legitimacy of political authority in *ancien regime* England. Law and society were intimately intertwined with the legitimacy of the of the judge embedded in his person. The foundation of his flowed from his

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166. J.M. Beattie, ' Crime and the Courts in Surrey 1736-1753 ', in J. S. Cockburn ed. *Crime in England 1550-1800* (London:Methuen, 1977), 156-176(pp.173-174)
167. M. Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford:Clarendon Press, 1991), p.55

person and its logic was, therefore, essentially social. For, it was not governed by its conformity to externally imposed legal rules or a core set of principles, but obeyed a regularity which issued from judicial practice itself. The law developed from within this practice, in which decisions to settle particular disputes were the mechanism by which the regularity of this practice was made explicit, and from which a tentative body of ' rules ' could be articulated. These ' rules ' were not fixed since they did not themselves direct or determine judicial practice, but were merely deductions from a generally immanent regularity of practice. They simply represented an attempt to establish an intentional and deliberate coherence, within judicial practice, so that a stable expectational framework could be developed with regard to it. this process of explication and formulation always lagged behind the reality of judicial practice directly linked to the dynamics of the surrounding social order through the presentation of alleged wrongs by prosecutors seeking a remedy.

The nature of judicial activity, at the trial, was that of a disposition. Not a product of rational, conscious calculation, but the product of a practical sense. This, in turn, meant that, formally and in the abstract, in conformity with the rest of the common law it presupposed

" a permanent capacity for invention, indispensible if one is to be able to adapt to infinitely varied and never completely identical situations. This is not ensured by mechanical obedience to the explicit codified rule(when it exists)....But this freeodm of invention and improvisation...should not be discusssed in terms of spontaneity and constraint, freedom and necessity, individual and society...the feel for the game is the social game embodied and turned into second nature...as society written into the body, into the biological individual, [which]enables the infinite number of acts of the game - written into the game as possibilities and objective demands - to be produced; the constraints and demands of the game...***impose themselves*** on those people - and those people alone - who, because they have a feel for the game, a feel that is, of the

immanent necessity of the game, are prepared to perceive them and carry them out. " [168]

The constraints and demands of the trial became, after 1736, both more pressing and more specific, with the large number of capital offences created by Parliament. The relation between the statute and the common law had always been an uncertain one, within the common law tradition as a whole, but their effect upon the felony trial was dramatic. They made the substantive law more rigid by increasing the number of offences punishable by death. The common law element of the criminal law had never strictly specified the punishments that attached to offences

" for since the system was based on procedures for an infinity of circumstances, it was felt that just as what constituted a crime could vary, so could the punishment. " [169]

This created a situation in which an increased number of defendants were brought to trial, before Courts of Assize and Quarter Sessions, alleged to have committed offences which, if established, carried the death penalty [170]. It was in this context that the relations between the the trial judge and the jury were formed in the mid to late eighteenth century. Traditionally, the jury was to be composed to individuals who had knowledge of the community in which the alleged offence took place, and, particular knowledge of the accused and prosecutor. In practice, by the mid to late eighteenth century, this was no longer the case

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168. Pierre Bourdieu, In Other Words: Essays Towards a Reflexive Sociology, trans. M. Adamson, (Oxford:Polity Press, 1990), p.63. See also on this Bourdieu's The Logic of Practice, trans. R. Nice (Oxford:Polity Press, 1992)

169. M. Lobban, The Common Law and English Jurisprudence 1760-1850 (Oxford:Clarendon Press, 1991), p.55

170. Beattie, in ibid pp.157-8, shows that between 1736 and 1753 a third of all the defendants tried, before the Surrey Court's of Sessions and Assize, were alleged to have committed offences which were punishable by death.

" jurors were drawn largely from the neighbourhood not of the crime but of the meeting-place of the court....the same jury heard most of the cases throughout an entire court session. Prisoners were arrainged in groups of a dozen or more and one panel of jurors were charged with them; but most often at the Surrey Assizes when the first trials were completed substantially the same panel of jurors were given another group in charge...normally the jury that ended the Assize session differed only by a few men from the dozen who had heard the first case. " [171]

The maintenance of a permanent jury, throughout the court's session, was reinforced by the small number of persons from whom potential jurors were drawn. A property qualification combined with selection from a limited geographical area produced this narrow group. The extent of its size can be gauged from the fact that many potential jurors were called upon with a certain regularity leading to a situation in which it was rare for any jury to be without those who had already had previous experience of jury service.

Jury practices were given a greater degree of regularity by these developments which, in turn, were a part of the consolidation of the role of the jury during the eighteenth century. Jury practices were brought under further control, while, the inviolability of the general verdict was maintained [172]. The jury was seen as an integral part of the criminal trial, but it was the judge who played the leading role. For, it was he who determined whether the prosecutor's allegation of wrong(lodged in terms of the commission of a felony offence by the accused defendant)was of substance, through his examination of prosecutor, prosecutor's witnesses, the defendant and any character witnesses on behalf of the defendant. His view of the case was clearly articulated through this process of examination and the judge's directions to the jury were equally clearly expressed:

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171. Beattie, Ibid, pp.164-5

172. See, for a detailed developmental history of the jury, Thomas A. Green, *Verdict According to Conscience:Perspectives on the English Criminal Jury 1200-1800* (Chicago:University of Chicago Press, 1985)

" the judge's directions to the jury were brief, but pointed and leading, if not coercive...the jurors...deliberated briefly and reached verdicts that largely accorded with the bench. " [173]

The felony trial was characterised by a unanimity between the judge's view and directions and the verdict of the jury. As a result, the time which was spne on the routine felony trial was short, with a number [174] being conducted during each day of the Assizes or Quarter Sessions.

The increase in the number of offences of felony which carried the death penalty during the eighteenth century, produced a more rigidly defined substantive criminal law. The parameters of judicial practice were, therefore, placed within a more clearly defined and structured situation. It became a matter of determining the applicability of the punishment to the individual defendant rather than, as in the case of the rest of the common law, a variable definition of wrong and remedy tied to the immanent logic of judicial practice. The establishment of the defendant's ***formal*** guilt now increasingly entailed the ***formal*** applicability of the sentence of capital punishment. This led to the increasing stress, within judicial practice, on the defendant's character and nature of the offence itself. These elements provided the ***real*** grounds for the judicial indication to the jury that the defendant should not be found guilty, or, for them to exercise mercy. In practice, they tended, to be expressed by the judge as a weakness of the evidence on the part of the prosecutor, or, false testimony by the prosecutor or prosecution witnesses. The determination of guilt or innocence was now intermarried with the issue of the appropriate sentence.

The jury was placed in the role of the principle institution of mitigation. Guided by judicial recommendation, the jury was seen as possessing a substantial

173. Thomas A. Green, ibid, pp.270-1

174. Beattie, ibid, estimates that fifteen felony cases a day was easily within the parameters of the Surrey Assizes or Quarter Sessions. This, he further estimates, when seen within the context of the other matters which concerned these court sittings, ' ensured that no time was wasted once a prisoner was actually put to his trial '(p.166)

degree of discretion in its own right since it was the institution, in the trial procedure, which had the task of ennunciating the trial's view of the defendant through the verdict. The severity of the substantive law was to be subordinated to the dynamics of judicial practice and jury verdicts. The law was applied selectively following a judicial logic which demanded the examination of particular circumstances and character of the defendant, and, a jury practice which was seen

" as assimilating the judicial inclination to mitigate the rigours of the law to its own independent process of deliberation. " [175]

The threshold of proof, which the narrative of the prosecutor and prosecution witnesses attempted to fulfil, was exclusively situated within the practice of individual trial judges. The location of this threshold was not fixed, but moved according to the influence exerted, through the judiciary's system of dispositions and the jury's process of deliberation, by the surrounding social order.

Theses intervened to create a degree of observable regularity between perceptions of increasing crime and higher rates of conviction and punishment. Beattie demonstrates that in

" the three periods identified...as years of moderately high crime(before1739), of wartime decline, and post-war increase(after 1749)juries can be shown to have leaned towards a higer conviction rate when crime was high and to have been more favourably disposed towards aquittals when the level appeared to fall; and within the limits that it was possible, judge's sentences varied similarly. " [176]

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175. Thomas A. Green, ibid, p.287

176. Beattie, ibid, p.176. As Beattie points out these variations could be quite dramatic. Defining conviction as both guilty and partial verdicts, of grand and petty jury decisions, he produces a more general measurement of the willingness to convict according to these periods of crime: 53% before 1739, 47% during the war, 61% 1748 onwards.

b)Misdemeanour Trials

Misdemeanours represented a very diverse collection of offences which related to property, public order and ' morality '. Unlike felonies where formal prosecuton had to be ensured; and; it was illegal for the victim to ' compound ' the felony by accepting damages from the perpetrator in return for an undertaking not to pursue the prosecution, misdemeanours were typified by a discretionary decision over both the decision and method of prosecution.

" While the indictment was the only legally recognised method of prosecuting felonies, misdemeanours could be(and were frequently)prosecuted using less formal procedures. Plaintiffs could choose form informal mediation by a justice of the peace, binding over by recognisance, and summary conviction(with punishment by either fine or commitment to a house of correction). These alternative procedures....were used far more often than indictments for prosecuting misdemeanours. Since each procedure involved different facets of the law and resulted in contrasting costs and consequences, the choice of procedure was important and it allowed plentiful opportunities for social considerations to influence legal strategies. " [177]

The potential prosecutor was presented with two ways of initiating the processing of her/his complaint. An indictment could be presented to the next sitting of the petty sessions, but this necessitated the prosecutor waiting for the indictment to be approved by the grand jury before it could be proceeded with. Alternatively, the justice of the peace could be contacted outside the sessions by the potential prosecutor. This enabled a wider choice of potential procedures to the prosecutor as the justice of the peace had more modes of dealing with the matter outside the sessions, and, these could bring pressure on bear on the accused far sooner than by proceeding by indictment. The justice of the peace heard the complaint and decided

177. R.B. Shoemaker, *Prosecution and Punishment: Petty Crime, and the Law in London and rural Middlesex c.1660-1725* (Cambridge:Cambridge University Press, 1991), p.8

whether it had any merit, and, if so, woudl intiate one of three modes of procedure: informal legal mediation, binding over by recognisance or dealing with the matter under their summary jurisdiction

The link between the particular misdemeanour offence alleged and the modes of procedure available to deal with them was not governed by formal rules. Most procedures were available to deal with any of the misdemeanour offences that existed. The link between them was supplied by the interpretative practices of the justices of the peace, unless the prosecutor proceeded by indictment where it centred on those of the grand jury.

" Despite the increasing specificity of the criminal law during this period, there was ample scope for flexibility, and in practice many offences were interpreted very broadly. " [178]

Proceeding by indictment was the most expensive [179] way for a potential prosecutor to initiate action in a misdemeanour offence compared with the other modes of procedure that were available. During the eighteenth century it came a mode of procedure which was to concentrated specifically against peace and property offences, particularly those of assault. This increasing focus and concentration upon certain categories of offence by those who proceeded by indictment was linked to a period of considerable expansion of the summary jurisdiction of justices of the peace in the eighteenth century. It came to utilised more frequently as an alternative to the other, more formal legal procedure of indictment which was available to the potential prosecutor. The justices of the peace were empowered to deal summarily with offences when authorised by statute. This allowed them individually or in pairs to convict defendants without the need for wither a jruy or referral to Quarter Sessions. The offences which could be tried in this way overlapped with many that could also be

178.Ibid, p.40

179. See, Shoemaker, ibid, p.140ff., for a detailed description of the procedural costs which the potential prosecutor faced when initiating a trial by indictment.

tried by indictment, and, were punishable by a sentence of a fine, whipping, or placement in a house of correction.

The justice of the peace was the locus of power and authority within this region of the criminal process. The degree of activism of an individual justice of the peace determined to a great extent the rate and regularity with which prosecutions were allowed to proceed, and, the mode under which they would be dealt with. The disposition of the justice of the peace was the ***real*** principle which governed the degree of intervention, of this area of the criminal process, into the surrounding social order. Therefore, the pattern and logic of this intervention was a social one which did not concern itself with conformity to express, explicit and formulated rules. It was the product of a highly personalised form of social power and authority whose boundaries and parameters were exclusively determined by the intentions of the individual justice of the peace. The predictability of teh actions of the justice of the peace, or, from the potential prosecutors perspective, the degree of co-operation that was afforded, was essentially based on

" a generative spontaneity which asserts itself in an imporvised confrontation wtih ever-renewed situations, it obeys a practical logic, that of vagueness, of the more-or-less, which defines one's ordinary relation to the world. " [180]

This type of practice was characterised by a practical sense which moved from case to case at the level of allegation of wrong to punishment without consideration or attention to the concept of general law. It remained vague and indeterminate because it was not deliberately differentiated from its surrounding environment by clear conceptual boundaries or procedures. This made it extremely sensitive and attentive to the demands to the surrounding society in which the capacities of this region of the criminal process were entwined with its fluctuating perceptions of ' criminality ' and '

180. P. Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology*, trans. M. Adamson (Oxford:Polity Press, 1990), p.78

disorder '. The potential prosecutor's experience of the flexibility of this part of the criminal process was one moment of this.

Misdemeanour offences placed the defendant in an environment which was even more attuned to the demands of the individual prosecutor and the variability of the societal concern with crime than that of the felony trial. If proceeded against by indictment the defendant would commonly plead guilty when it was first issued, or, at subsequent sitting of the sessions. The regularity with which this was done, by individual defendants, was directly linked to their position in the social structure. For,

" [r]egardless of their actual guilt or innocence, defendants had good reason to plead guilty to misdemeanour indictments: the prohibitive cost of a jury trial. At 12s., the minimum court fees for defending a plea of not guilty amounted to more than a week's wages for most lower-class defendants. These fees would be reduced to four-fifths, and the number of appearances in court cut in half, by pleading guilty. " [181]

This link between poverty and pleading guilty was perceived by the justice of the peace at the petty sessions and they gave further encouragement to it by offering defendants the expectation of a lower fine if they pleaded guilty. This applied to both those who pleaded guilty and those who subsequently did so, as Shoemaker demonstrates when the amount of the defendant's fine after a plea of guilty is compared to that given after a defendant had been convicted by a jury at the petty sessions.

" In sum, the most striking feature of the verdict of defendants indicted for misdemeanours in Middlesex is the large number of guilty pleas, which account for two-thirds of all verdicts, and the high proportion of small fines meted out to defendants who pleaded guilty. " [182]

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181. R.B. Shoemaker, ibid, p.152
182. Ibid, p.155

Despite the cost involved in prosecution by way of indictment there was, therefore, a high probability of obtaining a conviction if the case was taken through to the final verdict. It was a situation in which the defendant had few options(which, in turn, declined if the defendant was poor). Formal guilt could be established easily, as with felonies, at any subsequent trial of the indictment, and, since none of the offences carried the death penalty this area of the criminal process maintained, in conformity with the rest of the common law, a high degree of flexibility in regard to both the definition of misdemeanour offences and the applicable sentence. Once placed within the system, the defendant was unlikely to be found innocent, if he/she could afford the expense of a trial, and was encouraged by the system itself to plead guilty.

The summary jurisdiction of the justice of the peace was even less of a formal procedure. It rested entirely on an approach to a justice outside the formalities of the petty sessions. The process of initial consultation between the potential prosecutor and the particular justice of the peace determined the availability of the summary procedure in each case. If the summary procedure was afforded to the prosecutor this was tantamount to conviction of the defendant. For, the move from consultation and assessment of the potential prosecutor's case by the justice of the peace to the selection of the mode of procedure was immediate and rested entirely with the intentions of the justice of the peace. Depending upon the type of misdemeanour offence, conviction was based merely on the justice's view of the case after consultation with the potential prosecutor, or, with the additional testimony of one or two witnesses under oath. The defendant played no part in the actual process of determination of her/his own guilt other than as the named individual alleged to have committed the offence. Her/his existence apart from this was of no relevance to the summary procedure. The immediate and informal nature of this mode of procedure wher4e punishment followed directly upon conviction was unconcerned with the defendant's own case or version of events. Its logic and orientation were structured to the demands of prosecution. The practices of the justice of the peace, which

determined the guilt and punishment of the defendant, provided a very adaptable mode of social control which could be used by groups of prosecutors, parish constables or informers. The reorientation of this practice from the settlement of individual disputes to the disciplining of the underclass of the *ancien regime*, occured in relation to those misdemeanour offences which were victimless and concerned with matters of public order and ' morality '.

" Prosecution of offences such as ' idle and disorderly ' conduct, nightwalking, prostitution, and keeping or frequenting an unlicensed or disorderly alehouse (offences which were thought to be the roots of serious crime) fluctuated as public and official concern about these offences waxed and waned. As victimless offences, they were most likely to be prosecuted at the instigation of parish officers or informers, and both had many reasons not to apprehend or report offenders. When justices or respectable inhabitants of a neighbourhood demanded action against these offences, however, the fact that most such offences could easily be prosecuted summarily facilitated concerted campaigns of arrests and prosecutions of the community's underclass of vagrants, beggars and unemployed. " [183]

c)The Criminal Trial in the context of Ancien Regime Society

The felony and misdemeanour trial procedures of the eighteenth century were ones in which the trial judge and justice of the peace, respectively, operated according to a purely practical logic in which their decision-making, flowing from the the fact that legitimate authority was equated with the particular individual who held the position of the judge or justice of the peace, reflected the intentions, perspectives and concerns of the individual incumbent. The substance of authority of the person was the form in which social power was legitimate, and, hence the regularity and consistency of their decision-making was not based, or founded upon, their degree of conformity to a set of general, formal legal principles. Law and society were, as a result, not highly

183. R.B. Shoemaker, ibid, p.313

differentiated since the selection and decision-making of these individuals did not occur in accordance with a set of explicit rules established to achieve, by their imposition and articulation, regularity, and predictability in these trial procedures. This found its concomitant expression in the substantive criminal law. It was neither viewed, nor did it find expression as an abstract, universal form which imposed a duty whose actual content was arbitrary and contingent and had no essential link with this form. For, society was not conceived as being maintained and reproduced merely on the basis of the functional indispensibility of legal norms as an abstract, universal form. The criminal law evolved in accordance with a judicial practice which viewed human society as a heirarchy having a natural origin and truth. The human individual was not regarded as an abstract, universal subject within a society in which human relations were essentially contingent and any law was possible. It was a social order in which society was the established ' constitution ' of Anglican Church and State and from this reality could be inferred a divine order and origin of the State [184]. The society was, therefore, projected as essentially static and unchanging because the social hierarchy was of divine origin. This was articulated in the form of ' an argument from design '

" classically in Paley's Natural Theology(1802): from the watch we infer a watchmaker, and so on through the whole natural realm, including the State and political affairs. The proper(and divinely ordained)function of things(including political institutions)could thus still be inferred from their actual functions:a doctrine of powerfully conservative implications and one which was used by Paley and most of his contemporaries to conserve the established constitution in Church and State. ' Law and order ' meant to them, its successful defence. " [185]

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184. See on this J.C.D. Clark, *English Society 1688-1832:Ideology, social structure and political practice during the ancien regime* (Cambridge:Cambridge University Press, 1986), chapter 2, pp.42-118.

185. Ibid, p.80. William Paley was an important representative of the Anglican clergy(1743-1805; Fellow and Tutor of Christ's College, Cambridge, 1766-76; Archdeacon of Carlise, 1782-d.[Clark, p.57, n.47]) who with others(William Jones, Samuel Halifax, Richard Watson, Rev. John Whittaker, Dr. Samuel Horsley), articulated, what Clark terms, the social theory of elite hegemony.

The increase in the number of felony offences which carried the death penalty, from 1736 onwards, was part of the maintenance of this social order. The ' threats ', to which these capital statutes were a response, were perceived as a challenge to the material interests of the aristocracy and gentry, but the framework, within which these ' threats ' were conceived, was one in which the material and religious were one. Theft of wood from enclosed land, poaching or the stealing of crops/vegetables from a landowner's property did not merely represent an offence to the invidual affected, it also challenged a divine, heirachical social order founded upon social subordination and political obedience. It was a sacred constitution defended by the death penalty as Assize sermons made clear. Individuals were reminded of the intimate connection

" between religion and government; that the latter flowed originally from the same divine source with the former, and it was, at the beginning the ordinance of the Most High." [186]

This then made the trial judge and the justice of the peace, not a civil person of authority who acted as an ally to religion, but rather a minister of God, whose individual incumbents were acting with God's authority invested in their person.

It was here that the source and nature of the power and authority of judges and justices of the peace, coupled with the delineation of the position of the defendant, were located. The central position and dominance of the trial judge and justice of the peace in felony and summary trials was the corollary of the subordinate position of the individual accused who was subjected to this form of power and authority. It is the very dependence of the accused on the judge or justice of the peace that constitutes the defendant as a subject of the law by her/his subjection to this authority. This authority of the judge and jsutice of the peace translated itself into

186. George Horne (1730-92); Fellow of Magdalen 1750-; President 1768-;chaplain-in-ordinary to George III 1771-81; Dean of Canterbury 1781; Bishop of Norwich 1790, Clark, ibid, p.221, n.60), Discourse XXIV, ' The Origin of Civil Government ', in *Discourses on Several Subjects and Occasions*, 4vols (Oxford, 1787,1793,1799,1803,1824,1827), II, 434. Quotation from Clark, ibid, p.223. This was originally an Assize Sermon.

a form of power that was founded upon itself and hence was without limits, other than those which were produced within the practical field of its operation. The trial, whether for felony or misdemeanour, had the same way of viewing the defendant - the defendant's position was a function of this power structure. The way in which he/she was treated at the trial, as an object of prosecution and knowledge, linked the trial to the wider totality of social relations and power structure of *ancien regime* England. The defendant was observed and scrutinised at the trial (the process of scrutiny itself varied with the felony trial being far less cursory than the summary trial of a misdemeanour, by a justice of the peace). This process was one moment of the general form in which knowledge was generated in *ancien regime* England. In a hierarchical society, whose gradations defined the place of the individual, the practice of human observation formed the basis upon which the dominant strata sought to maintain their position within the upper position within the hierarchy. However, it was not exclusively generated within, and confined to, these dominant strata themselves, but extended over the whole of the hierarchical social structure. It was a form of knowledge which was closely focused upon social reality and never considered the individual person as an entity who occured prior to this social structure. As an individual was never perceived

" as a being deriving his essential regularities and characteristics from within. Rather, the individual is always observed in....society in his social context, as *a person in relation to others.* " [187]

This process of observation was concerned to generate enough information to form a description of the individual. The prosecution narrative was, therefore, both an allegation of an individual act of transgression of the parameters of the social order, and, the basis from which the accused could be placed within the social order. ' Character ' was the particular definition given to this knowledge within the trial process. Since it was a form of knowledge which arose from within the social order

187. N. Elias, *The Court Society*, trans. E. Jephcott (Oxford:Blackwell, 1983), p.104

its ' truth ' or credibility, at the trial, was not viewed as independent of that social order. Hence, the information supplied by character witnesses for the defendant at a felony trial was preceived as having greater weight, or, ' truth ' in direct conformity with the position of the character witnesses within the social order [188]

The way in which the defendant was viewed and managed by the modes of trial in the eighteenth century was one aspect of, or, ' materialisation ' of the wider political and philosophical conception of the subject within *ancien regime* England. The individual was held to be subjected to the power of another. It is this which makes her/him a subject, and, had nothing to do with the notion of an equation between the subject and the question of right. The subject is defined by her/his place within a system of internal and external powers. He/she is not primary and self-constitutive, but always and already belongs to a social order in which the definition of the subject is equated with the definition of obedience. Obedience is to the King and God as the pinnacles of this system, but it is alos in existence throughout the society in a hierarchy of social relations of dominance and subordination(master/servant, landlord/tenant, clergyman/congregant, magistrate/subject, employer/worker). So common were these relations held to be that they were projected as the divinely ordained model of the social order, and, hence, the natural and proper order of things.

The proper function and operation of things and political institutions were directly inferred form their actual operation in which the society and institutions were not the product of free, human action, but the conformity and entwinement of God's will with the extant political institutions. The origin of the State is, therefore, divine. The individual subjected to the power of another is represented as a collectivity in the form of set of subjects within a hierarchical social order linked by obedience.

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188. See, D. Hay, ' Property, Authority and the Criminal Law ', in D.Hay, P. Linnebaugh, E.P. Thompson ed. *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London, 1975), 17-63, on the way in which this intermeshed with and reproduced the hegemony of aristocracy, gentry and clergy, and, hence, the social order.

" Obedience is the principle, identical to itself along the whole length of the hierarchical chain, and attached in the last instance to its transcendental origin, which makes those who obey into the members of single body. Obedience institutes the command of higher over lower, but it fundamentally comes from below: as ***subditi***, the subjects will their obedience. And if they will it, it is because it is inscribed in an economy of creation(their creation)and salvation(their salvation, that of each taken individually and of all taken collectively). Thus the loyal subject....(he who ' voluntarily ', ' loyally ', that is actively and willingly obeys the law and executes the orders of the legitimate sovereign) is necessarily a ***faithful subject***. He is a Christian, who knows that all power comes from God. In obeying the law...he obeys God. The fact that the order to which he ' responds ' comes to him from beyond the individual and the mouth which utters it is constitutive of the subject. " [189]

This conception of society and the social structure persisted into the first two decades of the nineteenth century. It persisted, despite the challenges which confronted it, of the unrest and social disorder of the early years of the nineteenth century, coupled with the growing influence of non-Anglican religious groups and radicalism. These events and developments merely tested it. What led to its demise was the differentiation of the executive element of the state apparatus from the legislative element. This development was the product of the fundamental changes, between the 1780s and the 1820s, in the relation between the landed elite and political authority. It led, in the late eighteenth and early ninteenth centuries to the dissolution of a conception, by those concerned with the substance of governmental policy, which saw the landed elite and Anglican church as the sole and exclusive interests which were to be maintained by the conscious attention of the executive. They were placed, instead, within an increasingly influential perspective which regarded them as ***one*** interest among a number of others. These interests had now to be reconciled because the executive was ceasing to regard the landed interest and the clergy as the focus and

189. E. Balibar, ' Citizen Subject ' in *Who Comes After the Subject?*, E. Cadava, P. Connor, J-L. Nancy (London:Routledge, 1991), 33-57(p.41)

determinants of governmental policy. In the executive's conception of society, they no longer embodied society, which was now perceived as a social system whose survival and continuance depended upon policies which maintained the overall system, in which, the landed interest and clergy constituted one of its elements. Order in society was to be ensured by attempting to maintain the conditions of social stability in manufacturing and agriculture. The French Revolution dominanted the thinking of the executive. Not simply it consequences for the social system as a whole, but the understanding of its causes in order to prevent the conditions of possibility for such an ' event ' in England. Economic policy was therefore orientated to the preservation of the social system by the prevention of famine and scarcity.

" An adminstrative determination to ensure ' a sufficiency of supply at *steady* and *moderate* prices ' motivated succesive governments. For the hunger had helped to topple feudalism in France(where Huskisson had lived between 1783 and 1792)....Since then, a long war, with its formidable if largely futile blockade, a precarious peace, a realisation that in the last fifty or sixty years Britain had become a net corn importing country, the dramatic growth of population as highlighted by the first two censuses of 1801 and 1811, and actual deaths in 1795, 1797, 1800/1, 1812 - in short,...Malthus's terrifying spectre haunted the ministerial imagination. " [190]

Economic policy was, therefore, animated by the need to maintain law and order. What was feared most was the coincidence of economic crisis and social and political tension.

" At the Home Office, Sidmouth was forever inquiring anxiously about the forthcoming crops and prospects for employment. He believed that the ' instincts of disaffection ' were fundamentally economic, though they might have to be manipulated by incorrigable demagogues before bursting into revolt. Ministers

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190. B. Hilton, *Corn, Cash, Commerce: The Economic Policies of the Tory Governments* 1815-1830 (Oxford:Oxford University Press, 1980), p.20

dreaded the coincidence of dear bread and urban unemployment for social reasons. " 191

Food supply being paramount was dissociated from an eternal link with the landed interest. This was the basis for the conflict and dissociation between the landed interest and the executive. The Corn Laws of 1815 were seen by the landed interest as the continuation of the executive's support for, and conception of, the position of the landed interest. It was regarded by them, as a permanent and long-term commitment to maintain agricultural prices and hence agricultural profits - the material foundation for the landed interest. The executive's support for protection presented as in conformity with the interests and conception of the landed aristocracy and gentry was *essentially pragmatic*. To them, it was a transitional measure whose continuance rested on its ability to guarantee and safeguard food supplies, not the maintenance of agricultural profits through the extension of cultivation.

Any tendency towards increased protection for the landed interest was removed with the Agricultural Select Committees of 1820 and 1821[192]. They

" killed all hope of increased protection. Henceforth, any initiative for changes in the corn law was to come from its urban opponents, whom the Report encouraged, while agriculturalists had to fight to keep what they already possessed.....Meanwhile, for the ' official ' or ' administrative ' Tories, this long masterly document settled the future of corn law strategy - an ever-open and progressively freer corn trade, and increasing reliance on imported food. " 193

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191. Ibid, p.79

192. The Select Committee on Petitions on Agricultural Distress and the Mode of Ascertaining Prices of Corn in Maritime Districts under existing Corn Laws Parl. Papers, **1820** (255) II.101. The Select Committee on Petitions Complaining of the Depressed State of Agriculture of the U.K. Parl. Papers, **1821** (668) IX.1. See also the reaffirmation of this position in the First Report of the Select Committee to inquire into Allegations of Petitions complaining of the Distressed State of Agriculture of the United Kingdom **1822** (165) V.1 and the Second Report **1822** (346) V.9

193. B. Hilton, Ibid, p.107

This break in official agricultural thought in 1821, which loosened the correspondence between the material interests of the aristocracy and gentry and the government's policy, was to be one moment in a far more democratic dissociation in the later 1820s in the form of the repeal of the Test and Corporation Acts (removing restrictions upon those of Protestant religion, but who practiced outside and did not recognise the legitimacy of the Anglican Church) and the repeal of the restrictions imposed on Catholics. Both of these were seen by the aristocracy, gentry and clergy, as sundering the connection between the Church and State, and, hence the ' established constitution '. Hence,

" [t]he years of 1800-1832 witnessed, then, not so much the progressive advance of a liberal mood shared by all as the gradual numerical erosion of a social, religious and political hegemony from without, and a final and sudden betrayal from within. In that process parliamentary reform played a subordinate part....Interest in it as a political issue, never at very high level, waxed and waned; in the 1820s it almost died away entirely. Relatively few men at any time had hailed it as an *obvious solution* to society's manifold problems. Throughout the first decades of the nineteenth century, Emancipation and Repeal took a great and growing, precedence over Reform: Catholic and Protestant Dissent counted for much, democracy little. Far from Emancipation being ' an aspect of the reform question ', Reform was a consequence of the shattering of the old order by Emancipation." 194

The collapse of the ' old order ', in which aristocratic power was entrenched in a unitary society, with a State of divine origin initimately related and entwined with the Anglican Church, led to a restructuring and reorientation of the social order and its institutions. Among those, which became the object of this focus of reform, was the criminal law. The nature and type of reform of both the substantive and procedural

194. J.C.D. Clark, *English Society 1688-1832* (Cambridge:Cambridge University Press, 1986), p.409.

aspects of the criminal law of the ' old order ' was to determine the foundations of the system, and the place of the defendant within it, for the nineteenth century.

Remoulding the Criminal Law:Criminal Law Reform Under the Criminal Law Commissioners

a)Positioning the Defendant: The Consideration of the Representation of the Defendant by Counsel in the Second Report by the Commissioners on the Criminal Law 1836

It was during the consideration of this specific issue that the Commissioners would establish the status and position of the defendant in the remoulded criminal law. The ' old system ', as part of the *ancien regime*, produced the defendant's position as the pure effect of its own social power, as a result of the conjunction of the mode of authority and the individual person in the form of the judge and justice of the peace. The defendant was the subject of this power not merely in the sense of being affected by it externally, but that her/his position had no independent, stable existence it depended upon that social power for its creation. This mode of authority became the object of attention of the Commission through their consideration of the adequacy of the trial judge to act as the defendant's representative at the felony trial.

The ' Old System ' had not allowed counsel representing a defendant at a felony trial to address the jury directly. This was in contrast to misdemeanour cases where counsel could address the court of the accused. With the increase in the number of capital statutes in the later eighteenth century and early ninteenth century, until their reduction by Peel and Russell, this meant that a defendant on trial charged with a felony, which if proven carried the death penalty, could not be effectively represented by counsel; whereas; a person charged with a ' minor ' misdemeanour offence could be. This ' anomaly ' of the Common Law was the expression of the

emergence of lawyers with the criminal process. The ' Old System ' had operated, before their apperance, on the principle that the defendant could not give evidence, that is, take the oath and having given evidence be cross-examined on it. This was based on the principle that no one could be convicted unless the proof was so convincing that it excluded the possibility of a defence. This principle was rendered problematic with the emergence of the possiblity of legal representation for the defendant and was diminished by confining full legal representation to a particular class of offence. This ' resolution ' of the problem by the Common Law was the point of entry for the Commission into the wider question of the position and status of the defendant at the criminal trial.

The consideration of the position of the defence counsel at a felony trial, led them to pose the question of the basis on which the practice of the defence counsel addressing the jury could be allowed. This was to be their focus of attention on the matter, and, it basis was to be evaluated in terms of whether it would tend to the discovery of truth, and, if this answer to this intial consideration was affirmative, then it still had to be considered whether the advantageousness of the speech by defence counsel was offset by any inconvenience inseparable from the practice.

The Commission decided that because of the nature of the legal system itself, which differs from the rest of society, that some statement and explanation should follow the proof of the facts in a criminal case. Where this is a trial by jury, it becomes even more important for the Commission that

" ample means should be afforded for enabling them to come to the correct conclusion. " 195

195. *Second Report by the Commissioners on the Criminal Law*, Parl. Papers **1836**, Vol. XXXVI, p.188

The evidence of the accused was, therefore, established as essential to ' justice ' and, as a result, it also became essential that he/she should be heard in the manner most likely to be effectual - by her/his counsel. For, without this ability to be represented, the efficacy of the defendant's evidence would be placed in a context in which

" the privilege would frequently be illusory. " 196

This analysis led the Commission to the conclusion that it was jusifiable for the defendant to be represented, irrespective of the type of offence with which he/she was charged. The defendant was viewed as being incapable, in comparison with a lawyer, of stating a case, arguing against false witnesses and arguing against circumstantial evidence. When the defendant was confronted by a trial in which these were necessary, then, in the Commission' view,

" it is manifestly of little use to allow him the privilege of a speech to the Jury. " 197

The recommendation that the defendant have the capacity to be represented by counsel throughout the criminal process also flowed from an analysis of the judicial role in the ' Old System '. This was the existent site of the creation of the defendant's position in the criminal trial and representation by counsel was, in principle, antithetical to the type of power and authority which the judge currently exercised at the trial. For, it produced a guaranteed space, in the structure of the trial, for the existence of the defendant, which was independent, and separate from, any recognition conferred by the trial judge - the sole source of the present ' position ' of the defendant.

196. Ibid, p.188
197. Ibid, p.188

This reorientation, and, redefinition of the position of the judge and the defendant, within the trial, produced by the Commission, took place through an interrogation of the capacity of the trial judge to act as counsel for the defendant. By locating the process of investigation on this preceptual terrain, the Commission immediately occluded the possibility of considering the genesis of the position of the trial judge as one which was rooted in within the social relations of the *ancien regime*. The trial judge was ***assumed*** to have operated in this capacity throughout the *ancien regime*, and, he was to be held incapable of exercising it through a comparative assessment of the his position and capabilities with those of a defence counsel [198]. This assumption brought with it, as a necessary corollary, that the trial process under the ' Old System ' did accord independent recognition to the position of the defendant, but that this was prevented from its full realisation by various ' anomalies ' and ' flaws '. This, in turn, projected the Common Law foundation of the criminal process as in itself unproblematic and free from domination. Its origin is given the appearance of an immuntable and natural event which, as a result, need not itself be the subject of attention. This confers upon the trial, and, the relation between the judge and the defendant an equally rigid, unhistorical and natural appearance. It reduces the relation to one of pure ***formalism*** which renders it incapable of being comprehended as a particular insitutional expression of the totality of social relations.

This whole construction of the nature of the trial, and, the relation between the defendant and the trial judge, with its analytical moves and political logic, was the particular expression of the nature of the ' programme ' of legal reform in which

" Bentham's theoretical views could be used to make sense of an autonomous substantive system. It is this division of thinking, between Bentham's concepts and

198. See, in particular the evidence of Sir F. Pollock and W. Ewart, pp.195-6.

common law context, which explains much of the impetus behind, and, the nature of, law reform... " 199

It simply reformulated the Common law, through the process of clarification by rules, and readjusted the position of the trial judge by allowing the defendant to be represented by counsel thoughout the criminal process. This was no longer the trial structure of the ' Old System ', but neither was it a profound break with that system and its perception of the position of the defendant. For, in this remoulding of the criminal trial the defendant remained an object of prosecution, merely changing the ***form*** in which that status, as an object, was constructed. It ceases to be the effect of the practices of the trial judge and now becomes one which evolves through the evidence collated at the trial form the defendant and the prosecution. The ' uncertain ' practical logic of the trial judge is replaced by the rules of evidence which are presented as emancipated from the ' anomalies ' if the ' Old System '. This change, however, is not connected with the attempt to rethink the position of the defendant, but with the readjustment of the legitimacy of the criminal process.

" When it is considered that Criminal justice in this country is administered principally through the medium of the popular tribunal[thejury], it will be at once perceived how exceedingly important it is, not merely that the administration of Criminal Justice should be moderate and just, but that it ***should appear to be such*** to those to whom, as Jurors, duties so important are confided. " 200

In other words, the legitimacy of the criminal law is not sought to be based upon the concordence of formal procedures and material claims to justice from the perspective of the defendant, but solely and exclusively on rules of formal procedure. The legal decision confers validity upon the criminal process, and, has validity conferred upon it,

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199. M. Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford:Clarendon Press, 1991), p.188

200. *Second Report by the Commissioners on the Criminal Law*, Parl. Papers **1836** vol. XXXVI, p.203

but that decision itself. These is no need for any further legitimation as it is provided by the factual existence of the process and the operation of its procedure.

b)The Conceptual Legacy of the Commission: Fixing the Asymmetrical Distribution of Social Power within the Conception of the Criminal Process

The general perspective of the Commission was one in which the position of the defendant quickly slid, and, hence disappeared, into a consideration of the totality of available evidence and the justification for retaining any obstacle to its increased availability and amount. The trial was presumed to be the site in the criminal process that was free from domination, and, the evidence elicted within the trial was an object which was simply contemplated in order to arrive at a verdict.

Underlying this, was a conception of the social world which assumed that it was a universe of symbolic exchanges and that all action within it was merely communication whose meaning was to be discerned by means of a code, language or culture - here the rules of evidence. The truth was, therefore, founded and determined by the free exchange of information at the trial guaranteed by the benign background conditions of these rules of evidence. Once the existing ' anomalies ' had been removed, then the trial was presented as a sphere free from domination and any kind of coercion. For, with the defendant, prosecutor and judge now incapable of influencing the outcome of the trial there was no space for the exercise of arbitrary power by any one of them over any of the others.

This perspective projects the unification of the discursive practices at the trial, through the imposition of the rules of evidence, as one in which language is never seen as an object of action and power. Action is presented as a pure act of communication, and, social interaction as symbolic, but it thereby forgets

" that the relations of communication ***par excellence*** - linguistice exchanges - are also relations of symbolic power in which the power relations between the speakers or their respective groups are actualised. " 201

This forgetfulness enabled the trial to be presented as an end in itself, an almost ' formal exercise' whose dynamics are purely internal.

Equally internal and benign, on this presentation, are the rules of evidence themselves which provide the legitimate foundation and authority of the trial. They are viewed as representing a mere clarification and unification of the trial proceeding. Yet, they achieve far more than this for they provide the conditions of possibility for the split between the criminal process and the surrounding environment. This differentiation is effected and reproduced by these rules because, by processing information, they either confer value upon, or, devalue the information which they operation upon. This, then, reduces the possibilities of meaning of the information and enables it to be dealt with by the criminal trial process itself. These rules do not have to produce a consensus nor do they need to produce an agreement upon the ascription of value to the information. This, in turn, allows the criminal system to maintain a stable, system-specific abstraction from the environment. The rules of evidence prestructure

" the perception of choices, the way of posing questions, incentives to explore, preferences and so forth....As a result, the environment appears contingent for the system. " 202

The information which is ' ordered ' by these evidential rules, is generally produced orally by the prosecutor, defendant and their respective witnesses. This

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201. P. Bourdieu, *Language and Symbolic Power*, trans. G. Raymond and M. Adamson, ed. J.B. Thompson (Oxford:Polity Press, 1991), p.36

202. N. Luhmann, *The Differentiation of Society* (Columbia:Columbia University Press, 1982), p.172

means that the process of evaluation of that information is not one based merely upon the purely formal analysis of linguistice utterances. The claim to be heard and believed depends upon a ***social process*** of recognition.

" The question of performative utterances becomes clearer if one sees it as a particular case of the effects of symbolic domination, which occurs in all linguistic exchanges. The linguistice relation to power is never defined solely by the relation between the linguistic competances present. And the weight of different agents depends...on the ***recognition***...the they receive...Symbolic imposition...can function only if there is a convergence of social conditions which are altogether distinct from the strictly linguistic logic of discourse. " 203

By separating the act of speaking from the rest of the social field, the Commission sought to present this act of speaking as having an existence which was independent from the dynamics of the criminal process. The recognition of the position of the defendant could then be projected as being guaranteed an independence and status because her/his information was not seen to be intimately related to the trial itself.

This perspective was provided with a ' material ' element, onto which it could project itself, by the representation of the defendant by counsel. The defendant, being unable under the existing rules of procedure to act as witness in her/his defence, was, in the new schema of the Commission, able to delegate the conduct of his case to a lawyer. This, then, enabled the trial to be presented as resting purely on the presentation of the case, and, hence on the allocutionary skill and ingenuity of the defendant's lawyer. The lawyer is thereby accredited, as an individual and in his speech, with the power which forgets its origin and possibility in the structure of the criminal process.

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203. P. Bourdieu, ibid, p.72

" The real source of the magic of performative utterances lies....in the social conditions of the ***institution*** of the ministry of the ministry, which constitutes the legitimate representative as an agent capable of acting on the social world through words, by instituting him as a medium between the group and the social world; and it does that, among other things, by equipping him with the signs and insignia aimed at underlining the fact that he is not acting in his own name and under his own authority. " 204

This was to be reinforced by the lawyers themselves who acted within this space *as if* their position and capacities were solely the product of their individual linguistic competence. This, in itself, was

" also one of the manifestations of competance in the sense of the right to speak and to power through speech. There is a whole dimension of authorised language, its rhetoric, syntax, vocabulary and even pronunciation, which exists purely to underline the authority of its author and the trust he demands. In this respect, style is an element of the mechanism....through which language aims to produce and impose the representation of its own importance and thereby help to ensure its own credibility. " 205

The exclusive focus, by the Commission, on the trial as the sole site of the operation of the criminal process necessarily dissociated the trial from the collection of witnesses and evidence. These were, thereby, characterised as activities which no more than a practical and unremarkable relation to the trial and its determination of guilt or innocence of the defendant. The decision to prosecute, and, the stages up to the conduct of the trial became an unproblematic, external territory which surrounded the trial. This ' outside ' realm was not conceived or seen to have the potential to affect the outcome of the trial itself. The projection of the trial as purely

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204. P. Bourdieu, ibid, p.75
205. Ibid, p.76

communicative entity depended not only on the neutralisation of all power relations within the trial, but also upon the denial of their existence in the decisions and practices which resulted in individual's being ' fed-in ' into the trial.

These conceptual devices were interlinked to provide the Commission's definition and demarcation of the dynamics of the trial process and the position of the defendant within it effectively determined the dominant perception of the criminal process throughout the nineteenth century. This perceptual framework transcended the legislation of 1836 which accorded the defendant the ability to be represented irrespective of the type of offence which with which he/she was charged. It structured the interpretative horizon through which the criminal process was understood. The position of the defendant was fixed within its analytical framework and this entailed that subsequent consideration of this position would take place from within the terms which it had constructed. This meant that the position of the defendant was considered exclusively from the point of view of the trial, and, the issue centred around her/his representation at the trial and her/his ability of give evidence rather than an unsworn statement from the dock.

The form in which the Commission constructed the trial as an object of analysis, which, in turn produced this definition of the position of the defendant, related to a wider conceptualisation of the character of society. It was seen as a mechanical system whose smooth functioning and internal harmony was hampered by the friction of ' anomalies ' and arbitrary personal influences. With the removal of these elements, the machine-like social system would find its natural balance and would run itself without the need for substantial adjustment or alteration. This process was guided by the desire to make the ' the constitution ' more secure by linking the harmonious operation of the social system with its ' organic ' unity. It was not concerned with changing the position of the defendant other than as an effect of the revitalisation of the criminal process as an element of the social system. The logic

of that social system was the imperative ***not*** the consideration of the particularity of the defendant's position.

The Commission provided the perceptual framework within which the development of the criminal process could be shaped by the imperatives and tendencies of the elements which composed it. These developments would be perceived as the natural, unproblematic evolution of the criminal process because the belief in the legitimacy of the criminal process was founded on a purely empirical basis. The continued existence of the criminal process was sufficient for its legitimacy because its authority was purely procedural - simply making a decision according to a formal procedure.

With the dominance of the police as the sole agents of law enforcement, the expansion in summary jurisdiction and the development of the legal profession this perceptual framework, installed by the Commission, became ideological in another sense. It now operated not simply as a theory which was a reflection of a particular conceptual construction of the criminal process, but as a description of a reality to which it bore little relation.

The Remoulding in Practice: The Configuration of the Criminal Process in the Later Nineteenth Century

The ' natural ' evolution of the criminal process, which had been the foundation of the Criminal Law Commissions' conceptual framework, was in the later nineteenth century, intimately connected with the development, and interrelation between, the various elements that composed it. The tendencies and dynamics of these elements were to be the motive force behind this evolutionary change.

a)The Police

The County and Borough Police Act 1856, created the preconditions for the police to be able to assume control over both the enforcement of the criminal law and the decision to prosecute. The police were, therefore, placed in a position in which they could determine who was ' fed-in ' to the criminal process for trial. As a result, social control and the operation of the criminal process became increasingly tied to the aims of police practice 206.

With this dominance of the police within these areas the trial was immediately placed in a position in which its independence and claim to be the exclusive site of guilt deteremination, based upon the rules of evidence, ceased to be a true description of its character and existence. Police control over the conduct of prosecutions(which was recognised as legitimate which this role was brought into question with the issue of the establishment of centralised, state control over the conduct of prosecutions 207)meant that the criminal process was dependent upon the police for both the initiation of prosecutions ***and*** the nature, character and quantity of information which would be the basis of the prosecution case. This produced a situation where the prosecution was now conducted by a ***social system*** - the police- rather than being the result of numerous separate decisions of individual, private prosecutors. Therefore, the object of prosecution now became tied to the goals of a social system, and its collective practice. The area presented as external to the trial, and, hence unimportant and unremarkable continued to be characterised in this way by an exclusive concentration on the ***purely formal*** nature of prosecution which continued (with the failure of the attempts to institute a system of public prosecution)to be brought by individuals. The relation of the parties at the trial - an individual prosecutor and an individual defendant with their attendant witnesses - was held to represent and define the nature of the totality of proceedings leading up to the trial. Hence, the sphere

206. See previous chapter on the Police where this is dealt with in more detail.
207. See previous chapter on the System of Prosecution where this is dealt with in more detail

outside the trial was still projected as one which was free from domination and nay kind of coercion, and, it had to be if the other element of this conceptual framework - the centrality of the trial - was to be maintained.

b)Summary Jurisdiction

Summary jurisdiction had not been the object of the Criminal Law Commissioner's attention. They were much more concerned with indictable offences and trial by jury which had the effect of presenting them as the only jurisdictional and procedural region of the criminal law of any interest of concern. It became the focus of attention only in the 1840s with Jervis's Acts[208] which readjusted this area in accordance with the dominant perspective on the criminal process this meant that the Common Law basis was retained, but its form was altered in order to be subsumed under rules. The authority and scope of operation of justices of the peace was now expressed in legislation rather than in the implict practical logic flowing form the activities of the incumbant justice. The structure of the trial itself, however, was not fundamentally changed. The trial process still consisted of prosecutor, defendant, their respective witnesses and the justice. As with the trial for a felony before a judge and jury, there was little change in the substantive position of the defendant. It was simply a ***formal*** redefinition, merely re-locating the basis on which the defendant was an object of prosecution. Moreover, the reason for this redefinition was a by-product, rather than a central consideration, of Jervis's Acts. For, these Acts concentrated upon, and sought, the re-orientation of the function and scope of action of the justice of the peace of which the position of the defendant had been a creation.

Summary jurisdiction, in its modified form, presented a far simpler procedure for prosecution. Not only in the sense of the amount of time and the cost to the prospective prosecutor in comparison with the trial at Quarter Sessions or Assizes,

208. On this see the previous chapter on the Police and D. Freestone and J.C. Richardson, ' The Making of English Criminal Law (7) Sir John Jervis and his Acts ', *Criminal Law Review* (Jan. 1980), 5-16.

but also the greater degree of certainty of conviction that this procedure offered. Under the *ancien regime*, this trial procedure was to deal with misdemeanour offences only. However, legislation form the 1840s onwards, fundamentally altered the parameters of summary jurisdiction by allowing the justices to deal with certain felonies by the mode of summary trial [209]. This had a major impact on the distribution of criminal cases within the criminal process with the nineteenth century characterised by a marked and continuing increase in the number of cases dealt with summarily, and, a concomitant reduction in the number of cases dealt with at Quarter Sessions and Assizes. The periods of greatest decline were after the 1855 Act and the 1879 Act [210]. The character and pace of this change was equally dramatic at the local level,

" Reference to the Quarter Sessions minute books of both Bedfordshire and Nottinghamshire shows the dramatic decline in cases brought before these courts in the second half of the century. At Epiphany Sessions in the middle years of the century, for example, the counties were hearing on average about 20 and between 30 and 40 cases respectively; by the late 1890s these numbers had fallen, generally, to less than half a dozen in both instances. At the same time the number of cases heard summarily, was soaring; at the Epiphany Sessions by the mid 1860s Bedfordshire was

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209. The Acts which this change were: *The Juvenile Offenders Act 1847*(two magistrates could try offenders up to 14yrs old, with their consent, charged with simple larceny or a felony punishable as a simple larceny), *The Juvenile Offenders Act 1850*(this basic jurisdiction was extended by increasing the age of offenders to sixteen), *The Criminal Justice Act 1855*(with the consent of the accused, all simple larcenies could be dealt with up to the value of 5s. Also, by the motion of the justices themselves they could decide to deal summarily with a simple larceny/ theft form the person/larceny as a clerk or servant), *The Summary Jurisdiction Act 1879*(Justices could now deal with all indictable offences by children under 12[except murder]. The range of offences capable of being dealt with by the consent of 12-16yr olds was extended. Adults who pleaded guilty could be dealt with summarily for a similar number of offences as children between 12-16 with no limits on the value of property. Of their own motion they could nowtry all cases where property did not exceed 40s. in value), *The Summary Jurisdiction Act 1899*(Of their own motion justices could now try offences of obtaining money/goods under false pretences to the value of 40s. All offences committed summarily by 12-16yr olds, with consent, could now be dealt with summarily).

210. L. Radzinowicz and R.Hood, *The History of English Criminal Law and it Administration from 1750*, 5 vols (Oxford:Clarendon Press, 1990), V(1990), pp.618-622, note that in the years 1854-1857 the number of committed for trial declined by 57% from 21,000 to 9,000. While those charged with indictable offences but tried summarily increased from 3,000 to 35,000. Between 1879-1881 there was a decline of 10% in committals for trial from 10,000 to 9,000. While those charged with indictable offences but tried summarily increased from 35,000 to 46,000.

recording around 50 and Nottinghamshire 100 cases under the Criminal Justice Act[1855], with another half dozen or so under the Juvenile Offenders Act[1847]. In addition they were also filling, respectively, around 150 and around 300 other summary convictions for assault, drink offences, malicious damage, game offences, highway offences, vagrancy, etc. " 211.

This meant that by the 1860s the majority of criminal prosecutions were being tried summarily before justices of the peace. The number of defendants who were actually tried before a trial judge and jury was small and becoming increasingly smaller throughout the nineteenth century. Therefore, the concentration, by the Criminal Law Commissioners, on the trial before a judge and jury, and its presentation as the almost paradigmatic form of trial in the criminal process, had, by the 1860s, become an inaccurate portrayal of the reality of the criminal process.

Despite this inaccuracy, this theoretical framework retained its position as the dominant interpretative perspective upon the criminal process. Certain elements of this intial framework were merely adjusted in order that these changes were not seen to challenge the validity of the framework as a whole. Moreover, the coherence of this framework itself was not one that needed to be purely theoretical, that is internally consistent, because its claim to coherence was political, that is, its ability to generate acceptance of the ***real*** operation of the criminal process by constructing a theory which, in turn, constructs a consensus.

In terms of the theory, it entailed the defintion of all those cases that were tried aummarily as ' minor ', unremarkable cases, and, the small number of cases which came for trial by jury as exceptional, and, hence ' serious ' cases. The differing structure of each mode of trial could then be presented as a function of the nature of the cases which were dealt with. However, by following this route the theory

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211. C. Emsley, *Crime and Society in England 1750-1900* (London:Longman, 1987), p.168, footnote 102

confronts the possibilty of the lack of universality of the rules of evidence and representation of the defendant which had both been central elements of the Criminal Law Commissioners framework. The formal universality of the criminal process, articulated by the Commissioners, is undermined by the changed character and dynamics of the criminal trial process. The permanent shift of the majority of criminal cases to summary trial and the absence of ' strict ' legal proof, coupled with the greater certainty of prosecution and punishment only fixed more clearly and rigourously the position of the defendant as an object of prosecution to be processed. This pattern of operation of the criminal process could only be ignored by the system's disengagement from any concern with the particularity of the defendant's position as something which subsisted prior to the system itself; the dominance of process of process, efficiency and disciplinary values within the system, the lack of review or control over police practice by the system and the emphasis upon the ' serious ' offence before the jury as the ***real*** site of ' justice '.

c)The Legal Profession

The Criminal Law Commissioner's recognition and legitimation of the legal representation of the defendant, throughout the criminal process, was merely a universalisation of an already existing potential within the criminal process developing since the 1750s. Their increasing presence in the criminal process, though admittedly small, was bound up with the constitution of lawyers as a profession which was a parallel development during this period [212]. By the time of the 1836 Act, the lawyers themselves had split into two mutually exclusive professional groups - barristers(counsel)and solicitors(attorneys). Despite their growing collective presence within the legal system as a whole, the majority of their activities were bound up with

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212. See, for a detailed description of this process of the development of the conditions of possibility of the English legal profession, W.J. Reader, *Professional Men: The Rise of the Professional Classes in Nineteenth Century England*(London:Wiedenfeld and Nicolson, 1986) and B. Abel-Smith and R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965*(London:Heinemann, 1967)

civil matters, particularly property, with very few of them regularly and consistently involved in criminal matters.

With the other changes in the criminal process, the 1836 Act was very quickly rendered problematic. The Act itself had given a formal right to legal representation by counsel but had made no provision for its actual realisation by enabling the poor, as of right, to obtain counsel. For, the relation between counsel and client envisioned by the Act, was still to be a private, fee-paying one. This rendered it ***purely*** formal since the majority of criminal defendant's were without the means to exercise that right.

The Commission' s logic for the generalisation of this practice - the defendant's evidence as an integral part of the trial and the necessity for its adequate presentation - disappeared amidst the changes in the criminal process itself. The summary trial procedure, with the justices(magistrates)dealing with both matters of law and fact(unlike the indictable trial procedure in which these matters were embodied in separate elements - the judge and jury), became the site where the police prosecuted the majority of cases, of which, an increasing number were based upon offences whose general wording left their practical definition to the police themselves. The dominance of the summary trial form, within the criminal process, coupled with the control of law enforcement and the conduct of prosecutions by the police, produced a structure in which the majority of trials consisted of little more than the policeman giving evidence, perhaps with the addition of one or two witnesses. This was deemed sufficient to ensure a conviction whatever the defendant presented in her/his defence. Therefore, there was little scope, within this structure which dealt with the majority of criminal cases, for legal representation of the defendant to achieve much on her/his behalf. Once this mode of trial was characterised as dealing with ' minor ' and unexceptional matters, the necessity for legal representation itself, in accordance with the 1836 Act, was not seen to be an important element of that trial procedure. From the profession's point of view too it offered few financial incentives or chances to

establish or re-vitalise a career with a successful defence case which would gain wide publicity. Therefore, very few defendants wer represented in the cases which were tried summarily.

Attention was therefore concentrated exclusively upon the small number of trials which reached the higher courts. This reinforced the dominant view of these cases as the ' serious ' and hence ***real*** criminal cases. They were dealt with by a form of trial with a separation between those who tried the facts and those who tried the law - the jury and the judge respectively; and; it was the arena in which the great majority of criminal lawyers operated thereby strengthening the notion of this region of the criminal process as the one in which guilt or innocence were determined by means of procedures that were attentive to the seriousness of these matters. Moreover, the type of offence which was dealt with at this level tended to be ones where the quantity and type of evidence necessary to obtain a conviction was not satisfied by the evidence of individual policemen. This meant that the possibilities of challenge and contestation of the evidence offered by the prosecution were much greater than in the lower courts, and, hence created a space for a practice which could be presented as inhering within the individual lawyer, and, testifying both to the benefit of legal representation and the competance of the legal profession as a whole.

Despite the availability of this demonstrative space to the legal profession, the majority of defendants who were tried under this mode of procedure were unrepresented when they reached the trial. A system of ' dock briefs ' had evolved during the nineteenth century under which the defendant, in open court, could ask to be represented by an unnamed counsel then present in court. He/she had no right to ask for a specific barrister by name, he was merely chosen at random, by the defendant, from those attending court on that particular day. In essence, this supposed ' right ' comprised little more than a few minutes conversation between them prior to the trial.

" such dock brief defences[were]really a caricature, and almost invariably end[ed] in conviction. " 213

Alternatively, the trial judge, of his own motion, would ask a barrister to undertake the representation of the defendant gratuitously with much the same result.

The only other source of advice available to the defendant, apart from that which was provided indirectly by religious denominations, was that provided by Poor Man's Lawyers Meetings which were set up during the later nineteenth century and were located predominantly in the major cities. They were run by volunteer lawyers with little co-operation or co-ordination between the various Poor Man's Lawyer Meetings. Only a small percentage of people were able to get advice at these meetings with the number of people receiving advice, together with the amount of time given over to each individual who was able to get advice, declining with the number of people who turned up to each meeting. With the result that

" probably the average time given to each person at a large meeting[was]five minutes. " 214

These meetings could be held independently by lawyers, or, in London they could be part of the Settlements established during the nineteenth century. These were organisations of social workers formed to give education and social services to the poor. They were located in poorer areas or slums, and some offered regular Poor Man's Lawyer Meetings. However, as with the other Meetings there was no co-operation between the various settlements and there little organisation of the service itself with the advice being generally unsophisticated and unreliable.

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213. Gurney-Champion, *Justice and the Poor in England* (London:Routledge, 1926), p.52
214. Ibid, p.18.

" Essentially, it is haphazard, unorganised charity, depending, for its value upon the particular lawyer giving the advice, or much more upon his private circumstances, and the amount of time he can spare for charity. " 215

These three developments in the criminal process- the growth of police control over law enforcement and prosecution, the summary trial coming to deal with the majority of criminal cases, and, the configuration of the legal profession - all added impetus to and reinforced the development of a criminal process in which the position of the defendant was simply readjusted according to the internal criteria of the criminal process. The criminal process was developing into a system in which detection, trial and punishment were more coherently and consistently linked together with the ' excesses ' of the highly individualised nature of the *ancien regime* being replaced by an ' anonymous ' process which presented itself as free from all excess and violence.

Each aspect of this process was more distinctly demarcated and conducted by different elements each with its own set of practices and perspectives upon the criminal process. It was the maintenance of their coherence which became the goal of the system. This could only be produced by its adaptability to the demands of those elements which composed it, and, the generation of a stable yet alterable framework of expectation for the elements that composed it. These developments necessitated the independence of the criminal process from the defendant's interest as an irreducible, invariant anchor for the legitimacy of the criminal process. The basis of this legitimacy, therefore, come to rest on the mere act of decision-making, that is, selection and validity became inseparable. The guarantee of the legitimacy of authority became one of pure legality in which there was no claim or recourse to a foundation of legitimacy outside the procedures of the legal form itself.

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215. Gurney-Champion, ibid, p.29.

The ability of the criminal process to develop in accordance with these tendencies must be sought in the dominant political and legal characterisation of society and the criminal process. The nineteenth century saw modest extensions of the franchise in the Reform Acts of 1865 and 1885, but neither sought, or, were conceived with the intention of effecting universal suffrage. That is, individuals in society were not considered in the position of real equality, in which their mere identity as human beings was sufficient, in itself to found their admittance to the public realm of politics. Given that political participation was the basis for the formation and application of decisions(it both confirms the identity as being responsible for their vote/choice and unifies individuals), then, the norms which were produced by this process, were the emanation of the collectivity(composed of individuals who participate in it)and each individual would be submitted to the laws of the State. Obedience becomes transformed into being subject to the law, or, rather a subject of the law that must be applied and executed uniformly and universally. It is, however, at this point that an antimony becomes possible as these individuals have a status whcih both places them above any particular law because they would, otherwise, cease to be the source of legislation, and, subjects them to the law because of the imperative character of the norms which they formulate which this necessarily generalisable applicability. The reconcilliation of these two aspects can only be produced by their effecting their identity, namely, on the presumption of the real equality of all individuals that compose that society. Only if an individual had exactly the same rights as any other can their existence as simultaneously above and under the law occur. If this relation is denied, or, fails to be created then the institution of society ceases to be founded upon a claim to equality. Equality cannot be limited as once anyone is not equal then equality ceases to be applied.

In the nineteenth century, therefore, there was little attempt to base society upon an idea of the universality of citizenship, and, the incremental political changes were not themselves a gradual extension of equality as it had, to be coherent, to

immediately concern the universality of individuals. What was at issue, therefore, was the play of power and validation of domination. Hence, those excluded from the realm of politics were subject to a social system over which they had no control and whose legitimacy was not seen to rest upon the generation of their consensus. They did not participate in the formation and application of decisions, and, were only ***under*** the law - the objects administration. This institution of society provided the prerequisites for the development of these tendencies within the criminal process and its subsequent structuration in accordance with them. The continuance, in parallel with these developments, of the conceptualisation of the criminal system as one centred upon the trial, itself characterised as composed of judge and jury, with all other elements of the criminal process external and unimportant, found its last legislative expression, in the nineteenth century, in the Criminal Evidence Act 1898.

The Criminal Evidence Act 1898: Settling the Last Outstanding Matter Within the Dominant Conception of the Criminal Process

The Criminal Evidence Act 1898 accorded the defendant the right to give evidence in her/his own defence. The defendant was now a competant witness with the capacity to give evidence, on oath, during the trial. The ability to give evidence, under the terms of the Act, was to rest in the sole discretion of the defendant. The defendant could not be made to give evidence, he/she was not to be a compellable witness. While this measure was implemented at virtually the end of the nineteenth century, conceptually, its foundation is in the overall ' programme ' of change within the criminal process in the nineteenth century, and, various attempts were made throughtout the nineteenth century to remove the disqualification upon the defendant from giving evidence. In itself, the Act did not represent a profound change in either the operation of the criminal process as a whole, or, the position of the defendant within it.

a)The Parameters of the Debate over the 1898 Act: Rearticulating the Dominant Perspective

The discussion of the issues and the proposed Bill leading up to the Act of 1898, by both proponents and opponents of the measure, concentrated upon the necessity of change from the persepective of the criminal process as a whole. Opposition or support rested upon a divergence of opinion over whether the criminal process was currently operating in conformity with its own systemic values. Proponents argued taht the system was not operating effectively enough, and, opponents that change was unnecessary as the system was working perfectly well. This shared systemic perspective, of both proponents and opponents is strongly illustrated in the case of Herbert Stephen, a barrister and clerk of Assize of the Northern Circuit, who was the major opponent of the measure. He wrote a number of letters to the Times, articles in magazines and a book arguing against the measure. His book defends the unreformed system as being perfectly adequate in pursuing its purpose and being without any need for reform.

" It is generally admitted that competance to testify is pretty sure, in a certain number of cases, to lead to the conviction of guilty persons who might otherwise escape. This appears to me to be of no considerable importance. According to the Criminal Statistics published by the Home Office for 1894, the proportions of persons tried for indictable offences who are convicted is no less than 82 per cent....we do very well as we are....[and there can be]no concern as to the efficiency of our methods of trying such prisoners as come before the courts." 216

The debate over the proposed change was not conceived, nor focused upon, the defendant other than as an object of prosecution. The particularity of the defendant's interest is equated with and subsumed by the concern with evidence and proof at the trial. Therefore, the defendant's position is only considered as an effect of the criminal

216. *H. Stephen, Prisoners on Oath: Present and Future* (London:Heinemann, 1898), pp.13-14

process whose values are those orientated to the maintenance and reproduction of the system itself.

This perspective was reinforced by the definition of the trial - the indictable trial with judge and jury - which both the proponents and opponents operated with. That this formed the common argumentative terrain related to both the enduring interpretative horizon of the Criminal Law Commissioners, and that fact that previous exceptions to the rule(that defendants could not give evidence in their own defence), under the criminal law (The Explosives Act 1883 and The Criminal Law Amendment Act 1885), concerned offences which were only triable on indictment. The indictable trial was considered to be ***the*** site of ' justice ' with the full complement of procedural and evidential characteristics of the criminal law in operation. Therefore, the defendant's interest was already realised and in consideration with these ' devices '.

This focus upon indictable trials was linked to the dominant conception of evidence and the trial process in which the trial, and rules of evidence that operate within it, represent the central procedural practice of the criminal process. The narrowness of this focus and definition, in turn, produces a complementary exclusivity of concentration on the particular elements which comprise the trial process. The rules of evidence become the basis of the identity of the criminal process because they are held to differentiate it from the surrounding social environment. This differentiation is also presented as the exercise of control over this social environment by presenting the information sought to be utilised by the prosecution and defence as a radically different paradigm from that of the rules of evidence.

The changes in the nature of prosecution produced, by the appearance and predominance of the police, cease to be a concern of this perspective because this positing of the initial incommensurability between police information and legal evidence capable of being adduced at the trial. This incommensurability is further

represented as the difference between truth and the pragmatic demands of police practice which is maintained and guaranteed by the process of ' translation ' of police information into evidence in the legal system. While the police may be dominant agents of arrest and prosecution this perspective denies both the informational dependence of the trial on police practices of information collection, and, their ability to affect the nature and logic of these practices.

b)The Effect of the Act in Practice:Little Change in the Dynamics and Structure of the Criminal Trial

The operation of the Criminal Evidence Act 1898, within the structure of the criminal trial, did not initiate a dramatic change in the configuration and character of that process. The majority of cases were dealt with by the mode of summary trial where most trials amounted to little more than the defendant being confronted with primary police evidence. In this situation, the ability of the defendant to give evidence simply meant that the formal status, and the place within the proceedings, of anything that he/she said was altered. The capacity of the defendant to cross-examine the prosecutor, which the Act also conferred, presumed that this was in itself sufficient to equalise the institutional positions of prosecutor and defendant, and, lead to the presentation of the complete nature of the case. This presumption flowed from the other important element of the dominant perspective, namely, the assertion of the private, individual character of prosecutions which denied that this form had become an empty facade once the police gained control over the conduct of prosecutions 217.

The lack of difference which the measure made to the position of the majority of defendants was mirrored by its insignificance for the police as prosecutors within the criminal process. The redefinition of the position of the defendant, which the Act produced, had a negligible impact upon the way in which the police operated. For, being trial centred in its approach, and viewing the whole process of enacting criminal

217. See, for more detail, the previous chapter on the System of Prosecution.

proceedings as one between individuals, it did not perceive any divergence in the rationalities of action of the police and the defendant. Both were seen to act in accordance with the set of external rules of the criminal procedure, and, because of this conformity, there was no disparity in their power or capacities. It did not differentiate between the observance of law and the enforcement of law as it presumed that both were actions guided by norms.

However, the enforcement of law is not in itself activity which is normative. It is concerned with the maintenance of law and the reintroduction of legality.

" Enforcement is thus not observance, but is action of a different kind, which on its part may again observe or not observe norms. " 218

In other words, law enforcement entails an essential selectivity in its practice in accordance with its own criteria of judgement, values and work techniques. The rationality with which the police operate is orientated with respect to specific premises of action and concrete results. The fulfilment of concrete tasks serves as the primary criterion for judging actions and decisions. Efficiency

" is no longer defined as ' following the rules ', but the ' causing of effects '. From the standpoint of the concrete tasks and the purposive action action required by them, the administration[here the police]must consider its own inputs and premises as contingently dependent upon criteria of instrumental suitability. It is efficient ot the extent that it succeeds in doing precisely this. The premises of administrative action are no longer rules to be imperatively complied with, but are instead treated as ***resources*** which are to be weighed from their standpoint of their adequacy for specific tasks. " 219

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218. N. Luhmann, *A Sociological Theory of Law* (London:Routledge, 1972), p.207
219. C. Offe, *Disorganised Capitalism: Contemporary Transformations of Work and Politics* ed. J. Keane Oxford:Polity Press, 1985), p.305

This presumption of the rationality and character of police activity and practice, with which the Act operated, entailed a general trust in the police together with an inability to perceive the possibility of the disparity between the defendant and the police either existing, or, being able to be reproduced at the trial. Hence, the disengagement from exercising any form of control over police practice external to the trial, and, the concomitant freedom of the police to operate according to their own organisational values which were the source of the power to define an individual as the object of a prosecution.

The Act, therefore, made little significant difference to the operation and dynamics of the criminal process which had evolved during the nineteenth century. The defendant was not placed, despite the redefintion of the status to be accorded to his information should he/she chose to be a witness in her/his defence, in a position which reduced or attenuated her/his location within that criminal process as an object of prosecution. The criminal process had now taken on the configuration whic wa to characterise it during the majority of the twentieth century. The concerns of the dominant perspective, initially articulated by the Criminal Law Commissioners, were now fully realised with the passing of the Criminal Evidence Act 1898. The abstact legitimacy of the criminal processhad been established to the satisfaction of the dominant perspective with the result that the criminal process itself, as a societal insititution, was no longer conceived as being problematic. With this conferral of a background level of societal legitimacy, the strength of the values generated within the criminal system wer themselves reinforced. This, in turn, meant that the positioning of the defendant as an object of prosecution within the criminal process, which was a necessary effect of these values, was also reinforced. This conferred upon the criminal process the capacity to resist change, considered to be antithetical to these systemic practices and values, which had cohered together by the end of the nineteenth century, while at the same time adapting and adjusting elements to increase

its presentational legitimacy. This is clearly visible in the debate over the Poor Prisoner's Defence Act 1903.

The Poor Prisoners' Defence Act 1903: A Change in Systemic Presentation

The developments in the criminal process, during the nineteenth century, had meant that the representation of the defendant had remained at a purely symbolic level of generalisation. By the beginning of the twentieth century the meaning of access to legal representation by counsel, set out in the 1836 Act, was increasingly constested with the assertion that it remained purely formal and incapable of realisation without financial provision by the State to ensure the effectiveness of this right. The emergence of this challenge represented the first wave of reform of a developing access-to-justice movement in which the problem is enunciated as one in which the gap, between the real exercise of the right and its potential universalisability of application, is characterised as unmet legal needs. These can be met or satisfied with the greater accessibility of lawyers.

" The focus here is on the procedural availability of lawyers to the poor, rather than specifically on the substantive goal of enforcing rights affirmatively. " 220

To the extent, however, that this first wave had a predominant focus upon the trial it attested to its weakness as an articulation of an alternative perspective and programme. For, to invest the trial with this degree of centrality in the definition of access-to-justice, to the extent of closing the perspective around it, brought with it a number of assumptions which were shared with the dominant perspective from which it sought to distance itself. This points to the continuing ' hegemony ' of the dominant perspective due to its presence within the framework of its opponents and hence the weakness of that opposition. In spite of this, the first mode of reform aimed at

220. M. Cappelletti and B. Garth, ' Access to Justice as a Focus of Research ', in The Windsor Yearbook of Access to Justice, 1 (1981), ix-xxv(p.xi). See this also for the characterisation of the subsequent waves of the access-to-justice movement.

making rights more effective was strongly resisted, and prevented from being realised, by the institutional embeddedness of antagonistic systemic values within the criminal process.

a)The Committee on the Poor Prisoner's Defence Act 1903:Right is Transformed into Presentational Legitimacy through Systemic Resistance

The Proceedings and Report of the Committee show the collapse and relegation of this universal, rights-based approach to the defendant's position when confronted with the articulation of systemic values of efficiency and speed in the conduct of prosecutions.

The Solicitor-General of Scotland was the only person giving evidence to the Committee who adopted a position founded upon a rights-based approach to the question of the defendant's representation. He was immediately questioned by the Committee over this foundation for his position in terms of the delay that it might cause in the conduct of trials. He saw this as an irrelevant consideration

" it does not seem to me...that the chance that the trial would be longer should be used as an argument against having what I regard as a proper form of trial, namely, that a man who is on trial on a criminal charge should be properly defended. " 221

Every other witness who gave evidence, however, did not start with the same perceptual foundation in regard to the question of the representation of the defendant. Their resistance to universal reprsentation, as well as their acceptance of some form of State provision of funds to enable defendants to be represented, rested upon a perspective which considered the maintenance of the operation of the criminal system as the sole focus of attention. The large majority of cases were seen as not presenting

221. Evidence of the Solicitor-General of Scotland in *The Minutes of Evidence of the Proceedings of The Committee of the Poor Prisoners ' Defence Act*, Parl. Papers **1903**, Vol. VII, p.610

a need for the defendant to be represented because the existing system dealt with them adequately. Moreover, that any notion of universal representation for the defendant was unworkable as was argued in the evidence presented to the Committee by, Sir Harry Poland, from the Committee of the County of London Justices, on which he had served as chairman, that the proposed Bill

" is absolutely unworkable at the County of London Sessions, having regard to the fact that over 2,000 prisoners are committed for trial at those Sessions in the course of the year, namely over 1,700 at the 24 Sessions held a short intervals at Clerkenwell and over 500 at the 12 Sessions held at Newington. " [222]

Not only is the volume of business within the criminal system regarded as incapable of accomodating such a right, but the provision of the right would reduce the number of those who pleaded guilty. These are cases which are seen as ones in which the guilt of the defendant is so obvious that they simply plead guilty at the first opportunity with the trial as pure formality. However, the proposed Bill was seen as undermining this capacity of the system of elicit these guilty pleas.

" all those persons [those who plead guilty] were to be furnished with a copy of the depositions and a form to fill up that they might have solicitors and counsel to defend them. That would be an inducement to them to avail themselves of the liberal and enlightened profession of the law ***to get them off***, instead of their pleading guilty.....I think it would be most undesirable ot practically tell a man, ***considering the kind of men they are...***' Do not plead guilty, here is a solicitor and here is counsel for you, and you had better take your chance '..." [223]

The defendant was an object to be processed by the criminal system in accordance with the internal, systemic values of efficiency and discipline. The defendant was not

222. Evidence of Sir Harry Poland in, ibid, p.614. The Resolution in its entirety forms an appendix to the Report.
223. Evidence of Sir Harry Poland in, ibid, p.615.

to be given the capacity to interfere with the stucture of this process, and, the dominance of these process values to which it gave expression.

Yet, the provision of legal representation for defendant who was poor was not totally excluded by this perspective. It was only to be admitted in certain circumstances whose definition was to be confined to the criminal process itself, by locating the provision of this representation within the discretion of the justices of the peace(magistrates). Therefore, it was to be subsumed under the dominant process values of the criminal system. Institutionally, it could be presented as ensuring that representation was tied to the merits of the case which the justices would be in the best position to decide because of their contact with all cases that entered both the indictable and summary jurisdictions. Moreover, it gave presentational legitimacy to the criminal process because of its ability to provide this representation to poor defendants. As Mr. Justice Channell' Letter to the Committee states

" My main reason for thinking that the object of the Bill is desirable is that....it would tend to increase confidence in the fairness with which justice is administered. " 224

The concern with presentational legitimacy flowed from the trial centred perspective of the Committee and the evidence which it took. The proposed Bill sought the representation of defendants who were poor only at the Courts of Quarter Sessions and Assize, and, the focus of the Committee and the evidence which it collected, never challenged this initial reduction in the scope of the generalisability of the right to representation. This focus of the Committee ensured the reaffirmation of the triviality of summary jurisdiction, both in terms of the offences that were tried there and the mode of trial itself. The Courts of Quarter Sessions and Assizes were concomitantly confirmed in their status as the central sites of the practical enactment of justice in their trial of ' serious ', indictable offences. With this, went the validation of an

224. Mr. Justice Channell's Letter to the Committee in, ibid, p.641.

exclusively trial- centred approach to the question of the position of the defendant centred upon the rules of evidence, which defined the initial admissibility of information at the trial; and the techniques of examination, cross-examination and re-examination which sought to establish the veracity of the prosecution and defence cases. It also, thereby, reproduced the externalisation of, and, disregard for police practices of evidence gathering and witness collection. In the evidence given to the Committee, this disregard was more than an implicit consequence of the predominant perspective. It was an explicit element of this perspective and testified to the institutional legitimacy which the police themselves had by the beginning of the twentieth century.

This was typified by Mr. Justice Grantham, who states, at the beginning of his evidence to the Committee:

" I wish to impress upon the Committee that from my experience the police, as a rule, are very honest in their endeavours to assist prisoners charged with crime, there is no desire on their part to get convictions, and if you throw more responsibility upon them, and let them know that the state has always expected them to do what they could to investigate everything on behalf of the prisoner they would do so still more then they do now." 225

This articulation of the institutional legitimacy of the police was characterised by its strongly abstact nature such that it was incapable of being undermined, or called into question by particular instances of practices which were considered to be contrary to legality. This is clearly apparent in the evidence given by Mr. Buzard K.C., Recorder of Leicester when he is asked about the degree to which the defendant is in an inferior position in relation to the police, he replies that

225. Evidence of Mr. Justice Grantham in, ibid, p.656

" in getting their evidence together, and so on, no doubt they are, to a very considerable extent, in the hands of the police, but my experience is that the police do their durty very fairly, and the higher officers in the force in the big towns are certainly very to the prisoners and desirous that their cases should be brought fairly. " 226

This restates the predominant view of the institutional legitimacy of the police which, in turn, flows over into the characterisation of the general tendency of police practice in the conduct of prosecutions. The strength of this belief in their institutional legitimacy becomes apparent when he is asked whether he has had any experience of innocent defendants being convicted before him.

" I do not think that any innocent man has been convicted before me except once, and then I discovered it within about an hour, and he received a free pardon. ***That was through somehow or other facts being kept back by the police which ought to have been disclosed, and which were disclosed to me afterwards.*** That is the only case that I ever remember of any innocent man being convicted before me. " 227

This incident was not seen as challenging his belief in the institutional legitimacy of the police. Its effect is already determined by this perceptual framework which places it as an isolated incident, quickly discovered which has no explanation other than its mere occurrence as an event. Police practice, which secures its legitimacy from its more abstract legitimacy, remains similarly unaffected by this ' event '.

b)Wider Ramifications of 1903 Committee

The Committee proceedings, and the subsequent report on the Poor Prisoners' Defence Bill, produced a dual effect. They rendered the provision of representation

226. Evidence of Mr. H.C. Buzard, K.C., Recorder of Leicester, in, ibid, p.646
227. Evidence of Mr. H.C. Buzard in, ibid, p.643. My emphasis.

for defendants who wer poor into a merely formal right. The equality between all defendants, which the rights-based discourse had aimed at, was transmuted into a symbolic equality which placed defendants in a relation of ***reputed*** equivalence. This formal equality was given an origin of production and articulation within the criminal process itself by transferring the grounds of representation from the unversality of right to the variable, internal, systemic ground of the merits of the case. The particularity of the merits of the case could then be used to deny any a priori equality between defendants.

This, in turn, attested to the validation and reinforcement that was given to the systemic values of the criminal process and the dominant perspective within which they were placed. Representation of the defendant who was poor did not apply, under the 1903 Act, to the magistrates' court where the vast majority of criminal cases were being dealt with. It was confined to the Courts of Quarter Sessions and Assizes. That small percentage of defendants who were tried on indictment and eligible for this representation could not have it as of right, but had to apply to the magistrate at the pre-trial committal proceedings to be given a certificate for legal aid for the defence. The granting of the certificate depended upon the disclosure of the defence case. On the basis of the disclosed defence, the magistrate would then decide whether there was something special in the nature of the defence, or, from the interests of justice to justify the granting of the legal aid certificate. The foundation of the social identity of the criminal process was, therefore, reaffirmed with as its necessary corollary the definition of the defendant as an object of prosecution to be processed by the criminal system. The activities of the police who controlled the who controlled the initial decision to prosecute, through their exclusive ability to arrest, charge and prosecute, had their institutional legitimacy reinforced by the Committees' proceedings.

Conclusion

The change within the criminal process, intitiated and substantially completed, during the nineteenth century, did not alter the substantive content and character of the position of the defendant. The criminal process did not develop in accordance with a concept of progress or humanity whose advance could be demonstrated in an increased recognition and embedding, within the procedural mechanisms of the criminal process, of an autonomous definition and logic of the defendant's position. The reform ' programme ' of the nineteenth century, encapsulated in the Criminal Law Commissions between the mid 1830s and 1840s, was exclusively focused upon a systemic view of the criminal process in which consideration of the particularity of the defendant's position disappeared as the foundation for the analysis and articulation of both the reform ' programme ' and its supporting conceptual framework.

This conceptual framework was to be the dominant perspective upon, and explanation of, the operation of the criminal process throughout the nineteenth century. Its resiliance is shown by its survival, in a modified form, despite the recognition that the development of particular elements within the criminal process, later in the century, which placed its theoretical coherence and validity in question - the control by the police over law enforcement and the conduct of prosecutions, the transfer of the majority of criminal cases from trial by indictment before judge and jury to summary trial before magistrates, and, the very small number of lawyers engaging in criminal work as a whole together with their concentration upon trial by indictment.

The adjustments within the dominant perspective, necessitated by these changes, produced a durable, transposable and adaptable framework through which the criminal process could be presented and projected. The central element, on which all others in the framework rested and from which they gained their internal coherence, was the trial. The Criminal Law Commissioners had presented this as the

only important part of the criminal process. The rest of the criminal process was seen as of ephemeral importance and incapable of affecting the outcome of the trial itself. The externalisation of the other elements of the criminal process was predicted upon the presentation of the rules of evidence in operation at the trial as the mechanism throught which all other pre-trial proceedings and events were controlled. Anything that occurred outside the trial was, therefore, neutralised and rendered ineffective at the trial itself. The was the sole and exclusive site of the application of law with its proceedings equated with the realisation and enactment of ' justice '. For, the defendant and prosecutor were placed in identical positions because their cases, and the information that they sought to adduce in its support, were regulated by external rules of evidence which operated in accordance with ' justice ' since they were not tied to, or, produced by either of the parties. The trial was based upon the totality of evidence presented from which the guilt or innocence of the defendant could be independently determined.

The exclusivity of this focus was also tied to an exclusive utilisation of the trial by indictment as the insitutional expression of this conception of the operation of the criminal process. The functional differentiation of judge and jury, as triers of law and fact respectively, at the indictable trial provided a degree of procedural complexity which could be equated with a basically impersonal, disinterested trial process. The background legitimacy of the trial was on this basis assumed with any hinderances to the defendant regarded as ' ambiguities ' or ' anomalies ' which were not the expression of deeper, structural processes, but merely of accidental and spontaneous occurence. With the focus located upon the trial the only hinderances to the defendant here were capable of recognition. Therefore, the position of the defendant is only seen to be compromised, by the Criminal Law Commissioners, to the degree that he/she lacks legal representation.

This represented a benign characterisation of the previous historical development of the criminal process in which the trial judge was viewed as functionally inadequate to provided legal representation for the defendant. What this ignored, however, was that the trial judge did not represent the defendant in any sense. The trial judge in the *ancien regime* had never operated in this capacity since the whole structure of the trial, at this period, was predicated upon the absolute personal authority of the trial judge whose decision-making practice accorded with an irreducibly particularistic logic and social authority. The defendant's position was not an independently fixed and formally demarcated one, but existed solely as an effect of the absolute personal power an authority of the trial judge. Therefore, the mode of authority exercised by the trial judge was not based upon the representation of an already existent interest, but actually brought this interest into being since he was invested with the sole power of recognition of the defendant's institutional existence.

This indifference to the deeper nature of the *ancien regime* trial was linked to the wider transformation and reformulation of Bentham's philosophical and jurisprudential project which was reduced to an exercise in transposing the former practical logics of the criminal trial, and criminal process, into a coherent, rule-based form which was presumed to make public and universal the previously hidden regularities of the operation of that criminal process. The project of codification which the formed the essential link, in Bentham's view, between the theory and practice of philosophical radicalism was rejected, thereby, transmuting the whole of Bentham's project into a programme of readjustment of the existent system of Common Law. With this went the reject of the universal conference of citizenship based upon positive law, and, the retention of an increasingly ambiguous origin of the political and social status of individuals which continued to vacilate between a notion of the subject which stresssed its institutional independence, and, one which located its existence solely as an institutional creation and whose content and possibilities of development were institutional concerns.

The Criminal Law Commissioners, thereby, reaffirmed the continued subordination of the defendant to the criminal process as an object of prosecution, while shifting the ground of this subordination from a purely personal mode of power and social authority to an impersonal, supposedly rule-bound social system. This transposition of the defendant's position produced a greater fixity in its institutional definition, but the essential nature of this position as an object of prosecution remained unaltered. The alterations that occurred were in the interrelations between the elements of the criminal process itself.

The evolution of the criminal system from the mid-nineteenth century onwards only served to reconfirm and reinforce the defendant as an object of prosecution, and, the inability of the trial to afford the defendant an alternative recognition of her/his status. Once the police gained control over the process of law enforcement and prosecution the only way that the trial could continue to be portrayed as the sole site of guilt determination was by the stress on the rules of evidence as sufficient mechanism of control over police practice. This failed to recognise that with the confinement and redefinition of the authority and powers of the justices of the peace/magistrates, by Jervis's Acts 1847, the trial became dependent upon the police for the number and type of cases brought for trial and the information upon which the prosecution was based. The judges and magistrates could not initiate prosecutions themselves nor were they capable of gaining knowledge of the degree to which the police presented the totality of evidence available to them in each case that they prosecuted. The profound asymmetry of relations between the police and accused was not addressed during the whole of the nineteenth century because it was never recognised as existing given the stress upon the trial as the exclusive site of ' justice ' and the concomitant externality of pre-trial activities.

The universal right to legal representation which the Act of 1836 had created, in reponse to the Criminal Law Commissioners' Report of the same year, remained

purely formal until the Act of 1903 which recognised a limited right to legal aid for defendants who were poor. The vast majority of defendants were unrepresented during the nineteenth century, and, were tried under the summary jurisdiction which rapidly expanded from the 1850s onwards. The summary mode of trial lacked the institutional differentiation between law and fact of the indictable mode of trial, and, the rules of evidence were far less formalised. This provided a mode of trial which placed few procedural obstacles in the way of prosecution gaining a conviction against the defendant since most offences consisted of the presentation of a case in which the police defined the nature of the offence itself.

From the moment that the defendant was arrested they were consistently disempowered throughout their passage through the criminal process. The defendant remained an object of prosecution to be processed through the criminal system to the trial where a guilty verdict was sought by the police by means of building a case to achieve a conviction against the defendant.

The criminal system continued to develop into a coherent mechanism during the nineteenth century. By the time of the Poor Prisoners ' Defence Act 1903 a coherent articulation of internal, systemic values of efficiency and discipline had a developed which were embedded enough to supplant the attempt to render effective the right to representation of the 1836 Act and an attendant rights-based conception of the defendant's position within the criminal process. The 1903 Act represents the criminal system's ability to maintain itself and its systemic values while adopting certain adjustments to the form of its operations to enhance its presentational legitimacy.

The nineteenth century, therefore, marks the emergence of a different configuration of the criminal process whose reform is not directed at the weakness or oppression of those invested with authority, but the ineffectivity of the existent system

of authority. The adjustments and alterations to this mode of power and social authority are the real foundation of the changes in the position of the defendant who continues to be a product of that authority as a disempowered object of prosecution.

CHAPTER FOUR

THE CREATION OF THE COURT OF APPEAL: A PROCESS OF RELEGITIMATION IN ACCORDANCE WITH SYSTEMIC IMPERATIVES

The creation of the Court of Criminal Appeal, in the first decade of the twentieth century, is looked upon as a further institutional expression of the development of a more just and fair criminal process. The appellate body is projected as providing the defendant with the ability to challenge the decision of the court of first instance, and, hence produces greater scrutiny and uniformity within the criminal process as a whole.

Not only does it, as an institution, embody certain principles, but it is seen to have wider importance in the history of the development of the criminal process. Its creation is linked to the presentation of this developmental history as the unfolding of a concept of progress. It symbolises the movement of the criminal process, through time, towards the realisation of an increasing degree of conformity between the concept of progress and its expression in the reality of the criminal process.

The nature of this prespective, and, its presentation of the Court of Criminal Appeal becomes apparent when it is contrasted with an examination of the actual events, precedings and debates which formed the parameters within which the structure of the appellate court was determined. Through this examination it becomes clear that the creation of the Court of Criminal Appeal had little to do with a conception of progress of justice which took as its focus, and, conceptual foundation the position of the individual accused. The criteria which shaped the appellate court's creation were internal, systemic ones which had developed in accordance with the evolution of the elements of the criminal process during the nineteenth century.

The first section deals with the Committee Reports on the miscarriages of justice in the cases of Adolf Beck and George Edalji. It sets out the analysis of each of the Committees and seeks to demonstrate that their construction to the nature of the cases was presented by them in such a way that the ' mistakes ' were located in the administrative action of the Home Office, and that the solution was simply to adjust them without the need for a Court of Appeal. This meant that public pressure did not lead to the creation of the Court of Appeal. As the second section shows, it was exclusively determined by the institutional needs of the Home Office and the criminal process insofar as this was a part of that system. The third section deals with the case of (R v Gowlett), decided by the Court of Appeal in its first year of operation, and seeks to show that the Court refrained from intervening in the case, despite the actual judgement in the case, because of propensity to validate a trial process that was recognised as defective in oreder to avoid the risk of a challenge to the legitimacy of the criminal process.

The Genesis of the Court of Appeal: The Cases of Adolf Beck and George Edalji

A)THE BECK CASE

i)The factual circumstances of the case

In 1877, John Smith was convicted, at the Old Bailey, for committing frauds upon women whereby he obtained articles of jewellery and money. His method was to introduce himself as a titled aristocrat of wealth and offer the position of mistress to the women concerned. He would suggest that she required a new outfit and would write out a cheque to a well known outfitters drawn on a non-existent bank. He would, at the same time, on some pretext, borrow an article of jewellery or some money which he would disappear with. The name that he assumed for these frauds

was ' Lord Willoughby '. He was convicted and sentenced to 5 years penal servitude and remained in prison until April 1881 when he was released on licence.

Towards the end of 1894, the police began to receive complaints, from women, that they had been defrauded by a man who called himself ' Lord Wilton ', or, ' Lord Wilton de Willoughby '. The methods that were being used to defraud these women were exactly those that had been used earlier in the Smith case. The description that the police had been able to compile, from the information of the women who had been defrauded, varied considerably, but all the cheques that had been given to the women seemed to be in the same handwriting. Initially, the efforts of the police to find the person thay believed responsible were unsuccessful. On 16th December 1895, a women called Ottilie Melsonnier, who had been the subject of one of these frauds the previous month, happened to come across Adolf Beck in the street and began to claim that he was the man who had defrauded her. He protested that he had never met her before and tried to move away from her, but he pursued him along the street until they met a policeman from whom they both sought assistance. Adolf Beck was taken, by the policeman, to the police station where a charge was entered against him. He was identified, after being charged, by two women as the man who had defrauded them, and then sent to the police cells. Then, when the police had contacted the large number of women who had lodge complaints about being defrauded by ' Lord Wilton ', or, ' Lord Willoughby ', these women

" were then in the ordinary way[i.e.an identification parade where Beck would stand with other men]given the opportunity of seeing Mr. Beck, with a view to ascertain whether they could identify him as the man who had defrauded them. " [228]

Beck was then remanded in Holloway Prison and subsequently taken from prison to undergo a further indentification parade, and, after this was brought before the magistrates court and committed for trial. The case, apparently generated some

228. The Committe of Inquiry into the Case of Adolf Beck, Parl. Papers **1905**, Vol. LXII, p.470

publicity, and, as a result a man got in touch with the police to say that Beck was in fact the ex-convict Smith. This information led the police to find ex-policeman Spurrell who had arrested Smith in 1877.

" He swore positively that Mr.Beck was Smith, and was confirmed in his opinion by another officer who had been concerned with the Smith case. " 229

Beck was then re-committed for trial and was tried at the Old Bailey in March 1896 where he was convicted and sentenced to 7 years penal servitude. While in prison, Beck petitioned the Home Office, several times, to exercise the Perogative of Mercy on the grounds of mistaken identity and mistrial, but was refused. It was only when Beck's solicitor addressed a letter on his behalf, in may 1898, that the Home Office actually made inquiries into the case. During these, the Home Office discovered that in 1879, while Smith was in Portland Prison, he had been examined and found to have been circumcised. On the basis of this information, the Home Office consulted the judge in the case, and, came to the conclusion that it would not interfere with the conviction. It merely alloted a new number and letter which indicated that he was a prisoner without previous convictions. The Home Office did not inform the Director of Public Prosecutions, or the police that Smith had been examined by the prison authorities. In July 1901, Beck was released on licence. However, in April 1904 Beck was again arrested on a similar charge to that by which previously he had been convicted, and sent for trial. The trial judge, despite Beck's conviction, felt certain misgivings about the case and postponed sentencing to allow further inquiries to be made of the police and the prison services. These did not yield anything, in the trial judge's view, which was solid enough to withold sentence. Therefore, Beck was again committed to prison. It was not until the arrest of Smith, later in 1904, on similar charges, based on acts committed while Beck was in custody that any further enquiries were made into the case. The Home Office had not been aware that Beck had been arrested and tried a second time until Smith was taken into

224. Ibid, p.470

custody. These eventually led to the release and pardon of Beck for both the 1896 and 1904 convictions.

The matter did not rest with this, however, as a journalist on the Daily Mail, George Sims, took up the issues resulting from the Beck case - the possibility of a conspiracy against Beck - and demanded a Committee of Enquiry into the case as a whole [230]. Sims' demands were subsequently taken up by the Daily Telegraph a few days after the publication of Sims' first article on the Beck case. The Home Office responded by offering Beck £2,000. This was immediately taken up by all the newspapers who now consistently criticised the Home Office, and, insisted that it pointed to the validity of the initial allegations of Sims by demonstrating the desire to dispense with the matter without further enquiry while at the same time acknowledging, through the offer of a substantial payment, that it was in some way at fault, or responsible for the events. Beck, himself, refused the £2,000 and the Home Office then offered to establish an internal enquiry into the matter to be headed by a police officer, who had been instrumental in obtaining Beck's conviction, and that he should make further enquiries into all the events surrounding the Beck case. This proposal was attacked by Sims in the Daily Mail, and, in the Daily Telegraph on August 22nd. Both articles viewed the internal enquiry as an attempt to construct a means of enquiry which would re-legitimate it through a cursory investigation and the narrow terms in which the enquiry would be drawn. Both these papers and the rest of the press demanded that nothing more thatn an enquiry headed by a member of the judiciary would be sufficient.

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230. The first article that George Sims wrote on the Beck case was on August 16th 1904, and he continued to publish articles in the Daily Mail on the issue until the beginning of September when Akers-Douglas, the Home Secretary, appointed a Committee of Enquiry into the Beck case. As a result of the events of the Beck case, the Crimes Club was founded by Arthur Lambton, which included George Sims among its members, and, Churton Collins who attempted along with another member, Conan Doyle, to do what Sims had for Beck in the later case of Edalji in 1907. See, for more information on the Crimes Club, The Unknown Conan Doyle: Letters to the Press (London:Secker and Warburg, 1986).

Eventually, on 9th September 1904, the Home Secretary, Akers-Douglas, perceived that in order for the Home Office to be placed in a position where it would be re-legitimated the only option was to establish a Committee of Enquiry into the Case of Adolf Beck.

ii)The Committee of Inquiry into the Beck Case: Re-Legitimating the Home Office

The Committe states at the outset of its Report that it had defined the parameters of its investigation widely

" We construed our mandate as giving us the largest possible discretion in fixing the limits of our Inquiry. " 231

This meant that what was produced, as a result of this enquiry was to be a clear reflection and articulation of the underlying perspectives upon the operation, and, interrelation of the elements of the criminal process as revealed and defined by the Beck case. For, given this intial statement of the interpretative freedom that they were to enjoy, the only parameters of the inquiry were those produced by the Committee members own combined perceptual schema, through which they analysed the criminal process.

When the Committee sets out on its inquiry and the areas of the criminal process with which it is going to concern itself, it becomes clear that the Committee is intent upon drawing a particular conclusion from the Beck case. The Committee states that it wants to discover

" if possible, the cause not only of the original miscarriage at the first trial, but the subsequent failure of the reviewing authority to detect the flaw and redress the wrong. ***This latter inquiry seemed to us the more important of the two***, since the

231. The Committee of Inquiry into the Case of Adolf Beck, Parl. Papers 1905, Vol. LXII, p.469

judges, however able and experienced, are fallible, and evidence as to identity based on personal impressions, however bona fide, is perhaps of classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury. ***These elements of uncertainty cannot be eliminated from any system of jurisprudence. But it ought to be possible, not to say reasonably certain, that a miscarriage arising in the first instance from one or both of these causes should be capable of redress by the reviewing authority.*** Does our system provide with reasonable certainty for the detection and redress of miscarriage arising from either or both such grounds ? " 232

By this decision, the Committee immediately reaffirmed the dominant perspective upon the criminal process which viewed the trial as the sole site of determination of the guilt or innocence of the defendant. Those elements of the criminal process which exist prior to the trial are, by reason of this very externality, not seen to be important, or, as a possible source of practices which could have produced such a miscarriage. Everything which is pre-trial, therefore, is not considered to be an object of possible inquiry, or, discussion(other than through a statement of the reasons for a lack of inquiry into this area), and, hence because it will not be a focus of attention it will not be a possible target of criticism. This, in turn, means that pre-trial procedures and practices, particularly those of the police, have both their legitimacy and unremarkable character reaffirmed.

The police, as the element responsible for law enforcement and the initiation and conduct of prosecutions in the criminal process, are thereby, left unscrutinised, and, the possibility that they might be in some way responsible for the miscarriage of justice, as a result of the position that they occupied in the criminal process, is categorically denied. This is explicitly affirmed by the Committee when they turn their attention, briefly, to the police in the Report.

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232. The Committee of Inquiry into the Case of Adolf Beck, Parl. Papers **1905**, Vol. LXII, p.471. My emphasis.

This, itself, was a product of the Committee's denials of any police involvement in, or, responsibility for the miscarriage of justice in the Beck case. Moreover, their denials were seen, by them, to be necessitated as a result of what they saw as the

" vague charges that were suggested rather than asserted against them by Mr. Beck." 233

Beck, himself, was stated, by the Committee, to have had no evidence with which to support his assertions. The assertions were explained, by the Committee, as a ' conspiracy theory ' which Beck had produced because of the circumstances to which he had been subject where

" The mistake seemed too gigantic to be explicable on any other hypothesis. " 234

Despite this classification of Beck and his evidence, the Committee went on to further deny the culpability of the police in the Beck case. They stated that they had all the police officers before them, who were involved in the arrest and identification parade, as well as Mr. Dutton, Beck's original solicitor, who all confirmed that the process of idenfication had been properly conducted235. They also denied that the police were in any way interested in obtaining the conviction of Beck. This, they believed, was established by the fact that, in relation to the initial arrest of Beck, in 1896,

" the evidence...shows that though the police were looking for the criminal they had failed to find him, and that his first arrest was brought about on the personal initiative of the woman Melsonnier. " 236

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233. The Committee of Inquiry into the Case of Adolf Beck, Parl. Papers **1905**, Vol. LXII, p.472
234. Ibid, p.472
235. Ibid, p.472
236. Ibid, p.472

The lack of police interest in the conviction of Beck, to which the Committee believed that this pointed, was reinforced by their inability to find any motive for such suggested action. For,

" the evidence of the men themselves and their superior officers satisfied us that their conduct throughtout was dictated by nothing but a sense of duty, and perfectly correct. It requires no sinister hypothesis to explain the unreliability of evidence of identity based on personal impressions, and it would seem that there was some slight resemblance in fact between Mr. Beck and Smith. " 237

It was, therefore, evidence form the police themselves as to the nature of their own activities which convinces the Committe that they played no significant part in producing the miscarriage of justice. This, then, is the source of the Committee's previously articulated view that the miscarriage of justice was the result of the trial situation and the subsquent activities of the Home Office as reviewing authority. The Committee's particular construction of police activity in this case, which is also used to confirm its broader parameters of inquiry, and, the conclusions that it draws from them, becomes clear when the content of the evidence that Beck gave, and, from which the Committee drew the above conclusion, is examined.

Beck' evidence to the Committee concerns the methods by which the police proceeded against him. It alleges that the police had already decided that he was the individual responsible for the frauds, and actively ' constructed ' a case against him in order to establish this. The process of ' construction ', Beck believed, started form the moment that he was taken to the police station after Ottilie Melsonnier had sought the help of a police constable when she alleged that Beck was the man who had defrauded her.

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237. Ibid, p.472

At the police station, where Beck was taken to the charge room, the duty Inspector(whose function it was to decide whether an allegation against an individual was sufficient to justify charging that individual with an offence for which they would be prosecuted), did not take down Beck's statement in relation to the allegation made by Ottilie Melsonnnier, but did take down the statement made by Ottilie Melsonnier. Beck was then detained by the police, and, about five minutes after this

" two other women came in and said " Yes, that is the man " I said, " I have never seen these women in my life before. " I was locked up. " 238

While still in police custody, having been charged with the offence, an identification parade was organised in which Beck stood in amongst some other men, and two other women picked Beck out as the man who had defrauded them. The police then started the process of initiating criminal proceedings against Beck by taking the case to Westminster magistrates court. The magistrate remanded Beck in custody, in Holloway prison, to await committal for trial. During this period, a second identification parade was organised by the police.

" I was again put amongst some men, and a woman came and stood there, and was asked, " Can you see the man? " She said, " No; I believe it is the man standing there." " Well put your finger on him, " said the policeman, but she would not. He then took her umbrella and almost put it on me.[After this,]I was brought before the magistrate three or four times and committed for trial. A number of about twelve women said that I was not the man. They had the same cheques in their possession and had been similarly defrauded, but the police did not produce them or give my solicitor or me their names or addresses to enable me to do so....One day there were a lot of women in the yard and apart from six who said I was the man there were at least twelve who said I was not. " 239

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238. Ibid, p.115
239. Evidence of Beck in, ibid, pp.115-116.

The allegations that Beck made were not about the character of the identification parades themselves, but related to the wider point of the active construction of a case against him by the police who simply used the witnesses who identified him and chose to ignore the others who did not. The police then refused to let Beck of his solicitor have the names of other witnesses, thereby, ensuring that the police case against Beck was the strongest one possible.

The Committee's view, of Beck's evidence and allegations, as a ' conspiracy theory ' could only be taken, given their actual nature, if there was a prior presumption of the legitimacy of the police position, and, as part of this, a particular definition of the nature and rationality of their practices. The Committee's definition presented police practice as one engaged in a process of law enforcement which was guided by an active conformity to legal norms, and, whose nature was without possible effect on any subsequent trial. What Beck's evidence did was to challenge this by pointing to an underlying rationality to their practices which was goal-orientated, namely, to build as strong a case as possible against an individual defendant in order to secure a conviction. Police practice, as presented by Beck, was one which constituted both substantive criminal law and criminal procedure as the material environment within which they had to operate, and, which would be utilised or ignored according to the degree of assistance or hinderance it offered to the attainment of the goal - the accused's conviction. With this, the framework of the law was morally neutralised, and transformed into a set of resources whose adequacy to the goals of the police was the sole issue.

This, the Committee was not prepared to accept as the logic of police practice which Beck's evidence pointed to would have undermined not only the basis of the institutional legitimacy of the police, but would also have challenged the dominant, trial centred perspective through which the criminal process was analysed, explained and understood. The neutralisation of Beck's own evidence, by means of its

characterisation as a ' conspiracy theory ' was, therefore, essential to the foundation of the Committee's explanation, of the causes of the miscarriage of justice in the Beck case.

This rested on locating their origin at the first trial, and, in the subsequent actions of the Home Office as the reviewing authority. The first trial, however, was not seen, by the Committee, as having a great degree of responsibililty for the eventual miscarriage because of what it saw as the inherent difficulties of identification evidence. This then enabled it to pass on to the activities of the Home Office as the major source of the mistakes in the Beck case. However, in order to be able to do this the Committee had to utilise the trial centred perspective with its concomitant externalisation, and, denial of the importance of the pre-trial activities of the police.

The utilisation of this perspective was obvious in the way that it dealt with the question of identification evidence. Their characterisation of this type of evidence as always being one which was intrinsically problematic meant that the cause of this was located in the personal fallibility of the individual witnesses who gave such evidence. This, in turn, meant that the mistaken identification of Beck was presented not as the result of structural defects in the criminal process, but of the contingent, irreducibly particular ' flaws ' of individuals such a lack of memory. This absolved the trial from any implication that it was structurally incapable of adequately protecting the equilibrium between defendant and prosecutor by means of the rules of evidence; and; the trial judges' mistake became a purely singular, individual act equally dissociated from any implication in,or, link with notions of structural weaknesses and their potentially resultant asymmetrical power relations.

What this sought to ignore, and, which was integral to Beck's evidence, was that the police had, in their construction of the prosecution case, carried out a prior process of selection of witnesses who were to give identification evidence. This had

been done on the basis of selecting only those individuals, in the minority, who would identify Beck positively while ignoring ahd, therefore, excluding from the trial the substantially large number of witnesses who denied that Beck was the man who had defrauded them. This meant that the police, before the trial even took place, had knowledge available to them which strongly cast doubt on the likelihood that Beck was the alleged perpetrator of the frauds. Those individuals who gave identification evidence, for the prosecution, at the first trial were, contrary to the Committee's characterisation, selected on the grounds of their ***very capacity*** to give this evidence in order that the prosecution case, as a whole, would be strengthened.

The Committees' creation of a perspective in which the steps taken by the police, in the preparation of the prosecution, effectively disappeared was necessitated by their desire to place the main focus of attention upon the Home Office. The Home Office was seen by the Committee as having dealt defectively with the Beck case when he applied to them for the perogative of mercy to be exercised. Initially, Beck's applications to the Home Office were rejected, but when his solicitor wrote to the Home Office they actually undertook to investigate the case. This investigation, in 1898, elicited the fact that Smith was circumcised and Beck was not, and, therefore, as far as the Committee were concerned, conclusively proved that Beck was not Smith. The Home Office consulted the judge who had presided at the first trial, and, informed him of this. However, they failed to make clear that it was a documented fact, but implied that it was a suggestion of Beck's solicitor.

The conclusion that was reached between the judge and the Home Office was that Beck should not serve out

" his term and no answer was given to his petition except that he was accorded a new number and the mark indicating a previous conviction was withdrawn. " 240

240. Ibid, p.472.

This decision, coupled with the failure of the Home Office to communicate this discovery of conclusive proof that Beck was not Smith to the Director of Public Prosecutions, or, the police was, for the Committee, the origin of the mistake that produced the miscarriage of justice. For,

" the mistake that was made by the Home Office involved two consequences; it led to Mr. Beck's continued detention in prison; it indirectly led to his re-arrest and conviction in 1904." 241

By placing the major responsibility for the miscarriage on the Home Office, the Committee, proceeded to examine the workings of the Home Office Criminal Department as these are presented as the source of the mistakes in the Beck case. The Committee finds that the Department had an organisational structure in which a system of delegation was in operation. Simpler cases were dealt with by subordinate officers, and, the more difficult ones were passed up to the Permanent Undersecretary who, in turn, used his discretion in consulting the Secretary of State. The Secretary of State was always consulted in capital cases. The root of the problem they find, after having examined the Department's analysis of Beck's application, was that the Department lacked the necessary expertise to deal with criminal cases since the staff were not all trained lawyers. As a result, it was for the Committee, of

" the highest importance that the persons upon whom these duties are devolved should, at every link in the chain be trained lawyers. " 242

Not only was it a problem of personnel structure and recruitment policies of the Criminal Department it was also an informational one as well. There should have been a free circulation of information between the various elements in the criminal process. In the future, changes should be made to institutional practice so that

241. Ibid, p.479.
242. Ibid, p.479.

" different public authorities be brought into co-ordination so as to make it impossible that material information acquired by one of them affecting a particular prisoner should not be placed before all. " [243]

This, thereby, significantly altered the characterisation of the miscarriage. It was presented as a purely institutional matter, for which no one person or group of persons could be held responsible, since the sole source of the events lay in the flaws in the technical-bureaucratic procedures of the Home Office Criminal Department which the staff merely conformed to in their decision-making. It was thus transposed into a problem of the rationality of the administrative organisation the Home Office Criminal Department. The focus, of the Committee, was concomitantly reduced to the lack of conformity between the Department's own structures and processes, and, the external demands of both individual applicants seeking the exercise of the perogative of mercy and other elements of the criminal process. With this construction of the problem, came the simultaneous need to establish an equilibrium between the internal mode of operation of the Department and the external demands to which it was subject. It became a matter of adjusting the structure and processes which composed the admininstration of the Home Office Criminal Department.

This necessitated not only the disappearance of the police from the focus of attention of the Committee, but also, and equally essentially, a concentration upon, and particular characterisation of, the administrative organisation and processes of the Home Office Criminal Department. In order to present the Department as the ***exclusive*** site of the miscarriage it had to be projected as the origin of the mistake; and; that these were purely the result of defects in the internal structures and processes of the Department itself. It was thus confined to the question of dealing with a discrepancy between the Department's administrative structure and the function that it was suppposed to carry out in relation to the rest of the criminal process.

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243. Ibid, p.483.

To produce this explanation, however, the Committee had to make the presumption that adequate criteria for administrative action in the Department were both conceivable and practicable. For, only then could the ' problem ' become one of the deficiency of the Department whose solution depended on the discovery and introduction of these adequate criteria. However, this depended on the further presumption that the Department's adminstrative action could be characterised as a legal-bureaucratic form of administration in which action was subsumed under premises. The Department had to be presented as engaged in pure bureaucratic administration. This meant that it was operating at all times with a set of clearly defined legal norms which were its sole foundation for action, and, its decision-making was simply the regular application of these legal norms. Over time, this process of norm application was assumed to produce a systemic values of precision, stability, stringency, discipline and reliability. Because of the premises of administrative action were tied to pre-given norms; the norms which were applied were never able to be expanded, modified or avoided by the staff themselves. On this view, the premises of action were irrevocable with administrative action characterised by obedience to legal norms, that is , with legality as an integral part of its mode of operation. This, in turn, rested on the conception of the strict separation of politics and administration in which the apparatus engaged in the continuous application and realisation of norms was conceived to be completely distinct from the process which produces the norms forming the action premises of the apparatus.

The Committee's explanation of the Department's operation becomes problematic when it is compared with evidence given to the Committee by Sir Kennelm Digby, Permanent Undersecretary to the Home Office, as to the practice of the Home Office Criminal Department. From this, it is apparent that the legal-bureaucratic model, projected by the Committee, does not adequately characterise the Department's administrative activities.

The practice of the Department when it received applications from prisoners, friends, solicitors and persons interested in the cases of individual prisoners was to set the large majority of them aside on the basis that they represented a mere repetition of an earlier plea, insufficiency in the grounds of disputing sentence or conviction, or, were of a frivolous nature. This filtering process still left

" a great mass of petitions which put forward pleas which are prima facie reasonable and have to be considered on their merits. " 244

If the application arose from a summary conviction then the Department obtained the evidence in the case from the magistrate who had tried the case, and, also sought the magistrate's opinion on the case. Sometimes, a report from the police on the case was requested, especially if it had been dealt with by the Metropolitan Police Force. If it had arisen from a conviction at Courts of Quarter Sessions or Assizes then a report of the evidence was obtained from the trial judge(including the judges notes in capital cases). The Department then reviewed the evidence and decided whether there was a substantial ground for inquiry into the case, or, whether it should be dismissed as the application misrepresented the evidence, or contained only statements which were irrelevant to questions of the prisoners' guilt 245.

This review was, however, governed by the Department's perceptions of the external functional demands of the other elements of the criminal process. The concrete results of the Department's administrative action came to determine the suitability of the rules which governed the structure and processes of its administrative activities. As Digby states,

244. Evidence of Sir Kennelm Digby in, ibid, p.331.
245. Evidence of Sir Kennelm Digby in, ibid, p.331.

" if the Home Office.....were on slight pretexts to criticise verdicts and attempt to re-open cases, it would soon ***loose the co-operation of the judicial bench, which is essential to the carrying out of its function...***" 246

Administrative efficiency, thereby, ceases to be conceived as the following of rules. It is now defined as the causing of effects - the fulfilment of concrete tasks. Because the co-operation of the judiciary is deemed to be part of the task of the administrative action of the Department must be structured in accordance with the maintenance of their co-operation. Therefore, the rules which were supposed to be the sole authoritative source of the action premises of the Department are contingent. They are produced, followed or ignored in accordance with their instrumental suitability for this task. The schema which guides the reviewing activity of the Department is consciously constructed with the intention to ensure judicial co-operation. As a result, the Department

" will not re-open a case merely because someone sitting in the Home Office, who has not seen the prisoner and the witnesses, and, not heard the cross-examination, feels, on reading the printed evidence, some doubt..." 247

The staff act in accordance with this because

" the judge who has seen the witnesses and heard the examination and followed the whole case in open court is in a much better position to form an opinion than the Home Office. " 248

The choice of criteria of administrative action must conform to this imperative. As a result, it produces a normative schema in which very strong grounds are required in order to

246.Evidence of Sir Kennelm Digby in, ibid, p.331. My emphasis.
247. Evidence of Sir Kennelm Digby in, ibid, p.333.
248. Evidence of Sir Kennelm Digby in, ibid, p.333.

" induce the Home Office to take any action in a case when a plea of innocence is urged and no fresh evidence is available beyond that submitted at trial.....the broad principle remains that the case will not be re-opened merely in order to re-consider evidence which has already been examined at trial. If the plea is that the verdict is wrong, and if no new material evidence is offered, nor any means suggested by which new evidence can be obtained, the petition will, in ordinary circumstances be refused. " 249

Applications based, on what were defined as ' technical grounds ', were likely to be rejected. This meant that such events as the improper admission or rejection of evidence, or, misdirection of the jury were considered ' technical grounds ' and were not, by themselves, sufficient to engender Home Office review or intervention 250.

The administrative organisation and action of the Home Office Criminal Department was, therefore, geared to the satisfaction of the external demands of the rest of the criminal process. Its internal mode of operation was the result of the implementing rules which were adjudged to be adequate to the fulfilment of this concrete task. Premises of administrative action were at the disposal of the administration itself; action was not tied to rules or ' inputs ' which could not be expanded, modified or avoided. The institution which realised the rules, in administrative action, also produced the rules as well. The clear separation between action premises and their application was blurred, and, with it, the split between politics and administration. The Department, therefore, did not engage in an independent review of the rest of the criminal process. It viewed its activities as dependent upon the maintenance of co-operation of the rest of the criminal process and constructed its mode of review in accordance with this. With this self-consciously functional role adopted by the Department in its administrative practices the ' problems ' of the Beck case were not the product of the structure of the

249. Evidence of ibid, p.332.
250. Evidence of ibid, p.332.

administration itself. For, it was the structure and demands of the rest of the criminal process which had bound the Department to a specific mode of operation. The criminal process was, thereby, immunised against later challenge.

The Committees' explanation of the Departments' administrative action did not fit with the description given by Sir Kennelm Digby. This was because this description did not conform with the way in which the Committee had constructed the Beck case. They had disconnected it form any link to police practice, and, instead channelled and confined it to a problem in the structure of the Home Office Criminal Department's administration. This meant that the identification of the origin of the miscarriage, and, the elaboration upon its nature, by the Committee, then effectively acted as a process of re-legitmation for the Home Office Criminal Department. The events which occurred in Beck's case while serious are, in the Committees' view, simply indicative of gap in an otherwise smooth functioning system which is easily remediable and preventable by various adjustments to the existing system. It is prevented from representing a fundamental or profound challenge to the criminal process and the elements that compose it.

This construction was ***dependent*** upon the definition of its operation as legal-bureaucratic, namely, a continuous application of rules without regard for their effect upon the environment. This ignored the possibility that there was a relation between the elements of the criminal process was structured in accordance with systemic values and practices generated from their interaction. This narrowing of the focus of attention, simultaneously limited the parameters of conceivable change. The Committee did not perceive the case as placing in question the foundations of the criminal process, or, necessitating major institutional change. The creation of a Court of Appeal was seen, by the Committee, as unnecessary

" adequate protection for innocent persons can be secured without the erection of a new Court of Appeal. " 251

Public pressure may have led to the establishment of the Committee, to review the administrative activity of the Home Office Criminal Department, but it did not lead to a recommendation that a Court of Criminal Appeal should be established to replace the activity of the Home Office. The Committee managed, by the definition and construction of the Beck case, to reduce the permissible terrain of reform to a question of administrative-technical adjustment to the institutional procedures of the Home Office Criminal Department. This created a space in which reform could be justified and exclusively underpined by the purely institutional concerns of the elements of the criminal process because they had been exonerated, by the Committee, from any responsibility for the events of the Beck case. Through this shift, to the Home Office, there was, in turn, the neglect and denial of the significance of police practice, and, the failure to recognise the continuous influence it had on the passage of a case through the criminal process.

This explanation and the conclusions that followed from it, outlined by the Beck Committee, were subsequently utilised in the Committee Report on the Edalji case. It reaffirmed and reinforced the initial considerations of the Beck Committee by articulating a viewpoint orientated towards the securing the legitimacy of the existent criminal process without the need for substantial reform.

B) THE EDALJI CASE

i)The factual situation

There had been a number of instances of horse wounding in the area in which Edalji lived. These had created a ' considerable feeling in the neighbourhood '. The police

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251. The Committee of Inquiry into the Case of Adolf Beck, Parl. Papers 1905, Vol. LXII, p.483.

had sought to find the person(s) involved, but their initial efforts had not led to the apprehension of the individual(s). They were therefore,

" anxious to bring the offender to justice. " 252

The police had decided to undertake nightime patrols and surveillance of the agricultural areas in which the previous offences had been committed. One of the policemen engaged on this, became suspicious of Edalji when he was observed walking, at night, across fields in one of these areas. The police continued to observe Edalji as he was regularly taking walks at night, and, after another offence occurred, they decided to search his home the day after.

Here, they found a jacket, waistcoat and a pair of trousers that were damp and muddy. The jacket and waistcoat were also alleged to have had horse hairs on them. A pair of boots were found which were taken to be those that had made the footprints in one of the fields in which the previous offences had occurred. No proper measurement of the boots nor of the footprints was ever made by the police to enable a comparison to be made. They also found four razors, of which, one was damp, and taken by the police to have been freshly washed. These discoveries, by the police, led them to arrest Edalji and charge him with the commission of the offence.

When these offences had begun, and, throughout the period of the police investigation into them, they had received a number of anonymous letters about the offences. These were compared with Edalji's handwriting, and, taken to have been written by Edalji. These letters then became part of the evidence on the assumption that Edalji was responsible for the commission of all the previous offences as well.

While Edalji was on remand in prison awaiting trial another horse wounding occurred. This led the nature of the prosecution case to be changed. Edalji was now

252. Papers Relating to the Case of George Edalji, Parl. Papers 1907, Vol. LXVII, p.403

alleged to have been part of a gang of persons who had carried out these horse woundings. However, the police subsequently arrested a man, Mr.Green, for the commission of this offence, which took place while Edalji was in prison. He had no knowledge of Edalji, and, at the trial the prosecution did not present any evidence to substantiate this new characterisation of the nature of Edalji's involvement in the offences with which he was charged.

Edalji, charged with feloniously wounding a horse, was convicted at the trial and sentenced to 7 years penal servitude. While Edalji was in prison, after his conviction, a further two offences of horse wounding occurred in the area.

He made an application to the Home Office Criminal Department seeking the exercise of the perogative of mercy. This was initially refused. Edalji's case, however, came to the attention of the a Group called the Crimes Club founded in 1904. Two of its members, Churton Collins and Sir Arthur Conan Doyle, took up the case and published articles in the Daily Telegraph [253] which sought to cast doubt on the correctness of Edalji's conviction. These articles, as in the Beck case, were rapidly taken up by the rest of press. They demanded that the conviction against Edalji be overturned, and, for an investigation into the circumstances of the case in order to establish who or what was responsible for the miscarriage.

Unlike the Beck case, these demands were complied with almost immediately, and, a Committee was established to examine the Edalji case.

253. The most comprehensive of these it that published in the Daily Telegraph on 9 January 1907 entitled ' The Case of George Edalji: Special Investigation by Sir Arthur Conan Doyle. '

ii)The examination of the Edalji case: A Conceptual concordance with the Beck Committee.

The Edalji Committee began their inquiry by focusing upon the practice of the police in the case. They clearly state that, in their opinion, those policemen who were involved in the case undertook the process of the collection of evidence .

" not for the purpose of finding out who was the guilty party, but for the purpose of finding evidence against Edalji, who, they were already sure was the guilty man. " 254

Police practice was characterised as aberrational since it had strayed from the logic that was supposed to govern police practice, namely, an investigation in which the guilt of those under investigation is not an apriori presumption, but merely a conjecture whose truth is tested by the investigation itself. The Committee did not attempt to go beyond this initial analysis to find an explanation for this particular occurrence. The conditions which enabled it to arise, therefore, remained inexplicable and were not interrogated further. This meant, in turn, that the logic which the Committee supposed governed police practice went uninterrogated as this occurrence was not seen to put it into question. The concentration of law enforcement in the hands of the police was assumed to place an obligation upon them which was enacted in a disinterested process of evidence collection. The strength of this assumption becomes obvious when it cannot be rendered problematic by the occurrence of the events in the Edalji case. The question of whether and for whom the police assemble evidence and control its content is never adequately raised. For, to do so would then have placed police practice not as aberrational and contingent, but as within the parameters of standard police practice.

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254. Papers Relating to the Case of George Edalji, Parl. Papers **1907**, Vol. LXVII, p.403

Police practice was produced from an antagonism underlying the concentration of the process of law enforcement in their hands. With sole responsibility for the arrest, charge and prosecution of individuals [255] there was a constant tension between securing the accused's conviction and ensuring that the individual was treated fairly in this process. The police resolved this tension by concentrating solely upon the necessity of securing a conviction with fairness towards the individual accused perceived as an impediment to its achievement. The definition of an individual as a ' suspect ' by the police set in motion the process of investigation. Because belief in the individual's guilt preceded the process of investigation and the collection of evidence there was an inherent tendency to link the view taken of the offence and its presumed perpetrator with the investigative strategies themselves. The collection of evidence through investigation was, therefore, not a disinterested process in which assumptions were tested, but an effort motivated by the task of proving the individual's guilt. Police practice, orientated by the goal of securing a conviction against the individual accused, led to the building of the strongest case possible against that individual.

Police practice created a situation in which the task of securing a conviction determined the selection of the charge, the presentation of the case and the choice of witnesses. They determined the nature and amount of material that was provided at the trial on the basis of a prior belief in the accused's guilt, and, were predisposed to reject, or, ignore evidence which challenged this.

Police practice in the Edalji case was not an unique occurrence, but was a particular instance of general police practice. By presenting it as exceptional and hence inexplicable police practice was presented as one of the irreducibly particular conditions of the factual situation of the Edalji case. It was not seen to be a necessary product of the logic of the police practice of law enforcement. This characterisation of

255. See the previous chapters on the Police and the System of Prosecution for a more detailed, historical explanation of this.

police practice entailed the reaffirmation of the background institutional legitimacy of the police. The construction of the case as ' peculiar ' had as its necessary, though implicit, corollary that the majority of cases were ones in which the evidential material produced was not guided by the desire to convict the individual accused.

The Committees' decentring of the police from the main focus of attention in the Report was reinforced by the shift of attention to the trial. The evidence against Edalji was considered predominantly in terms of the rules of evidence, and, the finding of the jury in relation to the material with which they were presented in the case. The evidence collected form Edalji's house was regarded by the Committee as circumstantial, and, the footprints introduced by the police were seen as having a

" value.....as evidence[which] is practically nothing. " 256

They doubt whether this would, in itself, have been sufficient to secure the conviction 257.

In their view, the anonymous letters were the additional element which led to the conviction. They accept that they were written by Edalji, but state that their evidential value depended upon the assumption that the offence with which Edalji was charged was one of a series of outrages all committed by the same person. This was placed in doubt while Edalji was in prison awaiting trial, and, the Committee stress that, when examined, the letters do not

" have anything like the evidentiary weight which has been attributed to them. Their value depends on the contents of the letters themselves.....We think it quite as likely that they are the letters of an innocent man. " 258

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256. Papers Relating to the Case of George Edalji, Parl. Papers **1907**, Vol. LXVII, p.406
257. Ibid, p.406.
258. Ibid, p.407.

On this basis, they conclude that

" in our opinion, the conviction was unsatisfactory....we cannot agree with the verdict of the jury. " 259

The circumstances in which the investigation was conducted, and, the evidence was collected were, thereby, rendered increasingly peripheral. For, the trial was presented as the central site of guilt determination where the evidence was independently analysed and considered by the jury. The Committee made the attendant presumption that the prosecution case was, by this means, subject to scrutiny because the jury, as the ultimate decision-makers on the facts, ensured the propriety, and, hence legality of the prosecution case. The prosecution, therefore, on this view, was subject to regulation. However, the nature of this regulation was not examined further by the Committee despite their own admission that the jury had failed to scrutinise the case carefully enough. The effectiveness of this constraint was, therefore, not placed at issue by the Committee and the mistake of the jury was attributed to its very uniqueness, particularly, the anonymous letters.

The Committees' presentation of the general dynamics of the jury in the case occluded the trial's dependence upon police practice for the content of the prosecution case. The cases which were tried were ' fed in ' solely by the police since the process of law enforcement was concentrated exclusively in their hands 260. The trial dealt with material which was predominantly provided by the police. As a result, it was informationally dependent upon the police; and; the information which was provided was produced by a continuous process of selection. For, the police had control over the process of charging, the presentation of the case and the selection of witnesses. The case against the accused was constructed in order that it was as strong as possible, and, this entailed a recognition of the necessity of its presentation at the trial.

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259. Ibid, p.408.

260.See, for more detail on the historical development of this during the nineteenth century, the previous chapters on the Police and the System of Prosecution.

Police practice was attuned, by the goal of securing a conviction, to the need to ensure that the case was constructed in such a way that it would be immune from later challenge at the trial.

The ' mistake ' of the jury in the case then becomes explicable not as an exceptional or peculiar entity, but the reflection of the structural deficiency inherent in its capacity to act as a constraint upon police practice. The dependence of the jury upon the material produced by police practice was compounded by the misrecognition, by the rules of evidence, of the conditions of production of this evidence. These consisted of an asymmetrical power relation between the individual defendant and the police. However, the maintenance of the form of private prosecution in the criminal process, throughout the nineteenth century 261, meant that there was no clear recognition, within the legal form itself, of the link between the state, police and the practice of law enforcement. Hence, the jury trial continued to present, in its form, the defendant and prosecutor as individuals whose pre-trial interaction was not founded upon any asymmetry that could not be neutralised by the trial itself through the compliance, by both parties, with the trial procedures, rules of evidence and the scrutiny of the jury. With no conception of the social power of the police; and; its continual, institutional existence and reproduction there arose no perceptual space, within this schema, in which the defendant's position could be conceived as in need of particular recognition or extra protection.

The Committees' construction of the ' mistakes ', made by both the police, and, at the trial, as aberrations presented the general operation of the criminal process as a whole as unproblematic. There was no need, therefore, to investigate the adequacy of the criminal process itself because the origin of the causes of Edalji's case were not seen to be located there. This reaffirmed the legitimacy of the criminal process since the case, as a peculiarity, was not the product of normal institutional practices.

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261. See, for more detail the previous chapter on the System of Prosecution.

This unusual, contingent and particular character of the Edalji case, presented by the Committee, which had as its necessary corollary the inexplicable ' mistakes ' of the police and the jury, enabled attention to shift to the Home Office Criminal Department. This construction of the nature of the case, at the lower levels, made possible the continued projection of the Home Office Criminal Department as an independent, reviewing authority.

This view of the Home Office was not undermined by the Committees' assertion that the Home Office was incorrect not to intervene in the case [262]. For, their analysis of the Memorandum, prepared by Sir Kennelm Digby, as to the practice of the Home Office, which was presented to the Beck Committee, led them to the conclusion that the lack of intervention in the case was itself a ' mistake '. The Memorandum, as a description and explanation of the parameters of that practice, was seen as establishing that Home Office administrative action was geared to the comprehensive scrutiny and review of criminal cases [263]. The ' mistake ' of the Home Office, given the interventionist parameters of its administrative action, was simply one of the misrecognition of the type of case with which they were dealing. It was an isolated instance of the misapplication of administrative norms to a particular case. For, this was a

" very exceptional case, which [should have been] considered in an exceptional manner." [264]

The partiality of this interpretation of the Memorandum was revealed in the above analysis of the Beck Committees' Report; and; with this definition of Home Office administrative action, the conceptual concordance between the Edalji Committee and the Beck Committee was explicitly visible. As was its underlying aim

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262. See, for the analysis of the Home Office role and operation in the case, Papers Relating to the Case of George Edalji, Parl. Papers **1907** Vol. LXVII, p.408
263. See ibid, p.408
264. Ibid, p.408

of re-legitimating the existing criminal process through each Committees' construction of the explanation for these cases.

C)THE CONCEPTUAL LEGACY OF THE BECK AND EDALJI COMMITTEES.

The occurrence of these cases, and, the ' public ' pressure that they generated through the press, was seen to represent a challenge to the whole of the criminal process. The institutional legitimacy of the criminal process, which had remained an implicit, background assumption was, as a result, made problematic. It could no longer exist as a largely unarticulated and tacit presumption since the cases had made its very existence as an unreflective presumption questionable. Both of the Committees were assumed, by those in the press, to represent a form of independent investigation into each of the cases which would establish the nature of the causes and the responsibility of the criminal process; and; the attendant changes that were necessary.

However, the construction of the cases of Beck and Edalji in the Committee Reports produced a explanation which reasserted the legitimacy of the existent criminal process. This was done, in both Reports, by the subtle transfer of focus from the police and their practices to the trial, and, the exercise of the perogative of mercy by the Home Office. This description proscribed the ambit of possible criticism; and; at the same time, transmuted even this confined critical potential into the task of adjusting these administrative deficiencies in the existing system.

This was not produced by chance, as the construction of both the cases entailed an active denial of the social power of the police and the dependence of the rest of the criminal process upon the dynamics of their practice. This active denial flowed from an undiscussed presumption which lay behind Committees's

investigations, namely, the creation of the motivation necessary for the maintenance of the legitimacy of the criminal process without the need for major alteration or reform.

The creation of the Court of Criminal Appeal did not, therefore, originate in the Reports of either of the Committees. Neither of them recommended its formation, nor, was the conceptual schema that they produced attentive to the need for its creation. These Reports were the repositories of the dominant self-imagery and self-explanation of the workings and purposes of the criminal process. Their explicit rearticulation and reaffirmation of this perspective formed the basis on which the operation of the criminal process was to be understood. It also allowed the criminal process to continue without change being pressed upon it in accordance with ' public ' pressure, and, hence the possibility of the introduction of , or, regulation by, norms which were independent from those which were generated within the criminal system itself. The criminal process, through the efforts of both Committees, maintained the autonomy of its practices from external control. Its identity and reproduction continued to be governed and steered by systemic imperatives. Any change within the criminal process was, therefore, to be shaped and determined by the internal, systemic task of securing the continued survival of and the avoidance of risks to the criminal system. The creation of the Court of Criminal Appeal was to be the result of this type of decision-making process.

The Creation of the Court of Criminal Appeal: Formation According to Systemic Needs.

The Court of Appeal was, formally, the creation of a new institution in the criminal process. The consideration of the interests of the individual accused, or, prisoner were not the prime, or, major basis upon which this new institution was constructed. Its structure and parameters of operation were determined by the institutional needs of the Home Office Criminal Department.

This change was generated by the perception of the Home Office Criminal Department that its present role in the criminal process, through the exercise of the perogative of mercy, was placing it in a position where it was overburdened and its administrative activities were under strain. The Department felt that it was experiencing a situation in which

" the permanent staff of the Home Office is constantly held up to public obloquy by persons who have been unsuccessful in petitions on behalf of prisoners. " 265

This was a constant tendency of the Department's work, but in the cases of Beck and Edalji this had produced both condemnation in the press and the demand, through the Committees of Inquiry, to articulate their administrative practices. Despite the construction placed upon their activities by both Committees, this had been the first time that their administrative action had been subject to scrutiny, or, the attempt to attribute responsibility to it for failings in the criminal process.

This new level of public scrutiny of the administrative action of the Department was compounded by the workload which the existing parameters of the perogative of mercy produced. By 1905, the Department was having to deal with about 6000 applications for its exercise 266. The pressures that both these demands created led to the desire, on the part of the Department to alter the criminal process in to relieve them and, thereby, to ensure the survival of the Department, albeit in a modified form. The establishment of the Court of Criminal Appeal exercising a judicial function was now perceived to be the necessary solution to these needs of the Home Office Criminal Department.

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265. Home Office comments on the 1906 Criminal Appeal Bill dated 31/3/1906 in H.O. 45/10337/139064/1

266. Figure contained in confidential statistics supplied to the Lord Chancellor by the Home Office detailing the conviction by juries, appeals to the Home Office and release of prisoners by the Home Office in H.O. 45/10337/139064/3.

The Court of Appeal was to deal with appeals arising from indictable offences, leaving the Home Office to deal with those arising from summary offences under Section 1(1)

" A person convicted on indictment may appeal within the time provided by this Act to the Court of Criminal Appeal against conviction on any ground, whether law or fact, or of mixed law and fact, and he may so appeal against the judgement (other than judgement of death) passed on his conviction, on the ground of illegality or undue severity " 267

The Home Office viewed this as marking a substantial change in the Departments' practices and workload.

" The foregoing provisions for transferring to the Court of Appeal much of the work which the Home Office hitherto attempted to do will be an immense relief to Department C[Criminal Department of the Home Office]." 268

The relief that the establishment of the Court of Appeal was to cause the Home Office is immediately countered by the fear that, unless the procedures for the new appellate body were carefully worked out, the system would risk becoming disorganised. The main source of this potential disorganisation was seen to arise from an unrestricted right of appeal by defendants convicted of indictable offences. For, it was considered to be

" practically certain that every prisoner will appeal whether he has any real or substantial grounds for appealing or not, seeing he may gain by the operation, while he is left in none the worse position if he fails.....[T]he unrestricted right of appeal

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267. The Criminal Appeal Bill 1906 Section 1(1) in H.O. 45/10337/139064
268. Home Office comments on the 1906 Criminal Appeal Bill in H.O. 45/10337/139064/12.

would bring about such a condition of things as would result....in the complete disorganisation of the criminal business of the country." 269

The risk posed by a free exercise of a right of appeal led to the introduction of various mechanisms in order to prevent this right from attaining this position. This potentially uncertain ' environment ' which confronted the Court of Appeal was to be rendered stable and certain by a combination of restrictive criteria for appeal within the Act itself, and, external devices.

Before appeals, from those convicted of indictable offences, could even reach the Court of Appeal they were to be subject to two ' filters '. Commenting on the provisions of the 1906 Bill, the Home Secretary, stressed the need, when the Bill became law, to send instructions to prisons to adopt a policy, towards those prisoners who sought to appeal, which would

" prevent the accumulation of nugatory petitions and the consequent disappointment of petitioners" 270

In tandem with the establishment of the Court of Appeal there was to be the installation of an external, administrative ' filter ' which was to be in permanent operation throughout the prison system.

Appeals themselves were to be subject to a degree of limitation through the time that was to be allowed in which an appeal could be made and lodged. This was contained in Section 3 (1)

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269. Extract from the Report of the Parliamentary Committee on the 1906 Bill in H.O. 45/10337/139064/4

270. The Secretary of State's comments on the 1906 Bill in H.O. 45/10337/139064/12

" Where a convicted person desires to appeal under this Act he shall give notice of appeal.....within 10 days of the date of conviction, or such further time as may be allowed by the Court of Criminal Appeal or any judge thereof." 271

While an absolute and rigid time limitation was not placed upon appeals it was clear that the intention was that the 10 day limit would be the regulatory norm with only a small degree of flexibility to be exercised outside this. The extension of time for appeal was only to be exercised, stated the Home Office, if

" through some oversight or ignorance, the ten days have been allowed to go by.....A judge would not extend the time to appeal so as to allow an appeal, say a year or more after the time had elapsed. " 272

In comparison with the administrative action of the Home Office Criminal Department this Section was closing off the possibility of review far more quickly than had been characteristic of the Home Office. The Department had adopted a practice in which the

" perogative of mercy had frequently been exercised on facts brought to our knowledge a long time after trial. " 273

It was, therefore, the intention, despite the wording of the Section, that the Court of Appeal was to operate more restrictively than the Home Office had done, and, that appeals were to dismissed on the ground that they were outside the time limit.

If the appellant managed to overcome these ' filters ' they were then able to present their case to the Court. Under Section 1 (1) The Court of Appeal was given

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271. Section 3 (1) of The Criminal Appeal Bill 1906 in H.O. 45/10337/139064.
272. The Criminal Appeal Bill: Home Office points in L.C.O. 232/1270/1
273. Home Office comments on the 1906 Act in H.O. 45/10337/139064/1

considerable discretion in dealing with an appeal case. If the judges of the appellate court decide that the appeal ought to be allowed then they can under Section 1(1)(a)

" either quash the conviction and direct a judgement of acquittal to be entered, or quash the judgement passed at the trial, and pass such other judgement in substitution thereof as they think ought to have been passed. " 274

Alternatively, if they are not of the opinion that the appeal ought to be allowed then they may dismiss the appeal under Section 1(1)(b). The decision to dismiss the appeal is also one in which the appellate judges can exercise discretionary powers under Section 1(1)(b)(a)-(e). The most important were those contained in (a)-(c) in which

" (a) the court may, notwithstanding that they are of the opinion that the point raised in the appeal ought to be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has, in point of fact, occurred.

(b) the court, if it appears to them that the appellant, though not properly convicted on some other count or part of indictment, may either affirm the judgement passed on the appellant at the trial, or pass such judgement in substitution thereof as they think proper[Under section 1(2), however it is expressly provided that the ' Court of Appeal, shall not, by any substituted judgement passed by them under this section, inflict upon the appellant a severer punishment than that inflicted by the judgement passed at the trial.']

(c) where an appellant has been convicted of an offence and the jury would on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of the facts which proved him guilty of some other offence, the court may instead of allowing or dismissing the appeal. subsistute a verdict found by the jury a verdict of guilty of such other offence,

274.Section 1(1)(a) in The Criminal Appeal Bill 1906 in H.O. 45/10337/139064

and pass judgement in substitution for the judgement passed at trial as they think proper. " 275

With these powers the Court of Appeal was given a potentially strong interventionist and regulatory role in the criminal process. The definition of miscarriage of justice, for indictable offences, was placed within its almost exclusive purview. This definitional power meant that the notion was given a flexibility of content according to judicial assessment of the criminal process. This, in turn, meant that a particular case could be dealt with by a large degree of discretion in both the decision to grant or refuse appeal, and, the nature and character of the sentence as a result of that decision. The transfer of what the Home Office Criminal Department regarded as the majority of its responsibilities, in regard to the criminal process, to the Court of Appeal still left the institutional relation between the two to be decided. Under Section 6 the perogative of mercy was still to remain applicable to both indictable offences and summary offences.

" Nothing in this Act shall affect the perogative of mercy, but the Secretary of State to whom any petition to his Majesty for mercy, having reference to the conviction of a person on indictment to the judgement (other than judgement of death) passed on a person so convicted, is referred may, if he thinks fit, at any time refer the case to the Court of Criminal Appeal, and the case shall be heard and determined by the Court of Appeal, and the case shall be heard and determined by the Court of Appeal as if notice of appeal had been given by the person convicted within the time allowed by this Act. " 276

The maintenance of the perogative of mercy by the Home Office created the possibility of overlapping jurisdictions and institutional conflict between the Home Office and the new Court of Appeal. For, appellants could still be dealt with solely by

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275. Section 1(1)(b), subparagraphs (a)-(c) in The Criminal Appeal Bill 1906 in ibid
276.Section 6 in The Criminal Appeal Bill 1906 in H.O. 45/10337/139064.

the Home Office since they had a discretion, rather than a duty, to refer the matter to the Court of Appeal; and; there was nothing to prevent an unsuccessful appellant in the Court of Appeal subsequently applying to the Home Office.

The Home Office was, however, aware of this possibility and was intent upon altering its administrative action in accordance with a self-imposed task of functioning in a much reduced role in the new criminal process. Some alteration in its role was necessary, otherwise

" great difficulties would arise if the new court should be established as proposed in it [The Court of Appeal Bill] without corresponding adjustment at the Home Office. " 277

These adjustments were to take the form of

" (i) clear instruction as to the general principles on which we will now exercise the perogative of mercy after the establishment of the new Court, and, (ii) formal provision for keeping the Home Office acquainted with the applications made to the Court and decisions arrived at. " 278

The principles that were to govern the future administrative practice of the Home Office was to consist of referring cases to the Court of Appeal only if fresh evidence was brought forward by the appellant that was not available at the time of the appeal. In cases where the prisoner has exercised her/his right to appeal and been refused, and, then applies to the Home Office the Department recognised that it would either

277. Home Office comments on The Criminal Appeal Bill 1906 in H.O. 45/10337/139064/12
278. Ibid.

" have to incur the odium of refusing the prisoner what will be represented as his only chance to getting justice, or the censure of the Court for compelling it to hear an appeal on what the Court regards as frivolous or insufficient grounds. " 279

This dilemma which faced the Home Office between the choice of one of the two options was to be contradiction that was to continually confront the Department as a result of its altered role in the criminal process with the creation of the Court of Appeal. Action or inaction on the part of the Home Office was now placed in a position where it determined the extent to which the Court of Appeal was to act as the institutional pinnacle of the criminal process.

The reduction in the perogative of mercy, and, the establishment of the Court of Appeal had been driven by the internal needs of the Home Office Criminal Department. These needs too pointed towards the maintenance of the Court of Appeal as the appellate body of the criminal process. For, the diminution of the visibility of, and, risks to the Home Office role in the criminal process had been exactly what the creation of the Court of Appeal had been intended to produce.

Home Office control over the creation of the Court of Appeal, and, the new institutional pattern of the criminal process that it engendered meant that consideration of the position of the individual appellant was only considered in so far as it directly affected the implementation of this systemic alteration in the criminal process. The needs of the individual accused were not the foundation of this change. It was the continued survival of the criminal process, of which the Home Office was an element, that underlay the change. As a result, the legitimacy of the criminal process was considered to reside in the maintenance of public confidence in the criminal process. This was based merely upon the number of people who supported the criminal process. It was, therefore, a matter of continuing to produce the conditions in which people were motivated to do this. The administrative pressure

279. Home Office memorandum on the Court of Appeal Bill 1906 in L.C.O. 2/232/1270/1

that the Home Office felt itself subject to, was also considered to be endangering this public consent. The Court of Appeal was to be the institutional device which would overcome this potential threat to legitimacy.

The dominance of these systemic needs were reflected in the Court of Appeal being confined to deal with only indictable offences. These were regarded by the Home Office as the most demanding element of its existent workload, and, therefore transferred to be the sole workload of the Court of Appeal. However, this left those convicted of summary offences, without recourse to the new Court. Under section 31 of the Summary Jurisdiction Act 1879 those convicted of summary offences had been able to appeal to Courts of Quarter Sessions. It was clear, by the time of the Court of Appeal Bill, that it was a flawed process. The defendant could initiate proceedings under this section by informing the magistrates, at time of the trial, that he/she wanted to appeal, or, by lodging an appeal from prison. They had to give written notice of appeal with grounds to the prosecutor and the clerk of the justices, and, enter into recognisances usually with sureties. It was also practically necessary for the appellant to instruct a solicitor and/or counsel if they were to have a chance of success. The costs of representation had to be borne by the appellant themselves as the Poor Prisoner's Defence Act 1903 did not apply to summary cases. Therefore, even if successful the appellant still had to pay a solicitor's bill; and; sould they have their appeal dismissed then they were also liable to pay the prosecutor's costs. To undertake this procedure for appeal was an expensive prospect for any potential appellant, and, by the time of the Court of Appeal Bill it had become obvious that in practice

" the right of appeal to Quarter Sessions against summary conviction is absolutely useless to a poor man. " 280

280. Sir H. Poland and H. Cohen, *The Criminal Appeal Bill Examined* (London:Sweet and Maxwell, 1906), p.53.

Most appellants convicted of summary offences were, as a result, using their ability to apply to the Home Office for the exercise of the perogative of mercy because this procedure did not involve any expense or formalities. Applications by those convicted of summary offences were not treated with the same degree of seriousness or attention by the Home Office. Despite their practice of obtaining the evidence from the magistrate and his opinion on the case, and, occasionally a report from the police where there was a prima facie plea the decision-making process in regard to these offences was one which lacked much further inquiry. This was the result of the Home Office view that since the sentences for these offences was short then there was

" rarely time for elaborate inquiry. " 281

The relative lack of attention that had characterised Home Office practice towards summary offences was not altered by the establishment of the Court of Appeal. The restriction of the Court of Appeal to indictable offences reinforced the institutional separation of indictable and summary offences. Furthermore, the ability to use the Court of Appeal was a symbol and constant affirmation of the seriousness of indictable offences. All appellants unable to utilise the Court of Appeal were left with a separate appellate procedure which either presented them with substantial financial risks(appeal to Courts of Quarter Sessions), or, dealt with their case in a cursory manner(the Home Office Criminal Department). This, in turn, could only but reinforce the definition of these offences as non-serious, trivial and of little consequence.

Both the decision to establish the Court of Appeal, and, the determination its institutional form were guided by the values and norms of the Home Office Criminal Department. This process of establishment and formation was constantly informed by the systemic need to ensure the survival of the criminal process which, in turn,

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281. Evidence of Sir Kennelm Digby to the *Committee of Inquiry into the Case of Adolf Beck*, Parl. Papers **1905**, Vol. LXII, p.333.

produced a perceptual context in which the creation of the Court of Appeal was conceived as the solution to this practical problem. However, this produced only the legislative demarcation of the parameters of its operation. It was to be left to judicial practice to provide the concrete, practical continuity between desired legislative intentions and the actual institutional operation of the Court of Appeal.

The Replication of the Previous Immunity to Challenge of the Decisions of the Lower Courts: The Court of Appeal and the Case of Gowlett.

The case of (R v Gowlett)[282] was decided by the Court of Appeal in the first year of its operation. It shows the way in which the new Court of Appeal and the Home Office responded to an application which challenged the validity of the prosecution case, and, since this rested, in the main, on police identification, the nature of police practice.

i)The facts of the case

Two police detective constables, D.C. Hubbard and D.C. Powell, were engaged in the observation of a jewellers, in North London, where it was suspected by the police that the jeweller was receiving stolen property. Both policemen were operating ' undercover ' with D.C. Hubbard employed as a pawnbrokers assistant in nearby premises and D.C. Powell ' lounging ' on a nearby bridge.

At 12.00, on the morning of 5th October 1908, during this operation, two men, Gowlett and Haers, come out of a lodging house(where they were both staying), located in the same street, and walked up the street. A few minutes later, a man known to D.C. Powell as ' Jack ' passed by him on the bridge and told him that there were two telescopes in the lodgins house which might be stolen. D.C. Powell informed D.C. Hubbard of this, and, that he had seen Gowlett and Haers whom he knew were ex-convicts under police supervision. They agreed that it might be worth

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[282]. Criminal Appeal Reports, Vol.1 1909, pp.204-5,238-40

keeping an eye on them. At around 12.30 the same morning Gowlett and Haers returned to the lodging house, and, twenty minutes later D.C. Hubbard gave a signal to D.C. Powell that ' something was up '.

D.C.s Hubbard and Powell then alleged that they saw two men, one of whom they recognised as Haers, and, the other whom they could not immediately recognise walking up a side street. They said that they saw the other man give Haers a sack. The detective constables then followed both Haers and the other man whom they still could not identify. They did not arrest them immediately, acting on the advice to the station superintendant, but waited. On the 8th October the detective constables arrested Haers who was found to have the sack which contained the stolen telescopes. Also, on the 8th one of the detective constables alleged that he saw Gowlett in the road in which the lodging house where Haers was staying, but he was not arrested until the 9th when he was coming out of the lodging house.

Both men were charged jointly on indictment with stealing, and, receiving stolen property. Haers pleaded guilty to both charges. Gowlett pleaded not guilty and put forward an alibi that he was in bed on the evening of the robbery, and, at the time that he was alleged to have been seen with Haers on the morning of the 5th October, when the sack was exchanged, he was actually at Covent Garden. However, some of Gowlett's witnesses who had been summoned to appear did not come to the trial. The evidence of D.C.s Powell and Hubbard was the only content of the prosecution case. D.C. Hubbard stated that he had seen Gowlett ,on the 8th October, in the road on which the lodging house was on. D.C. Powell stated that he had known Gowlett for 5 years and that he was then under police supervision, and, that he had no doubt that Gowlett was the man with Haers that day. The Deputy-Chairman of Quarter Sessions directed the jury only to convict of receiving. He was sentenced to three and a half years penal servitude with two years police supervision. Gowlett

then lodged as appeal against his conviction. Leave to appeal was subsequently granted to call further witnesses to confirm the night and day alibis.

ii)The case on Appeal: (R v E. Gowlett)

Haers and two other witnesses called Chaffin and Betjeman gave evidence. Haers said that Gowlett had nothing to do with the offence. Chaffin and Betjemen gave evidence confirming Gowlett's alibi that on the morning of 5th October he had been with them at Covent Garden, and, had stayed with them until 2 o'clock in the afternoon. This evidence, and, the subsequent explanation by Chaffin that he had been unable to attend the initial committal proceedings as his father had been taken ill, and, had not come to the trial because his mother was dying when the case was being heard, was not sufficient to convince the court that the conviction should be quashed. The Lord Chief Justice dismissed the appeal saying that

" The Court is not satisfied with the the explanation given for not calling at the trial the evidence produced on appeal. These was no dispute as to the identity of the man, as the police knew the appellant very well. [The a]ppellant had to account for his movements on the day in question, and, though he sought to prove an alibi, at the trial he did not go into the [witness] box to establish it. The jury had the question of the alibi before them. " [283]

With the dismissal of his appeal Gowlett then applied to the Home Office for the exercise of the perogative of mercy on his behalf to quash the conviction.

iii)The Deliberations of the Home Office: Revealing and Affirming the Hidden Rationale of the Court of Appeal in the Case.

The Home Office Criminal Department, as a result of Gowlett's application, undertook their own examination of the case to establish whether, in their new,

283. Lord Chief Justice Alverstone in *(R v Gowlett) Criminal Appeal Reports*, Vol. 1 1909, p.240.

reduced role in the criminal process, they should intervene in his case. They first turned their attention to an analysis of the way in which the Court of Appeal dealt with the appeal.

The conviction of Gowlett was based, in their view,

" entirely upon his identification by the two detectives Hubbard and Powell. " 284

Gowlett's case on appeal was viewed favourably. His alibi that he was at Covent Garden on the morning of the alleged sighting of himself and Haers exchanging the sack was seen as being about

" as good a one as any man casually employed at Covent Garden can be expected to produce. The witnesses have good reason to remember that day [5th October was a Jewish holiday with most places closed in Covent Garden]. They gave their evidence well and were unshaken in cross-examination by Counsel or the Court. " 285

They then come to the Court's judgement itself and the reasons that led them to dismiss Gowlett's appeal. As the result of consultation between the Home Office and the Court of Appeal, it becomes clear that the judgement given by Lord Chief Justice Alverstone did not contain the real reasons for the decision. It was the understanding of the Home Office that

" the Court were ***inclined to quash the conviction but refrained from doing so because it would, in their opinion, have involved finding the detective guilty of perjury***. The detective's evidence is not entirely satisfactory. It is curious that at that moment[i.e. the morning of 5th October]they made no attempt to catch Haers

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284. The Case of Edward Gowlett alias Woodford under the heading entitled ' The Home Office analysis of the appeal in the Court of Appeal ' in H.O. 45/1689/105768.
285. Ibid.

companion. Gowlett says he slept at 180 Caledonian Road[the address of the lodging house]every night from 5th to 8th and is corroborated by the deputy and yet no inquiry was made by the detective at the lodging house. ***The Court was not satisfied with the detectives' explanation of this.*** " 286

It is unclear from the Home Office file, whether there was a finding that the detectives had lied; or; whether it was simply the feeling, on the part of the Court of Appeal, that this would be the inference drawn from if the conviction was overturned.

However, what is clear is that there was a willingness to validate a conviction, and the original trial process which produced it, which was recognised, by the Court of Appeal, from the evidence adduced by the appellant, and, the flaws in the prosecution case as defective.

This points to the continuing immunity of the trial process and the police case from subsequent challenge. It, therefore, indicates the degree to which, even in the first year of its operation, systemic values - here the avoidance of risk to the criminal process - had embedded themselves within the judicial practice of the Court of Appeal. Furthermore, it demonstrates the extent to which the new Court was prepared to go to satisfy these systemic needs, namely, effectively reversing the position of legal reasoning and the decision was supposed to flow from it. In this process, the normative foundation of the Court of Appeal contained in the legislation which established it, which was supposed to determine and guide the practice of judicial decision-making was transformed into a resource which was assist them to achieve their purpose - the concrete task of maintaining the legitimacy of the criminal process.

The Home Office too opts not to intervene, despite its misgivings. The rationale for non-intervention consists of the need to play a reduced role in the

286. Ibid.

criminal process by not challenging decisions of the Court of Appeal without substantial grounds for intervention, that is, something more than was presented at the trial.

" the Court of Criminal Appeal has had the whole case before it, has heard all the evidence which the prisoner failed to call at his trial and has decided not to interfere. This being so, I do not see how it is possible for the Home Office, whatever doubts we may feel, to revise the findings of the Court of Criminal Appeal. If any new evidence were available since the Court had decided the case, there ought to be an opening; but there is no suggestion that we have anything before us except the evidence given at the trial before the Court of Appeal. " 287

The possibility of institutional conflict with the Court of Appeal, and, the potential risks to the legitimacy of the decision-making practices of both the Home Office and the Court of Appeal that this might cause was the dominant consideration for the Home Office Criminal Department. It was the same logic, though expresssed in a different institutional context, which had governed the operation of the Department in the period prior to the Court of Appeal - the task of satisfying the expectations of the judiciary as propounded before the Beck Committee. This rationale was at the same time one that maintained the immunity of the case from interference in the higher levels of the criminal process. By maintaining this immunity it also furthered the reproduction of the systemic logic of the Court of Appeal.

The Home Office, under the reduced perogative of mercy, was engaging in an adminstrative practice which would not challenge the decision-making of the Court of Appeal in order not to undermine the appearance of the independence and depoliticisation of the criminal process which was effected by its creation. Institutional inaction, on the part of the Home Office, was to be the basis for the

287. Memorandum on the front of the file in, ibid.

maintenance of the legitimacy of the other institutional elements of the criminal process.

Conclusion

By the 1920s the Court of Appeal had been set within a discourse which stressed the necessity of its creation, and, the concomitant diminution of the powers of the Home Office under the previous, unreformed system. The Home Office was incapable of dealing with the task and the Court of Appeal was the inevitable result of this incapacity.

" [T]he Home Office was forced into the position of a final court of appeal...the Home Office possessed none of the ordinary powers of a court of law for this purpose. " 288

The Court of Appeal was the institutional solution to this problem with the transference of power to the Court of Appeal marked by a profound change in the criminal process in which

" The Home Secretary ws once and for all relieved of responsibility which ought not to have belonged to him. " 289

The nature of this change was more than a simple transfer of function from one institution to another as projected by this characterisation. The establishment of the Court of Appeal was a direct response to, and product of the Home Offices' increasing administrative workload and the visibility of its role in the criminal process produced by the inquiries of the Beck and Edalji Committees. Both of these elements were perceived in terms of the effect that they were having, or, could have upon the

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288. Sir E. Troup, *The Home Office* (London: Putnam and Sons, 1926), p.58.
289. Ibid, p.59.

legitimacy of the criminal process. The need, on the part of the Home Office, to ensure the maintenance of the criminal process led to the creation, with the Court of Appeal, of a more flexible and complex criminal process.

The re-legitimation of the criminal process which was begun with the analysis and construction of the Beck and Edalji Committees and ended with the implementation of the Court of Criminal Appeal, in 1907, was a process in which consideration of the protection of the individual defendant found little place. This ' project ' of renewal of the criminal process traced in this chapter was specifically orientated towards the maintenance and reproduction of the efficiency and organisational coherence of the criminal process. This was the conceptual environment in which the Court of Appeal was shaped.

The case of (R v Gowlett) points towards the appellate body's tendency to engage in the active reproduction of this institutional legitimacy even to the extent of the denial of evidence which they themselves knew cast doubt upon the voracity of an individual's conviction. This evinces the more general propensity to the reduction of the Court of Appeal's perceptual framework to the sole concentration upon the demands and interests of the other elements of the criminal process. This has the further consequence that the rationality of judicial decision-making becomes orientated by this goal, and, that the character and analytic content of Court of Appeal judgements become incoherent and irratic. For, what is demanded of them is a flexibility borne of the systemic needs of the criminal process. This, in turn, hints at the conformity in theory and practice between the operation of the Home Office Criminal Department under the unreformed system, and, the new Court of Criminal Appeal in the more complex system.

More fundamental than this potentiality for the decline of judicial reason is the disappearance from view of the activities of the police. The Court of Criminal Appeal

and the Home Office, in its reduced role, can only recognise ' mistakes ' or ' wrongdoings ' that occur at the trial, that is, those of ***legal*** significance. This means that implicit within this is the view that the trial is the sole site of guilt determination in which all external, pre-trial activities are without effect. This, ignores, through the constitution of its irrelevance, the continuous process of selection which the police engage in from the charge to the collection of evidence and witnesses, and, hence the substantial ***dependence*** of the trial on the material with which it is provided by the police. The whole purpose of police practice is to construct a case that is immune from later challenge in order to ensure the conviction of the individual accused whom they have already arrested and charged.

The rejection of the importance of the collective logic of police practice, ennunciated by both the Beck and Edalji Committees had as its corollary the concentration upon the Home Office and the narrowing of the perceptual horizon to purely adminstrative-technical considerations. Securing the legitimacy of the Home Office, and with it the rest of the criminal process, led to the deliberate focus upon, and, exclusive stress upon the wrong part of the criminal process. The social conditions of both law enforcement and the production of evidence, namely, the context in which the ends of the criminal process were determined thereby evaporated into the unexamined presumptions of the dominant conception of the criminal process.

CONCLUSION

LAW, STATE, DEMOCRACY

The development of the criminal process, during the nineteenth century, was one element in a more general transformation of society. It was an expression of the emergence of a modern state based upon law in which the legal system itself was differentiated from society and claimed exclusive control over the definition of legality and illegality by reference to its own autonomous system of legal norms and decisions. This transformation was not associated with a ' bourgeois revolution ' inspired by a revolutionary self-understanding of its character or purpose. Change was not interpreted as upheaval, rupture and emancipation but as the creation of the conditions for the regeneration and reformulation of the social system. It issued from a political strategy of systemic maintenance guided by the goal of the survival of the social system and a concomitant pragmatism in regard to the means by which to achieve it. This, in turn, produced an understanding of society in which institutional change was determined by an interest in technical control over society in order that the reproduction of the social system and its social structure could be maintained. The legitimacy of societal institutions was, therefore, based upon their efficiency and effectiveness in ensuring this systemic survival with the parameters of institutional and governmental reflection composed of the promulgation and solution of technical tasks. As a result, state control, centralisation or institutional adjustment were introduced incrementally and intermittently in response to the perception of the ineffectiveness of the traditional elements of the social system. The foundation and structure of this wider societal and institutional transformation were intimately connected with changes in the nature, distribution and exercise of social power and, with this, the definition of the political and legal subject. It is these elements in both their singularity and interrelation that form the basis for the reproduction, through the transmission of these elements of the past, of a social system (in which the modern

criminal process is an element) founded upon an asymmetrial distribution of social power and the generation of the grounds for the ' validity ' of this domination.

That this transformation was effected, and continued to be guided, from within was as a result of the differentiation of the state apparatus(between the executive and Parliament), during the late eighteenth and early nineteenth century 290, from which emerged the relative autonomy of the state in regard to the class structure. The state moved, from being a form in which the executive and the legislature, dominated by the landed elite, exercised political authority to the exclusive satisfaction of the landed interest, to a form in which in the executive differentiated itself from this identity with the concerns of the landed interest producing a higher degree of internal flexibility in the social order and enabling an increased capacity to be reformed from within.

This differentiation was expressed in the redefintion by the executive of the nature of society and its inseparability from unconditional support for the maintenance of the Anglican constitution of the landed interest. Society was now conceived to be mechanistic rather than organic. It was a machine composed of discernable elements not an undifferentiated sacred whole. Nature, while still held to be divine, was now intelligible in terms of a modified, Christian political economy and its ' natural laws '. This knowledge of society undermined the indispensibility of the Anglican constitution and the protection of the agricultural profits of the landed interest. For, they now became contingent and hence alterable in the face of these ' natural laws ' of society.

Societal transformation was not the outcome of the implementation of a radically new conception of the social order. It was not linked to a democratic revolution recognising itself in the French Revolution of 1789 with the power of the people as the sole foundation of political authority and the source of norms which are

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290. See, for more detail on this development P.J. Jupp, ' The Landed Elite and Political Authority in Britain, ca.1760-1850 ', *Journal of British Studies* XXIX, (1990), 53-79; B. Hilton, *Cash, Corn and Commerce: The Economic Policies of the Tory Governments 1815-1830* (Oxford:Oxford University Press, 1980) and J.C.D. Clark, *English Society1688-1832: Ideology, Social Structure and Poltical Practice During the Ancien Regime* (Cambridge:Cambridge University Press, 1985).

to be govern society in which previous forms of the social relations were characterised as oppressive and unnatural and to be removed. The creation of a society composed of juridical subjects/citizens ennunciating, through universal democratic procedures, a clearly human, positive law was not the object of this ' project '. This reordering of society was a determined effort to ***avoid*** the possibity of such change by the imposition of new forms of subordination to ensure continued obedience and submission. Forms of inequality and social domination, therefore, became illegitimate not through their recognition as ' unnatural ' in the sense of oppressive, but through their failure and incapacity to secure the maintenance of these relations of domination embedded within the social system.

This societal transformation in accordance with this technical self-understanding of the purpose of state intervention in society was not tied to the simple replacement of local, parochial structures of governance with centralised, state control. For, it retained a continuing willingness to adjust and vary the existant locally based system rather than characterise it apriori as irredemably flawed and seek its complete replacement with a system emanating from the state. This related to the fact that the bourgeoisie were incorporated into the existing state (The Reform Act1832) and the local structure of governance (The Municipal Reform Act1835), and accomodated to the general configuration of the social and institutional system of which they were now to be a part. They were no longer to be external to the governance of society thereby removing the possibility that a link would be generated between them and the lower classes which could find expression in the people/ancien regime split, similar to that of French Revolution 1789, in which two radically different forms of society were counterposed to each other with the political realisation and institutionalisation of the ' people ' predicated upon the overthrow of the *ancien regime*. The bourgeoisie were to be neutralised by their co-option into a widened power bloc whose unity was to be generated by the process of Parliamentary and local politics. This was not, however, merely a class alliance in which the landed

elite and the bourgeoisie retained their separate identity with their unity being a purely formal one generated through these political forms. It was consitituted at a the deeper level of a framework of shared ' ideas ' and ' values ' embedded in institutions and apparatuses which were both their material expression and condition for the continued reproduction of this particular configuration of the social system.

Anglian supremacy was the first part of the social order to be dismantled with the Repeal of both the Test and Corporation Acts and legislation against Roman Catholics. By these means religion was privatized and the State was no longer projected as divine. The Anglican Church was no longer to be at the centre of the social order as ***the*** religion of the State with the attendant disqualification of those who practiced other forms of Christianity. It was now placed as one entity within private sphere composed of a plurality of Christian beliefs which was itself part of an emergent civil society separated from the State.

This ' emancipation ' of the State from religion was at the same time the removal of the divine character of the whole social order and with it the capacity of the authority of the landed interest to be represented as the pinnacle of a divinely ordained static hierachical system of social relations. The continued existence of the authority, social position and institutions of the landed interest now came to rest transparently upon its ability to maintain the conditions for reproduction of society, that is, their conformity to the ' natural laws ' which political economy had discovered ensured that the parts of the societal machine operated in conformity with each other.

This reconstitution of the identity of the internal structure of the state, produced by the differentiation between executive and legislature, entailed the wider differentiation of state and society. The state had to present itself as dissociated from direct causal interconnection with society in order for action, will and law to be solely and exclusively attributable to it. This dissociation had also to be an externalisation of

the state from society with the state defined as a legal person or collective actor in contradistinction to a society composed of ' private ' needs and interests. This new self-representation of the state flowed from the secularisation of the state and the privatisation of religion. The state itself was now sovereign and this increasing unity and self-identity of the state led to its projection as representing the unity of society with the ability of the state to make law an expression of its co-ordination of social action in accordance with universal rules which generated the context of meaning for the actions of individuals within the ' private ' realm of civil society.

This process and character of change, during the early nineteenth century, directly affected the criminal system. It was reflected, at the most general level, in the alterations made to the Common Law foundation of the criminal law. Classical Common Law theory, which represented self-consciousness of the ancien regime legal system, viewed the implementation of law by the state as merely the articulation and symbolisation of a deeper entity which both preceded and exceded the existence of the state - God. The state was the representative of God and sought to govern society in accordance with the dictates of divine justice and reason thereby making both society and the state the objects of divine will. It was God, not the state which represented the unity of society and this found expression in the notions of a hierachically ordered social body and of common and immemorial custom. Within this context of a lack of clear differentiation between state and society, the judiciary and magistracy were regarded, under Common Law theory, as of at least equal importance to the state in that they too were engaged in the practice of the expression and symbolisation of God's will and its transmission, through tradition, within the hierachically ordered social body.

The substantive criminal law was, therefore, simply the expression of the commonly shared values and conceptions of the common good in conformity with the divine will. Each case that entered the criminal trial processes of the *ancien regime*,

called upon the judiciary and the magistracy to act not in the creation of law but in the articulation of something that was immanent within the larger process by which society was shaped and altered. Decision-making was characterised as cyclical and repetitive in which judicial action was always the reenactment and reaffirmation of these hierachical relations. It was not governed by the formulation of rules in accordance with specific ***legal*** norms and principles as it was a legal form in which adjudication followed a regularity produced immanently by practice. Its authority and existence were predicated upon a flexibility of interpretation in which previous case-law and statutes were only utilised for purposes of clarification and guidance. This interpretative approach was the only form of reason which Common Law theory recognised as subsisting in the Common Law and this too was not an external process of ordering the law in conformity with a set of principles established by a methodological framework, but a mode by which the reason ***intrinsic*** to the Common law would be discovered.

This flexibility was tied to the view of each case as a singular, particular entity with which the various sources of the Common Law were to be interpretatively applied in order to provide a solution to it. The degree of interpretative freedom was constrained, however, by the fact that the character of this decision-making was always guided by the notions of the truth and coherence of the ancient structure of the Common Law within which each case was always set. The flexibility of the law was not an expression of the contingency of the rest of society for a legal system operating in accordance with its own norms and procedures, but of the lack of differentiation of the legal system from the rest of society. For the Common Law was merely one institutional form among others which constantly articulates and symbolises the values of the community in which there was no sharply demarcated conceptual boundary between law and other societal forms, values and institutions.

The lack of sharp differentiation of legal norms and rules from the rest of society was reflected in the definition of substantive criminal offences. Since members of society were bound together within a divine social hierachy in which interaction took place in accordance with the dictates of common and immemorial custom then the designation of criminal offences could only be ***forms*** with the content to be filled in with reference not to the criminal law itself but to this wider ' community 'and its practices. The criminal law, under this Common Law foundation, operated with a system of remedies and wrongs in which the courts were engaged in the articulation of law through a process of interpretation in which the alleged wrong was placed in the context of this ' community ' since this was the only context for the meaning of society and social interaction.

This ' community ' had a double existence in that it was composed of individuals who were seen as transitory elements and the divine social hierachy which remained unchanged over time. This dualilty was replicated in the the subject positions of the dominant in that hierachy with these positions representing both the concrete individual and an existence which exceeded that since the social order as a whole was regulated by and eminanted from a higher causality - God. The legitimacy of political authority flowed from a source that was ***always*** beyond and outside the social order and was never capable of being totally and transparently articulable in a series of formal rules. For, authority was not founded in and organised by society but was only based upon itself since it was only expressed through society with the result that the individual placed in a dominant social position was without formal constraint in the sense of an externally imposed system of rules.

The authority and actions of the trial judge and magistrate were expressions of this sovereign will with the result that the substance of this authority rested in their person alone. The only regularity which formal procedures obeyed was that imminently produced by each incumbant's particular practice with the result that there

remained a high degree of flexibility and indeterminacy in the sphere of procedural and substantive criminal law in the classical Common law system. This was also reflected in the lack of differentiation in the role of the justice of the peace who could initiate, prosecute and decide a criminal case making the summary jurisdiction the most malleable institutional element of the criminal process of the *ancien regime.* This flexibility of the criminal process as a whole made it potentially highly adaptable and attentive to changing perceptions of crime and disorder in the ' community ' and in terms of procedure facilitated rather than hindered the potential prosecutor 291.

The position of the defendant was not one which was fixed and defined independently of the authority of the trial judge or magistrate. Individuals within *ancien regime* society were not subjects of the law but subject to the law with an identity posited between the freedom and subjection of the individual. God, not the individual, is the foundation of society and law an emanation of this sovereign will with the individual already subject to and created by this other power. The individual acts in accordance with a will which is free to the extent that it coincides with God's will which means, in turn, obedience and submission to the social hierarchy of unequal power relations. A crime was conceived as an act which always overflowed the individual prosecutor and accused as it was also a direct challenge to the divinity of the social order - an attack upon the ***absolute*** power and authority of both the monarch and God. It was this absolute and personal power without limit which was at the basis of the criminal system of the *ancien regime* 292. This was projected not only in the nature of punishment but also in the trial process itself with the establishment of truth being vested to a high degree in the trial judge or magistrate demonstrating that the determination of guilt, and with it the right to punish, was part of this absolute power. This demonstration was at the same time the simultaneous demonstration and reaffirmation of the existence of the subject as one who was

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291. See on this R.B. Shoemaker, *Prosecution and Punishment: Petty Crime, and the Law in London and rural Middlesex c.1660-1725* (Cambridge:Cambridge University Press, 1991)
292. See on this M. Foucault, *Discipline and Punish: The Birth of the Prison* trans. A. Sheridan (London:Penguin, 1977) and E. Balibar, ' Citizen Subject ', in E. Cadava, P. Connor, J-L Nancy ed. *Who Comes After the Subject ?* (London:Routledge, 1991), 33-57.

without power and identity except as an effect and emanation of this absolute power. The subject's position was not only intimately connected to the institutional dynamics of the criminal process under the *ancien regime* it was directly produced by and dependent upon it.

The increasing secularisation of the state prompted the reform of this criminal system, and, with it, the alteration of classical Common Law theory. The state, separated from religion, was no longer divine and part of a hierarchical social order. The content of law ceased to be the expression of God's will, becoming instead a purely secular matter produced solely in accordance with institutional procedures - the separation and differentiation of law from society. This differentiation meant the severance of a direct, causal and expressive link between common and immemorial custom and the unity and coherence of the legal system. The foundation and coherence of the legal system had, therefore, to be articulated in an autonomous, internally consistent form which ceased to be dependent upon its position within an organic social whole regulated by the implementation of God's will through the various institutional forms which composed it.

This change in the self-identity of the state and its consequences for the legal system did not produce a thoroughgoing critique and replacement of the system of Common law in conformity with a project aimed at the generation of a legal system constructed exclusively upon the principles of human reason. This is apparent in the deliberations of the Criminal Law Commissioners whose Reports, between the 1830s and 1840s, established the parameters of the new self-understanding of the operation of the criminal process for the rest of the nineteenth century. Their approach to the Common Law basis of the criminal law was to attempt reform in accordance with a recognition of the validity of this Common Law ' tradition '. It did not aim at the radical alteration or transformation of the criminal process, but merely the simple transposition of the Common Law into a new rule-based form. This was, in turn, the

reflection of the wider reinterpretation and de-radicalisation of Bentham's philosophical project in which Bentham's construction of a formally coherent, rule-based, legal system was appropriated, but its necessary link to a complete transformation of the Common Law through the creation of a Code, the supremacy of statutory law and diminution of the role of the judiciary was rejected [293]. Bentham's theory was thereby dissociated from its relation to a transformative social project in which the legal system was a prominent element and turned to the technical-practical task of the reinterpretation and reformulation of the foundation and identity of the Common Law.

This new configuration of the legal system, produced by the Commissioner's conceptual schema , although it placed the state at the centre of the legal system, did not accord it absolute authority. For, without the codification of the law and its reduction of the judiciary to a purely cognitive role the creation of law and legislation were not identical as judicial decision-making still represented a source of law. This schema merely readjusted the relation between the state and the judiciary which had developed under the previous Common Law system. This was an expression of the wider position of the state which while, split away from a ' private ' realm of civil society, now represented the unity of society based upon the retention of system in which its position was not overtly dominant.

This separation of the realms of civil society and the state entailed not the disappearance but rather the continuance of a dual system in which the local system of governance and the central state were equally important parts of the political structure of society. The removal of the divine foundation of the social order did not lead to the removal of the existing institutional structure of the *ancien regime*. The co-option of the bourgeoisie into an enlarged power-bloc allowed this structure to remain and

293. See, for a detailed analysis of the continuing dominance of the Common Law, M. Lobban, *The Common Law and English Jurisprudence 1760-1850* (Oxford:Clarendon Press, 1991); and; for the conceptual divergance between Bentham and the ' Philosophical Radicals ' more generally see W. Thomas, *The Philosophic Radicals: Nine Studies in Theory and Practice, 1817-1841*(Oxford:Oxford University Press, 1979)

merely for it to be adjusted and reconfigured in order to conform to this new power-bloc. The position of the state as both an creator of the background conditions for the existence of the market was thereby extended from this realm to include the local structure of governance.

The societal changes of the early nineteenth century produced a social system in which the state was placed in the background with a minimal presence and limited possibilities for action and manoeuvre. This was not the product of the operation of the notion of the rule of law, but of a limited capacity to secure the transmission of its decision-making premises to the elements of the local structure of governance and other societal institutions coupled with an increasing acceptance and observance of this situation during the nineteenth century.

The nature of the state's position and the lack of a profound transformation of the institutions of the *ancien regime* was also tied to the exclusion of the working class from participation in the structure of governance. The ' people ' were now equated with those who owned property in limited ' democracy ' which sought, through a technical understanding of democracy as a means to secure the unity and stability of the power-bloc, the reproduction of this social order. This unity of the power-bloc based upon property was founded upon a ' public ' of electors, at both local and national level, for whom class interest - the protection of the stability of the private property order - was the at basis of both the selection of representatives and the implementation of policies within the structures of local and national governance. The ' public ' were separated and demarcated from the working-class who were without property and, therefore, without the necessary link to the foundation of the social system in private property. They were outside the terms necessary for admittance to the ' public ' and its selection of the norms and representatives through which the social system was to be governed.

This constitution of the working-class as outside the ' public ' was not merely an exclusion from the realm of recognised politics but also a characterisation which presented them as an essential negative and destructive force. The stability of the property order, and, with it, the social system as a whole, rested on the continuous maintenance of this separation and exclusion of the working-class with the subsequent extensions of the Franchise in 1868 and 1885 premised upon the admission of those who, though owning less or very little property, were still committed to the private property system. The working class, without property, were equated with nature, barbarity and immorality as opposed to the culture, civilisation and morality of the institutions and private property system of existing social order 294.

This threat of the working class represented as a threat to society as a whole meant that the notions of democracy and liberalism, projected as the guiding conceptual framework within which society could be understood, were always unstable with this revocation of their universal content. It was the universalisation of democracy that was seen to represent the collapse of liberalism by its rationalisation of authority through mass participation in the processes of the formation of public opinion, norms and the structure of governance. This split between democracy and liberalism entailed the separation of the state and local structures of governance from the universal determination of state and local policy. The repositioning of the state at the centre of the social order was the substitution of God's will for the rule of law, but this law was an expression of ***will***, that of the property order, and not of ***reason*** - the immanent relation between law and truth based upon the former's claim to validity tested and criticised through universal, participatory democracy.

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294. On this process of construction of the identity of the working class as an integral part of the class struggle see J.P. Sartre, *The Critique of Dialectical Reason* Vol. 1 trans. A. Sheridan-Smith (London:Verso, 1985) pp.735-780. For its theoretical expression in England, see B. Hilton, *The Age of Attonement* (Oxford:Clarendon Press, 1988) and A. M.C. Watermann, ' The Ideological Alliance of Political Economy and Christian Theology, 1789-1833 ', *Journal of Ecclesiastical History* XXXIV, (1983), 232-41

The concept of the autonomy of the person did not reside at the centre of this understanding of society since it was predicated upon the recognition of the authority of the given structure of society. The freedom of the individual and the capacity for human autonomy was split away from the individual themselves and located outside the individual in the explicit laws of the state, and to a lesser extent the judiciary; and; in the implicit laws of the market explicable through the theory and methods of political economy. Society was not recognised as a creation of these individuals themselves, but as the result of the submission to these ***extrasocial laws***. The recognition of their authority was united with the

" surrender of autonomy(of thought, will, action), the tying of the subject's reason and will to pre-established contents, in such a way that these contents do not form the ' material ' to be changed by the will of the individual but are taken over as they stand as the obligatory norms for this reason and will. " 295

The foundation of the authority of the liberal state on the voluntary commitment or self-assumed ' obligation ' of individuals is rejected and turned into a requirement to obey. By this denial of the source of the state's authority in the active consent of individuals the social order is presented as a natural order and the state as a reified entity in which the political relationship between the state and the individual is premised upon the passive acceptance of the structure of the social system as an essential and unproblematic condition for the maintenance of their form of life. The equal participation of all in power was not the object of this change in the configuration of the political form of society thus producing the consequent sundering of the relation between freedom and equality and the generation of a

" degraded concept of freedom as restrained, defensive, and passive freedom. In this conception it...presupposes that one has already accepted alienation or political heteronomy, that one is resigned in the face of the existence of a statist sphere

295. H. Marcuse, *From Luther to Popper* trans. J. De Bres (London:Verso, 1988), p.51.

separated from the collectivity, that, ultimately, one had adopted a view of power(and even of society) as a ' necessary evil '. " 296

The alteration of the foundation of the social order did not produce or articulate a new understanding of the relation between subjects and the state in accordance with the redefinition of all individuals as a citizens and the vesting of the organisation of society in the absolute power of the ' people ' composed of these citizens. The individual still existed in society as an essentially subordinated subject it was merely the source of this subordination that was altered. The individual was no longer subject to God but to the social system composed of the state, the local structure of governance and the market. Societal transformation was merely the alteration of the form of subordination.

This was reflected in the criminal process with the relation between the criminal law, subject and state adjusted to account for the removal of the divine foundation of the criminal law. This ' programme ' of adjustment, which continued throughout the nineteenth century, was a systemically governed process of reformulating the institutions and practices of the Common Law to conform to this new societal self-understanding. It was also the expression of the collapse of the notion of common and immemorial custom, or, community binding the forms and institutions of social regulation that were embedded within it 297. This structure which ensured the reproduction of the social system was altered by the combination of a reformulation of these institutions 298 and a new ' sensibility ' towards the activities of those placed outside the realm of society which was increasingly to be enforced by the " New Police ".

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296. C. Castoriadis, *Philosophy, Politics, Autonomy: Essays in Political Philosophy* ed. D.A. Curtis (Oxford:Oxford University Press, 1991), p.137

297. See, for more detail on this increasing ineffectiveness and stress within the local institutions of the *ancien regime* P. Dunkley, ' Paternalism, Magistracy and Poor Relief in England, 1795-1834 ', *International Review of Social History* XXIV, (1979), 371-97 and E.J. Evans, ' Some Reasons For the Growth of English Rural Anti-Clericalism c. 1750-c.1830 ', *Past and Present* 66, (1975), 84-109.

298. The most important being the reform of the Poor Law and the magistracy. The latter was begun by the New Poor Law 1834 and completed with Jervis's Acts 1848.

Personal authority exercised within a hierarchical social order was replaced by an increasing separation between office and person in the form of rule-bound authority of those who now occupied institutional positions within this altered social order. This was coupled with the increasing predominance of law and the market as the sole elements which ensured the regulation and continuance of this social system.

The growing predominance of the criminal law in the maintenance of society was the product of the separation of the enforcement of law from the production of law. This expansion of the parameters of criminal law in the regulation of social interaction was created by the reconfiguration of the position the judiciary through the reduction (but not subordination) of their role and authority in accordance with the projection of the state as the source of unity of society; and; the clear delineation of their new position as simply that of trying cases that came before them. The magistracy who had been at the centre of the local system of governance of the *ancien regime* were now placed in a purely judicial role whose parameters were defined by rules under Jervis' Acts of 1848. They lost their capacity to enforce the law directly by prosecuting cases,or, indirectly by putting pressure on other elements of the *ancien regime* criminal process who also enforced the law.

This contraction in the position of the judiciary, particularly that of the magistracy, effected a firmer, rule-based differentiation between and substantive and procedural law since the authority of the judiciary no longer rested solely in the person of the incumbent, but in their conformity to the rules which now governed and defined their institutional actions and decision-making. It is at this point that the legal system becomes increasingly differentiated from the rest of society with the generation of separate structure of operation and an ***internal*** identity between its elements. This differentiation of the legal system is, in turn, predicated upon the dependence of the trial upon the rest of society for its ' inputs ' that is there is a split between the choice or freedom to invoke the law, and, the application of law to the particular situation

which has been subsumed under the law. Therefore the trial subsists in a position in which the

" actual occurrence of the case is regarded as sheer accident. It is in no way regulated by the underlying structures of the law or the legal system. This is a mirror image within the legal system of the sovereignty to invoke or not to invoke the law in situations of daily life. " 299

This ' passive ' position of the trial in regard to the surrounding societal environment is the precondition for the presentation of its independence from society and with it the projection of specifically juristic mode of decision-making which is radically divorced from politics - the institutional expression of the separation of law and morality. With the splintering of the ' community ' of the *ancien regime*, in which law and morality were undifferentiated and intimately entwined, meaning ceased to be an intrinsic part of the social whole. Meaning, in a society in which legality and morality were split apart into two separate and distinct entities, could now only be imposed and generated externally through the twin mechanisms of the ' laws ' of the market and the law generated by the legal system and the state. The differentiation of the legal system was, therefore, also tied to its centrality in the maintenance the conditions of possibility of society.

The central institutional position of the legal system was connoted in the criminal law by the position of the criminal trial as the centre of criminal process bestowing ' meaning ' through the resolution of individual disputes which are juridified by the choice of the individuals themselves. Relations between them were governed by the rules of evidence which, as a medium outside the control of the parties into which all the information which they sought to present had to be transposed, ensured the determination of the case in accordance with the search for the truth and the

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299. N. Luhmann, *The Differentiation of Society* (Columbia:Columbia University Press, 1982), p.135

consequent neutralisation of the nature of the parties individual identities, social position and capacities.

The capacity of the criminal trial to act in this manner became problematic with the development of the " New Police " during the nineteenth century and their control over the enforcement of law, the decision to prosecute and the determination of the content of the case against the accused. For, once the enforcement of law ceases to be vested in the actions of private prosecutors and transferred to the " New Police " the relation between prosecutor and defendant becomes one between an individual and a social system. The development of the " New Police " represents the emergence of a concentration of collective, institutionalised social power within civil society which was supposed to be a realm free from accumulations of power with the concentration of sovereignty and authority in the state. The enforcement of law by the " New Police " were interventions in social life which were at variance with the recognition of individuals as subjects defined according to universal norms. These norms were enforced with the purpose of disciplining certain sections of the working class in society and the exercise of this practice was predicated upon the maintenance and reintroduction of asymmetry into the relation between the police constable and the individual 300. The task of law enforcement was the implementation of a principle of classification founded upon an essentially arbitrary will - the demonstration of asymmetry.

This position of the " New Police " was not presented in the dominant perspective as itself problematic or worthy of attention. Their role in the enforcement of criminal law only became a matter of consideration when it began to interfere with the material representation of the independence and centrality of the trial by their appearance as prosecutors in criminal trials. Attempts were made in the later

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300. See on this M. Foucault, *Discipline and Punish:The Birth of the Prison* trans. A. Sheridan (London: Penguin, 1977),pp.222-223 and M. Brogden and A. Brogden, ' From Henry III to Liverpool 8:The Unity of Police Street Powers ', *International Journal of the Sociology of Law* 12, (1984), 37-58.

nineteenth century to remove the " New Police " from this role by the introduction of a system of public prosecution into the criminal process which would confine the " New Police " to the collection of evidence and the gathering of witnesses. These attempts failed and the " New Police " were accepted as prosecutors in criminal cases with their replacement, at the discretion of the " New Police ", by a legal representative where the case proved to be of difficulty or particularly serious. Acceptance of the " New Police " was not to be based upon their exclusion from the trial process due to the acknowledgement their efficiency and effectiveness in the enforcement of law by the magistracy and the Chairmen of Quarter Sessions in the 1870s [301]. This acceptance was coupled with the simultaneous denial of the collective character and autonomy of the " New Police " in relation to the rest of society. They were simply a collection of individuals within an organised framework undertaking on a permanent basis, and with exactly the same powers, the normal preoccupations and concerns of the private individual with the maintenance of law and social order.

The only remote possibility of problems with the " New Police " as agents of law enforcement were provided for by the independence of the trial from the pre-trial activities of the " New Police " through the rules of evidence; and; the legal-bureaucratic character of the " New Police " themselves with the generation of their normative framework of operation dissociated from their practices of implementation by their subordinacy to the Watch Committees in the boroughs and the magistrates in the counties. In this way, the " New Police " were projected as an unproblematic social entity accepted into the criminal process under the terms of an effective regulatory framework of control.

This validity of this projection collapses once these mechanisms are actually examined ;and; it becomes clear that the later nineteenth century, rather than being a period of accommodation and regulation of the " New Police ", was one in which they

301. See chapter on the System of Prosecution for more detail on this.

developed into an increasingly autonomous social system acting independently, in accordance with a purely internal definition of its purposes and practices, in which not legality but politics was the functional mode of its institutional legitimacy.

The trial was from the outset incapable of effecting the type of regulation over the practices of the " New Police " which was projected. For, the capacity of the rules of evidence to act as a effective control was predicated upon the assumption of a society composed of private prosecutors undertaking the processes of collection of information and witnesses in an essentially disinterested manner. Only then could the rules of evidence as an independent entity act as limit upon the activities of the parties in the case through a process of translation in which two radically distinct paradigms - the parties processes of the collection of information and the rules of evidence - were brought into correspondence by the subsumption of opinion under rules aimed at establishing the truth. Once the " New Police " assumed control over the totality of the process of law enforcement then they had complete discretion in its enforcement and this was driven by the desire to secure the conviction of the individual accused. The suspicion of the individual policeman pushed the individual into a process in which the investigation, collection of evidence and building of the case against them was tied to the substantiation of these original suspicions of the individual's guilt. Investigation was an ***interested*** process undertaken with the purpose of ensuring the conviction of the accused.

Since the trial was dependant upon the " New Police " for its ' inputs ' of cases it was necessarily dependant upon them for the character, type and quantity of the information which composed the prosecution case. This information which was presented to the court was geared to the conviction of the accused through its active and prior ' construction ' by the " New Police " before the trial. It was, therefore, filtered to take account of the possibility of challenge by these very rules along with the ' holding back ' or rejection of information which pointed to the accused's

innocence. Police practice constantly sought to turn the trial, as the mechanism through which the accused's innocence or guilt was determined, into a realm that was functional to its pre-trial practices so that cases passed easily and without incident from arrest to conviction.

The ineffectiveness of the trial as a control over the " New Police " was coupled with the increasing evasion, by the " New Police ", of a legal-bureaucratic institutional characterisation. This characterisation rested upon the maintenance of a firm separation between the realms of politics and administration in which the generation of norms, as the basis of institutional action premises, was completely distinct from the process of their implementation. This separation was one in which there was a direct transmission of decision-making premises from the realm of politics to that of administration with no possibility for interpretation or modification of these premises by the administrative agency. The administrative agency through its fidelity to its premises obeys these positive rules of law and this means that legality is the function mode of the operation of the administration.

The local structure of governance in which the " New Police " were placed initally operated with this understanding of their role in relation to the source of norm creation in the Watch Committees in the boroughs and the magistracy in the counties. However, later in the nineteenth century this began to break down with the result that the " New Police " were no longer constrained externally by the system of local governance, or, internally by their own institutional self-understanding by this legal-bureaucratic type of authority.

This process began earlier, and was more clearly visible, in the counties where the Chief Constable started with a considerably larger amount of authority and discretion under the County Police Acts 1839/40. This enabled them to develop a distinct and independent institutional self-understanding of their own role more

quickly and become capable of avoiding or modifying the normative framework which supplied their action premises. The borough forces started under a tighter system of control and their process of evasion was slower, developing through the interaction between Watch Committee and the Head Constable. However, despite these differences in the pace and transparency of this process most police forces had by the end of the nineteenth century come to base their actions on an understanding of a goal - the maintenance of law and order.

This self-definition of a task meant that administrative action was now geared to the production of concrete results in which the normative framework was rendered contingent. It was now utilised or rejected in conformity with its capacity to achieve this institutional goal of the maintenance of law and order. This produced a flexibility or instrumental relation to rules and led to a decline in the capacity of legality to act as mode of legitimacy for its operations and was increasingly replaced with the capacity for the successful or acceptable realisation of its task by the causing of concrete effects. This, in turn, transferred the mode of legitimacy to an extra-legal source - politics. It was through the active generation of consensus around the capacity of the " New Police " to effect a substantive realisation of the values of law and order that was now the basis for the abstract trust in the legitimacy of the police which protected its activities from refutation by everyday encounters.

These transformations in the police were a part of the wider process of the separation of the criminal system from external normative control and the guidance of its actions, coherence, identity and self-understanding by internal system imperatives. This process of guidance becomes self-reflexive and,therefore, more deeply embedded with the establisment of the Court of Criminal Appeal which was an institution totally shaped in conformity with systemic considerations of the wider efficiency and capacity of existing institutions of the criminal process. With the establishment of the Court of Appeal the institutional framework of the criminal process was provided with

mechanism which provided greater flexibility to its overall operation and allowed the Home Office to take up a reduced role in the criminal process. Despite this seemingly major alteration of the institutional structure of the criminal process the perceptual framework with which the new court operated were in substance essentially the same as that which had been exercised at the Home Office prior to its creation - the maintenance of the legitimacy and survival of the criminal process as a whole even when confronted with events which challenge this.

By the end of the nineteenth century the criminal process had become increasingly sundered from any claim to authority and legitimacy which rested upon an embeddedness in an independent system of norms. It was freed from a firm link between legitimacy and truth. Its legitimacy was now simply associated with a belief in the reaching of a decision in accordance with the criminal process' own procedures. There was no need to search behind them as they themselves were merely of regulative status providing the system's ***formal*** coherence. This formalism and purely procedural legitimacy was the result of the decreasing external restrictions upon the criminal process and the concomitant generation of internal systemic values which determined the selection of actions and experiences. This led to the possibility both of a growing autonomy of decision-making processes and the treatment of individuals who entered the criminal process as objects or things to be processed. This generated a view of the rest of society, by the criminal process, as one composed of elements which were a constant threat to the survival of the institutions of society in which there was a constant struggle to secure the habit of obedience among the individuals who resided within it. This behaviourist measure of the legitimacy and rationality of societal institutions was predicated upon the denial of the possibility of equal participation by all individuals, through a restrictive electoral franchise, in the determination of the norms and goals of society. The operation of society was to be governed externally by this societal institutional and individuals were rendered politically passive with the consequent equation between society and nature in which

individuals, particularly those seen as a threat to the basis of the social system, were subject to the necessity of the absolute force of systemic maintenance - coercion stripped of any restriction apart from that of the logic of the system's own practice.

BIBLIOGRAPHY

Primary Sources

i)Newspapers

The Daily Mail

The Law Times

The Telegraph

The Times

ii)Periodicals

Harvard Law Review

Justice of the Peace

The Solicitors Journal

The Saturday Review

iii)Parliamentary Papers

The Seventh Report of the Commissioners of Criminal Law, **1843** [448], XIX.1

The Eighth Report of the Commissioners of Criminal Law, **1845** [656], XIV.161

The First Report of the Select Committee on the Police, **1852-3** (603), XXXVI.1

The Second Report of the Select Committee on the Police, **1852-3** (715)(715-I), XXXVI.161, 345

The Report from the Select Committee on Public Prosecutors, **1854-5** (481), XII.1

The Report from the Select Committee on Public Prosecutors, **1856** (206), VII.347

The Fifth and Final Report of the Judicature Commissioners; with First Appendix Containing the Papers on Public Prosecutors and Minutes of Evidence; and the Second Appendix Containing the Papers on Circuits and Assizes, **1874** [C.1090], XXIV.307

Public Prosecutors Bill: Correspondence between September 1872 and December 1878 with suggestions on the Bills of 1872 and 1873, **1875** [C.1319], LXI.521

Report of the Committee Appointed to Inquire into the Office of the Public Prosecutor, **1884** [C.4016], XXIII.309

Prosecution of Offences Acts 1879 and 1884 including a Copy of a Return showing the working of the Regulations made in 1886 for carrying out the Prosecution of Offences Acts 1879 and 1884, with statistics setting forth the Number, Nature, Cost, and Results of the Proceedings instituted by the Director in accordance with those Regulations from the 11th day of June 1886 to the 31st day of December 1886, **1887** (119), LXVII.143

The Minutes of Evidence of the Proceedings of the Committee on the Poor Prisoner's Defence Act, **1903**, VII.582

The Committee of Inquiry into the Case of Adolf Beck, **1905**, [C.2315], LXII.465

Papers Relating to the Case of George Edalji, **1907**, [C.3503], LXVII.402

The Royal Commission on the Duties of the Metropolitan Police, **1908**, [C.4156], L.1

iv)Public Record Office Files

The case of Edward Gowlett aliasWoodford: The Home Office analysis of the appeal in the Court of Appeal *H.O.45/1689/105768*

The Criminal Appeal Bill 1906 *H.O.45/10337/139064*

Home Office Comments on the 1906 Criminal Appeal Bill dated 31/3/1906 *H.O. 45/10337/139064/1*

Confidential Statistics supplied to the Lord Chancellor by the Home Office detailing convictions by juries, appeals to the Home Office and releases of prisoners by the Home Office *H.O.45/10337/139064/3*

Extract from the Report of the Parliamentary Committee on the 1906 Criminal Appeal Bill *H.O.45/10337/139064/4*

Home Office Comments on the 1906 Criminal Appeal Bill *H.O.45/10337/1390641/12*

The Criminal Appeal Bill:Home Office Points *L.C.O.232/1270/1*

Home Office Memorandum on the 1906 Criminal Appeal Bill *L.C.O.232/1270/1*

Secondary Sources

i)Books

Abel-Smith, B. and Stevens, R. *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965* (London:Heinemann, 1967)

Adorno, T.W. et.al *The Authoritarian Personality* (Abridged Edition) (London: Norton and Co., 1982)

Bentham, J. *A Fragment on Government* (Cambridge:Cambridge University Press,)

Bentham, J. *Economic Writings* ed. W. Stark (London:Allen and Unwin, 1952)

Bentham, J. *Collected Works* ed. H.L.A. Hart (London, 1970)

Bourdieu, P. *An Outline of a Theory of Practice* (Cambridge:Cambridge University Press, 1977)

Bourdieu, P. *In Other Words: Essays Towards A Reflexive Sociology* trans. M Adamson (Oxford:Polity Press, 1990)

Bourdieu, P. *Language and Symbolic Power* ed. J.B. Thompson (Oxford:Polity Press, 1991)

Bourdieu, P. *The Logic of Practice* trans. R. Nice (Oxford:Polity Press, 1992)

Brogden, M.E. *The Police: Autonomy and Consent* (London:Academic Press, 1982)

Castoriadis, C. *Philosophy, Politics, Autonomy: Essays in Political Philosophy* ed. D.A. Curtis (Oxford:Oxford University Press, 1991)

Clark, J.C.D. *English Society 1688-1832:Ideology, social structure and political practice during the ancien regime* (Cambridge:Cambridge University Press, 1986)

Cockburn, J.S. ed. *Crime in England 1550-1800* (London:Methuen, 1977)

Colaiaco, *J.A. James Fitzjames Stephen and the Crisis of Victorian Thought* (New York:St.Martins Press, 1983)

Edwards, J. *The Law Officers of the Crown* (London:Sweet and Maxwell, 1964)

Elias, N. The Court Society, trans. E. Jephcott (Oxford:Basil Blackwell, 1983)

Emsley, C. *Policing and its Context 1750-1870* (London:Macmillan, 1983)

Emsley, C. *Crime and Society in England 1750-1900* (London:Longman, 1987)

Foucault, M. *Discipline and Punish: The Birth of the Prison*, trans. A. Sheriden (London: Penguin, 1987)

Fitzjames Stephen, *A History of the Criminal Law of England* Vol.III (London:Macmillan, 1883)

Fitzjames Stephen, J. *Liberty, Equality, Fraternity* (Cambridge:Cambridge University Press, 1967)

Green, T.A. *Verdict According to Conscience:Perspectives on the English Criminal Trial Jury 1200-1800* (Chicago:University of Chicago Press, 1985)

Gurney-Champion *Justice and the Poor in England* (London:Routledge, 1926)

Hay, D. and Snyder, F ed. *Policing and Prosecution in Britain 1750-1850* (Oxford:Oxford University Press, 1989)

Habermas, J. *Theory and Practice*, trans. J. Viertel (London: Heinemann, 1974)

Hilton, B. *Corn, Cash and Commerce: The Economic Policies of the Tory Governments 1815-1830* (Oxford:Oxford University Press, 1980)

Hilton, B. *The Age of Attonement:The Influence of Evangelism on Social and Economic Thought 1785-1865*(Oxford:Clarendon Press, 1991)

Hume, L.J. *Bentham and Bureaucracy* (Cambridge:Cambridge University Press, 1981)

Holdsworth, W. *A History of English Law*, Vol. XIII (London:Methuen/Sweet and Maxwell, 1965)

Howard, P. *Criminal Justice in England:A Study in Law Administration* (London:Macmillan, 1931)

Jones, D. *Crime, Protest, Community and Police in Nineteenth Century Britain* (London:Routledge, 1982)

Lee, K. *The Positivist Science of Law* (Gower Publishing, 1989)

Lobban, M. *The Common Law and English Jurisprudence 1760-1850* (Oxford:Clarendon Press, 1991)

Long, D. *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to His Utilitarianism* (Toronto:University of Toronto Press, 1977)

Luhmann, N. *The Sociology of Law* (London:Routledge, 1972)

Luhmann, N. *Trust and Power* ed. T.Burns and G. Poggi (Chichester, 1979)

Luhmann, N. *The Differentiation of Society* (Columbia:Columbia University Press, 1982)

Luhmann, N. *Essays in Self-Reference* (Columbia:Columbia University Press, 1990)

Luhmann, N. *Political Theory in the Welfare State* trans. J.Bednarz. Jr. (New York: Walter de Gruyer, 1990)

Lustgarten, L. *The Governance of the Police* (London:Sweet and Maxwell, 1986)

Marcuse, H. *From Luther to Popper* trans. J. De Bres (London:Verso, 1988)

Mather, F.C. *Public Order in the Age of the Chartists* (Manchester:Manchester University Press, 1959)

Offe, C. *Disorganised Capitalism: Contemporary Transformations of Work and Politics* ed. John Keane (Oxford:Polity Press, 1985)

Osborne, B. *Justices of the Peace 1561-1848* (Dorset:Sedgehill Press, 1960)

Outhwaite, W. *New Philosophies of Social Science: Realism, Hermeneutics and Critical Theory* (London:Macmillan, 1987)

Palmer, S.H. *Police and Protest in England and Ireland 1780-1850* (Cambridge:Cambridge University Press, 1988)

Phillips, D. *Crime and Authority in Victorian Britain: The Black Country 1835-1860* (London:Croom and Helm, 1977)

Poggi, G. *The Development of the Modern State: A Sociological Introduction* (London:Hutchinson, 1978)

Poland, H. and Cohen, H. *The Criminal Appeal Bill Examined* (London:Sweet and Maxwell, 1906)

Postema, G. *Bentham and the Common Law* (Oxford:Oxford University Press, 1989)

Poulantzas, N. *Political Power and Social Classes* (London:New Left Books/ Verso, 1973)

Radzinowicz, L. *A History of English Criminal Law and its Administration*, Vol. IV (London: Stevens, 1965)

Radzinowicz, L.A. *A History of English Criminal Law and its Administration*, Vol.V (Oxford:Clarendon Press, 1990)

Reader, W.J. *Professional Men:The Rise of the Professional Classes in Nineteenth Century England* (London:Wiedenfeld and Nicolson, 1966)

Reiner, R. *The Politics of the Police* (Brighton:Wheatsheaf, 1985)

Rose, G. *The Dialectic of Nihilism:Poststructuralism and Law* (Oxford:Blackwell, 1984)

Rosenblum, N.L. *Bentham' s Theory of the Modern State* (Harvard:Harvard University Press, 1978)

Shoemaker, R.B. *Prosecution and Punishment:Petty Crime, and the Law in London and rural Middlesex c.1660-1725* (Cambridge:Cambridge University Press, 1991)

Steedman, C. *Policing the Victorian Community* (London:Routledge, 1984)

Stephen, H. *Prisoners on Oath:Present and Future* (London:Heinemann, 1898)

Tholfsen, T.R. *Working Class Radicalism in Mid-Victorian England* (London:Croom and Helm, 1976)

Thomas, W. *The Philosophic Radicals: Nine Studies in Theory and Practice 1817-1841* (Oxford:Clarendon Press, 1979)

Troup, E. *The Home Office* (London:Putnam and Sons, 1926)

The Unknown Conan Doyle:Letters to the Press (London:Secker and Warburg, 1986)

Warnke, G. *Gadamer: Hermeneutics, Tradition and Reason* (California:Stanford University Press, 1987)

Wiener, M.J. *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830-1914* (Cambridge:Cambridge University Press, 1990)

ii)Articles

Adorno, T.W. ' Progress ', *The Philosophical Forum*, 15,(1983-84), 55-70

Adorno, T.W.' Static and Dynamic as Sociological Categories ', *Diogenes* 33,(1961),28-49

Apfel,W. and Dunkley, P. ' English Rural Society and the New Poor Law:Bedfordshire, 1834-47 ' *Social History* 10,(1985), 38-57

Balibar, E. ' Citizen Subject ' in Cadava, E. Connor, P. and Nancy, J-C. ed. *Who Comes After the Subject?* (London:Routledge, 1991)

Beattie, J.M. ' Crime and the Courts in Surrey 1736-1753 ' in J.S. Cockburn ed. *Crime in England 1550-1800* (London:Methuen, 1977)

Bradfield, B.T. ' Sir Richard Vyvyan and the Country Gentlemen, 1830-1834 ', *EnglishHistorical Review* 83,(1968), 729-43

Brogden, M. and Brogden, A. ' From Henry III to Liverpool 8: The Unity of Police Street Powers ', *International Journal of the Sociology of Law* 12,(1984),37-58

Brundage, A. ' The Landed Interest and the New Poor Law; a reappraisal of the revolution in government ', *English Historical Review* 87,(1972),27-48

Brundage, A. ' The English Poor Law of 1834 and the Cohesion of Agricultural Society ', *Agricultural History* xlviii,(1974),412-15

Cappelletti, M. and Garth, B. ' Access to Justice as a Focus of Research ' in *The Windsor Yearbook of Access to Justice* 1,(1981), ix-xxv

Dunkley, P. ' The Landed Interest and the New Poor Law: a critical note ', *English Historical Review* 88,(1973),836-841

Dunkley, P.' Paternalism, the Magistracy and Poor Relief in England, 1795-1834 ', *International Review of Social History* 24,(1979),371-97

Dunkley, P.' Whigs and Paupers: The Reform of the English Poor Laws, 1830-4 ', *Journal of British Studies* 20,(1981),124-49

Evans, E.J. ' Some Reasons for the Growth of English Rural Anti-Clericalism c.1750-c.1830 ', *Past and Present* 66,(1975),84-109

Fisher, J.R. ' The Limits of Deference: Agricultural Communities in a Mid-Nineteenth Century Election Campaign ', *Journal of British Studies*, 21,(1981),90-105

Francis, M. ' The Nineteenth Century Theory of Sovereignty and Thomas Hobbes ', *History of Political Thought* 1,(1980)

Freestone, D.and Richardson, J.C.' The Making of English Criminal Law (7): Sir John Jervis and his Acts ', *Criminal Law Review* (1980), 5-16

Harling, P.' The Power of Persuasion: Central Authority, Local Bureaucracy and the New Poor Law ', *English Historical Review* 107,(1992), 30-53

Hart, J. ' A Poor Man's System of Justice: The London Police Courts in the Second Half of the Nineteenth Century ' *The Historical Journal* 27, (1984), 309-335

Hay, D. ' Property, Authority and the Criminal Law ', in .Hay, D. Linnebaugh,P. Thompson, E.P. ed. *Albion's Fatal Tree:Crime and Society in Eighteenth Century England* (London, 1975)

Hay, D. and Snyder, F. ' Using the Criminal Law, 1750-1850: Policing, Private Prosecution and the State ', in Hay, D. and Snyder, F. ed. *Policing and Prosecution in Britain 1750-1850* (Oxford:Oxford University Press, 1989)

Hennock, E.P.' Poverty and Social Theory in England: The Experience of the 1880s ', *Journal of Social History* 1,(1976), 67-92

Jupp, P. J.' The Landed Elite and Political Authority in Britain, ca.1760-1850 ', *Journal of British Studies*, 29,(1990), 53-79

Long, D. ' Bentham on Property ' in Parel, A. and Flanagan, T. ed. *Theories of Property:Aristotle to the Present* (Ontario:Laurier University Press, 1979)

Mandler, P.' The Making of the New Poor Law *Redivivus* ', *Past and Present* 117,(1987), 131-57

Neuman, M.D.' A Suggestion Regarding the Origins of the Speenhamland Plan ', *English Historical Review* 84,(1969),317-322

Perkin, H.' Individualism Versus Collectivism in Nineteenth-Century Britain: A False Antithesis ', *Journal of British Studies* 17, (1977), 105-118

Phillips, D. ' Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons 1760-1860 ' in Hay, D. and Snyder, F. ed. *Policing and Prosecution in Britain 1750-1850* (Oxford:Oxford University Press, 1989)

Pocock, J.G.A. ' The Mobility of Property and the Rise of Eighteenth Century Sociology ', in Parel, A. and Flanagan, T. ed. *Theories of Property:Aristotle to the Present* (Ontario:Laurier University Press, 1979)

Pue, W.W.' The Criminal Twilight Zone: Pre-Trial Procedures in the 1840s ', *Alberta Law Review* 21, (1983), 335-363

Roberts, M.J.D.' Public and Private in Early Nineteenth Century London: The Vagrant Act of 1822 and its Enforcement ', *Journal of Social History* 13,(1988), 273-94

Rubenstein, W.D.' The End of " Old Corruption " in Britain 1780-1860 ', *Past and Present* 101,(1983),55-86

Stedman Jones, G. ' Rethinking Chartism ' in Steedman Jones, G. *The Languages of Class:Studies in English Working Class History 1832-1982* (Cambridge:Cambridge University Press, 1983)

Storch, R.' The Policeman as Domestic Missionary ', *Journal of Social History* 9,(1976), 481-509

Storch, R. ' Policing Rural Southern England before the Police:Opinion and Practice, 1830-1856 ' in Hay, D. and Snyder, F. ed. *Policing and Prosecution in Britain 1750-1850* (Oxford;Oxford University Press, 1989)

Vorspan, R.' Vagrancy and the New Poor Law in Late Victorian and Edwardian England ', *English Historical Review* 92,(1977), 59-81

Waterman, A.M.C.' The Ideological Alliance of Political Economy and Christian Theology, 1789-1833 ', *Journal of Ecclesiastical History* 34,(1983),232-41

Weinberger, B. ' The Police and Public in Mid-Nineteenth Century Warwickshire ' in Bailey, V. ed. *Policing and Punishment in Nineteenth Century Britain* (London:Croom and Helm, 1981)

Yeo, E.' Some Practices and Problems of Chartist Democracy ', in J.Epstein and D.Thompson ed. *The Chartist Experience: Studies in Working-Class Radicalism and Culture*, 1830-1860 (London:Macmillan, 1982)

Zimmerman, R.' Equality, Poltical Order and Ethics: Hobbes and the Systematics of Democratic Rationality ', in D.Rasmussen ed. *Universalism and Communitarianism*, (London:MIT Press, 1990)