

**RETHINKING PENAL REFORM AND THE  
ROYAL PREROGATIVE OF MERCY DURING  
ROBERT PEEL'S STEWARDSHIP OF THE HOME  
OFFICE 1822-7, 1828-30.**

Thesis submitted for the degree of

Doctor of Philosophy

at the University of Leicester

by

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February 2017

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**Abstract**

This thesis is the first to undertake an extensive study of the petitions for the Royal Prerogative of mercy submitted to Robert Peel during his stewardship of the Home Office between 1822-7 and 1828-30. It analyses the separate functions Peel was obliged to discharge as legislator, member of the Executive and servant of the Crown. Against the background of the criminal justice system in place in 1822, it explores the underlying legal, jurisprudential and constitutional issues which constrained Peel's decision-making and identifies the nature and extent of the conventions which evolved to curtail the personal discretion of the Monarch.

It focuses on the challenges faced by Peel in reforming the maze of statutes, common law and custom, the main sources of English Law, and demonstrates that criminal law reform, in this period, was conducted incrementally in a continuum with consensus of both Tories and Whigs.

It also stresses the importance of using accurate legal language in order to distinguish the common place meaning of mercy from the exercise of the Royal Prerogative of mercy with its constitutional constraints, and suggests that this is a pre-requisite for an accurate appraisal of Peel's stewardship.

Based on research of more than 5,000 cases, it reconstructs the process of begging for mercy and shows that, whilst there were no formalities for the petitions, the Home Office's responses were increasing standardised and bureaucratic. The conclusions reached will demonstrate that Peel's penal reforms and his recommendations for the exercise of the Royal Prerogative of mercy were key landmarks in the transition from a parochial system with capital punishment at its heart to a more centralised system based on secondary punishments.

## **Acknowledgment**

This thesis would not have been possible without the support of a number of people. Firstly my thanks must firstly go to Dr Paul Carter at TNA. After more than fifteen years working as a volunteer editor, it was Paul's remark that nobody, apart from Peel and Hobhouse, had edited more of the petitions that ignited the spark to write this thesis. Thanks must also go to my project supervisors and fellow volunteers at TNA who have been so encouraging and helpful over the years especially Celia Cartwright and Roy Metcalfe. Thank you to Professor Peter King who agreed to act as my supervisor. On Peter's retirement, Professor Roey Sweet stepped into the role and both she and Professor Clare Anderson have been a source of wise counsel, encouragement, patience and good humour. To you both, my grateful thanks for making the experience enjoyable and intellectually stimulating- a winning combination. Thanks also to my family especially my husband, Jonathan. Without his encouragement, support, tolerance and long suffering, this thesis would never have been completed. Just as Julia Peel was Peel's rock, you are mine.

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Decisions of the King in Council between April and December 1827.

## **List of Abbreviations**

AO Audit Office

BL British Library

CO Colonial Office

HO Home Office

JP Justice of the Peace

OBP Old Bailey Proceedings

PRO Public Record Office

TNA The National Archives, Kew

## **Legal language and terminology used by the Home Office in the 1820s.**

### **Language**

As far as possible, the language used by the Home Office in the 1820s has been replicated in this thesis. The word ‘pardon’ was never used as verb by either Peel or his under-secretaries. On very rare occasions, the petitions are annotated ‘to be pardoned’ thus recognising and acknowledging that the privilege of pardon lay exclusively with the Crown. The responsibility of recommending pardons under the Royal Prerogative of mercy had over time vested in the Home Secretary but the pardon itself was always granted under the sign manual (signature) of the Monarch.

‘Reprieve’ was not a verb used by the Home Office when dealing with death sentences, although it does appear in the parliamentary papers where returns are printed from the Assize records. Capital sentences were either commuted or respited. A ‘respite’ was sent to the keeper of the gaol where the prisoner was held and was for a fixed duration, usually a week. It was a holding measure in order for the Home Secretary to review new evidence or gather further information. It was generally sent with the caveat that the prisoner was not to expect that the sentence would be commuted. In most cases where a respite was ordered, the reality was that the capital sentence was subsequently commuted.

After 1822 when Peel took up office, the back sheet of petitions contained a synopsis of the prisoner’s case, which does not occur in petitions submitted before this date. Where the death sentence was commuted, the annotation usually read ‘[death] commuted to transportation for life. Pardon prepared’ and included a date. This use of the word ‘pardon’ can lead to confusion. The death sentence was being commuted on condition of the prisoner being transported for life. The pardon was a conditional pardon although this was rarely stated on the petition but was recited when the pardon was prepared for signature.

For non-capital or commuted capital cases, a reduction in the period of imprisonment or transportation was annotated with the term ‘remission’ or occasionally ‘mitigation.’ Thus, where a death sentence was commuted to transportation for life and then remitted to transportation for fourteen years, the prisoner would be, in effect,



conditionally pardoned twice; the first pardon on condition of transportation for life and the second pardon remitting the term.

## **Titles**

On the death of his father in May 1830, Peel succeeded to the baronetcy and thereafter should be referred to as Sir Robert Peel. Whilst acknowledging that this change of title was important to Peel, as indicated in his annotations which changed from being signed R.P. to S.R.P after this date, for consistency and to avoid confusion he will be referred to as ‘Peel’ throughout the thesis.

Likewise, when referring to puisne judges of the King’s Bench and Common Pleas, their designation was ‘Mr Justice ...’ and a judge of the Exchequer was ‘Baron’. When referring to a trial judge, this title will be used in the first instance and thereafter the suffix ‘J.’ or ‘B.’ will be employed. Although authorised law reports were not in existence in the 1820s, this device echoes the formula employed when law reporting was regulated in the 1860s. The term ‘judge’ was generally only used by Peel when requesting a report; in correspondence the judge was always referred to by title as for example Mr Justice Park or Sir James.

## **Documents in HO 17 and HO 6.**

As not all the petitions referred to in the thesis are available on TNA’s online catalogue, for consistency all the petitions are cited with their original HO reference. For example the papers in Daniel Davis’s case are cited as HO17/25/Cm 11. HO17 is the series, 25 the box number and the bundle number Cm11. There are approximately 25 different items in bundle Cm 11 including petitions, letters and depositions which total more than 70 pages. None of these items are foliated and few are dated. In order to avoid confusion, I have followed the same method of citation as Gatrell by citing only the series/ box/ bundle number.

The same difficulty arises in connection with the bundles in HO6. This series contains Recorder’s Reports, circuit letters and correspondence between the King’s justices, chairmen of Benches and the Home Office. Again these documents are filed in no order, are not foliated and many of the judges’ letters

are undated. As with series HO17, a reference to a document in this series is referred to with the box number only for example HO6/9.

### **Reproducing the documents in the Appendices**

Due to their nature, reproducing the documents in HO17 for the Appendices has proved very difficult. They are in various sizes on both paper and parchment, in manuscript form, (with much of the writing faded) and have been folded for nearly 200 years. Locating a formal petition of A4 size posed a particular problem as invariably they are written on a sheet of parchment (larger than A3) which became illegible when reduced. Changing the background colour helped with legibility as did setting out the text on a separate sheet.

## Chapter One:

### Introduction

When the Right Honourable Robert Peel took up the post of Home Secretary in 1822, capital offences, estimated at over 200, dominated the English criminal law.<sup>1</sup> The majority had been created by statute during the eighteenth century. As Thomas Fowell Buxton, the Whig MP, observed during a debate in the House of Commons on the Forgery Punishment Mitigation Bill in March 1821, ‘kill your father or catch a rabbit in a warren – the penalty is the same! Destroy three kingdoms or destroy a hopbine – the penalty is the same!’<sup>2</sup> Facing death, the convicted prisoner had no statutory right of appeal but merely a hope that his sentence would be commuted under the Royal Prerogative of mercy.<sup>3</sup> As Home Secretary, Peel was responsible for recommending the exercise of the Royal Prerogative of mercy but the failure to understand the Royal Prerogative of mercy, within a jurisprudential and constitutional framework, has coloured his historical legacy.

In 1994, V.A.C. Gatrell published his widely acclaimed book, *The Hanging Tree*.<sup>4</sup> Gatrell’s critical view of Peel’s decision-making, in this context, as ‘a great hangman’ has been highly influential even though he acknowledged that his conclusions were based on a small sample of 100 petitions for mercy.<sup>5</sup> He considered that the number of petitions which Peel reviewed, was between 10- 12,000, which is an overestimate.<sup>6</sup> It is likely that the actual number is nearer to 7,000 and this thesis is based on research of more than 5,000 of these cases.<sup>7</sup> This figure is based on the number of ‘Peel’ boxes in the petitioning archive held at The National Archives (TNA) under Home Office (HO) 17.<sup>8</sup>

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<sup>1</sup> D.R. Bentley, *English Criminal Justice in the Nineteenth Century* (London, 1998); C. Emsley, *Crime and Society in England, 1750-1900* (Harlow, 4<sup>th</sup> edn, 2010); A.K.R. Kiralfy, *Potter’s Historical Introduction to English Law* (London, 4<sup>th</sup> edn, 1958).

<sup>2</sup> HC Parliamentary Debates, May 23 1821, 1<sup>st</sup> series, 5, col. 905; O.M. Blouet, ‘Buxton, Sir Thomas Fowell, first baronet, (1786-1845)’, in (various eds), *Oxford Dictionary of National Biography* (Oxford, 2004) (hereafter *ODNB*); S Farrell, ‘Buxton, Thomas Fowell (1786-1845)’ in D.R. Fisher (ed.), *The History of Parliament 1820-1832*, 7 volumes (Cambridge, 2009) (hereafter *HoP*); C. Buxton (ed.), *Memoirs of Sir Thomas Fowell Buxton bart* (London, 1848).

<sup>3</sup> The Court of Criminal Appeal was established under Criminal Appeal Act 1907 (7 Edw.VII c.23).

<sup>4</sup> V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford, 1994).

<sup>5</sup> *Ibid* p.613.

<sup>6</sup> *Ibid* p.205.

<sup>7</sup> Petitions lodged in 1823 are missing from the series.

<sup>8</sup> For box numbers see Bibliography.

There are two elements of historical analysis which have been underrepresented in this field, each of which is essential to a full evaluation of Peel's penal measures as Home Secretary. The first is an accurate definition and understanding of what the Royal Prerogative of mercy actually was, both in theory and in practice; the second is wide ranging and thorough research into the petitions held at TNA, most of which have not been examined since they were first archived by the Home Office in the nineteenth century. It is these which the thesis addresses.

Analysing Peel's recommendations under the Royal Prerogative of mercy in isolation, however, fails to take into account the legislative and administrative reforms he introduced. Against the background of the criminal law framework in place in 1822, the thesis highlights the challenges faced by Peel in reforming a penal system consisting of an amalgam of common law, statute and custom which was generally administered on a parochial basis.<sup>9</sup> In an analysis of the nature of English law, this thesis will question why historians have continued to characterise the criminal law in the early nineteenth century as the period of the 'bloody code' when codes were and are virtually unknown in English law.<sup>10</sup> The idea that criminal offences were contained in a single coherent framework, which could be changed easily, misunderstands the nature of English law and the associated difficulties in its reform.

Further, it will show that the reforms to the criminal law in the 1820s and 1830s were promoted in a continuum and challenge the perception that there was a meaningful distinction between the reforms introduced by the Tory governments of the 1820s and the Whig governments of the 1830s.<sup>11</sup> Because of the nature of English criminal law, reform was implemented in a piecemeal manner often with consensus on both sides of the political divide. At a time when issues such as Catholic emancipation and parliamentary reform attracted polarised opinions, this co-operation will be analysed to highlight how Peel's measures were the catalyst for reform to the capital statutes by different governments in the following decades.

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<sup>9</sup> R. J. Walker and R. Ward, *Walker and Walker's English Legal System* (London, 7<sup>th</sup> edn, 1994), pp. 3-56.

<sup>10</sup> See Emsley, *Crime and Society in England*, pp.11, 22, 264; Gatrell, *The Hanging Tree*, pp. 20-1, 201-2, 237, 376, 403, 583; P. Handler, 'Forgery and the End of the Bloody Code in early Nineteenth Century England', *Historical Journal*, 48 (2005), pp. 683-702.

<sup>11</sup> D.Beales, 'Peel, Russell and Reform', *Historical Journal*, 17 (1974), pp. 873-82.

Peel's objective of streamlining the penal system to make it more efficient and effective was modelled on his own upbringing. His father, Sir Robert Peel, had built a large empire based on cotton weaving and calico printing and Peel brought this same dedication to hard work to his ministerial duties. Walter Bagehot, the eminent constitutionalist, considered that Peel was of a class that managed 'the company called the English nation' of which the aristocracy were the directors.<sup>12</sup> As Home Secretary, Peel adopted practices such as written reports which were familiar to him in business.<sup>13</sup> Peel's early life therefore played an important part in understanding how he discharged his obligations as Home Secretary and will be briefly considered.

### **An overview of Peel's early life and political career**

Peel was born in February 1788, the eldest son and third child of Sir Robert Peel, a wealthy cotton manufacturer and Member of Parliament (MP) for Tamworth in Staffordshire.<sup>14</sup> He was educated locally before going to Harrow in 1800 and then to Christ Church Oxford where he graduated with a double first in Classics and Mathematics and Physics in 1808. At first, Peel seemed destined for a life at the Bar, joining Lincoln's Inn in 1809. Any thoughts of a life at the Bar were, however, quickly dispelled as in early 1809 Sir Robert Peel was persuaded by the Duke of Wellington to purchase the seat of Cashel in County Tipperary for Peel. As Peel revealed in later life, his father was always keen for him to enter politics and was accustomed to say, 'Bob, you dog, if you are not prime minister some day, I'll disinherit you.'<sup>15</sup> He entered Parliament later in 1809 and began a life in politics which would continue until his death in 1850.

Peel followed his father in supporting the Tory government of the Duke of Portland and, after only one year in the Commons, he was offered the post of Under-Secretary of War and the Colonies under Lord Liverpool. When Liverpool assumed the premiership in 1812, Peel was promoted to the post of Chief Secretary for Ireland and

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<sup>12</sup> W. Bagehot., *The Works and Life of Walter Bagehot*, R. Barrington (ed.), 10 volumes (London, 1915), volume 2, p.188.

<sup>13</sup> Ibid p. 189.

<sup>14</sup> This account of Peel's life is drawn from the following sources: N. Gash, *Mr Secretary Peel: The Life of Sir Robert Peel to 1830* (London, 1961), pp. 15-64; J. Prest, 'Peel, Sir Robert, second baronet (1788-1850)', in *ODNB*; D.R. Fisher (ed.), *The History of Parliament 1820-1832*.

<sup>15</sup> A.D. (ed.), *Recollections ... of Samuel Rogers* (1856), quoted in Gash, *Mr Secretary Peel*, p. 39.

made a Privy Counsellor. By 1817, he was seen as the leading opponent to Catholic emancipation and accepted the invitation to represent Oxford University as one of its MPs in order to promote their Protestant views. However, Peel became weary of the continual travelling between Westminster and Dublin and in 1818 resigned his post. Apart from chairing the Parliamentary Committee of Enquiry into the return of the gold standard, he remained a backbencher until Liverpool offered him the post of Home Secretary in a government reshuffle some four years later.

Peel first served as Home Secretary from January 1822 until April 1827, stepping down when Liverpool retired through ill-health. He was responsible for domestic matters particularly the maintenance of law and order and the administration of justice, at a time when calls for reform of the penal system were firmly in the public domain. On his appointment as Prime Minister in April 1827, George Canning was keen for Peel to continue in his post but Peel decided that he could not serve under a premier who advocated Catholic emancipation and refused the position.<sup>16</sup> After the death of Canning and the fall of Viscount Goodrich's government, he returned to the government benches in 1828 as Home Secretary under the Duke of Wellington's premiership.

The election results in County Clare in 1827, which had returned the Catholic Daniel O'Connell to Westminster, caused Peel to reconsider his stance on Catholic emancipation. He took the pragmatic decision that the government had to change its position if it wished to continue in office.<sup>17</sup> He was instrumental in ensuring that the Roman Catholic Relief Act 1829 passed through the House of Commons but as a consequence felt obliged to resign his Oxford seat.<sup>18</sup> He was defeated in the election in February 1829 but was returned to the seat of Westbury the following month. Wellington's government continued for another year and was succeeded in November 1830 by a Whig government led by Earl Grey. Apart from a few months in 1834-5 when he led a minority government, Peel remained on the opposition benches until 1841. Following the election of July in that year, Peel had sufficient support to lead a majority Tory Government. He served as Prime Minister until 1846 when he was forced to resign after promoting the repeal of the Corn Laws aided by an alliance of

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<sup>16</sup> A. Aspinall (ed.), *Formation of Canning's Ministry* (London, 1937).

<sup>17</sup> Gash, *Mr Secretary Peel*, pp. 545-98.

<sup>18</sup> (10 Geo. IV c. 7).

Whigs and other liberals. He remained an MP until his sudden death in 1850 which resulted from injuries sustained when falling from his horse.

Contemporaries of Peel held divergent opinions in respect of his personality depending on their own political sympathies and position in society. To his friends and supporters, such as Henry Vane, 2<sup>nd</sup> Duke of Cleveland, and Henry Goulburn, he was an entertaining companion and affable host. Yet the majority of comments about Peel's character portray him as a cold, reserved man whose urbane manners concealed an irritable temperament. With his sudden death, all criticism of Peel appeared to dissipate with a national outpouring of grief orchestrated by a favourable press.<sup>19</sup> One obituary described him as a 'pillar of the state' whose death left a 'gap [which] may never be repaired'.<sup>20</sup> Funded by public subscription, statues were erected in many northern industrial towns ascribing to Peel's middle class virtues of initiative, enterprise, efficiency and merit.<sup>21</sup>

As mentioned earlier, the recent historiography of Peel as Home Secretary has been dominated by Gatrell who epitomised Peel as a 'great hangman' who 'let more people hang in the 1820s than any predecessor in office'.<sup>22</sup> His views have been reassessed by a number of historians, including Boyd Hilton and Simon Devereaux who have argued that his decision-making was more considered particularly in respect of capital cases heard at the Old Bailey.<sup>23</sup> However, there has been rare consideration of the duality of functions as member of the Executive and servant of the Crown which Peel was obliged to discharge as Home Secretary. The impact of Peel's political legacy has been analysed by many commentators and historians and the next section will concentrate on how his stewardship of the Home Office has been critiqued.

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<sup>19</sup> D. Read, *Peel and the Victorians* (Oxford, 1987), pp. 294-301.

<sup>20</sup> *The Times* 3 July 1850.

<sup>21</sup> Statues of Peel are sited in, for example, Bury, Leeds and Manchester as well as Tamworth.

<sup>22</sup> Gatrell, *The Hanging Tree*, pp. 566, 585.

<sup>23</sup> B. Hilton, 'The Gallows and Mr. Peel', in T.C.W. Blanning and D. Cannadine (eds), *History and Biography: Essays in Honour of Derek Beales* (Cambridge, 1996), pp. 88-112; S. Devereaux, 'Peel, Pardon and Punishment: The Recorder's Report Revisited', in Devereaux and Griffiths (eds), *Penal Practice and Culture 1500-1900: Punishing the English* (Basingstoke, 2004), pp. 258-84; 'England's Bloody Code in Crisis and Transition: Executions at the Old Bailey, 1760-1837', *Journal of the Canadian Historical Association*, 24 (2013), pp. 71-113; 'The Bloodiest Code: Counting Executions and Pardons at the Old Bailey, 1730-1837', *Law, Crime and History*, 6 (2016), pp. 1-36.

## Reforming the criminal justice system and Peel – the historiography

‘Was there ever such a dull man? Can anyone, without horror, foresee the reading of his memoirs?’ observed Walter Bagehot in 1852 just two years after Peel’s death.<sup>24</sup> During his life Peel had also been portrayed by the political caricaturist John Doyle as an ‘enigma’ although this was disputed by his nephew, Lawrence Peel.<sup>25</sup> Yet this dull and enigmatic man has attracted a large body of work by historians and biographers.<sup>26</sup>

In 1857, Francois Guizot praised Peel as an ‘excellent Home Secretary’.<sup>27</sup> Later historians, such as McCarthy, Kitson Clark and Ramsey, expanded this view and emphasised Peel’s liberal credentials.<sup>28</sup> The zenith of Peel’s historical reputation as the great reforming Home Secretary was reached on the publication in 1961 of Norman Gash’s biography *Mr Secretary Peel*. He applauded Peel’s achievements in arriving at a workable compromise between the system he inherited and the pressing need for change through ‘an instinct for continuity and the preservation of order and good government in a society which was confronted with the choice between adaptation or upheaval.’<sup>29</sup>

However, it was not long after the publication of Gash’s biography that the first notes of dissent surfaced. Derek Beales doubted Peel’s achievements, contending that it was only with the arrival of the Whig government in 1830 that noticeable change occurred in the criminal law.<sup>30</sup> This criticism was tempered by Leon Radzinowicz who declared

<sup>24</sup> W. Bagehot, *The Collected Works of Walter Bagehot*, N. St. John-Stevs (ed.), 15 volumes (London, 1965-86), volume 4, p. 51; J Hamburger, ‘Bagehot, Walter (1826-1877)’, in *ODNB*.

<sup>25</sup> J. Doyle, *The Substance and the Shadow! An Enigma*; K. Parker, ‘Doyle, John [H.B.] (1797-1868)’, in *ODNB*; L. Peel, *A Sketch and Life of the Character of Sir Robert Peel* (London, 1860), pp. 308, 313.

<sup>26</sup> W. Bagehot, ‘The Character of Sir Robert Peel (1856)’, in *The Life and Works of Walter Bagehot*, volume 2 (London, 1915) ; A. Briggs, ‘British Prime Ministers: VII Sir Robert Peel’, *History Today*, 1, 11 (1951), pp. 25-32; G. Kitson Clark, *The Life and Work of Sir Robert Peel* (London, 1950); Gash, *Mr. Secretary Peel*; Gatrell, *The Hanging Tree* ; R.A. Gaunt, *Sir Robert Peel: the Life and Legacy* (London, 2010); F. Guizot, *Memoirs of Sir Robert Peel* (London, 1857); Hilton, ‘The Gallows and Mr. Peel’, pp. 88-112; D. Hurd, *Robert Peel* (London, 2007); T.A. Jenkins, *Sir Robert Peel* (London, 1990); J. McCarthy, *Sir Robert Peel* (London, 1891); J. Morrow, ‘The Paradox of Peel as a Carlylean Hero’, *The Historical Journal*, 40,1 ( 1997), pp. 97-110; Peel, *A Sketch of the Life and Character of Sir Robert Peel*; A.A.W. Ramsey, *Sir Robert Peel* (London, 1928) and J. Prest, ‘Peel, Sir Robert, second baronet (1788-1850)’, in *ODNB*.

<sup>27</sup> Guizot, *Memoirs of Sir Robert Peel*, p. 25.

<sup>28</sup> McCarthy, *Sir Robert Peel*; Kitson Clark, *The Life and Work of Sir Robert Peel*; Ramsey, *Sir Robert Peel*.

<sup>29</sup> Gash, *Mr Secretary Peel*, pp. 13-14.

<sup>30</sup> Beales, ‘Peel, Russell and Reform’, p. 879.



in a speech in 1993 that few Home Secretaries had demonstrated the ‘dedication, zeal and reforming outlook of Robert Peel.’<sup>31</sup> As previously mentioned, it was Gatrell’s critical assessment of Peel’s achievements as Home Secretary which damaged his reputation as a reforming Home Secretary.<sup>32</sup> He advised that, ‘We are not going to meet the great criminal law reformer of legend.’<sup>33</sup> He went even further by concluding that ‘Peel’s final record was one of failure’ as his consolidation of the capital statutes was ‘unpicked’ by the successive Whig governments of the 1830s.<sup>34</sup>

In an article published two years later, Boyd Hilton concluded that it would not be an exaggeration to describe Peel as the villain of *The Hanging Tree*.<sup>35</sup> Hilton’s view of Peel’s achievements at the Home Office was less critical than Gatrell’s. He focussed on Peel’s speeches to identify the religious and ethical considerations which influenced Peel’s penal reforms. In Hilton’s view, Peel was not an evangelical who reviled the death penalty or corporal punishment but preferred, in Peel’s own words, to administer the criminal law on the ‘dictates of common sense’.<sup>36</sup> Unfortunately, Peel gave no indication of what he meant by this phrase.

Simon Devereaux has also attempted to counter Gatrell’s attack on Peel’s ministry by demonstrating that Peel’s decision-making, particularly in respect of capital cases decided at the Old Bailey, was ‘far better than recent work might lead us to believe’.<sup>37</sup> He highlighted that recommendations under the Royal Prerogative of mercy operated within the context of ‘a declining public acceptance’ of capital punishments and Peel was more sensitive to this shift in opinion than many of his Tory colleagues.<sup>38</sup> Yet despite the fact that Peel’s tenure at the Home Office produced a vast archive of

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<sup>31</sup> L. Radzinowicz, ‘Reflections on the State of Criminology’, *British Journal of Criminology*, 34, 2 (1994), pp. 99-104.

<sup>32</sup> Gatrell, *The Hanging Tree*, pp. 566-85.

<sup>33</sup> Ibid p. 568.

<sup>34</sup> Ibid p.570

<sup>35</sup> Hilton, ‘The Gallows and Mr. Peel’, pp. 88- 112.

<sup>36</sup> B. Hilton, *The Age of Atonement. The Influence of Evangelicalism on Social and Economic Thought 1797-1865* (Oxford, 1991), pp. 215-7; R. Peel, *The Speeches of the Late Rt. Hon. Sir Robert Peel 1788- 1850*, 4 volumes (London, 1853), volume 1, p. 397 (hereafter *Speeches*).

<sup>37</sup> Devereaux, ‘Peel, Pardon and Punishment’, p. 279.

<sup>38</sup> Ibid.

materials, as recently as 2010 Richard Gaunt considered that ‘there is a remarkable and lingering sense of anonymity surrounding Peel.’<sup>39</sup>

Peel’s penal reforms have also to be located within the context of the debate which emerged in the 1970s, and centred on the publications of a group of researchers at the University of Warwick led by E.P. Thompson over the nature of the criminal legal system. His hugely important book, *Whigs and Hunters*, was the starting point for detailed considerations of how the criminal law functioned in the late eighteenth century.<sup>40</sup> Over the next 25 years, this debate flourished, centred on the system in place in the 1780s and 1790s, and is best represented in the contrasting interpretations of Douglas Hay and Peter King.

Hay contended that the administration of justice served as an instrument of class rule. He argued that the discretionary nature of the penal system represented a system of ‘gross and capricious power’ resulting in a ‘ruling class conspiracy’. He considered that the threat of the gallows was sufficient to ensure deference to the *status quo* and that the power to commute sentences was a benevolent mechanism that reinforced the existing social order. He used this argument as evidence of the right wing Tories resistance to substantive legal reform.<sup>41</sup>

King considered that the discretion running through the criminal justice system was its golden thread and played a crucial part in the working of the process. Building on statistical evidence gleaned from researching criminal cases decided in Essex, he tabulated the reasons advanced for the mitigation of sentences as ‘factors’ and concluded that the element of discretion allowed all the circumstances of the crime as well as the individual’s personal attributes to be taken into account. He considered that the system operated on a far more equitable basis than that advanced by Hay.<sup>42</sup>

These differing views, on the criminal law of the 1780s, have little application to the system Peel inherited in 1822 due to the waning influence of the Crown and Peel’s more nuanced approach to the prisoner’s conduct.<sup>43</sup> The thesis echoes Gatrell’s view

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<sup>39</sup> Gaunt, *Sir Robert Peel: the Life and Legacy*, p. 3.

<sup>40</sup> E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London, 1975).

<sup>41</sup> D. Hay, ‘Property, Authority and the Criminal Law’, in D. Hay, P. Linebaugh, E.P. Thompson et al (eds), *Albion’s Fatal Tree; Crime and Society in Eighteenth Century England* (London, 1975), pp.17-63.

<sup>42</sup> P. King, *Crime, Justice and Discretion in England 1740- 1820* (Oxford, 2000).

<sup>43</sup> A.S. Foorde, ‘The Waning Influence of the Crown’, *English Historical Review*, 62 (1947),

that the debates relating to the eighteenth century criminal law have little relevance to the system in place in the 1820s. He considered that the vast number of petitions lodged at the Home Office in the 1820s were ‘too rich’ to be reduced to mere factors as each case required ‘long attention’ to be fully revealed.<sup>44</sup> Rather than reciting a quantitative survey of the numbers pardoned, the thesis establishes patterns in Peel’s decision-making which demonstrate his objective of making the criminal law more effective and consistent. This is challenging because of the nature of the records which will be discussed in the next section.

Petitions for the Royal Prerogative of mercy in the 1820s were still addressed to the King and couched in deferential language, but the notion of benevolence was beginning to appear outdated.<sup>45</sup> Changes in society after the Napoleonic wars had resulted in calls for reform to established institutions such as Parliament, the Church and the law.<sup>46</sup> Hay’s perspective of the criminal law in the late eighteenth century, does not reflect the expansion of the Executive’s influence in the exercise of the Royal Prerogative of mercy or the waning personal influence of the Monarch in the early decades of the nineteenth century.<sup>47</sup>

### **Peel, petitions for mercy and the Royal prerogative of mercy**

As Michael Lobban has observed ‘the position of legal history as a discipline has long been problematic, at least in English universities.’<sup>48</sup> The difficulty is: where does legal history fit in? Students wishing to practise the law question its relevance whilst historians, who use legal records to examine other issues such as equality and human rights, often pay insufficient attention to the law itself. It is only when the underlying jurisprudential and constitutional issues are analysed that an accurate appraisal of Peel’s actions can be sustained. The failure to do so, it will be argued, has led to some fundamental misinterpretations of Peel’s legacy by historians.

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pp. 484-507.

<sup>44</sup> Gatrell, *The Hanging Tree*, p. 613.

<sup>45</sup> Example of a formal petition see Appendix One.

<sup>46</sup> A. Burns and J. Innes (eds), *Rethinking the Age of Reform, Britain 1780-1820* (Cambridge, 2007).

<sup>47</sup> Foorde, ‘The Waning Influence of the Crown’, pp. 484-507.

<sup>48</sup> A. Lewis and M. Lobban (eds), *Law and History: Current Legal Issues* (Oxford, 2004), volume 6, p. 2.

The Royal Prerogative of mercy was a personal privilege enjoyed by the Monarch by which he could temper verdicts and sentences passed by courts of competent jurisdiction.<sup>49</sup> This privilege must be distinguished from the commonplace meaning of mercy and viewed as part of technical legal language. By the 1820s, the *de facto* power to recommend the exercise of this privilege had been vested in the Home Secretary. Convicted prisoners and their supporters petitioned the Home Secretary in the hope that he would recommend an absolute pardon or mitigation of the sentence. There were no formalities for petitions. The power to grant pardons lay exclusively with the Crown and the language used by the Home Office reflected this by rarely using the word ‘pardon’ as a verb. Pardons were prepared by the Home Office and were only valid when signed by the Monarch.

The thesis is based on research of more than 5,000 cases submitted to the Home Office during Peel’s tenure. There are inherent difficulties with the records as the 131 boxes in the series are not arranged in any chronological or geographic order. They are arranged in bundles of approximately 50 petitions, with an average of 150 petitions in each box, and are not foliated. The bundles vary in size and content; some have a single petition whilst others have a wealth of documents including, *inter alia*, petitions, letters, depositions, judges’ reports and certificates of good conduct amounting in some cases to more than 100 pages.

The starting point for this research was identifying the ‘Peel’ boxes which are spread throughout the series. From this, it was ascertained that all the petitions for the year 1823 are missing. Then a database of all the available cases heard by the King in Council between 1822 and 1830, amounting to more than 1,400, was prepared from the Recorder’s Reports contained in HO6, the Old Bailey Proceedings (*OBP*), HO13 and HO17.<sup>50</sup> Details of the case and the prisoner’s circumstances from the *OBP* including recommendations for mercy by the prosecutor and jury were recorded, as well as whether a petition was lodged, its reference and the outcome or ‘disposal’ of the prisoner. It is important to recognise that the petitions only supported the

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<sup>49</sup> J. Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (London, 1820).

<sup>50</sup> HO 13 are the criminal entry books which contain correspondence and copies of pardons. Tim Hitchcock, Robert Shoemaker, Clive Emsley, Sharon Howard and Jamie McLaughlin, *et al.*, *The Old Bailey Proceedings Online, 1674-1913* ([www.oldbaileyonline.org](http://www.oldbaileyonline.org) version 7.0), [date accessed: 24 March 2012]; HO 6 contain the Recorder’s Reports

petitioner's case and never recited all material facts surrounding the offence. The research, therefore, included an examination of all the associated papers including judges' reports, letters and newspaper articles in order to garner as much information about each individual case as possible.

Using these records was important, as Peel was a member of the King in Council which had to determine whether capital sentences at the Old Bailey should be confirmed or commuted. His ability to interfere with the decisions of Assizes outside London and Middlesex on the commutation of death sentences was much more circumscribed and depended on either an irregularity in the proceedings or the submission of new evidence.<sup>51</sup>

An extensive study of the petitions was essential in order to identify Peel's handwriting, recognise his annotations and to become familiar with his idiosyncratic abbreviations.<sup>52</sup> It also resulted in acquiring a degree of detachment from the heart-wrenching pleas from convicted prisoners and their supporters. Analysis of the petitions also highlighted the difficulty of categorising offences and grounds for clemency when seeking quantitative conclusions about the percentage of pardons recommended. Clive Emsley, for example, has used statistical evidence to demonstrate which capital offences were more likely to be recommended for a pardon.<sup>53</sup> In doing so he used the term 'forgery', for instance, to cover differing types of fraudulent activity but there were important contextual considerations which affected whether the capital sentence was enforced. For example, the Bank of England was pro-active in bringing prosecutions against offenders who passed forged bank-notes and only initiated proceedings where they judged that the outcome would result in a guilty verdict.<sup>54</sup> Likewise, with grounds for clemency in the petitions, concluding that a pardon was recommended on the basis of good conduct does not distinguish whether it was the prisoner's good conduct before the offence which was the mitigating factor or their conduct after sentence. This issue will be explored later in the thesis.<sup>55</sup>

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<sup>51</sup> Judgement of Death Act 1823 (4 Geo. IV c. 48).

<sup>52</sup> For an example of a draft letter see Appendix Two.

<sup>53</sup> Emsley, *Crime and Punishment*, pp. 267-71.

<sup>54</sup> Chapter Six pp.109-10 *infra*.

<sup>55</sup> Chapter Nine pp. 175-184 *infra*.

Researching a wide sample of petitions also meant that the process of begging for mercy could be reconstructed to determine the extent to which Peel's initiatives streamlined the system and made it more bureaucratic, centralised and impartial. A recent article by Tim Hitchcock has undertaken a text mining exercise of the Old Bailey records to highlight how changes to the court records may be adduced as evidence of the developments in court proceedings.<sup>56</sup> One particular aspect of the article which links the increase of guilty pleas with plea bargaining will be considered later in the thesis.<sup>57</sup> The idea of using an increase in the word count and the use of particular terms and words to trace changes to and developments in the criminal justice system can also be applied to the Home Office records. One example is how the back sheets of petitions changed over Peel's ministry. In 1822, the back sheet generally only contained the name of the prisoner and the Home Office reference but by 1824, details of the prisoner, court, offence, sentence, gaoler's report and annotations were noted. This more detailed record had the effect of making the process more transparent. If later petitions were lodged details of the original case were readily traceable with the result that the papers relating to the same case could be filed together with the result that some dossiers have a time span of more than 30 years.<sup>58</sup>

### **Outline of Thesis**

The thesis will explore the reforms initiated to the criminal law and the recommendations for the exercise of the Royal Prerogative of mercy made by Peel during his stewardship of the Home Office. Chapter 2 will set out the criminal justice framework which Peel inherited when he took up office as Home Secretary in 1822. Chapter 3 will consider the nature of English law and the challenges he faced in reforming and centralising its administration and making the system more effective. Chapter 4 will explore the political landscape in the 1820s and whether the absence of party politics, as understood today, affected the success of the reform measures introduced by Peel. In Chapters 5 and 6 this thesis will examine Peel's recommendations under the Royal Prerogative of mercy. It will initially consider the jurisprudential and constitutional issues which governed Peel's decision making and

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<sup>56</sup> T. Hitchcock, 'The Old Bailey Proceedings, 1674-1913: Text Mining for Evidence of Court Behavior,' *Law and History Review*, 34, 4 (2016), pp. 929-55.

<sup>57</sup> Chapter Two p.30 *infra*.

<sup>58</sup> See Appendix Three for an example of a detailed back sheet.

question what Gatrell meant when he observed that ‘petitioners found little mercy in Mr Peel.’<sup>59</sup> The final two chapters will explore how Peel balanced his duty as a member of the Executive to maintain law and order with his responsibility to act impartially as a servant of the Crown.

Bagehot considered that most legislation in this period was really administrative regulation; it did not decide what was to be done but how it was to be done.<sup>60</sup> He viewed Peel as ‘an admirable master’ of this type of legislation.<sup>61</sup> This thesis will build on Bagehot’s assessment of Peel that he was ‘externally expedient’ and ‘fortunate’ that he entered the Home Office at a time when ‘the principal measures required were “repeals”’.<sup>62</sup>

Understanding the mechanisms and processes required to bring about change is of course an essential prerequisite to the introduction of successful reform. But is Bagehot right to imply that reform by repeal requires a lesser degree of such understanding than repeal through new legislation? The reduction in the number of capital offences is no less of a meaningful reform because it was achieved through repeal. Indeed, for those directly affected, the ability of the reformer to select the timeliest process for reform is a very positive attribute. Peel’s measures streamlined the criminal justice system and made it more bureaucratic and centralised. These procedural and substantive changes were part of a wider movement in the 1820s to reform other aspects of the law such as the Court of Chancery as well as established institutions such as medicine and the Church.<sup>63</sup> It will show that his repeals were no less significant because they were not implemented through major new legislation or even codification and demonstrate that Peel was not the ‘villain’ portrayed by Gatrell.

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<sup>59</sup> Gatrell, *The Hanging Tree*, p. 567.

<sup>60</sup> Barrington (ed.), *The Works and Life of Walter Bagehot*, volume 2, p. 213.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid pp. 179, 212.

<sup>63</sup> Burns and Innes (eds), *Rethinking the Age of Reform, Britain 1780-1820*, pp.136-81.

## Chapter Two

### The criminal law and courts in 1822

#### Introduction

The criminal justice system which Peel inherited in 1822 was a product of evolution over centuries.<sup>1</sup> A.K. Kiralfy noted that the English legal system was ‘a composite’ and should be distinguished from legal systems in continental countries which were based on codes which prescribed the substantive law in a single document.<sup>2</sup> However, this period has been characterised by the phrase ‘bloody code’, an epithet of indeterminate provenance.<sup>3</sup>

When supporting a motion in the House of Commons for a select committee to enquire into the criminal laws in 1819, William Wilberforce, the MP most famous for his earlier support for the abolition of the slave trade, considered that any person who had a respect for the laws would wish to wipe from them that ‘code of blood’ but this was the only reference to a code in his speech. When referring to the criminal law, it is clear that he understood that English criminal law was a product of ‘gradual legislation’ repeating this phrase more than once.<sup>4</sup> Whilst this may have been the source of the term ‘bloody code’, it is more likely that it was coined by later radical reformers as a propaganda tool in order to promote their objectives. It was not, however, a phrase used by Peel when presenting his proposals on reform of the criminal law.

In England and Wales, the main sources of criminal law were and are an amalgam of common law, statute and custom.<sup>5</sup> Peel’s challenge was to bring about change against the background of this maze of offences and a rapidly changing society. This chapter will consider the fragmented nature of the sources of the criminal law in order to

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<sup>1</sup> For a condensed history of the criminal law see J.F. Stephen, *A History of the Criminal Law of England* (London, 1883), volume 2, pp. 219-20; A. Gillespie, *The English Legal System* (Oxford, 2013); P. Harris, *An Introduction to Law* (Cambridge, 2007); Kiralfy, *Potter’s Historical Introduction to English Law*; L. Radzinowicz, *History of the Criminal Law and its Administration from 1750*, 5 volumes (London, 1948-86); G. Slapper and D. Kelly, *The English Legal System* (Hoboken, 2014) and Walker and Ward, *English Legal System*.

<sup>2</sup> Kiralfy, *Potter’s Historical Introduction*, p. 7; and see for example T. Holmberg, *The Civil Code: an Overview* (online–Napoleon–series.org.2010) ;<[http://www.napoleon-series.org/research/government/code/c\\_code2.html#code](http://www.napoleon-series.org/research/government/code/c_code2.html#code)> [accessed 30 June 2016].

<sup>3</sup> In *The Hanging Tree*, Gatrell gives two examples of the use ‘bloody’ in connection with the criminal law but no use of the term ‘bloody code’, pp. 20-1.

<sup>4</sup> HC Parliamentary Debates, 2 March 1819, 1<sup>st</sup> series, 39, cols. 828-9.

<sup>5</sup> Walker and Ward, *English Legal System*, pp. 3-111.



understand the obstacles faced by Peel and other reformers in rationalising the criminal law. The framework of the criminal courts will also be examined to explain their practices and procedures. As today, the majority of criminal cases were tried summarily by magistrates at Petty Sessions (now Magistrates' courts). Few petitions survive from prisoners convicted at Petty Sessions but numerous petitions, on behalf of these prisoners, were submitted to the Home Office from visiting magistrates, who had responsibility for the management of local gaols. They generally requested a remission of sentence for prisoners in their custody in order to avoid overcrowding in the gaols. Prisoners indicted on more serious offences were tried at Quarter Sessions or Assizes and most of their petitions for mercy were concerned with overturning verdicts or mitigating sentences.

The lack of a statutory appeal structure continued throughout the nineteenth century until the establishment of the Court of Criminal Appeal in 1907 which conferred on convicted prisoners a right of leave to appeal against conviction or sentence or both.<sup>6</sup> The origins of the criminal law and the machinery of justice bear further consideration in order to fully understand the difficulties faced by Peel in reforming the substantive law and the constraints impacting his decision making when recommending the exercise of the Royal Prerogative of mercy.

### **Origins of the English Criminal Law**

All criminal offences are committed against the King's peace and dignity and any relief, pre 1907, was in the 'gift' of the monarch as it was 'reasonable that he who is injured should have the power of forgiving'.<sup>7</sup> Before the Norman Conquest, the King's Peace was local and personal and died with him resulting in disorder in the period between the death of one king and the coronation of his successor. This state of affairs ceased with a proclamation during the reign of Edward I when the King's peace was deemed to continue at all times. Criminal offences were classified as either felonies or misdemeanours. Felonies carried the death penalty but convicted prisoners could

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<sup>6</sup> Criminal Appeal Act 1907 (7 Ed. VII, c. 23).

<sup>7</sup> W. Blackstone, *Commentaries on the Laws of England*, 2 volumes (Oxford, 8<sup>th</sup> edn, 1778), volume 1, pp. 268-9. For a detailed history of the development of the criminal liability see J.H. Baker, *An Introduction to English Legal History* (Oxford, 4<sup>th</sup> edn., 2002), pp. 500-36.

escape punishment by pleading benefit of clergy, a legal fiction which had been removed from most statutory offences by the start of the nineteenth century.<sup>8</sup>

When Peel took up office in 1822 it was estimated that there were over 200 capital felonies.<sup>9</sup> As Professor R.C. Van Caenegem, the Belgian historian, noted, ‘if the common law stands for anything, it is the absence of codes.’<sup>10</sup> Defining the relationship between the common law and statute has long excited the attention of jurisprudential scholars. In 1985 P.S. Atiyah, the lawyer and academic, posed a question regarding the nature of the relationship between common law and statute but gave no definite answer.

Does our law constitute, in some sense, a single coherent integral body of law or does it consist of two separate entities, two streams running in parallel lines one of which occasionally feeds into the other but which are destined for ever to retain their separate identities? <sup>11</sup>

In considering the rationale behind Peel’s recommendations for the Royal Prerogative of mercy, it is necessary to consider the origins of the offence. If it was a common law offence which, either in its definition or manner of punishment had been modified by later statutory intervention, then it was incumbent on the Home Secretary to take into account all the provisions relating to the offence when deciding whether to recommend the Royal Prerogative of mercy. The offence of murder is an example of the ‘two streams’ running in parallel lines but with separate identities. Peel had to consider both the substantive nature of the offence at common law and the statutory provisions relating to punishment in his decision-making.

Murder was defined in the seventeenth century by the Lord Chief Justice, Edward Coke, as the killing of a human being within a year and a day with malice aforethought.

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<sup>8</sup> Kiralfy, *Potter’s Historical Introduction to English Law*, pp. 346-370.

<sup>9</sup> HC Parliamentary Debates, 2 March 1819, 1<sup>st</sup> series, 39, col. 787.

<sup>10</sup> R.C. Van Caenegem, ‘Judges, Legislation and Professors,’ *Chapters in European Legal History* (Cambridge, 1987), p. 39.

<sup>11</sup> P.S. Atiyah, ‘Common Law and Statute Law’, *Modern Law Review*, 48, (1985), pp. 1-28; D. Lieberman, ‘The Mixed Constitution and the Common Law’, in M. Goldie and R. Wokler (eds), *The Cambridge History of Eighteenth Century Political Thought* (Cambridge, 2006), pp.318-45; M. Lobban in ‘Old Wine in New Bottles: the Concept and Practice of Law Reform, c1750-1830’, in *Rethinking the Age of Reform*, pp. 114-35; R. Pound, ‘Common Law and Legislation’, *Harvard Law Review*, 21 (1908), pp. 383-406.

<sup>12</sup> This definition of murder was the precedent upon which courts, over the centuries, based their decisions and did not initially attract any parliamentary intervention. Over time, Parliament modified the circumstances which constituted the offence and punishment of murder but it remains a common law offence.<sup>13</sup> Under the Murder Act 1752, convicted murderers had to be hanged two days after sentence unless the third day was a Sunday in which case they were to be hanged on the Monday.<sup>14</sup> In addition, the Act attached an added stigma to the punishment; no one convicted of murder was to be buried in consecrated ground as their body was to be sent for anatomisation or hanged in chains.<sup>15</sup> The responsibility for ensuring the provisions of the Act were carried out was delegated to the Sheriff in each county but Peel became involved when his directions were sought as in the case of Catherine Kinrade and John Camaish.

Kinrade, aged 19, was embroiled in an affair with her brother in law, Camaish.<sup>16</sup> They plotted to kill Camaish's pregnant wife, Kinrade's sister, in order that they could marry. Kinrade was charged with murder and Camaish with aiding and abetting the crime. At the trial held at Castle Rushden on the Isle of Man on 18 March 1823, evidence was adduced to show that Camaish had tried on two occasions to buy arsenic on the pretence of killing rats; failing the first time but succeeding in buying ½ oz. of white arsenic at the second attempt. Kinrade poisoned her sister's food resulting in her death. They were both convicted and sentenced to death. There was no executioner and no facility for anatomisation on the island so it was nearly one month later before they were hanged thus contravening the provisions of the statute. In this interim period, the Lieutenant Governor of the Isle of Man, the Duke of Atholl, wrote to Peel requesting the warrant for execution and further instructions as to the disposal of the bodies. In these exceptional circumstances, Peel might have recommended that the strict provisions of the Act could be mitigated but he was not prepared to do so. He replied to the Duke that 'the rite of burial' should be withheld as a deterrent to others but gave no further instructions as to the disposal of the bodies.<sup>17</sup>

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<sup>12</sup> E. Coke, *Institutes* (1628), Part III, p. 47.

<sup>13</sup> Homicide Act 1957 (5 & 6 Eliz.2 c.11); Law Reform (Year and a day Rule) Act 1996 (c.19).

<sup>14</sup> (2 Geo. II c. 37).

<sup>15</sup> *Ibid.*

<sup>16</sup> HO 47/64 fols. 42-63.

<sup>17</sup> *Ibid* fol. 63.

On 18 April the Duke replied to Peel's letters confirming that the execution of Camaish and Kinrade had taken place and that in conformity with the instructions 'their bodies [had] been delivered to be anatomized.'<sup>18</sup> Newspaper reports confirmed that this anatomization occurred. However, in view of the Duke of Atholl's original concerns that there was no one on the island who had the competence to carry out the anatomization, perhaps a more plausible explanation was given by Reverend Clarke, chaplain of Sulby. He stated that in fact Kinrade was instead buried in Sulby at a spot where three roads converged.<sup>19</sup> Thus in this case there were no grounds for Peel to interfere with the decision of the court based on the common law offence of murder as the petitions were marked 'The Law to take its course'. He was, however, called upon to consider whether to recommend a mitigation of the manner of punishment contained in the later statutory modifications. This example highlights that in examining the basis on which Peel recommended the exercise of the Royal Prerogative of mercy, it is necessary to review all the sources of law appertaining to specific offences and not just look at the sources separately and in isolation.

### **The Courts**

Outside London and Middlesex, capital felonies were tried at Assizes (and occasionally Quarter Sessions) and were presided over by a judge appointed under royal commissions of *oyer and terminer* and gaol delivery.<sup>20</sup> The administration of justice, both criminal and civil outside London and Middlesex, was organised in circuits with judges travelling to various cities and towns within these circuits to hear cases. It was usual for one judge to try the criminal cases and for another to hear the *nisi prius* or civil cases. For example a judge on the Northern circuit would preside over cases in, *inter alia*, York, Newcastle upon Tyne, Lancaster, Preston and Liverpool.<sup>21</sup> In 1822, the King's justices of the King's Bench, Exchequer and Common Pleas numbered 12 and they heard cases on the same circuit year after year. Whilst this practice allowed judges to gain local knowledge of the areas where they presided and ensured consistency in their decisions, it could also mean that they were

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<sup>18</sup> Ibid fol. 716.

<sup>19</sup> *Annals of Kirk Christ Lezayre* < [www.isle-of-man/manxnotebook/fulltext/Ker1954/ch21.htm](http://www.isle-of-man/manxnotebook/fulltext/Ker1954/ch21.htm) > [accessed 10 April 2015]; *The Manx Sun* 3 August 1872 reprinted from *The Rising Sun* 2 April 1823.

<sup>20</sup> Kiralfy, *Potter's Historical Introduction to English Law*, pp. 110-34; Walker and Ward, *English Legal System*, pp. 131- 80.

<sup>21</sup> Kiralfy, *Potter's Historical Introduction to English Law*, pp. 79-87; Walker and Ward, *English Legal System*, pp. 181-94.

open to influence from the local dignitaries and land owners who often joined them on the Bench.<sup>22</sup> The Assizes were held in spring and summer of each year but Special Assizes could be convened when the situation demanded.<sup>23</sup> The holding of the Assize was a ritual attended with tradition and strict protocol. On each morning of the sittings, the judge, in full regalia, progressed through the town from his lodgings to the court. The whole process was a reinforcement of the King's divine right to rule and his recognition as the 'fountain of all justice.'<sup>24</sup>

One innovation which Peel attempted to introduce in 1823 concerned the timings of the Assizes outside London. In February of that year, he wrote to the Attorney General proposing a third Assize and sought his advice on the practicability of the proposal. Assizes outside London were held twice yearly namely during spring (Lent Assizes) and summer (Midsummer Assizes). This meant that, for example, a person arrested and charged in September would have to remain in gaol until the following Lent Assizes, a period of about six months before his case was heard. Peel asked the Attorney General to consider how to 'equalise the periods, which as the Assizes are at present regulated ...vary disproportionately between them.'<sup>25</sup>

He pointed out that the increase of population had resulted in greater levels of crime coupled with the need for an early trial and these considerations ought to outweigh any objections or intransigence on the part of the judiciary. Asking judges, however, to travel to the far reaches of England and Wales in the depths of winter by coach was always likely to be problematic and the proposal never came into force during Peel's stewardship of the Home Office. With the advent of the railways in the 1830s /40s, this objection dissipated. One other matter mentioned by Peel in the letter was his concern for pre-trial prisoners associating with convicted offenders and being drawn into criminal activities. Although highlighted by the penal reformer John Howard and others in the late eighteenth century, the segregation of prisoners awaiting trial and convicted prisoners was not yet established in the criminal justice system.<sup>26</sup> These

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<sup>22</sup> Gatrell, *The Hanging Tree*, pp. 497-514.

<sup>23</sup> An example was the Special Assizes held at Lancaster in 1827 to try the 'Rossendale rioters'.

<sup>24</sup> Walker and Ward, *English Legal System*, pp. 4-5; D. Hay, 'Property, Authority and the Criminal Law', pp.17-63.

<sup>25</sup> HO44/13/ fol. 13.

<sup>26</sup> J. Howard, *The State of the Prisons in England and Wales* (Warrington, 1777); R. Morgan, 'Howard, John (1726? -1790)', in *ODNB*.

issues demonstrate some of the difficulties Peel encountered in attempting to introduce new measures into the administration of criminal justice.

Prisoners convicted of felonies at Assizes were subjected to a mandatory capital sentence but by the 1820s, the *de facto* power to commute this sentence rested with the trial judge who sent a circuit letter to the Crown at the end of each Assize, advising that ‘favourable circumstances’ had been found in favour of the prisoner.<sup>27</sup> It was rare for any further details or reasons for the exercise of discretion in the prisoner’s favour to be divulged in the letter.<sup>28</sup> This *de facto* power was put on a statutory footing in 1823 when Peel promoted the Judgement of Death Act which gave judges the discretion to pass a lesser sentence when they considered the full sentence should not be imposed.<sup>29</sup> The Act did not apply to treason or murder. Prisoners left for execution could petition the Crown for relief but the chance of success was small unless there were established circumstances.<sup>30</sup>

The situation in London and Middlesex was different. The courts at the Old Bailey sat eight times a year and death sentences were handed down, usually by the Recorder of London, at the end of each Sessions. They were passed in escrow, meaning that they had to be confirmed at a subsequent meeting of the King in Council. This was an anachronism stemming from the Curia Regis or King’s Council which in earlier centuries had maintained that a residue of justice still resided in the Crown as an adjunct to the common law courts.<sup>31</sup> Traditionally, the meeting was held before the opening of the next Old Bailey Sessions but by the 1820s, the date of the meeting was determined by the Monarch. It was often delayed by months due to George IV’s indisposition or his unwillingness to return to London from Brighton.<sup>32</sup>

The Council was usually composed of the Monarch, members of the government, senior members of the church and the judiciary but there were no specific formalities as to its composition. Consideration of the cases took place between the Recorder of London, Home Secretary and chief legal officers before the meeting with the result that discussion at the meeting was focussed on the cases which were deemed the most

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<sup>27</sup> Circuit letters are contained in Series HO 6, Recorder’s Reports held at TNA.

<sup>28</sup> But see Mr Justice Park’s letter in the case of Rossendale rioters Chapter Eight pp.157-8 *infra*.

<sup>29</sup> Judgement of Death Act 1823 (4 Geo. IV c. 48).

<sup>30</sup> For established grounds see Chapter Five pp.81-7 *infra*.

<sup>31</sup> Gatrell, *The Hanging Tree*, pp. 564-5.

<sup>32</sup> See for example report of George IV’s illness in *The Times* 11 February 1823.

heinous.<sup>33</sup> Petitions, associated papers and judges' reports were considered and then the sentences were either confirmed or conditional pardons granted. Most meetings took place at the end of Privy Council business and were of relatively short duration. The Recorder's Report of May 1822 was notable for lasting for more than three hours.<sup>34</sup> Whether the prisoner was left for execution or conditionally pardoned, there was no bar to further petitioning the Home Secretary for a reconsideration of their case and/or further mitigation.

Criminal cases were also heard by justices of the peace (JPs) at Quarter Sessions. These courts had existed since 1362 and were held four times a year on specified dates.<sup>35</sup> The JPs held their power under a commission of peace from the King which extended to the whole of the county or particular local area which were known as City or Borough sessions. By the 1820s, their jurisdiction was restricted as they had no power to hear capital felonies. The principal officer of these courts was the *Custos Rotulorum* (Keeper of the Rolls) and was usually the Lord- Lieutenant of the county. He was appointed by the King under the Sign Manual and was selected for his 'wisdom, countenance and credit.'<sup>36</sup> He generally sat with two other JPs to hear the cases. Unlike cases at petty sessions, where JPs had the power to deal summarily with prisoners, cases at Quarter Sessions were tried before a jury. The Bench of the Quarter Sessions could impose periods of imprisonment, fines and terms of transportation.

In jurisprudential terms petitioning for relief from either conviction or sentence was the last hope when all other judicial avenues were exhausted but vested no rights in the prisoner. During the early part of the nineteenth century, there were, however, *ad hoc* procedures within the criminal justice system from which the establishment of the Court of Criminal Appeal would eventually evolve in 1907. An examination of this informal appeal structure will reveal that a prisoner's case may have been the subject of judicial review even before a petition for the exercise of the Royal Prerogative was lodged.

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<sup>33</sup> See Houghton and Bishop's cases Chapter Eight pp.149-51 *infra*.

<sup>34</sup> Chapter Six pp.104-7 *infra*.

<sup>35</sup>(36. Edw.III c.12) and see L.M. Boyer, 'The Justice of the Peace in England and America from 1506-1776: A Bibliographic History', *The Quarterly Journal of the Library of Congress*, 34, 4 (1977); W. Dickinson, *A Practical Guide to the Quarter Sessions and other Sessions of the Peace, Adapted to the Use of Young Magistrates and Professional Gentleman at the Commencement of their Practice* (London, 2<sup>nd</sup> edn, 1820); N. Landau, *The Justices of the Peace, 1679-1760* (Berkeley CA, 1984).

<sup>36</sup> Dickinson, *A Practical Guide*, p.24.

## Review by the Twelve Judges

In the 1820s, any of the King's justices could refer a case to his fellow judges to determine a difficult point of law. It was cited as a 'Referral to the Twelve Judges'.<sup>37</sup> This informal arrangement did not require that all twelve judges considered the case as the records reveal that on occasion only ten or eleven signatures appear on the document.<sup>38</sup> After deliberations on the point or points of law raised by the case, the judges decided whether the verdict was 'good in law'. They rarely, if ever, gave reasons for their judgment but signed a statement which generally read that they were of the opinion that the objections to the indictment were invalid and that the indictment was good and sufficient in law.<sup>39</sup>

By the time Peel took up office, counsel for the defence employed a referral as an avenue for case review.<sup>40</sup> Applications were relatively rare as few prisoners had the means to engage counsel on their behalf but it was not restricted to high profile cases. The disadvantage of requesting a referral, particularly outside London, was that there was often a delay of many months before the judges met. If the verdict was overturned on a point of law, then the stratagem worked as the prisoner was freed but if confirmed then the prisoner had suffered months of incarceration before he was hanged. The following examples raise the presumption that it was a risky strategy which was rarely successful.

One of the most sensational cases of the 1820s concerned the banker Henry Fauntleroy who was indicted at the Old Bailey in October 1824 on 30 counts of forging and uttering documents which led to the collapse of the private bank Messrs. Marsh and Co. in which he was a partner.<sup>41</sup> Although acquitted on the majority of the counts, he was convicted of uttering forged documents and sentenced to death. Before the

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<sup>37</sup>D.Bentley (ed.), *Select Cases from the Twelve Judges' Notebooks* (London, 1997); E. East, *A Treatise on the Pleas of the Crown* (London, 1803); P. Handler 'The Court for Crown Cases Reserved, 1848-1908, 29, *Law and History Review* (2011), pp. 259-88; J. Oldham, 'Informal Law- Making in England: Twelve Judges in the 18<sup>th</sup> and early 19<sup>th</sup> Centuries,' <<http://scholarship.law.georgetown.edu/facpub/361>> [accessed 20 March 2014]; W.O. Russell and E. Ryan, *Crown Cases Reserved for Consideration and Decided by the Twelve Judges of England 1799 – 1824* (London, 1825). This book is dedicated to Peel 'in admiration of his enlightened principles to remedy the defects in the law'.

<sup>38</sup> Examples appear in HO6/10 and HO6/11.

<sup>39</sup> Ibid.

<sup>40</sup> J. Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003); A.F. May, *The Bar and the Old Bailey* (Chapel Hill N.C., 2003).

<sup>41</sup> *OBP*, 28 October 1824, Henry Fauntleroy (t18241028-97); HO17/87/ Qk 46.



meeting of the King in Council, Fauntleroy's counsel, one of the leading criminal barristers, James Harmer, raised specific points of law concerning the verdicts and as a consequence the case was referred to the twelve judges. The main contention was that uttering a forged letter containing a power of attorney transferring shares in public funds or stocks was not a capital offence, either at common law or statute. The capital offence only related to forged deeds. Fauntleroy's case was considered twice by the twelve judges but on both occasions they confirmed the original sentence. Numerous petitions were sent to Peel to be considered at the King in Council on Fauntleroy's behalf but they contained no grounds for the sentence to be commuted and his sentence was confirmed at the meeting on 20 November 1824. Although Fauntleroy was able to find the means to employ Harmer to mount a detailed defence on his behalf, it was not sufficient to save his life.

Similar strategies were adopted in the cases of Joseph Dale and Theodore Moore. Although both employed counsel, there is nothing in the records to indicate that they had the same monetary resources as Fauntleroy. Dale had been convicted with two others at Chester Summer Assizes 1823 of murdering William Wood. His counsel objected to the indictments and the case was referred to the twelve judges. Their decision, reached in February 1824, was that there were no favourable circumstances to recommend a commutation of the sentence and the indictments were good in law. Dale, barely 19 years of age, was returned to the dock at Chester Lent Assizes 1824 and sentenced to death. Newspaper reports noted that he was so ill that he had to be supported to hear the sentence and when hanged was a shadow of the young man originally convicted of the offence.<sup>42</sup> Theodore Moore was convicted of coining at Stafford Summer Assizes 1825. Before sentence was passed, his counsel argued that the implements found on Moore were not 'edging tools' within the meaning of the relevant Act and pressed the judge to refer the case to the twelve judges. As with Dale, the procedure dragged on for months but finally in early 1826 the judges confirmed that the indictment was good in law. Sentence was passed on Moore at the Stafford Lent Assizes 1826 and he hanged on 25 March.<sup>43</sup>

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<sup>42</sup> *Derby Mercury* 2 February 1824; *Chester Chronicle* 2 February 1824.

<sup>43</sup> HO17/62/L1 16.

This informal procedure of reviewing cases by the twelve judges was replaced in 1848 with the passing of the Crown Cases Act which created the Court of Crown Cases Reserved.<sup>44</sup> Its terms were essentially a statutory consolidation of the *status quo* but the stratagem of counsel requesting that a case should be referred to the court was not incorporated into the Act. The Act specifically stated that whether a point of law was reserved or not remained a question for the discretion of the trial judge. So although there was no statutory appellate system in place during Peel's tenure at the Home Office, a limited discretion existed to reconsider whether the verdict was good in law or whether there was an error on the record. If there was an error then the judge advised the Home Secretary and requested a free pardon for the prisoner. Richard Armstrong and Charles Burke were capitally convicted of stealing in a dwelling house at Northumberland Lent Assizes in 1824. The trial judge, Mr Justice Bayley commuted the sentence to transportation for life but was advised by the clerk of the court that there was the possibility of an error in the indictment and it was doubtful whether transportation could be ordered. Bayley J. wrote to Peel requesting that if there was an error, after consideration by the twelve judges, a free pardon would be granted. Peel confirmed that this would be recommended.<sup>45</sup>

The question arises why did it take until 1907 for the power to review verdicts and sentences to be transferred from the Crown to the judiciary? Indeed, if the specific circumstances of Adolph Beck's case, where the prisoner was the subject of a miscarriage of justice due to mistaken identity, had not occurred there is an argument for concluding that the Court of Criminal Appeal might not have been established in 1907.<sup>46</sup> Beck was convicted twice in 1896 and 1904 for defrauding women of jewellery. On both occasions, he had an alibi but the police believed him to be 'John Smith', the real offender. When John Smith was subsequently arrested and confessed to both crimes, Beck was released with a full pardon. Between 1844 and 1906, Parliament had considered 31 bills on the subject of a Court of Criminal Appeal but all the attempts had ended in failure. Numerous reasons have been advanced to explain this. One was reluctance on the part of the judiciary to change the *status quo* as any questions on points of law could be considered by the Court of Cases Reserved.

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<sup>44</sup> Crown Cases Act 1848 (11& 12 Vict.c.78).

<sup>45</sup> HO6/9.

<sup>46</sup> *Adolph Beck* case (1904); R. Pattenden, *English Criminal Appeals 1844-1994. Appeals against Conviction and Sentence in England and Wales* (Oxford, 1996).

Perhaps the principal objection to the institution of a judicial appellate procedure was that it would undermine the primacy of juries in criminal trials which Lord Devlin described decades later as, ‘the lamp that shows that freedom lives.’<sup>47</sup>

The decision whether to exercise discretion arose throughout the criminal process. The prosecutor’s decision to institute proceedings, the attendance of material witnesses, the framing of the indictment and the considerations taken into account by juries all played their part in determining whether the prisoner was charged, convicted and of what offence.<sup>48</sup> By the time the prisoner’s case had come to the attention of the Home Secretary, it had undergone numerous deliberations by various stakeholders in the system. Thus an examination of the procedures in place for the conduct of a prosecution for a felony reveals that, at virtually every stage, differing participants had the opportunity to determine the outcome of the case.

### **Conduct of felony trials**<sup>49</sup>

In 1822, the responsibility for prosecuting offenders lay with the victim or his representative. Whilst Peel made many reforms in the area of criminal procedure, he was not prepared to institute public prosecutions. He acknowledged that if he was legislating *de novo* he would not hesitate to introduce a system of public prosecutions. Sensitive to ‘previous customs and formed habits’, he was not prepared to offer an opinion whether the public prosecution system, which operated in Scotland, could be successfully transplanted into the English system.<sup>50</sup> His reluctance may have stemmed from the fact that he considered it unlikely that such a measure would pass through Parliament. He anticipated that it would be seen as an attempt by the State to curtail the personal liberty of citizens to decide whether or not to prosecute the wrong doer.<sup>51</sup> This view is endorsed by Allyson May, who has claimed that an ‘historic, deep-rooted mistrust of an authoritarian state and fear of abuse of state power’ are the reasons

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<sup>47</sup> Devlin, *Trial by Jury* (London, 1966), p. 20.

<sup>48</sup> King, *Crime, Justice and Discretion*, p. 355.

<sup>49</sup> D.J.A. Cairns, *Advocacy and the making of the Adversarial Criminal Trial* (Oxford, 1998); N. Landau, ‘Summary Conviction and the Development of the Penal Law’, *Law and History Review*, 23, (2005), pp. 173-89; Langbein, *The Origins of the Adversary Criminal Trial*; May, *The Bar and the Old Bailey*.

<sup>50</sup> *Speeches*, volume i, p. 406.

<sup>51</sup> D. Hay and F. Snyder, ‘Using the criminal law, 1750-1850: Policing, Private Prosecution, and the State’, in Hay and Snyder (eds), *Policing and Prosecution in Britain, 1750-1850* (Oxford, 1989), pp. 25-6, 34, 43-4.

‘criminal prosecutions in England remained in the hands of private individuals well into the nineteenth century.’<sup>52</sup>

Once information regarding the commission of a crime was laid before JPs they had to consider whether there was sufficient evidence for the case to proceed. If a *prima facie* was made out then the accused was committed to stand trial. Apart from cases of murder and treason, JPs could bail the accused to appear before the next Assizes but in the majority of capital cases, he or she was remanded in custody. In the case of Daniel Davis capitally convicted of stealing letters containing promissory notes at the Old Bailey in January 1827, he recited as a ground for clemency that although granted bail, he had not fled the country to escape his trial.<sup>53</sup> He pleaded this factor as evidence of his innocence of the crime.

The indictments were prepared by the clerks of the Assize for presentation before the Grand Jury. It appears that at the Old Bailey, the clerks worked to set formulae in drawing up the indictments.<sup>54</sup> This may have been the objective but there can be no doubt that subjective considerations played a part in determining the severity of the offence. The absence of consideration of, or research into, the drafting of indictments by historians to date has meant that the pivotal position of the Clerk of the Assize or Clerk of Arraignment, as he was titled at the Old Bailey, has been overlooked. By 1822, most indictments were contained in printed sheets which the Clerk completed but it is impossible to ascertain how his decision, on which charge should be preferred, was made. The development of more complicated commercial transactions meant that particularly in forgery and theft cases, prisoners were often charged with many counts relating to the same offence.<sup>55</sup> This gave rise to the impression that the Clerk was concerned only with ensuring that he had covered all possibilities over the form of the negotiable instrument which had been forged. Framing the indictment correctly was fundamental to the success of the case as any technical defect could amount to the verdict being referred to the twelve judges or even overturned and a pardon granted.

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<sup>52</sup> A. May, ‘Advocates and Truth-Seeking in the Old Bailey Courtroom,’ *Journal of Legal History*, 26, 71 (2005), pp. 76-7; B.P. Smith, ‘The Emergence of Public Prosecutions in London, 1790- 1850,’ *Yale Journal of Law and Humanities*, 18 (2006), pp. 29-62.

<sup>53</sup> HO17/25/Cm11 and see Peel’s letter in Appendix Seven.

<sup>54</sup> *OBP*, ‘Crime and Justice- Trial Procedures’ < [www.oldbaileyonline.org](http://www.oldbaileyonline.org) > [accessed 20 May 2014].

<sup>55</sup> For example Daniel Davis was charged with eight counts relating to the same theft.

The government had no involvement in appointing the Clerk of Arraignment at the Old Bailey. He was elected by the Court of Common Council of the City of London.<sup>56</sup> This court was composed of Aldermen and Freemen of the City of London and was responsible for a variety of appointments within the City. Thomas Shelton held the position of Clerk for more than 40 years and on his death in 1829 his nephew John Clarke was appointed to the office. Fees were payable to the Clerk and were a significant factor in whether a prosecution was instigated. Shelton died a very rich man; perhaps he was prepared to negotiate with both sides in a case as to the framing of the indictments and was well rewarded for his attention. He was also the Clerk to the Admiralty and solely responsible for arranging the contracts for convict transportation to New South Wales. How he generated his wealth can only be a matter of conjecture but it would be unrealistic to suppose that he did not benefit from this monopoly on the granting of contracts or court fees.<sup>57</sup>

At Assizes outside London, the clerk of the Assize was usually appointed by the senior judge and by the nineteenth century nepotism was rife. A scandal following the appointment of a clerkship to the cavalry officer son of Bovill, Chief Justice of the Court of Common Pleas, resulted in the passing of the Clerks of Assize Act in 1869 but this did not effectively end nepotism.<sup>58</sup> Likewise the appointment of the Clerk to Quarter Sessions was within the remit of the Lord- Lieutenant. It was not until the middle of the twentieth century that the appointments of Clerks to Assizes and Quarter Sessions were vested in the Lord Chancellor and they were required to be barristers of at least five years' standing.<sup>59</sup>

As mentioned earlier, Hitchcock's recent work on text mining of the Old Bailey records has linked the substantial increase in the number of guilty pleas in the early decades of the nineteenth century with the growth in plea bargaining.<sup>60</sup> Whilst more detailed archival research is required in this area, it is likely that the decision to arraign a prisoner on a lesser charge produced the guilty plea. In cases of homicide where the

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<sup>56</sup> W. Bentham and C. Welch, *Mediaeval London* (London, 1901).

<sup>57</sup> C. Emsley, 'The Home Office and its Sources of Information and Investigation, 1791-1801', *English Historical Review*, 94 (1979), pp. 532-61. See Shelton's accounts held at TNA; AO3/291.

<sup>58</sup> Clerks of Assize Act 1869 (32 & 33 Vict. c. 89).

<sup>59</sup> J.S. Cockburn., *A History of English Assizes from 1558-1714* (Cambridge, 1972), pp. 70 -85; May, *The Bar and the Old Bailey*, p.147.

<sup>60</sup> Hitchcock, 'The Old Bailey Proceedings, 1674-1913: Text Mining for Evidence of Court Behavior,' pp. 929-55.

prisoner could be charged with either murder or manslaughter, it is reasonable to assume that the prisoner might agree to plead guilty to the lesser offence of manslaughter which generally carried a short term of imprisonment rather than risk being convicted of the capital offence of murder.<sup>61</sup> Little is known about any negotiations which may have taken place or the personnel involved. One exception was the Bank of England which had statutory authority to enter into a plea bargain with a prisoner and which will be discussed later in the thesis.<sup>62</sup>

The failure of material witnesses to appear at the trial usually meant that the trial collapsed and the prisoner was released. Although JPs had the power to require prosecutors and witnesses in felony cases to enter into recognisances in order to ensure their attendance, there appears to have been little uniformity in its application.<sup>63</sup> When submitting petitions for mercy, prisoners often complained that they had no opportunity to call witnesses on their behalf. The usual reasons were that the case was heard too far from their home and the witnesses could not get there, or the trial was called earlier than expected. For example, a prisoner who lived and was indicted for an offence in Blackburn would have his case heard at Lancaster Assizes approximately thirty miles away. Ensuring attendance of defence witnesses, whose only mode of transport was probably by foot, was a real difficulty for prisoners.

It was not until the passing of the Prisoners' Counsel Act in 1836 that prisoners had the right to employ counsel in their defence.<sup>64</sup> Prior to this, it was at the discretion of the judge. In most cases, the accused had no option but to speak on his own behalf as he had no resources to employ counsel. John Langbein has termed these trials 'the Accused speaks' trials, meaning that the only person who could set out a valid defence for the commission of the offence was the accused himself. Few barristers specialised in criminal law as it was not as lucrative as acting for clients in King's Bench or Chancery. At the Old Bailey, however, there was a cohort of barristers who acted for the prosecution including Messrs. Bolland and Law.<sup>65</sup> Outside London the situation was slightly different. The leading Whig politician and barrister, Henry Brougham,

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<sup>61</sup> *OBP*, John Henry Hale, 17 February 1825 (t18250217-7) was sentenced to 14 days' imprisonment after pleading guilty to manslaughter.

<sup>62</sup> Chapter Six p. 110 *infra*.

<sup>63</sup> The attendance of witnesses is today governed by Criminal Procedure (Attendance of Witnesses) Act 1965 c. 69.

<sup>64</sup> (6 & 7 Will. IV c. 14).

<sup>65</sup> May, *The Bar and the Old Bailey, 1750-1850*.

developed a lucrative practice on the Northern circuit specialising mainly in King's Bench cases but also appeared in criminal cases. For example in 1822, he defended the proprietor of the *Durham Chronicle*, John Ambrose Williams, on charges of criminal libel.<sup>66</sup> For the majority of prisoners in the dock, with no experience or expertise in the law or an understanding of the technical process, there was little hope of mounting any effective defence.

The decision of the jury is pivotal in considering Peel's recommendations for the Royal Prerogative of mercy. Juries were and are the arbiters of facts in a criminal case. Under oath, they are charged with bringing in a 'true verdict' on the basis of the evidence.<sup>67</sup> From the beginning of the eighteenth century, juries were often confronted with a dilemma where capital statutes were involved; they were under oath to bring in a guilty verdict where the facts of the case were proved but they sometimes recognised that the punishment was disproportionate to the offence committed. A practice developed whereby juries returned a guilty verdict on a lesser charge than that stated in the indictment.

For example in cases of theft, it was the value of the goods stolen which determined whether the offence was capital and so juries quantified the value of goods at less than the capital amount in order to reduce the offence. This practice was termed by Blackstone as 'pious perjury'.<sup>68</sup> He commended the 'mercy of juries' in straining a point in order to arrive at a just verdict. His choice of the word 'pious' is particularly interesting. This adjective, with its religious overtones, would seem to have imbued their decisions with a degree of moral authority over the temporal statutes in place at the time. In the two decades before Peel took up office, law reformers led by the Whig lawyer, Samuel Romilly, had pressed for the number and scope of the capital statutes to be repealed. He cited Blackstone as authority for justifying the practice of pious

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<sup>66</sup> J.A. Williams, *Trial of John Ambrose Williams for the Libel on the Clergy, Contained in the Durham Chronicle of August 18 1821* (Durham, 1823).

<sup>67</sup> J.W. Cairns and G. McLeod (eds), *The Dearest Birth Right of the People of England* (Oxford, 2002); J.S. Cockburn and T.A. Green (eds), *Twelve Good Men and True: the Criminal Trial Jury in England 1200-1800* (Princeton N.J., 1988); T.A. Green, *Verdict according to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (Chicago, 1985); Kiralfy, *Potter's Historical Introduction*, pp. 240-8; J.E.R. Stephens, 'The Growth of Trial by Jury in England', *Harvard Law Review*, 10, 3 (1869), pp. 150-60.

<sup>68</sup> Blackstone, *Commentaries*, volume 4, pp. 238-9.

perjury in theft cases, where the value of goods making the offence capital had not been changed for centuries.<sup>69</sup>

In 1818 just months before Romilly committed suicide, Sir Walter Scott, the eminent novelist of the day, published the novel *The Heart of Midlothian* which concerned the search for a Royal pardon by the sister of a woman wrongly convicted of infanticide. It was an extremely popular book and highlighted certain archaic legal practices which condemned innocent people to death.<sup>70</sup> Later that year in December 1818 two juries at the Old Bailey took the practice of pious perjury to its conclusion when, against the judge's direction, they refused to convict four prisoners prosecuted by the Bank of England on capital offences relating to counterfeit notes.<sup>71</sup> Whilst it is impossible to prove that the popularity of the novel coupled with criticism of the Bank of England's conduct were instrumental in the jury taking this stand, it is reasonable to conclude that they must have, at least, been an influential factor in the jury's decisions. After 1818, juries continued to bring in lesser verdicts but there are no recorded instances of juries deliberately acquitting prisoners against the judge's direction. It might be argued that the practice of pious perjury hampered the reform of the criminal law as it was the tool used by juries to mitigate the harsh punishments imposed on relatively trivial offences. Had they followed the letter of law rather than arriving at these artificial verdicts, then legislators may have been forced to address the question of proportionate punishments for trivial offences more quickly than they did.

## Conclusions

In 1822 the framework of the criminal courts had changed little over the centuries. Although there were more than 200 capital offences, most cases concerned misdemeanours and were heard summarily by magistrates at Petty Sessions. Felonies were tried before a jury at the Assizes presided over by one of the King's justices. Outside London and Middlesex, Assizes were held in spring and summer and Peel's attempts to institute a third Assize were abandoned after objections by the judiciary. There was no public prosecution system; instituting proceedings was at the discretion

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<sup>69</sup> *Speeches of Samuel Romilly in the House of Commons* (London, 1820), volume 2, pp. 320-2.

<sup>70</sup> W. Scott, *The Heart of Midlothian*, C. Lamont (ed.) (Oxford, 2003).

<sup>71</sup> For a detailed consideration of these cases see P. Handler, 'The Limits of Discretion: Forgery and the Jury at the Old Bailey 1818-1821', in Cairns and McLeod (eds), *The Dearest Birth Right of the People of England*, pp. 155-72.



of the victim or his representative. It was not until 1879 that a Director of Public Prosecutions was created.<sup>72</sup> Prisoners had no right to employ counsel or *sub poena* witnesses to appear on their behalf. As will be seen in the next chapter, Peel was determined to impose a measure of uniformity on the decision making of magistrates but he was hampered in this objective by the lack of regulatory control and the nature of English law.

Characterising this period in English penal history by the term ‘bloody code’ is to misunderstand the nature of English law. As Kiralfy has noted, ‘English law ... was not built in one day or ... by one man’.<sup>73</sup> It is a maze of common law, statute and custom which Peel set out to mould into a coherent and effective framework. From committal to conviction, there were numerous stages where the trial might collapse, or the defendant released or convicted of a lesser offence. With no judicial appellate system in place, it is important to understand the nature of the criminal offences and how the machinery of the criminal justice system operated in the early part of the nineteenth century. It was only when all avenues were exhausted that the prisoner petitioned the Crown for mercy and it was only at this point that as Home Secretary, Peel became involved in the prisoner’s case.

The next chapter will examine the challenges faced by Peel in reforming the substantive criminal law, against this historical background. It will explore the particular nature of English Law and how he dealt with parochial and vested interests which resented government interference with their power to act autonomously. Finally it will consider Peel’s perception, shared by many of his contemporaries, that the criminal law lacked any deterrent or salutary effect.

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<sup>72</sup> Prosecution of Offences Act 1879, (42 & 43 Vict. c.22).

<sup>73</sup> Kiralfy, *Potter’s Historical Introduction to English Law*, p. 7.

## Chapter Three:

### Peel's role in the reform of the Criminal Law.

#### Introduction

The reforms to the criminal law proposed by Peel, and discussed later in the thesis, were part of the period referred to as the 'Age of Reform' which encompassed changes, *inter alia*, to the civil law, religious institutions and with the passing of the Representation of the People Act in 1832, Parliament itself.<sup>1</sup> The peace following the end of the Napoleonic Wars in 1815 had created problems which threatened the stability of society. A post-war slump in trade and manufacture as well as increased industrialization, an unprecedented increase in population, the urbanization of large parts of British society and large numbers of disaffected and displaced soldiers were factors which forced governments to reassess the organisation and administration of established institutions including the criminal law.<sup>2</sup>

Peel acknowledged that he was not versed in the law but was faced with the challenge of attempting to simplify and amend the myriad of statutes, many of which had been passed in the eighteenth century, which created capital offences.<sup>3</sup> This chapter will explore the obstacles facing Peel in reforming the criminal law; the nature of English law, the problems of implementing changes in a system dominated by vested and parochial interests and Peel's perception that secondary punishments lacked a deterrent effect. By 1822 the proportion of conditional pardons granted had steadily grown from between 50% to 60% during the middle of the eighteenth century to nearer 90%.<sup>4</sup> This gap between those capitally convicted and those executed was the focus of reformers who believed that it made the law appear harsh, arbitrary and outdated.<sup>5</sup>

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<sup>1</sup> (2 & 3 Will. IV, c. 45), commonly referred to as the Great Reform Act; Evans and Innes (eds), *Rethinking the Age of Reform*; M. Brock, *The Great Reform Act* (London, 1973); E.J. Evans, *The Great Reform Act of 1832* (London, 1983); Hilton, *A Mad, Bad and Dangerous People? England, 1783-1846* (Oxford, 2006); J. Phillips and C. Wetherell, 'The Great Reform Act of 1832 and the Political Modernization of England', *American Historical Review*, 100 (April 1995) pp. 411-36; A.S. Tuberville, *The House of Lords in the Age of Reform, 1784-1837* (London, 1958); B. Ward, *The Eve of Catholic Emancipation* (London, 1915).

<sup>2</sup> N. Gash, *Aristocracy and People: Britain 1815-1865* (Cambridge Mass., 1979) pp. 3-4; E.J. Evans, *The Forging of the Modern State, Early Industrial Britain 1783-1870* (London, 1983) pp. 177-263.

<sup>3</sup> HC Parliamentary Debates, 9 March 1826, 2<sup>nd</sup> Series, volume 14, col.1214.

<sup>4</sup> J.M. Beattie, *Crime and the Courts in England 1660-1800* (Princeton, 1988); Emsley, *Crime and Society in England, 1750-1900*; F. McLynn, *Crime and Punishment in Eighteenth Century England* (Oxford, 1991).

<sup>5</sup> See for example J. Fairburn, *Memoir of the late Sir Samuel Romilly* (London, 1818).

## The nature of English law and reform

Peel acknowledged that the reform of the criminal law was a subject which many considered ‘barren and uninviting’.<sup>6</sup> The nature of English criminal law with its amalgam of common law, statute and custom meant that unravelling the different strands into a cohesive and workable framework was a task which would have taxed even the most astute politician. Peel cautioned reformers who demanded a wholesale revision of the criminal law noting that

the mere collection of dispersed statutes under one head [was] an easy process compared with the important task of rejecting what is superfluous, clearing up what is obscure, weighing the precise force of each expression, ascertaining the doubts that have arisen in practice and the solution which may have been given to those doubts by the decisions of the courts of law.<sup>7</sup>

The difficulties which Peel described illustrate just how multi-layered the criminal law was. Most felonies had existed at common law before they were incorporated into statute and any reforms had to take into account subsequent judicial interpretation of the statutes in individual cases. Some of the most serious offences existed only at common law and any attempt to codify them would result in a loss of their detailed layers and rich texture which had developed over the centuries. Thus it was only by successive Home Secretaries making incremental changes over the subsequent decades of the nineteenth century that meaningful substantive changes were introduced into the penal system.

Peel referred to the number of capital offences as this ‘heterogeneous mass of legislation’.<sup>8</sup> Earlier in 1788, this increase had been acknowledged in the sixth edition of *Hawkins’s Pleas of the Crown*. Its editor commented that since the first edition of the book published in 1715, the growth of commerce, opulence and luxury had ‘introduced a variety of temptations to fraud and rapine, which the legislature has been forced to repel by a multiplicity of occasional statutes, creating new offences and

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<sup>6</sup> HC Parliamentary Debates, 09 March 1826, 2<sup>nd</sup> series, volume 14, col.1214.

<sup>7</sup> Ibid, col. 1236.

<sup>8</sup> Ibid, col. 1221; Peel cited the theft of madder roots as an example; D. Hay, ‘Property, Authority and the Criminal Law’, pp. 17-63; J.H. Langbein, ‘Albion’s Fatal Flaws’, *Past and Present*, 98 (1983), pp. 96-120.

inflicting additional punishments.’<sup>9</sup> In addition, the growth of negotiable instruments had afforded new opportunities for fraud and forgeries resulting in the creation of new capital offences.<sup>10</sup>

Derek Beales and Gatrell have written about the ‘drastic’ reforms in the criminal law and the ‘collapse’ of the bloody code during the early decades of the nineteenth century.<sup>11</sup> The implication was that there was a radical, sudden and dramatic change in the penal system. Writing in 1905, A.V. Dicey, the eminent constitutional lawyer, considered that one of the characteristics of the English legal system in the nineteenth century was ‘legislative inactivity’, concluding that ‘legislative public opinion generally changes in England with unexpected slowness’.<sup>12</sup> Dicey considered that on average it took about 30 years for significant changes to the criminal law to be established in the public domain. He noted that the legislative reforms concerning offences against the person begun by Lansdowne in 1827 were not completed until the passing of the Offences against the Person Act in 1861.<sup>13</sup> He reasoned that the mitigation of the criminal law involved the carrying out of separate Acts to deal with specific offences and the framework was not designed for wholesale reform. Further, the legislative inactivity in criminal matters in the nineteenth century was the result of a backlash from the events of the eighteenth century when capital statutes were often frequently passed with little consideration for the penal system as a whole but merely to stem a transient or local problem.<sup>14</sup>

Beales considered that in respect of the criminal law, ‘Peel tinkered while Russell made drastic reforms.’<sup>15</sup> The use of the words ‘tinkered’ and ‘drastic’ is particularly interesting. They imply that Peel’s reforms were insubstantial whilst Russell’s initiated a sudden and substantial change to the *status quo* which fundamentally altered the nature of the criminal law in England and Wales. It is difficult to discern what exactly these fundamental changes were. The measures introduced by Russell were,

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<sup>9</sup> W. Hawkins, *A Treatise on the Pleas of the Crown*, T. Read (ed.) (London, 6<sup>th</sup> edn, 1788), preface.

<sup>10</sup> R. McGowen, ‘The Bank of England and the Death Penalty 1797-1821’, *Law and History Review*, 25 (2007), pp. 241-82.

<sup>11</sup> Beales, ‘Peel, Russell and Reform’, pp. 873-82; Gatrell, *The Hanging Tree*, p.21.

<sup>12</sup> A.C. Dicey, *Lectures on the relation between Law and Public Opinion during the Nineteenth Century* (London, 2<sup>nd</sup> edn, 1962), p.27.

<sup>13</sup> (9 Geo. IV c. 31; 24 & 25 Vict. c. 100).

<sup>14</sup> Emsley, *Crime and Society in England, 1750-1900*; J. Beattie, *Crime and the Courts in England 1660-1800*.

<sup>15</sup> Beales, ‘Peel, Russell and Reform’, p. 880.

in reality, a continuation of the policies instituted by Peel in shifting the emphasis away from capital punishments to more proportionate sentences. Beales' view was based on a table of statistics taken from G.R. Porter's *Progress of Nations* published in 1851 which recorded the number of capital sentences and executions in England and Wales between 1817 and 1840.<sup>16</sup> In 1822, 1,016 prisoners in England and Wales were sentenced to death and 97 hanged. In 1830, the number capitally convicted had increased to 1,397 and 46 hanged but by 1839 56 prisoners were sentenced to death and 11 hanged. It was these stark statistics, Beales contended, that 'did the real damage' to Peel's reputation as a penal reformer.

There is, however, a fundamental problem with relying on statistics collated at this time as an examination of the Old Bailey records of the 1820s will demonstrate. The value of any statistics is dependent upon factoring in accurate information and the availability of such information is particularly difficult here. Porter's statistics had been taken from the parliamentary papers of the period which in evidence to the Select Committee on Capital Punishment in 1819, Henry Hobhouse, Under-Secretary at the Home Office had acknowledged were 'very imperfect'. This observation was confirmed by Thomas Shelton, Clerk of the Arraignment at the Old Bailey who contended that the records were improving but the figures were a 'generality'.<sup>17</sup>

One of the main difficulties in compiling accurate statistics in respect of capital sentences passed at the Old Bailey was the idiosyncratic way in which these offences were dealt with. As has been considered earlier, capital sentences had to be confirmed at a subsequent meeting of the King in Council. Even when a death sentence was confirmed, it was still possible for the capital sentence to be postponed, or in the language of the Home Office respited, on the recommendation of the Home Secretary. Respiting a sentence did not automatically mean that the sentence would be commuted but invariably this was what happened. Ascertaining whether the sentence was thereafter commuted is more problematical as any conditional pardon subsequently granted does not always appear in the Home Office records. If a pardon does appear,

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<sup>16</sup> G.R. Porter, *The Progress of the Nation* (London, 1851), p.630.

<sup>17</sup> Quoted in D. Palk *Gender, Crime and Judicial Discretion 1780-1830* (London, 2006) p. 125.

it was often only recorded at a much later date. Sometimes the only contemporaneous record of a pardon was in a newspaper report.<sup>18</sup>

Relying on Home Office records alone often results in differing outcomes.<sup>19</sup> For example in 1826, the number left for execution by the King in Council was 18 but actually only 14 were hanged.<sup>20</sup> Likewise in the early months of 1827, when Peel was in office, one of the eight condemned prisoners received a late pardon.<sup>21</sup> It has been possible to trace a further six instances when the decision by the King in Council was overturned at Peel's instigation, often only the night before execution.<sup>22</sup>

**Table 3.1: Decisions of the King in Council January 1822- April 1827, January 1828- November 1830 (excluding murder convictions).**

| Year           | Capital convictions | Number left for execution | Percentage pardoned |
|----------------|---------------------|---------------------------|---------------------|
| Jan-Dec 1822   | 136                 | 27                        | 80.15%              |
| Jan-Dec 1823   | 127                 | 25                        | 80.32%              |
| Jan-Dec 1824   | 126                 | 10                        | 92.07%              |
| Jan- Dec 1825  | 145                 | 18                        | 87.59%              |
| Jan-Dec 1826   | 164                 | 18 (actually hanged 14)   | 89.03% (91.46%)     |
| Jan-April 1827 | 46                  | 8 (actually hanged 7)     | 82.61% (84.78%)     |
| Jan-Dec 1828   | 152                 | 20                        | 86.85%              |
| Jan-Dec 1829   | 128                 | 18                        | 85.94%              |
| Jan-Nov 1830   | 85                  | 3                         | 96.48%              |

Source: TNA HO6/ 6-14 (Recorder's Reports).

<sup>18</sup> See for example Henry Nicholls convicted of sheep stealing at the Old Bailey on 31 May 1827; *OBP*, 31 May 1827, Henry Nicholls (t18270531-78); prisoners convicted of sodomy were hanged on a different day from other prisoners which can also skew the figures.

<sup>19</sup> Figures compiled from HO6; HO13; HO17; HO19.

<sup>20</sup> The offenders whose sentences were commuted were George Houghton and James Bishop (t18260914-61), HO17/15/Bm1; Patrick Riley (t18261026-42), HO17/122/ Yl 11 and William Jones (t18260406-81).

<sup>21</sup> *OBP*, 11 January 1827, Daniel Davis (t18270111-49), HO17/25/Cm 11.

<sup>22</sup> *OBP*, 17 February 1825, James Dovey and Roger Adams (t18250217-35) HO17/102/Wk 21 and Wk26; 19 May 1828, James Anderson and George Morris (t18280519-54), HO17/45/Gn1; 03 July 1828, Richard Breach (t18280703-40), HO17/53/In4; 11 September 1828, Peter Fenn (t18280911-06), HO17/82/Pn40. Whilst all the available papers at TNA relating to the decisions of the King in Council during Peel's terms in office have been considered, it is entirely possible that further instances of late commutations exist which would render these figures even more inaccurate but locating instances, as has been stated, is hampered by the lack of recorded evidence in the Home Office papers.

As Peel was out of office between April 1827 and January 1828, a comparison with the numbers left for execution by the King in Council during Sturges Bourne's and Lansdowne's temporary tenures as Home Secretaries sets these percentages into context. They show that the percentage of prisoners pardoned was slightly higher than in the next two years but by 1830, when Peel's reforms to the criminal statutes had become embedded in the system, the number executed dropped significantly.

**Table 3.2: Decisions of the King in Council between April and December 1827.**

| Year           | Capital convictions | Number left for execution | Percentage reprieved. |
|----------------|---------------------|---------------------------|-----------------------|
| April-Dec 1827 | 139                 | 14                        | 89.93%                |

Source: TNA HO6/11.

These figures indicate that the trend to reduce the numbers of prisoners executed was already taking shape before the Whigs took office in December 1830. By the time Peel left office in November 1830, the number of those hanged in London and Middlesex had fallen dramatically and continued to do so during 1831 with the percentage pardoned during that year being 97.42%.<sup>23</sup>

This significant reduction in the number hanged in 1830 illustrates that it was the repeal of capital offences initiated by Peel and carried forward by his successors which changed the focus of the criminal justice system away from capital punishments. In this context, Beale's view that it was Russell who instituted drastic reforms appears less convincing. Notwithstanding that the accuracy of statistics available at this time was, at best, patchy often to the point of being meaningless, these drawbacks did not stop Peel using statistics to justify the reforms he proposed. His background in mathematics influenced his desire to adduce empirical evidence to press home the points he wished to emphasise. His landmark speech on reform of the criminal law of March 9 1826 was supported by statistics but how far these actually reflected the true position is impossible to gauge.<sup>24</sup>

<sup>23</sup> There were 155 capital convictions at the Old Bailey in 1831 and 4 executions: HO6/15.

<sup>24</sup> HC Parliamentary Debates, 9 March 1826, 2<sup>nd</sup> series, volume 14, col.1219; M. Poovey, 'Figure of Arithmetic, Figures of Speech: The Discourse of Statistics in the 1830s', *Critical Inquiry*, 19, 2 (1993), pp. 256-76; Gatrell, *The Hanging Tree*, pp 572-5.

Gatrell considered the ‘bloody code might fairly be said to have collapsed under pressure of the criminal law’s mounting prosecutor effectiveness.’<sup>25</sup> The notion that there was a ‘collapse’ or sudden change in the capital statutes does not reflect the gradual changes which were introduced by successive Home Secretaries. It was the cooperation and consensus by both Tory and Whig Home Secretaries that resulted in the tempering of the capital statutes and ensured that there was no ‘collapse’ of the system. Reflecting on the changes to the capital statutes, Gatrell also considered that it was ‘when the door was unlocked in the 1830s, it was unexpectedly’.<sup>26</sup>

It is difficult, however, to see how these changes introduced by the Whigs in the 1830s were unexpected. The substantial reforms of the capital statutes were, as Dicey explains, a slow and incremental process carried out over the nineteenth century. Unlike other controversial issues in the public domain, like Catholic emancipation or parliamentary reform, the repeal of the capital statutes was not a question which polarised political opinion. It was a question of degree, with the majority on both sides of parliament acknowledging that reform was needed but differing as to how far these reforms should proceed.<sup>27</sup> The reforms made by Peel and the initiatives he adopted with regard to policing and secondary punishments, paved the way for successive Whig administrations to build on these changes without the need for radical change to the system, for which neither party had an appetite.

Peel’s successor at the Home Office in 1830, Viscount Melbourne, established a Royal Commission on the Criminal Law in 1833.<sup>28</sup> The Commission sat for 15 years and was hardly a resounding success. It produced eight reports and veered from recommending codification of the criminal law in its first report to acknowledging by its seventh report that the coherent and sophisticated principles of the common law could not be distilled into a single statute. Whilst the Commission recommended some substantive changes to the administration of the criminal law, it was less successful in its attempts to consolidate and reform the criminal law. It was not until the passing of the Forgery Act 1913 and the Larceny Act in 1916, nearly one hundred years after Peel’s first proposals for reform of property offences, that these classes of offences

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<sup>25</sup> Ibid, p.21

<sup>26</sup> Ibid, p.22

<sup>27</sup> Hilton, ‘The Gallows and Mr. Peel’, p. 92.

<sup>28</sup> L. Farmer, ‘Reconstructing the English Codification Debate: The Criminal Law Commission, 1833-45, *Law and History Review*, 18 (2000), p. 397.



were fully consolidated.<sup>29</sup> Whilst it is true that the 1820s and 1830 marked a watershed in the reform of the criminal law, they were simply the first steps in a long campaign which would only come to fruition many decades later. Criminal law reform in this period was conducted in a continuum with political parties working together to achieve their objective of a smooth transition from capital punishments at its centre to more proportionate punishments.

Peel was responsible for promoting legislative changes to the criminal law but the next issue to be considered is what control did he have over their practical application?

**‘We are not the instruments for carrying it into effect.’<sup>30</sup>**

Ensuring the smooth passage of legislation was only the start of the process in reforming the criminal law. Peel was keen to emphasise that even if the measures he proposed were ‘without blemish’, the government was not directly responsible for carrying them into effect.<sup>31</sup> In order to minimise opportunities for objection and opposition to his proposals from opponents, particularly on the right wing of the Tory party and sections of the judiciary, Peel involved the key participants in his measures. To this end, he relied on the organisational abilities of Hobhouse, and the drafting expertise of leading barristers. After the policies had been agreed in Cabinet, draft bills were sent to members of the judiciary for their comments and suggestions. In an attempt to forestall any future objections, Peel specifically thanked them for their helpful advice in his speech in March 1826, singling out Lord Chief Justice Tenterden for his assistance.<sup>32</sup> This was not the first time that Peel had adopted this course of action; building on his successful experiences of reform of the Scottish penal system, he followed a similar pattern.<sup>33</sup>

Ensuring the support of the magistracy was problematic; with the judiciary, the numbers were manageable and there were clear lines of communication. With magistrates, there was no clear and readily accessible hierarchy through which he could obtain their views and use his influence. The administration of justice in the

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<sup>29</sup> Forgery Act 1913 (3 & 4 Geo. V c. 27); Larceny Act 1916 (6 & 7 Geo. V c.50).

<sup>30</sup> HC Parliamentary Debates, 22 February 1827, 2<sup>nd</sup> series, volume 16, col. 641.

<sup>31</sup> HC Parliamentary Debates, 9 March 1826, 2<sup>nd</sup> series, volume 14, col.1219.

<sup>32</sup> Ibid, cols. 1238-9.; Peel also referred to the works of Sir William Russell; W.O. Russell, *A Treatise on Crimes and Misdemeanours* (London, 1819).

<sup>33</sup> Gash, *Mr Secretary Peel*, pp. 318-20.

early part of the nineteenth century was very parochial with limited practical assistance available to the courts.<sup>34</sup> This meant that both magistrates and members of the House of Commons were focussed on dealing with specific local issues, most lacking any interest in the machinery of justice outside their own area and resenting any interference from government. As Thomas Erskine May, the constitutional theorist, observed ‘whenever an offence was found to be increasing, some busy senator called for new rigour until murder became, in the eye of the law, no greater crime than picking a pocket.’<sup>35</sup>

Any attempt to centralise power and increase the involvement of government in local issues was often opposed by magistrates who jealously guarded their powers to act without interference from central government. With no easy access to advice and guidance, some local magistrates construed new statutory offences in a manner different from that envisaged by Parliament; they used the letter of the law to address a specific local problem rather than considering the ‘mischief’ which the statute had been passed to curb.<sup>36</sup> The Protection of Property in Orchards etc Act of 1825 was such an example and can be seen against the wider issue of the changes in the way children were treated by the criminal system.<sup>37</sup>

A bill had been introduced into the House of Lords by the Lord Chancellor on 21 March 1825 on behalf of land owners who were concerned about the security of market gardens they owned on the outskirts of London. Plundering these gardens had become a profitable exercise and the bill was the landowners’ way of saving the expense of erecting walls and fences. The rationale behind the bill was that as sheep stealing was a capital offence then stealing the profits from land should carry a heavy sentence. The bill made entering into any orchard, garden etc and carrying away any trees, plants, shrubs, fruit or vegetables a felony with a maximum punishment of

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<sup>34</sup> H.Addington, *Abridgment of Penal Statutes* ( London,1775); J.F.Archbold , *Summary of the Law Relative to Pleading and Evidence in Criminal Cases: with Precedents of Indictments etc and the Evidence Necessary to Support them* ( London, 1824); R.Burn, *The Justice of the Peace and Parish Officer* ( London, 1793) volume 1; J.Chitty, *A Practical Treatise on the Criminal Law Comprising the Practice, Pleadings and Evidence which Occur in the Course of Criminal Prosecutions* ,4 volumes (London, 1816) ; L.Farmer, ‘ Of Treatises and Textbooks : the Literature of the Criminal Law in Nineteenth Century Britain’, in A.Fernandez and M.Dubber (eds), *Law Books in Action: Essays on the Anglo- American Legal Treatise* ( Oxford , 2012) , pp.147-59; L. Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* ( Oxford, 2016), pp. 139-61.

<sup>35</sup> T. Erskine May, *The Constitutional History of England* (London, 1863), volume III, p. 393.

<sup>36</sup> For construction of statutes see Walker and Ward, *English Legal System*, pp. 40-57.

<sup>37</sup> (6 Geo. IV c. 127).

transportation for life. Peel was not instrumental in its drafting and as a consequence it had inherent problems in that it did not allow for any distinction of circumstances. A cluster of cases illustrated how imprecise drafting of bills could arouse the indignation of the press and public opinion and the resultant clamour for amendment.

*The Examiner* considered that the Act had imposed a large 'amount of evil' on the country by inflicting prison sentences on boys and young men for stealing a few apples. It cited cases of boys and young men who had been found guilty under the Act at Salford Quarter Sessions November 1825. For example, James Oates and Henry Dray both aged 14 had been sentenced to two months' imprisonment for stealing a small amount of apples.<sup>38</sup> It condemned the manner in which criminals were manufactured in England by crowding gaols with persons deserving of a slight fine. 'They enter innocent and depart initiated in all the mysteries of thieving, ruined in reputation and ready to practise the arts which they have been taught.'<sup>39</sup>

Calls for the Act to be amended grew and reached their zenith with the case of six boys convicted at Dorchester Petty Sessions July 1826. The boys aged between six and ten were prosecuted by Reverend Mr. George Chamberlain for stealing two or three hatfuls of apples and pears from his garden in Wyke Regis. Chamberlain complained that his orchards were being systematically raided with the added indignity that most of the thefts occurred on a Sunday morning. The Dorchester Bench found all the boys, who had been taken to court by Chamberlain in a carriage, guilty. After confirming that there was space for them in the gaol and that they were tall enough to be put on the treadmill, the eldest boy aged ten was sentenced to three months' imprisonment with hard labour, the second eldest to two months' with hard labour and the four youngest to one month with hard labour.

Both *The Times* and *The Political Examiner* were scathing of the Dorchester Bench's treatment of the children and the prosecutor's 'zeal for justice'. *The Times*' article was reproduced in many newspapers and it resulted in the *Dorset Chronicle* printing a leader accusing *The Times* of 'wickedly and maliciously' misrepresenting the case.<sup>40</sup> The debate rumbled on for many months with numerous items in the press condemning

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<sup>38</sup> *The Examiner*, 13 November 1825.

<sup>39</sup> *Ibid.*

<sup>40</sup> *The Times*, 14 August 1825; *The Political Examiner*, 6 August 1826; *Dorset County Chronicle*, 17 August 1826.

how the Act was implemented with the result that Peel felt obliged to introduce a new bill the following year.<sup>41</sup> It repealed the existing Act and promoted a new offence which mitigated the punishment to a fine of three times the value of the produce stolen with the additional punishment of a term of imprisonment for more serious offences.<sup>42</sup>

Not all magistrates acted in this manner. King has noted that the development of summary court practices in relation to juvenile offenders resulted in more lenient treatment particularly in relation to thefts which were felonies. He has adduced evidence to show that magistrates, both in the metropolis and other areas, were prepared to deviate from the strict letter of the law in felony cases. They chose not to commit young prisoners to gaol to await trial at the next Quarter Sessions or Assizes in order to prevent them from being corrupted by mixing with seasoned criminals or they used their summary jurisdiction to convict juveniles of lesser offences. This practice became so entrenched that it was only when a parliamentary committee was established in 1837 that the legality of these decisions was questioned.<sup>43</sup>

Problems also arose when Peel attempted to improve conditions for prisoners. The shortcomings in the prison system in the 50 years before Peel took up office had been brought into the public consciousness by reformers such as John Howard and later Elizabeth Fry.<sup>44</sup> Gaols were managed locally and there was no uniform standard in respect of their conditions or discipline. Two House of Commons Select Committees held in 1819 and 1822 paved the way for the introduction of a bill by William Courtenay MP for Exeter, which proposed to implement national minimum standards.<sup>45</sup> When Peel took up office, he endorsed the contents of the bill but it was defeated in the House of Lords. Keen that the bill should be passed as soon as possible, Peel came to an understanding with Lord Eldon, the Lord Chancellor, that a new bill in substantially the same form would be introduced into the House of Lords when the new parliament convened in 1823. The result was the passing of the Gaols Act 1823.<sup>46</sup>

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<sup>41</sup> H.C. Parliamentary Debates, 27 April 1826, 2<sup>nd</sup> series, volume 15, cols. 717-8.

<sup>42</sup> *York Herald*, 19 August 1826 and 2 September 1826; Stealing in Gardens Act 1826 (7 Geo. IV, c. 69).

<sup>43</sup> King, *Crime and Law in England, 1750-1840*, pp. 114-41.

<sup>44</sup> J. Howard, *The State of Prisons in England and Wales*; R. Morgan, 'Howard, John (1726? -1790)', in *ODNB*; K. Fry and R.E. Cresswell, (eds), *Memoir of the life of Elizabeth Fry, with Extracts from her Letters and Journal* (London, 1847); F. de Haan, 'Fry, Elizabeth, (1780-1845)', in *ODNB*.

<sup>45</sup> Gash, *Mr. Secretary Peel*, p. 315.

<sup>46</sup> (4 Geo. IV c. 64).

The main provision of the Act was that a common gaol or house of correction was to be established in the principal towns throughout the country. The prisons were to be inspected by local magistrates and their reports submitted to the Home Secretary who would present them to parliament. The Act also allowed visits by chaplains and for salaries to be paid to gaolers. It banned the use of irons and manacles and for the first time women warders could be appointed to guard women prisoners. The 1823 Act was a first step to improving conditions for prisoners but was riddled with so many omissions that the Gaols Amendment Act 1824 was passed in an attempt to remedy these.<sup>47</sup> The Amendment Act included, *inter alia*, provisions extending the scope of the supervision of the Home Office over the gaols in towns not subject to the original Act and setting out the classification and separation of prisoners in the prisons named in the 1823 Act. Whilst the Home Office had a measure of control over the conditions in which prisoners were kept, without an effective supervisory body to oversee the provisions of the Act, it was ineffectual and in some cases worsened the plight of prisoners.

On February 24 1825, Colonel Wodehouse, Tory MP for Norwich, submitted a motion to the House of Commons requesting that the Lent Assizes for Norfolk should be moved from Thetford to the city of Norwich.<sup>48</sup> Wodehouse's concern was that innocent prisoners were required to be taken 30 miles from the gaol in Norwich to the court and then, if found guilty, transported the 30 miles back to Norwich at a substantial cost to the local council. Under the Gaols Act 1823, a 'large and commodious gaol' at the cost of £50,000 had been built in Norwich whereas the gaol at Thetford was small and cramped.<sup>49</sup> Why the gaol was built at Norwich is unclear but it was the largest town in the area. The Lord Chancellor and judiciary objected to the proposal but there is no indication on what grounds and Peel refused to interfere with the decision on the ground that he had 'no proper jurisdiction'.<sup>50</sup> Better prison conditions were thus thwarted by the judges' intransigence coupled with the local decision to determine where to build the new prison. The plight of the prisoners was not a consideration to which either segment of the machinery of justice paid any

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<sup>47</sup> (5 Geo. IV c. 85).

<sup>48</sup> HC Parliamentary Debates, 24 February 1825, 2<sup>nd</sup> series, volume 12, cols. 648-51.

<sup>49</sup> Ibid col.648.

<sup>50</sup> Ibid col. 650.

attention. A state of impasse was reached; prisoners had to endure the 30 mile trip to Thetford when their case was listed.<sup>51</sup>

The success of Peel's measures was dependent upon the effective implementation by magistrates and the judiciary. The Home Secretary's power, however, to sanction or replace individuals who acted outside their remit was limited.<sup>52</sup> The case of Henry Savery illustrated Peel's determination to uphold the independence and impartiality of the judiciary and magistracy against a background of vested interest and personal privilege. It also showed that he was not averse to using any tools available to him to ensure that any overreaching of their powers was brought into the public domain. Savery was the principal in the banking house of Savery, Towgood and Co. which was run on a speculative and reckless basis. Promissory notes, known as 'kites' addressed to fictitious persons had been forged by Savery which resulted in his prosecution by members of the Bristol Copper Company. At the City of Bristol Assizes April 1825, Savery insisted on pleading guilty even after the senior judge (Lord Gifford) ordered proceedings to be adjourned for Savery to reconsider his plea. Passing sentence of death, Lord Gifford advised Savery that he should expect no hope of clemency.<sup>53</sup>

After the trial, Savery petitioned the Home Office reciting that he had relied on the advice of Alderman Stephen Cave, a Bristol magistrate, who had assured him that pleading guilty would result in the death sentence being commuted.<sup>54</sup> Peel initially refused to interfere with the sentence but after reviewing numerous petitions from interested parties, he took the decision to reconsider the case with *The Times* noting that Peel had sought the advice of the Lord Chief Justice and Lord Gifford.<sup>55</sup> It continued that his decision, to recommend a commutation of the sentence, was reached on the facts and not on the basis of 'personal influence.' It concluded that the outcome

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<sup>51</sup> The Lent Assizes were moved to Norwich but not until 1832.

<sup>52</sup> D. Hay, 'Dread of the Crown Office: the English Magistracy and King's Bench, 1740-1800', in N. Landau (ed.), *Law, Crime and English Society, 1660-1830* (Cambridge, 2002); W. Holdsworth, *History of English Law*, 14 volumes (New York, 1919), volume X, pp. 248-9, 251-2; Kiralfy, *Potter's Historical Introduction*, pp. 226-9; N. Landau, *The Justices of the Peace, 1679-1760*; D. Lemmings, *Law and Government in England during the Long Eighteenth Century: From Consent to Command* (London, 2011), pp. 17-41.

<sup>53</sup> *Morning Chronicle*, 6 April 1825; R. Howard, *The Extraordinary Story of Henry Savery, Australia's First Novelist* (Melbourne, 2011).

<sup>54</sup> For the influence of Aldermen in the municipal affairs of Bristol see G.W.A. Bush, *Bristol and its Municipal Government, 1820-1851* (Bristol, 1976), volume 29.

<sup>55</sup> HO17/1; *The Times*, 26 April 1825.

would have been the same if the prisoner had been the ‘humblest individual in the kingdom’.<sup>56</sup>

Peel was unhappy about Cave’s interference in the case as evidenced by a letter he wrote to Mr Blissett, one of the prosecutors, on 10 April.

If it could be supposed that the administration of public justice in Bristol depends on private influence, the charter of the Corporation ought not to exist for another hour. And Mr Peel could not fail to feel strongly, the danger of such a supposition arising from Savery being reprieved after the ill judgement and unjustifiable interference of Mr Cave. [He] trusts that no such ill consequently will arise from the mercy which has been extended. But ...if the gentleman does not improve in his notion of a magistrate’s duties, the sooner he resigns his gown the better. The prisoner will be transported for life.<sup>57</sup>

Alderman Cave was 62 years of age when the case was heard and had been a JP for many years. He was a member of a wealthy banking family; his father John Cave was a founding partner in the Bristol Bank.<sup>58</sup> Presumably, when advising Savery, he considered that he had sufficient influence to secure a mitigation of sentence as this was the manner in which the criminal process had always operated. What Cave had failed to appreciate were the developing changes in the administration of justice. Peel was determined that the dispensation of justice should no longer be within the personal remit and at the personal behest of influential private individuals. His introduction of standard procedures and processes by means of Circulars was designed to curb these practices.<sup>59</sup> The idea of local justice dispensed autonomously on the whim of the magistracy was slowly being replaced by a system of impartial justice emanating from central government. It was a tardy process due to the lack of any regulatory control over magistrates and their reluctance to have the powers, which they had exercised for centuries, curtailed by government.<sup>60</sup>

With no formal means to sanction Cave, Peel employed a well used device as a warning to others who might be tempted to overreach their powers. He utilised the press to decry Cave’s behaviour and shame him in public. The notion of public shame

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<sup>56</sup> *The Times*, *ibid.*

<sup>57</sup> HO17/1; R. Howard, *The Extraordinary Story of Henry Savery*. Savery was transported to Van Diemen’s Land in 1825.

<sup>58</sup> Bush, *Bristol and its Municipal Government, 1820-1851*, pp. 28. and 235.

<sup>59</sup> pp. 49-50 *infra*.

<sup>60</sup> Chapter Seven pp. 141-2 *infra*.

and loss of reputation had been a key element in many aspects of punishment. With more enlightened views on punishment, this idea was becoming outdated and by the 1820s was being phased out.<sup>61</sup> *Berrow's Worcester Journal* discussed Cave's interference in the case and concluded that Peel had in a letter expressed 'his disapproval of such irregularity and indiscretion.'<sup>62</sup>

A Tory paper, the *Bristol Mirror*, neatly avoided criticising either Cave or Peel by denying the existence of the letter.<sup>63</sup> This lack of probity in refusing to acknowledge any rebuke by Peel of Cave's misconduct might be considered as an example of the local press guarding the interests and reputations of officials who were responsible for dispensing local justice. However, Cave's background and influence may have been the real reason for the paper's suppression of the rebuke as well as the highly partisan character of local politics in Bristol on the 1820s.

As mentioned earlier, changes to Home Office procedures were generally introduced by means of circulars; but these had no statutory effect. Peel was limited, therefore, in the action he could take to enforce them. In respect of new legislation, he was more successful but even this was a slow process. Five years after the introduction of the Gaols Act 1823, some magistrates still believed that they had the power to decide whether a prisoner should be granted a remission of sentence. In April 1828 Charles Crawley, a Gloucester magistrate requested that Peel issue a pardon for William Clutterbuck before the completion of his two year term of imprisonment. In robust terms, Peel informed him that the recommendation could only be made after the case had been considered by the Bench at Quarter Sessions and a written report submitted to the Home Office in compliance with section 16 of the Gaols Act 1823.<sup>64</sup> This request illustrated the difficulties encountered by Peel in implementing a centralised and more bureaucratic criminal justice system when faced with the entrenched interests of those who considered that they still held the personal power to determine the individual fate of prisoners.

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<sup>61</sup> See Bentley, *English Criminal Justice*, p.12; M. Philip, *Reforming Ideas in Britain: Politics and Language in the Shadow of the French Revolution, 1789-1815* (Cambridge, 2014), pp. 144-53.

<sup>62</sup> *Berrow's Worcester Journal*, 12 May 1825.

<sup>63</sup> Reported in *Morning Post*, 31 May 1825.

<sup>64</sup> HO13/51 / fol. 21; HO17/97/ Sk 32.



**‘But the whole subject of ... secondary punishment is full of difficulty’<sup>65</sup>**

Causally linked with Peel’s reluctance to press forward with more radical reforms of the criminal law were his views on effective deterrents, in particular the relationship between detection rates and the incidence of crime and the availability and suitability of (non capital) secondary punishments.<sup>66</sup> In London, he endeavoured to establish a police force early in his stewardship of the Home Office. In 1822, he introduced a bill which was not successful and would not come to fruition until 1829.<sup>67</sup> The deterrent effect of capital punishments remained the primary tool to maintain law and order.

In 1822 there was no centralised prison system. The only prison under the state’s control was the Millbank penitentiary which, after much prevarication as to its form, had been finally completed in 1816.<sup>68</sup> Bentham’s concept of a ‘Panopticon’, a circular structure where prisoners were held in separate cells but could all be viewed by a central watch tower, was rejected and the Penitentiary was built in the shape of a hexagon to a design by William Williams. The design was not successful; it was built on marsh land which as a result of poor ventilation and subsequent damp led to outbreaks of gaol fever. Other punishments such as fines and whippings were available to the courts but, as a result of inadequate prison capacity, the punishment most frequently passed in the case of felonies was transportation.<sup>69</sup>

Male prisoners who had been sentenced to a term of transportation were initially held in Newgate in London or in other local gaols and then transferred to hulks, as a preliminary to transportation. The hulks were decommissioned navy ships which housed thousands of prisoners in often appalling and inhumane conditions.<sup>70</sup> The only recorded occasion when women were held on hulks occurred after a bout of gaol fever in the Penitentiary in early 1824 which resulted in women prisoners being temporarily accommodated on the hulks *Narcissus* and *Heroine*. The situation was resolved in April 1824 and June 1824 by granting pardons to 34 of the women for helping to quell

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<sup>65</sup> Peel to S. Smith, 24 March 1826 in Parker, *Peel*, pp. 401-2.

<sup>66</sup> *Speeches*, volume i, pp.166-7.

<sup>67</sup> HC Parliamentary Debates, 14 March 1822, 2<sup>nd</sup> series, volume 6, cols. 1165-6; HC Parliamentary Debates, 4 June 1822, 2<sup>nd</sup> series, volume 7, cols. 790-805; Metropolitan Police Act 1829 (10 Geo. IV c. 44); C. Emsley, *The English Police: A Political and Social History* (Harlow, 1991)

<sup>68</sup> The Millbank Penitentiary is referred to as ‘the Penitentiary’ in HO papers.

<sup>69</sup> H. Mayhew and J. Binny, *The Criminal Prisons of London and Scenes of Prison Life* (London, 1862), pp. 232-69.

<sup>70</sup> *Ibid*, pp. 197-231.

a riot and rescue prisoners from the *Dromedary* hospital ship on 18 February 1824.<sup>71</sup> Despite these problems, a national prison building programme was not instituted for at least another decade.<sup>72</sup>

After the loss of the American colonies in 1776, transportation to North America was no longer an option and the increased need to house prisoners was met by prison hulks. The increasing colonisation of Australia solved this growing problem with the First Fleet of prisoners leaving England for Botany Bay in May 1787. By the 1810s, the convict settlement in Sydney and its surrounds was firmly established but for many in the government, particularly the Colonial Secretary, Lord Bathurst, any deterrent effect of transportation had dissipated.<sup>73</sup>

In 1819, Bathurst commissioned a Report into the perceived lenient practices of the Governor, Lachlan Macquarie, the flashpoint being Macquarie's proposal to appoint former convicts to the local magistracy. Bathurst's view was that Macquarie had gone too far in his attempts to rehabilitate convicts back into society. He was concerned that the original aims in establishing New South Wales as a penal colony with proper punishment had been eroded. Bigge, a career civil servant, was appointed to head the commissions and in 1822 he presented the first of his three reports.<sup>74</sup> Relations between Macquarie and Bigge were never cordial and unsurprisingly the report criticised Macquarie's management of convicts and expansive buildings policy. Bigge made practical suggestions regarding the establishment of further penal settlements at Port Macquarie, Moreton Bay and Norfolk Island for habitual and dangerous offenders. He also recommended that public expenditure could be reduced if more convicts were assigned to private employers. He believed this measure would increase

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<sup>71</sup> HO 17/34 Ek 46; HO17/52 Ik 8.

<sup>72</sup> Prisons Act 1833, (5 & 6 Will. IV, c. 38); Pentonville was built in 1842; D. Rothman and N. Morris (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford, 1995).

<sup>73</sup> 'Bathurst, Henry' (1762-1834), *Australian Dictionary of National Biography*, Australia National University: <http://adb.anu.edu.au/biography/bathurst-henry-1751/text1945> [accessed 15 March 2015]; J. Harrison and B. Shaw (eds), *Brisbane: Schemes and Dreams; Nineteenth Century Arrivals* (Brisbane, 2014); H. Grey Bennett, *Letter to Viscount Sidmouth on the Transportation Laws, the State of the Hulks, And of the Colonies in New South Wales* (London, 1819).

<sup>74</sup> J. Bigge, *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales* (London, 1822); *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land* (London, 1823); *Report of the Commissioner of Inquiry on the State of Agriculture and Trade in the Colony of New South Wales* (London, 1823)

the severity of the punishment as the convict would have less free time and more supervision.<sup>75</sup>

Many of the recommendations in Bigge's reports were implemented but the perception persisted that transportation to New South Wales held no salutary terror. In a letter to Reverend Mr. Sydney Smith in 1826, Peel commentated on the inefficacy of transportation to Botany Bay and conceded that the whole subject of secondary punishments was full of difficulty. He concluded the letter with the comment that 'the real truth is the number of convicts is too overwhelming for the means of proper and effectual punishment.'<sup>76</sup> This last sentence illustrated Peel's frustration with the measures available to him to reduce the increase in crime which he viewed as a threat to the maintenance of peace and order in the country.

The following year, writing to Robert Wilmot-Horton, Under-Secretary of State for the War and Colonies, Peel implicitly revealed the basis of his view of punishment and in particular his views on the need to ensure the deterrent effect of transportation. The context of this letter should not be underestimated as Horton was not an unknown official in the War and Colonies Office but a fellow alumni of Christ Church, Oxford both having been students there in 1805/6. By the tone of the letter the inference can be drawn that he was both a respected colleague and friend; perhaps this was a rare occasion when Peel felt able to be candid in expressing his views on punishment.

Punishment, in Peel's view, should be cost effective, involve hard labour and be effectively disciplined. These attributes are hardly surprising as they are attributes which Peel himself applied to many aspects of his own life. Hilton has suggested that Peel believed that men must 'stand on their own feet free from operations of caring or coercion by government or other ruling-class agency.'<sup>77</sup> Nurtured in a family whose wealth and position was founded on hard work and self discipline, he considered indolence to be a catalyst for crime and was keen to ensure that prisoners were subjected to hard labour as a way of making the reformatory effect and deterrence more efficacious.<sup>78</sup> The penal settlement at Bermuda was, in Peel's view, the paradigm for these attributes as revealed in the final paragraph of his letter to Wilmot-Horton

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<sup>75</sup> Ibid.

<sup>76</sup> Peel to S. Smith, 24 March 1826 in Parker, *Peel*, pp. 401-2.

<sup>77</sup> Hilton, 'The Gallows and Mr. Peel', p. 95.

<sup>78</sup> Gash, *Mr Secretary Peel*, pp. 15-40.

where he considered that no destination ‘answers its purpose so ineffectually as transportation to New South Wales’ contrasting this with the regime in Bermuda where costs were lower and the prisoners more effectually disciplined.<sup>79</sup>

Bermuda was strategically important to Britain as after the loss of the American colonies in 1776, there was no port to protect Royal Navy ships in North America. In 1809, work began at Bermuda’s Ireland Island on the construction of the Royal Naval Dockyard. Initially enslaved people did this work but following the abolition of the slave trade in 1807 it became apparent that a new source of unpaid labour was needed to complete the project. In 1822, after seeking the advice of the Attorney General, Peel promoted a bill, taking effect in July 1823, authorising convicts to be employed in hard labour on land or aboard any ship in any colony designated by the King.<sup>80</sup>

The first ship to be sent to Bermuda was the *Antelope* which sailed from Spithead on January 5 1824 arriving in Bermuda on February 8. In New South Wales and Van Diemen’s Land, a system operated where convicts who kept out of trouble, were allowed to apply for a ticket of leave after serving about half of their sentence or eight years, if they had been transported for life. This ticket permitted the convict to work for himself and buy goods and even land. Prisoners who were sentenced to transportation for seven years and were held on the hulks in England were eligible for release after four years’ incarceration but in Bermuda a prisoner had to serve a minimum of five years.<sup>81</sup> This led to mutinies and fighting on the hulks since there was no incentive or encouragement to behave well and early release was only granted in exceptional circumstances. In the 40 years Bermuda housed a convict station, more than 9,000 men were held there and over 2,000 died, mainly of yellow fever.<sup>82</sup>

A detailed consideration of Peel’s credentials as a humanitarian Home Secretary is outside the remit of this thesis but the significance of the number who died in the Bermuda hulks as a result of Peel’s initiatives has largely been ignored by historians. Convicts held on the Bermudian hulks frequently petitioned Peel about the harsh and inhumane conditions but these concerns were robustly dismissed as the need to

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<sup>79</sup> HO13/48/ fols. 28-9.

<sup>80</sup> HO44/13 / fol. 13; Convict Labour Act 1823 (4 Geo. IV, c. 47).

<sup>81</sup> Draft note confirming this in HO17/93/Ro 12.

<sup>82</sup> C. Hollis Hallett, *Forty years of Convict Labour* (Bermuda, 1999); B. Mortimer, ‘Prisoners in Paradise’, *Ancestors*, 78 (2009), pp.40-4.

establish a naval base, with unpaid labour, for the protection of commercial interests took precedence over the complaints of convicts.<sup>83</sup> In this instance Peel had to make a value judgement and balance the interests of the state against those of private individuals.<sup>84</sup> Peel's paramount objective was to ensure the efficacy, impartiality and deterrence of the criminal law rather than the promotion of humanitarian concerns. In his defence, however, it is unlikely that he could have anticipated the vast number of convicts' deaths from yellow fever, a disease which was unknown in Britain.

## Conclusions

Peel's measures were a significant step in the reduction of the number of capital offences. The nature of English law, with offences spread throughout hundreds of statutes and common law decisions, meant that these reforms were approached in an incremental manner. Peel believed that sweeping changes would excite a 'strong prejudice' in the country against the measures which were intended for the public good.<sup>85</sup> The notion that there was a substantive difference between the reforms proposed by Peel and his Whig successors is misleading as the reforms introduced in the 1830s were a continuation of the initiatives taken by Peel in the 1820s. To use Peel's own analogy, he proposed to 'break the sleep of a century' in his reforms of the criminal law but this awakening was gradual; there were no sudden or 'drastic' stirrings which might upset the equilibrium of the existing framework and cause anxiety in the country at large.<sup>86</sup> The reality was that it took over a hundred years from these first steps for capital punishment to be expunged from the statute books.<sup>87</sup>

Peel's objective in reforming the criminal law was to make it more effectual but he recognised that this would only succeed if he carried all the instruments of the administration with him. Gaining the approval of the judiciary before bills were presented to parliament was one method Peel employed to ensure their smooth passage but the lack of a regulatory structure, once laws were passed, meant that he was faced with challenges from parochial vested interests. He relied on circulars to introduce

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<sup>83</sup> HO17/49/HI 28 (petition of Henry Adams who complained that he was subjected to sexual assault.)

<sup>84</sup> For a discussion of the theory of balancing conflicting public and private interests as formulated by Roscoe Pound see R.W.M. Dias, *Jurisprudence* (London, 5<sup>th</sup> edn, 1985) pp. 431-5.

<sup>85</sup> *Speeches*, volume i. p. 456.

<sup>86</sup> *Ibid* p.399.

<sup>87</sup> Murder (Abolition of Death Penalty) Act 1965 c.71.

new procedures but these were often ignored or disregarded by local magistrates. His power to sanction non-compliance was limited.

Whilst he removed the capital element from a substantial number of offences, he considered that it was necessary to retain the death penalty as a deterrent due to the lack of salutary secondary punishments. Peel and his Whig successors as Home Secretaries had no intention to codify the criminal law; they made incremental changes in order to retain the rich blend of common law and statutory offences which would be inevitably lost in any attempt to reduce the offences to a single code. The next chapter will consider the reforms to the criminal law against the political landscape in place in the 1820s. Characterising calls for law reform based on whether they reflected so called Whig or Tory policies is too simplistic as the notion of party politics, as we understand them today, had not yet fully evolved and would not do so for another twenty years.<sup>88</sup>

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<sup>88</sup> Hilton, *A Mad, Bad, Dangerous People?*, pp. 195-288; R. Hofstadter, *The Idea of the Party System: the Rise of the Legitimate Opposition in the United States 1780-1840* (Berkeley CA, 1969), pp. 40-1.

## Chapter Four:

### Politics, Penal reform and Peel

#### Introduction

In 2006, Hilton observed that many historians have described the period 1807-1827 as characterised by sharp political differences between Whigs and Tories. Whilst he considered this had the merit of conveying a vigorous two-party atmosphere, ‘in reality the evidence is ambiguous.’<sup>1</sup> Comparing the Whigs and Tories of the early decades of the nineteenth century with the highly developed political parties of modern times is to misunderstand the political landscape when Peel took up office in 1822. Moreover, the ending of the Napoleonic Wars in 1815 had contributed to social changes that threatened stability and forced the government to reassess and reform the organisation and administration of established institutions.<sup>2</sup>

Lord Liverpool had been Prime Minister for more than ten years when Peel was appointed to the Home Office.<sup>3</sup> He led a Tory administration but it was an uneasy alliance of disparate interests. He was able to remain in power as the Whig opposition was ineffectual and the issue of Catholic emancipation, which aroused most controversy within his own party, was effectively sidelined.<sup>4</sup> George Canning, who was appointed by Liverpool as leader of the House of Commons in 1822, was in favour of granting concessions to Catholics.<sup>5</sup> Peel, until his infamous *volte-face* in 1828, was vehemently opposed to these measures. Liverpool’s government was also faced with dealing with periods of civil unrest due to changing industrial conditions in the 1820s and the instability in the economy. The early part of the decade saw a period of boom but disastrous government and private investments in South America and poor

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<sup>1</sup> Hilton, *A Mad, Bad and Dangerous People?* pp. 196-7.

<sup>2</sup> N. Gash, *Aristocracy and People: Britain 1815-1865* (Cambridge, Mass, 1979), pp. 3-4; Burns and Innes (eds), *Rethinking the Age of Reform*; Evans, *The Forging of the Modern State*, pp. 177-263; *The Great Reform Act of 1832* (London, 1983); M. Brock, *The Great Reform Act*; J. Phillips and C. Wetherell, ‘The Great Reform Act of 1832’, *American Historical Review*, 100 (April 1995), pp. 411-36; A.S. Tuberville, *The House of Lords in the Age of Reform, 1784-1837*; B. Ward, *The Eve of Catholic Emancipation*.

<sup>3</sup> N. Gash, *Lord Liverpool: The Life and Political Career of Robert Banks Jenkinson, Second Earl of Liverpool 1770-1828* (London, 1984).

<sup>4</sup> R. Floyd, *Church, Chapel and Party: Religious Dissent and Political Modernization in Nineteenth Century England* (New York, 2008); M. Wheeler, *The Old Enemies: Catholic and Protestant in Nineteenth Century English Culture* (Cambridge, 2011).

<sup>5</sup> S. Farrell, ‘Canning, George (1770-1827)’, in *HoP*.

harvests resulted in a currency crisis in the winter of 1825/26.<sup>6</sup> There was, however, less open disagreement in the Tory ranks on economic issues due to the dominance and expertise in financial matters of William Huskisson at the Board of Trade, Frederick Robinson at the Exchequer and Peel himself.<sup>7</sup> The issue of parliamentary reform also continued to simmer away and periodically raised its head in parliamentary debates.<sup>8</sup>

Calls for a reduction in the number of capital punishments were part of this movement of reform.<sup>9</sup> In late 1822, Lord Eldon, the Lord Chancellor, recognised the need for change when he advised Peel that ‘times are gone by when so many persons can be executed at once as were so dealt with twenty years ago.’<sup>10</sup> Whilst a detailed analysis of Michel Foucault’s work is beyond the scope of this thesis, it was apparent from the late eighteenth century that there had been a shift from the infliction of corporal to carceral forms of punishment.<sup>11</sup>

This chapter will trace the calls for penal reform during Peel’s stewardship of the Home Office and demonstrate how he was able to achieve reforms through consensus between both sides of the political divide. These issues set into context the difficulties involved in reforming the criminal law against the background of a barely interested House of Commons.<sup>12</sup> They also dispel the myth that there was a substantive difference in the reforms initiated by the subsequent Whig administrations in the 1830s and the reforms introduced by Peel.<sup>13</sup>

#### **‘A heterogeneous mass of legislation.’<sup>14</sup>**

In his leading speech on the reform of the criminal laws in March 1826, Peel urged the House of Commons to give the matter serious attention, commenting that the true principles of criminal jurisprudence of the country had been ‘too frequently

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<sup>6</sup> For economic policies see Evans, *The Forging of the Modern State*, pp. 177-263.

<sup>7</sup> Ibid p.194.

<sup>8</sup> Brock, *The Great Reform Act*; Evans, *The Great Reform Act of 1832*; E.J. Evans, *Britain before the Reform Act: Politics and Society 1815-1832* (Harlow, 1989).

<sup>9</sup> pp 60-2 *infra*.

<sup>10</sup> Eldon to Peel, 1822, *Peel papers*, BL Add. MS 40315 fols. 63-4.

<sup>11</sup> M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York, 1975); M. Ignatiev, *A Just Measure of Pain: the Penitentiary in the Industrial Revolution, 1750-1850* (London, 1978); D. Garland, *Punishment and Modern Society* (Oxford, 1990).

<sup>12</sup> HC Parliamentary Debates, 9 March 1826, 2<sup>nd</sup> series, 14, col.1214.

<sup>13</sup> Beales, ‘Peel, Russell and Reform’, p. 880.

<sup>14</sup> HC Parliamentary Debates, 9 March 1826, 2<sup>nd</sup> series, 14, col. 1220.



disregarded.’<sup>15</sup> Peel justified his comments by referring to two parliamentary committees which had considered the subject over the last 150 years. In 1666, a Committee under the Solicitor General and future Lord Chancellor, Lord Nottingham, was appointed to consider the repeal of obsolete statutes and to reduce all statutes of ‘one nature’ into a more comprehensible structure. Later, in 1796, another Committee was appointed to consider the same issue. In its Report, the observation was made that although a general revision of statute law had often been recommended, it was never carried forward ‘to any degree of maturity’.<sup>16</sup>

The rise of capital offences was justified in the opinions of some commentators in light of the general moral abasement of the population. Early in the eighteenth century Lord Chancellor Hardwicke had referred to ‘the degeneracy of human nature.’<sup>17</sup> Nearly a century later in 1819 Edward Christian condemned ‘the licentious practices of modern times.’<sup>18</sup> This view was tempered by the Reverend John Foley who, after considering that neither unemployment nor want of poor relief could justify the levels of crime, claimed that he could not ‘assign an adequate cause of this sudden increase in profligacy.’<sup>19</sup> It was not just the number and disparity of capital offences which excited the attention of reformers; the framework of the penal system itself was also considered by some as outdated and unfit for the changes in society.<sup>20</sup> The movement away from rural occupations to industrialised centres in the early decades of the nineteenth century called for a more centralised legal administration suited to the wants and needs of a society that was both tempted to transgress by the ever growing increase in consumer goods and was increasingly involved in complicated commercial transactions. Certainty in the law coupled with professional expertise and competence were required not the amateur and parochial justice of the local unpaid gentry.

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<sup>15</sup> Ibid col. 1214.

<sup>16</sup> Ibid col. 1218.

<sup>17</sup> Hay, ‘Property, Authority, and the Criminal Law’, p. 20.

<sup>18</sup> Ibid, p. 18

<sup>19</sup> G. Lamoine, *Charges to the Grand Jury, 1689-1803* (London, 1992), Camden IV, Series 43, p. 579; see also J. Locke, *Two Treatises of Government* (London, 1690), *Second Treatise*, sections 85 and 94; B. Calvert, ‘Locke on Punishment and Capital Punishment’, *Philosophy*, 68(1993), pp.211-29; P Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (London, 2<sup>nd</sup> edn, 2003).

<sup>20</sup> R. Follett, *Evangelicalism, Penal Theory and the Politics of the Criminal Law: Reform in England 1808-1830* (Hook, 2001).

One of the obstacles to radical reform of the penal system was the success of Blackstone's *Commentaries on the Law of England* published between 1765- 69. They influenced both lawyers and politicians to believe that the existing system, based on centuries of experience, should be protected and almost venerated. Blackstone's *Commentaries* were a narrative account of the workings of the English legal system and promoted no ideological theories on the nature of law, rather emphasised the order and coherence of the *status quo*. One of his students at Oxford was Jeremy Bentham who was not persuaded by Blackstone's encomium of the constitution and the common law. He attacked Blackstone's complacent and uncritical panegyric in publications going as far as to call Blackstone's view of 'natural rights' as 'nonsense upon stilts'.<sup>21</sup> Bentham took the view that the development of laws within a state should no longer be based on feudal hierarchy or papal interference but on the principle of 'utility' as asserted by the philosopher Hume.<sup>22</sup> This principle was that laws should be based on some scientific or rational standard which was capable of being quantified.

This became known as 'the greatest happiness principle' or 'doctrine of utility' which paved the way for the development of positivism or analytical jurisprudence which considered what law 'is' rather than what it 'ought to be.'<sup>23</sup> One of Bentham's main criticisms of the penal system was that it was unascertainable and inconsistent due to the presence of discretion and subjective considerations. He advocated that the criminal law should be codified to ensure clarity and precision.

Bentham considered certainty in the law as the foundation on which his code of 'internal law' or 'Pannomium' should be established. He divided the 'Pannomium' into four parts; constitutional, civil, penal and administration. Each part definitively prescribed the rights, duties, offences, punishments and code of procedure and thus negated the need for discretion in the legal system. His view was that if a person embarked upon a criminal act knowing with certainty that the sanction for that act would be enforced by the legal machinery, then it would act as a more effective deterrent than a system that politically could never be fully enforced against all

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<sup>21</sup> J. Bentham, *The Works of Jeremy Bentham*, J. Bowring (ed.), 10 volumes (London, 1838-1843 Reprinted New York, 1962), volume 2, p. 501.

<sup>22</sup> D.Hume, *A Treatise of Human Nature*, L. Selby-Bigge (ed.) (Oxford, 1888), pp. 516-34.

<sup>23</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford, 1907 reprint of 1823 edition), chapter 1.

offenders. In other words, it was the certainty of the punishment, rather than the severity, which was the most effective deterrent.<sup>24</sup>

Bentham never entered the political sphere but some of his ideas were taken up initially by the Whig lawyer Samuel Romilly and, after his death, the Whig MP and lawyer Sir James Mackintosh. Romilly 's view that the English penal system was no more than 'a lottery of justice' because of the uncertainty of punishment led him to introduce bills into the House of Commons proposing to reduce the number of capital statutes. However, he met with only very limited success due to the intransigence of the Tory peers in the House of Lords.<sup>25</sup> On Romilly's suicide in 1818, Mackintosh took up his mantle and in 1819 his motion for a Committee of Enquiry into the state of the penal system was carried against the government by a majority of 19. Mackintosh was keen to assure members of the House of Commons that he was not seeking codification of the criminal law; his proposals were more an exercise in clarification.<sup>26</sup> His main objection was, that during the last 100 years, members of both Houses had succeeded in adding capital offences with little scrutiny or rigorous debate in either House. He deplored the system that allowed Members to legislate on a whim and decried the fact that if a member 'could not do anything else, he could create a capital felony.'<sup>27</sup> He was not, however, suggesting a radical change to the existing criminal justice system as that would be 'too extravagant and ridiculous'.<sup>28</sup>

Mackintosh confirmed that he had no intention to propose the abolition of the death penalty believing that it was a necessary evil. Moreover, he did not wish to take away the right to pardon from the Crown. He was keen that it should be restored to its original purpose namely rectifying errors on the record or setting aside verdicts and remitting punishments in established and exceptional circumstances. His objective was to make 'the execution of the law form the rule, and the remission of its penalties the exception'.<sup>29</sup> The whole tenor of Mackintosh's speech was a denunciation of the

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<sup>24</sup> Ibid.

<sup>25</sup> Romilly published anonymously *Observations on 'Thoughts on Executive Justice'* (London, 1786). He was responding to *Thoughts on Executive Justice: with Respect to our Criminal Laws Particularly on the Circuits* (London, 1785), in which Martin Madan had advocated a more rigorous enforcement of the capital statutes.

<sup>26</sup> HC Parliamentary Debates, 1 March 1819, 1<sup>st</sup> series, 39, col. 783; J. Mackintosh, *The Miscellaneous Works* (New York, 1871).

<sup>27</sup> HC Parliamentary Debates, 1 March 1819, 1<sup>st</sup> series, 39, col. 787.

<sup>28</sup> Ibid, col. 783.

<sup>29</sup> Ibid, col. 796.

lax legislative process which had developed to protect the interests, particularly property interests of members, to the detriment of respect for the law.

Mackintosh chaired the Committee which reported to the House of Commons on May 9 1820.<sup>30</sup> A member of this Committee was Lord Lansdowne who would take up the post of Home Secretary in 1827. The report contained a review of the penal system and forwarded a detailed plan of reform to parliament which included, *inter alia*, the abolition of the death sentence for certain cases of larceny from shops and houses and proposals for the reform of the laws relating to forgery. Both Houses rejected these proposals in principle with the result that only minor amendments affecting the substantive law were passed. Two years passed before Mackintosh again brought the subject of criminal law reform to the floor of the House of Commons. In June 1822, he proposed a further resolution to reform the criminal law. This resolution was wider in nature than the earlier proposals and included proposals to increase the efficacy of the criminal laws and 'measures for strengthening the police, and rendering the punishment of transportation and imprisonment more effectual for the purposes of example and reformation.'<sup>31</sup>

In February 1823 Peel sent a memorandum to all members of the Cabinet to gain their support for the actions he proposed before the Commons debate in May of that year. He wrote

We must determine whether it be expedient for the Government to originate any proceeding or to leave the Resolution in the hands of the mover but whatever may be the decision to which we shall come on this point, it will be equally incumbent on us to state distinctly the extent of the alterations in the criminal law which we are prepared either to propose or to assent to.<sup>32</sup>

This memorandum is illuminating on two grounds. It is evidence of Peel's view that for measures to be effective the Cabinet had to work collectively and formulate a policy on which they were all agreed and for his measures to succeed unopposed, he required the prior agreement of all factions in the Tory party. In the memorandum, he

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<sup>30</sup> P. Handler, 'Forging the Agenda: the 1819 Select Committee on the Criminal Laws Revisited', *The Journal of Legal History*, 25, 3 (2004), pp. 249-68.

<sup>31</sup> HC Parliamentary Debates, 4 June 1822, 2<sup>nd</sup> series, 7, col. 790.

<sup>32</sup> HO44/13 fol. 7.

sought agreement that it would be ‘safe’ to remit the death penalty in certain offences including offences under the Black Acts, maliciously wounding cattle and larceny in a dwelling house under 40s.<sup>33</sup> He also questioned whether it was necessary for judges to continue to pass sentence of death on prisoners when it was their intention not to impose it. Whilst some of the proposals were not immediately adopted, the last proposal was enacted expeditiously with the passing of the Judgment of Death Act in the same year.<sup>34</sup>

In the subsequent House of the Commons debate in May 1823, Peel initially rejected Mackintosh’s motion indicating that he intended to introduce his own measures on the police and was awaiting a report on transportation but acknowledging that he was in general agreement with many of Mackintosh’s proposals.<sup>35</sup> It was another three years before Peel was ready to introduce two bills: one to consolidate, amend and mitigate the substantive law relating to property crime and the other to formalise administrative provisions.

The main proposals in Peel’s draft bill relating to the criminal law were, *inter alia*, consolidation of the 12 statutes relating to receiving stolen property into a single statute and supplying omissions where the law was defective particularly in relation to offences of embezzlement and stealing ‘mercantile instruments of all kinds’.<sup>36</sup> He acknowledged that whilst he proposed to extend the ‘grasp of the law’ he had no intention to increase its severity.<sup>37</sup> In respect of the administrative bill, he wished to close loopholes which allowed prisoners to escape justice. He cited the example of prisoners being acquitted because of ‘technical quibbles ‘on the indictment which did not materially affect their right to a fair trial.<sup>38</sup>

Peel based his proposed reforms on Baconian principles asserting that any measures which he advanced ‘tendeth to pruning and grafting the law and not to ploughing and planting it up again.’<sup>39</sup> Francis Bacon was a philosopher, scientist and lawyer who

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<sup>33</sup> Black Act 1723 (9 Geo.1 c. 22) – originally passed during a period of economic depression to prevent poaching and contained more than fifty capital offences including being found in a forest with a blackened face.

<sup>34</sup> (4 Geo. IV c. 47).

<sup>35</sup> HC Parliamentary Debates, 21 May 1823, 2<sup>nd</sup> series, 9, cols. 397-432

<sup>36</sup> H.C Parliamentary Debates, 9 March 1826, 2<sup>nd</sup> series, 14, cols. 1222-5.

<sup>37</sup> Ibid col. 1225.

<sup>38</sup> Ibid col. 1233.

<sup>39</sup> Ibid col. 1239.

became Lord Chancellor in 1618 under James I. Bacon was reluctant to generalise about the philosophical basis of law, being far more concerned with its practical application and his induction method of collecting and organising knowledge gave a new insight into how the law was applied. His aim to make ‘the Law of England ... a structure of a sacred temple of justice ‘could be achieved if steps were taken ‘to purge out the multiplicity of law, clear the uncertainty of them, repeal those that are most snaring and press the execution of those that are wholesome and necessary’.<sup>40</sup> These objectives were similar to those promoted by Peel in his speech of March 6 1826 namely simplification, consolidation and mitigation.

Why did Peel select Bacon’s view of the penal system as his template for reform? After two centuries, how widely were his works known? Peel included no explanation of Baconian principles in his speech, leading to the presumption that these were in the public consciousness, and perhaps it was no coincidence that the first volume of his works was republished in 1826.<sup>41</sup> If there was resurgence in the interest and acknowledgment of Bacon’s principles, Peel was able to utilise this as a counter-balance to Bentham’s call for radical reform and introduction of a penal code. Of even more interest is that Mackintosh considered Bacon ‘a wonderful person’ and wrote an essay on his ‘philosophical genius’.<sup>42</sup> This common link further strengthens the view that Peel’s measures did not radically differ from those proposed by Mackintosh and his associates and any differences were as Peel observed ‘only a matter of degree’.<sup>43</sup>

Whilst many observers, at the time, may have hoped that Peel would introduce radical reforms, he stated emphatically that he ‘was desirous of proceeding gradually in the course of improvement and to avoid as much as possible the use of rash experiments.’<sup>44</sup> He eschewed, for example, the proposals formulated by the philosophers Beccaria and Bentham for codification of the criminal law in an attempt to make it more certain.<sup>45</sup> One reason for Peel’s reluctance may have been the fact that codification of the law was primarily associated with the Penal Code of 1810 in Napoleonic France and adopting French political ideas, after protracted war with them,

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<sup>40</sup> F. Bacon, *The Works of Francis Bacon*, J. Spedding, *et al* (eds), 15 volumes (London, 1857-74), volume 8, p. 339.

<sup>41</sup> B. Montagu, *The Works of Francis Bacon: Lord Chancellor* (London, 1826-34).

<sup>42</sup> Mackintosh, *Miscellaneous Works*, p. 147.

<sup>43</sup> HC Parliamentary Debates, 21 May 1823, 2<sup>nd</sup> series, 9, col. 421.

<sup>44</sup> HC Parliamentary Debate, 22 February 1827, 2<sup>nd</sup> series, 16, col. 633.

<sup>45</sup> C. Beccaria, *On Crimes and Punishments*, R. Bellamy (ed.) (Cambridge, 1995).

would have been politically counter-productive. Moreover, the Penal Code of 1810 contained many inconsistencies and omissions and its fundamental objective of certainty proved unworkable in practice and amendments had to be introduced within seven years.<sup>46</sup> In Gash's view, Romilly and other reformers tried to take the government and legal authorities by storm but with little success.<sup>47</sup> Gatrell's view that 'the main legal structures of the *ancien régime* were safe in Peel's hands' was certainly true but they were also safe in the hands of the Whig reformers.<sup>48</sup> It is the consensus between the two sides of the political divide which will now be examined, demonstrating that drawing artificial distinctions between Whigs and Tories on penal reform does not reflect, as Hilton observed, the reality of the situation.

### **Dispelling the myth of Tory/Whig reforms**

The reform of the criminal law in general did not attract sustained public debate during the 1820s but the mitigation of the capital statutes relating to forgery continued to excite public clamour for reform. The Forgery Mitigation Bill of 1821 had failed to pass through parliament due to the entrenched and reactionary opinions in the House of Lords.<sup>49</sup> It was not until April 1830 that Peel presented his proposed reforms on the punishment for forgery to the House of Commons. Whilst the reforms were welcomed by both sides of the House, many of the Whig members felt that they did not go far enough in mitigating them.

One of the most vociferous Whig members was Thomas Barrett Lennard, MP for Maldon in Essex and an associate of Mackintosh. He had long campaigned for the punishment for forgery to be ameliorated and had informed the House in March 1830 that he was prepared to introduce a bill if the government delayed in taking action. In the event, Peel's bill was presented the following month and he demurred to the government measures.<sup>50</sup> Barrett Lennard complimented Peel on his measures but wished that he had completely removed the death penalty from all crimes relating to fraud and forgery. He concluded his speech with the observation that the country was indebted to Peel for 'relieving the question of the mitigation of the penal code from

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<sup>46</sup> [http://www.napoleon-series.org/research/government/france/penalcode/c\\_penalcode3b.html](http://www.napoleon-series.org/research/government/france/penalcode/c_penalcode3b.html) [accessed 21 February 2014]; Gash, *Mr Secretary Peel*, p. 340.

<sup>47</sup> Gash, *Mr Secretary Peel*, p. 330.

<sup>48</sup> Gatrell, *The Hanging Tree*, p. 568.

<sup>49</sup> HC Parliamentary Debates, 25 May 1821, 2nd series, 5, cols. 999-1001.

<sup>50</sup> HC Parliamentary Debates, 1 April 1830, 2<sup>nd</sup> series, 23, cols. 1176-88.

the odium of being considered a party question. The Right Hon. Gentleman had the high credit of having destroyed all such prejudices.’<sup>51</sup>

Lennard’s comments illustrate that there was little difference in the minds of Peel’s contemporaries and political opponents on the question of penal reform. It was because of the consensus between the Tories and Whigs in the 1820s and the agreement to continue with parliamentary bills, when out of office, that the smooth transition in the reform of the capital statutes occurred. Attaching political labels to the men who occupied the Home Office during the 1820s and 1830s, does little to understand how the criminal law was updated in a piecemeal manner to reflect the changing social and economic circumstances in these decades.

Peel’s appointment to the Home Office in January 1822 was intended by the Prime Minister, Lord Liverpool, to loosen the grip of the ultra right wing faction in his government. Peel’s predecessor, Viscount Sidmouth, had promoted a draconian policy designed to curb the civil unrest in the country in the seven years following the defeat of Napoleon at the Battle of Waterloo in 1815.<sup>52</sup> After the massacre on St Peter’s Fields in Manchester in 1819, Sidmouth introduced the repressive Six Acts which, *inter alia*, banned political assemblies and increased taxes on political pamphlets.<sup>53</sup> Whilst liberals condemned the Acts as an attack on the civil liberties of citizens, the government viewed them as a temporary measure in reaction to discontent in the manufacturing districts of the country where there was inadequate and ineffective civil power. Sidmouth’s tenure at the Home Office, which he had occupied since 1812, was characterised by his use of spies who infiltrated radical groups in order to report back on possible disturbances and civil unrest.<sup>54</sup> His fears were realised when Arthur Thistlewood and his associates were arrested and convicted of treason for planning to assassinate the Cabinet in 1820 in what became known as ‘the Cato Street conspiracy’.<sup>55</sup>

Whilst these repressive measures dominated Sidmouth’s later stewardship of the Home Office, he did attempt to introduce one change into the administration of the

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<sup>51</sup> Ibid col. 1186.

<sup>52</sup> P. Ziegler, *Addington: A life of Henry Addington, First Viscount Sidmouth* (London, 2013).

<sup>53</sup> The Six Acts (60 Geo. III and I Geo. IV c.1, c.2, c.4, c.6, c.8, c. 9).

<sup>54</sup> E. Baines, *History of the Reign of George III*, 4 volumes (Leeds, 1823), volume 4, pp. 72-90.

<sup>55</sup> J. Stanhope, *The Cato Street Conspiracy* (London, 1962).



criminal law. The Gaols Act 1823 was initially promoted by William Courtenay MP with the consent of Sidmouth.<sup>56</sup> Thus the first tentative step in establishing centralised responsibility for prisons was taken during the tenure of Sidmouth but brought to fruition under Peel. This continuation of bills from successive Home Secretaries, both Tory and Whig, carried on throughout the decade.

In examining Peel's criminal law reforms and recommendations for the Royal Prerogative of mercy, little attention has been paid by historians to the period of nearly nine months when he was out of office between April 1827 and January 1828. During this period, the office of Home Secretary was filled by the Tory, William Sturges Bourne for just over two months and the third Marquess of Lansdowne, a Whig, for the remainder of the time.<sup>57</sup> Their measures for reform of the penal system will be examined in order to contextualise Peel's actions. The question to be addressed is what radical changes, if any, emanated from the Home Office in respect of the criminal law by the appointment of a Whig to the post of Home Secretary? Before that question can be examined, it is first necessary to set out the circumstances which led to the appointments of Sturges Bourne and Lansdowne.

In February 1827, the premiership of Lord Liverpool, which had lasted for nearly 15 years, came to a sudden end.<sup>58</sup> On the morning of 17 February, Liverpool suffered a stroke which left his right side paralysed and his speech impaired. On hearing the news of Liverpool's illness, a ministerial meeting was convened and Peel was delegated with the task of informing George IV. George was convalescing from a severe bout of gout at Brighton and Peel travelled down to break the news. George wished to appoint a replacement as soon as possible but Peel advised him to wait until he had had an opportunity to consult with George Canning, the Leader of the House, who was also recovering from illness. Peel and Canning resolved to do nothing immediately as there was still hope that Liverpool might make a full recovery and agreed to carry on government business in the Commons as usual. The problem was that there was no

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<sup>56</sup> T. Jenkins, 'Courtenay, William (1777-1859)', in *HoP*.

<sup>57</sup> Henry Petty Fitzmaurice, third Marquess of Lansdowne is referred to by various titles including the Marquis of Lansdowne and Lord Lansdowne. For consistency, he will hereafter be referred to as Lansdowne in this thesis.

<sup>58</sup> For a detailed account of the events concerning the end of Lord Liverpool's administration see Gash, *Mr Secretary Peel*, pp. 426-48; W. Hinde, *The Life of the Rt Hon. George Canning* (London, 1973); H. Temperley (ed.), *Unpublished Diary and Political Sketches of Princess Lieven* (London, 1925), pp. 107, 116-7.

obvious successor to Liverpool and so the government carried on for the next few weeks until it was evident that Liverpool would not return to public life.

At the end of March 1827, matters came to a head when Liverpool formally resigned his office. The position of Prime Minister was in the personal remit of the King and he was faced with a dilemma.<sup>59</sup> The three leading candidates held differing views on the issue of Catholic emancipation; Canning was pro emancipation whilst the Duke of Wellington and Peel were fervently against it. The possibility of any of them forming a government was remote unless they could rely on support from unlikely sources. In late February Canning had been in negotiations with the Whig supporters of Lansdowne and they were prepared to support his government even though he was not in a position to immediately advance the cause of Catholic emancipation. When offered the premiership by the Monarch, it was to these Whig supporters that Canning turned, due to the resignation of so many members of the Liverpool administration. Peel had felt unable to serve in Canning's government because of his position on Catholic emancipation and had tendered his resignation in April 1827.

In a letter to Peel on his departure, Canning expressed the view that he understood that Peel was unable to continue as Home Secretary as the Catholic question was 'a point of honour'. Peel took exception to this turn of phrase with its implications that he was acting out of pique and pointed out to Canning that the motive for his resignation was based on 'public principle'.<sup>60</sup> With Peel determined to leave the Home Office, Canning was frustrated as his preferred candidate as Home Secretary, Lansdowne, was not prepared to take up office immediately as he had reservations over the exclusively Protestant appointments in the Irish administration. As a compromise, the Tory William Sturges Bourne was appointed until the end of the session. Sturges Bourne had been a great friend and associate of Canning for more than 20 years but was reluctant to take on the post, advising him that he hoped that 'a better arrangement may present itself'.<sup>61</sup> Canning was not to be deterred and with his considerable political acumen persuaded Sturges Bourne that his administration depended upon his

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<sup>59</sup> S.R. Lushington. to Sir William Knighton 26 March 1827, A. Aspinall (ed.), *The Letters of George IV*, 3 volumes (London, 1938).

<sup>60</sup> *Peel's Papers*, 40311 fols. 308, 311.

<sup>61</sup> Aspinall, *Formation of Canning's Ministry*, p.186.

taking on the Home Office for two months. In the face of such pressure, Sturges Bourne capitulated and accepted the Great Seals of office.

Sturges Bourne agreed that Peel should continue with his legislative reforms and endorsed his bills relating to the abolition of benefit of clergy and increase in punishment for second offences. This is hardly surprising given that they were both Tories and also the weakness of Sturges Bourne's position. On his resignation in July 1827, Sturges Bourne was appointed the First Commissioner for Woods and Forests and retained his Cabinet seat.<sup>62</sup> So how, if at all, did the appointment of the Whig Lansdowne change the policies and direction of the measures undertaken by the Home Office in respect of penal reform?

In 1993, the historian Jonathan Parry remarked of Lansdowne that 'no man served so long and left so little mark' and yet he had held, albeit briefly in both cases, two of the great Offices of State namely Foreign Secretary and Home Secretary.<sup>63</sup> Lansdowne's upbringing and background are important factors in analysing the measures he proposed as Home Secretary.

Lansdowne was born into a staunchly Whig family. His father, the Earl of Shelburne was a wealthy Irish landowner who had served as Prime Minister from 1782-3 and had appointed William Pitt the Younger as his Chancellor of the Exchequer. He was an advocate of numerous reforms especially in the areas of free trade, religious toleration and parliamentary reform. To pursue these aims, he gathered around him at the family seat of Bowood House, many members of the Whig intellectual elite including Jeremy Bentham and Samuel Romilly.<sup>64</sup> In 1786 Shelburne was appointed Marquess of Lansdowne in recognition of his negotiating skills in securing peace with America after the War of Independence in 1776.

In the same year, he employed Pierre Etienne Louis Dumont to reorganise his library at Bowood House and to act as mentor and travel companion to his second son, Lord Henry Petty, the future Home Secretary. Dumont was a Swiss born pastor; an ardent promoter of the utilitarian ideas on criminal reform formulated by Bentham and was

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<sup>62</sup> D Eastwood, 'Bourne, William Sturges (1769-1840)' in *OBND*.

<sup>63</sup> J. Parry, *The Rise and Fall of Liberal Government in Victorian Britain* (New Haven, 1993), p. 327; C.J. Wright, 'Fitzmaurice, Henry Petty – third Marquess of Lansdowne' (1780-1863) in *ODNB*.

<sup>64</sup> N. Aston and C. Campbell Orr, (eds), *An Enlightenment Statesman in Whig Britain* (London, 2011).

later the editor of Bentham's works.<sup>65</sup> The first Marquess of Lansdowne was determined that his second son should be exposed to the more enlightened views of the Edinburgh reformers. He insisted that after leaving Westminster school, Petty should attend university in Edinburgh rather than follow the traditional route to Oxford, although Petty did complete his university education at Cambridge. Raised in this liberal environment, it was as a Whig that Petty took his seat as MP for Calne Wiltshire in 1802 at the age of 22. The constituency of Calne returned two seats to the House of Commons and was within the patronage of his father.<sup>66</sup> On the death of Pitt the Younger in 1806, Petty was elected to serve as an MP for Cambridge University, Pitt's former seat, and appointed Chancellor of Exchequer in the Grenville national unity government. The government was short lived and collapsed within 13 months over the question of Catholic emancipation.<sup>67</sup>

Over the next three years, Petty's name was frequently suggested as a potential leader of the Whigs but he was obliged to give up his seat in the Commons when he succeeded his half brother as third Marquess of Lansdowne in 1809 and took his seat in the House of Lords. He would remain on the Opposition benches in the Lords until 1827.<sup>68</sup> But in these intervening years, he built up a coterie of radical friends and associates at Bowood House, as his father had done 20 years earlier.

One of these friends was Mackintosh, who convalesced at Bowood for a month in 1820.<sup>69</sup> Lansdowne had been a member of the Select Committee on reform of the criminal law in 1819, of which Mackintosh was Chairman. The focus of Lansdowne's concerns was the severity of the punishments for forgery. In concluding the debate in the House of Lords on the third reading of Mackintosh's bill, Lansdowne observed 'the more the punishment of death was confined to cases in which violence was added to the crime, the less frequently would be the instances in which violence would take place.'<sup>70</sup> This remark was evidence of Lansdowne's long held opinion that for the

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<sup>65</sup> C. Blamires, 'Dumont, Pierre-Etienne-Louis (1759-1829),' in *ODNB*.

<sup>66</sup> The lack of choice of representatives for the seats caused some inhabitants to challenge the influence of Lansdowne during the 1820s. In 1826 Cobbett called Calne a 'vile rotten borough', G.D.H. and M. Cole (eds), *Cobbett's Rural Rides*, 3 volumes (London, 1930), volume ii, pp. 405-6.

<sup>67</sup> Grenville's government is often referred to as the 'Ministry of All Talents' as it was made up of both Whig and Tory members.

<sup>68</sup> Wright, 'Fitzmaurice, Henry Petty – third Marquess of Lansdowne' (1780-1863)' in *ODNB*.

<sup>69</sup> *Ibid*.

<sup>70</sup> HL Parliamentary Debates, 18 July 1820, 2<sup>nd</sup> series, 2, col. 528.

criminal law to be more effective and a real deterrent, capital punishment should only be used when the offence involved violence.

Some ten years later, on June 23 1830, on the eve of the House of Lords debate on the Forgery Consolidation Bill, promoted by Peel, Lansdowne wrote to James Harmer, a leading Old Bailey barrister who had represented the forger Henry Fauntleroy.<sup>71</sup> He wished to know whether Harmer's view, that forgery should no longer be a capital offence, had changed over the last ten years. Referring to the 1819 committee, Lansdowne observed 'there was no witness whose testimony produced a stronger impression on my mind than yours'.<sup>72</sup> Harmer replied that his opinion had not changed and had, if possible, hardened over the intervening years. Yet when Lansdowne had the opportunity, three years earlier, to reform the laws on forgery, he did not seize it. He chose to propose reforms to other offences rather than make radical changes to the punishment for forgery.

Only a month after Lansdowne took up office in 1827, Canning died and was succeeded as Prime Minister by the Tory Frederick Robinson who had been elevated to the Lords with the title Viscount Goderich.<sup>73</sup> Lansdowne was asked to remain in office by the King in order to prevent a similar political crisis as had occurred with Liverpool's illness. If Lansdowne anticipated that the Goderich government would be short lived then he had more reason to press forward his proposed reforms to mitigate the punishment of forgery. He might have resurrected the Forgery Mitigation Bill of 1821 but chose to focus on reform of offences against the person. Martin Weiner has viewed these measures as signalling a major transition in the reform of the criminal law; illustrating that the government was no longer primarily concerned only with the consequences of property crime but was determined to introduce measures which would increase the penalties for violent crime. He goes so far as to say that it was 'one chapter in English criminal justice history closing and another opening.'<sup>74</sup>

Whilst it could be construed as a watershed in government policy towards the reform of the criminal law and offences against the person in particular, it was hardly a

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<sup>71</sup> See Chapter Two p. 25 *supra*.

<sup>72</sup> Anon, *The Punishment of Death: A Selection of Articles from the Morning Herald with Notes* (London, 1836).

<sup>73</sup> D.R. Fisher, 'Robinson, Frederick John (1782-1859)' in *HoP*.

<sup>74</sup> M. Weiner, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (Cambridge, 2004), p. 27.

landmark bill. The changes proposed by Lansdowne made only minor alterations to the *status quo*. Weiner's view that it was a step change in government policy is significant in one regard, however, in that the bill contained several clauses which ameliorated offences which were committed primarily by women and gave greater protection to female victims of crime. It could be cited as the first very small green shoot of a more enlightened policy in respect of women who become entangled with the criminal law. The offence of petty treason which carried the mandatory punishment of death by burning was abolished.<sup>75</sup> Other clauses in the Bill included making the concealment of a bastard child a substantive offence rather than combining it with an indictment for murder. The abduction of any girl under sixteen, whether or not she had any interest in property, was also made a criminal offence.<sup>76</sup>

Whilst these alterations marked the beginning of reform of offences against the person, radical and far reaching changes would not come to fruition until the passing of the Offences against the Person Act 1861.<sup>77</sup> This confirms Dicey's view, considered earlier, that substantial changes in English law were rarely implemented quickly.<sup>78</sup> As with Peel's reforms in relation to offences against property, Lansdowne's bill was the starting point for a rethinking of offences against the person which would occur over the next thirty years. Lansdowne gave no reasons why he chose to focus his efforts on the reform of offences against the person when he had lobbied for nearly ten years to mitigate the penalties for forgery. Perhaps, he chose these types of offences to distinguish his tenure at the Home Office from that of Peel and to underline his more liberal policies. A more pragmatic view could be cited; he did not have the appetite or skill to struggle with the complexities and vast expanse of laws relating to the offences of forgery and fraud in a government of which he was a reluctant participant.

In January 1828 Viscount Goderich resigned as Prime Minister and Lansdowne stepped down as Home Secretary to be replaced by Peel who resumed office under the premiership of the Duke of Wellington. The bill to amend the offences against the person did not fail but was promoted by Lansdowne through the House of Lords. On

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<sup>75</sup>(9 Geo. IV c. 31 cl. 2); murder of a husband by his wife constituted the crime of petty treason. For a detailed examination of the provisions of the Act see *The Law Magazine or Quarterly Review of Jurisprudence*, 1 (London, 2<sup>nd</sup> edn, 1830), pp. 129-41.

<sup>76</sup> Ibid.

<sup>77</sup> (24 & 25 Vict. 1861 c. 100).

<sup>78</sup> Chapter Three p. 37 *supra*.

its second reading in March 1828, Lansdowne acknowledged that he had been ‘induced to proceed in his objective’ with encouragement from the Home Office and confirmed that he had been in direct communication with it.<sup>79</sup> A month earlier, Henry Brougham, the Whig M.P. and lawyer had given a lengthy address, amounting to more than 60 pages, to the House of Commons on the defects in the laws of England. His speech had been prepared with the advice of Bentham and covered all aspects of both the civil and criminal laws.<sup>80</sup> In response, Peel confirmed that he had no intention of abandoning his reforms and confirmed that Lansdowne’s bill would be submitted during the present session of parliament. He claimed that law reform was now a subject that all members, irrespective of their party allegiances, were engaged in. Lansdowne’s bill was debated in the House of Commons in May 1828 and, subject to some minor alterations at the committee stage, obtained Royal Assent on June 28 1828.

During Peel’s last two years at the Home Office, he continued with reforms in the criminal law and its administration. Returning to reform of property offences, he tackled the difficult and complicated issues of forgery and coining. When introducing the Forgery Consolidation Bill into the House of Commons in 1830, he stated that he was reluctant to abolish the death penalty for all types of forgery as it was a crime with ‘a peculiar and exclusive character’ usually committed by persons with ‘ability and information’.<sup>81</sup> He considered that transportation and imprisonment were unlikely to act as a sufficient deterrent.<sup>82</sup>

As with his earlier measures, Peel had taken advice on how the reforms should proceed and had concluded that retaining the death penalty for certain forgeries, for example the forging of wills, would achieve his objectives of certainty and deterrence. During the passage of the bill, Mackintosh introduced an amendment to abolish capital punishment for all forgeries but it was initially lost. At its third reading the same amendment was proposed by the Whig MP, Thomas Spring Rice, and was carried

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<sup>79</sup> HL Parliamentary Debates, 18 March 1828, 2<sup>nd</sup> series, 18, col. 1171.

<sup>80</sup> H.L. Brougham, *Speeches of Henry Lord Brougham*, 2 volumes (Edinburgh, 1838), volume 2, pp. 287-486.

<sup>81</sup> HC Parliamentary Debates, 01 April 1830, 2<sup>nd</sup> series, 23, cols. 1176-88.

<sup>82</sup> Ibid.

against the government by a small majority. The amendment was reversed in the House of Lords but the reality was that there were no further executions for forgery.<sup>83</sup>

Although Peel's bill technically survived intact, with the assistance of the House of Lords, he nevertheless deemed it a defeat considering that members would 'repent the decision to which they had just come.'<sup>84</sup> Gatrell has contended that this signalled the start of the dismantling of Peel's 'statutory edifice' within a few years but this is to misrepresent the reality.<sup>85</sup> The nature of English law was that it developed incrementally and evolved to meet the changing conditions in society. Far from being 'dismantled' Peel's reforms should be acknowledged as the catalyst for the amelioration of capital offences which would continue piecemeal thereafter.

## Conclusions

Peel's objective in repealing the number of capital offences was to make the criminal justice system more effective and consistent. His reforms were cautious but in essence they varied little from the changes proposed by the more liberal Whigs such as Mackintosh. In reality only Bentham was calling for a codification of the penal system. The nature of English law, with offences spread throughout hundreds of statutes and common law decisions, meant that changes were incremental and developed over time. Peel believed that sweeping changes would excite a 'strong prejudice' in the country against the measures which were intended for the public good.<sup>86</sup> His cautious approach was adopted by his successors in the Home Office; drawing artificial distinctions between the policies of the Tories and Whigs during this period fails to understand the nature of reform in English criminal law.

In reducing the number of capital offences for which the death penalty was never in practice inflicted, Peel's aim was to introduce punishments which were more proportionate to the crime without compromising his duty to maintain law and order or lessen their deterrence. The aim of the reforms to the criminal law introduced by successive Home Secretaries over the 1820s and 1830s was to strip away mandatory capital sentences for less serious offences but from the records, it appears that these

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<sup>83</sup> T. F. Buxton, *Memoirs of Sir Thomas Fowell Buxton Bart.* (reprint London, 2013), pp. 112-3.

<sup>84</sup> *Speeches*, volume ii, p.181.

<sup>85</sup> Gatrell, *The Hanging Tree*, p. 583.

<sup>86</sup> *Speeches*, volume i, p. 456.



reforms did little to stem the flow of petitions for the Royal Prerogative of mercy. The question to be addressed is how did Peel deal with these petitions, which had become a substantial part of his portfolio, and what measures did he introduce to streamline the process? Before these issues can be addressed, it is necessary to examine the jurisprudential and constitutional meaning of mercy in this context and analyse how the Royal Prerogative of mercy developed over the centuries. Clarity on these issues is a prerequisite to understanding the basis of Peel's recommendations for the exercise of the Royal Prerogative of mercy.

## Chapter Five:

### The Jurisprudential nature of mercy, the Royal Prerogative of mercy and Peel.

#### Introduction

‘Petitioners found little mercy in Peel...’ so wrote Gatrell in *The Hanging Tree* in what is still seen as the leading account on Peel’s recommendations for the exercise of the Royal Prerogative of mercy.<sup>1</sup> The difficulty with this statement is ascertaining what is being considered; is it a subjective view of Peel’s humanitarian credentials or an objective analysis of his actions as Home Secretary in recommending pardons under the Royal Prerogative of mercy? In order to avoid ambiguity and confusion, this chapter will focus on three issues which require clarification.

Initially it will consider the significance of the technical language used by Peel and his contemporaries. It was notable that Peel never used the word ‘pardon’ as a verb. He understood that the power to pardon was vested in the Monarch and his annotations on the petitions reflected this. For example when a capital sentence was commuted by the trial judge or King in Council, then generally the annotation read ‘sentence commuted to transportation for life. Conditional pardon prepared.’ Thus this chapter will adopt the language used by Peel and Home Office officials to ensure clarity and avoid any misunderstanding of the parameters of the decision-making process.

This insight into Peel’s use of language is particularly important when examining the second issue of the history and meaning of mercy in the context of the Royal Prerogative of mercy. Tracing the history reveals how, over the centuries, the Royal Prerogative of mercy transitioned from a privilege exercised by the Monarch personally to a privilege constrained by constitutional conventions and only exercised on ministerial advice. Finally, the choice of language has many effects including distancing an emotional response from a formal decision or signalling the boundaries of the power or discretion residing in the decision maker. By differentiating between the emotional response of being merciful and recommending clemency under the Royal Prerogative of mercy, it will demonstrate that these two concepts are intrinsically different, even though could both arise in the same set of circumstances.

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<sup>11</sup> Gatrell, *The Hanging Tree*, p. 567.

## Language and the Law

In 1954 H.L.A. Hart, one of the leading legal philosophers of the twentieth century, wrote an article in the *Law Quarterly Review* on the topic of definition and theory in jurisprudence. He was keen to build on a warning issued by Bentham, that legal words ‘demanded a special method of elucidation’ and so must never be taken alone but considered in whole sentences in which they play their characteristic role.<sup>2</sup> This warning is especially important for historians when examining actions taken by politicians based on legal and constitutional doctrines. Every specialism has its own particular shorthand or jargon and misinterpreting the words used can lead to a flawed understanding of the principles involved.

Use of the correct legal terminology and by inference the legal doctrines themselves do not just cause difficulties for historians but also raised issues for Peel’s political contemporaries. The notion of whether a ‘code’ existed in the criminal law in the early nineteenth century has already been examined.<sup>3</sup> It is notable that during the sitting of the Criminal Law Commission (1833-1845), Henry Bellenden Ker, one of the Commissioners, was keen to distinguish between the idea of codifying the criminal law and preparing a digest of existing statutes. He warned against using these terms interchangeably as they were completely different concepts. The aim of a digest was to consolidate all existing statutes into a skeleton into which common law principles could be added whilst a code contained the substantive law in one uniform system.<sup>4</sup> The use of the correct legal terminology was particularly important in the recommendations of the Commission as the government of day in 1835 had no political appetite for a codification of the criminal law to the point that they wanted to ‘steer clear’ of it.<sup>5</sup>

More recently Hilton has written perceptively on Peel’s religious and economic ideologies but his examination of Peel’s penal reforms is less convincing.<sup>6</sup> Hilton

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<sup>2</sup> *L.Q.R.*, 70, 37(1954) reproduced in Lloyd, *Introduction to Jurisprudence* (London, 3<sup>rd</sup> edn, 1972), pp. 59-62.

<sup>3</sup> Chapter Two pp.15-6 supra.

<sup>4</sup> L. Farmer, ‘Reconstructing the English Codification Debate,’ *Law and History Review*, 18 (2000), p. 403; M. Lobban, ‘How Benthamic was the Criminal Law Commission?’, *Law and History Review*, 18 (2000), pp. 427-32.

<sup>5</sup> Lobban, ‘How Benthamic was the Criminal Law Commission?’ p.429.

<sup>6</sup> B. Hilton, *Corn, Cash, Commerce: the Economic Policies of the Tory Government 1815-30* (Oxford, 1977); *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought, 1785-1865* (Oxford, 1985); ‘The Ripening of Robert Peel’ in M. Bentley (ed.), *Public and private doctrine:*

reviewed Peel's contribution to the reform of the criminal law in the light of Gatrell's observations in *The Hanging Tree*.<sup>7</sup> Whilst Hilton was less critical than Gatrell in his assessment of Peel's recommendations for the exercise of the Royal Prerogative of mercy, one phrase neatly sums up the divergent approaches of historians concerning legal and constitutional issues and lawyers considering the history of the law. Hilton acknowledged that many convicts were reprieved by the King in Council whilst Peel was Home Secretary but asserted that 'in marginal cases, Peel was almost always to be found on the side of severity'.<sup>8</sup> It was unfortunate that Hilton did not give any indication of what he meant by the term 'marginal cases' nor any examples of Peel's 'severity' so it is difficult to understand how he arrived at his conclusions. He may have been referring to cases where the punishment appeared harsh and disproportionate when the details of the offence and the prisoner's circumstances were taken into account, but in a legal context it is a term too vague to be recognisable. Moreover, as there are no surviving minutes of the meetings of the King in Council, it can only be a matter of conjecture of what is meant by marginal cases. There were no majority verdicts in the English courts at this time though there was in Scotland, where the fifteen member jury had the further option of bringing in a verdict of non proven.<sup>9</sup>

The nearest to what might be objectively construed as 'marginal case' in a legal context occurred in the prosecution of Duncan Clark. He was convicted at the Circuit Court in Perth in 1826 of infanticide of the newborn daughter of Christine Cameron and sentenced to death. Six petitions for mercy were submitted to Peel including two from the jurors and a petition signed by more than 900 residents of Perth. The grounds for clemency pleaded in the petitions included, *inter alia*, doubts about the expert medical evidence, which was contradictory, and the time and circumstances surrounding the infant's death. Contrary to Hilton's view on his severity in marginal cases, Peel recommended that the sentence should be commuted to transportation for life and the annotations on the back sheet of the petition recited his reasons. These

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*Essays in British History presented to Maurice Cowling* (Cambridge, 1993), pp. 63-84; *A Mad, Bad and Dangerous People?*.

<sup>7</sup> Hilton, 'The Gallows and Mr Peel,' pp. 88-112.

<sup>8</sup> *Ibid*, p. 92.

<sup>9</sup> D.M. Walker, *The Scottish Legal System. An Introduction to the Study of Scots Law* (Edinburgh, 2001).

were the circumstantial nature of the evidence and the narrowness of the verdict namely an eight/ seven split.<sup>10</sup>

If Peel was always on the side of severity, then it is also very difficult to reconcile the cases of Henry Dunn and John Powell. It is rare that the circumstances of two crimes committed within a year by different offenders are so similar that a direct comparison of their punishment can be made. In September 1826, Henry Dunn was capitally convicted at the Old Bailey of stealing from his employers, Messrs. George Drake Sewell and Thomas Cross, drapers of Westminster.<sup>11</sup> Dunn had moved from Hull to London to find work and had been induced to steal more than £100 worth of materials by Martha Smith, ‘an abandoned woman’ with whom he was infatuated. She had then pawned the goods and kept the proceeds. Dunn maintained that he had no intention to steal and would pay for the materials out of his wages at the end of the quarter, even though they were insufficient to discharge the debt. He was convicted but the case was referred to the twelve judges on a point of law. The reason for the referral was not disclosed but presumably turned on the question of whether Dunn had sufficient *mens rea* (dishonest intent) to constitute the offence. Three months later in December 1826, the judges confirmed that the conviction was good in law but recited no details, as was the practice.<sup>12</sup> Dunn remained in the condemned cells in Newgate during this period whilst many petitions were lodged on his behalf pleading for the sentence to be commuted. This was an occasion when Peel found grounds to commute the sentence but, unlike on other occasions, did not annotate the reasons. Dunn was transported to New South Wales.<sup>13</sup>

Almost exactly a year later when Peel had been succeeded at the Home Office by Lansdowne, Powell was indicted for a like offence.<sup>14</sup> He had taken Dunn’s place as shop man at Sewell and Cross and had also stolen more than £100 worth of materials. He had kept the materials hidden in a locked building and sold them to maintain a lavish lifestyle. The only distinguishing factor between the cases was that Powell was not duped into stealing the goods by a third party but stole them for his own purposes. Irrespective of the motive for the theft, both men were convicted of the same offence.

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<sup>10</sup> HO17/11/ Am 4 [Scot].

<sup>11</sup> *OBP*, 14 September 1826, Henry Dunn (t18260914-53); HO17/25/ Cm 12.

<sup>12</sup> HO6/11.

<sup>13</sup> *Ibid*.

<sup>14</sup> *OBP*, 13 September 1827, John Powell (t18270913-14); HO17/93/Rm12; HO6/12.

The King in Council found no favourable circumstances in Powell's favour and he was left for execution.

Gatrell's general critique of Peel was that he came to dominate meetings of the King in Council, and that he used this dominant position to reduce the chances of a petition for mercy being recommended.<sup>15</sup> Gatrell does not give any specific evidence of this, and these cases cast doubt on this claim as well as the view of Hilton that Peel leaned towards severity. Dunn and Powell were convicted of the same offence and yet it was Peel who recommended mercy and not the Whig Lansdowne. There was no violence used in Powell's case and Lansdowne might have used the decision in Dunn's case to influence the Council to commute Powell's sentence in order to ensure consistency in the Council's decision making.<sup>16</sup> It was apparent that this did not occur.

Proponents of capital punishment might argue that the sentence on Powell was the corollary of the commuted sentence on Dunn as the Council did not consider transportation for life as a sufficient deterrent against the future commission of a like offence. However, this argument was one which did not hold sway with Lansdowne who, throughout the 1820s when out of office, continually argued that the imposition of the death sentence for non violent offences was ineffectual, did not stem the increase in crime but merely hindered or even prevented prosecutions being instituted.<sup>17</sup> From this case an inference can be drawn that even if Peel did dominate proceedings at the King in Council this would not have meant that petitioners were less likely to be recommended for clemency.<sup>18</sup>

In analysing the recommendations for the exercise of the Royal Prerogative of mercy made by Peel, the starting point has to be a clarification of the meaning of mercy in this context. There are many different dictionary meanings of the word mercy but the most common usage evokes compassion or forgiveness and can be dispensed by anyone without constraint.<sup>19</sup> However, it was not mercy *per se* that is being recommended by Peel but the exercise of the Royal Prerogative of mercy. By 1822 in

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<sup>15</sup> Gatrell, *The Hanging Tree*, p. 567

<sup>16</sup> For Lansdowne's view on death sentences in respect of non violent offences see Chapter Four p. 69 *supra*.

<sup>17</sup> *Ibid*.

<sup>18</sup> Gatrell, *The Hanging Tree*, p 567.

<sup>19</sup> *Oxford English Dictionary Online* (Oxford, 2016), < <http://www.oed.com/view/Entry/116713>> [accessed 12 January 2013].

criminal cases, this was an action taken by the Crown to commute a capital sentence or remit a term of transportation, imprisonment or a fine by means of a pardon. Once a guilty verdict was returned, the victim could informally forgive the prisoner but had no right to interfere with the exercise of the Royal Prerogative of mercy.

The Home Secretary was the member of the Executive responsible for carrying out the punishments passed by courts of competent jurisdiction. So in legal terms, Peel condemned no prisoner to the gallows. Mercy, in this particular context which resulted in a pardon, should not be confused with compassion or sympathy for the prisoner. The Royal Prerogative of mercy and the notion of being merciful are different concepts which can co-exist in the same set of circumstances but need to be carefully analysed in context. Having highlighted the importance of using the correct language to distinguish between mercy and the Royal Prerogative of mercy, the next questions to be addressed are how the Royal Prerogative of mercy developed and its scope when Peel took up office in 1822.

### **Historical development and parameters of the Royal Prerogative of mercy**

Until the establishment of the Court of Criminal Appeal in 1907, convicted prisoners had no statutory right of appeal against either conviction or sentence.<sup>20</sup> Just as equity had developed alongside the common law to remedy the defects in the Forms of Actions in civil matters, the exercise of the Royal Prerogative of mercy was invoked where apparent injustice had arisen in criminal cases. It was part of the Coronation Oath in which the Monarch promised to temper justice with mercy.<sup>21</sup> The grant of a royal pardon was a way in which the Monarch demonstrated his benevolence to his subjects as well as strengthening the links of loyalty between the Crown and his subjects. During the reign of Richard II in the fourteenth century, Good Friday pardons were granted to all criminals, emphasising the forgiveness displayed by Christ to the robbers crucified with him and reinforcing the Crown's 'divine right' to rule.<sup>22</sup>

One of the consequences of the Glorious Revolution in 1688 was that a distinction was drawn between the Monarch's exercise of powers in a personal capacity and as part of

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<sup>20</sup> Criminal Appeal Act 1907 (7 Edw. VII c. 23).

<sup>21</sup> Coronation Oath Act 1688 (1 Will & Mary c.6) as amended.

<sup>22</sup> H. Lacey, *Royal Pardon, Access to Mercy in 14<sup>th</sup> Century England* (York, 2009).

the embodiment of the State.<sup>23</sup> With the expansion and development of centralised government, most of the prerogative powers devolved on the appropriate Secretary of State who either exercised them in their own right or advised the Crown on the course to be adopted. By the middle of the eighteenth century, the power to recommend the Royal Prerogative of mercy rested with the Home Secretary though the nature and parameters of the power were imprecise. In 1874 a Home Office memorandum acceded that there were no 'fixed rules or forms of procedure' in the exercise of the Royal Prerogative of mercy.<sup>24</sup> In 1907, Herbert Gladstone, the Home Secretary, confirmed this view stating that it was a question of policy in each case and it 'would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy'.<sup>25</sup> The policy remained unchanged when reviewed by the government over 100 years later.<sup>26</sup>

Both Gladstone's statement and the review failed to acknowledge that there were instances when clemency was invariably granted and had become so established that there was an argument for asserting that they had become fixed conventions. One of the issues here is whether over the centuries, grants of the Royal Prerogative of mercy had become, in particular circumstances, 'routinized'. As the Monarch was in a unique position and his authority rested in the divine right of kings to rule, his ability to grant mercy was accepted by his subjects as inviolable and outside the legal framework. An analogy here can be made with Max Weber's charisma theory where an individual's acknowledged position is deemed as a valid basis for their participation in an extraordinary course of action which over time becomes institutionalised.<sup>27</sup> Research of more than 5,000 cases submitted to Peel has identified specific factual situations where clemency was usually granted. These conventions, set out below, did not give the prisoner any right to relief in law but elevated his hopes to an expectation that the Royal Prerogative of mercy would be exercised in his favour.

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<sup>23</sup> G. M. Trevelyan *The English Revolution 1688-9* (New York, 1939).

<sup>24</sup> HO 45/93/ fol. 62

<sup>25</sup> HC Parliamentary Debates, 11 April 1907, 4<sup>th</sup> series, col. 366.

<sup>26</sup> Ministry of Justice, *The Governance of Britain, Review of the Executive Royal Prerogative Powers* (London, 2009), pp.15-8.

<sup>27</sup> M. Weber, *Theory of Social and Economic Organisation*, A.M. Henderson and T. Parsons (trans.) (New York, 1947), Chapter 3.



i. Date error in the release of a prisoner

In the case of George Gardiner convicted at Somerset Summer Assizes 1829 of theft and sentenced to three months' imprisonment and a whipping, the visiting magistrates sought the Home Office's advice on whether the whipping could be remitted as the surgeon of the gaol had declared him unfit for the punishment. They advised that Gardiner had been incarcerated beyond the term of his punishment. Samuel March Phillips, one of Peel's under-secretaries at the Home Office, replied, in robust terms, that the prisoner should be released immediately. He then sent a memo to Peel advising him of the same. A pencil annotation (in Peel's hand) on the bottom of the memo states, 'Quite right'.<sup>28</sup>

ii. Error on the indictment

Where the indictment had been framed in error then any conviction would be set aside. John Puddifoot was convicted at the Old Bailey in January 1830 of stealing a sheep.<sup>29</sup> The case turned on the meaning of the word sheep as the statute under which he was indicted distinguished between 'ewes' and 'sheep' and it was proved that Puddifoot had actually stolen a ewe. The indictment only mentioned 'a sheep' and therefore was deemed bad in law and Puddifoot was granted a free pardon. Peel's annotation reveals that he was concerned about this course of action but was constrained to act in accordance with accepted practice. 'I suppose there is no alternative but to recommend a free pardon.'<sup>30</sup>

iii. The prisoner turned King's evidence

In respect of prisoners who turned King's evidence, clemency was generally recommended. The infamous 'Radlett' murder case of 1823 excited great interest in the press and the country.<sup>31</sup> Weare, a seemingly respectable solicitor, was murdered after being embroiled in an argument over a gambling debt with Thomas Thurtell, a wealthy young man and compulsive gambler. Thurtell was charged with Weare's murder and his two associates, Joseph Hunt and William Probert, with aiding and abetting the murder. Probert was acquitted but both Thurtell and Hunt were capitally

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<sup>28</sup> HO17/63/Lo7.

<sup>29</sup> *OBP*, 14 January 1830, John Puddifoot (t18300114-17).

<sup>30</sup> HO 6/15.

<sup>31</sup> See for example *Morning Chronicle* 12 November 1823; *Morning Post* 12 November 1823.

convicted. Hunt subsequently turned King's evidence and divulged to the authorities all the circumstances surrounding the case and his sentence was commuted to transportation for life.<sup>32</sup> Peel wrote to the King advising him why he had recommended this course. He reported that he had been in discussion with the Lord Chancellor, the Attorney General and Mr. Justice Park, the trial judge, and concluded that 'it could not be consistent with policy or justice to permit the law to take its course with respect to Hunt.' The letter is endorsed with the annotation, 'Approved, George.'<sup>33</sup> The case of the forger Samuel Miles which Gatrell highlights, albeit in a different context, also concerned turning King's evidence but this case had the opposite outcome as whilst Miles initially agreed to reveal details of forgery gangs the evidence was never forthcoming.<sup>34</sup>

#### iv. Assisting the authorities in preventing a prison escape or assisting in a rescue

A pardon was generally granted if a prisoner apprised the authorities of a prison escape even when Peel was reluctant to follow this course. William Townsend was convicted of highway robbery at the Old Bailey in October 1822.<sup>35</sup> He had demanded and taken money from a man named Seymour whom Townsend alleged had attempted to 'commit an unnatural act with him' whilst they were travelling in a coach. During 1822, there had been a cluster of similar cases culminating in the scandal surrounding the Bishop of Clogher who was charged with sodomy but skipped bail before his case came to court.<sup>36</sup> His actions were the subject of many cartoons and pamphlets and any person suspected of sodomy was dubbed 'a member of Bishop Joycelyn's Gang'. Viscount Castlereagh, the Foreign Secretary who committed suicide in 1822, was believed to have told the King that he was being blackmailed for 'committing the same offence as the Bishop of Clogher'.<sup>37</sup> Townsend's case was reviewed by the twelve judges and they recommended mercy on the basis that he had disclosed a proposed escape plan from Newgate by other prisoners. In their judgement, the judges recommended a free pardon but hoped that 'a pardon at this time will not afford

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<sup>32</sup> HO 17/1; Box 1 has no additional references.

<sup>33</sup> Ibid.

<sup>34</sup> Gatrell, *The Hanging Tree*, pp. 563-4; Chapter Five p. 115-6 *supra*.

<sup>35</sup> *OBP*, 23 October 1822, William Townsend (t18221023-6); HO6/7.

<sup>36</sup> G.H. Borrow (ed.), *Celebrated Trials and Remarkable Cases of Jurisprudence from the Earliest Records to the Year 1825* (London, 1825), pp. 483-9.

<sup>37</sup> C.Upchurch, 'Politics and the Reporting of Sex between Men in the 1820s', in B Lewis (ed.), *British Queer History: New Approaches and Perspectives* (Manchester, 2013), pp. 17-38.

encouragement to such abominable accusers nor establish a point of law in their favour.’ There is further pencil annotation (in Peel’s writing), ‘This is a most peculiar and guarded answer. I suppose Townsend must be pardoned. I give my reluctant consent.’<sup>38</sup>

As previously mentioned, female prisoners in the Penitentiary who were temporarily housed on the hulks in 1824 were granted pardons for assisting in a rescue of inmates on the *Dromedary* hospital ship.<sup>39</sup>

#### v. ill health or recovery from mental impairment

If a prisoner was suffering a physical illness which was, in the opinion of the surgeon of the gaol, exacerbated by confinement or was terminal, the usual practice was for the visiting magistrates of the county to seek a pardon for the prisoner. For example Samuel Torkington was convicted of an assault with intent to ravish at Preston Quarter Sessions January 1827 and sentenced to three years’ imprisonment and a whipping. He was released on account of his ill health in September 1829.<sup>40</sup> Occasionally, Peel requested further details from the magistrates but generally, the request was granted without further enquiry. In his final months as Home Secretary, Peel was concerned by the increase in the number of requests for pardons on medical grounds over the last three years and sent a memo to the Keeper of Newgate stating ‘that he would like to know the cause of this increase’. However, there is no recorded response.<sup>41</sup>

Prisoners acquitted of a criminal offence on account of insanity were initially held in the local gaol until a place was found for them in a lunatic asylum. Where the insanity was diagnosed as a temporary aberration of mind, it was possible that the prisoner could completely recover and again in these circumstances, a pardon was invariably granted, subject to conditions, on the advice of the medical experts.<sup>42</sup> In these cases,

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<sup>38</sup> HO 47/63/fol.18.

<sup>39</sup> Chapter Three, p.50-1 *supra*.

<sup>40</sup> HO17/45/Go 32

<sup>41</sup> HO17/73 No 43 (February 1830).

<sup>42</sup> HO17/45/Gn 49, James Williams convicted of maliciously shooting with intent to murder at Suffolk Lent Assizes 1828.

however, Peel's was usually keen to ensure that the prisoner had a place to live and support either from his family or friends before recommending the release.<sup>43</sup>

#### vi. Good conduct and King's birthday pardons

The practice of granting pardons to prisoners who had been imprisoned for more than half the term of their sentence had developed from the Good Friday pardons granted centuries before.<sup>44</sup> By the 1820s, these pardons or recommendation lists, which during the reign of George III had been granted on 30 June in each year in recognition of the King's birthday, were submitted on a more haphazard basis but were still part of accepted practice. The criteria for the grant of pardons were that prisoners had served at least half their sentence 'with orderly and good conduct.' These recommendation lists applied to both the hulks and the Penitentiary. In the early 1830s, the pardoning of prisoners was further regulated as the recommendation lists note that three percent of the prisoners on board individual hulks were recommended for pardons.

Requests for remission of sentences for those prisoners in local gaols were submitted by visiting magistrates and had to be made in writing. In a letter, dated 10 July 1826, written on his behalf to a magistrate only named as T.B. Morgan, Peel specifically made the point that the correct procedure should be followed. He wrote 'it [is] a rule to depend upon the written reports of Gaolers and Gaol surgeons and not what they state in conversation.'<sup>45</sup> The consequence of non compliance with the accepted practice was that the papers were returned to the sender and they were required to resubmit them.

This was evidence of the growing bureaucratisation which Peel was steadily introducing into Home Office procedures. In 1829, John Lockhart, the MP for Romsey in Hampshire, forwarded a letter from the surgeon on board the *Coromandel* hulk stationed in Bermuda in favour of a prisoner, John Lacey. Lacey had worked for the surgeon in the dispensary. He was 'a steady, correct, attentive and humane man' and thus worthy of a remission of sentence. The request was refused and with the papers

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<sup>43</sup> For example HO 17/73 No 1 (George James convicted at Dorset Spring Assizes 1826). For an overview of Mental Health legislation in this period see S. Cherry, *Mental Health Care in Modern England: The Norfolk Lunatic Asylum, 1810-1998* (Woodbridge, 2003), pp. 1-26.

<sup>44</sup> p. 80 *supra*.

<sup>45</sup> HO13/47 fol. 49. There is no further information as to the identity of T.B. Morgan or what case is referred to.

is a note from John Capper, the Superintendent of Convicts, advising that he had informed the surgeon ‘that this is irregular.’<sup>46</sup> Likewise Peel was highly critical of officials who overstepped the mark and held out offers of remission to prisoners. Writing to Boutton, the Keeper of Stafford Gaol, in August 1826, he rebuked him for promising a respite to a prisoner named John Fordham without the consent of the Secretary of State.<sup>47</sup>

Whilst it may be correct that there were no ‘fixed rules’ as to the grant of the Royal Prerogative of mercy, there were acknowledged and established conventions. Even when there was patently a reservation on the part of the Executive as to the recommendation of such a pardon, the convention was so well entrenched that they felt unable to depart from the established practice. In these instances, the distinguishing feature of them all is that the grant of clemency was made on the basis of facts which were susceptible of legal proof. Whilst the exact details were variable in each individual case, the basic premise, if satisfied, invariably resulted in the remission of sentence or free pardon. Having traced the history and development of the Royal prerogative of mercy, the next issue to be addressed is what part, if any, did mercy or compassion played in Peel’s decision making?

### **The jurisprudential nature of mercy**

Legal scholars have long struggled with the jurisprudential nature of mercy. Sean Coyle has highlighted the absence of serious discussion of mercy in the arguments of modern jurisprudence, concluding that ‘the reason for such lack of discussion can be put down to the general acceptance amongst jurisprudential scholars of a conceptual framework in which mercy has no obvious place.’<sup>48</sup> Mercy is the last hope of the prisoner and any attempt to define it within legal concepts as a right or privilege with correlative duties and responsibilities is bound to fail as an application for mercy only arises when all legal rights are extinguished.

David Dolinko, the legal philosopher, neatly summarises this position. He observes that justice is an obligation owed to everyone, they have legitimate claim to it but it

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<sup>46</sup> HO17/63/ Lo 10

<sup>47</sup> HO13/47 fol. 103; no further information is contained in the letter.

<sup>48</sup> S. Coyle, *Dimensions of Politics and English Jurisprudence* (Cambridge, 2013), p. 276.

follows ‘that mercy cannot be any part of what justice in a given case requires.’<sup>49</sup> Any appraisal of Peel’s recommendations for the exercise of the Royal Prerogative of mercy will only be sustainable if it is predicated on the juristic meaning of mercy. Jeffrie Murphy, the legal philosopher has set out a conundrum of mercy for legal scholars, in an oft quoted passage

If we simply use the term ‘mercy’ to refer to certain of the demands of justice (e.g. the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes a part of... justice. It thus becomes obligatory and all talk about gifts, acts of grace, supererogation and compassion become quite beside the point. If on the other hand, mercy is totally different from justice and actually requires or permits that justice sometimes be set aside, it then counsels injustice. In short, mercy is either a vice (injustice) or redundant (part of justice).<sup>50</sup>

Distinguishing between the differing attributes of mercy and justice is not innovative and has exercised the minds of many philosophers over the centuries.<sup>51</sup> Murphy, for example, separated the idea of forgiveness from the related concepts of justification, excuse, mercy and reconciliation. He defined forgiveness as overcoming on moral grounds ‘the vindictive passions- the passions of anger, resentment and even hatred that are often occasioned when one has been deeply wronged by another’.<sup>52</sup> The freedom to forgive is exercisable by the wronged individual without restriction and is a result of that individual’s own moral values and experiences. The reasons why a victim is prepared to forgive a wrongdoer are myriad, even irrational but are in the norm exercised freely, subjectively and without restraint. With regard to the exercise of mercy in a legal setting, Murphy is dismissive of decision-makers who allow their personal feeling to interfere with the administration of justice. He remarks, ‘Let them

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<sup>49</sup> D. Dolinko, ‘Some Naive thoughts about Justice and Mercy’, *Ohio State Journal of Criminal Law*, 4 (2007), p.353.

<sup>50</sup> J. Murphy, ‘Mercy and Legal Justice’ in J. Murphy and I Hampton (eds), *Forgiveness and Mercy* (Cambridge, 1988), p.171.

<sup>51</sup> See for example Anselm, *Proslogian*, T. Williams (ed.) (London, 2001) and G B. Sadler, ‘Mercy and Justice in St Anselm’s Proslogian’, *American Catholic Philosophical Quarterly*, 80, 1 (2006), p.41.

<sup>52</sup> Murphy, ‘Mercy and Legal Justice’, p.13. For further discussion on the meaning of mercy see J. Burnside, ‘Pardoning and Mercy’, *Denning Law Journal*, 8, 13 (1993), p.13; R. Harrison, ‘The Equality of Mercy’, in H Gross and Harrison (eds), *Jurisprudence* (Oxford, 1992) p.107; D.T. Kobil, ‘The Quality of Mercy Strained- Wrestling the Pardoning Power from the King’, *Texas Law Review*, 69 (1991), p. 569; L. Meyer, *The Justice of Mercy* (Chicago, 2010); N. Walker, ‘The Quiddity of Mercy’, *Philosophy*, 70 (1995), pp. 27-37.

keep their sentimentality to themselves for use in their private lives with their family and pets.’<sup>53</sup>

Edward Gibbon Wakefield, a contemporary of Peel, considered that dealing with the pleas for mercy had rendered Peel ‘callous’.<sup>54</sup> Considering Wakefield’s background and entanglement with the law, his opinion should be treated with caution. Wakefield had been convicted at Lancaster Assizes in 1827 of attempting to abduct the 16-year-old heiress, Ellen Turner, but breached bail. He was subsequently arrested in London and sentenced to three years’ imprisonment in Newgate.<sup>55</sup> Although already a wealthy man, Wakefield’s motivation was the pursuit of a political career and he needed further capital to fulfil this ambition. Whilst his opinions are based on his personal experiences of the criminal law, they are hardly those of an impartial observer. Further evidence of this can be garnered from Peel’s annotation on the petition of Wakefield’s brother, William. He had been convicted at Lancaster Lent Assizes 1827 of aiding his brother in the abduction and sentenced to three years’ imprisonment.<sup>56</sup> Peel noted that the statements recited in the petition were ‘inconsistent’ with the evidence on which he was convicted and thus called into question the probity of the prisoner.<sup>57</sup> Unfortunately, Peel does not elaborate on these inconsistencies.

Gatrell used Wakefield’s view of Peel as ‘callous’ to argue that he ‘only once wept a passing tear for those he sent to the gallows; but it was a thin tear after all’.<sup>58</sup> Yet he also acknowledges that Peel upheld the rule of law ‘without favour’ despite being ‘subject almost daily to impassioned pleas for mercy.’ It is difficult to reconcile these statements; if Peel is to be criticised for lack of compassion does this mean that (if true) his actions in upholding the law ‘without favour’ were proper but that his emotional response to these actions was deficient in some way? Should Peel have made extra-judicial decisions? If the former it is not evident that Peel’s emotional response was relevant to the outcome of petitions of mercy. Indeed it might be argued that in making life or death decisions a degree of detachment was essential. If the

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<sup>53</sup> Murphy, ‘Mercy and Legal Justice’, p. 174.

<sup>54</sup> E.G. Wakefield, Facts relating to the punishment of death in the metropolis (1831) in M.F. Prichard (ed.), *The collected works of Edward Gibbon Wakefield* (London, 1968) p. 244 quoted in Gatrell, *The Hanging Tree*, p.566.

<sup>55</sup> D.J. Moss, ‘Wakefield, Edward Gibbon (1796-1862), in *ODNB*.

<sup>56</sup> HO17/93/Rn9.

<sup>57</sup> The annotation is initialled R.P.

<sup>58</sup> Gatrell, *The Hanging Tree*, p. 572; R McGowen, ‘Revisiting *The Hanging Tree*: Gatrell on Emotion and History, *British Journal of Criminology*, 40, 1 (2000), pp. 1-13.

latter, then this is evidence of Gatrell's lack of understanding of the constitutional constraints underlying Peel's recommendations for the exercise of the Royal Prerogative of mercy.

The question is would justice be better served if Peel had recommended the Royal prerogative of mercy subjectively on the basis of his feelings? If Peel had shed a waterfall of tears would this have altered Gatrell's view that there was 'little mercy' in him? Recommending mercy on the basis of any one individual's particular sympathies would result in an inequitable criminal system which depended on the subjective and transient emotions and idiosyncrasies of the individual. The detachment shown by Peel was mirrored in the views of the Whig reformers at this time, who were keen to promote a more impartial system of law binding on all members of society.<sup>59</sup>

Reviewing cases with so called 'practised callousness' and seemingly resisting the urge, as far as humanly possible, to allow his personal feelings to interfere with his recommendations was the very attribute which ensured that Peel's decision making was on the basis of established conventions resulting in both certainty and consistency. There is no doubt that the petitions were filled with heart wrenching pleas for relief. But if mercy is recommended merely in reply to an emotional response, where would the line be drawn? It would be possible to cite thousands of petitions illustrating the distressing circumstances endured by prisoners. Here a snapshot of cases will suffice.

Henry Brooke was convicted of larceny from his former employers at the Old Bailey September 1828. He had lost his hand in a machine on the premises and then had been sacked as he could no longer carry out his work. His family was in distress and he had resorted to theft in order to survive. There were no other grounds for clemency and his six months' prison sentence was not remitted.<sup>60</sup>

James Hare, an unemployed cotton worker aged 17, was convicted at Lancaster Lent Assizes 1826 of uttering forged notes. He was so desperate that he was forced to sell his clothes for £1 in order to buy food for himself and his widowed mother. As a last

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<sup>59</sup> R. McGowen, 'A Powerful Sympathy: Terror, the Prison and Humanitarian Reform in Early Nineteenth-Century Britain,' *Journal of British Studies*, 25, 3 (1986), pp. 312-334; see also D.D. Grey, *Crime, Policing and Punishment in England* (London, 2016), pp. 286-8.

<sup>60</sup> HO17/63/ Ln33.



resort, he became embroiled with ‘bad characters’ and passed forged notes. His capital sentence was commuted to transportation for life but further mitigation was denied.<sup>61</sup>

James Norris aged 11 was capitally convicted at the Old Bailey 1825 of house breaking. His sentence was commuted to transportation for life by the King in Council but no further remission was granted. His parents pleaded that they were ‘distraught with grief’ as they had lost two children in the last six months.<sup>62</sup>

William Saunders aged 14 was convicted of theft at Surrey Sessions September 1828 and sentenced to seven years’ transportation. He was on board the *Euryalus* hulk and his mother petitioned for mercy on the grounds that his sister aged 19 had died and his father had committed suicide. Again, whilst very sad, these were not established grounds for a remission for sentence.<sup>63</sup>

These cases reveal the vast gamut of misadventure which criminals pleaded they had endured. There can be no doubt that all of these cases arouse sympathy but favouring one set of distressing circumstances over another, would set a dangerous precedent and ultimately bring the criminal justice system into disrepute. Moreover, it was necessary to view the petitions with a degree of scepticism as understandably they were drafted to elicit the most favourable response. Time and again, the petitioner pleaded that it was his first offence though the gaoler’s report on the back sheet of the petition stated that the prisoner had been ‘convicted before’.<sup>64</sup>

An illustration of Peel’s detachment, determination to achieve consistency in his decision making and retain an element of deterrence was highlighted in the case of Jane Hardy. Her husband, John, had been convicted of felony at York Assizes. Whilst awaiting removal to the hulks as a preliminary to transportation, he was held in the gaol at York Castle. Jane had attempted to effect his escape by bringing tools into the gaol but was discovered. She confessed and was convicted at the York Summer Assizes 1822.<sup>65</sup> The offence carried a mandatory sentence of seven years’ transportation. The keeper of the gaol wrote to Peel suggesting that as Jane was ‘a fine, stout and healthy person and has no family’, she should be sent out of the country

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<sup>61</sup> HO17/67/M1 16.

<sup>62</sup> HO17/30/D1 30.

<sup>63</sup> HO17/63/Ln 23.

<sup>64</sup> HO17/93/Ro 12.

<sup>65</sup> HO17/122/Yh9.

forthwith. In her letter to the judge, which had been written for her as she was only able to make her mark, Jane thanked him for sentencing her to transportation so that she could share her husband's 'fate.' A young woman of previous good character convicted of this offence would, on established guidelines, usually have the sentence remitted to a period in the Penitentiary.<sup>66</sup> This was the case here. A further annotation considered that it could set 'a dangerous example if this woman by committing the crime of attempting her husband's escape should obtain her object of accompanying her husband to NSW.'<sup>67</sup>

Whilst these annotations are unsigned, there is little doubt that they are in Peel's handwriting. Peel sought a report from the trial judge, Baron Wood. The judge showed empathy with Jane and tried to persuade Peel to reconsider his decision. His view was that Peel's decision was 'just' but he questioned 'whether there would be any impropriety' if the original sentence was 'carried into effect'. He considered that her objective was not 'to accompany her husband to NSW but that he might escape and not be sent there at all.'<sup>68</sup>

Peel was not to be persuaded and Jane was removed to the Penitentiary. His fear that departing from established principles might give encouragement to others may have been over cautious but it is patent that he was not prepared to take the risk. Moreover, breaking the law to gain a personal advantage was not to be supported or condoned. Peel's decision making may have appeared to lack compassion but in following the guidelines, Jane Hardy was a beneficiary of the Royal Prerogative of mercy neatly illustrating these differing concepts. It also highlighted the challenge faced by Home Secretaries in balancing the security of the state against the personal circumstances of the prisoner as will be discussed later in the thesis.

Peel's decision to recommend a mitigation of Hardy's sentence and his reasons for doing so were followed by one of his successors, Lord John Russell, who adopted the same course in a similar case. James Dabin had been convicted of theft at Kent Lent Assizes 1836 and sentenced to seven years' transportation. He committed the offence in order to pay for counsel for his mother who had been indicted on a felony. She had

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<sup>66</sup> See Chapter Seven pp.137-9. for guidelines on transferring prisoners to the Penitentiary at Millbank.

<sup>67</sup> HO17/122/Yh9; 'NSW' refers to New South Wales.

<sup>68</sup> Ibid.

been found guilty and sentenced to seven years' transportation and as in Hardy's case, Dabin made the mistake of pleading to be sent to New South Wales. He was 18 with no previous convictions. The usual course would be for him to be sent to the Penitentiary and this was the course adopted by Russell. Like Peel, Russell sought the opinion of the trial judge, Baron Vaughan, who reported that Dabin's motive was 'to share the same fate' as his mother. The petition is marked 'to the penitentiary'; Dabin was transferred there from the hulk *Fortitude*.<sup>69</sup>

In both these examples, the recommendation of the Royal Prerogative of mercy was based on established guidelines. For both Peel and Russell, their freedom to act was constrained by the necessity of following existing practices which resulted in decisions which could be perceived as harsh. Peel could have refused to recommend the exercise of the Royal Prerogative of mercy and relied on the opinion of the 'expert', the trial judge, but in his own words this would have created a dangerous precedent, lacked deterrence and was one which he was not prepared to initiate. The inflexibility in the decision making of both Peel and Russell exhibited just how fixed the practices or conventions had become. Both offenders were recommended for clemency even if it was not what they wanted. The notion that recommending the Royal Prerogative of mercy would not be in the public interest or that granting mercy could be dangerous were common themes on which Peel relied as evidenced from annotations on the petitions. For example in Ann Osborn's case, the annotation reads, 'to pardon the prisoner would be dangerous but will consider a pardon at the end of four years' imprisonment.' Osborn had been convicted of coining at the Warwick Summer Assizes in 1819 and the capital conviction had been commuted to transportation for life.<sup>70</sup>

The petitions reveal that there were many occasions when Peel appeared emotionally affected but understood, in following conventions, he had no power to interfere with the court's decision. The use of words like 'regret' (Mr Peel regrets that he cannot consistent with his public duty interfere with the judge's decision) or 'sorry' (Mr Peel is sorry that there are no grounds consistent with his public duty to recommend a

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<sup>69</sup> HO17/52 Hw 37.

<sup>70</sup> HO17/39 Fh 1.

mitigation of the sentence) illustrate this dilemma.<sup>71</sup> How far this sense of regret was an expression of genuine emotion stirred by the plight of the prisoner or a practised and expected reply is impossible to evaluate.

Peel's inner turmoil was further revealed in the case of William Field aged 13 and Thomas Godwin aged 11. They were found guilty in June 1825 at the Old Bailey of breaking into Hannah Doublet's shop in Shoreditch and stealing three pairs of spectacles valued 15s and an eye glass valued 3s. They were apprehended by a neighbour who found the glasses on Godwin.<sup>72</sup> Both petitioned for mercy on account of their age and previous good character and Godwin also pleaded that he had not been actively involved in the housebreaking but had been led into bad company. Godwin's father also petitioned the Home Secretary and reiterated that his son, the eldest of his four children, 'had been led into bad company' and had not been in trouble with the law before. The back sheet of Field's petition showed that this was not the case; the Gaoler's Report stated 'convicted before'.<sup>73</sup> The boys were held in Newgate to await the decision of the King in Council held on August 2 1825. Before the meeting, the prosecutrix, Hannah Doublet, also petitioned Peel begging for mercy for the two boys.<sup>74</sup> Her petition contained on a single sheet was barely literate and couched in pleading terms. She 'humbley' begged that they should be sent to the Penitentiary and not sent away from their families. It is the final section of her petition which revealed an insight into Peel's character. She recited that Godwin's father had met with Peel and Peel had 'given him a shilling' and promised that the boys would not be sent out of the country.<sup>75</sup>

When petitioners and their representatives sought meetings with Peel to discuss individual cases, he was generally reluctant to see them delegating the task to one of his under-secretaries. The implication in the petition was that the meeting between Peel and Godwin senior was arranged which was unusual. This shows Peel in a more human light and he did keep his promise to Godwin senior; the boys were not transported but were released after two years on the hulks on the grounds of their good

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<sup>71</sup> See for example HO17/62/Lm14, William Skipper convicted of shooting with intent to kill at Norfolk Lent Assizes 1827.

<sup>72</sup> *OBP*, 30 June 1825, William Field and Thomas Godwin (t 18250630-6).

<sup>73</sup> HO17/15/ B1 36 (Field); HO17/15/B1 37 (Godwin).

<sup>74</sup> HO17/67/M1 67; Appendix Five.

<sup>75</sup> *Ibid.*

conduct. It would have been easy for Peel to dismiss Godwin and promise him nothing but this case revealed that having given his word, he determined to keep it. Whatever Peel's personal feelings, a sense of detachment was a necessary prerequisite on the part of the decision maker, be he the Home Secretary, a judge or juror. Whether this attribute can be construed as callousness is a matter of interpretation.

## Conclusions

Replicating the language used by Peel and the Home Office officials in the 1820s, in this thesis, is important as in responding to petitions they were careful to only use specific language which was clear and unambiguous. By the end of the decade the language used was almost formulaic in nature. A wide reading of the annotations and draft letters written by Peel reveals that time and again they contained crossings out and alterations which indicates how careful he was not to overreach his powers or raise false expectations.<sup>76</sup>

The exercise of the Royal Prerogative of mercy was recommended by the Home Secretary but carried out by the Crown to mitigate a verdict and/or sentence passed in a court of competent jurisdiction. Confusing the concept of compassion with recommendations under the Royal Prerogative of mercy is to misunderstand Peel's decision making. The two concepts are different but are not mutually exclusive. The issue here, however, is not whether Peel shed a single tear over the plight of the prisoners or was more emotionally involved than previously considered but whether he allowed these subjective considerations to influence his decision making when recommending the exercise of the Royal Prerogative of mercy. Gatrell's arguments were based on a random sample of about 100 'complex appeals for mercy' and he acknowledged that greater research into the archive was required.<sup>77</sup> Every petition submitted to the Home Office reveals the circumstances surrounding the prisoner's conviction and has to be considered individually. In their own way, every petition is complex and it was only by researching more than 5,000 cases that this thesis has established patterns of decision making. Perhaps Peel did become inured to the pleas of distressed prisoners but in following conventions in his recommendations for the

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<sup>76</sup> For an example see Saunders case Chapter Six p.100 infra.

<sup>77</sup> Gatrell, *The Hanging Tree*, p. 613

exercise of the Royal Prerogative of mercy, he ensured that each petition was viewed as impartially as possible.

Moreover, in reading the petitions, Peel was only hearing one side of the case which was prepared in the best possible light for the prisoner without independent corroboration of the grounds for clemency pleaded. If the exercise of the Royal Prerogative of mercy was based solely on the Peel's emotional response to the contents of the petitions and he did not instigate further enquiries into the case, then the outcome would be unpredictable and inconsistent. By adhering to conventions and established practices, his actions may have appeared on occasion harsh but they were consistent and not governed by how compassionate or merciful he felt towards any particular prisoner.

In any appraisal of Peel's recommendations of the exercise of the Royal Prerogative of mercy, it is fundamental that compassion or forgiveness is distinguished from the action of a servant of the Crown mitigating a verdict or sentence of a court of competent jurisdiction. In adopting this approach, Peel effectively stemmed any political challenges to the recommendations he made for the exercise of the Royal Prerogative of mercy. This, however, did not prevent him from coming into conflict with the Monarch, George IV, who was initially determined to grant mercy whenever and wherever possible irrespective of the circumstances of the case.<sup>78</sup> Peel was determined that the *de facto* power to recommend the Royal Prerogative of mercy would no longer depend upon the personal whim of the Sovereign and was an important constitutional measure which curbed the right of the Monarch to act unilaterally against the recommendations of the Executive. How this power struggle with the King unfolded during Peel's stewardship at the Home Office will be examined in the next chapter.

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<sup>78</sup> See Chapter Six *infra*.

## Chapter Six:

### The Royal Prerogative of Mercy, the constitution and Peel.

#### Introduction

In 1885 A.V. Dicey, observed that the English Constitution was ‘the fruit not of abstract theory but that of instinct... which has enabled Englishmen... to build up sound and lasting institutions, much as bees constructed a honeycomb.’<sup>1</sup> In this ongoing construction of ‘the honeycomb’, 1822 marked a constitutional landmark in the history of the Royal Prerogative of mercy. The power of the Monarch to show clemency and personally intervene in a prisoner’s case was curtailed and thereafter only exercised on ministerial advice. One aspect of Peel’s decision making, which has been neglected by historians, is how the application of constitutional conventions limited his ability to interfere with verdicts and sentences passed by courts of competent jurisdiction.<sup>2</sup>

This chapter will examine, in general, these constitutional conventions and the specific difficulties which Peel encountered in his dealings with the Monarch, George IV. It will also depart from the views proffered by Gatrell and Beale and Haagan that the Royal Prerogative of mercy was exercised without due consideration. When referring to the meetings of the King in Council, Gatrell concluded that ‘in no other context was the power of life and death wielded with such remote and capricious disdain.’<sup>3</sup> Beale and Haagen supported this conclusion by opining that ‘because trials were slapdash affairs and the mercy appeals process little better, there was a random quality to the selection of those individuals who were actually executed’.<sup>4</sup> Whilst the detailed conduct of trials is beyond the scope of this thesis, it will demonstrate Peel’s decision making was neither capricious nor random but, within these parameters, was both impartially considered and generally consistent.

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<sup>1</sup> A.V. Dicey, *The Law of the Constitution*, J.W.F. Allison (ed.) (Oxford, 2013), p. 10.

<sup>2</sup> W. Bagehot, *The English Constitution* (London, 1867); Hood Phillips and Jackson, *Constitutional and Administrative Law* (London, 8<sup>th</sup> edn, 1997); S.A. De Smith and R. Brazier, *Constitutional and Administrative Law* (London, 7<sup>th</sup> edn, 1994), Chapters 6 and 7; A King, *The British Constitution* (Oxford, 2007).

<sup>3</sup> Gatrell, *The Hanging Tree*, p. 543.

<sup>4</sup> S.S. Beale and P.H. Haagen, ‘Revenge for the Condemned’, *Michigan Law Review*, 94 (1996), pp. 1622-59 at p. 1652.

## Separation of powers

Peel's recommendations under the Royal Prerogative of mercy were limited by constitutional conventions. The doctrine of separation of powers requires that the principal institutions of state, legislature, executive and judiciary, should be clearly divided in order to protect the liberty of citizens and safeguard against tyranny.<sup>5</sup> Nations such as the United States of America and Australia have a written constitution which preserves the rights and privileges of their citizens but in the United Kingdom, the constitution is unwritten.<sup>6</sup> This does not mean that a subject's rights are less protected. Writing in the 1740s, the philosopher Montesquieu considered the English constitution as the model to be adopted. In his view, it protected the rights and liberties of subjects because the 'three sorts of powers', namely the legislature, executive and 'power of judging' were distributed into separate institutional hands. He observed that in the case of the 'power of judging', the separation of functions meant that those responsible for creating law and for initiating the resources of the state (the Executive) lacked the power of punishing crimes or settling legal disputes between individuals. He continued that the system succeeded because all three branches of government were forced to work together to achieve their stated aims.<sup>7</sup>

The main concern with Peel's recommendations under the Royal Prerogative of mercy was that it vested in a single decision maker the discretionary authority to remit punishment with little, if any, mechanism for the other branches of government to review the decision. This blurring of functions in the constitution of the United Kingdom resulted because of the patchwork of legal and administrative structures and practices which had evolved over centuries and which Walter Bagehot considered 'the efficient secret of the English Constitution'.<sup>8</sup> The unwritten constitution means that subjects have freedom of action which is only curtailed if their actions infringe common law or statute.

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<sup>5</sup> P.A. Gerangelos, *The Separation of Powers and Legislature Interference in the Judicial Process* (Portland, Oregon, 2009), pp. 272-88.

<sup>6</sup> Ibid, pp. 57-116.

<sup>7</sup> C.L. Montesquieu, *The Spirit of the Laws*, A.M. Cohler, B.C. Miller, H.S. Stone (trans. and eds) (Cambridge, 1989). See also J.L. De Lolme, *The Constitution of England*, W. Hughes (ed.) (London, 1834); D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (Cambridge, 1989) and 'The Mixed Constitution and the Common law', in M Goldie and R. Wokler (eds), *The Cambridge History of Eighteenth Century Political Thought* (Cambridge, 2006), pp. 317-40.

<sup>8</sup> Bagehot, *The English Constitution*, pp. 67-8.



The power of the Executive to interfere with the decisions of the courts was, therefore, limited and contained within strict parameters. It is estimated that more than 90% of petitions which landed on Peel's desk were marked 'Nil', meaning that in his view there were no grounds to interfere with the original verdict or sentence. As Home Secretary, Peel was required to act as both a member of the Executive and as a representative of the Crown. As a politician, his role was to formulate and marshal bills through parliament with all the problems associated with a government comprising of a collection of individuals with disparate agendas and without the formal Whip system of today.<sup>9</sup> When recommending the exercise of the Royal Prerogative of mercy Peel was discharging his obligations as a servant of the Crown and he was cognisant of the need to defend the separation of powers and ensure that the delicate balance between the legislature, Executive and judiciary was maintained.

In his reply to a motion in the House of Commons in 1822 raised by Sir Francis Burdett MP requesting the early release of the orator Henry Hunt imprisoned for unlawful assembly, Peel advised that Hunt's early release was not a decision for Parliament. The 'unvaried practice of the House ... was not to express any opinion as to the continuance of a punishment awarded to an individual by a court of justice.'<sup>10</sup> He saw no circumstances of 'an overwhelming nature' for the House to interfere in the case. Hunt had been convicted by a jury on incontrovertible evidence but Peel acknowledged that if good reasons were advanced for the extension of mercy, 'he would immediately attend to them but would never consent to recommend anyone to mercy on the ground of personal favour.'<sup>11</sup> Peel concluded his speech with the statement that as a 'Servant of the Crown' he would not advise it to remit any part of the sentence. He added that he based his decisions on a 'sense of public duty alone' and enquired of the House whether they would 'allow the constitution to be sapped and undermined and invaded by those who took advantage of the liberty which the constitution provided.'<sup>12</sup>

In many instances, Peel was even more specific in acknowledging that he had no power to mitigate the sentence of the courts where no established grounds or new

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<sup>9</sup> See Chapter Four *supra*.

<sup>10</sup> *Speeches*, volume i, p. 183.

<sup>11</sup> *Ibid*, p. 185.

<sup>12</sup> *Ibid*, p. 185.

evidence was adduced. The usual annotation was ‘Mr P. cannot interfere in this case.’ For example, in the case of Robert Saunders capitally convicted of burglary at the Buckingham Assizes held at Aylesbury March 1828, Peel wrote on the back sheet of the petition that he regretted that it was ‘not in my power to advise the Crown to mitigate the sentence of the law’.<sup>13</sup> Peel’s inability to act was based on the concept that the courts should be free from interference by the Executive and Parliament. Overturning the decision of juries without due cause was tantamount to an abuse of power and infringement of the rule of law by government.<sup>14</sup> Countermanding the jury’s decision would in effect express the view that, although not present at the trial and not a party to hearing the evidence in person, the Home Secretary was better placed to decide on the guilt of the prisoner than the 12 men who had heard the case and the sentence passed by the court.

Whilst Peel was prepared to interfere in cases where there were recognised mitigating factors, such as mental impairment short of insanity which the jury could not take into account, he did not have *carte blanche* to pardon or remit sentences. Jury trial was heralded by Blackstone as the institutional centrepiece of the common law and acted as a restraint against the prerogatives of the Crown in criminal cases by placing in the hands of the people an appropriate share in the administration of public justice.<sup>15</sup> Peel acknowledged that trial by jury was a fundamental tenet of the English criminal justice system which protected the rights of citizens. When replying to a motion in the House of Commons on whether prisoners should be allowed counsel he referred to the fact that verdicts by juries were required to be unanimous which he considered ‘an immense security that injustice would not be done.’<sup>16</sup> He continued that he was satisfied that it would be unlikely that ‘twelve men would declare unanimously that another had been guilty of an offence for which he was subject to the penalty of death unless the proof were so clear as to leave no doubt of his guilt.’<sup>17</sup>

As the composition of the jury was limited to a specific category of citizens, namely freeholders or leaseholders with a minimum land value, this view may be criticised. However, the fact that trial by jury is still a ‘bulwark’ of the penal system illustrates

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<sup>13</sup> HO17/122/ Ym 2.

<sup>14</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, 3<sup>rd</sup> edn, 1889), Part II.

<sup>15</sup> Blackstone, *Commentaries*, volume 3, chapter XXIII.

<sup>16</sup> *Speeches*, volume i, p. 421.

<sup>17</sup> *Ibid.*

that Peel's faith in a trial by one's peers was not necessarily misplaced.<sup>18</sup> The importance of not interfering with the decision of juries had been neatly summed up some 30 years earlier when Lord Camden declared that trial by jury was the final legal check on tyranny and a hallmark of and safeguard for a truly free people. 'Trial by jury is indeed the foundation of our free constitution; take that away and the whole fabric will soon moulder into dust.'<sup>19</sup>

Peel set great store by his own integrity and probity; any attempt to impugn his reputation in this regard was robustly dismissed. He cultivated an image of a Home Secretary who was not swayed by personal interest but always acted in the best interests of the country. His public utterances reinforced this image but Peel was an ambitious career politician and a member of a government made up of members each with their own agendas. As a consequence it would hardly be surprising if amongst the petitions which landed on his desk there were instances of Peel acting with a complete disregard for these policies to secure a political advantage. However, it has only been possible to locate two such examples out of more than 5,000 petitions where he seemingly overreached his powers. In the first example, it is difficult to identify the reasons why Peel recommended a pardon as there appears to be no personal advantage or political element in his decision making.

Elizabeth Gould was convicted of receiving stolen goods at Dorchester Summer Assizes 1819 and sentenced to transportation for 14 years. Petitions from the Rector of Bryanston and other respectable parishioners were forwarded to Peel requesting a remission of sentence.<sup>20</sup> As was the usual practice, Peel sought the advice of the trial judge, Mr Justice Best, as to whether she was a 'worthy object for mercy'. Whilst acknowledging that her conduct whilst in the Penitentiary had been exemplary, Best J. was adamant that there were no grounds for him to recommend that the sentence should be remitted and he was insistent that the original sentence should stand. Whilst awaiting the judge's report, Peel received a letter from William Pitt, a local magistrate, confirming Gould's conduct and requesting her release.<sup>21</sup> Peel's usual response would be that he could not interfere but in this case a pardon was recommended. The reason

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<sup>18</sup> Per Lord Denning in *Ward v James* [1945] 1 All ER. 565.

<sup>19</sup> J.R. Spencer, *Jackson's Machinery of Justice* (Cambridge, 8<sup>th</sup> edn, 1989), p. 391 *et seq.*

<sup>20</sup> HO17/122/Yh8.

<sup>21</sup> There is nothing in the tone of the letter to indicate that Pitt had a personal association with Peel.

why he decided to override the judge's report is not apparent from the documents but the fact that Peel knew he was departing from the norm is clear as the petition is marked, 'the letters are not to go to Judge Best.'<sup>22</sup> It could be argued that in this case, any criticism of Peel's actions should be eschewed on the ground that it was for the benefit for the prisoner but in the treatment of John Post this was not the case.

Post was capitally convicted of sheep stealing at Kent Summer Assizes held at Maidstone in 1822.<sup>23</sup> The local MP Sir Edward Knatchbull, an influential Ultra Tory, spokesman for the landed gentry and no admirer of Peel, wrote to him in strong terms that the commuted sentence of one year's imprisonment passed by the trial judge, Mr Justice Park, was far too lenient for such a notorious character who made his living by stealing and selling sheep.<sup>24</sup> He further advised that he had notified the Judge's Clerk in Arms of the prisoner's bad character but this had been ignored. In response, Peel requested a report from the judge. In a reply spiced with pique and almost tangible resentment at being asked to justify his decision, Park J. responded that nothing was adduced in evidence about Post's bad character nor was any note received by him before sentence. He considered sheep stealing a great offence but always distinguished between sheep stealing as a business and as an individual offence. He concluded his report with the riposte that if he had known of Post's bad character he would 'probably have been more severe but certainly would not have carried the sentence into execution.'<sup>25</sup>

This did not satisfy Knatchbull who demanded that the sentence should be reconsidered as Kent was a county plagued by sheep stealing and a more severe punishment should be imposed on one of the most regular offenders. Peel's second response would, generally, be to confirm that he could not interfere with the judge's decision. In this instance, though, the petition is marked 'Transportation.'<sup>26</sup> No reasons were stated. It was patently an abuse of the rule of law as there was no power vested in the Crown to increase sentences passed by the Courts. Even today, when a sentence passed by the courts is deemed to be too lenient, the Attorney General only has the

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<sup>22</sup> HO17/122/ Yh 8.

<sup>23</sup> HO17/127/ZI 17

<sup>24</sup> H.C.G. Matthew, 'Knatchbull, Sir Edward, ninth baronet (1781-1849)', in *ODNB*.

<sup>25</sup> HO17/127/ZI 17; Gatrell, *The Hanging Tree*, pp. 528-9. Gatrell cites Knatchbull as Sir C. Knatchbull but his first name was Edward.

<sup>26</sup> Post was transported aboard the *Henry* see *N.S.W Archives*, Ref 29/53; 30/55; 31/120; 32/107 and 33/612; <<http://www.records.nsw.gov.au/state-archives>> [accessed 19 February 2014].

right to ask the Court of Appeal to impose a harsher sentence.<sup>27</sup> Peel's actions could be construed as an attempt to gain favour with a member of his own party with whom he was on bad terms and thus gain a political advantage. It could, on the other hand, be adduced as evidence of Peel acting pragmatically by imposing the sentence which the trial judge would have passed if in receipt of all the pertinent information.

### **The Royal Prerogative of Mercy, the King and Decisions of the King in Council.**

This extraordinary and unilateral action by Peel was particularly significant as only weeks before he was involved in a challenge with the King, George IV, concerning the ability of the Monarch to personally interfere with matters which had devolved on the government of the day. Both Gash and Gatrell focus on the Recorder's Report of May 1822 with Gatrell adducing it as evidence of Peel's outmanoeuvring of the King.<sup>28</sup> Presumably both Gatrell and Gash chose this particular Report as representative of the manner in which the Reports were conducted because Hobhouse named it as Peel's first as Home Secretary, even though this was in error.<sup>29</sup>

During his tenure as Home Secretary Peel was present at more than 60 meetings of the King in Council which discussed the Recorder's Report and although not all had constitutional implications, each was significant in its own way. Gatrell stated that Peel came to his first Council meeting as he left his last 'determined to hang men even handedly and as numerous as good order required and not to make exceptions where distinctions were narrow.'<sup>30</sup> This characterisation is difficult to reconcile with the circumstances surrounding Peel's involvement with the Council. Peel was determined that all the relevant factors should be adduced in each individual case and the number of late commutations illustrated that he was concerned to ensure that each case was dealt with on its own facts.<sup>31</sup> Moreover, in his last few months in office in 1830 and following the accession of William IV, Peel was keen to report to the House of Commons, in reply to comments made by the radical MP Joseph Hume, that His

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<sup>27</sup> Attorney General's Office home page, in <<http://www.gov.uk/government/organisations/attorney-generals-office/about>> [accessed 12 January 2014].

<sup>28</sup> Gatrell, *The Hanging Tree*, pp. 554- 64; Gash, *Mr Secretary Peel*, pp. 402-3.

<sup>29</sup> The first Recorder's Report attended by Peel as Home Secretary was in February 1822.

<sup>30</sup> Gatrell, *The Hanging Tree*, p. 558.

<sup>31</sup> Chapter Three p.40-1 *supra*.

Majesty had been advised that capital sentences should be commuted whenever the circumstances demand it.<sup>32</sup>

The Recorder's Report of May 1822 was of constitutional significance and revealed the lessening personal importance of the Monarch and the increasing powers of the government of the day.<sup>33</sup> At the previous Recorder's Report of March 1822, George IV insisted on a mitigation of punishment for one of the prisoners on the Recorder's List. Henry Newbury had been capitally convicted at the Old Bailey February 1822 of stealing a silver teapot and his sentence was commuted to transportation for life.<sup>34</sup> George pressed for the sentence to be further mitigated to a period in the House of Correction. There was some discrepancy over Newbury's age with George believing him to be 13 but other reports put his age at 17. In the event, Peel agreed to the mitigation not because he was bound to acquiesce to the Monarch's request but more probably because, after further enquiries, it was established that Newbury had been encouraged to steal the teapot by his two co-accused, Edward Childley and Henry Stephens who were notorious thieves.<sup>35</sup>

George believed himself to be a humane monarch.<sup>36</sup> When he ascended to the throne in 1820, he advised the incumbent Home Secretary, Lord Sidmouth, that in future he would play no part in the execution of any prisoner as he always leaned towards the side of mercy.<sup>37</sup> Sidmouth advised the King that if he intervened in capital cases heard at the Old Bailey then as a matter of consistency and fairness, he had to intervene in all capital cases heard outside London where the trial judge left a prisoner for execution.<sup>38</sup>

No minutes were kept of the meetings of the King in Council and so any attempt to reconstruct the rationale behind the decisions is almost impossible. The Reports were, in effect, lists with occasional annotations as to whether petitions had been lodged or certificates as to character had been submitted, and they revealed little detail about the

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<sup>32</sup> *The Sheffield Independent and Yorkshire and Derbyshire Advertiser*, 17 July 1830.

<sup>33</sup> Gash, *Mr Secretary Peel*, pp. 402-3; Gatrell, *The Hanging Tree*, pp. 554-65.

<sup>34</sup> *OBP*, 20 February 1822, Henry Newbury (t18220220-19). His age is reported as 15 in these reports; HO17/76/Oh 14; HO6/8.

<sup>35</sup> HO17/76/Oh 14.

<sup>36</sup> A. Aspinall (ed.), *The Letters of George IV* (Cambridge, 1938); C. Hibbert, *George IV* (London, 1988); R. Huish, *Memoirs of George the Fourth* (London, 1830); E.A. Smith, *George IV* (London, 1999), p. 211.

<sup>37</sup> Gatrell, *The Hanging Tree*, pp. 550-1.

<sup>38</sup> *Ibid.*

case or the prisoner.<sup>39</sup> When Peel returned to the Home Office in 1828, the lists become more detailed with handwritten notes in the margin. For example in the Recorder's Report 5 March 1828 against the name of William Baker, convicted of highway robbery, there was an annotation which referred to the case of another prisoner named Welsh and continued, 'Is it true that the prosecutor has absconded? This is a material fact which should have been inquired into. R.P.'<sup>40</sup>

The Recorder's Report of May 1822 contained 20 names; 19 men and one woman.<sup>41</sup> Eight prisoners were left for execution and the rest, apart from Weedon and Alcey, transported for life. Weedon and Alcey had stolen a lamb and were sentenced to six months' confinement in the House of Correction. The number left for execution was higher than previous Reports but concerned only three burglaries.<sup>42</sup> The incidence of burglaries in London had substantially increased over the preceding months.<sup>43</sup> Naylor, Adams, Ward and Anson were engaged in a joint enterprise which involved Adams being found with a pistol; Bartholomew and Close had stolen goods from a public house and Desmond and Davis from a law-stationer's house. Based on the principle of deterrence, Peel was adamant that it was the crime which should be punished and not the individual. The length of this meeting of the King in Council was unusual, lasting three hours.<sup>44</sup>

After the meeting, George, for no obvious reason, took the decision that four of the prisoners should have their sentences commuted and left it to Peel to decide which four of the eight should escape the gallows. Gatrell contends that Peel wanted all eight hanged drawing the inference that Peel was not prepared to personally recommend commutation of any of the sentences.<sup>45</sup> This is not the only possible interpretation of these events; Peel was upholding the decisions of the courts and the King in Council against the whim of the Monarch. George was present at the meeting of the King in Council and had the opportunity to express his concerns about the prisoners left to hang but he only decided after the meeting to raise an objection.

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<sup>39</sup> HO6/ 8-14.

<sup>40</sup> HO6/13. There is no further information about the convict Welsh with the records.

<sup>41</sup> See Appendix Four.

<sup>42</sup> For example at Peel's first meeting in February 1822, two prisoners were left for execution.

<sup>43</sup> *Oxford Journal*, 25 May 1822.

<sup>44</sup> *Morning Chronicle*, 20 May 1822.

<sup>45</sup> Gatrell, *The Hanging Tree*, pp. 554- 64

This disagreement between Peel and the Monarch marked a watershed in the constitution. By refusing to allow the King to interfere with the due processes of law, Peel was asserting that the authority of the Executive should take precedence over the personal wishes of the Monarch. If Peel had completely acquiesced with the King's wishes, all future decisions of the King in Council would have been conditional on the Monarch having a change of mind, leading to a lack of consistency or certainty in the law.

By insisting that four of the prisoners were to have their sentences commuted, George forced Peel to search for reasons to recommend the exercise of the Royal Prerogative of mercy. The death sentences on Desmond, Davis, Ward and Anson were respited for a week and in this interval, new evidence was adduced which persuaded Peel that the sentences passed on Desmond and Davis could safely be commuted to transportation for life. In a draft letter to an unknown recipient, Peel acknowledged that Davis had supplied information about a burglary in York Street Westminster and this information had proved sufficient to allow the capital sentence to be commuted. The death sentences on Ward and Anson, however, were confirmed. On receiving the warrant for execution, Sheriff Garrett refused to communicate the decision to the prisoners delegating the duty to the Ordinary of Newgate, the Chaplain. Ward wrote to Peel begging for mercy as 'he had already suffered all the horrors [*sic*] and pangs of expected death and is now the victim of bitterest disappointment being ordered for execution a second time.'<sup>46</sup> He even offered to answer all questions about the offence but these pleas were to no avail as both Ward and Anson were duly hanged. George's actions resulted in two lives being saved but it also demonstrated that he was a Monarch only prepared to interfere with decisions when it suited him to do so.

George's motivation for interfering with the decision of the King in Council in May 1822 was notable as a similar situation had arisen a month earlier at Warwick Lent Assizes.<sup>47</sup> Thomas Judd had been convicted of uttering forged notes and was left for execution which was scheduled for 19 April. A petition was sent to Lady Warwick who then forwarded it to Peel including a letter of her own on Judd's behalf. Complying with usual practice, Peel sent the papers to Mr Justice Best, the trial judge,

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<sup>46</sup> HO17/87/Qh 43.

<sup>47</sup> HO47/62/ ff. 149-170.



for his report on the case. On receipt of his advice and aware of Lady Warwick's friendship with the King, Peel wrote to George appraising him of the situation. After the usual pleasantries, Peel advised that on the advice of the trial judge 'the case [was] an aggravated one and it would not be expedient that mercy should be extended to the prisoner.' The King was at Brighton and a letter written on his behalf by his secretary, Sir Andrew Barnard, on April 15 stated that he agreed with Peel's opinion.<sup>48</sup> He concluded the letter by stating that if the judge changed his mind 'HM is always inclined to mercy he has no objection to granting a respite provided Mr Peel thinks it advisable.'<sup>49</sup>

So what changed over the month to motivate George to intervene in the Recorder's Report of May 1822? The background to the meeting of May 18 1822 perhaps gives a clue. After the victory at Waterloo in 1815 and on ascending the throne in 1820, George considered that he was entitled to be viewed as the most powerful Monarch in Europe and his position could only be sustained if he was given sufficient funds to finance his lavish and extravagant lifestyle.<sup>50</sup> Whilst the government was prepared to indulge him to a certain extent, there was a growing clamour for the King's excesses to be curtailed. This unease was fuelled by political caricaturists such as George Cruikshank, who portrayed George as a buffoon always in need of money.<sup>51</sup>

On 1 March 1822 the House of Commons voted to discontinue the services of one of the Lords of Admiralty and on 2 May to abolish one of the posts of Postmaster General. Lord Chancellor Eldon wrote in a letter to Lady Banks that he had seen the King who felt that the Commons was 'stripping the Crown naked' and represented the King 'as suffering from severe illness, occasioned by these attacks... on the Royal Prerogative.'<sup>52</sup> George saw the Report as an opportunity to reassert his personal authority. When he attempted to interfere with another decision of the King in Council the following year, it became a resignation issue for Peel who saw the monarch's

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<sup>48</sup> Barnard was appointed Groom of the Bedchamber in 1822; *The Gentleman's Magazine*, XLIII (London, 1855), p. 309.

<sup>49</sup> HO47/62 /fols. 149-70.

<sup>50</sup> Examples of George's extravagance include his building of the Brighton Pavilion and huge gambling debts.

<sup>51</sup> For examples of Cruikshank's work see *George IV and friends*. Brighton Pavilion museums. 25 February 2015. <<http://brightonmuseums.org.uk/discover/2015/02/26/george-iv-and-his-friends>> [accessed 12 January 2016]; E.A. Smith, *George IV* (London, 1999), p.254.

<sup>52</sup> H Twiss, *Life of Lord Chancellor Eldon*, 2 volumes (London, 1844), volume 2, p. 64; the letter is undated but Twiss believed it to be written in May 1822.

interference as an attempt to usurp the independence of the judiciary. The fact that the offences concerned involved the passing of Bank of England notes was relevant as there had been calls for reform of this issue over the previous five years.

### **Forging of Bank of England notes and coins**

At the behest of his mistress, Lady Conyngham, George was urged to interfere in the case of Samuel Miles who was left for execution at the meeting of the King in Council July 1823.<sup>53</sup> Lady Conyngham's stated motivation was that she was impressed by Miles' respectable connections but it may well have been that her real motivation was less altruistic.<sup>54</sup> The background to this case was important as it raised the question of the proportionality of the punishment for the forging of Bank of England notes.

During the middle of the eighteenth century, after involvement in wars and consequent gold shortages, the Bank of England was forced, for the first time, to issue £10 and £5 notes. These were the lowest denominations of Bank of England notes until 1797, when the Bank issued £1 and £2 notes. After a series of runs on the Bank, because of the uncertainty of war with Revolutionary France, there had been a depletion of its bullion reserve to the point where it stopped paying out gold for its notes.<sup>55</sup> These notes were widely circulated but proved easy to forge with the result that the number of prosecutions and convictions greatly increased between the years 1797-1818. Before 1797, there had only been a small number of convictions and executions for forging bank notes but between 1797 and 1818, Joseph Kaye, Solicitor to the Bank of England, reported to the House of Commons that there had been 998 prosecutions involving counterfeit notes. Of these, 313 prisoners were capitally convicted, 521 convicted of possessing forged notes and 164 were acquitted.<sup>56</sup> Of the capitally convicted prisoners more than 300 of them were executed during this 21 year period.

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<sup>53</sup> T. Ambrose, *The King and the Vice Queen* (London, 2005).

<sup>54</sup> Ibid; PRO30/45/1 fols. 739-40,745-6,751-2; Miles' petitions are indexed in HO19 but are missing from HO17/97.

<sup>55</sup> Bank Restriction Act 1797 (37 Geo. III c. 45).

<sup>56</sup> Art. IX. Returns of Prosecutions and Convictions for Forging Notes of the Bank of England from 1783-1818: laid before House of Commons, 21 April 1818 abstracted in *The Punishment of Death: A Selection of Articles from the Morning Herald* p.10; M Crosby, 'The Bank Restriction Act (1797) and Banknote Forgery.', D F. Felluga (ed.), *BRANCH: Britain, Representation and Nineteenth-Century History*; < <http://www.branchcollective.org/?ps-articles=mark-crosby-the-bank-restriction-act-1797-and-banknote-forgery> >[accessed 12 January 2014].

Recognising that the rapid rise in capital convictions and executions in such a short period of time would arouse public disquiet at a time when Britain's energies were focussed on hostilities with France, in 1801 the Bank's solicitors sought statutory authority to accept a plea bargain. The passing of the Banknotes Forgery Act of 1801 delegated to the Bank's solicitors prosecutorial discretion to accept a guilty plea to the lesser offence of possession of counterfeit notes which carried the sentence of 14 years' transportation rather than death.<sup>57</sup> The capital charge would not then be pursued. This was an innovative measure designed to halt the numbers of prisoners being executed for bank note offences, but was only partially effective.

After 1815 and with Britain at peace, the issue of forged bank notes returned to the public consciousness. Matters came to a head in December 1818 when, against the judge's direction, two juries at the Old Bailey refused to convict four prisoners prosecuted by the Bank of England on capital offences relating to counterfeit notes.<sup>58</sup> Radicals were quick to criticise the part played by the Bank of England in these prosecutions and pressed for reform of the forgery statutes.<sup>59</sup>

In 1821 Mackintosh introduced a Forgery Punishment Mitigation bill but it lacked widespread support and was defeated. Following the recommendations of a Committee of Enquiry in 1819 into the currency chaired by Peel, cash payments were reintroduced in March 1821 which Philip Handler considered 'virtually put an end to executions for offences relating to Bank of England notes'.<sup>60</sup> This statement bears further examination as prisoners charged at the Old Bailey and the non-metropolitan Assizes of passing forged Bank of England and private bank notes continued to appear with regularity throughout the rest of the decade as the Bank of England still issued £5 and £10 notes.<sup>61</sup> In 1826, as the result of an economic downturn, the Bank of England temporarily returned to issuing £1 notes. The number of prosecutions fell substantially in the years 1822-30, but executions continued to excite calls for reform of the capital statutes.

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<sup>57</sup> (41 Geo. III c. 37).

<sup>58</sup> P. Handler, 'The Limits of Discretion: Forgery and the Jury at the Old Bailey 1818-1821', pp. 155-72.

<sup>59</sup> J Wade, *The Black Book: or Corruption Unmasked!* (London, 1820), pp. 238-71; George IV and his friends. <http://brightonmuseums.org.uk/discover/2015/02/26/george-iv-and-his-friends> [accessed 12 January 2016].

<sup>60</sup> Handler, 'Forgery and the end of the Bloody Code', p. 691.

<sup>61</sup> The offence of passing forged notes was termed 'uttering'.

At the Old Bailey September 1821, months before Peel took up office, seven prisoners (six men and a woman) were capitally convicted of passing notes. The circumstances surrounding the convictions of Thomas Topley, Edmund Sparrow and George Ellis were similar: they all used counterfeit notes in shops to buy goods and pocketed the change but it was the case of Josiah Cadman which most aroused public interest. Cadman had pleaded guilty in the hope that the capital sentence would be commuted but despite numerous petitions and letters sent to Lord Sidmouth the sentence was upheld at the King in Council when it met in November 1821.<sup>62</sup> Although the trial judge, Baron Graham, considered Cadman's case 'deserving of mercy', the Bank's solicitors, Messrs. Kaye, Freshfield and Kaye advised that the Governors and Bank Directors could not interfere with the decision.<sup>63</sup>

A report in the *Annual Register* revealed the full extent of Cadman's guilt, illustrating that he had been a widespread dealer in both £1 notes and latterly £5 Bank of England notes and set out how he sold these counterfeit notes at a discount to large numbers of people.<sup>64</sup> With his execution imminent, articles appeared in the press decrying the continuance of the death penalty for forgery.<sup>65</sup> It was left to *The Times* to counter these arguments by stating that they believed Cadman was a dealer whose criminal activities resulted in the execution of other prisoners and as a consequence, viewed him as 'a murderer of the most atrocious and deliberate kind.' However, it could not resist criticising the Bank of England for not making the counterfeiting of notes more difficult stating that 'a man who leaves his stable door unlocked has no right to punish the stealer of the steed like one who secures his property with bolts and bars.'<sup>66</sup>

Both the government and the Bank of England had recognised the need to make improvements to the security of paper money in circulation with the appointment of a Royal Commission in 1819-1820. The Commission examined over 108 projects and more than 70 types of paper and concluded that the specimen notes produced by Applegarth and Cowper, based on copper plate engraving, were the best solution to prevent forgeries.<sup>67</sup> The choice of the Applegarth, Cowper note, however, was not

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<sup>62</sup> HO 6/ 6; HO17/49 Hh 2.

<sup>63</sup> *Leeds Mercury*, 24 November 1821

<sup>64</sup> *Annual Register*, 63 (1821), pp. 173-4.

<sup>65</sup> See for example *Morning Chronicle* and *Morning Post*, 23 November 1821.

<sup>66</sup> *The Times*, 22 November 1821 and 24 November 1821.

<sup>67</sup> A.D. McKenzie, *The Bank of England Note: A History of its Printing* (London, 1953), p. 65.

universally applauded. In 1819 the Society of Arts issued a report concluding that the only secure method of printing of paper money was to adopt the process invented by Joseph Perkins termed siderographic printing.<sup>68</sup> Perkins had travelled to England from America in 1819 to demonstrate the process to the directors of the Bank of England but they had not awarded him the contract. Siderographic printing replicated copperplate line engraving but used hardened steel plates and was more detailed in design which it was contended increased the security against forgeries.<sup>69</sup> In a letter addressed to Peel but printed for public consumption published two years after this Report, John Robertson of Hatton Garden reemphasised the need to adopt siderographic printing alleging that there were thousands of copperplate printers in England who were capable of copying the Bank of England notes and that nine out of ten were prepared to take the risk of forging the notes through need and distress.<sup>70</sup>

Prosecutions for forgeries of bank notes continued and in 1823, the government acknowledged that it had effectively run out of any ideas on how to achieve security of paper money. In a statement in the House of Lords in May 1823, the Prime Minister, Lord Liverpool stated that the government had taken all reasonable steps to prevent forgeries of the bank notes, spending between £20,000 - £30,000 on varied experiments but with little success.<sup>71</sup> With the counterfeiting of bank notes proving so easy and detection unlikely due to the lack of a professional police force, forgers of bank notes and their accomplices were in effect the organised criminals of their day. Lincoln B. Faller considered that forgers had replaced highwaymen as the ‘great crooks of the latter part of the eighteenth century’ and this description could equally be extended to the 1820s.<sup>72</sup> Uttering counterfeit notes was a highly lucrative business with the same *modus operandi* in most cases. Young men and occasionally women were recruited by dealers to buy items of little value in shops using a counterfeit note

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<sup>68</sup> See Report noted in J. Robertson, *A Letter to the Right Hon. Robert Peel.....upon the subject of Bank – note Forgery....* (London, 1822).

<sup>69</sup> C. Eagleton and A. Monolopoulou, ‘Security printers to the provincial banks: Perkins and Company and the production of banknotes in nineteenth century Britain’, in C. Eagleton and A. Monolopoulou (eds), *Paper Money of England and Wales* < <http://www.britishmuseum.org> > [accessed 5 September 2014]. A collection of letters held at the British Museum dated between 1820s and 1850 between Perkins and provincial banks reveal that the banks were very concerned to ensure that their notes were protected against counterfeiters.

<sup>70</sup> Robertson, *A Letter*.

<sup>71</sup> *London Gazette* 3 May 1823 reported in the *Hampshire Telegraph and Sussex Chronicle*, 5 May 5 1823.

<sup>72</sup> L.B. Faller, *Turned to Account: the Forms and Functions of Criminal Biography in Late Seventeenth and Early Eighteenth Century England* (Cambridge, 1987), pp. 92-3.

and pocketing the change. They then had to account for the change to the dealer who paid them a fee. The problem for the authorities was that whilst they might arrest the person passing the note, they had little success in arresting the dealers.

After his first meeting of the Recorder's Report in February 1822, Peel raised reservations with the Lord Chancellor about the confirmation of the death sentence on 18 year old William Rivers convicted at the Old Bailey the previous month of uttering forged bank notes. The Lord Chancellor passed Peel's letter to Liverpool who advised that he feared that 'if an example is not to be made of him it will bear encouragement to employ the young on this species of crime.' Rivers' execution was not the last execution of a young man passing counterfeit notes that year. In May 1822, 19 year old, John Lomas was convicted of 16 counts of uttering on two indictments. When arraigned at the Old Bailey, he had pleaded guilty but the judge, Mr Justice Bayley, adjourned proceedings for two hours for him to reconsider his plea. Lomas, however, was not to be persuaded and the death sentence was passed on him. Despite numerous petitions being lodged on his behalf, the sentence was confirmed at the King in Council and he hanged on June 27.<sup>73</sup> One of 11 children, Lomas had been enticed to pass the notes as he had been unemployed for some months and was in distress. *The Examiner* was scathing of this decision opining that it was 'another death for forgery ... added to the long, most melancholy and disgraceful list'.<sup>74</sup>

The following year four men were convicted at the Old Bailey of uttering counterfeit Bank of England notes. After Liverpool's opinion in the Rivers case, followed in the Lomas case, it was unlikely that any commutation of sentence in similar circumstances would be granted. However, in February 1823, Charles Clift pleaded guilty on two indictments of eight counts of uttering forged notes.<sup>75</sup> At the meeting of the King in Council on 26 April 1823, the confirmation of the death sentence was suspended with the annotation 'case suspended to make inquiry as to the extent and value of the information which has been given'.<sup>76</sup> At the following meeting of the King in Council on 13 May 1823, Clift's sentence was commuted to transportation for life. Ascertaining the reasons for this decision have proved difficult as all the petitions for

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<sup>73</sup> *OBP*, 22 May 1822, John Lomas (t18220522-22); HO17/107/ Vh 5.

<sup>74</sup> Reported in *Worcester Journal*, 4 July 1822.

<sup>75</sup> *OBP*, 19 February 1823, Charles Clift (t18230219-49).

<sup>76</sup> This annotation appears on the Recorder's List in HO6/8.

mercy for the year 1823 are missing and there is no correspondence in the Home Office papers or press interest concerning the case. However, some light was shed on the circumstances five years later in May 1828, when John Montgomery pleaded guilty to uttering forged Bank of England notes and was left for execution by the King in Council.<sup>77</sup> In his petitions for mercy, he mentioned the case of Charles Clift asserting that Clift had obtained a commutation of his sentence through the interference of William Chapman.<sup>78</sup> Whatever evidence Chapman adduced on behalf of Clift or was supplied by Clift himself, it must have carried sufficient weight for the death sentence to be commuted.

In June 1823 19 year old Samuel William Miles was tried on four counts of uttering counterfeit Bank of England notes. He pleaded not guilty and contended that there was no conclusive proof that he knew the notes were forged but after retiring for more than three hours the jury found him guilty recommending him to mercy on account of his youth. It was reported in the *Morning Chronicle* that the jury had passed a note to the Recorder of London containing their reasons for recommending mercy and the Recorder had refused to allow the note to be read in court.<sup>79</sup> The jury expressed the view that they found themselves ‘compelled by their oaths to find a verdict of guilty where the law inflicts the severe penalty of death for a crime ...so unequal to the punishment.’ In order to obtain a commutation of sentence, Miles’ brother, J.R.Miles, wrote to the Bank of England stating that the accused would supply information about the dealer in the forged notes whom he named as Black Harry. In the event no such information was forthcoming from Miles and at the meeting of the King in Council on July 16 he was left for execution.<sup>80</sup>

Three days after the meeting, George IV wrote to Peel asking him to immediately enquire into Miles’ case; he was anxious to save the prisoner’s life as he was ‘an unfortunate boy of only seventeen.’<sup>81</sup> For no apparent reason, Peel’s reply was not included in Parker’s edition of *Peel’s Papers*. The letter appears upside down in Peel’s papers (the only one in the volume), is written in Peel’s idiosyncratic abbreviated

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<sup>77</sup> *OBP*, 29 May 1828, John Montgomery (t 18280529-12); HO17/45/Gn 49.

<sup>78</sup> A William Chapman was associated with the bank of Chapman & Co in the 1820s; <<http://www.geog.cam.ac.uk/research/projects/chambersofcommerce/bankingpartners.pdf>> [accessed 12 March 2014].

<sup>79</sup> 4 July 1823.

<sup>80</sup> PRO 30/45/1 fols. 739-40,745-6,751-2.

<sup>81</sup> B.L. Ad. Ms 40299 fols. 241-3

language and not marked as a 'copy'. Peel advised the King that he had made full enquiries into the case, consulted the Lord Chancellor 'the result of which (Mr P. is sorry to add) was that there was a strong impression that the law ought to take its course.' He advised that it was his belief that Miles was considerably older than 17. He then noted that a prisoner named Hunter had been committed to prison for a like offence and had declared that he had been induced to commit the crime because of the leniency shown to Clift. Hunter further stated that the person who had employed him to pass the forged notes had assured him that, if caught, he would not suffer the death penalty but would only be transported for 14 years because of the Council's decision to commute Clift's sentence. Peel concluded the letter with the opinion that 'if the Law fails to take its course, in the case of Miles, an impression will be confirmed from which there will be worst [sic] consequences.'<sup>82</sup> This letter was revealing as Peel was uncharacteristically vague; in this instance he deliberately avoided expressing what he perceived these consequences to be.

After George's previous attempt to unilaterally interfere with the decision of the King in Council after the Recorder's Report of May 1822 this letter may have been a veiled attempt to warn the King that such interference would no longer be tolerated. Moreover, the relationship between the parties was an influential factor in the tone of letter. The work of the Home Office brought Peel into constant contact with George. For their relationship to work Peel was obliged to show deference to the King and perhaps this was a rare occasion when Peel was forced to mask his true feelings to protect his political ambitions. The King still retained the power to block political advancement and Peel was aware of this.<sup>83</sup> Peel's Under-Secretary, Hobhouse, noted in his diary that Peel believed the issue was of such fundamental importance that he was prepared to resign his office if the King insisted on Miles' sentence being commuted.<sup>84</sup> Whilst Peel was no doubt more candid with his trusted associate, a caveat is necessary in respect of the accuracy of Hobhouse's diary entries and should be

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<sup>82</sup> No person named Hunter appears in the *OBP* for this offence.

<sup>83</sup> George was reluctant to appoint Canning as Prime Minister in 1827 as Canning had supported Queen Caroline at the time of her trial in 1820 and he supported Catholic Emancipation. Likewise he refused to receive the Recorder's Report in 1828 from Thomas Denman, who had defended Queen Caroline at her trial.

<sup>84</sup> Hobhouse, *The Diary of Henry Hobhouse*, p. 104.



regarded with caution.<sup>85</sup> Whether Peel really intended to resign can only be a matter of conjecture. However, it is unlikely that Peel would have risked his future political career and in the end, his resignation was not necessary as George gave way and Miles was hanged.<sup>86</sup> His execution was witnessed by great crowds but there was no public disorder.<sup>87</sup>

George made no further attempts to directly interfere with the decisions of the King in Council but did write to Peel concerning the capital sentence confirmed on Joseph Hunton convicted of forgery at the Old Bailey October 1828.<sup>88</sup> In muted tones, George was 'very desirous' that Hunton's life should be saved if it could be done with propriety. After consultations with the Lord Chancellor and the Lord Chief Justice, Peel advised the King that there were no grounds to interfere.<sup>89</sup> Peel's reply was particularly interesting as the words he used were almost identical to the response written by Liverpool in February 1822 when Peel unsuccessfully sought the commutation of the capital sentence passed on William Rivers convicted of passing Bank of England notes. In both cases the answer stated that 'it would be very difficult hereafter to enforce the capital sentence of the law in any case of forgery if mercy [was] extended in this case.'<sup>90</sup> Why he chose to employ these exact words after nearly seven years is interesting. Various reasons could be advanced; using the same words as Lord Liverpool may have been a shield to protect him from any criticism of his actions in the face of the large number of petitions received on Hunton's behalf or perhaps the execution of Rivers, after his first meeting of the King in Council, had such a profound effect on him that he never forgot the actual words which sent the young man to his death.

Just before the end of his reign George made a final attempt to unilaterally exercise the Royal Prerogative of mercy. An Irish gentleman named Comyn was capitally convicted for forgery, perjury and arson and left for execution after consideration by the Lord-Lieutenant of Ireland, the Duke of Northumberland. George instructed the

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<sup>85</sup>It is Hobhouse who cites Peel's first meeting as Home Secretary at the King in Council as May 1822. This has been adopted without question by historians (see for example Gash, *Mr Secretary Peel*, p. 403; Gatrell, *The Hanging Tree*, p 554) Peel's first meeting was in February 1822.

<sup>86</sup> Gatrell, *The Hanging Tree*, pp. 563-4.

<sup>87</sup> *Jackson's Oxford Journal*, 26 July 1823.

<sup>88</sup> *OBP*, 23 October 1828, Joseph Hunton (t18281023-269); HO17/88/Qn5; HO6/13.

<sup>89</sup> Gash, *Mr Secretary Peel*, p. 480.

<sup>90</sup> p. 113 *supra*.

Lord-Lieutenant to commute the sentence without reference to either the Duke of Wellington, as Prime Minister, or to Peel as Home Secretary. After much persuasion by Wellington, the King was persuaded to withdraw the order and Comyn duly hanged. Within weeks George himself was also dead.<sup>91</sup>

These episodes illustrated the constitutional changes which occurred throughout the 1820s in respect of the Crown's ability to interfere with verdicts and sentences imposed by the courts and the decisions of the King in Council. The down-grading of the offence of counterfeiting coins was another indication of the waning prerogative powers of the Crown. Counterfeiting had been a capital offence since 1352 when it was classified as high treason.<sup>92</sup> The privilege of minting money was an exclusive prerogative of the Crown and therefore an attack on the King or his image was deemed treason in the same way as any other political or even physical attack on the Monarch. Over the centuries, the offence of both counterfeiting and uttering false coins had been statutorily modified resulting in a complicated and detailed schedule of provisions before a person could be indicted on the capital charge.<sup>93</sup> When Peel took up office in 1822, the offence was widespread but the lack of capital convictions meant that it did not arouse the same public interest as offences concerning the passing of bank notes.<sup>94</sup> Between 1822 and 1830, 100 prisoners were convicted of coining at the Old Bailey. The majority of these convictions were for misdemeanours and involved periods of imprisonment but 23 of the prisoners were capitally convicted and sentenced to death.<sup>95</sup> Of these 23 prisoners, nine were women, none of whom was executed, whilst three of the remaining 14 male prisoners were hanged. By 1832, coining and

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<sup>91</sup> George IV died on 26 June 1830 at Windsor Castle; Hurd, *Robert Peel*, p.77.

<sup>92</sup> (25 Edw. III c 2); A Kiralfy, *A Source Book of English Law* (London, 1957), p.18.

<sup>93</sup> Coin Act 1696 (8 & 9 Will.III c. 26); Counterfeiting Coin Acts 1741(15 Geo II c. 28) and 1797 (37 Geo.III c.126); F. McLynn., *Crime and Punishment*, pp. 164-71.

<sup>94</sup> P. Colquhoun, *A Treatise on the Police of the Metropolis: Explaining the Various Crime and Misdemeanour*, (London, 1796), pp 106-39.

<sup>95</sup> *OBP*, 18 February 1824, Richard Stagg (t18240218-1); 13 January 1825, James Lennard (t18250113-156); 12 January 1826, James Smith (t18260112-42), HO17/57/K1 13 ; 22 June 1826, Thomas Miles (t18260622-49); 26 October 1826, Martha Byatt ( t18261026-217); 12 July 1827, Peter Johnson Hamilton (t18270712-47), HO17/72/Nm 7; 13 September 1827, Mary Cavenagh and Ann Lynch (t18270913-28), HO17/88/Qm 14; 13 September 1827, Edward Lowe (t18270913-39); 25 October 1827, Elizabeth Cole and Elizabeth Smith ( t18271025-46), HO17/98/ Sm 13 and 47; 10 April 1828, Hamby Price and Mary Price (t18280410-29), HO17/26/Cn17; 11 September 1828, John alias Michael Callaghan (t18280911-43); 04 December 1828, James Coleman (t18281204-100), John Ponsonby (t18281204-179); 09 April 1829, James Smith (t18290409-176), Sarah alias Jane Ash ( t18290409-77), HO17/123/Yn31; 11 June 1829, John Watkins (t18290611-156); 03 December 1829, Mary Conway (t18291203-6), Hannah Wild (t18291203-8); 15 April 1830, William Wilson (t 18300415-17) and 08 July 1830, John Ireland (t18300708-7).

counterfeit offences were no longer deemed to be high treason and whilst still felonies no longer carried a mandatory capital sentence.<sup>96</sup> Thus offences, which for nearly five hundred years had been classified by Parliament and the courts as injurious to the Crown and dangerous to the fabric of society, were no longer singled out for specific punishment or distinguished from other felonies.

## Conclusions

Arthur Aspinall observed that the reign of George IV represented ‘an important stage in the long process whereby the quasi-personal monarchy of George III was transformed into the constitutional monarchy of Queen Victoria.’<sup>97</sup> He also considered that whilst most of the Crown’s traditional powers and prerogatives were maintained during George’s reign, their exercise was increasingly devolved to members of the Executive. At the beginning of his reign, George was determined to be a dominant influence in the decision making of the King in Council but by the end of the decade and the accession of William IV, the Crown had become little more than a figurehead acquiescing with the decisions recommended by government ministers. One factor for this change in the relationship between the Crown and the government may well have been the personalities of the participants involved, with William seemingly less concerned than George to demand complete deference to his position. However, the curtailment of the Crown’s personal involvement in recommending mercy under the Royal Prerogative was an illustration of a growing belief that the stability and security of the country was not intrinsically linked to the person of the Monarch.<sup>98</sup> This did not result in any lack of deference to the Crown in general terms, but policies evolved which diminished the extraordinary position previously held by the Monarch personally. The reign of George IV was a crucial stage in what Asa Briggs termed ‘the politics of transition’.<sup>99</sup>

This did not mean that future monarchs did not try to reinstate their power to intervene in criminal cases. 80 years later, during the early years of his reign, Edward VII was keen to exercise mercy on his own behalf. Viscount Chilston, Home Secretary,

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<sup>96</sup> Coining Offences Act 1832. (2 & 3 Will. IV c. 34)

<sup>97</sup> Aspinall, *Formation of Canning’s Ministry*, p. xxv.

<sup>98</sup> A. Briggs, *The Age of Improvement, 1783-1867* (London, 1959), pp. 161-86; A.S. Foorde, ‘The Waning Influence of the Crown’, pp. 484-507.

<sup>99</sup> Briggs, *The Age of Improvement*, p. 161.

prepared a memorandum on the constitutional reasons why the monarch should not get personally involved. Chilston stressed that it was important that the practice of non interference which had existed for the last 80 years should not be departed from. He insisted that if the King intervened in one case then he should intervene in all cases which numbered between 5,000 and 6,000 petitions a year. These remarks by Chilston confirmed that the stance taken by Peel had resulted in a constitutional landmark. Edward VII accepted this advice and there were no further recorded attempts by later monarchs to resurrect the privilege.<sup>100</sup>

Having considered the jurisprudential and constitutional constraints on Peel's recommendations for the exercise of the Royal Prerogative of mercy, the next question to be addressed is what formalities were involved in begging for mercy? Reconstructing the process demonstrates significant differences between civil proceedings and criminal cases and analyses the various stratagems adopted by prisoners and their supporters to ascertain whether they played an influential part in the outcome of the plea. It also reveals how the process became more standardised and bureaucratic during Peel's stewardship of the Home Office.

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<sup>100</sup> Memorandum from Viscount Chilston to Edward VII 26 September 1903 in E.A. Akers-Douglas Chilston, *The Chief Whip, The Political Life and Times of Aretas Akers –Douglas, 1st Viscount Chilston* (London, 1962), p. 52.

## Chapter Seven:

### The process of begging for the Royal Prerogative of mercy.

#### Introduction

Having considered the jurisprudential and constitutional restraints on Peel's recommendations for the Royal Prerogative of mercy, this chapter will reconstruct the process of begging for mercy by the petitioner and the Home Office's responses to the petitions. Considering the mechanics of begging for mercy will establish to what extent, if any, there were elements which discriminated between different categories of petitioner or which influenced the decision making by the Home Secretary. Their commonality was that they were all addressed to the Monarch and couched in the language of a supplicant, trusting in His Majesty's humanity and benevolence.<sup>1</sup>

Convicted prisoners merely had a hope or *spes* that mercy would be exercised in their favour. As has been established already, in certain factual situations, such as turning King's evidence, this hope could be increased to an expectation that mercy would be granted in accordance with established protocols and conventions.<sup>2</sup> Even in these situations, there was no right for the prisoner to demand relief. The protocols and conventions were never formalised by statute or common law and therefore gave discretion to the decision maker. This lack of formality was in stark contrast to the processes which evolved in dealing with deemed injustices in the civil law.<sup>3</sup>

With the establishment of the Home Office in 1782, the administration of the Royal Prerogative of mercy came within the remit of the Home Secretary acting on behalf of the Monarch. In 1822 the Home Office was staffed by two under-secretaries and ten clerks.<sup>4</sup> Petitions for the Royal Prerogative of mercy were a major and growing part of Home Office business. It has been estimated that by the time Peel left office in 1830, more than 2,000 petitions were received annually.<sup>5</sup> It was surprising that the

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<sup>1</sup> See examples of petitions see Appendices One and Five.

<sup>2</sup> Chapter Five pp. 83-8 *supra*.

<sup>3</sup> Kiralfy, *Potter's Historical Introduction*, pp. 293-311; for a history of the development of Equity see F.W. Maitland, *Equity: also The Forms of Action at Common Law: Two Courses of Lectures*, A.H.Chaylor and W.J. Whittaker (eds) (New York, 1909).

<sup>4</sup> J. Pellew, *The Home Office, 1848-1914 from Clerks to Bureaucrats* (London, 1982), p.2.

<sup>5</sup> P Carter, 'Early Nineteenth Century Criminal Petitions; an Introduction for Local Historians', *The Local Historian*, 31, 3 (2001), pp. 130-53.

numbers submitted continued to rise as few petitions were successful. Perhaps this could be cited as an example of hope over expectation.

This chapter will illustrate that whilst the petitions were varied in form, by the end of the 1820s the Home Office responses were increasingly standardised. It will also examine the form of petitions, explore the strategies employed in lodging petitions and analyse the Home Office's responses. The Home Office also had to deal with a small number of petitions for mercy sent from prisoners transported to the Colonies, the procedures employed were essentially the same but a detailed analysis of these is outside the remit of this thesis.

### **Form and style of petitions and petitioning strategies**

Petitioning for mercy was the last resort of prisoners when all judicial avenues had been exhausted. In the interests of clarity and precision the definition of a petition used in this thesis will be that utilised by TNA. The etymological root of the word petition is taken from the Latin verb *petere* to seek or beg and so any document asking for relief in some form is deemed a petition irrespective of the actual form the document takes. There was no requirement for a person to have *locus standi* to petition meaning that anyone could petition whether they had an interest in the case or not.<sup>6</sup> The petition could, therefore, be submitted by any individual or as a collective petition.<sup>7</sup> Some of the collective petitions contained the signatures of thousands of supporters of the prisoner; the majority were generally much smaller and compiled from the signatures of friends, relations, neighbours and employers/ employees.

Although petitions were submitted in many varied forms, petitions drafted by attorneys or petition writers tended to follow a particular form and florid style. These formal petitions generally commenced with a series of recitals that set out the material facts concerning the prisoner's case namely the offence, place and date of trial and any recommendations made by the jury or prosecutor. However, as the petition was drafted to benefit the prisoner, generally no details of the offence were disclosed in the petitions. Subsequent paragraphs then advanced the grounds for clemency on which

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<sup>6</sup> This is unusual. See for example judicial review applications Supreme Court Act 1981 s.31 (1); *R. v Inland Revenue Commissioners Ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617.

<sup>7</sup> The term collective petition as used by TNA refers to any petition signed by more one person.

the petition was based. These grounds included, *inter alia*, the prisoner's previous good conduct, his domestic responsibilities, youth, respectable connections and contrition.

It was very unusual, however, for prisoners to challenge the decision of the court. For example, George Carman was capitally convicted of forgery at the Old Bailey November 1829. In his petition he did not question the justice of the sentence but begged that his life should be spared. The capital sentence was commuted to transportation for life.<sup>8</sup> In contrast, Alice Woodward petitioned on behalf of her husband Joseph who had been convicted at Colchester Sessions January 1822 of stealing wheat. He was sentenced to seven years' transportation. Her barely literate petition asserted that he had been 'wrongly condemned' and that the real culprit was one James Bright. The word 'wrongly' was heavily underlined in pencil and as there were no established grounds to mitigate the sentence, the petition was marked 'Nil'.<sup>9</sup>

There is no indication that Peel treated formal petitions, drawn up by professional petition writers, more favourably than others. Informal petitions often revealed far more about the prisoner and his individual circumstances. For example, in 1829, James Rippett was convicted at Salford Sessions of theft and sentenced to transportation for life. He pleaded that he would rather be sentenced to death than 'seperated [*sic*] away from my three dear litle [*sic*] lads.' The eldest was 11 and the two younger boys were in the poor house. With no other mitigating factors, the petition was also marked 'Nil'.<sup>10</sup>

Whilst the vast majority of petitioners had some involvement in the case, letters and petitions were also received from citizens who had no direct knowledge of the circumstances. Occasionally, petitions were submitted anonymously with the writer referring to himself as 'An Englishman' or 'Seeker of Justice'.<sup>11</sup> Just as there were no limits on who could petition, so there were no constraints on the number of times a person could petition nor any time limits on petitioning. In April 1834, for instance, Mary Byrne was convicted at Lancaster Quarter Sessions of receiving stolen goods

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<sup>8</sup> *OBP*, 29 October 1829, George Carman (t 18291029-226); HO17/63/Lo 47.

<sup>9</sup> HO17/87/Qh 27 It is assumed that the underlining was made by Peel who annotated most of the petitions in pencil.

<sup>10</sup> HO17/63/Lo 46.

<sup>11</sup> See for example Amelia Robert's case Chapter Nine pp. 177-80 *supra*.

and sentenced to two years' imprisonment. Her daughter Mary Nowland petitioned the Home Office on 13 occasions between June 1834 and 1835. In each petition the grounds for clemency were the same; her mother's advanced age of 50, her good character and she bought the goods not knowing they were stolen. All 13 petitions were marked 'Nil'.<sup>12</sup> With no time limits on petitions, prisoners often continued to petition for mercy many years after their conviction. For example, Edward Norman, convicted of pick pocketing at the Old Bailey May 1825 and transported to New South Wales for life, petitioned successfully for an absolute pardon some 30 years after his original conviction.<sup>13</sup>

Petitions were generally sent directly to the Home Office but in a number of cases a different strategy was adopted. In order to gain additional 'respectability', the petition was first sent to a second party requesting them to present it to the Home Office. A local landowner, magistrate, MP or member of the aristocracy forwarded the petition often attaching a covering letter setting out their involvement with the case (if any).<sup>14</sup> Sometimes by the time the petition reached the desk of the Home Secretary, there were several covering letters and a number of character references all concerned with the same case. As this system was widespread, there was a view amongst petitioners that if a petition was endorsed by a member of a higher social class it carried more weight or influence with the decision maker. The nearer in social class and standing to the Monarch which the prisoner could exhibit was thought likely to improve the chances of success. In these asymmetrical relationships where one party was subordinate to the other, both parties envisaged that they would benefit from the process. The prisoner hoped for a mitigation of sentence whilst the patron used his influence to maintain and possibly even elevate his position in society. Peel's refusal to acquiesce with the Monarch's personal whim to grant the Royal Prerogative of mercy signalled that, in practice, this notion of Tory paternalism and patronage had little, if any, influence on his decision-making.<sup>15</sup>

Certain MPs, however, continually forwarded petitions to the Home Office in the hope that they would be looked on favourably. Richard Hart Davis, MP for Bristol, was a

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<sup>12</sup> HO17/55/ It 2.

<sup>13</sup> *OBP*, 19 May 1825, Edward Norman (t18250519-183); HO17/25/CI 14.

<sup>14</sup> In Norman's case, the petition was endorsed by Lord Aberdeen.

<sup>15</sup> P. Harling, *The Waning of Old Corruption. The Politics of Economical Reform in Britain, 1797-1846* (Oxford, 1996).



leading proponent of this strategy.<sup>16</sup> He presented, for example, the petition of John Hall convicted of larceny at the City of Bristol Quarter Sessions January 1820 and sentenced to seven years' transportation. In January 1822, Hall petitioned for clemency based on his good character, his naval service and dependent wife and two children. Hart Davis forwarded the petition to Peel with the comment that many respectable residents of Hall's parish had signed it but that he had no personal knowledge of him. As there were no established grounds to remit the sentence, the petition was marked 'Nil' and Peel wrote to Hart Davis expressing regret that it was not possible for him to interfere with the decision.<sup>17</sup>

As well as adding respectability, there may have been pragmatic reasons for this strategy. Before the passing of the Reform Act in 1832, some MPs were elected by a very small number of registered voters.<sup>18</sup> If the prisoner had any connection with one of the potential Member's constituents then agreeing to endorse the petition may have been a way of securing votes. As this could be construed as election malpractice, finding written evidence is understandably rare. It has only been possible to trace one example from the petitions researched. George Shaw was convicted at Westmorland Summer Assizes in 1823 of assisting the escape of a felon and sentenced to transportation for seven years. One William Popes entered into correspondence with Lord Lowther, one of the MPs for Westmorland, in order to gain a mitigation of Shaw's sentence.<sup>19</sup> On 16 May 1826 Popes wrote that he was prepared to support Lowther in the election if he arranged for Shaw to be released. Lowther duly requested a remission of Shaw's sentence but was unsuccessful as the papers were annotated 'refused'. Recommending Shaw's release may have been politically beneficial to Peel as Lowther was the heir to the Earl of Lonsdale, one of the largest land owners in the north of England and an influential member of the Tory party. Moreover, they had a personal connection as both Peel and Lowther were alumni of Harrow. However, as Shaw had served less than half his sentence there were no grounds for Peel to interfere with the original sentence.<sup>20</sup>

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<sup>16</sup> D.R. Fisher (ed.), *The History of Parliament 1820-1832*.

<sup>17</sup> HO17/62 Lh 32.

<sup>18</sup> Representation of the People Act 1832 (2 & 3 Will. IV c. 45).

<sup>19</sup> D.R. Fisher (ed.), *The History of Parliament 1820-1832*.

<sup>20</sup> HO17/15/ B1 33. The papers also refer to the case of Thomas Percival who was jointly charged with Shaw.

Other reasons, for the presentation of petitions by persons other than the prisoner, may have involved the payment of postage and how the Home Secretary's decision was communicated to the parties.<sup>21</sup> Many petitioners could not afford the cost of sending a bulky petition to London and so sending it to an MP would overcome this problem. In addition, whilst the petition itself was marked with the Home Secretary's decision, often there was no note in the Home Office records that it was ever communicated to the petitioner as they frequently wrote to the Home Secretary inquiring as to the progress of a petition.<sup>22</sup> Whilst there were procedures for dealing with letters from supporters like MPs, there seemed to be no standard procedure for replying directly to petitioners. It is likely that there may have been some means of informing the prisoner of the outcome of his petition, for example a note sent to the keeper of the gaol, but there is no evidence that this occurred.

Having reviewed what constituted a petition and the strategies in lodging them, the next question to be addressed is how the Home Office dealt with them. The procedure adopted by the Home Secretary depended on whether he was asked to review the verdict itself or the quantum of sentence.

### **Review by the Home Secretary**

There are no Home Office records which recited the steps taken when a petition was received but it has been possible to reconstruct the process developed during Peel's tenure. Peel's contemporary John Wontner, Keeper of Newgate prison, asserted that only 'a few solitary cases' ever reached the desk of the Home Secretary.<sup>23</sup> This view, however, seems an inaccurate description of what actually occurred. The method employed appears to be that all petitions were initially scrutinised by one of Peel's under secretaries who then passed the petition to Peel himself. If there were circumstances raised in the petition which required further clarification, Peel invariably requested a report from the trial judge. Even when there were no grounds for mitigation, annotations (in Peel's pencilled scrawl) often appear in the margin or

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<sup>21</sup> All MPs had the right to frank and receive a number of letters without payment; see Postal Museum <<http://www.postalheritage.org.uk>> [accessed 20 November 2014].

<sup>22</sup> See for example William Hughes' petition; HO17/15/BI 22.

<sup>23</sup> J. Wontner, *Old Bailey Experience: Criminal Jurisprudence and the Actual Working of our Penal Code of Laws* (London, 1832), pp. 117-43. (There is confusion over Wontner's first name: HO papers refer to him as John but he is named as Thomas in other papers.); S. Devereaux, 'The Criminal Branch of the Home Office', G.T Smith, A.N. May et al (eds), *Criminal Justice in the Old World and the New* (Toronto, 1998), pp.279-308.

parts of the petition were underlined. This gives rise to the assumption that Peel was involved in the decision making in the vast majority of cases which landed on his desk.

Peel took great care and time to fully consider the petitions to ensure that there were no grounds for mitigation which had been overlooked by the trial judge or that new evidence had come to light after the conviction. Examples of this direct scrutiny occur across Peel's stewardship of the Home Office. John Mann was convicted at Suffolk Summer Assizes 1825 of highway robbery with 'much violence' and was left for execution by the trial judge, Lord Chief Justice Tenterden. Mann petitioned the Home Secretary for mercy. Peel instructed Hobhouse to write to the keeper of the gaol at Bury St. Edmunds to inform the prisoner that the execution had been respited for one week in order for the case to be considered. The letter ended with the caveat that the prisoner was not to be led to expect any mitigation of the sentence. In the intervening week a further petition signed by numerous local dignitaries was presented to the Lord Chief Justice requesting he reconsider the case. The judge was firm that it was absolutely necessary for the sake of example that the full penalty of law should be imposed when such violence had been exhibited. There were no grounds for Peel to interfere with the judge's sentence so Mann hanged.<sup>24</sup>

In the infamous Radlett murder case of 1823, Peel wrote to his wife Julia that he was waiting 'in hourly expectation' of the results of the trial. He continued that 'he was intent on returning to the office at ten o'clock that evening' as he had no doubt that Hunt's solicitor would want to see him.<sup>25</sup> Generally face to face meetings with petitioners or their counsel were a rare occurrence for Peel, although Hannah Doublet noted that Peel had met with the father of Thomas Godwin and they had discussed the case.<sup>26</sup>

On another occasion he agreed to meet with the brother of John Orchard who was capitally convicted of forgery at Devon Lent Assizes in March 1827 and left for execution by the trial judge, Mr Justice Burrough. James Orchard pleaded that his brother had not intended to defraud the victim of the monies and had repaid most of the proceeds stolen. The victim was an elderly spinster who had died before the case

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<sup>24</sup> HO13/45/112 and *Morning Post* 19 August 1825.

<sup>25</sup> Peel, *The Private Letters of Sir Robert Peel*, p. 58; Chapter Five p. 84 supra.

<sup>26</sup> See Appendix Five.

came to trial. Orchard came from a respectable family and executions for forgery in Devon were a relatively rare occurrence so there was an expectation that Orchard's sentence would be commuted.<sup>27</sup> It was reported in the *Morning Chronicle* that a meeting had taken place and Peel had confirmed that the case had been carefully considered but that the circumstances of the case 'were too aggravated' to interfere with the judge's decision and recommend clemency.<sup>28</sup> It is difficult to discern why Peel would agree to this meeting except perhaps, as in Godwin's case, to salve his own conscience that he had considered all the relevant circumstances of the case.

One difficulty which Peel encountered when deciding whether there were grounds to recommend the Royal Prerogative of mercy was the gathering of the material facts about the case which would enable him to come to an informed decision. The petitions themselves generally only recited circumstances which benefitted the prisoner and so Peel was obliged to seek a report from the trial judge or Chairman of the Bench of Quarter Sessions. These reports had no standardised form. Some judges gave a brief synopsis of the evidence and confirmed the sentence but gave no indication whether they considered there were grounds to mitigate the sentence whereas other judges were adamant that the original sentence should stand.<sup>29</sup> Occasionally when a petition challenged the judge's conduct of the trial, there was a vehement reply detailing his impartiality. This was the case, for example, in the report of Mr Justice Park in the case of William Leggett convicted of theft at Essex Assizes 1827.<sup>30</sup>

On one rare occasion, the trial judge took the unusual step of asking Peel for his assistance on whether to commute a capital sentence. At the Lancaster Lent Assizes 1824, John Atkinson aged 22 was convicted of uttering a forged bill of exchange on Mills & Company of Dublin and sentenced to death. Although not bank notes, in the modern accepted sense, negotiable instruments issued by private stock banks were treated in commercial terms in a similar way to notes issued by the Bank of England. Atkinson endorsed the bill of exchange making it into a bearer note and then attempted to buy a quantity of sugar from a Mr Hutchinson who accepted the bill as he had

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<sup>27</sup> P. King and R. Ward, 'Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery', *Past and Present*, 228 (2015), pp.159-205.

<sup>28</sup> *Morning Chronicle*, 19 April 1827.

<sup>29</sup> See Elizabeth Gould's case, Chapter Six pp. 102-3 *supra*.

<sup>30</sup> HO47/73 / fols. 261-99.

previously dealt satisfactorily with Mills. The bill was presented by Hutchinson to the bankers, Heywoods of Liverpool who refused to pay it.

Three petitions for mercy were sent to the Home Office on Atkinson's behalf including one signed by 100 bankers, merchants and other citizens of Liverpool<sup>31</sup>. One of the grounds for clemency was that although the signatories recognised the severity of the crime they were concerned that a crime without violence should be punished by death. The petition continued 'stamping forgery and murder as crimes of equal degree' suggested that people were not deterred from the crime of forgery by the threat of death but rather that people were deterred from bringing a prosecution because of its punishment.<sup>32</sup> Peel had no grounds to interfere with the decision but requested a report from the trial judge, Mr Justice Bayley. He set out the facts of the case, noting that the prosecutor had recommended mercy in the strongest possible manner, but he was unwilling to grant mercy on the basis that it gave 'dangerous encouragement' to other forgers.<sup>33</sup> He asked for Peel's advice on how he should deal with the case, writing 'you know what the Privy Council would be likely to do in such a case'.<sup>34</sup>

Peel replied two days later advising that he had 'great difficulty' in saying what decision the King in Council would arrive at in similar circumstances, without details of the evidence.<sup>35</sup> He further stated that even if he was in possession of all that information, he would have 'great hesitation in giving an opinion'. This did not mean that Peel was unwilling to help. He forwarded the details of five cases of uttering of bank notes which had been before the King in Council, which he hoped would assist to the judge. It is unfortunate that the letter does not specify which cases were included. If Peel was, in Gatrell's view 'a great hangman', this was an opportunity to select cases where prisoners were left for execution and thus influence the judge to adopt the same course.<sup>36</sup> However, the outcome would seem to contradict this as days later Bayley J. recommended a commutation of the capital sentence on condition that Atkinson was transported for life. His circuit letter stated that he had found 'favourable circumstances' in the prisoner's favour notably that if the prosecutor had acted 'with

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<sup>31</sup> HO17/34/ Ek 14.

<sup>32</sup> Ibid.

<sup>33</sup> HO 6/9.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Gatrell, *The Hanging Tree*, p. 566.

a little vigilance' the fraud would have been frustrated.<sup>37</sup> This case illustrated that, in these exceptional circumstances, where there was no doubt that Peel could have influenced the decision, he was not prepared to interfere where there were no accepted grounds to do so.

Cases of uttering forged notes continued to appear at the Lancaster Assizes throughout the decade. Difficulties in deciding on the appropriate and proportionate punishment did not ease for the judges and Peel was drawn into the issue through questions in the House of Commons. Economically the years 1822-5 were a period of monetary expansion and speculative boom which could not be sustained and resulted in a spectacular collapse in the winter of 1825.<sup>38</sup> There was a run on the banks and many private banks failed with the episode becoming known as the 'paper panic'. The banking situation was different in Lancashire from other parts of the country due to the lack of joint stock banks caused by the failure of similar schemes in the late eighteenth century. Most manufacturers in Lancashire used Bank of England notes to pay their employees.<sup>39</sup>

With the temporary reinstatement of £1 Bank of England notes in March 1826, almost immediately six prisoners appeared before the Lancaster Lent Assizes charged with uttering forged notes. Daniel Whelan, Daniel Logan, James Hare, James Simpson, John Smith and Thomas Martin were all capitally convicted.<sup>40</sup> The judge, again Bayley J., addressed the prisoners before passing sentence. He deplored their actions in taking advantage of a period of great distress in the country which could threaten its currency. He acknowledged that there were different shades of guilt amongst the prisoners (Smith had been previously convicted for a like offence) but an example had to be made to 'convince all persons engaged in such practices that they could not proceed without impunity.' He concluded that the only check on this species of crime which was effectual in protecting the public was the punishment of death.<sup>41</sup> The tenor of Bayley J's statement condemned the culpability of the prisoners referring to their

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<sup>37</sup> HO 6/9.

<sup>38</sup> W.A. Acworth, *Financial Reconstruction of England 1815-1822* (London, 1925); L Neal, *The Financial Crisis of 1825 and the Restructuring of the British Financial System*, <<http://research.stlouisfed.org/publications/review/98/05/9805ln.pdf>> [accessed 20 November 2014].

<sup>39</sup> J. Clapham, *The Bank of England (1797- 1914)* (Cambridge, 1944), volume 2, pp. 91-2, 97.

<sup>40</sup> Logan HO 17/62/L1 20; Hare HO 17/67/M1 16; Simpson HO 17/62/L1 18; Smith HO 17/62/L1 19 and Martin HO 17/67/M1 39.

<sup>41</sup> *Liverpool Mercury*, 17 March 1826.

‘iniquitous careers’ but days later it was the culpability of the Bank of England which was debated in the House of Commons.

In a debate on March 21 1826, on a petition from Rochdale calling for the reform and reduction in taxation, Colonel Johnson MP for Boston in Lincolnshire, enquired of Peel, in view of the six convictions, what steps the government proposed to take to prevent the ‘baneful effects’ of the new circulation of £1 notes. Peel admitted that he knew nothing more of the trials or convictions than the information he had gleaned ‘from the channels of communications open to the public.’<sup>42</sup> This did not satisfy Pascoe Grenfell MP for Penryn, a consistent and ardent critic of the Bank of England, who pressed Peel to explain what steps the government was going to take to force the Bank to make the notes more difficult to forge.<sup>43</sup> In reply, Peel supported the Bank’s actions and questioned whether it was to blame. The Bank had spent considerable amounts of money in attempting to prevent forgeries of its notes and he felt that, in this respect, it could not be reproached when it had taken all possible steps.<sup>44</sup>

With the exception of Whelan, all the prisoners lodged petitions begging for mercy.<sup>45</sup> The petitions were marked with one of two annotations: ‘considered by Mr Peel’ or ‘the Law to take its course R.P.’ The latter annotation meant that there were no grounds for him to interfere with the judge’s decision. It was the judge who had decided that the prisoners would face the death penalty and Peel’s annotation merely reflected this. In his circuit letter sent to the Home Office at the end of the Assizes, Bayley J. advised that he had found ‘favourable circumstances’ to commute the sentences on Logan, Whelan and Hare but that Simpson, Smith and Martin were left for execution.<sup>46</sup> As was usual practice, no further information was included as to reasons for his decision. Whether there was any indirect or even direct pressure on Bayley J. to reconsider his decision on such a politically sensitive issue is impossible to ascertain but what happened next might lead one to that conclusion.

In a departure from the norm, two weeks later on 10 April when Bayley J had left Lancashire and was sitting at the Assizes at York, he sent a second circuit letter to the

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<sup>42</sup> HC Parliamentary Debates, 21 March 1826, 2<sup>nd</sup> series, 15, cols. 42-4.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> n. 43 *supra*.

<sup>46</sup> HO 6/11.

Home Office explaining why he had been induced to commute the sentence on the three prisoners he had left for execution.<sup>47</sup> He cited two reasons; there were no particular circumstances of aggravation and he had wished to assess whether the mere fact of their convictions had been instrumental in stemming the number of convictions on other circuits. The judge had ascertained that there were no similar cases on the Midland circuit and only one in Oxford and he was therefore prepared to recommend the prisoners to mercy upon condition that they were imprisoned for one year with hard labour and then transported for life.<sup>48</sup>

This was a radical change of position from the earlier statements made by Bayley J. but as he stated, he considered that passing and confirming the sentence was a sufficient deterrent. On the other hand, the judge may have been aware of the disquiet concerning the culpability of the Bank of England in the House of Commons and his decision was an attempt to stem further criticism. There is no documentary evidence that Peel played any part in the judge's decision but it relieved him of having to defend the Bank against further attacks. These cases are revealing as they show that in gathering information about cases Peel had to resort to referring to judges' notes and newspaper accounts of trials where there was little other available evidence. Law reporting was in its infancy and was concerned mainly with recording decisions in civil cases and it would be another 30 years before authorised law reports appeared.<sup>49</sup>

### **Review of the decisions of the King in Council**

The process in London and Middlesex in relation to capital sentences was different. Death sentences were handed down, usually by the Recorder of London at the end of each Sessions, and were confirmed at a subsequent meeting of the King in Council. Whether the prisoner was left for execution or conditionally pardoned, there was no bar to further petitioning the Home Secretary for a reconsideration of their case and/or further mitigation. Peel was keen to ensure that all the relevant circumstances were presented before the Council. Even after the decision was confirmed, if new evidence was adduced which in Peel's view materially affected the outcome, he did not hesitate

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Law Reports were not regularised until the establishment of the Incorporated Council of Law Reporting in 1865.



to institute enquiries to assess its probity and veracity.<sup>50</sup> At his first meeting of the King in Council, Peel had been concerned over the imposition of the death sentence on William Rivers for passing forged Bank of England notes.<sup>51</sup> This determination to make certain that all the circumstances relevant to the case were taken into account continued throughout his stewardship of the Home Office as the following examples demonstrate.

William Henry Reynolds was convicted at the Old Bailey January 1824 of shooting at General Burton with intent to murder him. Reynolds believed that his wife was conducting a clandestine affair with Burton and pleaded that he acted out of jealousy. In his defence he produced nine character witnesses and the jury recommended him to mercy on account of his previous good character. Prisoners convicted of attempted murder would usually hang so any factors in favour of a commutation of sentence were carefully considered.<sup>52</sup> On 31 January 1824, Hobhouse wrote to the Recorder of London advising that Peel had received papers from Archdeacon Blomfield, the Rector of St Botolph's Bishopsgate, in whose parish Reynolds lived. The papers purported to challenge Burton's evidence and Peel was keen that the Recorder should ascertain the veracity of the allegations. Hobhouse's letter clearly set out Peel's position that he considered 'the truth or falsehood of General Burton's evidence may make an important difference as to the ultimate fate of the convict.'<sup>53</sup> Reynolds' sentence was commuted to transportation for life but no reasons were recorded.

In the case of James Wingfield convicted of rape at the Old Bailey December 1826, Peel was again concerned that all the relevant information concerning the case had been presented to the King in Council held on March 14 1827. As a consequence, he wrote later that same day to the trial judge, Baron Hullock, confirming that Wingfield had been left for execution as there appeared to be no doubt of his guilt. However, Peel advised that he had received a letter from the Vicar of Harrow who had indicated that the judge himself had had 'doubts on the subject' and asking whether the Vicar had 'any authority for this statement.'<sup>54</sup> There is no reply with the papers but if

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<sup>50</sup> Devereaux, 'Peel, Pardon and Punishment', pp 257-84.

<sup>51</sup> See Chapter Six p.114 *supra*.

<sup>52</sup> See for example *OBP*, 23 October 1828, James Abbott (t18281023-51); HO17/82/Pn26; HO6/12.

<sup>53</sup> HO13/41/ f. 422 and HO17/30/Dk 21.

<sup>54</sup> HO13/48 /f. 138

Hullock B had any doubts either express or implied, they were not sufficient to save Wingfield.

At the meeting of the King in Council in March 1827, Daniel Davis, a two penny postman, was left for execution.<sup>55</sup> Davis had been convicted at the January Sessions of the Old Bailey of stealing a letter containing two promissory notes valued at £10 and £5.<sup>56</sup> At all times, Davis had pleaded his innocence and after conviction, numerous petitions were sent to the Home Office. Two of these were collective petitions from Davis's fellow workers who highlighted the lack of security practices in the Post Office. One of these petitions was signed by 175 letter carriers from Lombard Street Post Office and observed that if 'a letter should in any way be mislaid or lost (after it has been signed for), the parties are liable to be tried for their lives.'<sup>57</sup> This show of support for Davis appeared to have carried little weight as Peel confirmed that he had put all the circumstances before the King in Council but it had decided that the law should take its course.<sup>58</sup>

These comments belied the fact that behind the scenes Peel had arranged for Post Office officials to investigate all the circumstances of Davis's case. On the eve of Davis's execution, Peel wrote a letter which was circulated amongst all the members of the King in Council detailing his reasons for recommending a commutation of the sentence.<sup>59</sup> He confirmed that he had arranged for further inquiries to be made into the case. Davis's home had been searched and there was 'every indication of extreme poverty.' There was no proof that Davis had either changed banknotes or spent more money than usual. In conclusion Peel advised that there were sufficient grounds to commute the sentence but he was 'unwilling to remit without mentioning to the other members of the Council the grounds on which I have acted.'<sup>60</sup>

Even when he was about to leave office, Peel continued to ensure that all possible factors in favour of a prisoner were considered. Sharpe England was convicted at the Old Bailey February 1827 of uttering forged bills of exchange. On 21 March, prior to

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<sup>55</sup> For an overview of the postal system in the 1820s see Postal Museum <<http://www.postalheritage.org.uk>> [accessed 20 November 2014].

<sup>56</sup> *OBP*, 11 January 1827, Daniel Davis (t18270111-49); HO17/25/Cm11; HO6/12.

<sup>57</sup> HO17/25/Cm 11.

<sup>58</sup> *Ibid.*

<sup>59</sup> The Circulation List is with the other papers in HO17/25/Cm11 and is reproduced in Appendix Six; the letter is reproduced in Appendix Seven.

<sup>60</sup> *Ibid.*

the meeting of the King in Council in May 1827, Hobhouse was instructed by Peel to write to England's counsel, Charles Law, as he understood from the petitions that Law had information which was pertinent to the case and beneficial to the prisoner.<sup>61</sup>

These interventions add weight to Simon Devereaux's view that Peel's greatest contribution was ensuring that the quality of the decision making in the King in Council was both considered and based on the evidence, circumstances surrounding the crime and the crime per se rather than a random exercise or lottery.<sup>62</sup> George IV may have been responsible for saving the lives of two prisoners left for execution at the Recorder's Report of May 1822 but the records reveal that it was through Peel's diligence, in obtaining all the pertinent facts, that many more prisoners convicted at the Old Bailey escaped the gallows.<sup>63</sup>

### **Review of the sentence by the Home Secretary**

Having reviewed all the circumstances of the case, the next issue which the Home Secretary had to consider was what options were open to him to mitigate the sentence which would not undermine his duty to maintain law and order or lessen deterrence. It was not only capitally convicted prisoners who petitioned for a mitigation of their sentence. Prisoners convicted of non capital cases at Quarter Sessions and Petty Sessions and sentenced to a period of imprisonment or a fine also petitioned.

Petitions relating to these classes of offences were usually sent by visiting magistrates who were responsible for recording the conditions of prisoners in local gaols and submitting their findings to the Home Office. The remission of a fine when the prisoner had no possibility of payment involved a detailed procedure. Visiting magistrates petitioned the Home Secretary requesting that the fine should be remitted and gave their reasons. After consideration, the Home Secretary made a decision depending upon whether the prisoner was also sentenced to a term of imprisonment. If this was the case, then generally a further term of imprisonment was imposed. At the end of this further term, the Home Secretary would then recommend remission of the fine and inform the Lords Commission of Treasury. The Treasury then issued a

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<sup>61</sup> HO17/45/ Gm 23 and HO13/48/ fol. 152; England's sentence was commuted to transportation for life.

<sup>62</sup> Devereaux, 'Peel Pardon and Punishment', p. 284.

<sup>63</sup> Late commutations are discussed at Chapter Three p. 40 *supra*.

warrant which was submitted to His Majesty for signature. Once signed, the warrant commanded the High Bailiff to discharge the prisoner. This process was followed irrespective of the amount of the fine.<sup>64</sup>

It was unusual for prisoners to serve the full term of imprisonment. Some were released on the grounds of ill health but many received a remission of sentence after half their sentence had been served provided that their conduct in gaol or on the hulks was good. Some prisoners petitioned the Home Secretary before they had served more than half the sentence but invariably their petitions were marked 'to be considered when half sentence served'.<sup>65</sup> Male prisoners who were sentenced to be transported, either for a term of years or life, were initially held in the local gaol or, in respect of London convicts, in Newgate. After this initial period, they were transferred to the hulks as a preliminary to transportation. Some prisoners, however, due to their particular circumstances, the capacity of the local gaol and the logistics of transferring prisoners were never transferred to the hulks. If they remained in the local gaol for more than half the term of their sentence, they were often released without leaving the area in which they were convicted.

Convicts in a local gaol were ordered to be removed to the hulks by means of a warrant addressed to the sheriff of the county ordering him to arrange their delivery 'into the hands of the Superintendent of convicts' on a named hulk. It was usual for a number of prisoners from the same gaol to be removed at the same time. However, this practice could cause problems if, as occasionally happened, the coach carrying the prisoners was attacked and the prisoners freed.<sup>66</sup> As with local gaols, a small minority of prisoners held on the hulks who had served more than half the term of their sentence, were released if their conduct was good. Thus although sentenced to a term of transportation, they never left the country.<sup>67</sup>

Although not a mitigation of sentence, prisoners and their supporters often petitioned to be sent to the Millbank Penitentiary rather than the hulks.<sup>68</sup> The Penitentiary was the first national prison and was under the control of a committee of between 10 and

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<sup>64</sup> See for example the case of John Murphy convicted of assault and fined £2. HO17/63/ Lo 60

<sup>65</sup> See for example HO17/11/ An [Scot] petition of James Sinclair.

<sup>66</sup> See for example a report of 'daring rescue gang' *Morning Post*, 28 November 1820; *Morning Chronicle*, 16 December 1820.

<sup>67</sup> See Recommendation Lists Chapter Five pp 85-6.

<sup>68</sup> HO records refer to the Millbank Penitentiary as 'the Penitentiary'.

20 members who were appointed by the King in Council. Completed in 1816, it was to be the first of a series of national prisons but the initiative stalled as the second national prison, Pentonville, was not completed until 1842.

From the petitions, it can be discerned that many prisoners viewed serving a sentence in the Penitentiary as preferable to being incarcerated on the hulks. Conditions were perceived to be better and they thought they were less likely to be transported if they behaved well whilst in custody. This view of the Penitentiary may have been influenced by the publication during the 1820s of a series of books and pamphlets by George Holford, an MP and member of the Superintending Committee of the Penitentiary.<sup>69</sup> He confirmed that a tariff system was in operation at the Penitentiary whereby prisoners who had been sentenced to terms of transportation were only required to serve lesser periods than the original term and then were released. So a prisoner sentenced to be transported for life would, in Holford's view, only serve ten years and would not be transported.<sup>70</sup>

One prisoner was even prepared to offer a financial inducement in order to be sent to the Penitentiary. Sarah Ann Pearce was convicted at Old Bailey February 1826 of stealing a child's frock valued at 2s. It was not her first offence and she was sentenced to seven years' transportation. In her petition she acknowledged her guilt and asked to be placed in the Penitentiary so that she might learn a trade. To achieve this, a relative of hers would 'place a sufficient sum of money in the Bank of England.' Peel was not to be persuaded and marked the petition 'to be transported'.<sup>71</sup>

Although the Penitentiary was originally intended for prisoners convicted in London and Middlesex, prisoners were sent to it from all parts of England and Wales. In the summer of 1828 a dispute arose between Peel and the Superintending Committee regarding the selection of prisoners. Although the Penitentiary could hold 1,000 inmates, it generally operated far below this capacity. The Committee complained that one of the objectives on which it was founded namely the reform of first time offenders was being jeopardised by hardened criminals being ordered indiscriminately to serve

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<sup>69</sup> D.R.Fisher (ed.), *The History of Parliament 1820-1832*.

<sup>70</sup> G. Holford, *An Account of the General Penitentiary at Millbank* (London, 1825), pp. 278-9 quoted in P. McRorie Higgins, 'The Scurvy Scandal at Millbank Penitentiary', *Medical History*, 50, 4 (2006), pp. 513-34.

<sup>71</sup> *OBP*, 16 February 1826, Sarah Ann Pearce (t18260216-191); HO17/62/L1 13.

their sentence there. The Committee also inferred that there had been a 'want of cordial cooperation' on the part of the government in carrying out these objectives. To rebut this criticism, Peel set out in detail the guidelines on which prisoners were selected for the Penitentiary and confirmed that whatever his own opinion upon the objectives, he held 'a sincere desire to promote the general success of the Institute'.<sup>72</sup>

He noted that two constraints had materially limited the numbers of prisoners who could be sent to the Penitentiary; a higher percentage of female prisoners had been sent to New South Wales in order to redress the gender imbalance in the colony and the Committee objected to the reception of young boys as they considered that the discipline imposed in the Penitentiary was not suitable for young offenders. Having set out the limits on selection, he proceeded to reconstruct the procedure adopted by the Home Office. Preference was uniformly given to prisoners who were recommended by judges, chairmen of Quarter Sessions or magistrates but he observed that these recommendations amounted to only a small number of convicts. He had, therefore, instituted a process ordering keepers of local gaols to produce a list of all prisoners in their gaols awaiting transportation. This list termed 'Call for Returns' was very detailed requiring that 12 separate heads of information were completed; these included the name, age and profession of the prisoner, previous convictions, ability to read and write and state of health.<sup>73</sup>

With the caveat that no safeguard could prevent the occasional error, Peel asserted that it was only after a careful inspection and consideration of all these factors that a selection of prisoners for the Penitentiary was made. He continued that great care had been taken to ensure that only suitable prisoners had been sent to the Penitentiary but if errors had been made in the Returns then it was up to the Committee to advise him. He did note, however, that rigidly applying the guidelines should not limit his paramount duty to ensure the maintenance of law and order or reduce the deterrent effect of the sentences.<sup>74</sup>

Discharging this duty meant that, on occasion, he departed from recommending suitable prisoners for the Penitentiary. Frederick Moon aged 19 was convicted of

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<sup>72</sup> HO13/51/ fols. 252-5.

<sup>73</sup> Ibid fol. 253.

<sup>74</sup> Ibid fol. 255.

burglary at Surrey Summer Assizes 1828 and sentenced to death.<sup>75</sup> On the recommendation of the trial judge, the sentence was commuted to transportation for life. Moon petitioned to be sent to the Penitentiary. Following the standard practice, Peel requested a report from the gaoler who considered Moon a fit case for the Penitentiary. He based this on the fact that it was Moon's first offence and that he had respectable connections. The request, however, was refused with Peel's annotation on the petition stating, 'Let him be transported. The last Guildford Assizes presented very many bad cases, I believe.'<sup>76</sup>

Whilst this example reveals that the Home Secretary retained flexibility in dealing with individual cases, it does not detract from the importance of demonstrating that established practices in dealing with petitions were already in place in the Home Office by 1830. Peel was determined that these protocols and procedures should be followed so that when a specific request or petition arrived on the Home Secretary's desk there was an acknowledged method of dealing with it. This leads to the conclusion that whilst petitions were not subject to any formalities, the Home Office's response was increasingly standardised and based on procedures which were firmly established. By the time Lord John Russell was in office in 1835, the response to petitioners who were refused mercy was in the form of a printed reply.<sup>77</sup>

Even when dealing with non routine applications or petitions, processes were in place to dispose of them. Visiting magistrates required the consent of the Home Secretary to remove a prisoner acquitted on the grounds of insanity from a gaol to a local asylum or to the Bethlehem Hospital (Bedlam).<sup>78</sup> Firstly, the Home Secretary required a medical report from the surgeon attending the local gaol. Depending on his report, the Home Secretary either refused the application or issued a warrant for the prisoner's removal to the asylum with the proviso that the prisoner's parish should be responsible for the costs of his care. Some visiting magistrates were more enlightened in their approach to the treatment of prisoners but still required the consent of the Home Secretary if they wished to remove them from local gaols.

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<sup>75</sup> HO17/63/Ln 20.

<sup>76</sup> Ibid.

<sup>77</sup> See Appendix Eight for an example of a printed form.

<sup>78</sup> See for example cases of Charles Hart HO17/25/Cl 23 and Cain Mahoney and William French HO17/30/Dl 27.

Harriet Smith was convicted of larceny at St Albans Borough Quarter Sessions 1821 and sentenced to seven years' transportation. Whilst in prison, Smith gave birth to a 'bastard child'.<sup>79</sup> The Mayor, Visiting Magistrates and Recorder for the Borough petitioned Peel in January 1822 requesting a free pardon for Smith as they had been assured of a place for her in the Refuge for the Destitute. They recited that Smith was penitent and she was aware of the magnitude of her conduct. These grounds would not in the usual course result in a pardon but on this occasion a free pardon was recommended. This is an example of Peel acting on the advice of local officials and as protection against any future criticism which is a pattern that is evident throughout his stewardship of the Home Office and will be discussed later in the thesis.<sup>80</sup> Not all magistrates complied with the correct procedure. As mentioned earlier, in dealing with juvenile offenders during this period, King has identified informal practices followed by magistrates to prevent children becoming entangled with the criminal justice system. Juvenile offenders indicted on a felony were often found guilty of a misdemeanour by magistrates and ordered to non custodial refuges thus preventing them from mixing with and being corrupted by hardened criminals in gaols.<sup>81</sup>

Enforcing any designated procedure formulated by the Home Office was problematic. Delegating the administration provisions of legislation passed today is mainly achieved by means of statutory instrument but this was little used in the 1820s. The Home Office was reliant on the use of circulars which carried no statutory effect. Peel, however, refused to consider any applications from magistrates which did not comply with the latest circular. On 4 February 1824, the Home Office sent out a circular to all clerks of the peace and local gaol committees setting out a new procedure when submitting an application for the remission of a prisoner's sentence. It has been impossible to locate a copy of this circular but from the correspondence in a case involving the Glamorganshire Bench, it has been possible to deduce what it detailed.

Sarah Davies was convicted of felony at the Glamorganshire Epiphany Sessions Cardiff 1822 and sentenced to seven years' transportation.<sup>82</sup> In late 1824, the clerk of the peace, on behalf of the gaol committee of the Quarter Sessions, submitted a headed

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<sup>79</sup> HO17/62/Lh 35.

<sup>80</sup> See Chapter Eight pp 146-9 *infra*.

<sup>81</sup> P. King, *Crime and Law in England, 1750-1840*, pp. 114-41.

<sup>82</sup> HO17/15/BI 11



form to the Home Secretary requesting that he recommend a free pardon for Davies on the basis of her ‘orderly and industrious’ conduct’. Hobhouse, acting on Peel’s instructions, returned the form as the Bench had not complied with the circular. Euan Thomas, one of the visiting magistrates, wrote to Hobhouse advising that they were not aware of the circular and asking for a copy to be sent to them. A second document was then submitted setting out, in detail, the reasons for applying for a pardon on Davies’ behalf. They detailed the work she had done in prison, her good conduct and contrition and on this basis Peel advised that she would be recommended for a pardon in July when she had served half her sentence. A similar situation occurred in June 1825 when the Chairman of the visiting magistrates of Norfolk Quarter Sessions requested Peel to recommend a remission of sentence for John Jordon convicted of larceny and sentenced to two years’ imprisonment. The reply was to the point, ‘advise them to comply with the circular.’<sup>83</sup>

The inference, which can be drawn from these examples, was that before 1824 applications from visiting magistrates were granted with little scrutiny or enquiry. The intransigence on Peel’s part illustrated that he was not prepared to recommend pardons indiscriminately but was adamant that magistrates should follow the correct procedures. It is a further example of the wresting of power away from local officials by central government in order establishes consistency and impartiality into the administration of justice, which was a key policy of Peel’s ministry.<sup>84</sup>

## Conclusions

Reconstructing the process of begging for mercy illustrates, that by the time Peel left the Home Office, there was a defined procedure for responding to the petitions. It is estimated that more than 90% of the petitions were marked ‘nil’ meaning that Peel had no established grounds to interfere with the court’s verdict or sentence. Extracting patterns in his decision making, when recommending a mitigation of sentence, is made more difficult as he did not always annotate his reasons. Moon’s case, discussed earlier, was an exception where it is apparent that his duty to maintain the deterrence in sentencing took precedence over the prisoner’s individual circumstances.

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<sup>83</sup> HO17/62/L1 15; see also HO17/97/ Sk 32.

<sup>84</sup> HO17/30/ D1 35.

Although the process for responding to petitions was more clearly defined, Peel did not seek to impose any formalities on the form of petitions or the strategy adopted in lodging them. Peel was determined to ensure that all the relevant circumstances of each case were taken into account before making a recommendation. Wontner's suggestion that he had little involvement in the majority of cases is not borne out by the annotations on the petitions, filed notes and draft letters demonstrating that Peel's hand was present in virtually every decision.<sup>85</sup> His insistence on compliance with the procedures and processes for dealing with the petitions and associated applications meant that by the mid 1830s, Home Office responses to petitions were often by means of printed form rather than individual letters. This streamlining and bureaucratisation of Home Office procedures ensured that applications were dealt with expeditiously.

It is interesting that whilst he initiated standard responses, he made no attempt to inhibit or demand change to the petitions themselves. Petitions continued to land on his desk in various forms and styles which were required to be read individually; he did not insist on printed forms for the petitions which would have streamlined the process even more. For example indictments, warrants etc were by the mid 1820s all in printed forms.<sup>86</sup> Perhaps this was an occasion, with a person's life or liberty at stake, that they should be free to express their case in their own words and style and not a situation which could be reduced to a standard form. Curtailing a petitioner's freedom of expression was not a step Peel was prepared to take even when it meant an additional burden upon him and his officials.

The reconstruction of the process highlights how the mechanics of begging for mercy were increasingly standardised under Peel's ministry and challenge the view that mercy was recommended on a 'slapdash' basis.<sup>87</sup> The next question to be addressed is what considerations did Peel take into account or disregard in arriving at his recommendations for the exercise of the Royal Prerogative of mercy? Whilst he was keen to consider each case on an individual basis these deliberations had to be balanced against his duty to ensure the maintenance of law and order against a

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<sup>85</sup> p. 126 *supra*.

<sup>86</sup> Example of printed form of January 1824 committing George Fuller to custody; HO 17/92/Rk8.

<sup>87</sup> Beale and Haagan, 'Revenge for the Condemned' at p. 1652; Chapter Six p. 97 *supra*.

background of private influence, freedom of speech and the growing power of the press. It is these considerations which will be considered in the next chapter.

## **Chapter Eight:**

### **Member of the Executive and Servant of the Crown; balancing the responsibilities.**

#### **Introduction.**

In 1822 John Singleton Copley, a future Lord Chancellor, considered that the primary duty of the Home Secretary was to ‘maintain the general order and tranquillity of the kingdom and to secure and superintend the due administration of the laws’.<sup>1</sup> This responsibility, as a member of the Executive, was causally related to the duty to act impartially as a servant of the Crown when recommending the exercise of the Royal Prerogative of mercy. Balancing this duality of functions was an important aspect of the stewardship of the Home Office. Introducing a more bureaucratic and standardised response to the petitions as discussed in the previous chapter, did not detract from Peel’s determination to take into account all the pertinent circumstances relating to an individual prisoner. He had to be certain, however, that his recommendations did not result in public disorder, compromise the safety of private citizens or reduce the deterrent effect of sentences. This chapter explores how Peel discharged his primary duty to maintain law and order against the economic and political landscape of his tenure of the Home Office.

The 1820s was a decade which saw spasmodic outbursts of civil unrest mainly due to fluctuating economic conditions. Poverty, unemployment and the introduction of mechanised processes into different industries were all causes for discontent.<sup>2</sup> In these circumstances, Peel had to weigh up whether to release prisoners involved in industrial disputes or continue their detention, which could provoke future breaches of the peace.<sup>3</sup>

The fluctuations in the economic landscape were not the only causes of civil unrest. Peel also had to balance the freedom of the press against the circulation of materials likely to undermine the stability of the state or prejudice the right of an individual to a

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<sup>1</sup> J.S. Copley, *The State of the Nation at the Commencement of the Year 1822* (London, 6<sup>th</sup> edn, 1822), p. 60. Copley was elevated to the peerage as Baron Lyndhurst when appointed Lord Chancellor in 1827.

<sup>2</sup> Evans, *The Forging of the Modern State*, pp.190-211.

<sup>3</sup> See R. Pound, ‘Contemporary Juristic Theory’ in Lloyd, *Introduction to Jurisprudence* (London, 1972), pp. 367-72.

fair trial. Peel did not press for the Six Acts, passed in the wake of the events of Peterloo, to be renewed after 1822.<sup>4</sup> The abeyance of these repressive statutes, which had criminalised all forms of dissident political and religious expression, resulted in certain sections of the press resuming their attacks on the government's lack of progress in introducing reforms.<sup>5</sup> Prosecutions and subsequent convictions concerned with the publication of seditious materials ensued, with Peel having to balance recommending the release of the convicted prisoners against the likelihood that they would reoffend and incite protest.

Coupled with this was the burgeoning growth and influence of the press.<sup>6</sup> Aspinall concluded that it was the rise in advertising revenue, as a consequence of the expansion of trade and industry in the early decades of the nineteenth century, which allowed newspapers to become both financially and editorially independent. As a result, they were able to expand and print more news items, particularly details of court cases rather than the auction sales and quack remedies which had been the norm in the late eighteenth century.<sup>7</sup> In respect of court reporting, newspapers were free to shape their coverage without restriction. Articles written about the prisoner's character and circumstances were often published before the trial which could lead to the court and specifically the jury gaining a distorted and unfavourable impression of the prisoner's conduct.<sup>8</sup>

Peel was determined to ignore pleas from individuals who believed that they had some influence through their social standing, political affiliations or personal relationship. How far Peel took into account the victim's view will also be considered as will the constitutional significance of the jury's decision.

One aspect which Peel had to carefully examine was how far his decisions to mitigate sentences undermined the deterrent effect of the original sentence. He was keen to ensure that any reduction in sentence did not afford encouragement to others who were tempted to break the law. Where possible he always took advice from experts to ensure

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<sup>4</sup> (60 Geo.III & I Geo. IV cs. 1, 2, 4, 6, 8, 9).

<sup>5</sup> Examples include *Sherwin's Political Register/ the Republican* and *The Black Dwarf*.

<sup>6</sup> A. Aspinall *Politics and The Press c 1780-1850* (London, 1949); P. King, 'Newspaper Reporting and Attitudes to Crime and Justice in Late Eighteenth-Century and Early Nineteenth-Century London', *Continuity and Change*, 22 (2007), pp. 73-112; S. Devereaux, 'From Sessions to Newspapers? Criminal Trial Reporting and the London Press 1770-1800', *The London Journal*, 32, 1 (2007), pp. 1-27.

<sup>7</sup> Aspinall, *Politics and the Press*, p. 379.

<sup>8</sup> See Probert, Fauntleroy and Hibner's cases pp. 156-8 *infra*.

that his recommendations were impartially made. In acting on this advice, Peel was able to deflect any future criticisms regarding his actions. This chapter will analyse how Peel balanced the interests of the state against the individual mitigating circumstances of the prisoner.

### **The economy and the Royal Prerogative of mercy**

The economic landscape during Peel's tenure of the Home Office was one of boom and bust. In the three years before Peel took up office in 1822, there had been a number of serious insurrections including Peterloo although these lessened as the economy began to pick up by the end of 1822. By 1825 however, the economy was again stagnant causing further spasmodic bursts of industrial unrest.<sup>9</sup> Between 1827 and 1829, the economy stabilised but by 1830 poor harvests and the introduction of threshing machinery caused riots in the south east of England and East Anglia. Known as 'the Swing Riots', protesters sent letters to farmers in the name of 'Captain Swing' threatening to set fire to their farms if wages were reduced or threshing machinery introduced.<sup>10</sup>

Although economic conditions had improved by 1822, industrial disputes were still likely to spring up in various parts of the country often due to employers unilaterally reducing wages or the restrictions on workers from participating in secret trade unions. Before the repeal of the Combination Acts in 1824, workers who joined together to secure higher wages or better working conditions could be prosecuted and subsequently imprisoned or fined if found guilty.<sup>11</sup> This led to discontent and potential disorder. During his first year in office, Peel had to deal with outbreaks of violence in Monmouthshire, the Forest of Dean, Staffordshire and Newcastle-upon-Tyne but also had to consider whether to recommend the exercise of the Royal Prerogative of mercy for prisoners involved in earlier riots particularly in Shrewsbury and Yorkshire.<sup>12</sup>

In January 1821 due to a depression in the iron trade, employers at iron works near Shrewsbury cut workers' wages from 15s. to 12s. a week. 3,000 workers retreated to

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<sup>9</sup> Evans, *The Forging of the Modern State*, pp. 190-211; M. Berg, *The Age of Manufacturers 1700-1820: Industry, Innovation and Work in Britain* (London, 1994); J.H. Clapham, *An Economic History of Modern Britain: the Early Railway Age 1820-1850* (Cambridge, 1930).

<sup>10</sup> E. Hobsbawm and G. Rudé, *Captain Swing* (London, 2001).

<sup>11</sup> (5 Geo.IV c.95); Gash, *Mr Secretary Peel*, pp. 344- 66.

<sup>12</sup> *Ibid.*

cinderhills near Dawley and threatened violence. Two troops of local yeomanry were called out and the Riot Act was read but this did not prevent the soldiers being pelted with stones and bricks. In the ensuing melee two miners were killed when the soldiers fired on the mob. The ringleaders, Thomas Palin and Samuel Hayward, and five protesters were arrested. At Shropshire Lent Assizes held at Shrewsbury March 1821, Palin and Hayward were both capitally convicted of riot and the other prisoners received periods of imprisonment. Palin was hanged on 7 April but favourable circumstances were found for Hayward and his sentence was commuted to transportation for life. The riot was locally known as ‘the Cinderloo affair’, an ironic reference to the events at St Peter’s Field in Manchester. In February 1822, less than a year after the riots, the visiting magistrates of Shrewsbury gaol petitioned Peel on Hayward’s behalf. They cited his good conduct in prison and the fact that the principal offender’s execution had ‘made a serious impression on the other offenders’. There were no annotations on the petition but these reasons and the fact that the local magistrates were prepared to endorse the release of Hayward resulted in Peel recommending a free pardon which was granted on 22 February 1822.<sup>13</sup>

A similar situation arose in respect of the Yorkshire weavers who were involved in a thwarted insurrection in March 1820. The so-called Yorkshire Rebellion was one of the largest insurrections of the pre-Chartist era in England. An assault on the town of Huddersfield, in the West Riding of Yorkshire, by 2,000 armed men was planned for April 1 1820 but was aborted. A second attempt orchestrated by the Barnsley Union Society, involving an armed force of about 400 linen weavers was planned for the night of April 11. They marched towards Huddersfield where the leaders of the group, Richard Addy and William Comstive expected to join up with large numbers of insurgents from other surrounding areas. However, only about 20 radicals from Huddersfield were waiting for them so the group fled but not before troops had arrested 17. Fears of a general uprising over the North of England and Southern Scotland quickly spread but although there were minor skirmishes in Sheffield,

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<sup>13</sup>A.B. Mercer, ‘The Cinderloo Affair’, *Shropshire Magazine* (1966), pp. 22-3; B. Trinder, *The Industrial Revolution in Shropshire* (London, 1973), pp. 373-402; HO17/67/Mh1.

Halifax, Dewsbury and Mirfield and more serious exchanges in Greenock and Paisley, the fears came to nothing.<sup>14</sup>

In total, 22 men were arrested and tried for high treason at York Summer Assizes 1820. After a plea bargain, the prisoners pleaded guilty with their sentences being commuted to various periods of transportation and imprisonment. Over the next year, petitions for mercy from the prisoners were submitted to the Home Secretary, Lord Sidmouth, for a remission of the sentences but these were refused and the majority of the men were transported to Van Diemen's Land in 1821. In 1822, some of the prisoners were still confined in the county gaol in York and Peel received a petition from the visiting magistrates requesting that the remaining prisoners be granted a pardon and released from custody.

So what had changed in those two years which made Peel look again at the circumstances of the prisoners convicted of such a serious offence? The upturn in the economy and the fact that the local magistrates felt the prisoners could be safely released played their part in Peel's decision. The deciding factor was the advice of Sir John Byng, the military commander in the North. Hobhouse, on Peel's behalf, sought Byng's opinion on whether the pardons should be granted. In reply, Byng advised that the area was 'perfectly quiet' with 'plenty of employment and provision very cheap.' The only possible threat was from the so called 'Ranters' who met frequently under the pretence of praying together to discuss political subjects. He concluded that he could see no objection to the release of the prisoners.<sup>15</sup> Having satisfied himself that there was no apparent risk of reoffending or adverse impact on the general policy of deterrence, Peel recommended pardons should be granted.

These two examples illustrate that Peel's approach was to carefully balance keeping these prisoners incarcerated, which could be a catalyst for further unrest in the same industry, or releasing them with the possibility that they would reoffend. Allowing possible trouble makers back into the community could easily have backfired on him but all the prisoners were deemed by Byng and the visiting magistrates of the localities

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<sup>14</sup> *The Times*, September 11 1820. For a full account of the Yorkshire Rebellion and the part played by William Rice see C. Cartwright and B. Mortimer, 'Doomed to exile', *Tasmanian Historical Research Association, Papers and Proceedings*, 58,1 (2010), pp. 42-5.

<sup>15</sup> HO17/122/Yh 47; The Ranters were Methodists.



concerned to be low risk. Relying on this advice, Peel decided that the security of the state would not be compromised by their release.

Unrest bubbled away beneath the surface of society in the early 1820s and after the short period of boom, the inevitable bust came in 1825/6. Thousands of silk weavers in the East End of London were unemployed, while in Lancashire, there were riots in the cotton industry against the introduction of new power machinery. Peel's approach to these sporadic outbreaks of civil unrest illustrate that he was keen to distinguish between those committing offences as a result of genuine distress caused by unemployment and those who used unemployment as justification for criminal activity.

In 1826, the silk industry in the East End of London was in the doldrums caused by the introduction of the Jacquard Power Loom and the repeal of the Spitalfields Acts, which had ensured silk weavers were paid a minimum wage.<sup>16</sup> At a meeting of Silk Manufacturers on January 28 1826 it was stated that 7,721 looms were idle resulting in over 4,000 unemployed workers.<sup>17</sup> With dependants, this figure was estimated to be about 20,000.<sup>18</sup> About 500 of the unemployed weavers met in a brickfield in Spicer Street, Bethnal Green and became infamous in the capital as 'the Bethnal Green Brickfield Gang'.

They stole food and goods from shops without fear of reprisal with the result that local leaders of the community sought help from Peel to restore peace to the area. With no civilian force in place, Peel agreed to send in 40 men from the Horse Patrol in order to deter the illegal activities of the gang.<sup>19</sup> This show of force worked but not before three members of the gang were arrested and charged with highway robbery on a Doctor Fuller. Dr. Fuller was returning home along the Bethnal Green Road when a gang of youths attacked him and stole his money, medical instruments and watch. James Boyce, Henry Boyce and George Houghton, all members of the Brickfield gang,

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<sup>16</sup> For history of silk –weaving in the East End see C. Tilly (ed.), *Citizenship, Identity and Social History* (Cambridge, 1996), pp. 28-34; F. Warner, *The Silk Industry in the UK: Its Origins and Development* (London, 1921). For a discussion of the repeal of the Spitalfields Act 1824, J.H Clapham, 'The Spitalfields Acts, 1773-1824', *The Economic Journal*, 26,104 (1916), pp.459-71.

<sup>17</sup> *Morning Chronicle*, 30 January 1826.

<sup>18</sup> *Ibid.*

<sup>19</sup> Anon, *Riots and Outrages In Bethnal Green 1826*, Tower Hamlets Local History Library <<http://www.mernick.org.uk/thhol/riots.html>> [accessed 19 October 2015]; *The Morning Post*, 20 September 1826.

were tried at the Old Bailey in September 1826. The jury acquitted Henry Boyce but both James Boyce and Houghton were found guilty. Despite the jury recommending Boyce to mercy and pleas for clemency from his supporters, the capital sentence on Boyce was confirmed by the King in Council as he had a previous conviction for felony. He was hanged in October 1826.<sup>20</sup>

At his trial, Houghton had relied on alibi evidence that he was drinking at a local inn at the time of the offence. Before the meeting of the King in Council in November, Peel sought the advice of the Lord Chancellor as to the veracity of this evidence. At the Old Bailey sessions in October, James Bishop, Charles Downes, Henry Ore and George Hackman were all indicted for the same attack. Only Bishop was convicted as there was contradictory evidence as to whether the other accused were participants in the attack. Due to doubts over the evidence adduced against both Houghton and Bishop, consideration of their sentences was postponed and were only confirmed when the King in Council met in December 1826. The date for their executions was set for 2 January 1827. Numerous petitions were submitted to the Home Office detailing circumstances which showed that the prisoners were not involved in the offence. With the Lord Chancellor expressing further doubts about the probity of the verdict, Peel took the decision to respite the executions for a further week.<sup>21</sup>

Whether Peel would have recommended the commutation of the sentences is impossible to know as external events intervened to take the decision out of his hands. The Duke of York died on 5 January 1827 and, whilst there is no ascertainable direct evidence, it appears that by convention no public executions were carried out during the immediate period of mourning. Houghton and Bishop thus had their sentences commuted to transportation for life. They were both transported to Van Diemen's Land but not before Bishop had escaped from the hulks and been recaptured.<sup>22</sup> Seven months later at the Old Bailey, Thomas Norton was convicted of the highway robbery on Dr Fuller.<sup>23</sup> Of the 17 prisoners capitally convicted at the July Sessions, he was the only one left for execution by the King in Council which met on 21 August 1827. Norton acknowledged his guilt and confirmed that Houghton was not involved in the

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<sup>20</sup> *OBP*, 14 September 1826, James Boyce, Henry Boyce, George Houghton, (t18260914-16); HO17/117/XI 13(Boyce); HO17/15/Bm 1 (Houghton); HO6/11.

<sup>21</sup> *Ibid.*

<sup>22</sup> *The Lancaster Gazette and General Advertiser*, 2 June 1827.

<sup>23</sup> *OBP*, 12 July 1827, Thomas Norton (t18270712-15); HO17/72/Nm 9.

robbery. Further petitions on behalf of Houghton were sent to the Home Office but were unsuccessful. Peel was not involved with these petitions as he had left office in April 1827.<sup>24</sup>

The lack of employment in the silk trade was the catalyst which led to the formation of the Bethnal Green Brickfield Gang but drawing any causal connection between unemployment and the criminal activities of the gang is more difficult to establish. It was only a very small number of the silk weavers who engaged in the gang's activities so intrinsically linking unemployment as the sole reason and justification for the attacks would seem misplaced. The situation was the reverse in the case of the Rossendale rebels who were responsible for destroying thousands of looms in Lancashire.

In April 1826, thousands of Lancashire cotton weavers had taken up arms in protest against the introduction of power looms and subsequent lowering of wages for hand weavers. During four days of rioting, the mob destroyed over 1,000 looms and caused widespread damage to cotton mills. The disorder was only quelled when the Burnley artillery was called out to prevent further riots. Several rioters were killed by the militia during the disturbances and more than 60 of the protesters were arrested. In August 1826 Special Assizes were held at Lancaster where 42 of the rioters were capitally convicted and four for felony. All the capital sentences were commuted with the majority being sentenced to transportation for life. In his circuit letter, Mr Justice Park, gave numerous reasons for commuting the sentences including the fact that no personal violence had been involved.<sup>25</sup> This was a rare departure from the norm and it can only be assumed that Park J. sensed that his commutation of the sentences was likely to be deemed lenient and lacking deterrence.

There is no recorded comment by Peel on the commuted sentences. Given his own background in calico and cotton weaving, he may have been sympathetic to the mill owners who had suffered severe financial loss from the criminal damage. Whatever his own subjective considerations, as Home Secretary there were no established grounds for him to interfere with the judge's decisions. It was notable that of the 42

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<sup>24</sup> Houghton remained in Van Diemen's Land and eventually gained a conditional pardon. He ended his life working on whaling boats in the South Seas.

<sup>25</sup> HO6/10.

capital convicts only a small number were actually transported with the majority remaining either in the gaol at Lancaster Castle or being transferred to the hulks but not transported.<sup>26</sup>

Peel adopted a nuanced approach to the recommendation of the Royal Prerogative of mercy for offences committed by unemployed workers as he appeared to distinguish between those who committed offences causally linked to their work and those for whom the lack of employment was an excuse to engage in what he saw as unrelated criminal activities. Peel may have feared that there would be further attacks on looms in Lancashire, but he did not have the power to override the decision of the judge to commute the sentences and re-impose the death penalty on the prisoners as a deterrent. Although the maintenance of law and order was the paramount duty of the Home Secretary, this duty was subrogated to the constitutional restraints on his ability to interfere with verdicts and sentences passed by courts of competent jurisdiction. However, where the threat to public disorder had apparently evaporated, as in the cases of the Shrewsbury and Yorkshire prisoners, he was prepared to recommend the release of prisoners whose continued imprisonment might have been a catalyst for a resumption of further unrest.

### **The Press and Public Opinion**

The possibility of a prisoner reoffending and instigating public unrest was an important issue in relation to political offences particularly where the prisoner was convicted of publishing seditious or blasphemous materials. Judging that a return to the repressive measures of the Six Acts would not be conducive to the maintenance of law and order, Peel was faced with finding a balanced solution to the difficulty of allowing unrestricted freedom of speech against the possible consequences of public protest and demonstrations stirred up by these publications.

In the 1820s a series of cases which excited public opinion concerned Richard Carlile and his supporters. Carlile owned a bookshop and printing press in London and campaigned for the reform of the political system and established church. He was convicted in 1819 in King's Bench of publishing seditious and blasphemous materials,

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<sup>26</sup> Isaac Hindle was one of the few men transported to Van Diemen's Land, HO17/122/Y1 48.

namely the works of Thomas Paine in pamphlet form.<sup>27</sup> The prosecutions were under the Six Acts and he was sentenced to three years' imprisonment and a fine of £1,500. Carlile's imprisonment did not stop his supporters and followers from selling the pamphlets. His wife, Jane, sister, Mary, and many of his employees were arrested and imprisoned for periods of two and three years.<sup>28</sup> The imprisonment of Mary Carlile was the subject of a House of Commons motion in March 1823 when calls were made for her release as she had served her term of imprisonment but was unable to pay the fine imposed. Peel rejected the motion on the ground that he would be failing in his public duty if 'he shrank from applying and enforcing' the law, concluding that, 'if there were any blame for continuing the imprisonment complained of, he was willing to take the blame on himself'.<sup>29</sup> The usual procedure for the non payment of a fine was that a further period of imprisonment was imposed so Peel was following the accepted practice in refusing to remit the fine.<sup>30</sup>

One of Carlile's followers, Susannah Wright, a lace maker from Nottingham, attracted great public interest when she was imprisoned for two years for selling the pamphlets in Carlile's shop. Her treatment in prison drew the attention of the female radicals of the day who lobbied for her release.<sup>31</sup> She was held in the House of Correction at Cold Bath Fields and the likelihood of her reoffending was questioned by the Chaplain to the gaol who considered her of 'no fixed intelligible opinions on the subject but to be merely a tool of a party.'<sup>32</sup> Peel, however, was not prepared to risk the security of the country by releasing Wright and like all the 'Carlile' prisoners she was required to serve the whole of her sentence. This intransigence was probably an overreaction by Peel but in his annotations on the petitions he noted that early release of the prisoner would be seen as 'an attempt to triumph over the laws.'<sup>33</sup>

As a 'political' prisoner Carlile served much of his imprisonment in Dorchester gaol in order to segregate him from other prisoners who might have been influenced by his

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<sup>27</sup> G. Aldred, *Richard Carlile, Agitator: His Life and Times* (London, 1923); I. McCalman, *Radical Underworld: Prophets, Revolutionaries and Pornographers in London, 1795-1840* (Cambridge, 1988), pp. 156-60, 181-217.

<sup>28</sup> HO 17/92/ Rk 3 petitions of Thomas Riley Perry, Richard Hassell, John Clark and William Campion

<sup>29</sup> *Speeches*, volume i, pp. 228-9.

<sup>30</sup> Chapter Seven p.136 *supra*.

<sup>31</sup> C. Parolin, *Radical Spaces; Venues of Popular Politics in London 1790-c1846* (Canberra, 2011), pp. 83-105.

<sup>32</sup> HO17/92/Rk 16.

<sup>33</sup> *Ibid*.

subversive ideas. He remained there on the expiration of the term of imprisonment as he was unable to pay the fine. As Carlile owned the publications and printing press, the usual procedure was for sheriffs to distrain and then sell the goods to discharge the fine.<sup>34</sup> It was held in King's Bench, that if there was any seizure of the materials then the sheriffs would technically be guilty of being in possession of blasphemous or seditious materials and liable to punishment. Therefore, the fine remained unpaid.

In June 1824, Carlile appeared to have lost any chance of freedom when he wrote an open letter to Peel in *The Republican*. A section from the opening paragraph illustrated the tone and contempt in which he held Peel.

Back to the Jennies you must go, as there are many men there better qualified for your office than yourself and place must yield to qualification. I grant that you are not so imbecilic as your predecessor but you have neither the necessary ability nor necessary disposition to make the improvements in the law and magistracy of this country, which the intellect and disposition of the people at large require.<sup>35</sup>

He ended the letter by stating that if his imprisonment were to continue, he would consider himself illegally detained and justified in killing any government official appointed to guard him. Carlile remained in prison. The following year Joseph Hume, the radical MP, presented a petition in the House of Commons observing that Carlile's case was 'a very hard one' and urged Peel to either liberate him or restore his property. Peel's reply was to highlight the improper course of conduct adopted by Carlile.<sup>36</sup>

Hume's petition was ordered to lie on the table but he was not prepared to let the matter rest. A few months later he raised the issue again basing his argument on the fact that a prisoner named Muirhead had been fined £500 for an 'unnatural offence' and as a wealthy man, the only inconvenience was writing the cheque.<sup>37</sup> Carlile, on the other hand, had no prospect of release as he no means of paying the fine. He asserted that judges should specify the additional term of imprisonment which a prisoner should

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<sup>34</sup> Legal term for seizure of goods is distress.

<sup>35</sup> *The Republican*, 25 June 1824. Jennies referred to 'Spinning Jennies' and Peel's background in cotton manufacture.

<sup>36</sup> *The Examiner*, 3 April 1825.

<sup>37</sup> *The Examiner*, 30 October 1825.

serve if they were unable to pay a fine. It should not be left to be determined by the Home Secretary.<sup>38</sup>

In a surprising move at the King in Council in November 1825, Carlile was unexpectedly released and the fines remitted.<sup>39</sup> The reasons for the government's change of position were not apparent. There were no reports in the London papers; the only confirmation of his release was contained in a single sentence in some provincial papers.<sup>40</sup> Perhaps Peel concluded that releasing Carlile would be politically expedient rather than allowing his continued imprisonment to be a subject for government criticism.

The question remained; did Peel allow the personal attack on his integrity and competence to influence his decision not to recommend clemency at an earlier date? Hume's assertion that Carlile's case was a 'hard one' is not borne out with comparable cases in respect of the quantum of the fine imposed and the term of imprisonment actually served. For example, in February 1828 after Carlile was released, Robert Taylor was convicted in King's Bench of blasphemous slanders. He was sentenced to 12 months' imprisonment and ordered to provide a personal recognisance in the sum of £500 and two further securities in the sum of £250 each.<sup>41</sup>

However, cases where prisoners petitioned for the mitigation of large fines were extremely rare in the 1820s. There were hundreds of examples of visiting magistrates requesting the Home Secretary to remit small fines where the prisoner was unable to pay them. They were invariably granted on the basis that detaining the prisoner resulted in his dependents being an economic burden on the parish and a contributory factor in the overcrowding in local gaols.<sup>42</sup> In a comparable case to Carlile's heard in 1822, Frederick Oldfield was convicted in King's Bench of keeping a gaming house and sentenced to one year's imprisonment and fined £1,000. He was subsequently convicted of further offences whilst serving his sentence. In 1824 he petitioned for a

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<sup>38</sup> Hume was making an interesting jurisprudential point. Until 2003, the Home Secretary had the power to determine the tariff for convicted murderers. After a decision of the European Court of Human Rights, this power was transferred to trial judges.

<sup>39</sup> *Derby Mercury* 23 November 1825; *Caledonian Mercury*, 24 November 1825.

<sup>40</sup> *Ibid.*

<sup>41</sup> HO17/26/Cn 38.

<sup>42</sup> For examples see HO17/9/Ak 12 where Robert Ponting's fine was remitted at the request of the Gloucestershire Visiting Magistrates and HO13/47/fol. 331 where Thomas Nutter and John Cramy had their £5 fines imposed at Cumberland Midsummer Quarter Sessions 1827 remitted.

remission of the fine as he was unable to pay. The petition was annotated 'to be recommended when he has completed two years beyond his sentence – not to be communicated to the prisoner.'<sup>43</sup>

There was no evidence that Oldfield was a threat to public order and yet the determination by Peel meant that Oldfield served three years before he was released. If Peel had used the same formula for Carlile, he would have had to serve nine years but in the event he served six. Peel indicated that he would have viewed Carlile's application for an earlier release more favourably but for the threats of violence.<sup>44</sup> There is no evidence that the decision to release Carlile was motivated by the press and public interest in the case but perhaps it was the view of the Executive that the incessant clamour in the press and parliament could be dissipated if Carlile was released.

With no curbs on the press, newspapers were free to report on cases without restriction. Although the principle that a prisoner is innocent until proven guilty is enshrined in English Law, the press paid little heed to this. In cases which attracted widespread press coverage, this could amount to an orchestrated campaign to discredit the prisoner even before the trial commenced. As considered earlier, Henry Fauntleroy, a partner in the banking house of Marsh Sibbald & Co., was indicted at the Old Bailey in October 1824 on 30 counts of forging transfers of annuities with intent to defraud.<sup>45</sup> In his defence, he asserted that he had made the transfers to cover deficiencies in the firm's finances which had accrued over many years. Alluding to the references in the press over his gambling and womanising, he condemned the 'cruel and illiberal manner in which the public prints have untruly detailed a history of my life and conduct.'<sup>46</sup> He maintained that the stories written about his extravagant lifestyle were false and were designed to denigrate his conduct in the eyes of the jury. In his summing up the trial judge, Mr Justice Park, reminded the jury that they were not there to try the question of character remarking that even 'if the prisoner had borne the character of an angel [if] the charge was established by the evidence, they would be bound to return a verdict of guilty.'<sup>47</sup> In the event the jury found him guilty and he was

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<sup>43</sup> HO17/49/Hk 34.

<sup>44</sup> HC Parliamentary Debates, 29 March 1825, 2<sup>nd</sup> series, 12, col. 1287.

<sup>45</sup> *OBP*, 28 October 1824, Henry Fauntleroy (t18241028-97); HO17/87/ Qk 46; HO6/9.

<sup>46</sup> HO17/87/QK 46.

<sup>47</sup> *Caledonian Mercury*, 4 November 1824.



sentenced to death which was confirmed at meeting of the King in Council in November 1824.<sup>48</sup>

It is impossible to assess whether the revelations about Fauntleroy's private affairs played any part in the Council's decision. There was no doubt that Fauntleroy himself was aware that these attacks in the press on his integrity and character were damaging to his hope for relief. His petition contained the statement that he objected to being portrayed 'as a coldblooded and abandoned profligate running all around for the selfish gratification of vice and sensuality.'<sup>49</sup> Whether the allegations mounted in the press were true or not, there were no grounds to reconsider the sentence and Fauntleroy was hanged. The press interest generated in his case and the sight of a member of the 'respectable' classes facing the gallows were no doubt contributory factors in drawing a crowd of more than 100,000 to the execution.<sup>50</sup>

The press interest in Fauntleroy's case was not an isolated example of sensational reporting during Peel's stewardship of the Home Office. Other cases excited widespread press interest; two examples will illustrate the point. William Probert, who had been acquitted as an accessory to the Radcliffe murder in 1824, was subsequently convicted of horse stealing at the Old Bailey April 1825.<sup>51</sup> It was widely held in the press that he had been wrongly acquitted of the earlier charge and had escaped justice. Probert's defence was that, since the trial, he had been hounded by the press wherever he went in the country to the extent that 'even the smallest village [I] went to spurned me as an outcast'. He declared that public animosity had been kept alive against him by the press intrusion into his life. In January 1825, he had threatened legal action against the editors of public journals for using his name in a 'most unwarrantable manner' and as a result some newspapers started to refer to him as the 'notorious Probert'.<sup>52</sup> Alluding to the press interest, the trial judge, Lord Chief Justice Tenterden, advised the jury that the verdict should be founded on the evidence alone and that they should disregard anything they had heard or read of the defendant's character.<sup>53</sup>

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<sup>48</sup> Ibid.

<sup>49</sup> HO17/87/Qk 46.

<sup>50</sup> *Morning Post*, 1 December 1824; Gatrell, *The Hanging Tree*, pp.29-103.

<sup>51</sup> *OBP*, 7 April 1825, William Probert (t18250407-1); HO17/10/A1 28; HO6/10.

<sup>52</sup> *Morning Post*, 10 November 1823; *Morning Chronicle*, 24 January 1824; *Morning Post*, 21 February 1825; *The Times*, 24 February 1825.

<sup>53</sup> *Morning Post*, 8 April 1825.

Whether this advice was heeded or not, Probert was convicted and his case was listed in the Recorder's Report for consideration at the next meeting of the King in Council which was held on 14 June 1825. This meeting reviewed cases heard at both the April and May sessions. Probert was one of two prisoners capitally convicted of horse stealing at the April Sessions and there were four others convicted of the same offence at the May Sessions. Of the six convicted prisoners, three were left for execution namely Probert, Sargeant and Harper and all three hanged.<sup>54</sup> *Prima facie*, this appeared to be a high percentage for one class of crime particularly when no prisoners, convicted at the Old Bailey, were hanged for horse theft in 1824.<sup>55</sup> With no minutes to reveal the reasons for the decisions, it is possible, however, to identify a pattern from the earlier Recorder's Report of May 1822 when burglary was on the increase and the King in Council left eight men for execution in an attempt to halt the incidence of that particular crime and as a measure of deterrence.<sup>56</sup> Perhaps the same reasons can be adduced here. The press campaign resulting in Probert's inability to gain employment may well have been a significant factor in his committing the offence but once convicted it is difficult to conclude that it was a decisive factor in his execution.

Esther Hibner was convicted at the Old Bailey April 1829 of the murder of one of the young girl apprentices she had taken in from the Poor House.<sup>57</sup> The inhumane and cruel treatment of the girls in her care had been graphically detailed in the press before the trial with headlines like 'Starvation Case at St Pancras'.<sup>58</sup> A petition was submitted on her behalf highlighting the contradictory medical evidence as to the victim's death but from the records it appears that Peel did not take his usual course and request further information about the case as the petition was marked 'the Law to take its course.' Hibner hanged but not before she attempted to commit suicide the night before her execution. Her execution was attended by thousands of people who

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<sup>54</sup> *OBP*, 7 April 1825 William Sergeant (t18250407-3), HO17/10/AI 31; 19 May 1825, William Benyon (t18250519-1) HO17/10/AI 6; 19 May 1825, James Harper (t18250519-6) HO17/10/AI 17; 19 May 1825, James Hill (t18250519-12) HO17/10/AI 19 and 19 May 1825, William Brooks (t18250519-129); HO6/10.

<sup>55</sup> In 1824 the prisoners convicted of horse stealing were *OBP*, 3 June 1824, Thomas King (t18240603-125); 15 July 1824, John Jay alias Norfolk (t18240715-4), HO17/67/Mk 18; 16 September 1824, William Sparks (t18240916-137), HO17/81/Pk 19; 16 September 1824, James Baker (t18240916-184); 16 September 1824, George Iden (t18240916-230); HO6/9. All were conditionally pardoned and transported for life.

<sup>56</sup> Chapter Six pp. 105-7 *supra*; Appendix Four.

<sup>57</sup> *OBP*, 9 April 1829, Esther Hibner (t18290409-41); HO17/118/Xn 7.

<sup>58</sup> *The Standard*, 18 March 1829 and 13 April 1829; *The Times*, 14 April 1829.

displayed their contempt for her actions, which had been stirred up by the press coverage, by booing and hissing as the rope was placed around her neck.<sup>59</sup>

In deciding whether to recommend the Royal Prerogative of mercy, Peel had to balance the freedom of the press against the right of the individual to a fair trial. There were no restrictions on the press printing their own view of the prisoner's character and actions before the case came to trial. It is impossible to know why certain prisoners were singled out for such widespread and derogatory coverage. Perhaps their status was one reason. In Hibner's case the horrific treatment by a woman under a duty to protect and nurture young girls was abhorrent and yet by choosing to publish the graphic details, newspaper editors must have anticipated that the sensational nature of the case was good copy and would increase circulation. There is nothing to suggest that the King in Council or Peel acted inconsistently in confirming the death sentences on Fauntleroy, Probert and Hibner but it is notable, from the available records, that Peel made no attempt to make enquiries into the disputed issues raised by these prisoners and their supporters. This approach was in stark contrast to the steps he took to ensure that all the circumstances of other cases, like Davis, were fully explored.<sup>60</sup> Perhaps it can be surmised that in these sensationalised cases, where there were no obvious established grounds for Peel to intervene, he was reluctant to instigate further investigation which might lead to an outcome which would be strongly criticised in the press.

A detailed examination of the influence of public opinion on Peel's decision making is outside the remit of this thesis. The effect of 'public opinion' and the legitimate sphere of its influence on government had been discussed since the early eighteenth century and this notion was gathering momentum during the 1820s.<sup>61</sup> Bentham considered that the 'Public Opinion Tribunal' was an important check on 'misrule' by constantly judging government actions. He also contended that its operation depended upon the freedom of the press to investigate and publicise government actions in order to facilitate a form of public debate through newspapers.<sup>62</sup>

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<sup>59</sup> *The Standard*, 13 April 1829.

<sup>60</sup> See Peel's letter, Appendix Seven.

<sup>61</sup> J.A.W. Gunn, *Beyond Liberty and Property. The Process of Self Recognition in Eighteenth Century Political Thought* (Montreal, 1983), pp 260-316.

<sup>62</sup> F. Cutler, 'Jeremy Bentham and the Public Opinion Tribunal', *The Public Opinion Quarterly*, 63, 3 (1999), pp. 321-46.

Peel was much more circumspect about the influence of public opinion and was keen to differentiate genuine public concerns from populist clamour which he envisaged would put the safety of the country at risk. In 1820 when Peel was out of government he was concerned that, after the events of Peterloo, there was a disparity between the policies adopted by the government and the nation at large. Writing to his friend and fellow MP John Croker in March 1820, Peel sought his view on whether public opinion ‘that great compound of folly, weakness, prejudice, wrong feeling, obstinacy and newspaper paragraphs’ was more liberal than the policy of the government.<sup>63</sup> Peel acknowledged that moderate reform could not be resisted in the long term but envisaged that this would only happen if Whigs and Tories united to carry it through.<sup>64</sup> When establishing the Metropolitan Police force in 1829, he incorporated this objective into the nine principles by which the force had to operate.<sup>65</sup> Clause five stated that the police should

seek and preserve public favour, not by catering to public opinion but by constantly demonstrating absolute impartial service to the law in complete independence of policy and without regard to the justice or injustice of the substance of the individual law.

In 1828 the former Tory MP, William Mackinnon published a treatise on the subject.<sup>66</sup> In defining what was meant by public opinion, Mackinnon was keen to distinguish it from ‘uneducated public clamour’ which he considered would be the result if universal suffrage was introduced. Public opinion, in his view, was only meaningful if three ‘requisites’ were in place.<sup>67</sup> These were wealth diffused amongst a sizable middle class, effective communication and moral principle. It was because Britain exhibited these attributes that the rise of the power of public opinion was explained. Mackinnon’s treatise may have reignited the debate in the public domain on the influence of public opinion on governments but his conclusions were not universally applauded. Benjamin Disraeli, the future Prime Minister, on meeting Mackinnon in 1832 considered him ‘an ass’.<sup>68</sup> Thus Peel acknowledged that any government should

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<sup>63</sup> J.W. Croker, *Correspondence and Diaries*, L.J. Jennings (ed.) 3 volumes (1884), volume 1, p 170; Gash, *Mr Secretary Peel*, pp. 249-51.

<sup>64</sup> *Ibid.*

<sup>65</sup> Metropolitan Police Act 1829 (10 Geo. IV c. 44).

<sup>66</sup> W.A. Mackinnon, *On the Rise, Progress and Present State of Public Opinion in Great Britain and Other Parts of the World* (London, 1828).

<sup>67</sup> *Ibid.*, p. 11

<sup>68</sup> H. Spencer and P. Salmon, ‘Mackinnon, William Alexander (1784-1870) in *HoP*.

have as its objective public favour but he was not prepared to pander to public opinion if he believed it to be transitory and not in the country's interests.

### **Private Influences**

When recommending the exercise of the Royal Prerogative of mercy, Peel was required to act impartially as a servant of the Crown. This meant that as far as possible, he had to set aside political considerations and act equitably. As was noted earlier, he was not prepared to acquiesce with the pleas of the Monarch, friends or political associates in favour of particular individuals where there were no established conventions to do so. Whilst Peel could dismiss the petitions from friends and associates where he had no grounds to recommend a pardon, he was faced with a more difficult dilemma when the petition came from a member of the Royal Family who had a personal, if tenuous, connection with the prisoner. George IV's attempts to overturn the decisions of the King in Council stemmed from his desire to act humanely and there was no suggestion that he had any personal involvement with the prisoners themselves.<sup>69</sup>

At Peel's second meeting of the King in Council in March 1822, he was obliged to deal with such a plea for clemency from a member of the Royal family. Edwin Cochrane alias James Morrison and William Osborne alias Henry Clare were capitally convicted at the Old Bailey in February 1822 of an aggravated burglary involving a pistol.<sup>70</sup> Both Cochrane and Osborne were young men aged 19 and 18 and petitioned for mercy. Cochrane pleaded that he had suffered long periods of unemployment and due to distress, had agreed to 'point out' the house of his former employer to a 'group of ruffians'. Osborne recited that he had not been involved in the robbery and had bought the watch from strangers in a public house. He did not know or believe that the watch was stolen. Osborne had once worked in the stables of the late Duke of Kent and before the meeting of the King in Council, the Duchess of Kent, instructed her secretary, Sir John Conroy, to write to Peel advising him of her interest in the case and hoping that Osborne 'might be found deserving of mercy'.<sup>71</sup> Due to the aggravated

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<sup>69</sup> See Chapter Six pp.104-7 *supra*.

<sup>70</sup> *OBP*, 20 February 1822, Cochrane and Osborne (t 18220220-1); HO17/72/ Nh 37 and 45; HO6/7.

<sup>71</sup> HO17/72/Nh45.

features of the crime, the request was not granted and the sentence on Osborne was confirmed at the meeting of the King in Council.

Concerned about the probity of the verdict against Osborne and the proportionality of the sentence, Peel wrote to Lord Chief Justice Tenterden seeking reassurance for a commutation of the sentence. Distinguishing between parties who were jointly charged with an offence was an unusual and inequitable step for the Home Secretary to take unless there was overriding reason to do so. On 30 March 1822, almost on the eve of execution, Tenterden confirmed that he had read the papers and agreed that having considered the nature of the evidence against Osborne there was ‘a possibility of his being innocent of the actual burglary’.<sup>72</sup> He concluded that the capital sentence should be commuted to transportation of life. So whilst Peel was initially not prepared to acquiesce with the Duchess of Kent’s personal request, he was responsible for initiating further enquiries into the case to ensure that all the pertinent facts were ascertained.

In obtaining the written acknowledgement of his actions from the Lord Chief Justice, Peel was demonstrating a characteristic which was apparent throughout his stewardship of the Home Office. He rebutted any possible challenges to his ability to carry out the responsibilities of his office by ensuring that he undertook all steps to deflect any criticisms of his decision making. Just as he had obtained Sir John Byng’s agreement to the release of the Yorkshire prisoners, so in Osborne’s case he only acted when he had the approval of the leading lawyer in the land. If there was any subsequent criticism, this approval would provide a shield to protect his reputation.

It was striking that his successor, Lansdowne, was less concerned to ensure that the petitions from influential petitioners were as impartially considered. One such case concerned Thomas Sackett who was convicted at the Old Bailey in September 1827 of highway robbery.<sup>73</sup> When passing sentence the Recorder of London had indicated that Sackett had no hope of mercy because of the aggravated nature of the crime.<sup>74</sup> As will be discussed in the next chapter, Lansdowne was able to find ‘favourable

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<sup>72</sup> Ibid.

<sup>73</sup> *OBP*, 14 September 1827, Thomas Sackett (t 182709013-21); HO17/93/ Rm 22; HO6/12.

<sup>74</sup> *Morning Chronicle*, 19 November 1827; *Morning Post*, 19 November 1827.

circumstances' in Sackett's case and recommended the exercise of the Royal Prerogative in his favour.

### **Victims of crime and jury decisions**

The question of what considerations Peel took into account or disregarded in reaching a decision has been analysed earlier in this chapter but two further factors should be taken into the equation; the supremacy of the jury and justice for victims of crime.

Having gathered the facts of the case, how influential was the opinion of the victim in Peel's decision making? Prisoners and their supporters often sought the signature of the prosecutor to their petitions as evidence that the victim supported the claim for clemency. Whilst some victims may have been prepared to endorse the petition voluntarily, there is evidence that many only signed if they were paid to do so. For example in Henry Dunn's case, the prosecutors demanded £50 to sign the petition.<sup>75</sup> As prosecutions were brought privately by the victims, this demand for payment was a device employed in order to recover any losses they had incurred in the commission of the crime. Peel therefore had to attempt to discern whether the recommendation by the prosecutor was motivated by a genuine concern for the prisoner or by monetary considerations. This was an almost impossible task with the result that the plea of the prosecutor was only one factor taken into account by Peel in his decision-making.

The plight of future victims of crime was, however, a fundamental concern to Peel when proposing his reforms to the criminal law. He was concerned that if secondary punishments such as transportation and imprisonment held no 'salutary terror' for potential offenders then removing the capital element for particular crimes would result in further increases and lose any deterrent effect.<sup>76</sup> His reluctance to completely remove the capital sentence for forgery was evidence of this. Perhaps he had in mind the victims who suffered through the misdeeds of Henry Fauntleroy.<sup>77</sup> The majority of investors attempted to recover some of their losses, through the courts, for nearly ten years after Fauntleroy's death. In June 1834, after prolonged litigation in the Court of King's Bench, the Court of Common Pleas and Chancery, the House of Lords found in favour of Ann Keating, one of Fauntleroy's victims, that she could recover some of

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<sup>75</sup> HO17/ 25 / Cm 12.

<sup>76</sup> Peel to Sydney Smith, 24 March 1826 in Parker, *Peel*, pp. 401-2.

<sup>77</sup> Chapter Two p. 25 *supra*.

the monies transferred to Marsh, Sibbald & Co., under a forged power of attorney.<sup>78</sup> Nothing is known about Mrs Keating but her situation may have been in the thoughts of Lord Eldon, former Lord Chancellor, in a debate in the House of Lords in 1832 on the mitigation of the punishment of death.<sup>79</sup> Referring to Fauntleroy's case, he asked, 'How many honest and industrious persons have been reduced to want and misery by such nefarious and profligate proceedings?'<sup>80</sup>

As has been noted earlier, the majority of petitions received by the Home Office were marked 'Nil' meaning that Peel had no grounds to interfere with the original decision. Whilst this course of action was a practical application of the separation of powers, it may be also adduced as evidence of Peel's regard for the integrity and supremacy of the jury in criminal cases.<sup>81</sup> He stressed the importance of unanimous jury decisions in England comparing them with the majority verdicts passed in the courts in Scotland.<sup>82</sup> Peel's view of the integrity of juries and giving prisoners the benefit of the doubt may have been coloured by his family's experiences.

John Stephenson, a servant to the Peel family, was indicted for the theft of cotton items valued at more than £60 at the Old Bailey in July 1807.<sup>83</sup> He pawned some of the items and was in possession of the rest when arrested. The offence of stealing in a dwelling house was capital but the jury, on consideration of the facts, found him guilty of theft only. He was sentenced to transportation for seven years. This was a typical example of 'pious perjury' where the jury brought in a lesser verdict in order to remove the possibility of the prisoner being hanged. It may even have alerted the younger Peel to the lack of consistency and the need for a more proportionate range of secondary punishments.

In 1821 Peel's father, Sir Robert Peel, was the victim of a sophisticated forgery. William Swiney Barnard Turner, a clerk in the Bank of England, was indicted on several counts of forging a receipt for £1,045 in the name of John Penn with intent to defraud the Governor and Company of the Bank of England.<sup>84</sup> The facts of the case

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<sup>78</sup> *Marsh v Keating* (1834) 1 Bing. 199.

<sup>79</sup> HL Parliamentary Debates, 25 June 1832, 3<sup>rd</sup> series, 13, cols. 982- 1000.

<sup>80</sup> *Ibid*, col. 988.

<sup>81</sup> *Speeches*, volume i, pp. 420-22; see also T. Green, *Verdict According to Conscience*; Walker and Ward, *English Legal System*, pp.196-203; Gatrell, *The Hanging Tree*, pp. 523-5.

<sup>82</sup> *Speeches*, volume i, p. 421.

<sup>83</sup> *OBP*, 1 July 1807, John Stephenson (t180701-03).

<sup>84</sup> *OBP*, 12 September 1821, William Swiney Barnard Turner (t18210912).



were complicated but involved Turner transferring government stock belonging to Sir Robert Peel to John Penn. The prosecution alleged that the original transaction involved the sum of £10,000 but they proceeded on the basis that they could only produce evidence showing a transfer of 1,000 5% Navy Bonds from Sir Robert's account amounting to £1,045.

*Prima facie*, the evidence against Turner was so detailed that it appeared overwhelming. The prosecution was able to adduce evidence that no person named Penn was resident in Highgate or was known to the authorities. In his defence, Turner delivered an impassioned plea to the jury begging them that his existence 'hangs upon your breath' as mercy was never granted in these cases.<sup>85</sup> In summing up the case, the judge, Mr Justice Richardson, considered it 'somewhat remarkable' that Turner had not made inquiries into Mr Penn to ascertain whether he did hold assets in excess of £10,000 in the Bank of England.<sup>86</sup> In a lengthy and meticulous address, he reviewed the evidence and advised the jury to decide whether Turner's account was true or an 'ingenious defence'.<sup>87</sup> He added that if they had the slightest doubt in their minds, then the prisoner was entitled to the benefit of it. He acknowledged the prisoner's excellent character but was pains to remind them that when arrested the prisoner had tried to escape by jumping through a window.

The jury retired to consider its verdict which had to be unanimous. After one and a half hours of deliberation they found the defendant not guilty on all counts. Given the weight of the evidence against Turner, the jury's decision appears contradictory but taken into context was not surprising. Only three years earlier, Old Bailey juries had refused to convict two prisoners on forgery where the evidence had been incontrovertible.<sup>88</sup> It is impossible to ascertain on what basis this jury arrived at its decision but it is interesting to speculate whether Sir Robert's great wealth played a part in their deliberations. The sum of £1,045 represented only a small fraction of Sir Robert's fortune and, in fact, he was compensated by the Bank of England for the loss. The verdict may have been very different if the monies had not been stolen from the Bank of England or were a victim's life savings. Peel was not directly involved with

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<sup>85</sup> *The Morning Post*, 18 September 1821.

<sup>86</sup> *The Times*, 18 September 1821.

<sup>87</sup> *Ibid.*

<sup>88</sup> P. Handler, 'Forgery and the End of the Bloody Code', pp. 683-702.

the case but had a close relationship with his father.<sup>89</sup> It is possible, as mentioned earlier, that Peel's belief in the integrity and supremacy of the jury to decide on a prisoner's guilt and to give a prisoner the benefit of doubt may have been directly and intrinsically linked to his father's experiences.<sup>90</sup>

## Conclusions

In reaching his decisions on whether to recommend the exercise of the Royal Prerogative of mercy, Peel had to balance the interests of the state against the individual circumstances of the prisoner. With no professional police force in London until 1829, crime prevention and detection were very limited and so the implementation of apparently harsh sentences was one tool which he utilised in order to deter potential law breakers. The economic landscape of the 1820s also played a part in Peel's recommendations. He did, however, refuse to accept that distress was a justifiable excuse for criminal actions.

One change during the decade was the expansion of the printed press. With unregulated court reporting, offences could be sensationalised and prisoners 'convicted' in the press even before the trial had commenced. Whilst trial judges were keen to advise juries that they should ignore press articles, it is impossible to assess how influential the press reporting was on the eventual outcome of these cases. Political pamphlets and cartoons continued to appear throughout the 1820s but Peel did not revert to the draconian measures adopted by Sidmouth in 1819 when faced with dealing with writers and publishers of seditious and blasphemous materials.

Whilst there is no direct evidence that the victim's recommendations for mercy were influential in Peel's decision-making, he was aware of the need to retain the notion of deterrence in order to protect future victims. Peel's recommendations were made on the basis of the evidence and circumstances of each individual case and he was not prepared to depart from established conventions in order to appease the pleas of influential petitioners. His principled stance of acting as an impartial servant of the Crown may not always have been politically astute but was an important step towards a more equitable system of criminal law. Having reviewed how Peel

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<sup>89</sup> Gash, *Mr Secretary Peel*, pp. 33-4.

<sup>90</sup> Chapter Six pp. 99-100 *supra*.

balanced his duty to maintain law and order as a member of the Executive and his duty to act impartially as a servant of the Crown, the next chapter will examine to what extent the individual circumstances of the prisoner played a part in his decision-making.

## Chapter Nine:

### Mitigating Factors

#### Introduction

In a diary entry in June 1828, Lord Ellenborough, Lord Privy Seal, recorded that he was ‘shocked by the inequality of punishment’ at the King in Council.<sup>1</sup> He deplored the fact that a prisoner was hanged as an example when another ‘escapes for the same crime... because it is a heavy calendar and there are many to be executed.’ He did concede that the Council arrived at their decisions ‘most conscientiously’ but still found it ‘very difficult and painful’.<sup>2</sup> These comments were in contrast to an entry he made in respect of the meeting the previous month. There, he had complained that the Council had left six prisoners for execution when there were ‘at least ten cases in which the punishment of death ought to have been inflicted.’<sup>3</sup> This would suggest that Ellenborough’s objection was not to the imposition of the death sentence but to the personal burden of the decision making which the system required him to discharge.

Ellenborough’s view confirms that Peel was faced with balancing the competing interests of his political responsibilities as Home Secretary with his obligations as an impartial servant of the Crown. In respect of capital cases heard outside London and also in non capital offences, he was limited in his ability to interfere with the judge’s decision but as a member of the King in Council he was directly involved with the outcome of capital sentences passed at the Old Bailey. Peel often had little option but to make a value judgement on the individual prisoner’s circumstances when arriving at a decision. Whilst it is possible to extract from a wide sample of the petitions for mercy a list of the factors on which it appeared the Royal Prerogative of mercy was granted, there is insufficient evidence to causally link these factors to any mitigation of sentence. Petitioners often only pleaded circumstances which were to their benefit such as previous good conduct but these were in many cases untrue or inaccurate. This

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<sup>1</sup> Ellenborough, *A Political Diary*, R.C.E. Abbot (ed.) (London, 1881), volume II, pp. 154-5; D. Steele, ‘Law, Edward, first earl of Ellenborough (179-1871)’ in *ODNB*.

<sup>2</sup> Ellenborough, *A Political Diary*, pp. 267-8.

<sup>3</sup> *Ibid*, p. 101.

was a particular problem when a prisoner's age was involved as there was no legal requirement to record births.<sup>4</sup>

This chapter initially reviews briefly the age and gender of the prisoners and how these influenced Peel's recommendations for the Royal Prerogative of mercy.<sup>5</sup> It will then consider the character and conduct of the prisoner. When analysing the factors which resulted in a mitigation of sentence in late eighteenth century petitions, King considered that a prisoner's previous conduct was significant in achieving success.<sup>6</sup> The thesis adopts a different approach from King and analyses the prisoner's conduct in a more nuanced way. During Peel's tenure at the Home Office, good conduct after conviction was deemed an essential prerequisite in order to gain a reduction in a prison sentence or term of transportation. Previous good conduct alone, however, was not always a sufficient mitigating factor to counteract any breach of duty involved in the offence. As will be examined later in this chapter this was not always the approach adopted by Lansdowne, when Home Secretary, who considered that previous good conduct and connections were a significant determinate on whether to recommend the Royal Prerogative of mercy.

## Age

The age of the prisoner was a mitigating factor which was taken into account by the courts and the King in Council when deciding on the actual punishment imposed. At common law children under the age of seven lacked the necessary *mens rea* to commit a criminal offence and the presumption of *doli incapax* related to children aged

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<sup>4</sup> The civil registration of births was not implemented until 1837 under the Births and Death Registration Act 1836 (6&7 Will. IV c. 86). Even with the passing of this Act registration of birth was not made compulsory until later in the century.

<sup>5</sup> J.M.Beattie, 'The Criminality of Women in Eighteenth Century England', *Journal of Social History*, 8 (1975), pp. 80-116 ; J. Duckworth, *Fagin's Children: Criminal Children in Victorian England* (Hambledon, 2002); M.Feeley and D.Little, 'The Vanishing Female: The Decline of Women in the Criminal Process, 1687-1912', *Law and Society Review*, 25 (1991), pp. 719-57; S.K. Kent, *Gender and Power in Britain, 1640-1990* (London, 1999); P. King, *Crime and Law in England, 1750-1840: The Rise of Juvenile Delinquency in England 1780-1840: Changing Patterns of Perception and Prosecutions*, *Past and Present*, 160 (1998), pp. 116-66; P. King and J. Noel, 'The Origins of the "Problem of Juvenile Delinquency": the Growth of Prosecutions in London in Late Eighteenth and Early Nineteenth Centuries', *Criminal Justice History*, 14 (1993), pp. 17-41; D.Palk, *Gender, Crime and Judicial Discretion 1780-1830* (Woodbridge, 2006); R.B. Shoemaker, *Gender in English Society 1650-1850: The Emergence of Separate Sphere* (Harlow, 1991); H. Shore, *Artful Dodgers: Youth and Crime in Early Nineteenth Century London* (London, 1999).

<sup>6</sup> King, *Crime, Justice and Discretion*.

between eight and fourteen.<sup>7</sup> *Doli incapax* was the common law doctrine that children could only be found guilty if they understood the difference between right and wrong and that their actions constituted a criminal offence.

In 1816 a parliamentary committee was set up to investigate the causes of the increase of juvenile delinquency in the metropolis.<sup>8</sup> The committee was mainly composed of reformers such as Thomas Fowell Buxton MP and leading Quakers, and was an initial step in the cooperation between the voluntary sector and government to address the problem of juvenile delinquency and to bring it into the public domain. In its Report, the committee identified various causes for the increase including *inter alia* the improper conduct of parenting, want of employment and severity of the criminal law but formulated few proposals for reform of the system.<sup>9</sup> One change, however, which did occur was that juvenile prisoners held in the gaols at Cold Fields Bath and Horsemonger Lane in London were, in future, to be held separately from adult prisoners thus adopting the system in place in Newgate. In 1818 the Reverend Mr Price, Chaplain to the *Retribution* wrote to John Capper, Superintendent of the Hulks, arguing that juvenile offenders should be placed on a separate hulk in order to remove them from their 'haunts and companions' and offer the best chance of 'improvement'.<sup>10</sup>

This suggestion was not immediately taken up but, in 1823 Peel ordered the *Bellerophon* at Sheerness to be set aside for juvenile offenders and 320 were sent on board. In 1825 the *Bellerophon* was broken up and the boys transferred to the *Euryalus* which was moored at Chatham in Kent. It remained 'the boys' hulk' for more than 20 years. Peel was the instigator of this initiative but his motivation is unclear. If as Gatrell suggests Peel was 'indifferent to the redemption of the vicious in reformatory prison regimes' why did he take steps to isolate juvenile offenders from adult prisoners if they had no hope of rehabilitation?<sup>11</sup> It would seem an unnecessary measure to implement if Peel believed that there was no benefit to be gained by the prisoners. It

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<sup>7</sup> The common law position was statutorily modified in 1933 and abolished in 1998 under the Crime and Disorder Act of that year.

<sup>8</sup> *Report of the Committee Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis* (London, 1816).

<sup>9</sup> *Ibid* pp. 11, 12.

<sup>10</sup> W. Branch Johnson, *The English Prison Hulks* (Chichester, 1970), pp. 147-50.

<sup>11</sup> Gatrell, *The Hanging Tree*, pp. 576-7; Hilton, *The Age of Atonement*, pp. 215-7.

could, however, be adduced as evidence of Peel's determination to centralise the prison system in respect of young offenders by relocating them from local gaols and bringing them under the control of government.

How juries viewed youth is impossible to define. For example at the Old Bailey April 1824, John Frederick Crees was convicted of larceny in a dwelling house.<sup>12</sup> He had stolen household items from his wife's employer valued at more than £200. His wife was jointly charged with him but acquitted. On arriving at their verdict, the jury recommended him to mercy 'being a young man'. He was aged 27. At the same sessions Edward Brimmell, William Clutterbuck and John Wales were capitally convicted of burglary and although aged 26, 23 and 17 respectively they were all 'recommended to mercy by the jury on account of their youth and character.'<sup>13</sup> Whilst there is no evidence that either Peel or the King in Council were influenced by these recommendations, juries at the Old Bailey continually made them which would seem to indicate that they believed that they had some impact on the deliberations of the King in Council.

During Peel's first tenure at the Home Office, a review of all the capital cases heard at the Old Bailey and the subsequent decisions of the King in Council revealed that no prisoner aged 16 or under was hanged.<sup>14</sup> As Peel's successor as Home Secretary between April and July 1827, Sturges Bourne attended two meetings of the King in Council to consider the Recorder's Report. Due to the King's illness and the political upheavals resulting from the retirement of Lord Liverpool, the meeting held on May 19 1827 covered both the February and April sessions of the Old Bailey and concerned the sentences of 55 prisoners. 26 prisoners had been capitally convicted at the February sessions and of these three were left for execution; John Eagles, a postman, for secreting letters containing a substantial amount in bank notes, George Williams for the theft of a gelding and 33 sheep and Benjamin Saunders for the violent robbery of a Chelsea pensioner.<sup>15</sup>

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<sup>12</sup> *OBP*, 7 April 1824, John Frederick Crees (t18240407-02); HO17/44/Gk39.

<sup>13</sup> *OBP*, 7 April 1824, Edward Brimmell, William Clutterbuck and John Wales (t18240407-20) HO17/44/Gk 37, 38.

<sup>14</sup> This is subject to the caveat that the age of prisoners was not always stated.

<sup>15</sup> *OBP*, 15 February 1827, John Eagles (t18270215-36), HO17/45/Gm 22; 15 February 1827, George Williams (t18270215-52), HO17/58/Km16 and 15 February 1827, Benjamin Saunders (t18270215-16), HO17/50/Hm 8. Eagles' case can be distinguished from Davis's case as he stole over £1000 to fund a lavish lifestyle and the upkeep of his mistress.

In respect of the April sessions, 29 prisoners appeared on the list; one prisoner Joseph Brown aged 16 convicted of highway robbery was left for execution. He was alleged to have been one of a group of four or five young men who had violently assaulted William Cooper, a labourer, and stole, *inter alia*, a hat, spectacles and two half crowns. Cooper attested that Brown had attacked him with a stick and beat him around the head. When Brown was arrested he was found to have two half crowns in his pocket and a stick in his possession. Brown's defence was that he was walking along when he saw the prisoner lying in the road with his hat next to him. Brown admitted that he took the hat but nothing else. The jury found him guilty on the capital charge<sup>16</sup> The violence inflicted by Brown and the fact that he was part of a gang were aggravating factors elevating the seriousness of the crime and resulted in the capital sentence being confirmed.

If Sturges Bourne had followed the pattern set in Peel's first tenure at the Home Office, Brown's age would have overridden these factors and the sentence would have been commuted. Three petitions had been submitted on Brown's behalf; one containing 78 signatures of inhabitants of St James, Clerkenwell, pleading Brown's contrition and neglect by his widowed father. Although the petitions revealed a discrepancy over Brown's age stating it to be both 16 and 19, in view of what happened next, it is assumed that he was the younger age. Whether any pressure was exerted on Sturges Bourne or whether he took outside advice from Peel to commute the sentence is impossible to ascertain from the records. Without giving any reason except the usual 'favourable circumstances', Brown's sentence was commuted on the eve of execution when a respite was sent to Wontner, the Keeper of Newgate. Brown was ordered to be transported for life. This last minute unilateral commutation of sentence by Sturges Bourne without informing the other members of the King in Council or giving his reasons was not the practice adopted by Peel but was followed by Lansdowne.<sup>17</sup>

Thus the age of the prisoner was a mitigating factor which generally influenced the measure of punishment imposed. Clarifying what 'youth' meant and proving age were

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<sup>16</sup> *OBP*, 5 April 1827, Joseph Brown (t18270405-12); HO17/45/Gm11; HO6/12.

<sup>17</sup> See p.182-4 *infra*.



often difficult because of the lack of public records but the clear impression is that no-one under 17 capitally convicted at the Old Bailey during Peel's tenure at the Home Office was hanged.

## Gender

The gender of the prisoner was also taken into account when reviewing the petitions for the exercise of the Royal Prerogative of mercy. Women who were sentenced to a period of transportation were never housed on the hulks except on the one occasion in 1824 when gaol fever raged through the Penitentiary.<sup>18</sup> They were held in Newgate, a local gaol or House of Correction until a warrant was received from the Home Office ordering the sheriff of the locality to arrange for the female prisoners to be 'removed for disposal on the next available ship'. This meant that some prisoners never left their local area as they had served more than half the term before the warrant arrived and were then eligible for release. Women aged over 50 were never transported as confirmed in a letter by Hobhouse.<sup>19</sup>

After conviction, female convicts were generally treated differently from their male counterparts but the question arises whether gender was a factor in Peel's recommendations for the exercise of the Royal Prerogative of mercy. The perceived lenient treatment of women was highlighted in a letter to the *Morning Chronicle* in July 1822. Parkins, a former Sheriff of London, deplored the leniency shown by the King in Council to two prisoners, Ann Darter and Mary Ann Andrews.<sup>20</sup> Darter had been convicted at the Old Bailey April 1822 of the theft of a substantial amount of household items and Andrews of a similar offence at the July Sessions.<sup>21</sup> He advised that both women were atrocious offenders. He questioned how they had managed to secure pardons, despite both being capitally convicted on two separate occasions, when he had been unable to secure a pardon for an innocent man named Bird.<sup>22</sup> Parkins' view, that women were treated more leniently, may have been formed

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<sup>18</sup> See Chapter Two p. 50 *infra*.

<sup>19</sup> Letter to Daniel Giles; HO13/48 /fol. 19.

<sup>20</sup> *Morning Chronicle*, 28 July 1822

<sup>21</sup> *OBP*, 17 April 1822, Ann Darter (t18220417-47); 3 July 1822, Mary Ann Andrews (t18220703-36).

<sup>22</sup> There is evidence that an Ann Darter was capitally convicted twice at the Old Bailey in 1818 and 1819 but no such record for Andrews. This is not conclusive as Andrews may have been charged under a variant of her name. John and George Bird were executed in 1820 for burglary.

because of his disappointment in not being able to influence the decision in Bird's case but is borne out when other cases are examined.

The case of Maria Williams would also lead to the impression that women were treated more leniently than men charged with similar offences. Williams, aged 19, was convicted of uttering forged Bank of England notes at the Old Bailey in January 1824.<sup>23</sup> The Ordinary at Newgate (chaplain) prepared a petition on her behalf citing that she was an orphan who had been 'prey to wicked and designing men' but with education could become a 'valuable member of society.'<sup>24</sup> At the King in Council meeting on 19 March 1824, Williams' sentence was commuted to transportation for life. With no reasons given for the decision, it is difficult to equate it with the imposition of the death penalty on Rivers, Lomas and Miles in the previous two years for convictions on similar facts. It was particularly unusual as Lord Liverpool had advised Peel in respect of Rivers' case that any commutation of sentence would only bear encouragement to others to commit a similar offence.<sup>25</sup>

The most compelling contemporaneous evidence that women were treated more leniently is contained in Ellenborough's diaries.<sup>26</sup> At their meeting on 28 June 1828, the King in Council had to consider whether to commute the capital sentences passed on 15 prisoners at the Old Bailey sessions in May 1828. They left four of the prisoners for execution: John Montgomery for forgery, William Rice for burglary and James Anderson and George Morris who were jointly charged with Mary Young for robbery.<sup>27</sup> Ellenborough opined that Young was 'spared on account of her sex' even though she was the most guilty of all.<sup>28</sup> She was pardoned on condition of transportation for life. Young was a prostitute who had lured the victim into a bawdy house where he was set upon and robbed. Anderson and Morris were alleged to be the perpetrators but after the confirmation of the sentence questions were raised with Peel by the attorney E.J. Wilde as to the probity of the prosecution's evidence.<sup>29</sup> Peel ordered the irregularity of the evidence given by the prosecution witness, Harriet

<sup>23</sup> *OBP*, 14 January 1824, Maria Williams (t 18240114-54); HO17/30/Dk 28; HO6/9.

<sup>24</sup> The Ordinary at Newgate was the chaplain.

<sup>25</sup> See Chapter Six p 113 *infra*.

<sup>26</sup> Ellenborough, *A Political Diary*, p.154.

<sup>27</sup> *OBP*, 29 May 1828, John Montgomery (t18280529-12), HO17/45/ Gn 29; 29 May 1828, William Rice (t18280529-17), HO17/45/Gn45; 29 May 1828, James Anderson, George Morris and Mary Young (t 18280529-54), HO17/45/Gn1, Gn 21 and Gn 28.

<sup>28</sup> Ellenborough, *A political diary*, p. 154

<sup>29</sup> For a more detailed consideration of the case see Gatrell, *The Hanging Tree*, pp. 441-2.

Morris, to be investigated with the result that the sentence on Anderson and Morris was commuted on the eve of execution. They ultimately served two years' imprisonment before being granted a free pardon on 1 June 1830. It is unfortunate that Gatrell states that it was only when the Whigs came to office that the men were released. Gatrell's criticism of Peel's reluctance to commute capital sentences has already been questioned by the number of late commutations instigated by Peel and is further undermined by this case. Peel monitored the case over the two years from 1828 and he was in office when the pardon was recommended.

Whilst these are only a few examples of the perceived leniency shown towards women convicts, a review of the decisions of the King in Council between 1822 and 1830 would suggest that they are representative of the manner in which women charged with capital offences involving property were treated. It is impossible to reach a definitive conclusion due to the discretion of private prosecutors to proceed with a case, the failure of witnesses to turn up, errors in bills of indictment and pious perjury. With that caveat, of the 136 capital convictions excluding murder passed at the Old Bailey between January 1824 and December 1824, 12 of these were women, none of whom hanged.<sup>30</sup> In fact only one woman convicted at the Old Bailey was hanged for property crime during Peel's first tenure as Home Secretary between 1822 and 1827. The circumstances of her case illustrated that age and gender alone were not always sufficient mitigating factors to commute a capital sentence. Peel and the King in Council had to weigh up the criminal conduct of the prisoner, any relationship between victim and perpetrator, the need for deterrence and arrive at a decision which was consistent with both his duty to maintain law and order and act equitably.

### **Fiduciary relationships, breach of trust and prisoner's conduct**

As has been discussed earlier, historians considering applications for the exercise of the Royal Prerogative of mercy in the late eighteenth century have offered differing views on the reasons why particular petitions were successful. Hay argued that one significant factor was the class of the prisoner whereas King has quantified the grounds for success in cases heard in Essex, concluding that judges were more likely to recommend mercy on the basis of, *inter alia*, previous good conduct or youth rather

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<sup>30</sup> 1824 was chosen as a random sample but it is representative of the situation between 1822 and 1830.

than respectable connections.<sup>31</sup> In rural areas, where prisoners were well known in the community, respectability and/or good conduct probably continued to play a part in determining the measure of sentence imposed in the 1820s. Whether these factors had any real effect on sentences passed on prisoners tried in London or other provincial towns is questionable.

Whilst good conduct after sentence was a necessary requirement for prisoners seeking mitigation of a non capital sentence, the particular nature of the offence and the prisoner's actions were significant factors in Peel's deliberations on whether to recommend a commutation of a capital sentence. This approach was particularly apparent in cases of forgery, a crime which Peel considered had 'peculiar characteristics' which made it 'deserving of especial consideration.'<sup>32</sup> These characteristics included the ease of commission and difficulty of detection. One factor not specifically mentioned by Peel but implicit in his opinion was that forgery, in respect of private documents, was typically an offence committed by a person who was in a fiduciary relationship with the victim. Entrusting money and control of financial matters to a third party in the 1820s was based on trust, where good reputation was a by word for probity and stability. Whilst there is still an element of trust today, this idea was superseded over time with the introduction of written contracts and detailed regulations which governed the conduct of financial dealings making the notion of 'my word is my bond' of less consequence.<sup>33</sup>

Whilst complicated commercial transactions and the growth of negotiable instruments were evolving in the 1820s, most contracts were still concluded on a personal basis where a person's integrity and honour were the fundamental basis for the success of the deal. If class connections were the determining factor in whether a prisoner was a 'fit object for His Majesty's clemency', then it is unlikely that either of the forgers, Henry Fauntleroy or Joseph Hunton would have hanged. Both men came from respectable families and had no criminal past but these considerations were not

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<sup>31</sup> See Chapter One pp.8-9 supra.

<sup>32</sup> HC Parliamentary Debates, 24 May 1830, 2<sup>nd</sup> series, 24, cols. 1031-60 at 1045.

<sup>33</sup> W. Cornish, M. Lobban and K. Smith, 'English Law in an Industrialising Society', volume XI Part One and M. Lobban 'Commercial Law' volume XII Part Three in W. Cornish, J. Stuart Anderson et al (eds), *The Oxford History of the Laws of England, 1820-1914* (Oxford, 2006).

deemed of sufficient weight to cancel out their conduct in defrauding the victims who had trusted them with their money and investments.

This fiduciary duty also applied to servants who stole from their masters. One example will succinctly illustrate the point. William Davies was convicted at the Old Bailey January 1827 of stealing plate and other silver goods from his master.<sup>34</sup> Three of his former masters supplied certificates as to his previous good character and the jury and prosecutor strongly recommended him to mercy on account of his character. There was no violence involved in the offence. Davies' previous good conduct and his plea that he was induced to commit the crime by 'a worthless woman' were not sufficient reasons for his sentence to be commuted. He was left for execution when the King in Council met on 14 March 1827.

Sir Thomas Lawrence, the eminent portraitist and a great friend of Peel, was concerned with this decision and sought Peel's opinion on whether any steps could be taken to commute the sentence.<sup>35</sup> It is rare to be able to locate the reasons why the King in Council reached a decision but in replying to Sir Thomas's letter on 17 March, Peel felt obliged to set out the reasons why the Council had not felt able to exercise mercy in Davies' favour. He stated that the King in Council had carefully considered the certificates of good conduct in favour of Davies but in the interests of public justice and 'the effect of example' it was necessary that the capital sentence should be implemented. He continued that Davies had been employed because of his good character and had been entrusted with looking after his master's property. Yet within a month, he had committed the theft which involved 'a gross breach of trust'.<sup>36</sup> It was not just the theft itself which demanded the death penalty but the fact that it was coupled with this breach of trust that meant Peel felt unable 'consistent with his public duty' to recommend a commutation of the sentence. This case showed that despite evidence of Davies' previous good character, this mitigating factor carried less weight in the eyes of the decision makers, when balanced against the need to impose the full

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<sup>34</sup> *OBP*, 11 January 1827, William Davies (t18270111-35); HO17/25/Cm10; HO6/11.

<sup>35</sup> Peel was renowned as a leading patron of the arts. He had commissioned Lawrence to paint his wife Julia's portrait on several occasions. M. Levey, *Sir Thomas Lawrence* (New Haven & London, 2005); HO13/48/ fol. 152.

<sup>36</sup> The words 'gross breach of trust' were underlined in pencil in the copy of the letter to Sir Thomas Lawrence.

sentence of the law as an example and deterrent to offenders who breached their duty of good faith.

This idea of acting ‘honourably’ was important to Peel as was evidenced in his letter to Lawrence. Breach of trust on the part of the prisoner also played a part in press coverage of trials. Esther Hibner was vilified in the press for her cruel treatment of the vulnerable girls in her care and it is suggested that this stemmed from the fact that she breached her duty to care for the girls with fatal results.<sup>37</sup> However, it was the case of Amelia Roberts which most clearly demonstrated the importance which the King in Council and Peel attached to offences which concerned a breach of trust.<sup>38</sup>

In January 1826 32 year old Amelia Roberts was the trusted housekeeper of Morgan Fuller Austin, a surgeon of Clerkenwell in London. She had been in service for many years working for several distinguished families acquiring an education and air of sophistication. She met Patrick Riley, a young man in his early twenties, at a friend’s tea party and they embarked upon an affair instigated by Roberts. Riley had come to London from Kerry in Ireland, some three years earlier, to seek work as a labourer but had found work hard to find in London. He found Roberts’ promises of wealth and a secure future impossible to resist. Over the summer, Roberts persuaded Riley that they should go to America and use her wealth to build a new life there.<sup>39</sup>

On August 10 1826 Mr Austin was away in the country and Roberts was left in charge of the London house. She arranged for Riley to meet her at the house and he arrived as Roberts and a coach driver were carrying her cases and boxes out of the house. When he asked her what was in the boxes, she told him that they contained clothes. She then showed him £24 which she said was all that she had on her but that there was plenty more in the boxes. The coach was to take them to Newport in Wales where a ship was scheduled to embark for America. Arriving in Newport, they discovered that they had been misinformed and there was no ship. Riley wanted to return to London but Roberts persuaded him that they should take lodgings in the town, which she would pay for, and she would find work as a seamstress. It was only when she was changing

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<sup>37</sup> See Chapter Eight p. 158 *supra*.

<sup>38</sup> The following account of the case is extracted from *OBP*, 26 October 1826, Patrick Riley and Amelia Roberts ( t18261026-42); HO17/122/Y1 11; HO6/11.

<sup>39</sup> *Ibid*.

that Riley discovered the boxes contained plate, jewellery and clothes worth more than £400.

At this point, Riley realised that he had been tricked and Roberts had no wealth of her own. When he tried to leave, she locked him in the room. On his return to London and discovering the theft, Mr Austin made enquiries and traced the couple to Newport. Arriving in the town, he found their lodgings, informed the local constable who arrested them. They were charged with theft and returned to London to face trial at the Old Bailey in October 1826.<sup>40</sup> Roberts raised no defence at her trial but begged for mercy. Riley pleaded in his defence that he was innocent and called five witnesses who gave evidence as to his good character. They were both found guilty on the capital charge.

When the Recorder of London passed death sentences on all the prisoners who had been capitally convicted during the sessions, he often took the opportunity to lecture the prisoners on the seriousness of their crimes and to advise some of them that there was no hope of mercy from His Majesty. At the end of the October Sessions, it fell to the Common Sergeant, deputising for the Recorder due to illness, to address the prisoners. He advised that servants who robbed their masters were guilty of a 'heinous offence' as they had been entrusted with the care of the master's property. He continued that it was an offence which was easily committed with the 'guilt of treachery' added and it included 'the extreme aggravation of gross hypocrisy and deceit: for the offence is committed under the mask of good character, which not only allays but excludes suspicion'.<sup>41</sup>

At the meeting of the King in Council on December 16 1826, Roberts and Riley were left for execution. Roberts made very little effort to save herself. Her petition is undated, incomplete, unsigned and ran to less than a page. Her only grounds for clemency were her honesty and integrity. She did, however, put great effort into trying to save Riley. She pleaded that she knew Riley would leave her if he found out that she had no money.<sup>42</sup> She also stated that he knew nothing about the contents of the

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<sup>40</sup> Ibid.

<sup>41</sup> Reported in *The Times* some months later on 20 March 1827.

<sup>42</sup> HO17/122/Y1 11; HO6/11.

boxes and when he found out, he tried to leave her. Riley's petition was much more detailed and stated that he knew nothing about the theft until they were in Newport. He confirmed that he had had an affair with Roberts and was induced to accept her offers of help because he was 'in very inferior circumstances'. He made his mark at the end of the petition and it was undersigned by 15 people who lived in and around the Holborn area of London.

Riley lodged a second petition confirming the circumstances of his first petition and pleading that he was an illiterate labourer who was led astray by a considerably older woman who he believed was a widow but whose husband was still alive. When he was arrested he had one shilling in his possession. Although Riley did not make his mark at the end of this petition, it was signed by the prosecutor, Mr Austin and his wife. Austin argued that the punishment given to Riley was disproportionate and he was evidently determined to take all steps to help him.

Once the decision of the King in Council was reported in the press, there was a clamour for Riley's sentence to be commuted. Austin wrote to Peel asking him to reconsider Riley's sentence as it was his 'conscientious opinion' that Riley was not aware that the packages in the coach were stolen. The Clerk to the Magistrates in Newport also sent Peel a letter saying that he had attended the examination of the prisoners and that Riley swore that he did not know that the boxes contained stolen property. He described him as an 'ignorant labourer' and asked Peel to reconsider the case. A certificate as to Riley's good character was sent to Peel by his former employer, Thomas Cubbitt, builder of Grays Inn Road. There were other depositions attesting to Riley's good character and his 'frugal and industrious' nature.

The executions were set for 2 January 1827 and on the night before, it was reported in *The Times* that 'Riley's life is saved.'<sup>43</sup> The paper recited that Mr Sheriff Farebrother had attended an interview with Hobhouse, as Peel was in the country, and laid before him the circumstances of the affair, which Hobhouse had promised to communicate to Peel.<sup>44</sup> After further enquiries and a thorough investigation of the circumstances, there

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<sup>43</sup> *The Times*, 2 January 1827.

<sup>44</sup> *Ibid.*



was sufficient uncertainty over Riley's involvement for his sentence to be commuted to transportation for life. There was no respite for Roberts and she hanged.

Roberts' execution appeared harsh when compared with the leniency shown to Maria Williams in respect of her conviction for forgery offences and the decision to commute Henry Dunn's sentence earlier the same month for a similar offence.<sup>45</sup> One difference was that both Williams and Dunn committed the offences at the behest of third parties; Williams by 'wicked and scheming men' and Dunn by 'an abandoned woman'. Neither materially benefitted from the crimes and so their situation could be compared to that of Riley who was in Austin's words 'a victim like himself'. Roberts, on the other hand, was the instigator of the crime and implicated Riley for her own sexual purposes. She breached the trust of her employer to safeguard his property for her own financial gain.

Roberts' case showed that it was the breach of the fiduciary relationship between master and servant which was a significant factor in the full sentence being imposed. Her previous good conduct did not carry sufficient weight to counteract the conduct committed in the crime itself. This notion that Peel was less inclined to interfere in cases where the prisoner had abused his social position or advantages in life in committing the offence is a recurring theme throughout his stewardship of the Home Office. The cases of William Davies and Orchard, considered earlier, are also examples of prisoners in fiduciary positions suffering execution. Both were able to adduce a body of evidence as to their previous good conduct but, like Roberts, this was not sufficient to commute the capital sentence.

An example, in a non capital case, which further illustrates the point, occurred in the case of Charles Owen. Owen had been convicted of riot at the premises of Neal and Co., weavers, at Gloucester Quarter Sessions November 1825.<sup>46</sup> He was sentenced to two years' imprisonment which was a longer term than other prisoners convicted of the same offence. In September 1826 when he had served nearly half his sentence, the visiting magistrates for the gaol in Northleach in Gloucestershire petitioned Peel for the remainder of the sentence to be remitted. They pleaded that Owen had been well

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<sup>45</sup> p.173 *supra*.

<sup>46</sup> HO17/122/Y1 5; HO13/ 48 fol. 97.

behaved in prison and that a remission of sentence would have ‘a good effect on the manufacturing population in the neighbourhood’.<sup>47</sup>

In reply, Peel stated that it would be ‘inconsistent’ with his public duty to submit the case to His Majesty for any mitigation of sentence. He disagreed that Owen’s early release would have a good effect. He viewed Owen’s offence as greatly aggravated because he had served in the Army concluding that Owen should have had the strength of character to resist the pressure to riot as he had been a sergeant in the 50 Regiment of Foot for many years. Peel was of the opinion that Owen’s pension ‘deprived him of the excuse of distress which was open to many other offenders of the same class.’ Because of his background, Owen had no reason to riot and even though this was his first offence, his social advantages over other prisoners convicted of a like offence, was a significant factor in Peel’s refusal to recommend the remission of the sentence. The case did not rest there. Peel wrote to Richard Neave, the Secretary of the Royal Hospital Chelsea, asking whether the prisoner ought to be deprived of his pension in view of the conviction.<sup>48</sup> Neave confirmed that this would be done.<sup>49</sup> This withdrawal of Owen’s pension was undoubtedly a harsh measure but was evidence of Peel’s determination that prisoners who had squandered or abused their social advantages and acted dishonourably would not be so favourably treated as those who had not enjoyed those privileges.

This approach, however, was not followed by Lansdowne. Thomas Sackett was convicted at the Old Bailey in September 1827 of highway robbery.<sup>50</sup> Sackett had been a beneficiary under his grandfather’s will and inherited approximately £3,000. By 1827 there was little of his inheritance left. He was alleged to have been part of a gang which attacked James Sharpe, a banking clerk, and stole over £1000 in bills of exchange. No bills were found on Sackett but witnesses confirmed that he was one of the gang who had accosted Sharpe. He was convicted but recommended to mercy by Sharpe as he had suffered no personal injury. On 16 October, before the meeting of

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<sup>47</sup> Ibid.

<sup>48</sup> Owen’s pension was paid by the Royal Hospital.

<sup>49</sup> HO17/122/Y1 5.

<sup>50</sup> *OBP* (t 18270913-21); HO17/93/Rm 22; HO6/12.

the King in Council, David Whittle Harvey, an MP for Colchester had written to Lansdowne asking him to commute the sentence.<sup>51</sup>

Sackett lodged a petition claiming his innocence but worded in deferential terms and not challenging the jury's decision on the evidence. Other petitions were also lodged with the Home Office on Sackett's behalf confirming his good character and highly respectable connections. These were not sufficient for the King in Council at its meeting on 16 November 1827 to commute the sentence and Sackett was left for execution. In the days after this decision, Harvey was again in correspondence with Lansdowne and sent to the Home Office further character references and testimonials as to Sackett's previous good conduct. Harvey stated in his letter of 20 November that he was doing this at the suggestion of Lansdowne who had advised that the best prospect of a commutation of sentence was "the production of testimonials to his character down to a recent period before the prosecution signed by respectable individuals".<sup>52</sup> These character references proved sufficient for Lansdowne to recommend a commutation of sentence and on the eve of his execution Sackett was conditionally pardoned. Lansdowne wrote to Harvey and advised him that in consequence of the documents sent to his Under Secretary, Mr Phillips, he (Lansdowne) 'felt himself warranted in transmitting... an authority for the respiting of the execution of the prisoner's sentence.'<sup>53</sup> This was an unusual decision as Lansdowne did not cite the usual phrase of 'favourable circumstances'. Whilst this single case does not establish a pattern of Lansdowne's recommendations for the Royal Prerogative of mercy, it does illustrate that he was prepared to override the decision of the King in Council on the basis of character, conduct and respectable connections rather than on the established grounds even when the offence involved violence.

This decision calls into question Gattrell's view that class interests embedded in the late eighteenth century were actually irrelevant in the 1820s.<sup>54</sup> It was the Whig Lansdowne who recommended the commutation of the capital sentence passed on

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<sup>51</sup> Harvey was a man of modest means and it is patent from the papers that the Sackett family were wealthy.

See <<http://sackettfamily.info>> [accessed 21 June 2014].

<sup>52</sup> Inverted commas are included in Harvey's letter. It has not been possible to locate Lansdowne's letter to Harvey.

<sup>53</sup> HO13/50 fol. 114.

<sup>54</sup> Gattrell, *The Hanging Tree*, p. 613.

Sackett apparently on the grounds of his previous good conduct rather than the established conventions. Peel gave reasons why William Davies' sentence was not commuted on the same grounds as Sackett's so it is reasonable to draw the inference that it was the combination of Sackett's good conduct and connections which saved him from the gallows. This action harked back to the unilateral decisions of the Home Secretaries of the late eighteenth century of whom Hay argued that 'the claims of class saved far more men who had been left to hang ... than did the claims of humanity.'<sup>55</sup>

On the face of it, the commutation of Sackett's sentence was difficult to comprehend as Lansdowne had, throughout his political career, considered that the death penalty was the only meaningful deterrent against violent crime.<sup>56</sup> Yet in this situation, he was prepared to commute the sentence on Sackett but made no effort to commute the sentences on the four other prisoners left for execution by the King at Council. Two of the prisoners, John Powell and Edward Lowe, were convicted of non violent property crimes and Charles Smith and John Keaton of highway robbery.<sup>57</sup> Making the decision to commute the sentence on Sackett and not to consider the circumstances of the other four prisoners was both inequitable and inconsistent with the system in place under Peel. The conclusion from this was that it was the Tory Peel and not the Whig Lansdowne who was more concerned with ensuring that prisoners should be treated impartially and not given relief because they were members of a particular class or group.

One other aspect of Lansdowne's recommendation to respite Sackett's punishment was that it was taken unilaterally and there was no evidence that he informed the other members of the King in Council of his decision, sought their consent or the advice of the Lord Chief Justice. This raises an interesting jurisprudential point; did the Home Secretary have the power to overturn the decision of the King in Council without the consent or at least the acquiescence of the other members of the King in Council? If new evidence was adduced or the prisoner turned King's evidence, then it appears that Peel felt under no obligation to advise the other members of his decision to recommend a commutation of the sentence. Where, however, his decision was made on the probity

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<sup>55</sup> Hay, 'Property, Authority and the Criminal Law', p. 44.

<sup>56</sup> See Chapter Three p. 69 *supra*.

<sup>57</sup> *OBP*, Lowe (t 18270913-39), HO6/12; Keatson (Keaton) (t18270913-14), HO6/12; Smith (t18270913-42), HO17/93/Rm27; HO6/12. Powell's case see Chapter Five pp 77-9.

of the evidence in the case then Peel was more cautious in his approach. When he recommended that the capital sentence on Daniel Davies should be commuted, he wrote a detailed letter to the other participants of the meeting of the King in Council advising them of his reasons for the recommendation; there was no such response from Lansdowne in Sackett's case or Sturges Bourne in Brown's case.<sup>58</sup> Neither attempted to set out their reasons for recommending the commutation of the death sentences. This leads to the conclusion that whilst Peel considered the decisions of King in Council were made collectively, neither Sturges Bourne nor Lansdowne felt under an obligation to inform the other members of their actions or the reasons for them.

### Conclusions

This chapter has examined some of the more generally pleaded grounds for clemency recited in the petitions which might have influenced the Home Secretary's decision. Compiling a list of the general grounds on which clemency was granted is flawed as it is almost impossible to produce a meaningful list of factors. For example, there is no definition of 'youth'; 'good conduct' is not sufficiently nuanced. In researching the petitions, it has been possible, however, to discern patterns of decision making employed by Peel. These patterns give a more detailed understanding of the factors which Peel took into account or disregarded when recommending the Royal Prerogative of mercy. Every petition was individual to the writer and often contained a myriad of reasons or excuses why the prisoner committed the offence and the devastating effect the punishment would have on his relatives and dependants. The prisoner may have been 'intoxicated', 'seduced by bad characters' or 'by an abandoned woman' and it is difficult not to be swayed by these wrenching heartfelt pleas and the obvious despair etched in every line. Perhaps the most moving are petitions from 'distressed' spouses or parents lamenting the fate of the prisoner and hoping that their pleas would prove successful in gaining a mitigation of the sentence.

Peel's duty as an impartial servant of the Crown was to recommend the exercise of the Royal Prerogative equitably and in compliance with the conventions in place.<sup>59</sup> If he was to discharge this function consistently, he had to retain a measure of detachment and not allow his emotional responses to the petitions to be the determining factor in

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<sup>58</sup> See Appendix Seven.

<sup>59</sup> See Chapter Five pp.81-6 *supra*.

his decision- making. Whether Peel was sympathetic or indifferent to the plight of a prisoner is a different issue from whether he executed his responsibility as a servant of the Crown fairly and on established grounds. As has been discussed, the concept of mercy or compassion and the decisions taken by Peel in recommending the exercise of the Royal Prerogative of mercy are different and need to be distinguished.<sup>60</sup>

This did not mean that he ignored all the mitigating factors which petitioners advanced in order to gain a remission of sentence. Age and gender were taken into account in Peel's recommendations as was the prisoner's conduct. Unlike Lansdowne, Peel adopted a holistic approach to the significance of the prisoner's conduct. He reviewed the prisoner's antecedents, previous conduct and conduct during the commission of the crime before deciding whether to recommend the exercise of the Royal Prerogative of mercy. Acknowledging these different facets of conduct is important particularly when gathering statistical data as to the success of the petitions. Citing the ground of 'good conduct' is too simplistic and does not distinguish between pre conviction conduct, conduct during the offence and post conviction conduct. It is only when these are analysed together that the importance of a prisoner's conduct as a mitigating factor can be meaningfully assessed. Even then, the particular circumstances of the crime may fundamentally negate any beneficial effect of a prisoner's good conduct if the offence involved a breach of trust or fiduciary duty. Having examined the difficult task which Peel faced in balancing the interests of the state with the mitigating circumstances of the prisoner, it is inevitable that there were cases where the prisoner's punishment could be perceived as harsh or inconsistent. Criticising Peel for the decisions in these 'hard cases' is unwarranted. All criminal justice systems depend on human decisions, including an element of discretion, which by their nature are not infallible.

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<sup>60</sup> Ibid pp. 86-94.

## Conclusions

### Restating the objectives of the thesis.

The aim of this thesis was to widen the analysis of Peel's penal reforms and his recommendations under the Royal Prerogative of mercy through original and systematic research into the relevant Home Office archives at TNA, an analysis of the underlying jurisprudential and constitutional issues, and their economic, social and political context.

Gatrell's critique of Peel was based on research into about 100 'appeals for mercy' and he acknowledged that it was not 'the exhaustive study the archive deserves.'<sup>1</sup> This thesis is the first to undertake an extensive legal analysis of more than 5,000 cases where petitions for mercy were lodged, the vast majority of which have not been consulted before. It initially reviewed the criminal law framework in place in 1822 and the extent to which the nature of English law influenced and circumscribed Peel's approach to its reform. In English law there is no single criminal code; offences exist at common law, in statute and by custom. One obstacle facing Peel in his reform of the criminal law was that many offences had been created in the eighteenth century to deal with specific local issues or to stem a transient problem.<sup>2</sup> Peel's objective was to 'prune' the system, with more than 200 capital offences, into a coherent and more centralised framework.<sup>3</sup>

Peel's approach was pragmatic and evolutionary rather than revolutionary. He set out his objectives in his landmark speech of March 1826, when he confirmed that there would be

no encroachments upon civil liberty, no extension of executive authority, no rash subversion of ancient institutions, no relinquishment of what is practically good, for the chance of speculative and uncertain improvement.<sup>4</sup>

These words were, no doubt, designed at least in part to avoid causing alarm amongst those who were sceptical of reform. Nevertheless, his cautious approach was the

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<sup>1</sup> Gatrell, *The Hanging Tree*, p. 613.

<sup>2</sup> Chapter Three pp. 37-8 *supra*

<sup>3</sup> Chapter Four pp. 64-5 *supra*.

<sup>4</sup> *Speeches*, volume i, p. 409.

catalyst for the acceleration of the pace of transition from a criminal justice system based primarily on the deterrent effect of capital punishment to one based on improved rates of detection and the availability of a more subtly calibrated range of secondary punishments. Gaunt has argued that Peel's criminal law reforms were designed to improve its efficiency but not necessarily to reduce the severity of punishment with the result that there was 'no immediate down-turn in capital executions (as Beales found) because it was neither the intention nor the practical outcome' of his reforms.<sup>5</sup> This is not borne out by the records. Peel's major reforms of the criminal law were mainly passed during his second term as Home Secretary with the result that executions in London and Middlesex fell drastically from 18 in 1829 to three in 1830.<sup>6</sup> This was a radical change and its impact has not been fully appreciated by historians such as Beales who considered that Peel 'tinkered' and it was only with the arrival of Lord John Russell at the Home Office in the mid 1830s that any substantial change occurred.<sup>7</sup>

Peel acknowledged that 'the law was not perfect' but his opinion was that the severest penalties should remain for certain categories of crime such as robbery, ameliorated by the exercise of a discretion enabling the offender to 'look up to the grace of the sovereign if [his] offence were not aggravated.'<sup>8</sup> This reference to the grace of the sovereign appears to distance Peel from Bentham's approach based on codification and certainty of punishment. As Gatrell points out the main legal structures of the *ancien régime* were safe in Peel's hand but they were also safe in the hands of the later Whig administrations.<sup>9</sup> Criminal law reform was achieved by consensus and in a continuum; there was no appetite on either side of the political divide for a radical overall of the framework.<sup>10</sup>

From a constitutional perspective Peel was required to act as a legislator, member of the Executive and servant of the Crown. This involved an acknowledgement of the doctrine of the separation of powers; although there is no doubt that his paramount obligation was the maintenance of law and order. He was aware of the need to avoid

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<sup>5</sup> Gaunt, *Sir Robert Peel*, p. 73.

<sup>6</sup> Chapter Three p. 61 *supra*.

<sup>7</sup> Beales, 'Peel, Russell and Reform', p 880.

<sup>8</sup> *Speeches*, volume i, pp. 244-5.

<sup>9</sup> Gatrell, *The Hanging Tree*, p.568.

<sup>10</sup> Chapter Four pp. 66-74 *supra*.



personal and political interference in matters relating to the Royal Prerogative of mercy (including any discussion in parliament).<sup>11</sup> In addition, he interpreted the doctrine to mean that he was unable and unwilling to interfere with the jury's decision except in cases where new evidence has come to light or he had been advised that there was an error on the record.

By researching more than 5,000 cases it was possible for the first time to reconstruct the process relating to the Royal Prerogative of mercy and the rationale and practices underpinning the decisions of the King in Council and Peel. This research revealed that by the time Peel left office the pardoning process had become more standardised with the result that discretion was exercised on the basis of written records and the application of developed conventions rather than on the subjective basis of influence or personal ideology. Some of these conventions, such as turning King's evidence, were so deeply entrenched in the system that the petition was certain to succeed. It also confirmed Devereaux's view that the decisions in the King in Council were more carefully considered than previously thought.<sup>12</sup>

One area where it was more difficult to establish patterns in Peel's decision making was the rationale on which he recommended that prisoners sentenced to transportation should instead serve their term in the Penitentiary. Whilst he set out the guidelines for transfer to the Penitentiary which included, *inter alia*, refusal if the prisoner had previous convictions these were, as in all decisions, subrogated to his paramount duty to maintain law and order and to uphold the deterrent effect of punishment.<sup>13</sup>

As Home Secretary, Peel was responsible for carrying out domestic government policies. He could have used his powers to advance his political ambitions but what is notable in researching the cases is that it has only been possible to locate one example, the case of John Post, where it could be argued that Peel's decision making had a political dimension.<sup>14</sup> Perhaps Peel revealed the reason for this lack of political pardoning in the case of William Power where he was more concerned about his historical legacy than gaining political benefit. Power had been convicted of obstructing an officer in the execution of his duty at Devon Spring Sessions 1823 and

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<sup>11</sup> Chapter Six pp. 100-1 *supra*.

<sup>12</sup> Devereaux, 'Peel Pardon and Punishment: The Recorder's Report Revisited', pp. 258-84.

<sup>13</sup> Chapter Eight pp. 146-7 *supra*.

<sup>14</sup> Post's case Chapter Six pp.100-1 *supra*.

sentenced to three years' imprisonment. In 1824 the visiting magistrates of Exeter gaol petitioned for Power's early release on the ground of his 'meritorious' conduct which had been verbally communicated to them by the keeper of the gaol. In refusing to recommend a mitigation of the sentence, Peel advised them that 'in the administration of the criminal law he [Peel] can only attend to written documents which will remain in this office for the justification of his public conduct.'<sup>15</sup>

The influence of the press and growth of public opinion during the 1820s played a part in Peel's decision making. He was, however, adamant that the government's role was to lead and not follow public opinion. A year after leaving office in April 1831, he condemned the Whig government for its strategy of leaving the country 'at the mercy of the very worst and vilest species of despotism-the despotism of the demagogue and the demagoguery of the press'.<sup>16</sup> During the 1830s he returned to the subject of public opinion on a number of occasions, questioning whether it was constitutionally desirable for Parliament to submit to public opinion which could be 'whipped into a frenzy' by any demagogue or newspaper editor. His solution was that it was only by restoring the 'moral authority' of the House of Commons that anarchy would be avoided.<sup>17</sup> Thus it can be seen that throughout his political career, including in his measures to reform the criminal law, he exhibited a sincere respect for but not blind deference to public opinion.

Frederic William Maitland, the eminent legal historian of the late nineteenth century observed 'thorough training in modern law is almost indispensable for anyone who wishes to do good work on legal history.'<sup>18</sup> Maitland's view was echoed by his fellow legal historian, Sir Henry Maine who considered that to fully understand and appreciate the history of the law, knowledge of the law was essential. He used the analogy of a beautiful view to make his point by observing that a working knowledge of geology was required if one is to understand the formation of a landscape and not just enjoy its

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<sup>15</sup> HO17/97/Sk16.

<sup>16</sup> *Speeches* ii, p 310.

<sup>17</sup> M. Cragoe, 'Sir Robert Peel and the 'Moral Authority' of the House of Commons, 1832-1841', *English Historical Review*, 128 (2013), pp. 55-77.

<sup>18</sup> F.W. Maitland, 'Why the History of English Law is not written', H.A.L. Fisher (ed.), *The Collected Papers* (Cambridge, 1911), p. 493; S.F.C. Milsom, 'Maitland, Frederic William (1850-1906)', in *ODNB*; C.H.C Fifoot, *Frederic William Maitland: a Life* (London, 1971).

beauty.<sup>19</sup> In rethinking Peel's penal reforms and his recommendations under the Royal Prerogative of mercy, this thesis has highlighted and clarified the jurisprudential and constitutional issues, such as the nature of English criminal law and the meaning of mercy, which impacted his strategy for reform and his decision making as a servant of the Crown. Historians have not always fully understood these or given them sufficient emphasis when assessing Peel's historical legacy.

### **Penal Reform and the Royal Prerogative in 'the Age of Reform'.**

Taking up the post of Home Secretary only seven years after the conclusion of the war against Napoleon's France and with turbulence both at home and on continental Europe, Peel was responsible for ensuring the maintenance of law and order. Unlike Sidmouth, he rarely employed spies to monitor possible domestic disturbances.<sup>20</sup> He was keen to promote the establishment of an effective civilian force which he considered was needed to detect and deter crime although this did come to fruition until 1829, when the Metropolitan Police was formed.<sup>21</sup> However, during this period, radical reform of the criminal law was not an issue which polarised views in parliament nor was it high on the political agenda. Peel's approach was sufficiently liberal to gain the consensus of the moderates in parliament but not to the extent of alienating the Ultra Tories in his own party.<sup>22</sup> The calls for change to established institutions were part of the political landscape of the 1820s and Peel's reforms to the criminal law should be viewed as part of a wider movement for social, economic and political reform.<sup>23</sup>

Considering reform of the law in this wider context, a key focus was the delay in Chancery cases. The Court of Chancery and the Royal Prerogative of mercy both evolved from the Monarch's coronation oath to administer justice with mercy. Plaintiffs in common law actions, who had suffered hardship, sought relief from the

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<sup>19</sup> R.J. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge, 1988); Lewis and Lobban (eds), *Law and History*, p. 19.

<sup>20</sup> E. Baines, *History of the Reign of George III*, volume IV (Leeds, 1823), pp. 52-71.

<sup>21</sup> Metropolitan Police Act 1829 (10 Geo. IV c. 44).

<sup>22</sup> E.C Black., *British Politics in the Nineteenth Century* (London, 1970), pp. 11-75; N. McCord *British History 1815-1906* (London, 1991); G.I.T. Machin, *The Catholic Question in English Politics 1820-1830* (London, 1964).

<sup>23</sup> Burns and Innes (eds), *Rethinking the Age of Reform*; A. Briggs, *The Age of Improvement* (New York, 1959), 'The Background of the Parliamentary Reform Movement in Three English Cities', *Cambridge Historical Journal*, 10,3 (1952), pp. 293-317; E.L. Woodward, *The Oxford History of England: The Age of Reform 1815-1870* (Oxford, 1938).

King. By 1494 cases were heard by the Chancellor alone and the body of doctrines and maxims known as equity was established.<sup>24</sup> In the early 1820s, due to its inability to deal swiftly and effectively with the volume of cases coming before it, the Court of Chancery and Lord Eldon, Lord Chancellor, were singled out for particular criticism.<sup>25</sup> Analysis of the petitions for mercy, however, has revealed that the delays and technical formalities which dogged the Court of Chancery were not prevalent in the pardoning process. The reasons for this included the fact that Peel was aware of the need for a very timely process in dealing with capital cases, and that without the obligation to follow a judicial process influenced by the judges and based on precedent, he saw no reason to impose formalities on the petitions.

By 1861 the substantive criminal law and its administration were virtually unrecognisable from the system Peel inherited in 1822. The death penalty was confined to a handful of offences and a number of consolidating Acts had rationalised the most serious offences into a workable framework.<sup>26</sup> Other provisions had changed court procedures. For example as early as 1836, the Prisoners' Counsel Act allowed defence counsel the right to address the jury for the first time. The development of medical expertise, which was a feature of this era and will be discussed below, played an increasing part in a jury's decision. In 1843, for example, Daniel M'Naghten shot at Edward Drummond believing him to be Peel. He pleaded not guilty on the grounds of insanity. The result was that the House of Lords formulated rules which defined specific tests to be applied by a jury in cases involving the insanity of the accused.<sup>27</sup> Although efforts to establish an appellate court with a statutory right of appeal for the prisoner would not come to fruition until 1907, the Court of Cases Reserved Act in 1848 regularised the *ad hoc* procedure of referring cases to the twelve judges.<sup>28</sup>

These changes illustrate how the reforms instigated by Peel provided the momentum for the development of the criminal justice system in the early-mid nineteenth century to the extent that by the latter decades of the century the transition to a system based

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<sup>24</sup> J. Martin, *Hanbury and Martin, Modern Equity* (London, 14<sup>th</sup> edn, 1993), pp.3-7.

<sup>25</sup> Gash, *Mr Secretary Peel*, pp.321-6.

<sup>26</sup> For example the Offences against the Person Act 1861 (24 & 25 Vict. c. 100).

<sup>27</sup> (6 & 7 Will. IV c.14); *M'Naghten's case* [1843-1860] All ER 229.

<sup>28</sup> Crown Cases Act 1848 (11 & 12 Vict. c.78).

on improved rates of detection, the availability of more proportionate secondary punishments, and increased rights for defendants had in large measure been achieved.

### **Future research**

This thesis is based on the research of more than 5,000 petitions for mercy contained in 40 boxes in HO17 which cover the dates between 1820 and 1830. The remaining 91 boxes in the series relate to petitions submitted between 1831 and 1838. At present about 90 of 131 boxes have been completed and have been uploaded onto TNA's online catalogue. It is anticipated that by 2019 all the petitions will be edited and it will then be easier to analyse whether there was any substantial difference between Peel's decision making and that of his Whig successors.

Whilst the petitions for mercy reveal a great deal about the lives of the citizens who became entangled with the law, as this thesis has revealed, they are also indicative of changes in court procedure which have been little examined. For example, research into murder cases at the Old Bailey indicated that the testimony of medical experts was becoming an important determinate in the finding of guilt. Alfred Flower, for example, was indicted for murder of a three day old child at the October Sessions 1825.<sup>29</sup> It was alleged that he had kicked the mother, Mary Sullivan, in the stomach two days before the child was prematurely delivered. Mr Denton, a surgeon, was called to give evidence and he attested that he was unable to say that the child had not died of natural causes and Flower was acquitted. This greater reliance on expert medical evidence coupled with changes in the medical profession indicated that the courts were increasingly concerned to base their verdicts on the expert scientific evidence adduced in court which could form the basis for future research.<sup>30</sup>

One further area for research which has attracted little attention is whether criminals convicted in the 1820s and 1830s and transported were ever successful in obtaining absolute pardons. For example, prisoners transported for life generally served eight years before they were considered for a conditional pardon but absolute or free pardons were rarely granted.<sup>31</sup> Edward Norman was convicted of pick-pocketing at the Old

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<sup>29</sup> *OBP*, 27 October 1825, Alfred Flower (t18251027-65).

<sup>30</sup> (2&3 Will.IV c.75); I.A. Birney, 'Medicine in the age of reform', in Burns and Innes (eds), *Rethinking the Age of Reform*, pp. 163-81.

<sup>31</sup> *OBP*, 19 May 1825, Edward Norman, (t18250519); HO17/ 25/ CI 14.

Bailey in 1826. He was 16 years old and sentenced to be transported for life. He had a chequered career in New South Wales, moving to Melbourne in the early 1850s where he founded the Melbourne Brewery. The discovery of gold in the area resulted in a stampede of speculators and Norman's brewery flourished. He became very wealthy and rapidly became an influential and respectable member of Melbourne society. In 1853 Norman held a conditional pardon but wished to return to England and sought an absolute pardon to enable him to do so. He enlisted the help of Sir Charles Fitzroy, the Governor General of Australia, who forwarded the petition to Lord Newcastle, the Colonial Secretary, asking him to recommend an absolute pardon. This was refused as Lord Newcastle advised that absolute pardons were only granted if there was an error in the conviction or 'extraordinary services' had been rendered to the public.<sup>32</sup> In 1858, Norman was granted an absolute pardon but only after the Colonial Office again reiterated that it was not government policy to grant convicts absolute pardons unless there were exceptional circumstances but did not reveal what these were in Norman's case.<sup>33</sup> Further detailed archival work would reveal whether the grant of an absolute pardon to Norman was rare. Evaluating the number of transported prisoners who were successful in gaining absolute pardons would further understanding of how far the rehabilitation of these prisoners was part of penal policy in the later decades of the nineteenth century.

### **A new era?**

The availability of court and associated records and the detailed information they contain has fuelled an interest in the history of the criminal law over the last 40 years. This thesis has highlighted the necessity for historians to have a sense of the nature of English law, its origins and practices. Tracking changes in society and social issues may not require a knowledge and understanding of the law but research based on legal and constitutional doctrines does, if the conclusions are not to be flawed. Peel was aware of his own lack of legal expertise. He observed that 'some may think it extraordinary' that he should undertake to introduce measures which require 'professional and technical learning' with no legal training.<sup>34</sup> Peel, however, had the

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<sup>32</sup> CO/ 202/ fol. 63.

<sup>33</sup> Ibid, fols. 490-2.

<sup>34</sup> *Speeches*, volume i, p. 409.

advantage of seeking assistance from and taking the advice of eminent lawyers when drafting bills etc. in order to ensure that they were legally and technically sound.

In reviewing Peel's recommendations for the exercise of the Royal Prerogative of mercy, the emphasis has been on examining the process rather than merely focussing on the personality of Peel and his humanitarian credentials. Whilst he was determined to discharge his obligation as a servant of the Crown impartially and without favour, research of the petitions has brought to light instances where Peel was affected by the prisoner's plight. The case of William Osborne, considered earlier in the thesis, was a case in point.<sup>35</sup> He was left for execution but Peel had misgivings about the decision. After much discussion with the Lord Chief Justice, it was agreed, on the eve of execution, that Osborne's sentence should be commuted to transportation for life.

Peel could have left the matter to his officials without further thought but that is not what occurred. He wrote to Hobhouse, asking him to acknowledge the respite observing 'the sooner that it is sent the better.'<sup>36</sup> This sense of urgency was repeated in a letter, with the respite attached, which George Dawson, Peel's parliamentary under secretary, sent to the keeper of Newgate. Dawson wrote, 'Mr Peel is anxious to relieve his mind from his present state of dreadful suspense as soon as possible.'<sup>37</sup> Dawson was well placed to reveal Peel's state of mind as he had been his friend from schooldays and had recently married one of Peel's sisters. It is unlikely that he would have written such a comment without, at least, the tacit consent of Peel himself. This case showed that Peel could indeed be emotionally affected by the possibility of a miscarriage of justice.

The final question to be addressed is whether the reforms to the criminal justice system would have occurred without Peel? It can only be conjecture but the clamour to reform many of the principal institutions of the state was firmly in the public domain and it is unlikely that the criminal law would have escaped the attention of reformers and parliament. Whether subsequent changes would have been enacted so quickly without the diligence of Peel is a different issue. Peel did not view the repeal of the capital statutes in isolation. His measures in centralising conditions and procedures in local

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<sup>35</sup> See Chapter Eight pp.162-3 *supra*.

<sup>36</sup> HO17/72 / Nh 37

<sup>37</sup> *Ibid*.

gaols and the establishment of the Metropolitan Police in 1829 quickly became a key part of the state's role in maintaining law and order. These particular developments, instigated by Peel, marked a significant and essential step in the evolution of the criminal law system and enabled further amelioration of the capital statutes in the 1830s. They provided a powerful demonstration of a system in which crime might be better controlled through improved enforcement and a calibrated carceral system rather than the terror of capital punishment.

Whilst Peel was not a man of creative ideas, he was a great administrator who in Bagehot's view was a member of the class that wished to see 'the government administered according to the notions familiar to them in their business life.'<sup>38</sup> This willingness to engage in the day to day business of the Home Office meant that he had an understanding of how the criminal law worked both in theory and practice. He was always careful to protect his political legacy. A pattern throughout his stewardship of the Home Office was that he often obtained the advice of the 'experts' before reaching a decision. This was in part a consequence of increasing bureaucratisation but it also served to defend him from any criticism.

In conclusion, Peel's stewardship of the Home Office ushered in a new era in the machinery and administration of the criminal law. He effectively ended the monarch's personal interference on behalf of individual prisoners. With rare exceptions, he refused to use the privilege of recommending pardons for political purposes but endeavoured to establish a more impartial system based on standardised procedures and processes such as requiring written reports from magistrates. He appreciated that he had to gain the approval of other stakeholders if his proposed penal reforms were to be successful. Whilst his most enduring and best known achievement was the establishment of the Metropolitan Police in 1829, this should not overshadow the other initiatives he introduced to make the criminal justice system more attuned to the 'Age of Reform'. As Hilton observed, adapting the words of Bagehot, Peel 'bore the burden and the heat of the day and should be given a substantial share of the credit.'<sup>39</sup>

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<sup>38</sup> Bagehot, *The Works and Life of Walter Bagehot*, volume 2, p. 189.

<sup>39</sup> Hilton, 'The Gallows and Mr. Peel', p. 90.



# **Appendices: (various sources at TNA)**

## **Appendix One:**

Undated (c. April 1824) formal petition on behalf of William Lathom by yeomen of Upholland Lancashire. Lathom was convicted of manslaughter at Lancaster Assizes 1823 and sentenced to three years' imprisonment. HO17/97/Sk10.

The humble Petition of William Lathom, son  
a Prisoner in Lancaster Castle of Upholland, the  
Parish of Wigan, County of Lancaster.  
We the under mentioned Yeoman of Upholland,  
sheweth you, that you and without your assistance, and  
the above named prisoner, in behalf of the mitiga-  
tion of his confinement, he having a Wife and five  
small children, awaiting his support the eldest  
only nine years of age.  
William Lathom, is an honest, sober, industrious man,  
supporting his Wife and Family, with credit to  
himself and his Parishioners.  
Your benifcence to restore him unto his Wife and  
Children, will alleviate their Infants breasts with  
joy, and for your happiness they will ever pray.  
Attest the Petition of Upholland  
Thos. Stopford Chapel Warden  
Robt. Stopford  
Thos. G. Lister  
William Morris - George Gaskell  
Abrametscroft - James Ball  
Ch. Holmes - James Morris  
Edward Taylor -

**Appendix One:****Text**

The Humble Petition of William Lathom (now a Prisoner in Lancaster Castle) of Upholland the Parish of Wigan, County of Lancaster.

We the undermentioned Yeomen of Upholland, beseech you that you will extend your clemency unto the above named prisoner; in behalf of the mitigation of his confinement, he having a Wife and five small children wanting his support, the oldest only nine years of age.

William Lathom is an honest, sober, industrious man supporting his Wife and Family with credit to himself and his Parishioners.

Your beneficence to restore him unto his Wife and Children will alleviate their Infants breasts with joy and for your happiness they will ever pray.

Undersigned by 12 signatures.

The back sheet of the petition is marked 'Nil'.

**Appendix Two:**

Draft Letter (undated but c February 1827) from Peel to Frederick Montague, Postmaster General, in the case of Daniel Davis HO17/25/Cm11.

My Lord  
I have had the Honor  
of recy<sup>d</sup> of L<sup>ts</sup> letter of  
yesterday sup<sup>g</sup> soliciting  
my Intercession with the  
H<sup>on</sup> of D<sup>s</sup>  
on the ground of its being  
the first instance of a  
person in the prison  
of the P<sup>o</sup> being condemned  
to the death since your

L<sup>ts</sup> has had the  
full situation of the  
P<sup>o</sup> & -  
I should be most happy  
to attend to any Circ<sup>um</sup>  
of Mitig<sup>n</sup> in Davis's  
Case w<sup>ch</sup> of L<sup>ts</sup> may  
be enabled to state.  
But after it has  
undergone the <sup>deliberate</sup> Consider<sup>n</sup>  
of it in Council  
I do not feel ~~anymore~~  
~~we~~ justified in apply<sup>g</sup>  
for the Royal Mercy  
on the Gro<sup>und</sup> w<sup>ch</sup>  
of L<sup>ts</sup> states -

## Appendix Two

### Text

My Lord,

I have had the honour of receiving your Lordship's letter of yesterday [requir] soliciting my intercession with the King on behalf of D. [Daniel] D. [Davis] on the ground of its being the first instance of a person in the service of the P. [Post] O. [Office] being condemned to the death since your Lordship has held the [post] situation of the P. [Postmaster] G. [General].

I should be most happy to attend to any circumstances of mitigation in Davis's case which your Lordship may be enabled to state.

But after it has undergone the deliberate consideration of H.M. in Council I do not feel myself [we] justified in applying for the Royal Mercy on the ground which your Lordship states -



## Appendix Three

Back sheet of Davis's petition HO17/25/Cm11.

Cm - 11.

Daniel Davis

Old Bailey

Jan<sup>y</sup> Less 1827App Money from a  
Letter while employed  
in the Post Office. -19 March 27  
Chambers for LifeConsidered at Report  
in Council 14  
March 1827. -

**Appendix Four:**

Summary of cases heard at the King in Council May 1822.

**Recorder's Report 18 May 1822 (April Sessions) HO6/7**

| <b>Name/age</b>  | <b>Crime</b>             | <b>Sentence commuted</b>               |
|--|--------------------------|--|
| John Yates/19<br>Michael Donahone/26                                       | Burglary                 | Yes                                    |
| Francis Meadows  | Theft                    | Yes                                    |
| Henry John Naylor/24<br>George Adams/32<br>Edward Ward/21<br>John Anson/26 | Burglary                 | No                                     |
| George Smith/16  | Horse stealing           | Yes                                    |
| William<br>Bartholomew /34<br>John Close/33                                | Burglary                 | No                                     |
| William Tilley/30  | Horse stealing           | Yes                                    |
| Henry Leonard/31   | Theft                    | Yes                                    |
| Edward Desmond/17<br>James Davis/17  | Burglary                 | Yes/ late respite<br>Yes/ late respite |
| Charles Gray/ 45   | Burglary                 | Yes                                    |
| William Piece/35   | Forgery                  | Yes                                    |
| Matthew Verney/45  | Horse stealing           | Yes/admitted to lunatic asylum         |
| Samuel Weedon/25<br>Thomas Alcey/28  | Theft                    | Yes<br>Yes                             |
| Eleanor Shrieves/23  | Setting fire to property | Yes                                    |



## Appendix Five:

Hannah Doublet's petition in the case of Field and Godwin, HO 17/62/ MI 6

Hon<sup>ble</sup> Sir

I humbly beg Pardon for Addressing you in the behalf of those two Unfortunate young Boys Wm Field aged 13. and Tho Godwin aged 11. Tried and found Guilty Death, last June Sessions, at my Suit not knowing at the time, but they were going to the Penitentiary, but finding they were sent away and having a family of my own I feel for these Unfortunate Boys, and I humbly beg your kind Interference in their behalf in Mitigation of their Sentence, and I humbly hope, Sir that as you kindly promised Godwins Father last Summer when he had the honour to speak with you concerning the Boys, at Kensington, and you was kind enough to give him a Shilling and promis<sup>ed</sup> him that they should not be sent out of England therefore kind Sir I rely on that promise well knowing by whom it was made, and humbly hope that through your kind Intercession their time will be shortened, I again beg Pardon for addressing you and I shall ever be in duty Bound to Pray

your Humble Servt

Paul Street

Hannah Doublet

Shoreditch

Prosecutrix

## **Appendix Five:**

### **Text of Hannah Doublet's petition.**

Honoured sir,

I humbly beg pardon for addressing you in the behalf of those two Unfortunate Boys, Wm [William] Field aged 13 and Tho.[ Thomas] Godwin aged 11 Tried and found Guilty Death last June Sessions at my suit not knowing at the time but they were going to the Penitentiary but finding they were sent away and having a family of my own I feel for these Unfortunate Boys and I humbly beg your kind interference in their behalf in Mitigation of their sentence and I humbly hope Sir that as you kindly promised Godwin's Father last summer when he had the honour to speak with you at Kensington and you was kind enough to give him a shilling and promised him that they should not be sent out of England therefore kind Sir I rely on that promise well knowing by whom it was made and humbly hope that through your kind intercession their time will be shorted I again beg pardon for addressing you and I shall ever be in duty bound to pray

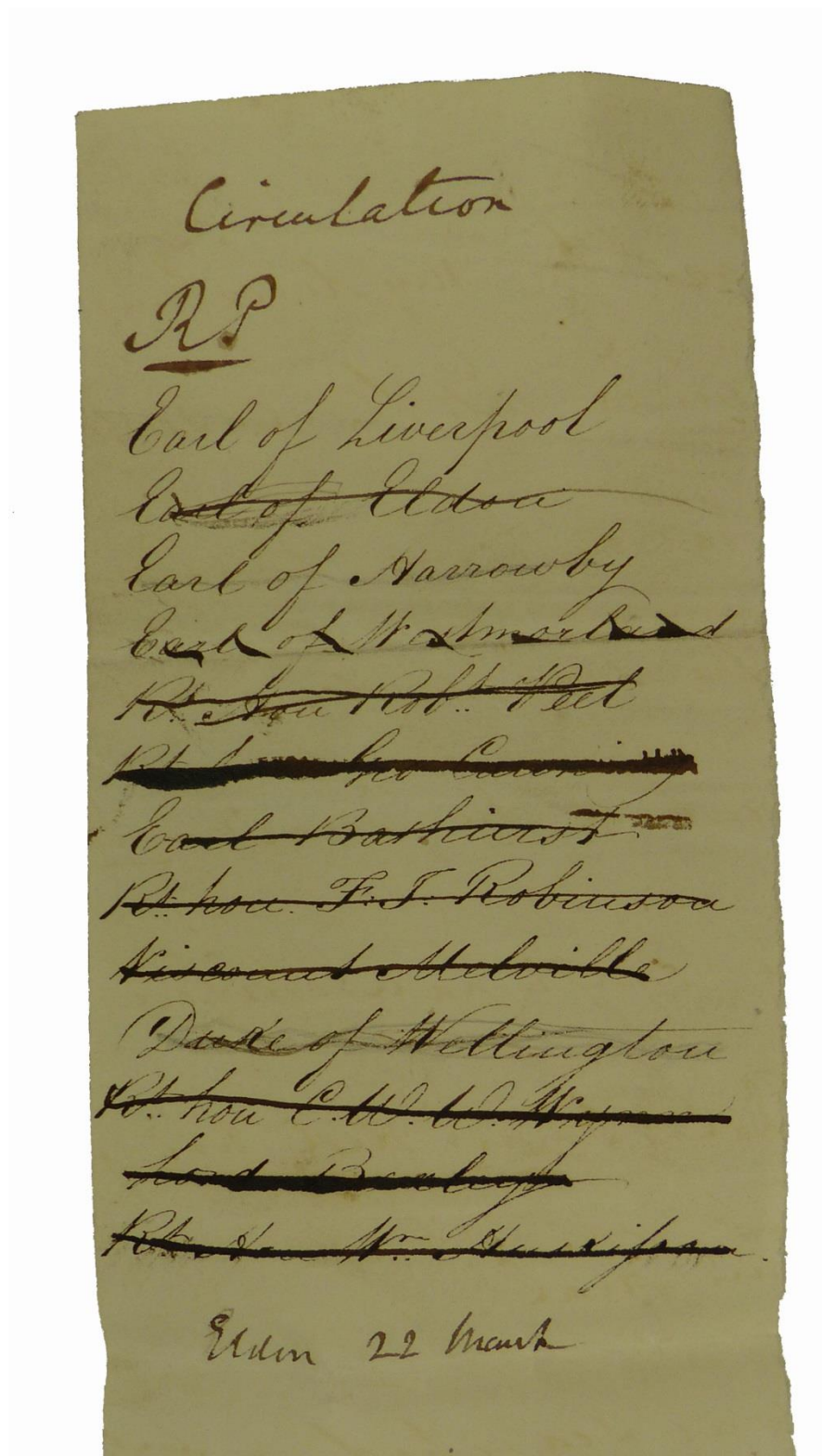
Paul Street  
Shoreditch

Your humble serv  
Hannah Doublet  
  
Prosecutrix



## Appendix Six:

Circulation List in case of Daniel Davis HO17/25/Cm11.



# Appendix Seven:

## Letter of March 19 1827 from Peel to members of the King in Council in Davis's case.

Whitehall  
March 19

As I was resolved at the last Council to  
leave for execution a man of the name of Davis  
who was convicted of stealing fifteen pounds from  
a letter committed this charge - I think it  
right to state the circumstances under which I  
have sent a Respite for this man.

First he remembered that there was  
no evidence proving the money to be the  
actual possession of the Council - no proof of  
his having changed the notes - I have then  
seen Mr. Trevelyan - and the Solicitor  
of the

Post Office who have by my directions been  
making minute inquiries into the case.

I find that Davis on being charged with  
the offence, was on the same evidence which  
was subsequently adduced at the Trial - admitted  
to bail by the Police Magistrate before whom  
he was taken - That Davis did not forfeit  
his bail - but took his Trial.

That his house was searched - and there  
was every indication of extreme Poverty -  
not a shilling was found in it -  
no proof at the time at which he died that

he had either changed bank notes - or  
spent more money than usual.

Mr. Trevelyan and the Solicitor of the Post  
Office think it not impossible - that  
after the letter was delivered to him -  
he might have lost it - or that it might  
have been stolen from him - and that  
in such a case a timid man might  
prefer paying the Postage due from him -  
and running the risk of his being apprehended  
rather

than come forward and admit the fact.

I cannot but see that the Officers  
of the Post Office are not altogether satisfied  
with the Conviction - They did not expect  
it - neither did the Council for the Crown.

I have seen in these circumstances  
sufficient ground to remit the Capital  
Sentence - but I am unwilling to remit  
it without mentioning to the other Members  
of the Council the grounds on which I have acted

Wm. Peel

**Appendix Seven:**  
**Text of Peel's letter.**

Whitehall  
 March 19

As it was resolved at the last Council to leave for Execution a man of the name of Davis who was convicted of stealing fifteen pounds from a letter committed to his charge- I think it right to state the circumstances under which I have sent a Respite for this man.

Must be remembered that there was no evidence [pieces] tracing the money into his actual possession of the Convict – no proof of his having changed the notes- I have this day seen Mr Freeling and the Solicitor of the Post Office who have by my directions been making minute inquiries into the case.

I found that Davis on being charged with the offence was on the same evidence which was substantially adduced at the trial-admitted to bail by the Police Magistrate before whom he was taken that Davis did not forfeit his bail- but took his trial.

That his house was searched and there was every indication of extreme poverty- not a shilling was found in it. No proof at the shops at which he dealt that he had either changed banknotes or spent more money than usual.

Mr Freeling and the Solicitor of the Post Office think that it not impossible that after the letter was delivered to him he might have lost it or that it might have been stolen from him and that in such a case a timid man might prefer paying the Postage due from him so running the risk of discovery of the offence rather than come forward and admit the loss.

I cannot but see that the Officers of the Post Office are not altogether satisfied with the conviction- they did not expect it neither did the Counsel for the Crown.

I have seen in these circumstances sufficient grounds to remit the Capital sentence but I am unwilling to remit it without mentioning to the other Members of the Council the grounds on which I have acted.

Robert Peel

**Appendix Eight:****Printed reply from the Home Office in case of Joseph Ball HO17/66/Lz 1.**

Whitehall,  
28 Feb 1839

William Ball

Lord John Russell having  
carefully considered your application in behalf of  
Joseph Ball;

I am directed to inform you that there is no sufficient  
ground to justify his Lordship, consistently with his  
Public Duty, in advising Her Majesty to comply  
with the prayer thereof.

I am,

Your most obedient

humble Servant,

J. W. Phillips

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