

THE DECLINE OF CAPITAL CRIME STATUTES IN EARLY 19TH CENTURY ENGLAND

Kinsley G. Romer, Jr., Kennesaw College

"I sentence you to be hanged by the neck until dead!" By the late 18th century, the defendant in an English criminal trial could expect these words to follow a guilty verdict in any of some 250 crimes. The law was so chaotic no one knew the exact number.

Extensive use of the death penalty had two justifications. First, the ultimate penalty was used when governments had no effective means of enforcing the law. It was hoped that the liberal use of the threat of death might frighten potential criminals into obedience. Second, it was much easier to kill a person than to develop and pay for a less severe means of punishment.

These ideas sounded good in theory; but, in practice, they produced some negative results. English juries were hesitant to convict an individual for a minor felony if it carried the death penalty because the death sentence was mandatory for all capital offenses. Also, the Home Secretary had to make the final decision on all executions. This kept him busy deciding who would live and who would die. And, last, the threat of death had little impact because the likelihood of being caught was negligible. For example, hanging was a spectator sport in England and the person who benefited the most from such events was the pickpocket who was guilty of a capital crime himself. Fortunately, this approach toward crime prevention changed completely in less than twenty-five years.¹

The amelioration of capital punishment had a lengthy background in England. During 1610, the great common law authority, Sir Edward Coke, refused to consider making additional crimes capital offences. Unfortunately, he had little influence because some 190 additional capital punishment crimes appeared between 1660 and 1800. Other critics included such people as the diarist and correspondent, Horace Walpole, and the novelist, Henry Fielding.²

The most important 18th century voice in criminology was that of the Italian, Marquese di Beccaria. His An Essay on Crimes and Punishments was first published in Italian during 1762, then rapidly translated into English and French. Beccaria felt that the type and seriousness of the punishment should be closely related to the severity of the crime.³ His influence in

England was immediate. For example, William Blackstone's famous Commentaries on the Laws of England evidently reflected Beccaria's thinking: "...if the same punishment be decreed for killing a pheasant as for killing a man, or for forgery, the differences between those crimes will shortly vanish..."⁴

There is no doubt that Beccaria had most influence on Samuel Romilly, a leading reformer and lawyer. He carried on massive correspondence with different political figures such as the moderate French revolutionary, the Comte de Mirabeau, who strangely expressed no interest in holding a seat in Parliament. However, in 1806, under pressure from Charles James Fox, Romilly changed his mind. Thereafter, he served in the House of Commons until his death in 1818.⁵

Romilly's ideas on capital punishment are important because they influenced all the reformers who followed him. If Beccaria can be called the father of the movement to modify the death penalty in England, Romilly was its midwife. He thought that only one person in twenty convicted of a felony was actually executed, the death penalty connected with many such crimes had no valid reason for existence.⁶ Romilly reasoned that punishment should have three principal objectives: deter, prevent, reform. He thought the greatest blot on the English legal system was the indiscriminate execution of all types of criminals. In one of his letters, Romilly stated: "...it gave the poorer people the feeling that while they were guilty of theft, the government was guilty of murder."⁷

The existing condition of capital punishment in England was made public in 1819 when the House of Commons received the "Report from the Select Committee on Criminal Law Relating to Capital Punishment in Felonies." The investigation was mostly the work of Sir James Mackintosh, the committee chairperson. He was a Whig who, in 1813, had entered Parliament where he came under the influence of Romilly. Mackintosh devoted much of his parliamentary career to capital punishment reform.⁸ It is remarkable that his committee was ever established since Lord Castlereagh, the Foreign Secretary and government spokesperson in Commons, opposed it. The M.P.'s, however, apparently thought such a committee could serve a useful purpose since the establishment was approved by nineteen votes.⁹ The membership of the Select Committee included such luminaries as William Wilberforce, a leader in several humanitarian movements, and two key figures in later capital punishment reforms, Lord John Russell and Henry Brougham. The group met for three months, interviewed 61 people, and collected a massive amount of data.¹⁰

The Select Committee identified six different types of capital crimes in English law: offenses against the state; offenses against the coin; forgery; homicide; personal violence and rape; riots and acts of malice or violence; and larceny.

robbery, burglary, and assaults with intent to rob. The total number of capital crimes under these six categories was approximately 250. It proved impossible for the Committee to count them accurately.¹¹

Mackintosh knew his best chance to have much effect was to start slowly. Therefore, he advocated the repeal or revision of twenty-seven laws divided into two classes and categorized by the committee as obsolete statutes. The first class required no punishment at all. It was recommended that the second should remain on the books as misdemeanors rather than felonies. These statutes give an excellent idea of the extremes to which English criminal law had gone. A few examples will be sufficient. Specifically, it was a capital offense to be in the company of "Egyptians" (gypsies) for over a month, to be disguised within the mint, to rob warrens, or to injure Westminster Bridge.¹² Often statutes such as these were the result of vanished problems. As a result, they were almost never enforced; but they could be. With a few exceptions, Mackintosh's bills passed Commons and failed in Lords. But it was now much safer to be in the company of "Egyptians" and the committee recommendations had prepared the way for major changes during the next twenty years.¹³

The first systematic attempt to revise capital crime statutes was the work of the young Tory, Sir Robert Peel, who became Home Secretary in 1823. For the first two years, Peel adopted a piecemeal approach to this type of reform, which resulted in the elimination of the remaining obsolete statutes in the Committee's class I.¹⁴ Mackintosh and his followers considered this a small victory because conviction for these crimes was very rare and execution non-existent. During this period, Peel did pass one significant bill. Magistrates were given the option of not applying the death penalty except in cases of murder.¹⁵ The importance of this statute will be discussed later.

Peel soon became convinced that the piecemeal approach was not effective. On March 8, 1826, in a major speech, he presented his revised program concerning criminal law and capital punishment reform to the House of Commons. The Home Secretary recommended a four part approach. First, all statutes whose reason for existence had vanished would be eliminated. Second, outdated statutes would be repealed or the punishment reformed while retaining the law. Third, in clearly necessary statutes, the punishment was to be mitigated if the death penalty appeared extreme. Last, Peel proposed reducing the number "...of concurrent statutes heaped one upon another to one clear and uniform law."¹⁶

Peel realized that changes in law enforcement and reforms in secondary punishment were necessary before extensive capital

statute revisions would be palatable to Parliament. His promise to protect the "security of property" gave him widespread support, but also limited his proposal's scope.¹⁷ The Secretary's program was completed by 1830. As an interesting sidelight, his plan included the elimination of the age-benefit of clergy, that anachronism which originally gave clerics special rights but now was used to distinguish between capital and non-capital crimes.¹⁸

Sir Roberts Peel's impact on capital punishment in England is not easy to evaluate, but some conclusions can be reached. He removed some 200 laws of which slightly over 100 had capital punishment provisions, but the death penalties were retained in the majority of the consolidated statutes.¹⁹ Statistics suggest that convictions for capital crimes increased slightly during the period 1822 to 1830. Specifically, 968 people were sentenced to death and 54 were executed during the year 1823 while 1,397 were sentenced to death and 46 executed in 1830.²⁰ Probably the most important of Peel's capital crime statutes was the 1823 law which allowed magistrates to pass a lesser sentence except in murder cases. This statute should have encouraged juries to convict in cases involving less serious crimes which still carried the death penalty. The testimony collected by the Select Committee of 1819 suggests that judges, lawyers, and others were already beginning to realize that large numbers of capital sentences had little effect on crime.²¹ A change in philosophy rather than a change in the laws seems to have been responsible for the reduction in deaths. Sir Robert Peel's accomplishments should not be underrated, however. His police bills improved law enforcement and made later legislators more inclined to reduce the number of capital crimes while his four consolidation bills clarified the law for Judges.²² If nothing else, the consolidation program saved the next decade's repealers much work.

Agitation for Parliamentary reform, the elections, and the Whig return to power in the early 1830's had a definite impact on capital punishment. By 1835, sufficient support could be found in Commons for any reasonable legal reform. The House of Lords still reflected a conservative tinge, but even there some important support for reform appeared. Forty new peers were created, the majority in 1831, to aid passage of the Parliamentary reform program. The most important of these was the Whig Radical, Henry Brougham (Lord Brougham), who had been an early supporter of Mackintosh's efforts and served on the Select Committee of 1819.²³ There was also the growing conviction among some conservative peers that transportation to remote parts of the British Empire for life represented a suitable replacement for the death penalty.²⁴

The reduction in the number of capital crimes was again piecemeal until 1836. Numerous non-violent offences had their

penalties reduced. The most notable were a number of capital statutes relating to the coin.²⁵ Statistics provide a graphic picture of this trend. In 1832, 1,449 people were sentenced to death and 54 were executed, while in 1836, the numbers declined to 494 and 17 respectively.²⁶

Parliament established a special commission in 1836. Its purpose was to conduct another investigation into the state of the criminal law. Home Secretary, Lord John Russell, promised Commons he would prepare legislation based on the commissions's findings. The report recommended that only eight types of crimes retain the death penalty: (1) high treason, (2) murder, (3) attempted murder accompanied by personal injury, (4) the burning of buildings or ships that endangered human life, (5) piracy with injury or acts endangering human life, (6) burglary aggravated by cruelty or violence, (7) robbery accompanied by cruelty or violence, and (8) rape and the violation of children under ten.²⁷ There is an interesting contrast between the two reports discussed in this paper. The 1819 Commission listed statutes to be repealed while the 1836 investigation specified capital crimes to be retained.

Lord John Russell introduced his proposals for the reduction of capital punishment on March 23, 1837. He stated that in 1834 some 523 people had been condemned to death, but only 34 were executed. This situation, he thought, could not possibly add to public security and, therefore, needed to be changed. His second point was that he saw no increase in crimes for which the death penalty had been removed, but the conviction rate did increase. Russell concluded that capital punishment should be limited to treason and violet crimes which could endanger human life.²⁸

Opposition to Russell's proposals was weak. Sir Robert Peel did state that the discretionary power of the Home Secretary should be retained, but he did not push this.²⁹ Apparently he thought the "security of property" was now insured. The proposals were guided through Lords by Thomas Denman (Lord Denman), the Lord Chief Justice. Even here things moved smoothly. Russell had supported capital punishment amelioration since his service on the Select Committee of 1819. He now considered his work completed.³⁰

Statistics for the period after 1836 indicate that Russell's reforms had a major impact on the number of death sentences. In 1837, 438 people were sentenced to die, 11 for muder. Eight of this latter group were executed. In 1838, the figures were 116 sentenced to death; 25 for murder. Six of the latter group were executed; five for murder and one for attempted murder. The trend continued in 1839, when 56 people were sentenced to death; 12 for murder and one for attempted murder.³¹ The 1839 figure remained stable until the 1860's when law enforcement had become so effective that Parliament was ready for more major changes.

After 1868, only treason and crimes that resulted in death were capital, and executions became private rather than public in nature.³²

Two final questions need to be considered in discussing the reduction in capital crimes during the early nineteenth century in England. They relate to the motives of the key figures in the reform movement and more specifically whether this type of activity was primarily a matter of political party affiliation or personal conviction. During the early part of the Age of Reform, there is no question that the people who supported amelioration were driven by humanitarian concerns. For example, numerous early supporters such as Mackintosh and Wilberforce were members of the "Saints," a society dedicated to the elimination of slavery in the British Empire. On the other hand, Sir Robert Peel was a moderate Tory and his motives seem to have been pragmatic rather than idealistic. He wanted to make the criminal law more effective but thought that reforms should be cautious and slow. Because of this philosophy, Peel was able to view the whole spectrum of change more clearly than his liberal colleagues. He realized that reform of the courts, police, and criminal law all went together. Statistics suggest that Peel had little impact on reducing either the number of people sentenced to death or those executed for capital crimes. His primary importance was to make law enforcement more effective while organizing and clarifying those crimes carrying the death penalty.

The Whig leader of the later phase of the capital punishment reform movement, Lord John Russell, was the key figure in reducing the number of death sentences and executions. He had supported amelioration of capital punishment throughout his career, and his work during the late 1830's marked the successful completion of the reforms he considered necessary and desirable. There were charges that Russell's motives were partially political, but it seems clear that this was not the case. Therefore, it remains strange that his biographers do not emphasize Russell's humanitarian commitment in this matter.

Division lists and Parliamentary sources suggest that Whigs were more likely to support capital punishment repeal than Tories, but the same evidence strongly indicates that this was not considered a party matter. For example, the division list relative to the bill which proposed repealing the death penalty for forgery in 1830 was supported by 78 Whigs, 19 Tories, 1 Radicals, 2 Canningites, and 19 unknown or uncommitted individuals.³⁴ This bill failed passage by only 16 votes. The same general party divisions remained true during most of the later debates. It is also clear that bills had a much better chance of bipartisan support when they were backed by the Government. Thus, it appears that an M.P.'s attitude toward the amelioration of capital punishment was a matter of conviction rather than party. The philosophical background that made an

individual a Whig or Tory helped determine his views on this questions, but his party did not determine how he would vote.

Tremendous changes had taken place in capital punishment by the end of the Age of Reform. In 1820, 1,236 people had been sentenced to death while 107 were executed in well-attended public hangings. Among the executed were people guilty of such varied crimes as murder, cattle and sheep stealing, forgery, sodomy, and sacrilege.³⁵ During 1868, twenty-one people were sentenced to death - all for murder. Twelve were executed behind closed prison doors.³⁶ There were no further major changes in capital punishment until it was abolished in 1957.

NOTES

1For detailed information on this topic see Sir William Holdsworth, A History of English Law (16 vols., London: Methuen and Co., Ltd., 1938) vols. I-XI and William Blackstone, Commentaries on the Laws of England (4 vols., London: Dawson's Pall Mall, 1966).

2Holdsworth, History of English Law, XI, 575-578.

3Cesare Bonesana, Marchese di Beccaria, On Crimes and Punishments, trans. Henry Paolucci (Indianapolis: Bobbs-Merrill, 1963) pp.1-99 passim.

4Blackstone, Commentaries, IV, p. 18; Holdsworth, History of English Law, XI, 578, feels Beccaria had a major influence on this passage.

5For the life of Romilly see Patrick Meed, Romilly: A Life of Sir Samuel Romilly Lawyer and Reformer, (London: Collins, 1964).

6Great Britain, Hansard's Parliamentary Debates (1st Series) (1808) 395.

7Sir Samuel Romilly, The Life of Sir Samuel Romilly with Selection from his Correspondence, edited by his Sons, (2 vols., London: John Murray, 1841) II, 486.

8For the life of Sir James Mackintosh see Robert James Mackintosh (ed.), The Life of Sir James Mackintosh (2 vols., Boston: Little, Brown and Co., 1853).

9Hansard (1st Series) XXXIX (1819) 803.

10Great Britain, Parliamentary Papers, Vol. VIII (Administration Criminal Law, Vol. I) July 1819, "Report of Select Committee on Criminal Law Relating to Capital Punishment in Felonies," (Shannon, Ireland: Irish Univ. Press, 1963) passim.

11Ibid., p. 264.

12Ibid., pp. 1-9.

13Great Britain, Statutes at Large, 1 Geo. 4, c. 116 (1823) "Capital Felonies Repeal Act."

14Statutes at Large, 4 Geo. 4, c. 46 (1823) "An Act for Repealing the Capital Punishments Inflicted by Several Acts."; Ibid., 4 Geo. 4, c. 53 (1823) "An Act for Extending Benefits of Clergy to Several Larcenies." and Ibid., 4 Geo. 4, c. 54 (1823) "An Act for allowing Benefit of Clergy to Persons convicted of certain Felonies under Two Acts passed in the Ninth year of

George Second; and to make better provisions for the punishment of Persons guilty of sending Threatening Letters."

15Statutes at Large, 4 Geo. 4, c. 48 (1823) "An Act to Allow Magistrates to Waiver Sentence of Death."

16Hansard (2nd Series) XIV (1826) 1217.

17Ibid., 1214.

18Statutes at Large, 7 & 8 Geo. 4, c. 28 (1827) "An Act for further Improving the Administration of Justice in Criminal Cases."

19Pioneer work on the topic of law enforcement in England and a good source for Peel's programs is Leon Radzinowicz, A History of English Criminal Law and Its Administration since 1750 (3 vols., New York: Macmillan Co., 1948-1958).

20Great Britain, Parliamentary Papers, 235 (Accounts and Papers) Vol. 29 (1827-1828) "Committals for England and Wales." and Ibid., 375 (Accounts and Papers) Vol. 33 (1813-1832) "Committals in England and Wales."

21Report from the Select Committee on Criminal Law...." pp. 46, 47, 63, 65, 87, 111, and 115.

22Statutes at Large, 7 & 8 Geo. 4, c. 29 (1827) "An Act for Consolidating and Amending the Laws in England relative to Larceny, and other offenses connected therewith."; Ibid., 7 & 8 Geo. 4, c. 30 (1827) "An Act for Consolidating the Laws of England Relative to Malicious Injury to Property."; Ibid., 9 Geo. 4 (1828) "An Act for Consolidating and Amending the Statutes in England relative to Offenses against the Person."; and Ibid., 11 Geo 4 and 1 Will. 4, c. 66 (1830) "An Act for Reducing into one Act all such Forgeries as shall henceforth be Punished with Death and for otherwise Amending the Laws relative to Forgeries."

23A. S. Turberville, The House of Lords in the Age of Reform, 1784-1837 (London: Faber and Faber, 1958) p. 260.

24Great Britain, Journal of the House of Lords, Vol. 64, p. 360.

25Statutes at Large, 2 & 3 Will. 4, c. 34 (1832) "An Act for Consolidating and Amending the Laws against Offenses relating to the coin."

26Parliamentary Papers, 88 (Reports) Vol. 46 (1837) "Statements on the Criminal Law, prepared by direction of the Secretary of State for the Home Department."

27Parliamentary Papers, 343 (Reports) Vol. 36 (1936) "Second Report of His Majesty's Commissioners Appointed to inquire into the State of the Criminal Law," p. 328.

28Hansard (3rd Series) XXXVII (1837) 709-733.

29Ibid., XXXVIII, p. 256.

30With few exceptions, Russell opposed any further amelioration of capital punishment.

31Parliamentary Papers, 3590 (Reports) Vol. 21 (1866) "Report of the Commissioners appointed to inquire into the provisions and operations of the laws now in force in the United Kingdom, under and by virtue of which the punishment of death may be inflicted upon persons convicted of certain crimes, and also into the manner in which capital sentences are carried into execution."

32Adjusted from Ibid.; Statutes at Large, 31 & 32 Vic. c. 14 (1867-1868) "An Act to provide for carrying out of Capital Punishment in Prisons."

33Hansard, XXXVIII, 1781.

34Hansard (2nd Series) XXIV (1830) pp. 1060-1061; Gerrit P. Judd, IV, Members of Parliament 1734-1832 (New Haven: Yale Univ. Press, 1955) passim; Henry Stooks Smith, The Parliaments of England from 1st George to the Present Time (London: Simpkin, Marshall and Co., 1844) passim.

35Parliamentary Papers (Accounts and Papers) Vol. 29, "Committals..."

36Parliamentary Papers, 4195 (Accounts and Papers) Vol. 58 (1868-1869) "Capital Returns for England and Wales."