UNIVERSITY OF CAMBRIDGE
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THE PENAL EQUATION

Derivations of the penalty structure of English criminal law

D.A.THOMAS

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"There is no real or ascertainable connexion or relation existing between crimes and punishments which can afford any correct test for fixing the nature or extent of the latter, either as regards particular offences or their relative magnitudes."

Seventh Report of the Commissioners on Criminal Law (1843)

TABLE OF CONTENTS

FOREWORD

Some years ago I suggested to the Home Office and to the Chairman of the Advisory Council on the Penal System (at that time the late Sir Kenneth Younger) that it was time for a review of the maximum terms of imprisonment on the English statute book. They are of course an extraordinary collection, with well-known curiosities. Some of them reflect the prejudices of earlier generations, others the short-lived alarms caused by spectacular episodes. More important, however, is the time-scale on which they are based. It is a very long one by the standards of countries such as Sweden or the Netherlands, though not quite as terrifying as those of Italy or the U.S.A. It exhibits a strange, biblical[1] faith in multiples of 7. The only thing to be said in its favour is that it has only a tenuous effect on the lengths of sentences nowadays imposed, which seldom approach the high maxima allowed by the law.

One thing on which Sir Kenneth Younger, the Home Office and I agreed at the time was that we knew far too little about the stages and the reasoning by which we had reached this position, and that if the Advisory Council were ever to be asked to tackle this problem they would need a thorough monograph on the historical background. It was also obvious that the person who should be asked to provide this was David Thomas, who had recently published his authoritative book, Principles of Sentencing. David Thomas readily agreed to undertake the research, with a grant from the Home Office; and this monograph is the result. Eventually it was decided that the Advisory Council should be asked to review the maximum lengths of prison terms; and the original version of this monograph was an invaluable basis for its early discussions. (We also benefited from discussions with David Thomas.) The publication of the Council's report will add to the interest of this already fascinating document.

January 1978 Nigel Walker

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1 See Genesis 29 for Jacob's two periods of 7 years' labour for Laban. See also Revelations, passim.

PREFACE

This is the first of two reports of a research project undertaken at the request and with the financial support of the Home Office. The purpose of the inquiry was to identify the process by which existing criminal offences were assigned their maximum penalties, and to assess the relationship between statutory maximum penalties and judicial sentencing practice. The subject matter of the research fell into three sections: the transition of the penalty structure of the criminal law from widespread capital punishment to penalties measured in terms of penal servitude; the choice of maximum penalties for newly created criminal offences between 1861 and the present day; and the development of judicial conventions on sentencing practice between the legislation which firmly entrenched their modern role in the sentencing process in 1861 and the creation of the Court of Criminal Appeal in 1907. This paper is concerned primarily with the first of these topics; it is hoped to publish later this year a second paper, provisionally entitled "Constraints on Judgment", dealing with the last.

The groundwork of the project was carried out under my direction by four research assistants, Mr David Brown, Miss Helena Campbell, Mr Frank Sutcliffe and Mrs Jacqueline Tombs. This paper draws upon, but does not by any means exhaust, the work of all of them. I am grateful to them for the energy and skill which they devoted to the inquiry. Miss Margaret Guy prepared the manuscript for publication; I am indebted to her as much for her many helpful suggestions on presentation as for undertaking the typing.

D. A. Thomas

January 1978

Legislative origins

The structure of maximum sentences in modern English criminal law is founded on the Consolidating Acts of 1861. Dealing with larceny, violence, malicious damage, forgery and coining, these statutes constituted a catalogue of the offences which make up the central core of the criminal law. Enacted within four years of the abolition of transportation, they were the first substantial essays in criminal legislation in the context of a penal system in which penal servitude and imprisonment had become the primary sanctions; all remained on the statute book throughout the period which saw the development of the underlying principles of judicial sentencing in relation to the use of penal confinement. Their penalty provisions provided the standard against which newly created offences were evaluated as the criminal law expanded during the century following their enactment.

Although the penalty provisions of the 1861 legislation were a powerful influence in moulding both legislative and judicial attitudes to sentencing as the modern penal system developed, their origins must be traced in penal practices remote from those they came to govern. The pattern established in the Consolidating Acts was shaped thirty years earlier during the radical changes of the 1820's and 1830's, as wholesale capital punishment gave way (on the statute book) to judicially imposed transportation. It was in relation primarily to transportation that the first legislative attempts were made to construct a modern penal equation, in which the gravity of offences was measured in units of time forfeited to the state: the quantities then chosen formed the basis of the scheme adopted as transportation evolved into penal confinement in the 1850's.

The systematic transportation of convicted felons commenced two hundred years earlier.[1] A statute of 1597[2] authorised the transportation of incorrigible rogues to "such parts beyond the seas as shalbe at any time hereafter

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1 For general accounts of transportation, see O'Brien, *The Foundations of Australia* (1950); Shaw, *Convicts and the Colonies* (1966).

2 39 Eliz., c.4.

for the purpose assigned" and in 1617 an Order in Council[1] recognised the practice of transporting capitally convicted offenders under conditional pardon. This was to be the legal basis of much transportation throughout its history. At common law the penalty for felony was death, subject to the felon's right to benefit of clergy; if benefit of clergy was available the offender would be discharged after being branded on the hand, unless the court ordered him to be whipped, or imprisoned for a period not exceeding one year.[2] By the late seventeenth century anyone convicted of felony (other than those from which benefit of clergy was excluded) was entitled to benefit of clergy for his first offence if he could read the "neck verse".[3] If the offence was not clergyable or the offender had previously claimed his clergy, the duty of the judge was to pronounce sentence of death, subject to his power to order postponement of execution. Where the judge granted a reprieve, the King might pardon the felon on his accepting the condition that he be transported beyond the seas, usually to the American colonies. Substantial numbers of pardoned convicts were transported on this basis during the seventeenth century,[4] and the practice was sufficiently established by 1679 to be expressly saved in the Habeas Corpus Act[5] of that year from the prohibition then enacted of sending prisoners beyond the jurisdiction of the court. The wording of the saving provision of the Habeas Corpus Act suggests that it was common practice for the capitally convicted offender to take the initiative in

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1 Set out in O'Brien at p.84.

2 18 Eliz., c.7.

3 The necessity for reading was abolished in 1705 (5 Anne c.6).

4 For an estimate of the numbers, see Shaw op. cit., p.24.

5 31 Car. 2 c.3 s.14.

suggesting transportation.[1] Judicial discretion in felonies where benefit of clergy was not available was limited to the decision whether to reprieve or to leave the prisoner for execution; the decision whether or not to pardon, and on what conditions (including the period of transportation) was with few exceptions[2] an executive decision taken by the King in Council.[3]

Several statutes of the late seventeenth century authorised courts to order transportation in non-capital cases on their own authority. In 1661 Assizes and Quarter Sessions were empowered to order transportation of Quakers convicted a third time of refusing to take an oath or attending religious meetings[4] and the following year Quarter Sessions were authorised to order transportation of incorrigible rogues, vagabonds and sturdy beggars.[5] In neither case was any period of transportation specified, but a statute of 1666 provided for transportation for life at the discretion of the judge in a limited category of otherwise capital cases.[6] Transportation as a judicial sentence, as opposed to an exercise of Royal clemency, did not become firmly established or widespread until the enactment in 1717 of a statute with the long title 'An Act for the further preventing Robbery, Burglary and other Felonies, and for the more effectual Transportation of Felons, and unlawful Exporters of Wool ...'.[7] Reciting that "the punishments inflicted by the laws

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1 "If any person or persons lawfully convicted of any felony, shall in open court pray to be transported beyond the seas, and the court shall think fit to leave them in prison for that purpose ...". The same procedure is envisaged by 22 and 23 Car. 2 c.7 s.4, enacted nine years earlier. The Act made nocturnal burning of houses and haystacks, and nocturnal killing of sheep and cattle, a capital felony, but provided that if anyone so convicted "to avoid judgment of death ... shall make his election to be transported beyond the seas" the judge might enter judgment that he be transported for seven years.

2 By 22 Car. 2 c.6 s.4 judges were allowed "at their discretion" to grant pardons on condition of seven years' transportation to persons convicted of stealing cloth or woollen manufactures by night, or of stealing naval stores; and see 22 and 23 Car. 2 c.7 (above).

3 See Radzinowicz, *A History of English Criminal Law*, Vol. 1. (1948).

4 13 and 14 Car. 2 c.2 s.2.

5 13 and 14 Car. 2 c.13 s.23.

6 18 Car. 2 c.3 s.2 dealing with "great, known and notorious Thieves and Spoil-takers" in the counties of Northumberland and Cumberland.

7 4 Geo. 1 c.11.

now in force ... have not proved effectual to deter wicked and evil-disposed persons", the Act authorised courts to order the transportation of persons convicted of larceny or other felonious taking of property and entitled to benefit of clergy, as an alternative to burning in the hand. The court was given discretion whether or not to exercise the power to order transportation, but the term of transportation was fixed at seven years in all cases, except that of a person convicted of knowingly receiving or buying stolen goods who might be transported for a period fixed at fourteen years. The statute preserved the system of transportation under conditional pardon in non-clergyable cases, specifying that where no term was indicated in the Royal pardon, the period was to be fixed at fourteen years.[1]

The Act of 1717 is of major significance in the history of transportation and sentencing generally. It expanded the scope of transportation to include a much wider group of offenders than was eligible under the system of conditional pardon; it extended the range of judicial discretion in felony (without yet giving the judge power to fix a period of time in relation to particular cases); it served as a model for many later transportation statutes; and it established that preference for the seven times table which was to be the hallmark of much subsequent criminal legislation, long after transportation itself had ceased. The Act remained on the statute book until 1827 and it was under the powers it conferred that the overwhelming majority of convicts transported by order of the judiciary, as opposed to conditionally pardoned, were sentenced.

The eighteenth century saw a steady increase in the severity of the criminal law and a frequent resort to the death penalty. Numerous new felonies, capital without benefit of clergy, were created, and benefit of clergy was removed from many existing felonies.[2] A variety of other penalties also found legislative favour, and a considerable number of statutes authorised courts to order transportation on their own authority. The majority of these, at least until the accession of George III, followed the pattern of the 1717 legislation, either

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1 The subsequent provisions conferring contractual capacity on "idle persons" between the ages of fifteen and twenty-one to engage with merchants to be transported to the American colonies and serve for eight years may well be the first legislative recognition of the young adult offender as a category.

2 See generally, Radzinowicz, op. cit., Vol. 1, chs. 1 and 2.

explicitly[1] or by implication;[2] others simply used the fixed period of seven years transportation for which the 1717 Act created a precedent.[3] Despite minor variations in the formulae employed by the draftsmen, most transportation statutes of the first half of the eighteenth century had two features in common - the obligation to transport on conviction for the specified offence, and the fixed period of seven years. Only a few enactments of this period conferred discretion on the sentencer to vary the term of the sentence. These varied in the nature and scope of the discretion allowed; most were concerned with misdemeanour, where judicial discretion in term-fixing was already well established, rather than felony. A statute of 1729 dealing with forgery, perjury and related offences gave courts dealing with persons convicted of perjury or subornation the choice between commitment to the House of Correction for a period not exceeding seven years, or transportation "for a term not exceeding seven years, as the Court shall think most proper";[4] In 1736 courts were empowered to transport persons convicted of assaulting customs officers on board ship "for such term as such Court shall think fit, not exceeding seven years";[5] and in 1752 persons convicted of entering mines with intent to steal lead were exposed to twelve

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1 E.g., 8 Geo. 1 c.8 s.6 (smuggling while armed, disguised or in company, or forcibly resisting officers of Customs and Excise); 11 Geo. 2 c.26 s.2 (rescuing offenders against liquor licensing Acts, etc.); 19 Geo. 2 c.34 s.3 (harbouring smugglers after expiration of amnesty); 24 Geo. 2 c.40 s.28 (rescuing offenders against liquor licensing Acts, etc.).

2 E.g., 11 Geo. 1 c.22 (debtor assaulting, etc., a process server in certain localities); 12 Geo. 1 c.39 (person convicted of perjury, forgery or barratry, subsequently practising as attorney or solicitor); 12 Geo. 1 c.34 (workman assaulting Master Woolcomber or Weaver in course of trade dispute); 5 Geo. 2 c.33 (destroying turnpike gates); 7 Geo. 1 c.21 (assault with intent to rob or demanding with menaces); 10 Geo. 2 c.32 (poaching deer in royal forests, or assaulting keepers); 11 Geo. 2 c.22 (destroying granary or spoiling corn); 25 Geo. 2 c.38 (rescuing body of executed murderer with intent to prevent dissection).

3 E.g., 16 Geo. 2 c.32 (assisting escape of convicted felon from custody of constable or contractor for transportation); 26 Geo. 2 c.19 (assaulting officer concerned in the salvage of shipwreck); 32 Geo. 2 c.28 (civil prisoner refusing to disclose or assign assets).

4 2 Geo. 2 c.25 s.2. The Act appointed death without benefit of clergy for various other offences, all felony.

5 9 Geo. 2 c.28.

months imprisonment with hard labour, with or without such public whippings as the court might ordain, or transportation "for a term not exceeding seven years, as such court or judge shall think most proper."[1] Other misdemeanour statutes, notably 30 Geo. 2 c.24 dealing with obtaining by false pretences and other frauds, allowed the sentencer to choose between transportation and other punishments commonly provided for misdemeanour (fines, imprisonment, whipping, or standing in the pillory) but specified seven years as the period of transportation if ordered.

After 1750 transportation statutes began to exhibit a wider variety of provisions relating to the period of transportation and the scope of judicial discretion. While many repeated the formula of mandatory transportation for a fixed period of seven years[2] other statutes provided for transportation for fourteen years (the period fixed in 1717 for conditionally pardoned transportees and receivers of stolen property). The first such statute appears to have been 26 Geo. 2 c.33, which so penalised persons solemnising matrimony without publication of banns unless a licence had previously been granted.[3] Some statutes extended to newly created felonies the degree of discretion previously limited to misdemeanours[4] and a new formula providing a minimum and maximum period of transportation, but allowing discretion to specify a period in between, made its first appearance.[5] An alternative formula, which approximated more closely to the normal procedure for dealing with the general run of offences, imposed death as the prescribed penalty for the offence, but

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1 25 Geo. 2 c.10.

2 E.g., 2 Geo. 3 c.28 s.13 (damaging cordage, etc., used to moor ships); 6 Geo. 3 c.36 (damaging standing timber or stealing growing plants, etc.); 26 Geo. 3 c.106 (counterfeiting certain seals).

3 See also 31 Geo. 2 c.32 s.15; 13 Geo. 3 c.59 s.2 (dealing with certain offences of forgery); 2 Geo. 3 c.28 s.12 (receiving stolen goods from ships in the River Thames).

4 E.g., 26 Geo. 3 c.71 (offences in connection with slaughter houses).

5 Probably in 28 Geo. 3 c.55.

allowed the judge at his own discretion to substitute a sentence of seven years transportation, if he "shall think it reasonable, upon the circumstances of the case" to do so.[1]

Among the chaotic jumble of criminal laws enacted during the eighteenth century[2] these enactments were of very limited importance, except in so far as they tended to reinforce the model established by the Act of 1717. There can be little doubt that the 1717 legislation provided the legal foundation for the overwhelming majority of sentences of transportation passed during the eighteenth century[3] and that the occasion for the exercise of judicial discretion in fixing the term of transportation rarely arose. The conditional pardon remained an important source of transportation, possibly the most important source, during this period, but in this context the scope of judicial discretion did not extend to term fixing. This remained an executive function, although the King would usually receive and act on the suggestion of the judge who had tried the case.[4] Even when in 1768 a combination of administrative dilatoriness and the appalling state of the gaols led to legislation which recognised that the grant of a conditional pardon following a judicial reprieve was almost automatic and expedited the procedure of transportation, no discretion to fix the term of transportation was conferred on

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1 18 Geo. 2 c.27. Precedents for this formula can be found in 22 Car. 2 c.6 s.4, and 22 and 23 Car. 2 c.7 (p.3 footnotes 1 and 2).

2 See Radzinowicz, op. cit., Vol. 1, pp.611-659 for detailed illustrations.

3 Of the 786 convicts transported to Australia in the First Fleet of 1787, it appears that 253 were transported under conditional pardon, 486 were sentenced to seven years transportation for theft or kindred offences under the Transportation Act 1717, 12 were sentenced to fourteen years transportation under the Act for receiving, and the remaining 26 for unidentified or other offences (including one sentenced under 18 Geo. 2 c.27 (footnote 1 above). See Cobley, *The Crimes of the First Fleet Convicts* (1970).

4 See Radzinowicz, op. cit., Vol. 1, pp.119-120.

the judge.[1]

In cases of felony the sentencing discretion of the eighteenth century judge was in practice limited to the choice rather than the quantification of the sentence. If the case was non-clergyable (either because the offence was not subject to clergy or the offender had previously had his clergy) he had the effective choice between execution and a period of transportation; in clergyable cases falling within the scope of the 1717 Act (which included almost all offences of dishonesty) he had the choice between ordering transportation for the period stipulated by the Act, whipping, or a short term of imprisonment. In cases of misdemeanour the eighteenth century judge enjoyed by tradition a much broader discretion; he was empowered in the case of common law misdemeanours to order whipping, the pillory, a fine or unlimited imprisonment. In practice such terms of imprisonment as were ordered appear to have been relatively short by modern standards; either judges were reluctant to deprive an Englishman of his liberty or they were conscious of the impossibility of surviving for any length of time in the stinking gaols of the period. Long sentences were passed on occasion: in 1729 one Hales was ordered to stand twice in the pillory and be imprisoned for five years following conviction for forgery. Stephen, writing in 1882, believed this to be the severest sentence imposed for common law misdemeanour since the seventeenth century.[2]

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1 8 Geo. 3 c.5. The preamble recited that "several offenders, convicted of crimes for which they are by law excluded from benefit of clergy, are reprieved by the judge who tries them, and recommended by him to His Majesty's mercy: who generally, on such recommendation, is graciously pleased to extend the same to them, on condition of transportation to some of His Majesty's colonies and plantations in America for life, or for the term of fourteen years", but pointed out that as the convict had to remain in custody until the next assizes when the order for transportation could be made "such offenders lie several months in gaol after conviction whereby they are rendered less capable of being useful to the publick in the parts of America to which they are sent". The Act authorised the judge who had granted the reprieve to make the order for transportation outside assizes without waiting for the next session: it provided that if no period of transportation were specified in the conditional pardon, the term was to be fourteen years.

2 Stephen, *A History of the Criminal Law of England*, Vol. I, p.490. See, however, p.52, footnote 1, below.

Statutory misdemeanours enacted during the eighteenth and early nineteenth centuries tended to follow the pattern established by the common law. In many cases no specific penalty was provided;[1] in others courts were expressly authorised to impose unlimited imprisonment at their own discretion, usually with the alternative (or additional) penalties of whipping or unlimited fines,[2] often in combination.[3] Where transportation was permissible in misdemeanours, as has been shown, the judge was more commonly allowed a discretion in fixing the term of the sentence than in felony; transportation for any period not exceeding seven years was a popular formula.[4] Restricted periods of imprisonment were, however, not uncommon; various periods were specified, the most common being three years[5] and two years,[6] with many variations in the alternative punishments. It is not possible to identify any system in the distribution of varying penalty provisions among these offences.

The repeal of the capital statutes

The modern system of maximum penalties began to appear in the legislation enacted to restrict the scope of the death penalty in the second quarter of the nineteenth century. Despite the mounting campaign during the first two decades of the century for the restriction of capital punishment, the role of the judge in the sentencing process did not begin to change substantially until the late 1820's.

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1 E.g., 49 Geo. 3 c.126 s.5 (operating business of sale or purchase of employments in public departments); 55 Geo. 3 c.50 s.9 (clerk of assize exacting fee from prisoner acquitted or not indicted).

2 E.g., 50 Geo. 3 c.89 s.6 (revenue officer providing false returns); 55 Geo. 3 c.50 s.13 (gaoler extracting fee from prisoner on account of discharge); 59 Geo. 3 c.69 s.8 (adding to the number of guns aboard ship of war in service of foreign prince).

3 E.g., 26 Geo. 3 c.71 s.9 (offences in connection with lime pits in slaughterhouse); 53 Geo. 3 c.141 s.8 (advancing money to infant in return for rent charge).

4 See p.5 footnote 5.

5 E.g., 53 Geo. 3 c.160 s.2.

6 E.g., 39 and 40 Geo. 3 c.60 s.14; 37 Geo. 3 c.126 s.4 (uttering counterfeit foreign coin for second time).

The statutes of 1808 and 1812 which constituted the first major successes of the abolitionists did however establish a new formula which was to be used frequently in later statutes, and which significantly enlarged the formal role of the judge in relation to term fixing. By 48 Geo. 3 c.129 the offence of larceny from the person ceased to attract the death penalty and became punishable by transportation for life or for any period not less than seven years. The original bill proposed a fixed period of transportation for seven years, following the model of the Act of 1717, but its promoter, not an enthusiast for unfettered judicial discretion,[1] was forced to concede the more severe penalty structure, with its consequential expansion of judicial authority, to placate those who were opposed to the removal of capital punishment from the offence.[2] (This process was to be repeated several times during the later stages of the repeal of the accumulated capital statutes of the eighteenth century, and an important determinant of the penalty imposed in place of the death penalty in several instances was the strength of the opposition to its abolition.) The Act of 1812[3] abolishing capital punishment for stealing from bleaching grounds employed a similar formula in relation to transportation, but provided the alternative of a period of imprisonment not exceeding seven years.

The extensive judicial discretion in term fixing in cases of felony, for which these statutes established precedents, became an increasingly important element in the sentencing structure evolved as the penal system underwent fundamental transformation during the following forty years. The principle of judicial discretion in term fixing was endorsed by the House of Commons Select Committee on Criminal Laws in 1819, who recommended the substitution of transportation or imprisonment for death in relation to a range of offences, "allowing considerable scope to the discretion of judges respecting the term

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1 See Romilly, *Observations on the Criminal Law of England* (1810) pp.11-20.

2 See Radzinowicz, op. cit., Vol. 1, p.499.

3 51 Geo. 3 c.41.

for which either punishment is to endure".[1] The statutes enacted in the light of the Committee's report[2] each employed the formula which had originated in 51 Geo. 3 c.41 in 1812. They allowed the fullest range to judicial discretion, empowering courts to order up to seven years' imprisonment, or transportation for life or any period not less than seven years.

The greater part of the process of reducing the scope of capital punishment on the statute book took place within the space of ten years, from 1827 to 1837. The legislation concerned provided the major part of the raw material for the consolidations of 1861. It consisted of two groups of enactments, each of which codified important areas of the substantive criminal law in addition to establishing the basis of a new penalty structure, and a number of less substantial statutes enacted in the intervening period dealing with the abolition of the death penalty for several offences which had remained capital after the first consolidations of 1827-1830. The penalty structure which emerged at the end of this period of legislative activity was devoid of any appearance of system or principle. The Commissioners on the Criminal Law, surveying the law relating to punishment as it stood in 1843, commented that the law "presents a vast variety of punishments which are not, however, adapted to corresponding gradations or shades of guilt, but are of an arbitrary and sometimes of a capricious character ... in annexing penalties to offences from time to time, no endeavour has been made to frame them according to any fixed rule".[3]

Various factors contributed to the process by which the penalty structure evolved during this period. The established conventions relating to transportation, however accidental their origins, played an important role, but the penalty assigned to a particular offence also reflected in part the individual views of the promoter of the statute removing it from the list of capital crimes[4]

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1 See Report from the Select Committee on Criminal Laws (1819) p.7.

2 1 Geo. 4 c.115; 1 Geo. 4 c.117.

3 Seventh Report, 1843, p.100.

4 E.g., 3 and 4 W. 4 c.44, which allowed the court to order imprisonment as a preliminary to transportation rather than as an alternative.

and the strength of the lobby to keep the death penalty in the particular case.[1] The factor which probably contributed more than any other to the lack of design in the emerging alternative penalty structure was confusion over the meaning of a sentence of transportation, lack of confidence in its efficacy and uncertainty over its future. Criticism of transportation had become increasingly virulent since the export of convicts was resumed in 1787. By the end of the decade of legislative activity which effectively substituted transportation for death as the principle sanction of the law in most cases, a Parliamentary Committee had recommended in unqualified terms that the system be discontinued at the earliest possible moment.[2]

The period of reform began with the enactment in 1827 of 7 and 8 Geo. 4 c.28, a statute which abolished many of the anachronistic procedural rules which had survived from the fifteenth and sixteenth centuries. The Act abolished benefit of clergy, but provided that felonies should no longer be capital unless already excluded from clergy or specifically made capital by subsequent legislation. Where no sentence was specially provided for the felony, the penalty was to be transportation for a fixed period of seven years, or imprisonment for up to two years, with the addition of whipping at the court's discretion in the case of males. The Act thus preserved substantially the penalty structure established for clergyable theft in 1717 (4 Geo. 1 c.11 was repealed simultaneously by 7 and 8 Geo. 4 c.5). Persons convicted of felony after a previous conviction for felony, who would not have been entitled to clergy and thus liable to be sentenced to death under the earlier law, became liable to transportation for life or any period not less than seven years, or imprisonment for up to four years.

A similar sentencing structure was established by 7 and 8 Geo. 4 c.29, which consolidated much of the law relating to larceny and kindred offences. Simple larceny was made punishable by transportation for the fixed period of

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1 E.g., 2 and 3 W. 4 c.62 (stealing in a dwellinghouse to the value of £5 or more). Mandatory transportation for life was the price of abolishing the death penalty for rape as late as 1840; see 4 and 5 Vic. c.56 s.5.

2 See pp.28-29, below.

seven years, with the alternative of two years imprisonment, and this formula was applied to many other comparable offences. More serious offences for which the death penalty was not retained, such as larceny from the person, demanding with menaces, assault with intent to rob, and breaking and entering premises other than dwellinghouses, were made punishable with transportation for life or any period not less than seven years, or imprisonment for up to four years. Misdemeanours under the Act were for the most part punishable with transportation for a fixed term of seven years, or imprisonment for the traditionally unrestricted period. For receiving stolen property and certain forms of aggravated larceny - larceny as a servant and embezzlement - the Act provided transportation for any period between seven and fourteen years, with the alternative of three years imprisonment. The same scheme of transportation, but with the alternative of unlimited imprisonment, was provided for a group of misdemeanours which in later times would have been classified as fraudulent conversion.

Apart from the retention of the unrestricted discretion to order imprisonment in misdemeanour, 7 and 8 Geo. 4 c.29 presented a reasonably coherent sentencing structure. Death was reserved for those offences considered most heinous or threatening - principally burglary of dwellinghouse, robbery, and certain forms of aggravated larceny. Other offences were divided into three groups for the purposes of transportation - punishable with seven years to life, seven years to fourteen years, or seven years only. The alternative terms of imprisonment were scaled accordingly - four years, three years, or two years respectively. While this structure owed more to the legislative conventions which had been established during the eighteenth century than to any theoretical analysis, it at least purported to make distinctions between crimes of different gravity in a systematic manner. Inconsistencies and anomalies began to appear as a result of efforts to remove the death penalty from those offences which had remained capital under the consolidating act. Larceny of cattle and larceny in a dwellinghouse in excess of £5 remained capital under the 1827 Act (although the qualifying limit for larceny in a dwellinghouse was raised from £2 to £5 - an increase which was alleged not to have kept pace with inflation since benefit of clergy was withdrawn from

the offence in 1713[1]). They were made non-capital by a private member's bill which became 2 and 3 W. 4 c.62. The penalties originally proposed by the promoters were in accordance with the scheme of the consolidation act - transportation for life or any period not less than seven years, or imprisonment for up to four years. Such was the opposition in the House of Lords to the abolition of the death penalty for these offences that the promoters were forced to concede a mandatory sentence of transportation for life.[2] Legislative intention was however defeated by judicial practice; it became usual for judges to inform the Home Secretary what sentence they would have passed if discretion had been allowed them. These recommendations were taken seriously by the Home Office and thus the judge did "exercise a discretion, though not in the face of the court, and without the general knowledge of the public".[3] The following year a private member's bill to abolish the death penalty for housebreaking and stealing by day passed into law, substituting the alternative sentence of transportation for life or any period not less than seven years, with the alternative of four years imprisonment; this was in accordance with the scheme of 7 and 8 Geo. 4 c.29 except that the court was also given power to order four years imprisonment prior to transportation.[4] The combined effect of these enactments was to produce the anomaly, noted by the Commissioners on the Criminal Law in their First Report,[5] that the punishment for stealing in a dwellinghouse to the value of £5 was "transportation for life absolutely", while the punishment was discretionary "where, in addition to stealing in a dwellinghouse to the amount of £5 or any other amount, the offence has been aggravated by the house being broken open."

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1 See Radzinowicz, op.cit., Vol. 1, p.582.

2 See Radzinowicz, op.cit., Vol. 4, p.305.

3 See Correspondence between H.M. Principal Secretary of State for the Home Department and the Commissioners appointed to inquire into the Criminal Law (1837) p.7.

4 3 and 4 W. 4 c.44.

5 (1834) p.33.

This anomaly was corrected in the second series of amending Acts,[1] which removed the death penalty in some cases where it remained and altered the penalty structure in others where it had previously been repealed. In a number of cases where transportation for life had been substituted for death by earlier legislation, either as a mandatory sentence or at the discretion of the court, a new formula of transportation for any period between ten years and fifteen years was introduced.[2] The effect of this change was to expand the scope of judicial discretion in some cases, and contract it in others, possibly in response to the view expressed in the Second Report of the Criminal Law Commissioners that judicial discretion in the term fixing should be set "within proper limits".[3] Offences associated with larceny from which the capital penalty was removed in the same series of enactments were made punishable by transportation for life or any period not less than fifteen years,[4] or transportation for life or any period not less than ten years.[5] While it is possible to see some internal consistency in the penalty structure of the 1837 legislation as it applied to larcenous offences, its effect in combination with the remaining parts of the 1827 larceny legislation was to destroy any appearance of symmetry. Periods of transportation for offences connected with larceny were now seven years, seven to fourteen years, ten to fifteen years, ten years to life, and fifteen years to life.

The policy of restricting the scope of judicial discretion in term-fixing was not followed consistently. In the same group of statutes the formula of transportation for any period from seven years to life was applied for the first time to certain offences of forgery which ceased to be capital,[6] and in a number

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1 7 W. 4 and 1 Vic. cc.84 to 91.

2 7 W. 4 and 1 Vic. c.90.

3 (1834) p.33.

4 E.g., armed robbery (7 W. 4 and 1 Vic. c.87 s.3); certain forms of blackmail (ibid., s.4).

5 E.g., burglary (7 W. 4 and 1 Vic. c.86 s.3).

6 7 W. 4 and 1 Vic. c.84 s.1.

of cases of forgery for which mandatory transportation for life had replaced the death penalty in earlier legislation[1](again because of opposition to the removal of the capital punishment)[2] the same formula was introduced "in order that a more discretionary punishment may be substituted".[3]

Other differences of policy are evident in the treatment of imprisonment in the legislation of 1837 as it affected larceny and forgery respectively. In contrast to the graduated scale of four, three or two years provided by 7 and 8 Geo. 4 c.29, the new legislation applying to offences related to larceny provided a general maximum of three years irrespective of the period of transportation authorised (except where the previous maximum period of imprisonment was two years). This pattern of a fixed maximum term of imprisonment in all cases was again not adopted in the statute enacted one month earlier dealing with forgery,[4] which repeated the formula of imprisonment for not less than two nor more than four years which had been established in the first Forgery Consolidation Act of 1830.[5]

Despite these differences, the process which produced the penalty structure in forgery in many ways resembled that seen in relation to larceny. Provisions penalising forgery with death, or a wide range of other punishments, were scattered throughout the statute book: almost any statute of the eighteenth or early nineteenth century authorising the issue of stock, or in any other way providing for transactions involving documents which could be forged, contained a capital provision. In 1830 the enactment of 11 Geo. 4 and 1 W. 4 c.66 removed most of these offences from the scope of the death penalty. The Act provided that no forgery was to be capital unless death was provided specifically by 11 Geo. 4 and 1 W. 4 c.66 itself, or by subsequent legislation. The alternative penalty structure provided by the Act in place of the abolished death penalty lacked, however, even the symmetry of that of

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1 7 W. 4 and 1 Vic. c.84 s.2.

2 See Radzinowicz, op. cit., Vol. 4, p.305.

3 7 W. 4 and 1 Vic. c.84 s.2.

4 7 W. 4 and 1 Vic. c.84.

5 11 Geo. 4 and 1 W. 4 c.66.

the first Larceny Consolidation Act. The death penalty, where it was abolished, was replaced by transportation for life or any period not less than seven years, but many other forms of previously non-capital forgery consolidated in the Act retained their original penalties. In some cases where previously non-capital forgeries were consolidated in one section, the pre-existing penalty structure was modified to conform to the formula of transportation for any period from seven years to life,[1] but no effort was made to rationalise other penalty provisions. The result was that different sections, dealing with different varieties of forgery, provided a great variety of sentencing possibilities. Periods of transportation provided by the Consolidation Act were for not less than seven years, fixed terms of seven years, seven years to life, seven years to fourteen years, or fixed terms of fourteen years. A subsequent statute of 1832, 2 and 3 W. 4 c.123, further reducing the scope of capital punishment for forgery, imposed mandatory transportation for life, again as a result of opposition in the House of Lords to abolition. The second major amendment Act, 7 W. 4 and 1 Vic. c.84, abolished the death penalty for forgery in all cases where it still applied (including at least three offences for which it had been imposed for the first time since the consolidation of 1830[2]), again replacing death with transportation for life or any period not less than seven years. The same formula was applied to those offences for which mandatory transportation for life had been imposed by 2 and 3 W. 4 c.123. This legislation did not, however, consolidate or otherwise simplify the penalty structure in non-capital forgeries established by the Consolidation Act of 1830.

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1 E.g., the offence of forging an entry in a parish register was punishable under 52 Geo. 3 c.146 s.14 with transportation for a fixed period of 14 years, while falsifying a register of marriages was punishable with mandatory transportation for life under 4 Geo. 4 c.76 s.29. These provisions were consolidated into s.20 of 11 Geo. 4 and 1 W. 4 s.66 as a single offence punishable with transportation for life or any period not less than seven years.

2 By 2 and 3 W. 4 c.25; 5 and 6 W. 4 c.45; 5 and 6 W. 4 c.51.

Even where the whole of the criminal law relating to a given topic was consolidated in a single statute, the resultant penalty structure does not manifest a coherent pattern. The first Coinage Consolidation Act, 2 and 3 W. 4 c.34, enacted in 1832, consolidated an enormous mass of legislation relating to coinage offences and abolished the death penalty for all of them. Although the Act was passed without any opposition, its penalty structure does not reflect any obvious policy. The majority of the more serious felonies re-enacted in the Act, such as counterfeiting silver coinage, gilding copper coin with intent to pass it as silver, or handling or dealing with counterfeit coinage, were made punishable with transportation for life or any term not less than seven years, with the alternative of imprisonment for four years. However, the offence of impairing or lightening silver or gold coinage with intent to pass it as current coin was made punishable with transportation for any period between seven and fourteen years with the alternative of three years imprisonment. Uttering counterfeit coinage remained a misdemeanour punishable with imprisonment for one year, or two years if the offender was found in possession of further counterfeit coinage. Counterfeiting copper coinage, although a felony, was made punishable with transportation for any period up to seven years, with the alternative of two years imprisonment.

The lack of any general policy in the allocation of non-capital penalties at this time is perhaps most strikingly illustrated by comparison of the penalty structure of the Post Office Act 1837[1] with that of the various statutes of the same year dealing with larceny and related offences. The formula of transportation for any period from seven years to life was removed from several larcenous offences[2] by 7 W. 4 and 1 Vic. c.90 and replaced by transportation for from ten to fifteen years; but the 'seven years to life' formula was applied in the Post Office Act to a series of offences affecting the Post Office, including stealing and embezzling letters, their contents, or mailbags, and receiving such property knowing it to be stolen.[3]

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1 7 W. 4 and 1 Vic. c.36.

2 Breaking into certain buildings with intent to steal; stealing goods from a vessel.

3 7 W. 4 and 1 Vic. c.36 ss.26, 27, 28, 30, as explained by s.41.

The Criminal Law Commissioners

A detailed analysis of the structure of non-capital punishments in English criminal law, and proposals for their rationalisation, were made by the Commissioners on the Criminal Law in the course of their extended efforts to produce a draft code of the criminal law. The Commissioners were appointed in 1833 to "digest into one statute all the statutes and enactments touching crimes, and the trial and punishment thereof, and also to digest into one other statute all the provisions of the common or unwritten law touching the same ...". Their initial task did not include revision of the law governing punishments, but in their first report they drew attention to the close connection between the form of the substantive criminal law and the control of the sentencing process. "Legal definitions of offences are frequently of so large a description, and the criminal acts they include differ so widely in the mischief they occasion to society, that, without a definite scale, marking different degrees of criminality, appropriate punishments cannot be previously defined ... this imperfection can only be diminished by defining different degrees and aggravations of offences, and annexing to them punishments, which shall, after allowing a discretionary latitude to be exercised by the court within certain limits, be carried into execution".[1] The Commissioners went on to observe "that the law, in the assignment of punishments, often exhibits a remarkable degree of inconsistency. This has apparently arisen in most instances from the circumstances that new statutes have been passed, without sufficient reference to the antecedent state of the criminal law."

These preliminary comments introduced the themes which occupied the attention of the Commissioners in their discussions of the law of punishment in their Second, Fourth and Seventh Reports - the illogicality of the existing penalty structure,[2] the problem of determining the proper scope for judicial discretion in awarding punishment, and the attempt to construct a scale of punishment varying from the most trivial to the most severe, against which all offences could be measured.

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1 First Report (1834) p.32.

2 See in particular Seventh Report, pp.97 et seq.

Much of the Commissioners' thinking on the question of the proper scope of judicial discretion in sentencing in general can be traced to their analysis in the Second Report of the operation of judicial discretion under capital statutes, by which judges had enjoyed for nearly two centuries effective power of life or death in selecting convicts for execution or recommendation for conditional pardon. The existence of extensive and virtually unregulated discretion was vigorously criticised on several grounds.[1] It was argued that excessive discretion introduced a high degree of uncertainty into the application of the law and thereby undermined its deterrent effect: "it is of the very essence of a law that its penalties should be definite and known, how else are they to operate on the fears of offenders, or to afford a practical guide to conduct?"[2] Too broad a discretion resulted in arbitrary and inconsistent decision-making: the award of punishment "must necessarily be subject to variations, depending on the peculiar notions of policy entertained by different individuals, or their firmness and resolution of mind ... discrepancies such as these are notoriously the subjects of observation and anxious study on the part of those whose fate may depend on them ... peculiarities are observable which sometimes are the foundation of a general reputation."[3] Excessive discretion further gave rise to the use of criteria which were unspecified in the law and often unrelated to the overt object of the legislation; the existence of such "collateral considerations" weakened the deterrent effect of the law and was fundamentally unjust to the prisoner, who was "punished without due warning."[4] Finally, the facts on which the exercise of discretion depended, being collateral to the issue of guilt, were not established in accordance with the basic principles of criminal procedure, and the prisoner was effectively denied the protections which the law purported to afford him. "It is an ancient and well known rule of law, that a man shall not be punished for

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1 The arguments substantially coincide with those of Romilly, as expressed in his *Observations on the Criminal Law of England as it relates to Capital Punishments* (1810).

2 Second Report (1836) p.24.

3 Ibid., p.25.

4 Ibid., p.26.

a crime which is not clearly alleged against him ... if it be right so to relax the rigour of that law as to execute but a few of those who fall within its scope, it is also essential to justice ... to provide that no offender should suffer without due warning, or in respect of any charges which are not alleged and proved against him."[1]

These arguments against the existence of a wide judicial discretion in the allocation of the death penalty clearly informed the Commissioners' views on the proper scope of judicial discretion in relation to the secondary punishments of transportation and imprisonment. Excessive discretion in this context was also claimed to diminish the deterrent effect of the law, and lead to inconsistency. Many statutes allowed "a most inconvenient latitude of discretion";[2] it was essential to establish a more precise statutory system of secondary punishments under which there would remain a residual discretion to the judge "within proper limits" to mitigate the penalty "with a view to the condition and circumstances of offenders."[3] The view that judicial discretion in sentencing should not be unrestricted was reiterated in the Fourth Report published in 1839, after the enactment of the legislation removing the death penalty from the majority of the offences to which it had earlier applied. "All that human wisdom can effect in applying gradations of punishment is to distinguish crimes into classes properly defined, and adapted as nearly as possible to the different degrees of guilt, with power to the judge, within certain limits, to adapt the punishment still more precisely to the guilt of the offender."[4]

This approach, derived directly from Beccaria,[5] was substantially reiterated in the Commissioners' Seventh Report, a sophisticated essay which marked the conclusion of their general discussion of this aspect of the criminal law. The primary conflict lay between increased certainty in the application

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1 Second Report (1836) p.27.

2 Ibid., p.37.

3 Ibid., p.36.

4 Fourth Report (1839) p.viii.

5 See ibid., p.vii.

of the law, which would enhance its deterrent effect, and the need to match punishment to the gravity of the offence and the offender's responsibility with a high degree of precision. "Uncertainty greatly diminishes the apprehension of future evil and therefore tends to the necessity of imposing a larger measure of punishment than would otherwise be necessary to produce the same degree of restraint", it is argued, and "uncertainty in respect of the quantum of punishment necessarily arises from allowing the punishment to depend either wholly or to a great extent on mere individual discretion."[1] On the other hand, "fixed and peremptory punishments" were not acceptable as "the degrees and shades of guilt are infinite, and it really rarely happens that a crime defined either simply or with aggravations does not admit of varieties which require distinction in respect of punishment."[2] The solution was to prescribe by legislation a range of penalties for each offence "leaving the various innumerable intermediate cases which cannot be provided for by any set definitions, to the exercise of judicial discretion."[3] This approach compromised the benefits of certainty of punishment; judicial discretion in sentencing was an unfortunate necessity, and "endeavour ought to be made to confine the mischief within the narrowest practicable limits." To allow more scope to discretion than was strictly necessary was "an evil, because a risk of abuse or mistake is incurred without any counteracting benefit." Even without the risk of abuse, the demand of certainty would "evince the necessity for confining the exercise of such discretion within reasonable limits."[4]

The central theme of the Commissioners' efforts was the construction of a graduated scale of punishments by reference to which all offences could be evaluated. The idea emerges in the concluding paragraphs of the Second Report where the Commissioners, having mentioned the anomalies in the structure of secondary punishments which already existed, proposed "a scale of punishments ... by which the different gradations of crime should be more distinctly marked

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1 Seventh Report (1843) p.92.

2 Ibid., p.94.

3 Ibid., p.94.

4 Ibid., p.94.

and settled according to some uniform system."[1] Such a scale would facilitate the adjustment of punishments to particular offences and "tend to preserve a greater degree of consistency in the measure of punishment than now exists." The theme is developed in the Fourth Report, which included a massive appendix setting out the whole of the criminal law as it appeared to exist in 1839, with offences classified according to their penalties. Leaving out death and various obsolete penalties, the appendix set out forty varieties of penalties for felony and ninety-six varieties for misdemeanour. Many of these varieties arose as a result of the multiplicity of the possible combinations of the conventional periods of transportation with those of the various alternative punishments, principally imprisonment, and fines. While some of the offences listed were contained in statutes of the sixteenth century and earlier, the overwhelming majority of the offences listed in the catalogue were contained in, or derived their penalty from, legislation enacted between 1827 and 1838.

The Commissioners gave, as an example of the casual way the penalty structure had been evolved, the history of the punishment for perjury. Originally the offence was punishable under 5 E. c.9 with six months imprisonment, a fine of £20, or to have both ears nailed to the pillory. The pillory having been abolished for perjury in 1837, it was thought that no adjustment had been made to the scale of the remaining penalties which, in the view of the Commissioners, were "wholly insufficient to repress the commission of the offence, or to mark its enormity."[2] In fact the Commissioners appear to have overlooked 2 Geo. 2 c.25 s.2, which added seven years transportation or seven years confinement in the House of Correction to the original penalties for perjury or subornation. Although the illustration is therefore not strictly accurate, it is probably typical. The consequence of this approach of prescribing the penalties for offences was that "the degrees of guilt have been confounded, and the relative proportions of punishment destroyed."[3]

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1 Second Report, p.37.

2 Fourth Report (1839) p.xvi.

3 Ibid., p.xvi.

In the place of this chaos, the Commissioners proposed a scale of twenty classes of punishment, in descending order. By the Seventh Report the scale had grown to forty-five classes, descending from death with aggravations to a fine of £40. The Commissioners recognised that any scale of punishments was essentially arbitrary - "there is no real or ascertainable connexion or relation existing between crimes and punishments which can afford any correct test for fixing the nature or the extent of the latter, either as regards particular offences or their relative magnitudes."[1] The important objective was to avoid an excess of severity, which experience had shown to be likely to defeat the very objectives of the criminal law, and to maintain proper distinctions in the punishment of crimes of greater and less degrees of gravity. "As the great object of penal laws is to deter men from committing crimes by fear of consequences, it is essential that the crimes most odious and hurtful should be most distinctly pointed out and prohibited under the severest penalties. Penal laws which omitted to give such warning would not only be defective for want of adaptation to effect the object for which they were made, they would fail also in a collateral object which ought not to be forgotten, viz. their efficacy in a moral point of view to throw the highest degree of odium upon such crimes as are attended with the most dangerous consequences to the peace and happiness of society."[2] So as far as possible such distinctions should be expressed in legislation; to allow them to operate in the context of judicial discretion was both unjust to the offender and ineffective in terms of general deterrence. Legislative prescription of aggravating factors which would justify an enhanced sentence was particularly important in relation to offences triable at Quarter Sessions; "if the law lay down no rules for the just apportionment of punishments to the real magnitude of offences, it is vain to expect that fluctuating bodies, such as magistrates in the inferior courts, should frame any for their own guidance."[3]

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1 Seventh Report (1843) p.92.

2 Ibid., p.94.

3 Ibid., p.100.

The Commissioners' policy of constructing a carefully graduated scale of punishments, allowing a restricted scope for judicial discretion, is exemplified in the forty-five classes of punishments suggested in the Chapter of Penalties appended to the Seventh Report and forming part of its proposed code of criminal law. While some of the established formulae (such as transportation for life, or any period not less than seven years) are retained, the Commissioners' preference was for formulae imposing more restriction on the sentencer. Typical examples are transportation for any period between seven and fifteen, or seven and ten years, with various alternative terms of imprisonment. In twenty-four classes, imprisonment is the primary sanction, in periods descending from the maximum of three years, through two years, eighteen months, one year, six months, to the lowest maximum of three months; various minimum sentences, and alternative fines or corporal punishment, are provided in combination with each maximum period. Thus two years imprisonment came either with the additional power to order a male offender to be whipped, or the power to impose as an alternative or substitute an unlimited fine, or a fine not exceeding £500, or with no alternative fine. The various classes were to be deemed to be arranged in descending order of severity, and each offence in the code was to be assigned to its appropriate class.

The chapter "On Punishment" in the Seventh Report of the First Commissioners was their last extensive discussion of the problem of designing a legislative structure for sentencing. The subsequent Commissioners adopted the basic scheme of a scale of penalties arranged in classes to which offences would be variously allocated, but varied the details. The forty-five classes proposed in the Seventh Report were reduced to thirteen by the Second Commissioners in their Second Report (1846), which omitted some of the classes relating to minor penalties and amalgamated several of the other classes.[1] By the Third Report (1847) the number of classes had grown again to thirty-one, but in the Fourth Report of the Second Commissioners the number was reduced to eighteen, by omitting some classes which applied only to single offences and incorporating general provisions on the power to order corporal punishment.

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1 E.g., the Seventh Report's classes 15, 16 and 17, providing transportation for a fixed term of seven years with various alternatives, became class 6 of the Second Commissioners' scheme, allowing transportation for a fixed term of seven years with the single alternative of imprisonment for up to three years.

The proposal of the Commissioners for a single scale or code of penalty provisions independent of the definition of offences was not translated into legislation, although the Commissioners' arguments clearly influenced the thinking of the draftsmen of the 1861 legislation. One specific proposal, made in the Seventh Report of the First Commissioners, which did have considerable practical importance was that maximum terms of imprisonment, whether authorised as alternatives to transportation in felony, or as the primary sanction in misdemeanour, should not normally exceed three years. The Commissioners rejected the view, exemplified by 7 and 8 Geo. 4 c.29 that the maximum alternative sentence of imprisonment should vary in accordance with the maximum authorised term of transportation, and proposed that in all cases where imprisonment was provided as an alternative to transportation the maximum should be three years, irrespective of the maximum permissible term of transportation. It was essential to avoid "such chasm as might exclude the infliction of any such intermediate degree of punishment as the exercise of discretionary authority might require" and preserve "a continuity in the scale of punishment between two extremes."[1] The term of three years was chosen - from among the variety of formulae for which there was by now legislative precedent - because it had been favoured in the most recent legislation affecting sentencing.[2] The Commissioners would have preferred a longer maximum sentence of imprisonment but felt bound to conform to the most recent legislative model.[3]

A similar normal maximum term of imprisonment was suggested for misdemeanours. The Commissioners were opposed to the extensive sentencing discretion conferred on the judiciary by the common law and by many statutes creating misdemeanours. Their arguments were analogous to those deployed in the Second Report against excessive judicial discretion in the application of the death penalty. "So indefinite and indiscriminate an extent of

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1 Seventh Report (1843) p.103.

2 7 W. 4 and 1 Vic. cc.85, 87, 90.

3 Seventh Report (1843) p.103.

punishment as may now be inflicted is not sanctioned by any principle of criminal jurisprudence. The denunciation is too vague and uncertain to be effectual in inspiring terror; any excessive exertion of the power would be mischievous, as tending to obstruct the due course of justice; therefore this state of the law probably operates less on the fears of the ill-disposed than the threat of a moderate but defined punishment would do if attended with greater certainty as to its infliction: it tends to confound the different gradations of guilt ... which ought to be marked by the infliction of corresponding degrees of punishment."[1] Again the Commissioners proposed a general limit of three years, "in deference only to the recent enactments of the legislature." Four years would have been preferable in their view, but sentences in practice rarely exceeded three years. The limitation was not expected to cause inconvenience.[2]

The Commissioners' proposal to fix a general maximum term for imprisonment, wherever it occurred, was eventually adopted in the 1861 legislation with respect to the statutory offences then consolidated. The period eventually chosen was two rather than three years. It remained a legislative convention until the assimilation of penal servitude to imprisonment in 1948. The Commissioners' proposal to limit the penalty for common law misdemeanours has never been acted upon.

Penal servitude

By the middle years of the nineteenth century a sentence of transportation had acquired many meanings. For some convicts it meant a term (usually shorter than the term of transportation to which they had been

1 Seventh Report (1843) p.104.

2 Ibid., p.105.

sentenced) in one of the newly-built penitentiaries.[1] Others would spend some years aboard the hulks moored on the Thames and other rivers, theoretically awaiting shipment to whichever part of the Antipodes was currently prepared to receive convicts, before being pardoned and released in England.[2] For those convicts who did reach Australia, the experience of transportation meant many different things. It was claimed in 1838 that "transportation is not a simple punishment, but rather a series of punishments embracing every degree of human suffering, from the lowest, consisting of a slight restraint on the freedom of action, to the highest, consisting of long and tedious tortures."[3] The official view that a term of actual transportation to the

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1 The earlier legislation (52 Geo. 3 c.44 s.15 (1812), 56 Geo. 3 c.63 s.13 (1816)) applying to the first penitentiary at Millbank contained a precise scale of periods of detention under varying terms of transportation; offenders under sentence of transportation, or pardoned on condition of transportation, could be "removed to and imprisoned within the said penitentiary house for and during any term not exceeding five years, in case such offender shall have been sentenced to be transported for seven years only; for any term not exceeding seven years, in case he or she shall have been so sentenced for fourteen years; and for a term not exceeding ten years, in case such offender shall have received sentence of transportation for life, or shall have been capitally convicted." The later statute authorised the detention of persons under sentence of transportation in Pentonville (5 and 6 Vic. c.29 (1842)) but left the term of confinement to the discretion of the Home Secretary, and the legislation affecting Millbank was subsequently brought into conformity (6 and 7 Vic. c.26 (1843)).

2 Various legislation authorising the detention of convicts in vessels moored on the Thames or elsewhere was passed from time to time from 1776 onwards; see in particular 5 Geo. 4 c.84 (1824).

3 Report of the Select Committee on Transportation (1838)(The Molesworth Committee). "A criminal sentenced to transportation may be sent to New South Wales, or to Van Diemen's Land, or to Bermuda, or even to Norfolk Island; in each colony a different fate would await him; his chance of enduring pain would be different. In New South Wales, or even under the severer system of Van Dieman's Land, he might be a domestic servant, well fed, well clothed, and well treated by a kind and indulgent master; he might be fortunate in obtaining a ticket of leave, or a conditional pardon, and finish his career by accumulating considerable wealth. Or he may be the wretched praedial slave of some harsh master, compelled by the lash to work, until driven to desperation, he takes to the bush, and is shot down like a beast of prey; or for some small offence is sent to work in chains, or to a penal settlement, where having suffered till he can endure no longer, he commits murder in order that he may die. Between these extremes of comfort and misery, there are innumerable gradations of good and evil, in which the lot of a convict may be cast." Ibid., p.xx.

Antipodes was less severe than the equivalent term served in confinement in England[1] was reflected in the practice of releasing those offenders who were otherwise detained in the United Kingdom after approximately half the term of their sentence of transportation had elapsed.[2] This practice evolved administratively through the use of the prerogative of pardon and had no statutory basis. The terms of convicts who were actually transported were also frequently shortened, either by the grant of tickets of leave or by the use of conditional pardons.[3] Whether the convict sentenced to transportation for a particular term of years stayed in England or went to Australia, the term of years pronounced in his sentence rarely bore any definite relationship to the actual period of time during which he was subject to restraint in one form or another.

The system of transportation had been criticised frequently since its earliest days. The forced interruption following the loss of the American Colonies brought the question of non-capital penalties to the forefront of public attention, and various schemes were proposed[4] and some enacted.[5] Despite the vigorous criticism of transportation, both as a penal measure and an incident of colonisation, short-term expediency prevailed and transportation to Australia began in 1787. Fifty years later the system of transportation was comprehensively reviewed by the Molesworth Committee and condemned without qualification. "The two main characteristics of transportation, as a punishment, are inefficiency in deterring from crime, and remarkable efficiency not in reforming, but in still further corrupting those who undergo the punishment; these qualities of inefficiency for good and efficiency for evil, are inherent in the system, which is therefore not susceptible of any satisfactory improvement; and lastly ... there belongs to the system extrinsically from its strange character as a punishment,

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1 See the evidence of H. Waddington to the Select Committee on Transportation (1856) paras. 135-137.

2 Ibid., para. 124.

3 See Shaw, *Convicts and the Colonies*, pp.82-85.

4 Ibid., ch. 2.

5 Principally the Hard Labour Act (16 Geo. 3 c.43).

the yet more curious and monstrous evil of calling into existence, and continually extending societies, or the germs of nations most thoroughly depraved, as respects both the character and degree of their vicious propensities."[1] In place of transportation, the Committee recommended that penitentiaries should be established either in the United Kingdom, or elsewhere, where convicts could be held to hard labour for periods rather shorter than the conventional sentence of transportation. The existing informal systems of shortening the duration of confinement or transportation would be systematised as "a powerful means of influencing the mind of the convict."[2]

Despite the impetus which the Molesworth Committee report gave to the opponents of transportation, transportation continued with increased vigour and seventeen thousand convicts were transported to Van Diemen's Land between 1840 and 1845. The problems caused by this practice were such as to stimulate the settlers to vigorous opposition to further transportation, and by 1852 only Western Australia was available as an outlet for transported convicts.[3] Between 1848 and 1852 both the absolute number of persons sentenced to transportation, and the proportion of those sentenced who were actually transported, declined fairly steadily.[4] The first Penal Servitude Act, which took effect in August 1853, did little more than recognise a situation which had evolved by administrative practice. The Act provided that no person should be sentenced to transportation for any term less than fourteen years, and persons previously liable to be sentenced to transportation for terms of less than fourteen years would be sentenced instead to penal servitude. The Act provided a scale by which terms of transportation were to be converted into terms of penal servitude; seven years transportation was equivalent to four years penal servitude, ten years transportation to six years penal servitude, and fifteen years transportation equivalent to either eight years penal servitude (where the term of transportation was a maximum) or ten years (where it was a minimum).[5] Where there

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1 Report of the Select Committee on Transportation (1838) p.xli.

2 Ibid., p.xlv.

3 See Shaw, chs. 14 and 15.

4 Evidence of Waddington to Select Committee on Transportation (1856) para. 16.

5 16 and 17 Vic. c.99.

was power to impose transportation for fourteen years or more, the court was given discretion to sentence either to transportation or to penal servitude for the same term. Persons sentenced to penal servitude were liable to be confined in any prison or place of confinement in the United Kingdom (including the hulks) or in any part of Her Majesty's dominions beyond the seas "and such person may during such term be kept to hard labour and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined." The main practical change made by the Act, other than the abandonment of the use of the word "transportation" in relation to the shorter terms where it had become effectively a legal fiction, was to apply a system of release on licence to convicts who would now be released in England without transportation. Previously, convicts released in England either from the penitentiary or from the gaols or hulks under conditional pardon had been released absolutely; the introduction of release on licence, based on the procedure of tickets of leave developed in Australia, was intended to provide some measure of control over discharged convicts; "The power of revoking their licence, without assigning any course whatever, at the pure pleasure of the Crown, would hang in terrorem over the unfortunate persons, and would hold the very strongest possible inducement to conduct themselves properly, and to abstain from any violation of the law."[1]

The working of the 1853 legislation was reviewed by Select Committees of both Houses in 1856. The Commons committee received evidence that the practice of giving licences had been confined to convicts already under sentence of transportation, and that it was not proposed to give licences to persons under sentence of penal servitude. Home Office policy was to release persons sentenced to penal servitude absolutely at the expiration of the full term of the sentence.[2] The Committee wished to introduce an element of indeterminacy into the sentence of penal servitude primarily as a means of enhancing discipline

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1 Waddington, ibid., para. 20.

2 Waddington, ibid., para. 217.

in the convict prisons (formerly the penitentiaries). The Committee accordingly recommended that every sentence of penal servitude should involve a definite period of imprisonment with hard labour, followed by a further period "capable of being abridged by the good conduct of the convict himself." In order to allow scope for the operation of this proposal, it was further recommended that the terms of penal servitude should be "changed and lengthened, so as to be identical with the terms of transportation for which they are respectively substituted."[1]

This recommendation was followed in the second Penal Servitude Act 1857[2] which abolished all sentences of transportation and provided that wherever a person was liable to be sentenced to transportation he might now be sentenced to be kept in penal servitude for the same length of time. Persons sentenced to penal servitude were liable either to be detained in the United Kingdom in accordance with the 1853 Act, or "conveyed to any place or places beyond the seas" as if they had been sentenced to transportation. The Act reduced the minimum term of penal servitude to three years and provided that wherever a sentence of seven years transportation might previously have been passed, the court might at its discretion pass a sentence of penal servitude for not less than three years.

The Consolidation Acts

Contemporaneously with these changes in the legislation governing penal practice, determined efforts were being made to consolidate the substantive criminal law. The labours of the Criminal Law Commissioners culminated in 1848 with the publication of a draft bill containing "an entire digest of the written and unwritten law relating to the definition of crimes and punishments."

1 Report of the Select Committee on Transportation (11 July 1856) p.iii.

2 20 and 21 Vic. c.3.

The bill[1] was introduced into the House of Lords the same year but was not proceeded with. Four years later Greaves, eventually draftsman of much of the 1861 legislation, and Lonsdale were instructed by the Lord Chancellor to prepare fresh bills for the codification of the criminal law, to be based on the reports of the Criminal Law Commissioners and incorporating the relevant statute and common law.[2] Greaves and Lonsdale drafted a bill dealing with Offences against the Person which was introduced in the House of Lords in 1853.[3] The bill contained its own schedule of penalties, consisting of ten classes. These were death, transportation for life or any term not less than seven years, transportation for fifteen years or any term not less than seven years, and transportation for seven years (in each case with various alternative provisions relating to imprisonment and fine). The last five classes provided imprisonment for terms not exceeding three years, two years, eighteen months, one year, and six months respectively, in each case with the alternative of a fine at discretion. Despite the existence of this schedule the bill repeated the penalty in the definition of each offence; for example, clause 13 read "Whosoever shall maliciously cause any bodily harm to any woman, being his wife, or cohabiting with him as his wife, shall incur the penalties of the sixth class: that is to say, imprisonment for any term not exceeding three years, or fine, at discretion, or both, and with or without sureties to keep the peace and be of good character."

The Select Committee of the House of Lords disapproved this scheme. The schedule setting out various classes of punishments to be allocated by reference to each offence was removed and the Committee amended the Bill in accordance with the traditional system of specifying the punishment for each

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1 H.L. Bill 131, ordered to be printed 12 May 1848. The Bill proposed 31 classes of punishment. An amended version of the Bill proposing 18 classes of punishment was ordered to be printed on 6 June 1848 (H.L. Bill 162). This Bill was reintroduced in 1850 in substantially the same form (H.L. Bill 20, ordered to be printed 8 February 1850). No progress was made on any of these occasions.

2 Greaves, *The Criminal Law Consolidation Acts* (1861) Preface p.xiv.

3 H.L. Bill 58, ordered to be printed 10 February 1853.

offence in association with its definition. This change marked the end of the proposal for a separate scale of penalties which had been the central feature of the Criminal Law Commissioners' solution to the problem of systematising the legislative structures of penalties.[1] Encouraged by the general reception given to their work by the Lords' Select Committee,[2] Greaves and Lonsdale proceeded with the drafting of a series of bills designed to constitute a complete criminal code. Early in 1854 they completed seven bills based to a considerable extent on the reports of the Commissioners. The first two of these bills, dealing with Offences against the Person and Larceny, were circulated to the judges and their observations were subsequently printed,[3] followed by the replies of Greaves and Lonsdale.[4] The opposition of the judges to the plan for codification, both in principle and in detail, was such that the bills were not introduced and the scheme to codify the criminal law came to an end.[5]

Later the same year Commissioners were appointed to consider the consolidation of statute law and in 1856 they resolved to consolidate the whole of the statutory criminal law. Greaves was appointed to the Commission and took an active part in the preparation of a further eight bills. The object of these bills was simply to consolidate the existing statutory criminal law without amendment.[6] The bills were introduced in 1856 in the House of Lords but made

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1 The Bill as amended is printed as H.L. Bill 306 (1853). The problem of establishing a penalty structure in this Bill was undoubtedly complicated by the fact that the first Penal Servitude Act (16 and 17 V. c.99, below) was passing through Parliament simultaneously.

2 See Greaves, ibid., p.xv.

3 See *Copies of the Lord Chancellor's letters to the Judges and of their answers respecting the Criminal Law Bills of the Last Session*, ordered to be printed by the House of Commons, 12 June 1854.

4 Greaves and Lonsdale, *A Letter to the Lord Chancellor* ... (1854).

5 The judges were opposed to the principle of codification, which necessarily involved the repeal of common law offences (see e.g., answers of Chief Baron Pollock, Baron Parke and Baron Alderson). These objections were supplemented by a very large number of detailed criticisms of the terminology of particular provisions. There was no obvious interest in the penalty structure proposed in the bills.

6 See e.g., Offences against the Person Bill, 1856 (21 July 1856, 282). This Bill preserved the existing penalty structure, including unlimited imprisonment for existing misdemeanours which had no fixed maximum penalty, but incorporated the effect of the first Penal Servitude Act 1853.

no significant progress. The strong objections raised by Greaves to the principle of consolidation without amendment, which he argues with force in the preface to his edition of the 1861 statutes, led to the relaxation on the restrictions imposed on the draftsmen.[1] The approach now adopted was to consolidate the statute law but to incorporate in the process such improvements of detail as appeared to be necessary. By 1857 a further bill dealing with Offences against the Person had been prepared, based primarily on the consolidation bill of the previous year but including various amendments derived from the earlier draft legislation prepared by Greaves and Lonsdale as part of the projected code. Bills dealing respectively with larceny, malicious damage to property, forgery, coinage offences, and certain other matters were drafted in a similar way. These bills passed the House of Lords but did not proceed in the Commons beyond the first reading.[2] The bills were revised again and at one stage an attempt was made to revive the idea of a separate schedule of classes of punishments, as proposed by the Criminal Law Commissioners. The proposal was to enact the schedule as part of a separate Punishment Act, which could then be incorporated by reference in all other criminal legislation. Greaves took the view that as the Lords Select Committee had been opposed to the incorporation of a separate schedule of punishments in his first Offences against the Person Bill of 1853, there was no chance of such a ill passing into law.[3] The principal bills were accordingly not introduced in this form, but the Punishment Bill was introduced in the Commons in 1859 in conjunction with two other bills dealing with Personation and Offences against Public Justice respectively.[4] The principal bills, in

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1 Greaves, ibid., pp.xxiii-xxvi.

2 Greaves, ibid., p.xxxi.

3 Greaves, ibid., p.xxxii.

4 See Punishment Bill, 1859 (H.C. Bill 26).
The Bill proposed eight classes of punishment, identified by letters rather than numbers, and incorporated the effects of the second Penal Servitude Act, 1856 (which had abolished all sentences of transportation and also the scale of reductions of sentences of transportation contained in the first Penal Servitude Act, 1853). The terms of penal servitude proposed in this legislation were therefore equivalent to the terms of transportation provided by the earlier legislation.

the form in which they were introduced in 1859, stated a maximum punishment in relation to each individual offence and included a general clause specifying what alternative punishments might be imposed.[1] None of the bills made any progress. After further revision the bills were re-introduced in the Lords and passed, only to fail to pass the Commons due to lack of time.[2] The bills were re-introduced in the Commons in 1861 and suffered several amendments before passing. Difficulties following the sudden death of the Lord Chancellor led the Government to pass the bills through the Lords without any attempt to remove the amendments made in the Commons, much to Greaves' disappointment.[3]

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1 See e.g., Offences against the Person Bill, 1859 (H.C. Bill 111). This Bill generally appointed a maximum term of penal servitude or imprisonment (e.g., clause 23 read "Whosoever shall unlawfully and maliciously ... burn, maim, disfigure, disable or do any grievous bodily harm to any person, shall on conviction thereof be liable to be kept in penal servitude for life") and contained a general provision (clause 69) that "Whenever any person shall be convicted of any offence under this Act punishable with penal servitude for life or for any term greater than three years, the court may in its discretion, sentence the offender to be kept in penal servitude for the term hereinbefore assigned this offence, or for any other term of penal servitude less than such a term, but not less than three years, or to be imprisoned for any term not exceeding three years ...". The Bill also proposed a general maximum punishment of three years imprisonment for misdemeanours for which no specific maximum penalty was otherwise provided (clause 69).

2 See Offences against the Person Bill, 1860 (H.C. Bill 148). By this time Greaves' scheme to state merely the maximum term of penal servitude or imprisonment in each section, and include a general section empowering the court to impose lesser alternatives, had been dropped. The Bill stated the details of the penalty in full in relation to each offence, e.g., clause 52 read "Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

3 See Greaves, ibid., pp.xxxvi-xl.

The legislation of 1861 consisted of "chiefly re-enactments of the former law, with amendments and additions."[1] It was not intended to constitute a criminal code incorporating principles new to the criminal law. While the enactments owe a great deal to the work of the Criminal Law Commissioners, they do not reflect the views of the Commissioners on the shape of the penalty structure and the scope of judicial discretion in sentencing. Unlike the Commissioners, Greaves was in favour of relatively broad definitions and a wide measure of judicial discretion in sentencing. His preference was for definitions "framed in such general terms as to include all cases of the same kind within it. This is the simplest and perhaps the best course; and it leaves the judgment of the court entirely unfettered as to the punishment in every case. It is so perfectly impossible to foresee all the circumstances that may happen to mitigate or aggravate any offence, that it is very advisable to leave a very wide discretion to the court."[2] He was unable to construct the Acts entirely on this principle; he would have preferred, for instance, to have avoided the many specific varieties of attempted murder mentioned in sections 11 to 14 of the Offences against the Person Act 1861, including them all in a single general section dealing with all analogous offences. He preferred the sentencing structure evident in common law offences such as manslaughter, in which "every offence of the class, however aggravated or venial, is included ... and the court has a discretion as to the punishment, which ranges from penal servitude for life to the lowest possible fine."[3] Like the Criminal Law Commissioners, Greaves would have restricted this broader discretion to judges and limited more carefully the powers of Quarter Sessions. He justified his unsatisfied wish to include all forgeries within a single definition punishable with penal servitude for life, rather than the many definitions with varying punishments which the Forgery Act 1861 included, by pointing out that "as no forgery can be tried by any court of Quarter Sessions, there is no reason why the same wide discretion as to punishment should not be given to the court."[4]

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1 Greaves, ibid., p.xi.

2 Greaves, ibid., p.xli.

3 Greaves, ibid., p.xlii.

4 Greaves, ibid., p.xliii.

As the object with which the 1861 enactments were prepared was consolidation rather than codification, they incorporated a penalty structure which was essentially that established in the reforming legislation enacted between 1827 and 1838, but substituting penal servitude for the now defunct sentence of transportation in accordance with the Penal Servitude Act 1856. Despite the many and vigorous criticisms of the disorderly nature of the penalty structure of this legislation made by the Criminal Law Commissioners, Greaves was prevented by opposition in both Houses from achieving any significant degree of rationalisation. His improvements to the penalty structure were limited to minor amendments. Periods of fifteen years penal servitude were reduced to fourteen years so as to produce some degree of uniformity with the preponderance of legislation which had remained loyal to the seven times table preferred in 1717, and a general maximum sentence of imprisonment of two years was established throughout the Acts, whether as an alternative to penal servitude or as the primary sanction.[1] The Lords Select Committee had preferred a period of three years, but the Select Committee of the Commons reduced the maximum period of imprisonment to two years "on the ground that so long a sentence of imprisonment as three years would never be awarded."[2]

Greaves considered the penalty structure of the 1861 legislation its least satisfactory feature. "I have long wished that all punishments for offences should be considered and placed on a satisfactory footing with reference to each other, and I had at one time hoped that that might have been done in these acts. It was however impracticable ... The truth is, that whenever the punishment of any offence is considered, it is never looked at, as it always ought to be, with reference to other offences and with a view to establish any congruity in the punishment of them, and the consequence is that nothing can well be more unsatisfactory than the punishments assigned to different offences."[3]

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1 The Criminal Law Commissioners had preferred a longer period, possibly four years, but proposed three years in deference to the pattern adopted in statutes of the late 1830's; above, p.26.

2 Greaves, ibid., p.xlv.

3 Greaves, ibid., p.xlv.

The process by which the penalty structure of the 1861 legislation evolved can be illustrated by an examination of those sections of the Offences against the Person Act 1861 which define offences and assign penalties to them. The statutes consolidated in the Offences against the Person Act covered a wider range of time than those consolidated in most of the other consolidation acts, spanning a period from 1820 (1 Geo. 4 c.4), which became section 35, up to 1859 (23 and 24 Vic. c.8) which provided sections 23 and 24 of the consolidation. Among the more important statutes included in the consolidation were 9 Geo. 4 c.31, the first Offences against the Person Act, which consolidated much of the earlier law and removed the death penalty from certain offences; 7 W. 4 and 1 Vic. cc.85 and 89, which continued the process of repealing capital provisions; a number of statutes creating new offences, including 9 and 10 Vic. c.25, dealing with the use of explosives, 14 and 15 Vic. c.19 (endangering railway passengers), 12 and 13 Vic. c.76 (procuring sexual intercourse with a woman under the age of 21 by false representations) and 23 and 24 Vic. c.8.

For the most part, the 1861 Act reproduces the penalty structure of the earlier statutes, incorporating amendments consequent upon the Penal Servitude Act 1856, and making a few minor adjustments to produce some appearance of consistency. A number of significant changes were, however, made. The death penalty was removed from several of the remaining offences to which it still applied, including wounding with intent to murder, and damaging a ship with intent to murder; these two offences became punishable with penal servitude for any period from three years to life with the alternative of two years imprisonment. (This was the equivalent in terms of penal servitude under the Penal Servitude Act 1856 of transportation for any period from seven years to life, first introduced in 1812 as a formula to be used on the repeal of the capital statute.) With one exception, <u>minimum</u> terms of penal servitude were fixed at three years, irrespective of the minimum period of transportation stipulated in the previous statute. Thus wounding with intent to do grievous bodily harm, previously punishable under 7 W. 4 and 1 Vic. c.85 s.4 with transportation for any period from fifteen years to life with the alternative of three years imprisonment, became punishable under s.18 of the 1861 Act with penal servitude for any period from three years to life with the alternative of two years imprisonment (two years

being the maximum term of imprisonment, whether as an alternative sanction or as the primary sentence for any offence under the Act). Other offences previously punishable with transportation for any period from fifteen years to life which became punishable with penal servitude for any period from three years to life included causing bodily harm by an explosion (s.28, previously punishable under 9 and 10 Vic. c.25 s.3), causing an explosion with intent to cause grievous bodily harm (s.29, previously 7 W. 4 and 1 Vic. c.85 s.5) and procuring a miscarriage (s.58, previously 7 W. 4 and 1 Vic. c.85 s.6). The only case where the minimum term of penal servitude was fixed above the level of three years was that of buggery, a capital offence until the passing of the Act, which under s.61 was made punishable with the minimum of penal servitude for life or any period not less than ten years (there was no alternative penalty of imprisonment). In a few isolated cases there were significant changes in maximum terms of penal servitude; thus the offence of placing gunpowder near a building, punishable under 9 and 10 Vic. c.25 s.6 with transportation from fifteen years to life, became punishable as s.30 of the 1861 Act with penal servitude for a maximum of fourteen years. Conversely, attempting to administer poison with intent to murder, previously punishable with a maximum of fifteen years transportation under 7 W. 4 and 1 Vic. c.85 s.3, became punishable as s.14 of the 1861 Act with penal servitude for life or a period not less than three years. Other changes included the conferment of discretion on the court in cases of rape, which became punishable with penal servitude for any period from three years to life, in place of the previous mandatory transportation for life which had been substituted for the death penalty by 4 and 5 Vic. c.56 s.5. The same change was made in the penalty for the offence of unlawful sexual intercourse with a girl below the age of ten years.

Apart from these changes, the Offences against the Person Act 1861 largely followed the pre-existing penalty structure. Offences previously subject to a maximum of seven years transportation (such as child stealing and bigamy, both previously so punishable under 9 Geo. 4 c.31), were made punishable by penal servitude for any period from three to seven years.

The treatment of misdemeanours reflects the fact that the draftsman was more concerned with accurately reproducing the existing law than producing a coherent penalty structure. With a few exceptions, the 1861 Act adopts the term fixed under the earlier legislation, even though this meant that some misdemeanours attracted penal servitude and others only imprisonment. Thus malicious wounding, enacted as a misdemeanour punishable with three years imprisonment by 14 and 15 Vic. c.19 s.4 became s.20 of the new Act punishable with penal servitude for three years or imprisonment for two. The same applied to several other relatively recently enacted misdemeanours, including administering poison with intent to annoy (previously 23 and 24 Vic. c.8 s.2) and failing to provide for apprentices (previously 14 and 15 Vic. c.11 s.1). Where the existing misdemeanour was punishable with two years imprisonment, this limitation was generally carried forward into the 1861 Act. Thus endangering railway passengers, punishable under 3 and 4 Vic. c.97 s.15 with two years imprisonment, remained punishable with this term under s.44 of the 1861 Act. Assault on a constable, previously punishable with two years imprisonment under 9 Geo. 4 c.31 s.35, retained the same penalty under s.38 of the 1861 Act, as did assault in pursuit or any combination, previously 9 Geo. 4 c.31 s.25, now s.41 of the 1861 Act, and procuring sexual intercourse with a woman below the age of twenty-one by false pretences or false representations, originally enacted as 12 and 13 Vic. c.76 s.1 as a misdemeanour punishable with two years imprisonment. The draftsman exercised some discretion in cases of misdemeanours previously punishable at the discretion of the court. Thus setting a spring gun or man-trap, a misdemeanour created by 7 and 8 Geo. 4 c.18, became punishable with three years penal servitude or imprisonment for two years, as did unlawful sexual intercourse with a girl between the ages of ten and twelve years, previously punishable under 9 Geo. 4 c.31 s.17 as a misdemeanour. In other cases where there was no existing limitation on the court's discretion, the draftsman was content with two years imprisonment; examples are abduction of a girl under the age of sixteen, previously 9 Geo. 4 c.31 s.20, and indecent assault, previously punishable under 14 and 15 Vic. c.100 s.29.

As a result of this preference for consolidating earlier legislation rather than constructing a coherent new penalty structure, offences dealing with closely related subjects often had widely different maximum penalties primarily

because they were derived from different statutes enacted at different times and probably without much regard to the existing state of the law. Thus maliciously interfering with a railway with intent to endanger the safety of any person travelling on the railway was punishable with penal servitude for life, as was the offence of throwing objects at an engine or carriage on the railway with the same intent. Both sections originated in 14 and 15 Vic. c.19. However under section 34 of the 1861 Act anyone endangering the safety of any person conveyed on the railway by any unlawful act or wilful omission, but without the intent to endanger, was punishable with a maximum of two years imprisonment only, this offence having originated as a misdemeanour in 3 and 4 Vic. c.97 s.15. Similarly, unlawful sexual intercourse with a girl under the age of ten, which had been capital until 4 and 5 Vic. c.56 s.3, was punishable with penal servitude for life, while unlawful sexual intercourse with a girl between the ages of ten and twelve, a misdemeanour previously contained in 9 Geo. 4 c.31 s.17, was punishable with a maximum of three years penal servitude. The same large differences appeared in relation to wounding offences. By s.18, wounding with intent to do grievous bodily harm was punishable with penal servitude for life, having previously been transportable for life under 7 W. 4 and 1 Vic. c.85 s.4, while malicious wounding or maliciously causing grievous bodily harm, enacted as a misdemeanour punishable with three years imprisonment in 14 and 15 Vic. c.19, remained punishable under the 1861 Act with a maximum of three years penal servitude.

The third Penal Servitude Act

The penalty structure established by the 1861 legislation survived intact for only three years. Following the incidence of a number of violent robberies in London in 1862 a Royal Commission was appointed to inquire further into the workings of the Penal Servitude Acts. The Commission came to the view that while it was not the only factor, the recent changes in the penal system were partly responsible for the apparent increase in crime which had taken place between 1860 and 1863. The new system was a less potent deterrent than transportation: "penal servitude, under the present system, appears not to be sufficiently dreaded, either by those who have undergone it, or by the criminal classes in general ... crimes have even been committed, for the sole purpose of

obtaining the advantages which the offenders have supposed a sentence of penal servitude to confer."[1] The major cause of the "want of sufficient efficacy in the present system of punishment" was primarily attributable to "the shortness of the punishment generally inflicted upon convicts." The lengths of sentences being passed had diminished considerably over the previous three decades; "sentences of penal servitude for only three or four years are now generally passed for offences, for which, a few years ago, not less than seven years transportation would probably have been given, and which in general would have been visited with much heavier punishment." The deterrent efficacy of penal servitude was further diminished by "a striking inequality in the punishments inflicted, by different judges, for the same offences committed under similar circumstances." While some such inequality was inevitable, it tended to encourage criminals "to speculate on the chance of receiving, if convicted, the minimum of punishment ever known to be inflicted." The Commission expressed the view that on the whole "the discretion entrusted to the courts in this respect ... is larger than is expedient."[2] The main recommendation of the Commission was that short sentences of penal servitude should not be passed; it would be advisable to return to the previous term of seven years normally (but not invariably) the minimum term of transportation, and adopt this as the minimum term of penal servitude. Under the Commission's proposals such sentences would still be indeterminate; a convict would be able to gain his discharge from a sentence of seven years penal servitude after serving a little short of five years, as opposed to the two and a half years which a convict sentenced to three years penal servitude would normally serve.

One of the Commissioners, Lord Cockburn, then Lord Chief Justice, dissented entirely from the views of the majority of the Commission.[3] He discounted the importance of the recent apparent increase of violent robberies[4]

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1 Report of the Commissioners appointed to inquire into the operation of the Acts relating to Transportation and Penal Servitude (1863).

2 Ibid., para. 39.

3 Supra., Memorandum by the Lord Chief Justice.

4 "It may be that the panic produced in the metropolis during the last year by the prevalence of robberies with violence was disproportionate to the real state of the facts; the number of such cases may have been exaggerated; the offences, though numerous, may have been the work of a limited number of persons."

and placed little weight on the "alleged inequality in the sentences pronounced by different judges." This was no greater and no less than it always had been. Cockburn was opposed to the policy of extending the lengths of sentences and incorporating an element of indeterminacy. His answer was the opposite: shorter sentences of a more rigorous character. "In proportion as the severity of the punishment is increased, so may its duration be abridged." Consistent with this approach, which he claimed would be more efficacious in terms of general deterrence than that proposed by the majority of the Committee, Cockburn argued that the system of remission or licence should be abolished. "The sentence of the judge once pronounced, the punishment should be suffered for the full and entire period of the sentence."

The Commission recognised that their proposals would involve considerable amendment of the Criminal Law Consolidation Acts. Many offences under these Acts specified three years as the minimum term of penal servitude; in a smaller number of cases three years penal servitude was a maximum. As their proposals would involve a substantial increase in the maximum penalty for this second group of offences, the Commission suggested that the increase should be applied selectively after careful consideration. "It will be for Parliament to decide in which of these numerous crimes, the higher sentence of penal servitude now proposed as a minimum may, without undue severity, be imposed."

The recommendations of the Commission were not fully put into effect. Emergency action had already been taken in the form of the Security from Violence Act 1863 (more popularly known as the Garotters Act), empowering courts to order whipping in cases of robbery with violence, in addition to penal servitude. (Corporal punishment, other than death, had previously been for the most part limited to misdemeanour.) The Penal Servitude Act 1864 raised the minimum term of penal servitude from three years to five. The Act ignored the suggestion of the Commissioners that offences subject to a maximum term of three years penal servitude should be considered individually, and provided that in all such cases the maximum, and in fact the only, term of penal servitude would be five years. The Act further provided that where a person previously convicted of felony was convicted of an offence punishable

with penal servitude, the least sentence of penal servitude which could be awarded would be seven years.

One effect of the Penal Servitude Act 1864 was to distort further the already imperfect penalty structure of the 1861 legislation. Arbitrary differentials between existing maxima were in some cases exaggerated - thus the maximum sentence for procuring sexual intercourse with a woman under twenty-one by false pretences (Offences against the Person Act 1861, s.41) remained imprisonment for two years, while a maximum for unlawful sexual intercourse with a girl between the ages of ten and twelve years (s.51), previously three years penal servitude, increased to five years penal servitude. In other instances, differentials between offences were eroded as a result of the same process. The maximum penalty for administering poison with intent (Offences against the Person Act 1861, s.23) remained ten years penal servitude, while the maximum for the lesser offence of administering poison with intent to annoy (s.24) was increased to five years penal servitude. (This offence had been created only five years previously as a misdemeanour punishable by three years imprisonment; it became punishable with penal servitude in the 1861 Act only because the Select Committee in the Commons preferred a general maximum of two years imprisonment as opposed to the three years originally proposed; now the maximum term was increased by a statute whose object was to restore a level of penalties which had been reduced before this particular offence had been created.)

The second effect of the Penal Servitude Act 1864 on the penalty structure of the 1861 legislation was to open up a wide gap between the maximum term of two years imprisonment and the minimum term of five years penal servitude (or seven years in the by no means infrequent case of an offender with a previous conviction for felony). This gap in the middle of the range of sentences was not closed until 1891, and it was during this period that the judges began to evolve a consensus on normal levels of sentence which was eventually articulated in 1901. There can be little doubt that the existence of five years and seven years as <u>minimum</u> terms of penal servitude powerfully influenced the development of judicial concepts of the appropriate level of sentencing, and that the conventions which they helped to establish continued to influence the sentencing process long after the statutory minima were removed from the Statute Book.

Legislation since 1865

The combined effect of the Consolidation Acts of 1861 and the Penal Servitude Act 1865 was to establish a series of conventions relating to maximum terms of confinement, to which virtually all legislation creating new indictable offences over the last hundred and ten years has conformed. While the allocation of particular offences to specified maximum terms is often difficult to justify, it cannot be argued, except in relation to summary offences, that modern criminal law provides an unnecessary multiplicity of maximum terms. At present there appear to be eight maximum terms on the statute book[1] - one year, two years, three years, five years, seven years, ten years, fourteen years, and life.[2] Of these, three years imprisonment remains limited to a very small number of offences, and the majority of offences commonly tried on indictment are punishable with imprisonment for two, five, seven, ten or fourteen years, or life. All of these terms are found in the Consolidation Acts, as amended by the Third Penal Servitude Act.

Given these conventional terms, the process of allocating maximum terms of imprisonment (or penal servitude until 1948) has been a haphazard one. In the process of creating new offences, the choice of an appropriate maximum penalty has rarely been the subject of much discussion in Parliament or elsewhere. In general the legislative approach has been to allot one of the conventional terms with little consideration of current sentencing practice or penal policy: the choice of a maximum is more likely to be influenced by the public reaction to the circumstances which led to the enactment of the legislation creating the offence than by any serious appraisal of the social danger represented by the activity in question.

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1 Compare the scheme of the schedule to the Punishment Bill 1859 (above, p.35).

2 The term of twenty years disappeared from the law with the increase in the maximum sentence under Explosive Substances Act 1883 s.3 to life imprisonment. See Criminal Law Act 1977 s.33.

Examples abound. The Personation Act 1874 was enacted as an urgent response to a case which, although it occupied public attention and dominated the sensational press for over two years, was an isolated incident of an inevitably rare kind of fraud - the impersonation of the long lost heir to a substantial estate and peerage. Although the law already penalised the closely related offence of obtaining property (other than land) by false pretences with penal servitude for five years, and the fraudulent claimant had in fact been sentenced to two consecutive terms of seven years penal servitude for perjury committed in the course of the civil action in which he sought to establish his claim, the new offence was made punishable with penal servitude for life. The bill passed both Houses without any debate. By contrast, the Public Bodies (Corrupt Practices) Act 1889 was enacted in the light of two major public scandals, one sufficiently serious to justify the appointment of a Royal Commission, and against a background of widespread corrupt practices in public and commercial life which had been a subject of press comment for over ten years. The offences created by this Act were however made punishable as misdemeanours with two years imprisonment. The Explosive Substances Act 1883 passed all stages in both Houses within twenty-four hours following two explosions (which caused no injuries and restricted damage to property) in London and the discovery of several Irishmen in Liverpool and Birmingham in possession of explosives. It created offences punishable with penal servitude for life, twenty years, and fourteen years respectively. The Infant Life Protection Acts of 1872 and 1897, enacted after long campaigns and revelations of systematic 'baby-farming' which cost the lives of large numbers of young children, created offences punishable on summary conviction with three and six months imprisonment.

The same lack of interest in rationalising the overall structure of maximum penalties was evident in the more important consolidating acts - the Perjury Act 1911, Forgery Act 1913, Larceny Act 1916, Coinage Offences Act 1936. For the most part these statutes re-enacted the penalty structure of the enactments they replaced, which as consolidating Acts they were effectively bound to do. Even where the legislature had a free hand, as in the Perjury Act 1911, which consolidated both statute and common law, revision of the penalty structure was limited to relatively minor amendments intended to produce

uniformity; a wide range of differing penalties under a variety of different statutes was reduced to the common formula of a maximum term of seven years penal servitude with the alternative of two years imprisonment.

In determining maximum penalties for newly created offences, the general tendency has been to favour the shorter maximum terms. Two years imprisonment, the standard maximum term of imprisonment adopted in the 1861 legislation whether as the principal sanction or an alternative to penal servitude, remained a popular figure, undoubtedly because for many years it marked the dividing line between the two forms of sentence. It was employed in a large number of statutes,[1] and has been frequently chosen despite the abolition of the difference between imprisonment and penal servitude in 1948.[2] Five years has not been so regular a legislative choice, despite the fact that this term was established in 1865 as the maximum term of penal servitude associated with some of the most common offences - simple larceny and offences punishable as simple larceny, malicious wounding and assault occasioning actual bodily harm. The more important early examples of statutes applying this term to new offences are the Prevention of Cruelty to Children Act 1894 (cruelty to a child whose life was insured in favour of the defendant) and the Cremation Act 1902 (cremating body with intent to impede prosecution). Recently five years has begun to be used more frequently as a maximum term - examples include the Road Traffic Act 1956 (causing death by dangerous driving) and the Firearms Act 1965.

Seven years retained its traditional popularity until relatively recently; the new offences to which it has been applied include incest (Punishment of Incest Act 1908), passing information for a purpose prejudicial to the interests of the state (Official Secrets Act 1911, raised to fourteen years by the Official Secrets Act 1920) and frauds in connection with investment in unit trusts and similar arrangements (Prevention of Fraud (Investments) Act 1939, Protection

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1 Including Merchandise Marks Acts 1861 and 1887, Frauds by Debtors Act 1869, Falsification of Accounts Act 1875, Public Bodies (Corrupt Practices) Act 1889, Prevention of Corruption Act 1906, Census Act 1920, Honours (Prevention of Abuses) Act 1925, Incitement to Disaffection Act 1934.

2 Examples enacted after the passing of the Criminal Justice Act 1948 include Prevention of Crime Act 1953, Indecency with Children Act 1960, Race Relations Act 1965, Trades Description Act 1968.

of Depositors Act 1963). The number of new indictable offences created since 1861 which carry maximum penalties in excess of seven years is very small. The Explosive Substances Act 1883, the Personation Act 1874 and the Official Secrets Act 1889 were the only late nineteenth century statutes to apply penal servitude for life to new offences; in the twentieth century the sentence of life imprisonment has been applied to new offences of genocide,[1] hi-jacking,[2] and certain offences in connection with firearms.[3] The effect of the Theft Act 1968 and the Criminal Damage Act 1971 has been to widen the application of life imprisonment as a maximum term by redefining a variety of old established offences in single "broad-band" offences. Maximum sentences of fourteen years have also been relatively rarely applied to new offences; exceptions are the Explosive Substances Act 1883, the Official Secrets Act 1920 (increasing the penalties applied by the 1911 Act), the Firearms and Imitation Firearms (Criminal Use) Act 1933, and the Suicide Act 1961. Since the middle sixties, however, ten years has become more common as a maximum term: it was used in both the Firearms Act 1965 and the Dangerous Drugs Act 1965, and has since, by its use in the Theft Act 1968, become a more important formula; it appears to be replacing seven years as the normal legislative indication that an offence is considered relatively heinous. Seven years has however been applied to at least one completely new criminal phenomenon within the last few years.[4]

Once a new offence has been created and assigned a maximum penalty, it has generally retained that maximum. Changes in maxima have been relatively uncommon and for the most part limited to specific offences; often the change can be related to a specific situation which has arisen. Thus the Prevention of Corruption Act 1916 which raised the maximum sentence for corrupt practices in relation to government contracts from two years imprisonment to seven years

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1 Genocide Act 1969.

2 Hijacking Act 1971.

3 Criminal Justice Act 1972.

4 Immigrant smuggling; see Immigration Act 1971.

penal servitude, was a direct response to a trial which revealed the existence of widespread corruption and dishonesty in relation to the supply of equipment to the army. The Official Secrets Act 1920 doubled the maximum penalty for the most serious offences under the 1911 Act, from seven to fourteen years penal servitude (but did not reinstate penal servitude for life, which had been applicable in certain cases under the repealed Official Secrets Act 1889). This change was part of a general process of strengthening the legislation after the Act had been tested during and immediately after the Great War.[1] Other indictable offences whose maxima have been raised are living on the earnings of prostitution,[2] indecent assault on a girl under thirteen,[3] and certain offences in connection with the possession of firearms[4] and explosives.[5] Only one offence appears to have had its maximum decreased: buggery with a male person, originally punishable with life imprisonment, became punishable with various shorter maxima in the Sexual Offences Act 1967.

Apart from those important areas of the law which have been completely recast in modern legislation - the Theft Act 1968, the Criminal Damage Act 1971 and the Misuse of Drugs Act 1971 - no general reconstruction of penalty structures has been accomplished. A bold attempt at a major scaling down of maxima was initiated in 1911 when the Criminal Law (Mitigation) Bill was published.[6] A private member's bill, this measure would have removed the death penalty from all remaining capital offences except murder, raised the minimum age for the death sentence to twenty-one, abolished the death penalty for infanticide, and restricted corporal punishment to boys between the ages of ten and sixteen years. The bill also proposed a complete revision of

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1 See Williams, *Not in the Public Interest* (1965).

2 Street Offences Act 1959. (The Wolfenden Report recommended that the penalty be left at two years).

3 Indecency with Children Act 1960. See also the Attempted Rape Act 1948, apparently based on a misconception of the law.

4 Criminal Justice Act 1972.

5 Criminal Law Act 1977 s.33.

6 (1911) H.C. Bill 46.

existing statutory maximum terms of penal servitude. Two new scales of maxima were proposed, one for adults and the other for juvenile adults - persons aged between eighteen and twenty-one. Existing maxima of penal servitude for life would have been reduced, with the exception of manslaughter, to ten years, or in a few cases fifteen years. (Seven years would have been the equivalent for juvenile adults.) Existing maxima of fourteen years were to be reduced in almost all cases to seven years (usually five years for the juvenile adult). In a series of other offences, including larceny, it was proposed to limit penal servitude to offenders previously convicted on indictment: the effect of this provision would have been to reduce the maximum of five years penal servitude to two years imprisonment for many offenders. Despite its radical proposals, and current controversies relating to sentencing and the allegedly improper use of the prerogative to reduce sentences by the then Home Secretary,[1] this Bill appears to have attracted no public attention. It was introduced in February 1911, but by the date fixed for its second reading the constitutional crisis had arisen and the Parliament Bill consumed all available Parliamentary time. The Bill was reintroduced the following year but again made no progress.

Throughout these developments, the penalty structure for common law misdemeanours (which must be distinguished from statutory misdemeanours for which no penalty was fixed) remained unaffected despite the strongly argued views of the Criminal Law Commissioners,[2] except by the abolition of the pillory and the restriction and subsequent abolition of corporal punishment. Neither the consolidation acts of 1861 nor the penal servitude acts restricted the powers of the courts to impose unlimited fines or imprisonment for these offences. The development of a legislative convention restricting statutory maximum terms of imprisonment to two years was undoubtedly based on what was in effect a judicial convention not to exceed that term of imprisonment,[3] and served in turn to reinforce that convention to the point where it was often assumed to

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1 See The Times, 27 January 1911.

2 Above, pp.26-27.

3 See the observation of the Criminal Law Commissioners, Seventh Report (1843) p.105.

have the status of a legal rule, but the powers of the courts in common law misdemeanours were never reduced. While the courts were not empowered to impse the new statutory sentences of transportation and subsequently penal servitude for these offences, they retained the power to impose long terms of imprisonment, and at least one judge is reported to have used it[1] during the heyday of penal servitude. The anomaly became less obvious in 1948 when the abolition of distinction between penal servitude and imprisonment had the effect of making many other offences (previously punishable with penal servitude for life) punishable with imprisonment for life. The Attempted Rape Act 1948, enacted just before this merger to make attempted rape punishable with seven years penal servitude, was apparently based on the misconception that the offence was punishable only with two years imprisonment; as a common law misdemeanour, like all attempts other than those dealt with by statute, the offence was already punishable with unlimited imprisonment, but not with penal servitude. The effect of the Act was thus to reduce, rather than increase, the maximum sentences for the offences to which it applied. The position of common law misdemeanours was subsequently reviewed in a series of cases which authoritatively established the position.[2]

A new approach to codification

The creation in 1965 of the Law Commission[3] led shortly to the announcement of a third assault on the problem of codifying the criminal law[4] (the second Draft Code, substantially the work of J. F. Stephen, failed to reach the statute book in 1881).[5] The Criminal Law Revision Committee, appointed

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1 Stephen J. is reported to have sentenced a man to seven years imprisonment for publishing obscene matter: see Minutes of Evidence taken before the Joint Select Committee on the Licensing (Consolidation) Bill and the Perjury Bill (1910) para. 564.

2 Morris (1951) 34 Cr. App. R. 210; Higgins (1951) 35 Cr. App. R. 130.

3 Law Commission Act 1965.

4 See Law Commission, Second Annual Report (1967).

5 The Draft Code of 1879 proposed no major changes in the law of maximum penalties, beyond specifying maximum sentences for offences which were previously, as common law misdemeanours, subject to unlimited imprisonment.

in 1957, had already begun to clear the ground for codification with two major reports - the Seventh Report, recommending the abolition of the distinction between felonies and misdemeanours, and the Eighth, recasting the whole of the law governing theft and related offences. Each of these reports led to the enactment of legislation with unprecedented speed. The Criminal Law Act 1967 removed the distinction between felony and misdemeanour, one of the remaining obstacles to rationalisation of the statutory criminal law, and the Theft Act 1968 established a legislative style which has heavily influenced subsequent proposals for the reconstruction of other areas of the criminal law. The discussion of maximum penalty provisions in the Eighth Report of the Criminal Law Revision Committee is therefore of particular significance, as the approach the Report advocates seems likely, on present trends, to be adopted throughout the new Criminal Code as it emerges during the next decade.

The general policy of the Criminal Law Revision Committee, and subsequently of the Law Commission, has been to reduce a multiplicity of crimes into a relatively small number of broadly defined offences: thus the Theft Act 1968 combined embezzlement, fraudulent conversion and a large number of varieties of larceny into a single offence of theft. A similar approach was adopted in the Criminal Damage Act 1971, prepared by the Law Commission, and is proposed in the Law Commission Report on Forgery and Counterfeit Currency. The inevitable consequence of this policy is that the maximum penalty for the new offence is set at a relatively high level and the task of determining the level of penalty applicable to the general run of cases is left to the discretion of the judiciary. "It seems to us better, and more in accordance with modern theories of sentencing, to fix a maximum for each offence which will be high enough for the worst cases, even though it will rarely be imposed, and leave a wide discretion to the courts, than to lay down scales related to particular aggravating features. Since the seriousness of an offence always depends on a combination of factors, it is in general misleading to single out certain factors for the purpose of providing maximum penalties. Moreover the simplification of the law which is obviously desirable could not be achieved unless the present policy of graded maximum penalties were for the most part abandoned."[1]

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1 Criminal Law Revision Committee, Eighth Report, Theft and Related Offences, para. II (1966).

The effect of the Theft Act 1968 was not entirely in the direction of higher maxima; the process of collapsing multiplicities of definitions led to reductions in some cases. The replacement of the old maximum of five years imprisonment[1] for simple larceny by the new maximum of ten years for the redefined offence of theft constituted an increase, but the new offence also included various aggravated forms of larceny previously punishable by maxima of fourteen years[2] or life.[3] Similarly, the proposals of the Law

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1 The history of the maximum penalty for simple larceny well illustrates the extent to which the pattern of maximum penalties has been governed by historical accident. Seven years transportation with the alternative of one year's imprisonment under the Transportation Act 1717 became seven years transportation or two years imprisonment under the first Larceny Consolidation Act of 1827. Lord John Russell, as Home Secretary, thought that transportation was too severe for this offence and secured its removal in 1849 (12 and 13 V. c.11), leaving the maximum as two years imprisonment. Greaves thought this maximum too low (see The Criminal Law Consolidation Actsp.74) and would have increased it to three years imprisonment; in the event the preference of the House of Commons Select Committee on the 1861 bills for a general maximum term of two years imprisonment led to the provision in the Larceny Act 1861 of a maximum penalty of three years penal servitude, with the alternative of two years imprisonment. The third Penal Servitude Act 1864 increased the maximum and indeed the minimum term of penal servitude to five years, so that the penalty for simple larceny between 1864 and 1891 was imprisonment for any term not exceeding two years or five years penal servitude. The Penal Servitude Act 1879 reduced the minimum term of penal servitude to three years, but left the maximum alone so that from 1891 until 1916 the penalty structure was imprisonment for any period not exceeding two years, or penal servitude from three to five years. Five years penal servitude was thus the maximum sentence provided when the law of larceny was consolidated for the third time in 1916, and remained the maximum term (the distinction between penal servitude and imprisonment being abolished in 1948) until the law of dishonesty was reconstructed in the Theft Act 1968.

2 Larceny of cattle (Larceny Act 1916 s.3); larceny of goods in process of manufacture (ibid., s.9); larceny in a dwelling house (ibid., s.13); larceny from a person (ibid., s.14); larceny from ships, etc. (ibid., s.15); larceny as servant (ibid., s.17).

3 Larceny of wills (Larceny Act 1916 s.6); larceny of mail (ibid., s.12); and embezzlement by officer of the Post Office (ibid., s.18) or the Bank of England (s.19).

Commission[1] for the reconstruction of the law of forgery and counterfeiting would have the effect of reducing some existing maxima and increasing others to a uniform maximum of ten years imprisonment. (Certain lesser offences would generally be punishable with two years imprisonment.)

The approach of the Criminal Law Revision Committee and of the Law Commission, which would have appealed to Greaves but not to the first Commissioners on the Criminal Law, reflects an increased confidence in the exercise of sentencing discretion by the judiciary and in the means which have evolved of regulating the exercise of that discretion.[2] Legislation enacted on the recommendation of these bodies, or proposed by them, covers the area of four of the five consolidating Acts of 1861. The remaining area, offences against the person, is currently under review by the Criminal Law Revision Committee.[3] The practical importance of these statutes in the modern penalty structure is immediately apparent from the Criminal Statistics. Of the 22,476 persons sentenced to immediate imprisonment by the Crown Court in 1976, over seventy-five per cent were sentenced for offences contained in the Theft Act 1968, the Criminal Damage Act 1971, or covered by the proposed Forgery and Counterfeit Currency Bill; a further seventeen per cent were convicted of offences against the person or sexual offences under statutes currently under review by the Criminal Law Revision Committee, and three per cent of offences under Misuse of Drugs Act 1971. Over ninety-five per cent of offenders imprisoned by the Crown Court following conviction or indictment were thus convicted of offences which are either now or are likely in the foreseeable future to be contained in modern legislation, with penalty provisions largely

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1 Report on Forgery and Counterfeit Currency (Law Commission No. 55, 1973).

2 Most particularly, appellate review of sentences by the Court of Criminal Appeal, subsequently the Court of Appeal (Criminal Division); see Thomas, D. A., *Principles of Sentencing* (2nd ed., 1978).

3 See Working Paper on Offences against the Person (1976).

based on the principles advocated in the Eighth Report of the Criminal Law Revision Committee.[1] These principles appear to be, in the view of that Committee, the necessary corollary of its general approach to the simplification of the criminal law; and that view appears to be shared by the Law Commission. As the Criminal Law Commissioners pointed out in their First Report in 1834, the penalty structure cannot be considered in isolation; it is intimately related to the substantive criminal law, and is dependent on the kind of definitions employed. It is difficult to avoid the conclusion that any revision of maximum penalties for indictable offences which would affect more than a small minority of offenders currently likely to be sentenced to imprisonment by the Crown Court would raise issues relating to the definitions of offences, and call in question the trend towards simplification of the substantive law which has been the overriding legislative policy since 1968.

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1 The penalty provisions of the Misuse of Drugs Act 1971 are graduated in greater detail than those of most other recent criminal legislation.

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INDEX

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