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Bureaucratic mercy: The Home Office and the treatment of capital cases in Victorian England

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Rice University, 1989

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BUREAUCRATIC MERCY:
THE HOME OFFICE AND THE TREATMENT OF
CAPITAL CASES IN VICTORIAN ENGLAND

by

GEORGE ROGER CHADWICK

A THESIS SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE
DOCTOR OF PHILOSOPHY

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1989
ABSTRACT

Bureaucratic Mercy:
The Home Office and the Treatment
of Capital Cases in Victorian England
by George Roger Chadwick.

This dissertation examines the role of the Royal
Prerogative of Mercy - the pardoning and mitigating powers of the
Crown - in the Victorian criminal justice system. Its principal
source has been the hitherto confidential collection of files in the
Home Office 144 and 45 Series at the British Public Record Office.
These files not only review the process of trial and conviction in
homicide cases but also contain the correspondence between the
judges and the Home Office on their degree of culpability.

The study has had useful results in three poorly
interrelated fields of historiography, 19th century legal history,
institutional history and Victorian cultural history.

In the field of legal history it traces the progressive, if
piecemeal, centralization and specialization of the criminal justice
system as a whole. These were trends which served to strengthen the
forces of law and order at the expense of those were prosecuted. The
trend was reinforced by a parallel development in legal doctrine
where a stricter construction of the concept of 'mens rea' occurred.

The development of a professional Home Office
bureaucracy and the gradual limitations which it imposed on
ministerial power is an important theme in the history of
government that is illustrated from the files. In the close relations
which this bureaucracy developed with the legal profession it is
also possible to observe an emergent legal and bureaucratic
establishment in whose hands the new 'national' criminal justice
system was used, and used effectively, to constrain the traditional
violence of pre-industrial and pre-urban England.

The privileged correspondence between judges and civil
servants reflects the attitudes and preconceptions of this
establishment. It is complemented, however, by petitions from the
public, appeals from prisoners and by contemporary press comment.
This dialogue as a whole makes an important contribution to some
much debated aspects of 19th century social and cultural history.
These topics include Victorian attitudes to normal and deviant
behavior, to the definition and treatment of insanity and towards
women and children, as offenders or victims.

The Prerogative of Mercy survived as the only official
mechanism of mitigation in the criminal justice system. Its
exercise laid upon the civil servants of the Home office the
responsibility of adapting an absolute law to shifting community
ideas about justice. This study suggests that, as the century drew
towards its close, the gap between establishment values and those
of the community at large was narrowing. The mass of 'respectable'
Victorian England had come increasingly to share the morality of its
civil service.
ACKNOWLEDGEMENTS

Access to much of the primary source material for this dissertation depended on the cooperation of the British Home Office and I am, therefore, particularly grateful to the Departmental Record Officer and his staff for their help. Research into this exciting material was only made practically possible by generous grants from both the Office of Advanced Studies and Research and the Humanities Department at Rice University. No less important were the fellowship stipends given to me during my years as a graduate student in the Department of History at Rice.

It is, however, to the faculty of the Humanities Department at Rice University that I owe the greatest debt. Their teaching, encouragement and friendship alone gave me the confidence to undertake this project. Professor Martin Wiener first identified the significance of prerogative decisions and later directed the dissertation. His advice and support have been unstinted and his own work, in a parallel field, a constant source of inspiration and example. Professors Thomas Haskell and Robert Patten have been both invaluable teachers and later practical and involved members of my committee. Professor Harold Hyman read the manuscript and made much helpful and constructive criticism.

Finally I must acknowledge a debt to my contemporary graduate students who, like me, have flourished in the stimulating
environment of the History Department at Rice. In their company the otherwise lonely life of a graduate student became a very rewarding experience.
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Introduction

This dissertation is a study in the administration of criminal justice in mid-Victorian England, and in particular of the Prerogative of Mercy. It has substantially depended upon original research into the hitherto confidential H.O.144 and H.O.45 files at the British Public Record Office but has also made use of Old Bailey Session Papers, contemporary reports of both criminal law issues and cases and internal Home Office memoranda as yet unpublished.

The individual case-files on capital cases, assembled by the Criminal Department of the Home Office for the use of Secretaries of State, have never been publicly examined. The most important recent work in this general area made use of a summary prepared by the Home Office itself in 1882, for the period 1866-1881 and would, in any event have been denied access to the files for later years by the one hundred year rule of confidentiality then in operation.¹ In 1949 the Permanent Under-Secretary at the Home Office presented a memorandum on the exercise of the Prerogative of Mercy to the Royal Commission on Capital Punishment. This was later published in the Commission's Report in 1952.² This described the practice since 1900. These two summaries represent the only published accounts of this material so far available. With

the assistance and help of the Home Office it was possible in this project to examine files for the whole period from 1861 to the end of the century, although, due to constraints of time no cases originating later than 1896 were studied.

An outstanding feature of criminal justice in the second half of the 19th century was a progressive if reluctant centralization of its administration. This was partly a response to the exigencies of a country whose rapid urban and industrial development posed problems in the control of serious crime that could not be met by a diffuse local management of policing and detection, prosecution and penal institutions. It was also the result of pressure from legal and penal reformers who, having failed to rationalize and reform the law itself, sought to accomplish their goals by creating a more efficient, uniform and predictable administration. In the years between 1860 and 1900 these diverse pressures led to significant developments in the criminal justice system.

The responses of the Home Office and the legal profession are well illustrated in the H.O.144 files on capital cases and constitute the general organizing theme of this work. The peculiarly frank character of the exchanges in this material suggests, however, that these changes were not accompanied by any profound alteration in the ideology of the bureaucrats and lawyers who effected them. Instead we can observe the emergence of a remarkably homogeneous official establishment which,
despite rising standards of academic and professional education, retained traditional and generally conservative values at a time of considerable intellectual and ethical ferment. When faced with the task of exercising the Royal Prerogative of Mercy in capital cases this establishment evolved its own rules and precedents in a bureaucratic attempt to formalize and protect their procedures.

The Prerogative of Mercy, itself a target of rationalizing law reformers, derives from a central paradox in the law. The Common Law embodies a concept of strict personal liability for a short range of broadly defined offences and it has successfully resisted any attempt to change this stern formula for justice. Its administrators have, however, long recognized that they must accommodate changing perceptions of both human frailty and criminal deviance if respect for the law is to be maintained. During the second half of the 19th century this responsibility devolved on the Home Secretary. The emergent legal and bureaucratic establishment which surrounded him evolved two related strategies for dealing with this problem. On the one hand there developed between judges and civil servants a very close and confidential exchange of opinions on what appears in the files as a strictly ad hoc series of decisions. These decisions were resolutely abstracted from the public or parliamentary domain by appeal to that essential tool of central government, the Prerogative itself. At the same time senior civil servants and their subordinates built up a 'case law', a set of guiding rules, within whose arcane logic these issues might be debated. In doing so they
constructed a defence should the prerogative shield be broken and a public explanation be required. It was moreover, a palliative against the prompting of individual ministerial consciences in what were, after all, among the most painful of decisions. It is this response, so characteristic of centralizing bureaucracy, that will be the specific focus of the thesis.

The work falls into three parts. Chapter 1 considers the evolution of the law which, in Maitland's phrase, traditionally took a "high view" of individual liability and yet accepted that jurors, judges and the Crown itself could participate in a process of penal mitigation, a process which was both official and unofficial in its operation. Such mitigation was a pragmatic attempt to accommodate the sensibilities of the public and win their support for, and participation in, the legal process rather than an exercise in the compassion of individual or collective consciences. The introduction will go on to examine the impact of both rationalistic and utilitarian law reformers and their evangelical contemporaries in the late 18th and early 19th century. The former saw this paradoxical process as inconsistent, unpredictable and, therefore, highly inefficient in achieving their goal of the prevention of future crime. For Evangelicals it failed to clearly reaffirm social morality, to enhance individual responsibility or to reclaim and reeducate social deviants. The tension between the optimistic

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positivism and the cautious conservatism which underlay these disparate aims aborted substantive legal reform or even codification of existing laws. While sufficient common ground existed to effect progressive reform of the criminal justice system, the tension persisted in the attitudes and preconceptions of those who administered them.

The process of centralization and administrative change is considered in the second part of the work, which consists of four chapters (#2 -#5). The H.O. 144 files and the Old Bailey Session Papers have been used to illustrate the evolution between 1860 and 1900 of the arrest, committal, trial and final disposition of homicide offenders. A significant shift can be seen from an essentially local operation, with only occasional governmental intervention, to one that was substantially controlled by the Home Office and the Law Officers of the Crown.

These changes are significant in the pre-trial phase, which is discussed in Chapter 2, where the growing importance of the Treasury Solicitor and, later, of the Department of Public Prosecutions, was reflected in many case-files over the period. These developments were matched by a marked decline in the traditional investigative roles of the Justices of the Peace and of Grand Juries.

There was an equally significant change in the role of the judges both in terms of their courtroom hegemony and in their powers of mitigation. Such changes were accompanied in the trial phase by the rising professionalism and authority of counsel and
by a continuing, and surprising, element of unofficial jury mitigation. This phase is the subject of chapter 3. In this period the post-trial phase became increasingly the responsibility of the Home Office and its response is considered in Chapter 4 both in terms of an expanded and more professional Criminal Department and in the development of bureaucratic "Rules" through which to impose a superficial rationality and coherence on the disparate decisions which they formulated in capital cases and on the sentencing patterns which followed.

The final chapter of this section, Chapter 5, considers cases where the Home Office, aided by the trial Judge, re-examined the evidence in cases of legal doubt about the jury's verdict. The picture that emerges is one of urgent and conscientious effort, if occasionally of bureaucratic incompetence. In this context the cases of Israel Lipski and Adolph Beck are highlighted.

The third and final part consists of three chapters (#6-#9) and examines those judicial and bureaucratic attitudes towards criminal responsibility which underlay the review of all capital cases other than those which hinged on strictly legal matters. The correspondence of the judges, the minutes of the bureaucrats and the language of popular appeals in these cases constitute a significant debate on the issue of criminal responsibility and as such reflects some of the deepest preconceptions and anxieties of Victorian society. They also provide a rare glimpse of an emergent establishment morality.
Chapters 6 and 7 considers the argument about various physical grounds for diminished responsibility. In the first of these (Chapter 6) the broad issues of sanity and insanity, immaturity and old age and the effects of physical trauma are reviewed and illustrated from the case files. In the second (Chapter 7) the preconceptions of legal administrators about women, and in particular about the crime of infanticide, will be considered. The third major ground for mitigation was social rather than physical and centered on claims of provocation which will be discussed in Chapter 8. In these numerous cases Judges and bureaucrats revealed their preconceptions about "normal" and "deviant" behavior in the home, the workplace and in society at large. Where the temporary diminishment of responsibility was at issue in such cases, the characters of both criminal and victim were relevant and their relative deviance from accepted social norms were considered.

Whereas the study of the trial and its protagonists, in Part 2, identifies and illustrates some significant changes, the discussion of bureaucratic attitudes in this final section is more tentative in this respect. The period under review is too brief and the role of judges, senior civil servants and Home Secretaries too short for one to note more than some individual vagaries. Indeed the striking feature of this whole cohort is its homogeneity. This is less surprising when the overwhelming predominance of lawyers in all these categories is noted. On the other hand changes in style
and expression do seem to permit of some generalization and a shift from the fulsome and emotional language, characteristic of barristers, judges, bureaucrats and public petitioners in the 1860's, to the altogether dryer and more detached styles at the end of the century is apparent. There is an evident change in sensibility if not of ideology.

The correspondence of this important group of lawyers and bureaucrats on the issue of mitigation does not suggest any radical change in their presuppositions about truth and justice. Traditional values survived largely unchanged in this conservative enclave. The ultimate test of 'truth' continued to consist in an appeal to conscience, to an earnest search for "moral certainty", even when the evidence presented could have better been judged in terms of probability. Nevertheless the traditional compromise of the common law, of an unchanging idealism in its substance and flexible methods in its enforcement, enabled it to accommodate the considerable changes in public sensibility which occurred over this period. The consensus of the 1860's had matched this conservatism with a solid commitment to utilitarian notions of penal treatment. In that of the 1890's a similar concept of justice coexisted with a renewed dedication to professional and technical efficiency. Confidence in the self-correcting properties of the human spirit under a uniform regime were giving way to an emergent, but equally optimistic, set of hopes for social engineering and medical therapy. The shifting character of these
compromises will be the subject of Chapter 9 and the conclusion of the work.

This study has had potentially useful results in three poorly interrelated historiographical contexts. It is first a contribution to the legal history of the 19th century, a field which itself divides uncomfortably into the study of legal administration on the one hand and of legal doctrine on the other. Secondly because of its focus on the Home Office and its bureaucracy the work has a place in the history of government and governmental institutions. Finally it has conclusions to offer in the area of social and cultural history and, in particular, on Victorian perceptions of normal and deviant behavior, of insanity and the subject of gender.

Characteristically the massive work of Leon Radzinowicz in the first of these fields has little to do with the law itself, if much to offer on its administration. It is an account of the evolution of 'modern' penal practise and of the progressive rationalization of the criminal justice system. This dissertation does not fit comfortably in such a context. The process of centralization revealed by the Home Office files is less organized, less rationally driven than Radzinowicz implies. A heavy emphasis on legal administration and a relative disregard for the evolution of the courts and legal doctrine may have led to questionable assumptions in his account of the prerogative. It is suggested that Victorian Secretaries of State followed the recommendations of the Royal Commission on Capital Punishment (1864-6) in trying to establish a 'two-tier' definition of

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4 Radzinowicz, op.cit.
murder, and to restrict capital punishment only to those who had exhibited "express malice." 5 It seems clear, however, from the Home Office files that all these Ministers came to recognize the practical impossibility of such a policy and its incompatibility with prevailing constructions of the doctrine of 'mens rea.' In this and other respects the legal and bureaucratic establishment of Victorian England were greatly more conservative than this whiggish history will allow.

Radzinowicz apart Victorian criminal justice has yet to receive the measure of attention accorded to the 18th century. When it does it is likely that a similar debate will arise between those who see the criminal law as an instrument of class and social control6 and those who see it as a traditionally more 'open' system, subject to popular participation and mitigation at all levels.7 The major theme of this work, that of the centralization and bureaucratization of justice, involves not only a shift in power towards central government but a change in the balance between prosecution and the poor defendant. In this respect it confirms, from case data, the conclusions which V.A.C.Gatrell has drawn from the criminal statistics 8. This conclusion is not, however, readily translatable into class terms. The legal establishment who promoted stricter constructions of criminal liability enjoyed support from a wide spectrum of 'classes' and this support seems to have become

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6 For example E.P.Thompson, Douglas Hay and George Rude.
7 J.M.Beattie, T.A.Green and J.Langbein in particular.
more extensive and homogeneous towards the end of the century. The tension between 'ruling' classes and 'working' classes is less evident than a persistent, if diminishing, conflict between the values of 'respectable' urban England and those of a traditional, pre-industrial, constituency which John Brewer and others have described in earlier periods.9

The account of the Home Office in this study has depended substantially on the earlier work of Jill Pellew. It complements her conclusions with its evidence of a developing bureaucracy in action. In its account of an evolving bureaucratic method it confirms the observations of Donajgrodzki on the clerks of the pre-1848 period.10 However this same evidence, of a growing bureaucratic professionalism based on rule and precedent, suggests a wider explanation of the gradual shift in power from ministerial hands to those of their permanent staff. Appeals that were decided by the Home Secretary alone in the 1820's, with a brief comment and a signature, were substantially determined by his staff in 1900 in the light of an established practise of which they alone were masters.

Nigel Walker occupies a position in the study of crime and the law comparable with that of Radzinowicz in his wider field.11 His work has comparable characteristics in so far as it records a progressive, if slow, ascent to contemporary practise and, in his

case, an understanding of insanity. This work suggests that the Victorian bureaucracy played a more positive role in the acceptance of medical accounts of insanity than Walker allows. Once equipped with the means to institutionalize the criminally insane they came to see criminal insanity as an acceptable alternative to other modes of controlling deviance and actively encouraged findings of insanity at all stages of the criminal justice process. This conclusion is more directly at odds with that of Roger Smith. Smith's reasonable observation of the fundamental antithesis between the law's insistence on the strict liability of autonomous individuals and medical accounts of the limitations on such responsibility led him to stress the court-room conflicts which occurred in the 1850's and 1860's between lawyers and medical men. It is possible that if he had continued his study of cases into the next two decades a different conclusion would have emerged.

The values of the emergent legal establishment were paternalistic and antithetical to the aspirations of feminists. Whether, as Hartman argues, such traditional pressures led to murder is problematical but it is clear that the criminal justice system, staffed wholly by men, judged women, both offenders and victims according to a traditional paradigm of normality. In this respect the many cases in the Home Office archive support feminist conclusions as widely separated in time as those of Frances Power

Cobbe\textsuperscript{14} and Barbara Showalter \textsuperscript{15}. At the same time this work, and particular the evidence of appeals which it incorporates, tends to support the conclusion that most Victorian women were active in supporting a traditional social order\textsuperscript{16} and that this acceptance was clearly a contributor to the perpetuation of a general social tolerance of male violence.\textsuperscript{17}

In describing social attitudes we are commonly forced back on abstractions, upon such familiar but imprecise terms as individualism, paternalism or feminism. The protagonists in this account of the Victorian criminal justice system abhorred such terminology and accounted for their opinions and decisions in simpler, if now equally elusive, moral language. This study's long catalogue of violent crime does, nevertheless, reveal the attempts of legal minds to impose upon their subjective decisions "the logic or the symmetry of the law,"\textsuperscript{18} and to extract principle and consistency from their solutions of individual problems. The records of the Home Office bureaucracy record these solutions and help to translate Victorian concepts of virtue and vice into the 'values' of the present.

\textsuperscript{15} E. Showalter, "Victorian Women & Insanity," in Scull (Ed), Madhouses, Mad-Doctors & Madmen, University of Pennsylvania, 1981.
\textsuperscript{16} The argument of Brian Harrison in Separate Spheres: The Opposition to Women's Suffrage in Britain, London, Croom Helm, 1978.
\textsuperscript{17} This is argued by Susan Edwards in Gender, Sex & the Law, Croom Helm, 1985.
Chapter 1
The Role of the Prerogative of Mercy in English
Criminal Law before 1861

Despite a growing body of contemporary work, there is, as yet, no authoritative or satisfying explanation of the origins and development of the criminal law before the 19th century. The failures and inadequacies of that system have been well documented but less attention has been paid to those persistent characteristics which survived the irruption of 19th century reform and helped shape the compromise of contemporary 'liberal' justice. Indeed the impact of such reform on the law is easily exaggerated and the debilitating tensions which were inherent in this compromise were apparent before the end of the century. It was in fact a compromise in implementation and not in the law itself. Changes took place in the operation of justice, in penal policy and in legal administration but not in its substantive form. All attempts to recodify the law in positive terms failed and while its operation was increasingly seen as a mechanism of social policy the criminal law remained grounded on an uncertain ethical consensus. The equation of law and Christian morality survived even when that traditional morality had become widely secularized.

Early Anglo-Saxon law appears to have been both local and consensual in character and secular in its administration. It only slowly evolved any discrete concept of abstract crime as opposed to emendable social harm. At the same time the subject of justice was
less the individual than the larger social group to which he belonged and who carried a measure of responsibility for him. From this base the concept of personal responsibility and liability emerged only slowly. Early law was, thus, essentially arbitrative, and was retributive only in so far as the extraction of compensatory damages demanded such action. The notion of public exculpation for the more heinous offences was also of slow growth. It was clearly associated both with the gradual extension of royal authority within the various kingdoms of the heptarchy and with the breakdown of an increasingly cumbersome tariff of compensations and fines in an expanding and more complex society.\(^1\) By the end of the Anglo-Saxon period the calendar of unemendable crimes included murder, treason, arson and flagrant theft. For such offences capital punishment had become recognized as a normal sanction, as had the King’s power to mitigate that punishment.\(^2\)

The rapid expansion of a national and centralized system of criminal justice in the 12th and 13th centuries by the Angevin Kings and their successors developed some of the features of the immediate pre-conquest period but the overall effect was to complete a radical and lasting change in the character of the criminal law. In place of the detailed tariff of social wrongs we find a short list of broadly defined offences, so construed as to ensure the widest possible reference to royal justice. The punishments associated with them were those of maximum severity where once a

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principle of equivalency had prevailed. Finally the law maintained, in this new environment, what Maitland described as a 'high' view of culpability or what is now called 'strict liability'. It was a liability already conceived in individual rather than collective terms.

The dependence of the Crown on its alliance with the Church, not least in the administration of the law, ensured that the concept of moral infamy became closely associated with that of social wrong in the definition of crime. We thus see increasingly imposed on a simple descriptive account of criminal responsibility a verdict which ascribes guilt or innocence to the perpetrator of social harm. The truth or falsity of a charge must now bear the test of intention. Where earlier tradition had held, with Chief Justice Brian, that "The thought of man shall not be tried for the devil himself knoweth not the thought of man," there arose another and, overriding tradition which owed much to St Augustine and to the Roman law scholarship of Bracton and other cosmopolitan clerics of the time. "Actus non facit reum nisi mens sit rea" was a dictum first noted in a 12th century account of early Norman law, the Leges Henrici Primi, and it was rapidly developed to distinguish fault (dolus) and guilt (culpa) in both civil and criminal law. In this way the criminal law became at once an instrument for maintaining social order and a didactic, or exemplary affirmation both of a Christian moral code and of the royal power. It was a code whose anathemas were as widely drawn

5 T. A. Green, Verdict According to Conscience, caps 1-3, University of Chicago, 1985.
and as undifferentiating as those in the twentieth chapter of Exodus. It was, nevertheless, a system whose absolutes and maxima were only politically and socially sustainable if moderated by human judgement and a measure of social consent. Maitland described this compromise as follows:

What is the measure of culpability that ancient law endeavours to maintain? Is it high, is it low? Do we start with the notion that man is only answerable for those results of his actions that he has intended, and then gradually admit that he is sometimes liable for harm that he did not intend or, on the other hand, do we begin with the rigid principle which charges him with all the evil that he has done, and then do we accept first one and then another mitigation of this rule? There seems now to be little room for doubt that of these answers the second is the truer.6

Such powers of mitigation lay not only in the prerogative of the Crown but also with both judge and juries. In this latter case the increasing use of juries of presentment, forerunners of the grand jury, and the petty or trial juries involved a significant element of local consent and participation. It was often reluctant participation and traditions of community justice were maintained by persistent efforts at composition rather than the hazardous and expensive

6 Pollock & Maitland, op. cit. Vol: 2
process of an appeal to the criminal law. For the Crown, the exercise of its powers of pardon or mitigation came to represent an opportunity to respond to the pressures of general or specific interests, to enrich itself from fines and to demonstrate its ultimate power.

In 1861 Sir Henry Maine offered an intriguing explanation of the role of the royal conscience as a flexible link between an evolving social perception of justice and the less elastic progress of judge made common law. In a memorable and whiggish passage he wrote,

Nothing is more distasteful to men, either as individuals or as masses, than the admission of their moral progress as a substantive reality. This unwillingness shows itself . . . in the exaggerated respect which is ordinarily paid to the doubtful virtue of consistency . . . The movement of the collective opinion of a whole society is too palpable to be ignored and is too visible for the better to be decried . . . it is commonly explained as the recovery of a lost perfection. . . . In England . . . the same view appears in a different and quaintier form in the old doctrine that equity flowed from the King's conscience - the improvement which had in fact taken place in the moral standard of the community being thus referred to an inherent elevation in the moral sense of

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the sovereign.\textsuperscript{8}

Whether as a mechanism for accommodating moral change or as a source of relief for frustrated litigants equity came to share with the Prerogative of Mercy an analogous role in moderating the common law. In each case the mechanism was the same, the King's conscience and its access to the moral law. As Selden later observed it, it was an uncertain tool..."a roguish thing. For law we have a measure but equity is according to the conscience of him that is Chancellor and as that is larger or narrower so is equity. T'is all one as if they should make the standard for the measure a Chancellor's foot."\textsuperscript{9}

The English criminal law preserved these characteristic doctrines of the broad definition of felony, of maximum severity and its 'high' view of culpability until the end of the 18th century. At the same time it maintained its essentially subjective view of mitigation and an increasingly inaccessible opportunity for equity relief in Chancery. Blackstone sought to reconcile the tension between the Angevin fusion of moral and secular law in this defence of the royal prerogative.

...the exclusion of pardons must necessarily introduce a very dangerous power in the judge and jury, that of construing the criminal law by the spirit instead of the letter; or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender,

though they alter not the essence of the crime, ought to make no distinction in the punishment.\textsuperscript{10}

Despite Blackstone's subsequent emphasis on the role of the Crown in mitigation, the initiative lay firmly with the courts by the end of the 18th century. In the absence of an effective police force to recruit evidence or of official prosecutors to frame indictments, both grand and petty juries were able to apply rigorous standards to often defective prosecutions. If their sympathies were engaged they did not hesitate to do so. As both J.M. Beattie\textsuperscript{11} and T.A. Green\textsuperscript{12} have argued, their grounds for such unofficial mitigation were both social and humanitarian and reflected their judgement of the character, circumstance and prospects of offenders. Their recommendations for clemency with guilty verdicts were normally endorsed by the judges. Indeed when, after the 'Murder Act' of 1752 (25 Geo ii C37), execution became mandatory within forty-eight hours of sentence on the last day of an Assize, the Prerogative of Mercy, was wholly in the hand of the judge. Without judicial respite and a letter to the Privy Council, hanging was automatic although an exception must be noted here in the case of those tried in London where all death sentences were referred to the Privy Council for confirmation. There is, it seems, little evidence that juries and judges failed to agree in that small residuum of cases where exemplary justice was called for. It seems equally clear that the


\textsuperscript{12} T. A. Green, Op. Cit. cap. 7.
role of the Crown, whether acting in the Privy Council or, after the first decade of the 19th century, on the advice of the Secretary of State for the Home Department, was almost entirely formal. When upwards of two thousand cases a year were referred to the Crown by the Judges of Assize or the Recorder of London, it could hardly have been otherwise.\textsuperscript{13}

It may thus be argued that, while the royal prerogative itself was already a vestigial element of the criminal law, its mitigating principle was still a central feature of that law. It symbolically represented all the subjective reservations of a conservative society about the promise of absolute justice and the possibility of perfectible man-made law. Oliver Goldsmith expressed this conservatism in these terms:

In England, from a variety of happy accidents their constitution is just strong enough, to permit a relaxation of the severity of the laws, and yet those laws still to remain sufficiently strong to govern the people. This is the most perfect state of civil liberty, of which we can form any idea; here we see a greater number of laws than in any other country, while the people...obey only such as are immediately conducive to the interests of society; several are unnoticed, many unknown; some kept to be revived and enforced on proper occasions, others left to grow obsolete ...It is to this

\textsuperscript{13} Select Committee on the Criminal Laws etc, \textit{British Parliamentary Papers 1819} Appendices 1-3.
ductility of the law that an Englishman owes the freedom he enjoys.\textsuperscript{14}

The movements for law reform which emerged towards the end of the 18th century can be called rational in so far as both legal and penal reformers sought to accommodate the law and its sanctions to the logic of the developing urban and industrial market place. It was both a secular and a spiritual phenomenon, in which the forces of enlightenment rationalism coexisted uneasily with a dynamically revived and often self-consciously secularized Protestant individualism. Beneath these two reforming tendencies there lay, despite their common origins, a basic ethical antithesis. What was contemporarily given the generic name of positivism, depended wholly on reason and experiential knowledge and was opposed by an equally broadly defined constituency of intuitive idealists. There were reformers in both categories. We thus find at one end of the polarity a small but potent group of philosophical radicals and their utilitarian followers and, in due course, Comtean "positivists." At the other end is a cluster of Quaker, Methodist, Unitarian and Anglican social reformers who shared, in varying degrees, an optimistic belief in the accessibility of an absolute moral law and in the human conscience as its interpretive mechanism. This latter group were distinguished from their fellow Christians not only by a profound sense of the possibility of personal and social moral improvement but also by an urgent sense of obligation to effect it.

This optimistic benevolence was often at odds with the more pessimistic conservatism of their Christian contemporaries.

These reformers held much in common. Optimism bred in each a robust individualism, a conception of the progressive nature of social and moral knowledge and a corresponding disrespect for the wisdom and institutions of the past. Legal fictions which were a traditional method of adaptation for the common law, and of which the Prerogative of Mercy was a prime example, were equally abhorrent to both. Yet while both saw the law as a proper tool for the moral reeducation and repair of a fractured society, and an essential ingredient for the restoration and maintenance of good social order, their viewpoints stood far apart and from the perspective of a 'high morality' evangelical idealists spurned the 'low morality' of positivism. The goals of evangelical reform were, as Radzinowicz observed, ameliorative\(^{15}\) or morally therapeutic, where those of positivism were, in the context of law reform, altogether more radical. In alliance, as for example in the campaign to restrict the death penalty, results were formidable but attempts by utilitarians alone to establish a court of criminal appeal or to revise and codify the criminal law were wholly unsuccessful. Indeed by the mid 1860's all of these campaigns had evidently failed although abortive efforts were made to revive them in subsequent decades. The force of evangelicalism had been much attenuated in the affluence that Wesley had foreseen and Mill himself only judged

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\(^{15}\) Radzinowicz (& Hood) op. cit. cap. 3.
the success of the philosophy which his father and Bentham had promoted realistically when he wrote to his French publisher in 1861.

Like many of the French you appear to be of the opinion that the 'idea of utility' is in England 'the dominant philosophy.' It is nothing of the sort...it is, and has always been, very unpopular here...the school of Bentham has always been regarded (I say it with regret) as an insignificant minority.\(^{16}\)

Of the various public debates referred to above none demonstrate these characteristics so well as that against the death penalty. In its early phase which extended from Romilly's first initiatives in 1808 to the mid 1830's, the campaign was concerned with the progressive elimination of capital punishment from all felonies other than murder and treason. It united utilitarians and evangelicals and many who would not have owned to be either. For the utilitarians it was an essential step in the establishment of a measured and proportionate penal code, one whose moderation must lead to the elimination of the unpredictable and subjective mitigation then practised by judge, jury or the Crown. In the words of Cesare Beccaria, whose *Essay on Crimes and Punishments* was a basic text for such reformers.

As punishments become more mild, clemency and pardon are less necessary...Clemency is a virtue

which belongs to the legislator and not to the executor of the laws. To shew mankind that crimes are sometimes pardoned and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity. Let the executors of the laws be inexorable and let the legislators be tender, indulgent and humane.\textsuperscript{17}

In evangelical eyes capital punishment was more often seen as an offence against public sensibility, which, especially when carried out in public, degraded where it should have uplifted, and thus hindered the establishment of that general spirit of benevolence which would create in Sir James Mackintosh's words "an adequate security for mankind".\textsuperscript{18} There was thus a powerful, if temporary, unity of reason and feeling. By 1836 Fowell Buxton's motion to restrict capital punishment to murder alone fell one vote short of a majority in the Commons. Conservative resistance was formidable but, although a quarter of a century was to pass before the law was finally changed, the battle had in practise been won. For the next twenty-five years it was in the functioning of the law, in the actions of juries, judges and the Crown that the sensibilities of the community were accommodated. Thereafter the campaign for total abolition fell into the hands of a vigorous minority of idealists using the tools of utilitarian criticism - Bright, Ewart, Beggs and Tallack.

\textsuperscript{17} Cesare Beccaria, \textit{An Essay on Crimes and Punishments}, pp. 175/6, English Trans, (3rd Ed.) 1770.
By the time the Commission on Capital Punishment was established in 1864 their isolation was evident and only four years later, in the parliamentary debate on the Capital Punishment in Prisons Bill it was John Stuart Mill himself who called a halt to their "exaggerated" philanthropy.\textsuperscript{19} Mill spoke for many when he stigmatized the cultivation of "a peculiar sensitiveness of conscience on this one point, over and above what results from the general cultivation of the moral sentiments." Some years later, Sir John Gorst expressed the essentially consensual character of mid-Victorian moral judgements when he stated in debate,

The vast majority of members of the House were most anxious to see the punishment of death limited as far as possible, to those cases of murder in which the general public conscience and the general public opinion admitted the application of the penalty of death to be appropriate.\textsuperscript{20}

At this moment, as much as at any time, the mass of English people seem to have distrusted both the powers claimed for individual reason and the reliability of the individual conscience and in no area was this pessimism more evident than the debates on proposals to reform the criminal law.

The protagonists of a court of criminal appeal, whose campaign began in 1844 with Sir Fitzroy Kelly’s Bill, were for the most part utilitarian lawyers, followers of Bentham, Austin and

\textsuperscript{19} \textit{Hansard}, April 21st, 1868.
\textsuperscript{20} Ibid, May 11th, 1866.
Brougham. They attacked the secret and unpredictable use of the prerogative, the fallibility of juries and what they held to be the excessive power of the judges. With the establishment of the Court of Crown Cases Reserved in 1848 they succeeded in formalizing the existing practise of the Queen's Bench, in reviewing points of law referred to them voluntarily by their colleagues in the Assize Courts. They failed, however, in subsequent attempts to extend this review both to the facts as found by the jury and to the sentence as awarded by the Judge. In both of these last objectives they threatened deep rooted public as well as professional legal traditions. In the case of the Royal Prerogative their proposals were often met with incomprehension. In his evidence to the Commission on Capital Punishment in 1864, Lord Cranworth, a judge, was asked whether it was not "one of the greatest objections to the existing system that a resort to the Crown is allowed so extensively in this country?" He replied that, even after two trials, "there must be such an appeal somewhere." Justice and mercy were to him, as to Blackstone, distinct concepts, and if one was an absolute the other was a relative question. This debate, which continued throughout the period, is important because it brings into relief the conflict of rationalist concerns for eliminating the subjective and uncertain factors in the legal process and a countervailing pessimism about the possibility of the law as a mechanism for recovering truth and justice.

The long history of the Commissions into the Consolidation of the Criminal Law reflects the same contentions. In its first Report the Commission of 1833 set out its intentions, and those of its sponsor Lord Brougham, of revising and codifying the criminal law. It proposed to correct or eliminate some of those traditional features of the law which have already been noted; the broad definition of offences, the high maxima of sentences and the wide discretion allowed to judges. Proclaiming a belief in free will and the voluntary nature of crime, it emphasized the need for rational deterrence based on an intelligible legal code which would match in its penalties "the degrees and shades of guilt." It cited the current lack of relation between offences and punishment, "in point of moral guilt or the injury sustained." Such a difference led, it was argued, "to great uncertainties in the application of punishment, whereby the motive to abstain from the commission of offences is weakened." 22 The hesitation between moral guilt and injury sustained is characteristic of the need which the Commission felt to compromise, a pressure which drove John Austin, one of its members, into early resignation. Austin and his utilitarian cohorts considered the assumption of any coincidence between the civil law and the natural or moral law as a dangerous fallacy. He argued that we must obey the law out of prudence and change it, if its consequences were not socially useful. The retrospective examination of moral guilt with its implicit focus on intention

rather than consequence was irrelevant to his concept of justice.\textsuperscript{23} His colleagues, who continued to serve as members of the Commission for a further fourteen years, supported the utilitarian critique of the criminal law in most respects except that of the role of morality in the law. In their Seventh Report, in 1843, they declared that,

...the temporal law dependant as it is in so great a degree on moral support of its authority at once strengthens the efficacy of the moral law and increases its influence...By the neglect of moral distinctions and a vain reliance on such as are artificial and technical the law is not only negatively objectionable in failing to enforce moral values, it is productive of positive evil in tending to weaken their authority.\textsuperscript{24}

Neither the project to rationalize and codify the criminal law, nor Austin's efforts to incorporate an utilitarian equity in a new positive code of law were successful. By 1843, and seven reports later, the Commissioners had defined forty five classes of offence, each with a specific set of aggravating circumstances and a tariff of appropriate penalties. In doing so they were attempting to turn the law's principles upside down. They proposed to start with a minimal concept of liability and look for 'aggravation,' rather than maintaining strict liability with subsequent mitigation. Their

\textsuperscript{23} John Austin, \textit{Lectures on Jurisprudence}, 2nd Ed., 1861.
proposals were not accepted by Parliament and the much more modest recommendations of the Second Commission of 1845 were likewise ignored. The simple reason offered by commentators such as Radzinowicz and Cross25 is that the Judges sank the proposals but this is an area that deserves more study than it has yet received since it seems likely that opposition extended far beyond the bench. The Acts in which the law was eventually Consolidated (25 & 26 Vict.C100) were merely classificatory and are best remembered because they reduced the number of Capital Offences to three. According to J.F.Stephen even their classification was obscure.

Their arrangement is so obscure, their language so lengthy and cumbrous, and they are based on, and assume so many singular common law principles that no one who was not well acquainted with the law would derive any benefit from reading them.26

Each of these legal reform movements fall into a section of Radzinowicz and Hood's work entitled "clinging to the past" and this implicit judgement is not unfair, unless it be to those elements of the past which had so stoutly rebuffed the encroachment of the present.

In 1861 the common law retained its high view of culpability, or strict liability, its broad definition of offense, and an essentially maximal view of punishment with wide latitude for judicial

26 J. F. Stephen, Fortnightly Review #18, 1872.
consideration of circumstance. The widespread belief in the necessary coincidence of morality and the law had not been effectively challenged. The law continued to be seen as a retributive mechanism for the settling or annullment of guilt and the necessary condition of that annullment through punishment was the establishment of guilt and its measurement. The equation of guilt and evil intention remained the touchstone of this process, and it was a process that presupposed an underlying consensual morality.

The concept of exemplary justice survived without essential change although descriptions of its rationale did change. Traditional jurisprudents of the 18th century saw its role as intimidatory, in Paley's tag - "Poena ad paucos, metus ad omnes". For both early utilitarians and evangelicals it was didactic but towards the end of the century it was increasingly seen as an expressive affirmation of society's apparently crumbling moral values. Thus, in 1883, J.F.Stephen defended the retention of capital punishment in these terms:

A great part of the general detestation of crime which happily prevails among the decent part of the community in all civilized countries arises from the fact that the commission of offences is associated . . . with the solemn and deliberate infliction of punishment . . . I think it highly desirable that criminals should be hated and that their punishments should be so contrived as to give expression
to that hatred.\textsuperscript{27}

The Common Law maintained, as it had always done, a formal respect for the equal distribution of justice. Nevertheless the practical enhancement of this element, which had figured so largely in the minds of many enlightenment jurists, was never a major item on the agenda of early 19th century English law reformers. It seems that the underlying presumptions of equality inherent in the concepts of autonomous conscience and reason shared by both evangelicals and positivists served to deflect attention from practical questions of access to the law. There was always a more tender concern for equality of punishment than for equality of legal rights or process. There is nevertheless, an element of compromise in the intellectual climate of 1861. Doubts about the efficacy of reason and conscience alike prompted the reassertion of a consensual ethics. This move towards consensus was evidenced by an incipient compromise between utilitarian rationalism and the intuitive idealism which had for long stood at the center of English ethics. It was a characteristic aspect of that brief moment of equipoise.

The publication of John Stuart Mill’s \textit{Utilitarianism} in 1861, in \textit{Frazer's Magazine}, marks something of a watershed in this ethical debate. For John Grote, an idealist opponent, Mill was no longer offering a defence of classical rationalism but a recognition of its

limitations. This was in Grote's phrase, "neo-utilitarianism", which with its a priori scale of hedonistic values and its acceptance of some role for the intuition seemed to have moved closer to the 'common sense' tradition of contemporary epistemology. We have already noted how both rationalist and idealist reformers had set a high premium on social order and had held an uncomfortable balance between the demands of individual freedom and self restraint which this social order required. In 1861 it seems that both were moving towards a more central position where conformity to consensual values helped obscure the evidence of religious disarray. As John Stuart Mill had written as early as 1834, "There never was, and never will be, a virtuous people where there is not unanimity, or an agreement nearly approaching to it, in their notions of virtue."

During the next half-century common notions of virtue came to be shared by an ever widening segment of the population. It was a consensus which made possible both a progressively stricter enforcement of the law and more demanding calls on the self-control of individuals. The respectable majority sought, in Mathew Arnold's words to achieve a more harmonious moral perfection "in the subduing of the great and obvious faults or our animality." The contribution of Government to this process came not in the formulation of new criminal laws but in the steady extension of a

centralized criminal justice system across the changing face of mid-Victorian England.
Chapter Two

The Pre-Trial Phase - Central Government Takes Charge.

During the second half of the 19th century substantial changes occurred in the administration of the criminal justice system shifting responsibility for the prosecution of crime from the hands of individuals and local authorities into those of central government. This process was piecemeal and often ended in compromise but it was sufficient to alter the balance between the criminal and his prosecutor and to make possible a more effective enforcement of the law. This chapter, and those two which follow, examine the prosecution of homicide and those legal stages which culminated in the execution or reprieve of a prisoner already convicted of murder. Homicide as a whole and murder in particular became progressively rarer crimes in late Victorian England and those which did occur were more successfully prosecuted. In the pre-trial phase both Coroners and police became more efficient in detecting murder and in apprehending those responsible. Central government became increasingly involved both in the prosecution of serious offences itself and in the provision of legal aid of one kind or another to local authorities. No such aid was available to those accused of such offences and their position became relatively weaker during this period.

It is convenient to divide this process into three stages. A pre-trial phase of arrest, examination and committal was followed by
trial at an Assize Court or at the Central Criminal Court in London and this, in turn, by a post-trial period, rarely exceeding three weeks, in which appeals were considered and a temporary respite or a permanent reprieve might be granted by the Home Secretary. In each of these phases significant changes occurred in the administration of the law during the second half of the 19th century. These were not changes in the forms of criminal justice or, except in rare cases, in the law itself. It is rather in the changing patterns of human involvement, in the location and character of administrative power and in an evolving bureaucratic rationale that their significance is to be found.

Powering these changes were those incoherent and often mutually conflicting pressures that, despite repeated failure to rationalize the criminal law, remained active when it was merely consolidated in 1860 and 1861\(^1\). The demand, from reformers, for a nationally consistent and efficient administration of the law and its penal function was undiminished and this theme was steadily reinforced by local calls for assistance in grappling with the complex problems of a rapidly growing urban and industrial society. In the early part of the period under review the Home Office, and the Law Officers, were reluctantly forced to assume an increasing role in the centralized direction of this administration. However, there later developed a more positive and confident taste for bureaucratic power. A similar pressure for increased legal efficiency and

\(^1\) Criminal Law Consolidation Acts 1860/1 (25 & 26 Vict. C. 100 etc.)
competence encouraged specialized education for lawyers and a growing professionalism amongst both barristers and solicitors, although it will be argued that, in the area of the criminal law, the emergence of a respectable professional status for specializing solicitors was less evident. Despite the failure of attempts to establish a truly national police force, centralized inspection and control of a significant budgetary subsidy slowly imposed consistent standards and procedures on the county and borough forces. In the area of penal administration the process of centralization was most rapidly accomplished and by 1877\(^2\) the whole network of prisons had become the responsibility of the Home Office.

Caught in the midst of these developments the latitude and wide courtroom hegemony traditionally enjoyed by the Judges of the High Court was inexorably if slowly diminished. Despite their success in opposing either reform or codification of the criminal law the power of Judges was restricted as other participants in the legal process increased their authority and professional self-confidence. This was particularly true of the bureaucrats who, unlike the Bench, had allegiances other than to the Law itself, and were, in the last resort, answerable for their decisions in Parliament. As a result they developed their own practises and internal case-law through which to rationalize and perhaps justify their decisions. Elsewhere in the process the Justices of the Peace,

\(^2\) Prisons Act 1877 (40 & 41 Vict. C. 21)
who as John L. Langbein has demonstrated were once the investigating prosecutors of the criminal justice system\(^3\), exchanged their critical power in the investigation of serious crime for a mass of summary jurisdiction in minor offences\(^4\). The power lost by the J.P.'s, and by the county gentlemen of the Grand Jury, passed slowly into the hands of the police and a new group of bureaucrats in the office of the Director of Public Prosecutions.

This three-fold process will be examined in the context of those capital cases which comprise the H.O.144 series and whose files offer an unique account of the system as a whole. These files were compiled to permit a thorough final review of each case and no comparably complete archive exists. Their sharp focus on cases in which convictions were obtained for murder does, however, set them apart from the mass of less serious crimes as does the absence of a parallel record of cases in which acquittals occurred. No confident and quantifiable generalizations about the criminal justice system can therefore be made on this basis. These are, moreover, the records of official decisions compiled by civil servants and their perspective tends to ignore the defendant who, in any event, played a modest and largely mute part in the proceedings of Victorian justice. Such limitations apart we have a window opening into a room rarely visited and through it can observe a process about which there is today no plausible account.

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\(^4\) See Chapter 3 below.
The experience of those convicted of murder was a much rarer one in Victorian England than the annual figures for homicide might suggest. Each year the Registrar of Criminal Statistics at the Home Office recorded between 300 and 400 case of homicide as "known to the police." This figure included all those cases where Coroner's Courts had brought in homicide verdicts and those cases where, despite the absence of a body or witnesses of death, an assumption of homicide could be made. The Coroner's verdict in the former cases was supported by both police and medical evidence and while mistakes could be made, as in the case of Harriet Staunton in 1877, their presence lends a substance to the homicide figures which is often lacking in other comparable categories of the Criminal Statistics. On the other hand the figures share the common weakness of an inevitable underreporting of successful crime, in this case of unremarked deaths that slipped quietly into the 'dark figure' of undetected crime.

Coroners were, certainly, by no means universally efficient and their inquests were not extensive especially in the first half of the 19th century. Prior to the Coroner's Act of 1887(50/51 Vict: ) the Coroners, who were then mostly lawyers, had wide discretion in deciding to hold an inquest and in ordering, at further cost to the

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6 H.O. 144 Series, Case #64091C, (1877). In this case the effects of tubercular meningitis were apparently confused with those of deliberate starvation.
rate-payers, an autopsy. Their methods were, moreover, widely
criticised. In the evidence submitted to the Commissioners on the
Criminal Law in 1845 one not untypical witness declared:

The proceedings in general before Coroners are so anomalous
that they deserve little confidence in any respect and the
frequent inaccuracy of the inquisitions, in point of law, is
notorious. 7

In 19th century England the availability of registered medical
practitioners to attend the dying was a function of means and, in the
absence of a death certificate from such a doctor, the Registrar of
Births, Marriages and Deaths was required to advise the Coroner if
he was unsatisfied with the account given of any death he was asked
to record. 8 The relatively high level of inquests in the first half of
the period now under review is not, therefore, surprising. About 50
deaths in every thousand were subject to inquest in this period and
between 1880 and 1910 the figure rose to 70 9 This increase was
due, no doubt, to the requirement of the 1887 Act that inquests be
held in all cases where there was "reasonable cause" to suspect that
the subject had died "either a violent or an unnatural death." Lionel
Rose argues that the principal victims of this incompetence and
parsimony were infants, and especially those of the poor. 10

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9 Judicial Statics for England & Wales 1861-1910, British Parliamentary Papers. These annual Reports record, inter alia, a summary of the inquests held.
active Coroner such as Dr. Edward Lankester, the Middlesex Coroner from 1862 to 1874 found verdicts of murder in some 10% of the infant deaths he examined while his contemporary in Bristol reported only 1%. Despite these anomalies murder verdicts on infants under one year old accounted for nearly 50% of all "murders known to the Police" in the 1860's and for between 25% and 30% in the last two decades of the century.\textsuperscript{11} This was a figure that remained fairly constant up to the outbreak of the second world war. The discovery of homicide, whether among infants or adults is, however, likely to have become slowly more probable as medically-trained Coroners gradually replaced lawyers and as the registrars of births, marriages and deaths became more active and closely supervised.\textsuperscript{12} Despite such changes coroner's verdicts of culpable homicide (murder or manslaughter) only accounted for about 70% of these crimes reported as "Known to the Police" in the last decade of the century.\textsuperscript{13} Their methods also continued to be uncertain and in cases where prisoners were committed for trial on the basis of coroners verdicts alone there was an unusually high rate of 'No-Bills' from grand juries.\textsuperscript{14}

Homicide, if not always easily identified, is a universally reprobated crime and its successful prosecution a common yardstick of effective law enforcement. By 1861 England and Wales were

\textsuperscript{11} Judicial Statistics for England & Wales, 1861-1910.
\textsuperscript{12} L. Rose, op. cit., p. 123.
\textsuperscript{13} Judicial Statistics for England & Wales.
\textsuperscript{14} See Appendix B, Table 3.
beginning to be extensively policed and there was already a density of more than one policeman to every thousand of the population outside London and two in the metropolitan area.\textsuperscript{15} This growing police presence on the streets of Victorian England is reflected in the H.O.144 files, evidenced by the speed with which constables arrived at the scene of crime, very often within minutes of the incident. While apparently highly efficient at arresting those responsible for homicide they were much less successful in providing evidence to ensure convictions. In the 1860's, as V.A.C. Gattrell has observed, arrests were made in virtually all cases of "homicide known to the police".\textsuperscript{16} Paradoxically the percentage fell over the next 50 years as enthusiasm was, perhaps, tempered by prudence and in the first decade of the new century such arrests occurred in only 85\% of cases.\textsuperscript{17} As with arrests, so with committals to the county goal, pending trial at the next Assize, which fell from 93\% of "homicide known to the police" at the start of the period to only 71\% after 1900. This suggests growing discrimination in considering prosecution and was particularly the case where murder indictments were involved.\textsuperscript{18}

The superficial improvement in the rate of conviction to committal which occurred over the same period is a misleadingly poor reflection on the quality of Victorian prosecutions which

\textsuperscript{16} V.A.C. Gatrell, op. cit., Appendix A.
\textsuperscript{17} Ibid, & Judicial Statistics for England & Wales.
\textsuperscript{18} Appendix B,Table 2
undoubtedly became more effective. A conviction rate of 36% of those committed for murder in the 1860's had risen fifty years later to only 43%\textsuperscript{19}. However, whereas in the first period 50% were either acquitted, or their cases dropped, by the early 20th century (1900-1910) this figure had fallen to only 22.5%. To those convicted and sentenced to death we must now therefore add a much larger proportion, 34% compared with 15%, who were found either unfit to plead or guilty but insane. Along with those 'sane' convicts who were either hanged or imprisoned for life this group were also incarcerated at the "pleasure" of the Queen or her Secretary of State, and usually for life.

Whatever its outcome trial and conviction for murder was, nevertheless, a rare occurrence in Victorian England. It happened in only about 7% of "homicides known to the police" giving an annual average of cases which rose slowly from about 25 to nearly 30 p.a. in the first years of the 20th century (Table 2). It was upon this small residuum that the Prerogative of Mercy was exercised. In the following chapters the problems of both prosecutors and defendants will be examined and some of the reasons for this 'wastage' will become apparent. Changes in the methods of prosecution will emerge as part of a general tightening in the system of law enforcement and will be more evident than any comparable improvement in the situation of the defendant. This was a time in which the bureaucrats

\textsuperscript{19} Appendix B, Table 2
began to take charge and to ensure that there was "No failure of justice."

The law of England traditionally laid on the victim of crime the responsibility of prosecuting the offender. In cases of homicide this custom created obvious difficulties and by the middle of the 19th century responsibility at least for the initial stages of arrest and presentation to the magistrates had passed to the local police. It was still open to relatives or friends of the victim to obtain a warrant, to summon a constable and to personally charge an offender with the crime but such cases were evidently rare and no cases of a successful private prosecution have so far emerged from the H.O.144 files after 1861. Based upon the evidence of the police and their witnesses the magistrates could commit the defendant for trial at the next Assize on a warrant prepared by their clerk. This warrant was sent to the Chief Gaoler at the County Gaol who prepared the Calendar for the itinerant Judge of the High Court with his commissions of Oyer and Terminer and General Gaol Delivery. To the Clerk of the Peace went the depositions sworn to at the committal proceedings and a list of the witnesses bound over in their own recognizances to appear before the Grand Jury. As David Philips has noted in his study of the Oxford Circuit between 1835-1860 these recognizances were substantial; a prosecutor might be required to offer a bond of up to £40 and a prosecution witness

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21 The Clerk of the Assize Court.
between £10-20. Upon this evidence an indictment, or bill of particulars, was prepared by the Clerk of the Peace. In the case of murder the effective authority for prosecution was thus the magistrate's warrant. The individuals involved, policemen or private citizens, while technically one or other was the nominal prosecutor, remained compulsory witnesses at the subsequent proceedings. In rare cases magistrates failed to endorse Coroner's findings and committals were made on the authority of the Coroner alone, often with the kind of results referred to above. The individual named as prosecutor in the magistrate's warrant would normally retain a solicitor to prepare the case. Since Bennett's Act of 1818 (58 Geo 3 cap 70) the prosecutor had been able to recover the costs involved on a scale fixed by the local Courts. Since such costs were both substantial and hard to predict there was every incentive to employ an experienced solicitor and there was usually no shortage of willing candidates. The replies to a questionnaire sent by the Criminal Law Commissioners to a large sample of Justices, Justices' Clerks, Coroners, and working barristers in 1845 reflect the problems this system created and are well summarized in the reply of the Clerk to the Justices of Bishop Auckland in Co. Durham:

In reference to the present law as regards the duty of prosecution I think it is by no means effectual and requires

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23 Philips, op. cit., P. 112/3. See also Appendix B which illustrates the practice in one county, Co.Durham, in the 1840's.
amendment. It frequently happens that prosecutors are persons of the poorer classes and that attorneys in low practise are on the watch to obtain the prosecutions for the costs allowed by the county. These persons have not the responsibility which usually subsists between solicitor and client.... In many instances the cases are imperfectly got up and the prisoner escapes the justice which he merits; and in other instances cases of a trifling description are urged forward which should never have come to court.24

There seems little doubt that in murder cases the committing magistrates took care to see that either the local police, in the person of the Chief Constable, or a substantial private person was nominally responsible for the case and that a respectable local solicitor, often the Justices' Clerk, was engaged. It was not, however, universal practise and cases occurred where, as we shall see, the prosecution was totally neglected. Murder cases were often simple ones and in such cases this procedure worked well enough. In the parliamentary debate on the Prosecution Of Offences Bill of 1879 the Attorney General, Sir John Holker, declared,

As a rule the present system works remarkably well. Prosecutions go on before the Magistrates and are undertaken by the Police and then go to the Quarter Sessions or Assizes and are directed by the Magistrates Clerks or

Solicitors in the various localities.\textsuperscript{25} This is very much of an oversimplification for it is evident that the practise varied and that it could prove inadequate in cases of complexity. Many cases called for the marshalling of evidence additional to the preliminary depositions, including that of specialist witnesses and most would involve the task of ensuring the attendance of reluctant witnesses. While homicide cases, especially those where insanity or technical evidence was at issue, could fall into this category, it seems clear that the real impetus for a Public Prosecutor came from the new types of crime that characterized the changing face of mid-Victorian England and that the public prosecution of murder by central government was only a side effect of this pressure. It was the problem of organizing the successful prosecution of fraud, embezzlement and the criminal aspects of bankruptcy that were in the forefront of Member's minds when parliament debated and passed the Prosecution of Offences Act in 1879\textsuperscript{26} just as it had been for the Criminal Law Commissioners when they first recommended such a step in 1845.\textsuperscript{27}

In the case of murder the onus for prosecution shifted only slowly from local prosecutors to central government and it did so as a result of appeals from local authorities. A small but growing proportion of difficult cases were undertaken by the Treasury Solicitor at the instruction of the Home Secretary in the early

\textsuperscript{25} \textbf{Hansard}, March 14 1879.
\textsuperscript{26} Prosecution of Offences Act (1879), 42&43 Vict. C. 22.
\textsuperscript{27} CCL 8th Report, Appendix A, p. 320.
1870's and, after 1879, by the Director of Public Prosecutions on his own decision. When the offices of Treasury Solicitor and Director of Public Prosecutions were amalgamated in 1884 the Director continued to act only in response to local requests and it was not until the end of the century that a stage was reached when virtually all capital cases were managed by his department.28

The pattern of such appeals for help is significant since it tends to reflect the uneven development of police services in England and Wales. In those areas outside London, it is the counties and small boroughs, who lagged behind in the creation of effective policing, and who appealed both for investigative and prosecutorial help most frequently. In London, on the other hand, the relatively integrated service, which had existed since Peel established the Metropolitan Police under the control of the Home Office in 1829, ensured that the Stipendiary Magistrates already had access to both kinds of assistance. This model was followed by other Cities and large new boroughs in the 1830'and early 1840's. In this latter period many soon began the further practise of nominating a police prosecutor and a local solicitor to handle all criminal prosecutions. This development was prompted in part by the Municipal Corporations Act of 1835 which disqualified the Town Clerk's office from the task.29 The pioneer was Leeds and its Town Clerk

29 Municipal Corporations Act (1835), 5 & 6 Wm. IV C. 76.
described the system to the Criminal Law Commissioners in 1845 as follows:

With regard to the present law as regards the binding over of prosecutors and witnesses and the duty of prosecutions, an experiment has recently been tried in the Borough of Leeds of appointing two respectable attorneys to act as public prosecutors and a similar course has been adopted in other towns. This is done by binding over an Inspector of Police as the prosecutor in every case with the understanding that he shall employ one of the Attorneys selected. . . the experiment has been very successful.\textsuperscript{30}

Where both an effective police force and a satisfactory system of managing prosecutions was created appeals for help in detecting or prosecuting crime were very few. Those who were not prepared, like the citizens of Leeds, to establish resources comparable to those of the Metropolis increasingly appealed to the Secretary of State for help.

Most murder cases presented few problems either in respect of proving an act of homicide or the felonious intention which made such an act into one of murder. Prompt arrests and the unguarded statements of those arrested usually left little doubt as to who had done the deed or that they had intended to do it. It was in the balance where no clear evidence of commission was available or genuine doubt arose about intention, either through possible insanity or a

\textsuperscript{30} CCL 8th Report, p. 271.
high degree of provocation that help was called for. The growth of a national press, with an insatiable appetite for sensation, ensured that murder once discovered never went unreported and unresolved cases or fumbled prosecutions were a serious potential embarrassment to local authorities.

The case of Constance Emilie Kent, who was tried in 1865 for the murder of her infant step-brother five years earlier, illustrates such a dilemma. When the child’s body, its throat savagely cut, was found in an out-house of the substantial Kent family home near Trowbridge the local police were unable to find any evidence as to the culprit. Gypsies or vagrants were the first convenient suspects and when this line failed suspicion fell on the father Samuel Kent and then on the nurse-maid, Elizabeth Gough, who was arrested in October 1860 but later released without having been charged. The Clerk to the Trowbridge Justices obtained Home Office authority to offer a reward and when this failed to produce any evidence the Chairman, Sir John Eardley Wilmot, proposed first a larger reward and then, in May 1861, the unusual expedient of a government-sponsored local enquiry.31 This was approved by the Home Office and a firm of Trowbridge solicitors, Messrs Slack and Simmons, conducted an unofficial second ‘inquest’ into the case. It too was abortive and in the records for October 1861 they are to be found appealing for their expenses which, in due course, the Treasury

31 H.O. 144 Series, Case #20/49113, Constance Emilie Kent, (1865)
pared down from L824 to L694. In the following month Sir John Eardley Wilmot appealed again to the Home Office, this time for the aid of a Scotland Yard detective. The request was strongly opposed by the Commissioner of the Metropolitan Police, Sir Richard Mayne, on the grounds that there was no fresh evidence to work on. Sir John Eardley Wilmot seems, however, to have had good political connections and The Home Secretary, Sir George Grey, overruled Mayne and Inspector Jonathan Whicher was sent to Somerset. He focussed his enquiries on the daughter of Samuel Kent's first marriage, Constance, and eventually arrested her only to have his case dismissed by the local bench for lack of evidence. The matter remained unresolved until 1865, when Constance herself walked into Bow St. Police Station and gave a written confession. She thus ended a long episode of malicious local gossip and speculation against her father and the nurse-maid. National press interest was reawakened and the Attorney General himself, briefed by the Treasury Solicitor, was at last able to rid the local magistrates of this incubus.

Both contemporary comment and some recent historical studies have tended to be unflattering about the investigative talents of the Metropolitan Police in Victorian England. Their public and preventive role originally conceived by Peel always conflicted with the investigative role demanded in cases of serious crime.

32 Ibid.
33 Ibid.
34 Ibid.
Inspector Lestrade, that upright and unimaginative creation of Conan Doyle may be contrasted with the altogether more successful French 'police spy', Vidocq. After a tentative start in 1842 with only two inspectors and six sergeants the detective branch at Scotland Yard developed slowly with only grudging support from the Commissioners Rowan and Mayne. The latter, according to Edwin Chadwick, "disliked detection on principle and only yielded to its adoption on what they deemed to be superior authority." 36 It was only after 1878, in the wake of the Druscovitch scandal, 37 that a Criminal Investigation Department was established and real expansion began. Under the energetic leadership of a barrister named Howard Vincent staff grew from about 250 to over 800 men in six years with better pay and training improved significantly. Even then they depended substantially on the information of paid informers and on close, some argued too close, observation of the "criminal class" which they had themselves helped to define. It was not a background which greatly assisted the solution of so random and unpredictable a crime as homicide particularly outside their own "manor" of London. Nevertheless they came to share the generally high reputation of the force as a whole and their services were increasingly in demand from the provinces. The pattern of Scotland Yard involvement emerged slowly over the period and in general was a mark both of the difficulty of the case and its potentiality for trouble.

37 Thurmond Smith, op. cit., p. 69.
A murder near Sandwich in 1878 had both these ingredients. Inspector Andrews of Scotland Yard was sent to solve the murder of the son of a prominent local landowner, apparently committed by a member of Joseph Arch's Union of Agricultural Workers, then on strike in that area. The Clerk to the Justices wrote to the Home Office,

... at the suggestion of the Justices engaged in the investigation, not only on account of the nature of the murder but also from the strike of agricultural laborers in the neighborhood and the alienation of proper feeling among them, to ask that no failure of justice from insufficient means being employed may arise and that its sense of outrage may be shewn and a determination to preserve the peace and good order of society may be impressed on the public mind.\textsuperscript{38}

In the end, however, it was the traditional government strategy of a reward for information that broke the case. Stephen Gambrill, a prisoner sharing a cell with two others in Maidstone Gaol, boasted that he had killed the young man because the latter had found him breaking a new steam plough on his father's estate.

In the early 1870's investigative assistance began to extend beyond the conventional techniques of police work to include those of chemical analysis, medical examination and even ballistics. Dr. Alfred Swayne Taylor had effectively been medical advisor to the

Home Office since the late 1860's and his reports are available on a number of important cases including that of the Stauntons in 1877, when his critical comments on the prosecution's use of the medical evidence were studiously ignored by his employers. In 1880 the Home Office retained Dr William Thompson, a chemist and Fellow of the Royal Society, to advise on the evidence in William Cassidy's case where the accused was alleged to have poured paraffin on his sleeping wife and then ignited it. In the even more sensational case of Israel Lipski in 1887 no less than three specialists were employed by the Home Office to analyse the nitric acid which Lipski forced down his victims throat. One of these, Dr Stephenson, appears to have replaced Dr Taylor since he appears in numerous cases in the 1880s.

In another celebrated case in 1876 William Habron had been convicted of the murder by shooting of P.C. Cock, at Wythenshawe near Manchester. The conviction was obtained by the local police on purely circumstantial evidence aided by the bad reputation of Habron and his brothers who were Irish. The local force were criticized in the national press for offering evidence of a footprint whose measurements they swore to but could not present in the form of a

41 H.O. Series, Case #A47465, Israel Lipski, (1887). Drs. Stevenson & Calvert were analytical chemist who examined the acid forced down the the throat of the victim. Dr. Gover, of the Prison Commission, and Dr. Kay, a Police Surgeon, examined the apparently self-inflicted injuries of Lipski himself.
plaster cast.\textsuperscript{42} When later, in 1879, the notorious Charles Peace was arrested and proved to have committed a burglary in the same area in 1876, Scotland Yard employed Purdy the famous London gunmaker to carry out ballistic tests on a revolver found in Peace's possession. When these proved to match the bullet found in P.C.Cock's body Habron was pardoned and awarded a substantial, and rare, compensation.\textsuperscript{43}

The growing specialization and technical expertise available to central government enabled the Home Office progressively to dispense with two traditional tools of investigation, rewards for "information leading to conviction" and the offer of Royal Pardons to accomplices who gave evidence against their fellows. Together they had been, in Leon Radzinowicz' words, "the main weapon against public disorder and crime well into the 19th century."\textsuperscript{44} This does not mean that the role of the paid informer disappeared but rather that it became an unofficial police practise. By the same token charges continued to be dropped against compliant crown witnesses. It was the official sanction of such means by the Secretary of State that came to be considered both unseemly and an invasion of the civil liberties of the citizen which smacked of continental practise.

The case of the 'Brighton Railway Murder' was the cause celebre of 1881 and for nearly two weeks in June of that year no

\textsuperscript{42} H.O. 144 Series, Case #60198, Wm. Habron (1876). Cuttings from the Manchester Examiner & (London) Times of Dec. 6, 1876.  
\textsuperscript{43} Ibid, entries for March & April 1879.  
\textsuperscript{44} Radzinowicz, op. cit., vol. II, p. 3.
trace could be found of the suspect, Percy Lefroy Mapleton.\textsuperscript{45}
Mapleton was believed to have robbed and then murdered a wealthy
merchant, Mr Gold, in a first class compartment as the express
passed through Croyden. Howard Vincent, the Director of the
Criminal Investigation Department at Scotland Yard, applied to the
Home Office for authority to offer £100 reward for information
leading to Mapleton's arrest. This was to supplement the sum of
£200 already offered by the Directors of the Brighton and South
Coast Railway. The Permanent Under-Secretary A.F.O.Liddell minuted
on this request on June 30th,

\begin{quote}
The usual rule is not to offer a reward until the Coroner's
jury has returned a verdict of wilful murder. An exception
might be made in this case . . . but it would be most improper
to name Mapleton as Vincent suggests.\textsuperscript{46}
\end{quote}

The Home Secretary, Sir William Vernon Harcourt, agreed with
Liddell as he did about a further request from Vincent. The latter,
being under under great pressure from an outraged public, now
proposed to open the mail of some ten friends and relatives of
Mapleton who might have been sheltering him. Liddell minuted on
the 8th July:

\begin{quote}
It is contrary to practise and I should say quite out of
the question . . . the vague but significant instructions
which it is proposed be given to the Post Office officials
\end{quote}

\textsuperscript{45} H.O. Series, Case #A6404, Percy Lefroy Mapleton, (1881).
\textsuperscript{46} Ibid, entry June 30, 1881.
would be highly objectionable.\textsuperscript{47}

In the event the reward worked and the landlady of a lodging house in London's East End identified Mapleton to the police and duly collected the reward when the latter was convicted on November 8th 1881.\textsuperscript{48}

In 1875, R.H. Cross, a conservative Home Secretary, had shown less compunction during the investigation of the equally atrocious case of the Wainwright brothers. He then instructed the Post Master General to intercept telegrams between Thomas Wainwright and a suspected female confederate. This was authorized by a personal warrant from the Home Secretary to his colleague at the Post Office.

The case of the "Saw-Mill Murder" at Tonbridge Wells in 1887 appears to have been the last in which a Royal Pardon was offered to an assumed accomplice.\textsuperscript{49} Witnesses had reported that two men had accosted the time-keeper of the sawmill and it was concluded that one of them had later shot him dead. With no arrests and "excitement in the town at fever pitch"\textsuperscript{50} the Town Clerk wrote to the Home Office proposing the offer of a pardon for information leading to the arrest of the murderer. Godfrey Lushington, who was now Permanent Under-Secretary, proposed rejecting both the offer of a pardon and a financial reward. In this case he considered that,

\textsuperscript{47} Ibid, entry July 8, 1881.
\textsuperscript{48} Ibid, Correspondence from Mrs. Bickers, July/Nov. 1881.
\textsuperscript{49} H.O. 144 Series, Case #A49141, Dobell & Gower (1888). In the following year the Home Secretary refused to offer rewards or pardons in the case of the Whitechapel murders, (Jack the Ripper).
\textsuperscript{50} Ibid, Town Clerk of Tonbridge Wells to H.O. July 28, 1888.
A pardon is much less objectionable than a reward, but the rule having been made . . . if it is broken in some cases it will be impossible to maintain it in others. Whenever there is a murder committed it is necessary to do everything which can properly be done to find the perpetrator.\(^{51}\)

The Secretary of State, Henry Mathews Q.C., overruled him, however, as follows:

I think the rule should be that a pardon is only to be offered in cases where more than one person is concerned . . . with varying degrees of guilt and that all reasonable efforts have been made without success to discover the criminal. In this case grant pardon to any one not the actual murderer.\(^{52}\)

The case was only resolved when one of the two criminals made a voluntary confession to a Salvation Army Captain who reported the matter and the judge ruled that it was on his evidence that the two were subsequently convicted. It does not appear that Mathews' variant on the Home Office rule was treated as final or that other offers of pardon were ever subsequently made by the Home Office in criminal cases.

The problems of successful prosecution were, as the figures already quoted indicate, even more intractable than those of detection. From the early 1870's there is evidence of increasingly

\(^{51}\) Ibid, Minute of G. Lushington on Town Clerk's letter of August 11.

\(^{52}\) Ibid, minute of H. C. Mathews QC, Sec of State.
frequent appeals by both police and magistrates for legal aid in the prosecution of difficult cases. Indeed by the end of the decade the phrase 'legal aid' had acquired a formal significance of its own and a bureaucratic paraphernalia including a certification procedure and, in the case of the Treasury Solicitor's department, official forms recording the outcome of cases which they undertook. The variety of problems which prompted such appeals was considerable and is indicative both of the growing complexity of law enforcement in a national community and of the increasingly rigorous standards of evidence required by the courts to convict capital offenders.

Thus it was in 1872 that Sir Edward Henderson, Commissioner of the Metropolitan Police, applied to the Home Office for assistance in prosecuting the Reverend John Selby Watson, a school master who had inexplicably battered his elderly wife to death. He rightly anticipated a well organized defence of insanity and claimed that it was a case,

... in which legal assistance will be required to further the ends of justice. I therefore request that Mr Secretary Bruce will be pleased to give direction for such being employed. The Certificate of the Committing Magistrates and the enclosed report of particulars for the Solicitor of the Treasury is herewith transmitted.53

The procedure was even then familiar enough for L.C. Everett, the Chief Clerk in the Criminal Department of the Home Office, to

53 H. O. Series, Case #7940, Revd.. John Selby Watson, (1871/2).
minute, without further authority, "Instruct the Solicitor of the Treasury to take charge of the Prosecution.".\textsuperscript{54} The case of the Wainwright Brothers, already referred to, presented two kinds of problem. It was to be a divided defence, with each brother claiming to have been no more than an unwilling accomplice in the grisly dismemberment of a woman with whom both had had relations. It was moreover a case that aroused a peculiar fascination amongst all classes in London and when in due course it came on before Lord Campbell, the Lord Chief Justice, at the Old Bailey the court was packed with men and women from high society.\textsuperscript{55} It was the kind of case in which a fumbling prosecution could not be allowed and after the committal proceedings the magistrate, Ralph Benson, duly submitted his certificate declaring, "I certify that in my opinion the case of Henry Wainwright . . . is one requiring immediate legal assistance for the purposes of Justice."\textsuperscript{56}

The case of Frederick Mommsen, a German sailor on a British ship was even more complicated. Mommsen was accused of murdering the First Mate of the sailing ship "Barbadian" while on passage to Singapore. Charged at an Admiralty Court in Singapore, he was sent under arrest to London.\textsuperscript{57} The witnesses on the other hand had returned to the "Barbadian's" home-port of Glasgow and had there been discharged. The Magistrates at the East End court of

\begin{footnotes}
\textsuperscript{54} Ibid, entry Nov. 1, 1871.
\textsuperscript{55} The Times (London), Nov. 24, 1875.
\textsuperscript{56} H.O. 144 Series, Case #48007, Henry Wainwright, (1875). Sept. 13, 1875.
\textsuperscript{57} H.O. 144 Series, Case #42844, Fred'k Mommsen, (1875).
\end{footnotes}
Stratford had no authority to require the presence of these
witnesses in London, let alone to round them up and pay their
expenses from Glasgow to London. Over the whole issue loomed a
question of jurisdiction: should the case be tried in Scotland under
Scottish Law, in England under that of England or was it a case for
the Court of Admiralty? This time the case was outside Everett’s
experience. "What is to be done?" he minuted on May 24th 1875,
The witnesses are supposed to be at Greenock, and the
case to be tried in Scotland. The Prisoner is under
remand until the 29th inst: at Stratford. Had not the
papers better be sent to the Solicitor of the
treasury with a view to his taking charge of the
proceedings . . . ? 58

Liddell was quick to accept this sensible solution. Two days later
Augustus Stephenson replied to a rather hesitant instruction with
characteristic self-confidence.

I assume that I am instructed by the Home Office accordingly
- that is to say that I am to take charge of the proceedings... 59

He did so, and having determined that the Central Criminal Court was
both an Assize Court and an Admiralty Court and Mommsen was duly
convicted there on July 15th 1875.

Despite such hesitations on the part of the Home Office staff
it is evident that by the 1860’s they were beginning to act with

58 Ibid, entry Mar 24, 1875.
59 Ibid, Stephenson, May 26, 1875.
some self assurance in matters of police and public order. As Carolyn Steedman points out,"It had after all been a police authority since 1829".\(^{60}\) Moreover if, as Henry Parris observes, the department "often displayed indifference to local authorities seeking assistance," this was usually due to political sensitivity and a sharp awareness of the proper limits of its own authority.\(^{61}\)

Gambrill's case in 1879, already referred to, presented both problems of detection and potential political repercussions. Thus, while offering police assistance, the Home Office rejected a further appeal for legal aid. In this case as in many others they also received requests for legal advice but were unable to suggest any way in which the local prosecution could hold the two recipients of Gambrill's confession in Gaol, safe from the suborning pressures of his cohorts in the Agricultural Labourers Trade Union.\(^{62}\) Nevertheless the growing confidence of the Home Office bureaucracy in its authority on legal procedure, rather than the law itself, was well exemplified a few years later when, in 1883, the Stipendiary Magistrate of Swansea wrote for guidance in the case of Mary Ann Morgan.\(^{63}\) He reported that Mrs. Morgan, the wife of the much respected County Analyst, had been before him that morning charged with drowning her three year old child. She was in his opinion "quite


\(^{63}\) H.O. 144 Series, Case #A33589, Mary Ann Morgan (1883). Letter Nov. 22, 1883.
mad." Without reference to the Secretary of State, Liddell advised against committing her to the next Assize and suggested that immediate certification by the Visiting Magistrates at Swansea Gaol and two local Doctors would close this embarrassing affair. She was promptly certified and within six days of her offence was despatched to Broadmoor where she spent the remainder of her life.

The Judicial Statistics for England & Wales show a marked increase of such Home Office interventions in the last two decades of the century and clearly suggest, as in the case above, that the Home Office were prepared to short-circuit expensive trial procedures in cases where there was prima facie evidence of insanity and no likelihood of friends or relatives opposing this procedure. Those certified as criminal lunatics before trial in the High Court became known as "Secretary of State's lunatics", as opposed to those tried and found guilty but insane who, being sentenced to be detained "During Her Majesty's Pleasure," were termed by the civil service "Queen's Pleasure Lunatics." This formula for instant justice in cases of conspicuous insanity was not without its dangers and the case of T.J. Maltby (see below Cap.6) provoked some embarrassing litigation with uncompliant relatives before it was resolved.64

By the end of the 1870's the pressure of local requests for help was matched by a new generation of Officials in central government itself. These were men who stood somewhat below the highest

64 H.O. 144 Series, Case #93521, T.J. Maltby, 1880.
level of the civil service and thus at a distance from the political pressures to which Permanent Under-Secretaries, such as Liddell or Lushington, were exposed. Edmund DuCane, Director of the new Prison Commission\(^{65}\), Augustus Stephenson, Treasury Counsel and later Director of Public Prosecutions\(^{66}\) and Howard Vincent, Director of Criminal Investigation\(^{67}\) all share what for civil servants was an uncharacteristic boldness and drive for executive efficiency.

In 1879, over the written protests of the Coroner, Stephenson decided to upgrade the indictment of a suspected baby killer, Charles Surety, from manslaughter to murder.\(^{68}\) In this he was aided by Howard Vincent as he was in the case of Hannah Dobbs, which also occurred in that year.\(^{69}\) Despite the failure of the prosecution in this, the celebrated "Euston Square Murder," we see two examples of the way in which energetic centralizers reinforced existing trends. The case-file contains a lengthy correspondence in which both men tried to convince the Home Secretary, Cross, and his sceptical and frugal staff, that a police surveyor should routinely be employed to prepare plans of the "scene of the crime". They argued that the cost, in this case two guineas, was small but that the benefit in

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\(^{65}\) Sir Edmund DuCane became a Director of Convict Prisons at age 33, 1864. He succeeded Edmund Henderson as Chairman five years later and retired in 1895.

\(^{66}\) Sir Augustus Stephenson, a barrister and Recorder of Newark, was appointed Treasury Solicitor in 1875. He became Director of Public Prosecutions in 1884 and retired in 1894.

\(^{67}\) Sir Howard Vincent became Director of Criminal Investigation at Scotland Yard (HQ of the Metropolitan Police) in 1879, when aged 29. He retired six years later and entered Parliament.


\(^{69}\) H.O. 144 Series, Case #84111, Hannah Dobbs, (1879/80).
credibility and professional competence would add greatly to the impact of the prosecution's evidence. It was, Vincent argued, a matter of "expense and efficiency." Cross was unconvinced and decided that such issues should be decided on a case by case basis.

The very failure of this prosecution pitched these two bureaucrats into further innovation in their efforts to catch the acquitted servant, Hannah Dobbs, on another charge, this time of larceny. No longer was the question one of legal aid but a decision from the top to pursue a prosecution. When arrested for the murder of a lodger in the house where she worked, Dobbs had in her possession a number of articles belonging to the murdered woman. The matter was passed, in January 1880, to the new Director of Public Prosecutions, Henry Maule Q.C.. Since Maule refused to prosecute on the grounds that the case was stale, Vincent went this time to Stephenson who strongly supported him and wrote accordingly to the Home Office. In this and subsequent letters.. Stephenson deplored the recently divided authority of the government in this area and usefully describes the system before the Prosecution of Offences Act of the previous year. In particular he points out where the initiative lay and how he saw the role of government:

Now for the purpose of settling the practise under the new system it may be convenient to consider what the

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70 Ibid, letter July 31, 1879.
72 The new Department of Public Prosecutions began to operate on Jan. 1, 1880.
practise was before the 1st January 1880.
Criminal Prosecution was undertaken by the Treasury
Solicitor on direction from the Secretary of State.
Application for legal aid...was made to the Secretary
of State by Police Magistrates, the Commissioner Of Police
or by the Director Of Criminal Investigations and all such
applications were usually dealt with at the Home Office -
without reference to the Treasury Solicitor for his opinion.

Similar applications to the Home Office made by private
persons and Solicitors, occasionally by County and Borough
Magistrates or their Clerks...were (I believe invariably)
referred by the Home Office to the Treasury Solicitor for
his opinion "as to whether the particular prosecution
was one which ought to be undertaken at the public expense."

Cross chose to resolve this issue by reference to the Law Officers
and although they supported Stephenson the matter was not acted
upon. A change of Government intervening, the question was referred
by the tenacious Stephenson to the new liberal Law Officers in 1881
who decided finally that the matter was now too stale to
prosecute.\textsuperscript{73}

The inadequacies of the pre-1880 system were not
immediately resolved by the establishment of the Department of
Public Prosecutions which continued to function in a responsive
manner. In the short term the most significant change was to

\textsuperscript{73} Case of Hannah Dobbs, letter August 1881.
replace the energetic and selfconfident Stephenson with the
hesitant and inexperienced Maule. A crisis in the bureaucracy was
reached one day in January 1884 when George Baldwin and Alice
North appeared, on separate murder indictments at the Central
Criminal Court, without counsel either to prosecute or defend them.
At the same session Thomas Edwards and Edwin Draper were charged
with attempted murder and in their cases, too, no prosecuting
counsel had been briefed. It was left to the Clerk to give the
depositions in each case to a Grand Jury and, true bills having been
found, for Mr Justice Hawkins to pass them on to counsel otherwise
unemployed.74 When the circumstances were reported to the Home
Secretary, Sir William Vernon Harcourt, on the 16th January the
reaction was prompt and strong:

Ask the Attorney General to explain to me how it is possible
that in as bad a case as this there should be no Solicitor in
charge of the prosecution and that the prosecution should
have been solely in the hands of a counsel to whom the
depositions were handed in court. I did not suppose that
such a thing was possible in a capital case at the Central
Criminal Court.75

Sir Henry James, the Attorney General, replied on the following day
as follows:

...in as much as the Director of Public Prosecutions only

74 H.O. 144 Series, Case #A34231, George Baldwin (1884).
interferes in cases of difficulty I presume that the absence of any prosecuting solicitor resulted from the fact that no private person took sufficient interest in the case to instruct one.\textsuperscript{76}

In the meantime the Director of Public Prosecutions was investigating and, one week later he reported to the Home Office. It appeared that the jurisdiction of the Central Criminal Court had been specifically excluded from the Act of 1879 and that it was not the practise in London for the Magistrates to insist on the employment of a solicitor to prepare a prosecution as part of the prosecutor's recognizances. This was a practise which he claimed had become universal in the rest of England since the passage of Sir John Jervis' Act in 1848.\textsuperscript{77} His report goes on,

The due prosecution here required has, in the case of murder, always been held to include the employment of a solicitor and of counsel, the expenses of which are allowed in the cost of the trial and which are often supplemented by the Treasury.

The prosecutor, he continued, was entitled "to invite the interference of the Director of Public Prosecutions" and if granted this involvement released him from his obligation to prosecute.\textsuperscript{78} What Maule failed to observe was the extent to which serious London cases, within the jurisdiction of the Central Criminal Court, had

\textsuperscript{76} Ibid, James to Harcourt, Jan. 17, 1884.
\textsuperscript{77} 11&12 Vict.. C42.
\textsuperscript{78} Ibid, Henry Maule to Harcourt, Jan. 26, 1884.
become the prerogative of the Treasury Solicitor and that it was this service which was no longer working.

In the meantime, on January 13th, Harcourt had minuted on James' reply:

    Ask the Attorney General whether he does not think it expedient that all cases of murder should not be in the hands of the Public Prosecutor so that the scandal may be avoided.79

To this Sir Henry James replied on January 23, agreeing that the "pretended system of Public Prosecutions" was unjustifiable and that the Public Prosecutor should take all capital cases.80

This case, and the report of a Departmental Committee which had sat in 1883, led to prompt legislative action. This recent committee, chaired by Harcourt himself, had recommended amalgamating the departments of the Treasury Solicitor and the Director of Public Prosecutions on the grounds of economy. The latter's work they reported "is not of an extensive or onerous character and does not involve much time or labour".81 In Stephenson's dismissive phrase the new Department was "... a fifth wheel" on the vehicle of public prosecution. While the Committee devoted little consideration to the inadequacies of the prosecution of serious crime, the new law was more positive in this

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80 Ibid, James to Harcourt, Jan. 23, 1884.
respect. Under the Prosecution of Offences Act of 1884 the Director of Public Prosecutions was made responsible for all cases where the offense was punishable by death together with all cases hitherto undertaken by the Treasury Solicitor or where an order was made by the Secretary of State. The Act also required Chief Constables to report all indictable offences to the Director but it appears that this soon became discretionary in all but capital cases.\textsuperscript{82} The Act finally amalgamated the Offices of Treasury Solicitor and Public Prosecutions and Stephenson was appointed to the combined post where he remained firmly in charge until 1896. It was to prove an uncomfortably large portfolio and despite the efforts of Stephenson and his successor, Lord Desart, the growth of the work led, in 1908, to a final separation and the evolution of a discrete Public Prosecutor.

The problems and opportunities facing those accused of murder were rather more formidable than those already discussed. Their opportunities, if they may be so described, were the obverse of those facing the prosecution. There was evidently some prospect that a failure by the prosecution to follow up a committal would lead to a Grand jury dismissal or that a mismanaged case would have the same effect when, for example, a badly drawn indictment would be thrown out on a technicality. In some criminal cases there was thought to be the chance of witnesses being suborned or intimidated into giving false evidence in the Grand Jury room where evidence

\textsuperscript{82} Ibid, evidence of A.K. Stephenson, minute #228.
was not given on oath.\textsuperscript{83} It must, however, be assumed that this was less likely to occur in cases of such high public profile as murder. It is, moreover, evident that almost all committed murderers were lonely, poor and ill-equipped to exploit the loopholes of an archaic system of prosecution.

On the other hand there were substantial disadvantages to which such prisoners were exposed both by the law, its forms and their personal circumstances. Prisoners were only allowed legal aid if, at the time of arraignment in the High Court they were unrepresented, at which point a "Dock Brief" was given by the Judge at a flat rate of one guinea and 3/6 for his clerk. While there is that such work was widely spread among the members of the Circuit Bar and not given exclusively to the the youngest and most inexperienced, it clearly precluded the services of those most in demand. Even more critical was the inability of many poor defendants to be legally represented at the preliminary proceedings. While levels of literacy were not high\textsuperscript{84} many prisoners were unable to afford to buy copies of the depositions sworn against them or to pay for the costs of attendance by friendly witnesses. As will be seen later this presented crucial problems in cases where specialist medical or scientific evidence was in question. Finally the law itself extended the dubious privilege of silence to the preliminary proceedings and so effectively ensured that in many cases a defence

\textsuperscript{83} Atkinson, op. cit. at (25) above.
\textsuperscript{84} CCL 8th Report, Appendix A, p. 320, evidence of the Justice Clerk's Society, for example.
was only fully exposed in the final and forbidding arena of the High Court.

The procedure of preliminary examination before magistrates had survived unchanged from the reign of Mary Tudor, when the Bail and Committal Statutes became law, until Sir John Jervis' Act in 1848 (11&12 Vict c42).85 The Tudor statutes laid on the Justices of the Peace the responsibility both for investigating serious crime and for initiating a formal, written prosecution with adequate witnesses.86 In the long interval this inquisitorial role had overtaken that of the Coroner and, while serving as a necessary 'prop' for the continued private prosecution of crime, had evolved a character generally unfavorable to the defendant. Emphasis was laid heavily on the evidence of the prosecution whose evidence was recorded without the presence of the accused person who was subsequently required to pay for a copy of such testimony. In many respects this procedure reflects that subsequently followed before a Grand Jury and the duplication contributed to the progressive redundancy of the latter. Sir G.A.Lewin, the Recorder of Doncaster described the character of these preliminaries in 1848:

The proceeding is in general a one-sided affair. The Magistrate, instead of investigating the whole of the facts of the case by asking for and hearing the witnesses

85 1&2 Philip & Mary C.13 and 2 & 3 Philip & Mary, C.10.
86 Langbein, op. cit. pp. 34 ff.
on both sides, or remanding when the prisoner is not prepared to bring his witnesses forward, proceeds to commit upon a statement 'ex parte. This is only doing what the Grand Jury have bye and bye to do again.\textsuperscript{87}

The prosecutorial emphasis of such enquiries was described by the eminent contemporary jurist, James Fitzjames Stephen, in bold terms. "The object," he declared,"of the earlier Statute is to expose and detect a man assumed to be guilty."\textsuperscript{88} However, while many deprecated the apparent imbalance of the examination others saw in it what a leading Barrister in criminal practise described as "a tenderness which must have arisen in the first instance from the very great severity of our criminal code."\textsuperscript{89} He saw it as a means of preventing the prisoner from making damaging admissions, and this is a view endorsed by John H. Langbein who has written "the phenomenon of the prosecutorial devices becoming safeguards over the passage of time is one of the deepest themes in the history of English criminal procedure."\textsuperscript{90}

The Act of 1848 while an attempt to offset some of these now traditional defects, in fact confirmed the ex parte nature of the proceedings. It stipulated that witnesses only be examined in the presence of the accused, who was to be at liberty to cross-examine them. A continuing concern for the self-incriminating possibilities

\textsuperscript{87} CCL 8th Report, Appendix A, p.220.
\textsuperscript{89} CCL 8th Report, Appendix A, p.280, evidence of W.J. Woolrych.
\textsuperscript{90} Langbein, op.cit.,p.74.
of the preliminary proceedings required a formal caution to be given
to the accused as follows:

You are not obliged to say anything unless you desire to do
so but what ever you do say will be taken down in writing
and may be given in evidence against you at your trial.

The accused was also to be allowed to call witnesses whose
examination and depositions would become part of the record. A copy
of the record was to be given to the prisoner at the cost of between
6d and 9d per page.

This Act and the growing availability of police evidence
marked the effective end of the inquisitorial role of the Justices.
While it may be that they came to hold, as Stephen argues, "the
position of a preliminary judge," it was a judge of an often
attenuated proceedings.\footnote{Stephen, History, Vol.1 p.221.} The weakness of the accused person's
position left him, even if represented by a solicitor, with little
chance to develop a plausible case for dismissal. The best advice he
could get would be to "reserve his defence." He was, moreover,
extremely unlikely to get Bail in any case of homicide and never in
the case of murder where a statute antecedent even to the Marian
Bail Statute precluded it.(3 Edw.I cap 15 ) The implicit deferral of a
full examination of the accused which effectively survived Jervis' reform seems to have had its roots in the assumption voiced by
Stephen when he stated that "it must be remembered that most
persons accused of crime are poor, stupid and helpless."

The same sentiment which denied such people the right to give evidence in their own behalf, tried to ensure that they did as little as possible to incriminate or perjure themselves before their appearance in the High Court, under the stern protection of a judge.

The evidence of the H.O.144 files suggests that a high proportion of those appearing before magistrates on a charge of murder were indeed poor and helpless and, if not necessarily stupid, so overcome by the turmoil of events as to disregard their own immediate interests. In statements made to the police, to friends, relatives and even to strangers at the time of their arrest the accused person usually laid the basis of their subsequent conviction. In a number of cases these were deliberate confessions, if not of murder, at least to an act of homicide and these duly went into the depositions taken at the committal proceedings.

This last is a distinction of some significance illustrated in the cases of Constance Kent and Stephen Gambrill already referred to. The former admitted at Bow St., in 1865, that she had intentionally killed her young brother whereas Gambrill claimed to have killed his employer's son in a struggle and had not intended to do so. In cases of the former type there was little that even good legal advice could do to prevent a conviction. When John Allen admitted to killing his wife Betsy in 1864 he had, in the words of of a later petitioner,"no money, no inclination to defend himself and no

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92 Ibid., p.442.
solicitor to collect extenuating evidence.\textsuperscript{93} Even more helpless was John Wakefield who appeared at Derby Police Station one day in April 1880 and told the Superintendent "I have committed a murder" and then led the officer to the body of the child he had killed.\textsuperscript{94} In the same year William Distin of Bristol, while drunk, stabbed his wife and then took her to the hospital where, after lingering for a week, she died. He was to claim that he had never intended to kill her.\textsuperscript{95} It was her dying statement that provided the vital evidence of intent as it was in the case of William Cassidy whose dreadfully burned wife declared, "Will, you have done it, you have tried many times but you have done it at last."\textsuperscript{96}

Not infrequently the spontaneous reaction of the prisoner was to admit the act and to try to justify it, often as much to himself as to others. Thus in December 1880, James Williams, having just drowned his pregnant mistress, sought to account for the dreadful action to a friend:

I've pushed the bugger in the cut - Jack, she's a bloody whore and wants to father a child on me that doesn't belong to me.\textsuperscript{97}

In the case of Abraham Thomas, a butler who had just shot the Housekeeper of the house where both worked, an attempt was made

\textsuperscript{93} H.O.144 Series, Case # 79311, John Allen (1864), letter of Dr Cordwnt.
\textsuperscript{94} The Times (London), July 30, 1880.
\textsuperscript{95} The Bristol Mercury, Nov. 4, 1880
\textsuperscript{96} Manchester Guardian, Jan. 27, 1880.
\textsuperscript{97} The Staffordshire Advertiser, Feb. 5, 1881.
to put the deed down to impulse. He told the arresting Police Constable, "I didn't know what I was doing at the time. I didn't think of doing it five minutes before.".98

Others left even more damning evidence both of their deed and their intention in notes written before abortive suicide attempts. In 1874 the Reverend John Selby Watson wrote "I have killed my wife in a fit of rage. . . her body will be found in the room adjoining the library."99 Five years later, in 1879, Emma Wade, an 18 year old unmarried mother, wrote that she was about to kill her infant son and herself because she could not bear to part with it to a foster home.100 In both these cases the only possible defence was to be temporary insanity.

The significance of such premature admissions of homicide should not, however, be overstated. Of the more than one hundred capital cases so far examined between 1861 and 1900 rather less than 10% hinged on the question of fact as to homicide. In a further 5% of cases there was dispute over the true cause of death, where for example an intervening infection might actually have been the proximate cause. In the remaining 85% the issue was one of intention and the case of Constance Kent was the only one in which the prisoner pleaded guilty to the charge of murder. The very large majority therefore faced the formidable task of proving that they

98 H.O.144 Series, Case File # A24246, Abraham Thomas, 1883.
100 The Daily Telegraph, May 12, 1879.
"did'nt mean to do it," that they were provoked or that the act was accidental.

Whatever the nature of the legal problems facing the prisoner at the time of committal they were exacerbated by poverty and isolation. The extremity of the deeds to which they resorted gave this group, from whatever level of society they came, a special isolation. This was not, it must be said, the artificial segregation of the "criminal classes" for only a few could, by any stretch of the imagination, be so defined. Charlie Peace (1879) and Thomas Wheeler (1880) made a practise of burglary, Charles Sales (1894) was a "known" receiver, and the Colmers made their living as abortionists while Charles Crew (1862) supplemented his with poaching. For this tiny minority among Victorian murderers the hazards of their criminal practises merely added to the tensions which led to a single and fatal abandonment of self-control. Far more common was the grinding pressure of poverty. When John Wingfield (1880) was arrested, after stabbing his wife in broad daylight on a London street, the constable who searched him at the police station found on him "a purse, twopence half penny, a comb, a prayer book, a school-board summons and a tract".¹⁰¹ Wingfield claimed to have killed his wife because she had abandoned him but this tragic inventory suggests a more complete collapse of his efforts to sustain the values of society as a whole rather than any allegiance to an "alternative" society.

¹⁰¹ H.O.144 Series, Case File# 90932, notes of Mr.J. Grove, Mar. 9, 1880.
The files suggest that in less than 30% of cases were solicitors retained at this early but critical stage. In some further cases solicitors were retained only after conviction when public sympathy generated enough funds to hire a lawyer to organize a petition against the death penalty. A typical situation was that of William Distin of whom *The Times* commented "A striking feature [of the case] was the entirely friendless condition in which the prisoner was left at the trial, no solicitor being retained on his behalf.".  

It was the small group of middle-class prisoners who were able to have immediate recourse to solicitors as in the cases of Constance Kent (1865), Fanny Oliver (1869), the Revd John Selby Watson (1872), the Wainwrights (1875), the Stauntons (1877), T.J. Maltby (1879), Percy Leroy Mapleton (1881), or Florence Maybrick in 1889. In the cases of two foreign seamen, Frederick Mommsen (1875) and James B.Sims (1873) it was the German and U.S. Consuls who provided prompt legal aid and later mounted appeals at the highest diplomatic level. It was a trade union, the N.U.M\(^{103}\), who financed the cost of a defence for William.Siddle and his two co-defendants in 1881, while William Cassidy's defence was paid for by his Quaker employer in Manchester. The case of Israel Lipski, despite the horrifying nature of the crime alleged against him, stirred the sympathy of the Jewish community in London who "spared no expense" to defend this Polish Jew, who was unable even

\(^{102}\) H.O.144 Series, Case File# 98910, Wm.Distin, 1880.  
\(^{103}\) The National Union of Mineworkers.
to speak English, let alone pay for a lawyer.\textsuperscript{104} In some other few cases there is evidence of a cohesive family or of a small local community who were able to respond promptly rather than, as was more usual, only after sentence of death had been passed.

Even when, as in the case of Thomas Wheeler in 1880,\textsuperscript{105} his family retained a solicitor many problems remained. They were clearly spelled out when the solicitor, George Annesley of St Albans, wrote to the Home Office on October 19th. Wheeler and two of his brothers had committed a series of burglaries on farm premises in the St Albans area during the last of which Thomas, the youngest of the family, had shot and killed the farmer. Annesley wrote as follows:

\begin{quote}
i am the solicitor for the prisoners in these cases and have conducted their defence up to now and am engaged to defend them at Chelmsford winter Assizes. Henry and George Wheeler have some little means and the magistrates are prepared to to make an order \ldots for the payment of the additional expenses of their being tried at Chelmsford instead
\end{quote}

\textsuperscript{104} The Pall Mall Gazette, Aug. 22, 1887.

\textsuperscript{105} H.O.144 Series, Case File# 98426, Thos.. Wheeler, 1880.
of Hertford.

Thomas Wheeler is wholly without means and will be
undefended unless the Treasury instructs someone on his behalf.
I have obtained copies of the depositions in the three burglary
cases but a copy of the depositions in the murder case would be
so costly that I have contented myself with briefing the evidence
from reports in the newspapers . . . I hope I may be instructed
to continue with his defence.106

This plea was passed to the Treasury Solicitor by the Home Office
and Stephenson's assistant, Cuffe, replied categorically:

I think the application cannot be acceded to as a
matter of principle. Assuming that there were extra
expenses these would really be expenses of Solicitor
and Counsel for the defence which are never recognized
as being payable out of public money. The course adopted
in serious cases is of the judge giving the depositions to
Counsel . . . without any expense.

It would be creating a dangerous precedent in my judge-
ment to accede to an application for the payment of legal
expenses for the defence . . . and one which if followed
would cause very large additional expense to the country.107

This was advice with which the Home Office promptly agreed and in
the event Wheeler's defence was given as a dock-brief by Mr Justice

106 Ibid., Letter to H.O., Oct.9,1880.
107 Ibid., Letter from H.Cuffe, Oct.22,1880
Hawkins when the case came up at Chelmsford in November 1880. The Times reported that "Prisoner's counsel intimated that he would not call any witnesses or present any evidence for the defence" and Wheeler was convicted of what Hawkins described as ". . . as foul, as wicked, as cruel, as diabolical a murder as was ever committed."  

The case of Alfred Gough in the following year (1881) further illustrates these problems. Gough was a tinker, a wandering salesman of cheap parasols whose barrow was no doubt a magnet for young children in the villages through which he passed. He was arrested in September 1881 for the murder and sexual assault of a six year old girl in the village of Brimington, near Chesterfield in Derbyshire. The charge was supported by no positive evidence beyond the testimony of a single elderly woman who claimed to have seen Gough with the child on the morning of the crime. Gough persistently denied the offence. It was, needless to say, a case which united the local community and aroused in them a deep hatred of the prisoner and perhaps fortunately Gough was committed to Derby Gaol, more than thirty miles from Brimington. The authorities, anxious for a quick resolution of the case, put the prisoner up at Leicester Winter Assize on November 2 and he was convicted in less than two hours. He had no solicitor and his court appointed counsel, Charles Weightman a future judge, was able to offer no evidence or witnesses in his defence. Without family, a home neighborhood or even a charitable parson to speak on his behalf Gough was

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108 The Times (London), Nov. 9, 1880.
defenceless. Having been progressively removed from the scene of
the crime Gough was left in circumstances where the graphic details
of the crime itself overrode any defects in the evidence linking him
with it and he was hanged without a murmur of protest or appeal.109

The dock brief was in fact the only legal aid available to the
truly indigent 19th century criminal and it was aid that usually
came too late in the proceedings to effect the result. At the end of
the period the Criminal Evidence Act of 1898110 permitted the
prisoner to give evidence on his own behalf and on oath. It was the
only measure since an Act of 1836 111 had allowed criminal
defendants the right to counsel, which had significantly altered the
position of the poor prisoner and its impact was ambivalent.112 In
1903, as a result of pressure from a body of Liberal lawyers and
from a Select Committee of the House of Commons, the Poor
Prisoners Defence Act became Law and its modest purpose was
described later by Lord Alverstone in the House of Lords:

. . . the Act was not intended to give a prisoner legal assistance
to find out if he has got a defence . . . The governing principle
of the Act is that people who have a defence should tell the
truth about it at the earliest opportunity. All the Magistrates
have to be sure of is that a defence requiring legal consideration

109 H.O.144 Series, Case File # A10204, Alfred Gough, 1881.
110 61 &61 Vict.. C396.
111 6 & 7 Wm..IV C114.
112 See the comments of Sir Edward Clark cited below, Chapter 3.
has been disclosed at the time by a prisoner. The Act was passed in the interest of innocent persons.\textsuperscript{113}

This is a particularly clear statement of the persistent assumption that guilt is a clear-cut, black and white affair and that, in the event of that guilt being proven, only a consideration of mitigating circumstances is relevant.

The picture which emerges of the critical preliminaries to a trial for murder is one of a slow but significant development of the means available to society for prosecuting this crime. This trend can be related in part to the development of more effective policing and partly to the centralized direction of the prosecution of difficult cases. The former development owed much to the assistance given by the Home Office and its own metropolitan resources and the latter to the role of the Treasury Solicitor and the Director of Public Prosecutions. The role of the Home Office in coordinating prosecutions was evidently fitful and reluctant and one must look to its subordinates - to Augustus Stephenson, to Howard Vincent or Edmund DuCane to find genuinely centralizing and managing bureaucrats. These civil servants began to invest their specialized functions with that aura of exclusivity and expertise which is the true hallmark of the would-be professional. The bureaucrats of the Criminal Department at the Home Office had a less easily defined specialization but we can, nevertheless, begin to detect similar developments even in the preliminaries of the criminal justice

process. The expertise garnered in the long tenure of office by the Permanent Under-Secretaries, Waddington, Liddell and Lushington\textsuperscript{114} bred a growing confidence that was to be sustained by increasing reliance on their own apparatus of precedent and prior ministerial ruling in a wide range of issues from prosecution expenses to pardons.

There is on the other hand little change to be observed in the opportunities open to those accused of serious crime. This evolving imbalance is no doubt an important factor in the growing effectiveness of the prosecutorial process. In his account of the committal proceedings after Sir John Jervis's Act, James Fitzjames Stephen contrasts the practise under the Marian Statutes with that of Victorian times. "The object of the earlier Statute," he argues, "is to expose and detect a man assumed to be guilty. In the latter Statute the object is a full enquiry into his guilt or innocence."\textsuperscript{115} This is a view which is hard to reconcile with the evidence of the H.O.144 files where all the signs point to a deferral or reservation of defence evidence and the role of the magistrate appears to consist in the consideration of a "prima-facie" case for the prosecution. Despite the effort by magistrates to avoid self-incrimination by the prisoner at their hearings such caution did not extend to evidence obtained at the time of arrest and damaging admissions were recorded for later use at trial.

\textsuperscript{114} See Appendix A for a schedule of the Home office Establishment
The implicit deferral of a full investigation to the next available Assize had a special significance in the case of murder charges where relatively few prisoners were in a position to rebut the charge of homicide itself. The best they could hope for was to produce evidence in the High Court to justify a verdict of manslaughter or to persuade a jury to bring in a recommendation to mercy based on provocation or absence of premeditation. For such a result, or for the scarcely less ominous verdict of guilty but insane it was often vital to mobilize friendly witnesses, or specialized assistance, and committal to the often remote county gaol was a way of negating such an Opportunity for most defendants. For the few who could obtain good legal assistance it was a chance to develop a defence without exposing it to the prosecution.
Chapter Three

The Victorian Trial of Homicide:
The Pursuit of "Moral Certainty"

The reluctance of lower courts to prejudice the trial of serious felonies, and particularly that of murder, was a reflection of the confidence reposed in the Courts of Assize by the legal profession as a whole and, indeed, by the public at large. This confidence was reinforced by some important changes both in the jurisdiction of the Assizes and in the perceived roles of the main actors in its traditional and unchanging rituals as the century progressed. In the increasing detachment of the judiciary, the growing 'professionalism' of the Bar, in the quality of state directed prosecutions and in the dutiful attention of its juries there seemed to be good grounds for pride in this critical aspect of criminal justice.

This chapter will consider the contracting jurisdiction of the Assize Courts and their emergence as specialized tribunals for the judgement of serious crime. It will go on to examine the changing roles of those who administered the courts and the problems which they encountered in the pursuit of truth and justice. It will, in particular, consider the character of this truth and the quantum of proof required to establish it. Finally it will consider the mute figures of those charged with serious offences, the subject of an intimidating enquiry.
in whose position little change can be detected. For the most part their apparent reactions to the proceeding were recorded only in the press, where an increasingly intrusive interest in the workings of justice was not the least significant feature in the sombre history of this great legal institution in the 19th century.

Despite the evident changes in the operations of the Assizes they did not escape public criticism. Significantly these criticisms focussed less on the growing imbalance between the State as prosecutor and the individual citizen in the dock than on what were seen as occasional aberrations in verdicts or anomalous judicial sentences. The continuing acceptance by the legal profession of the handicaps imposed by poverty and legal custom on those of their number defending the accused is remarkable in an age well used to the call for reform. It will be argued that when public protest was voiced it was often due to the inability of the substantive criminal law, unchanged throughout the period, to accommodate shifting public perceptions of criminal responsibility. The unchanging character of the criminal law, with its characteristic broad categories of offence, did not permit a very precise treatment of the infinite range of human wickedness and the simple polarity of its judgements, of guilty or not guilty, allowed no formal recognition of any shades or degrees of guilt. In the trial of murder, where the proof of malice was an essential ingredient of guilt, this was especially taxing for an age that demanded
"moral certainty" of its verdicts. The consequence of these two factors was a wide judicial discretion in awarding punishment. These highly subjective decisions were further obscured by those constraints of procedure and expense which hindered the majority of those charged with such offences from fully exposing the circumstances of their crime and even occasionally from establishing their innocence. As a result there was not only a continuing pressure for reform of the criminal law, especially that of murder, and for its codification but also for the creation of a court of criminal appeal. These pressures were resisted and the task of resolving its most conspicuous shortcomings fell to the bureaucrats of the Home Office. This was especially true in the case of murder.

The jurisdiction of Assize courts was sharply narrowed by the emergence of summary proceedings in magistrate's courts early in the 19th century and by its steady growth thereafter. This was initially a response to the high costs and logistic problems of prosecuting offences before juries at Assize and Quarter Sessions which have already been described. It led, as David Philips has observed, to substantial increases in the number of such offences prosecuted and thus to a general tightening of law enforcement. In 1827 Justices of the Peace were empowered to try various trespasses and poaching
offences\(^1\), in 1847 to try simple larceny by those under fourteen years of age\(^2\) and in 1855 to hear all cases of theft or embezzlement of things under 5/- in value\(^3\). The Criminal Law Consolidation Acts of 1861 \& 1862\(^4\) extended these powers especially in respect of larceny and malicious damage as did the Summary Jurisdiction Acts of 1879 and 1899\(^5\), although the former restored the option of trial by jury to all so charged. By the end of the 19th century less than 11,000 cases were tried annually at Assize compared with an average of nearly 20,000 cases in the five years 1860-1865\(^6\). On the other hand the total of those tried for indictable offences at Petty Sessions had risen to over 45,000 p.a. by the year 1900. The extent of the latter's task in this time of increasing law enforcement is indicated when we note that indictable offences prosecuted at Petty sessions still accounted for less than 10% of all the cases then heard in these courts\(^7\).

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\(^1\) Larceny Act (7 & 8 Geo. 4, C29)
\(^2\) Juvenile Offenders Act (10 & 11 Vict. C32)
\(^3\) Youthful Offenders Amendment Act (18 & 19 Vict. C87)
\(^4\) Criminal Law Consolidation Acts (24 & 25 Vict. C100 etc)
\(^5\) Summary Jurisdiction ct (42 & 43 Vict. C49) and Summary Jurisdiction Act (62 & 63 Vict. C22)
\(^6\) Criminal Statistics for 1906 (Pub. 1908) Comparative tables p. 32, British Parliamentary Papers 1908 Vol. CXXIII. The figures for the decrease in trial of indictable offences at Assizes cited by Radzinowicz, op. cit, vol V at page 623, appear to be wrong. The decrease following the 1857 Act (Note 3 above) is steady and not the immediate fifty percent reduction stated.
\(^7\) Ibid.
This shift in the jurisdiction of the courts effectively moved power away from the judiciary and into the hands of central government. This is not to confuse the assortment of country gentry, professional and businessmen who made up the benches at Petty Sessions or sat as stipendiary magistrates with bureaucrats but to recognize that the authority of central government over these justices grew steadily through the century and did so in ways from which the judicial bench were protected. The Home Secretary and his staff had since 1839\(^8\) exercised effective control over the lower courts in London. On his recommendation the Crown appointed the Chairmen and Deputy Chairmen of London Sessions and the Stipendiary Magistrates in the new Police Courts, whose business he also regulated. Elsewhere he had the appointment of stipendiary magistrates in growing cities and the large new boroughs, the power to establish separate Quarter Sessions and to appoint Recorders to administer them.\(^9\) He settled the salaries of Clerks of the Peace, fixed the tables of allowances to be paid to prosecutors and witnesses in criminal cases and provided a growing body of advisory circulars on the proper administration of both existing and new laws.\(^{10}\) In this latter respect a growing body of social legislation in the last quarter of the century, in respect of such

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\(^9\) Ibid.

\(^{10}\) Ibid.
services as public health, education and licensing, created a mass of new offences and new offenders as an expanding government began to create a framework of law about the new urban and industrial society of Victorian England. Bureaucratic power was unobtrusively applied but was increasingly significant as the balance of the magistracy tipped away from the traditionally independent country gentry and towards less robustly self confident members of the new commercial classes.

In such circumstances it is not surprising that the social as well as the legal significance of the Assize Court was curtailed. While the solemn dignity of the court and its judges was undiminished its social impact could not survive in the often shrinking county-towns which made up the circuits.\textsuperscript{11} Daniel Duman has described the judges of the late 18th and early 19th centuries as "a vital component of the political and social establishment." As such they "were often the most immediate and accessible representatives of the ruling classes in the provinces"\textsuperscript{12} and their charges to grand juries an occasion for a general expression of the political as well as the legal policy of the government. As the century progressed these charges became more

\textsuperscript{11} There were six English and two Welsh circuits plus a Central Criminal Court (Old Bailey) which, from 1834 onwards, dealt with serious crime in Middlesex & Metropolitan London. D. Duman, (The Judicial Bench in England 1727-1875, Royal Historical Society,1982,) details the counties which made up these circuits at page 24, note. 49.

\textsuperscript{12} Ibid.
specifically legal and the opening of the Assize less of a social occasion than in earlier times.

The social preeminence of the judges, once supported by a combination of aristocratic extraction, high fees and patronage also underwent a corresponding change in the increasingly affluent world of mid-Victorian England. Judicial salaries were first fixed in 1825 at levels which reflected those prior rights of patronage, fees and the sale of office which had so incensed Jeremy Bentham.\textsuperscript{13} The Lord Chief Justice of the King's Bench received £10,000 p.a., the Chief Justice of the Common Pleas £8,000, the Chief Baron of the Exchequer and the Master of the Rolls £7,000 each and the puisne judges of the King's Bench and the Exchequer £5,500. It was these latter from whom the Commissioners of Assize were chosen. This settlement preserved, and even enhanced, at least temporarily, the economic position of the bench who, as Duman observed "moved en-masse from Bloomsbury to the West End".\textsuperscript{14} These salaries were not, however, to be adjusted for more than one hundred years and the social position which they once supported could not survive a slow inflation of prices or the general enrichment of the middle classes from whom they were, themselves, increasingly drawn. By the end of the century successful barristers were

\textsuperscript{14} Duman, op. cit., p. 122/3.
hesitating, and even refusing, to accept the drop in income which followed promotion to the bench. They continued, in Bagehot's phrase, to be ornaments of the constitution' but less glittering ones than in the past.

The growth of summary jurisdictions removed the Assize courts themselves from the center stage of the social life of the country so that they became, in effect, a remote but ominous side-show where society's war on the "criminal classes" was conducted. Occasionally a titillating piece of theater to which the affluent might go for diversion but for the most part only a source of scabrous copy for the newspapers.

The Assize court had already begun to assume this specialized function by 1861 when this study of its operation begins and it might be assumed that its Judges continued to enjoy within this circumscribed jurisdiction the wide discretion traditionally associated with the common law. However "the power which the Courts of Justice are said to possess of adjusting the law to changing circumstances by

\[15\] See, for example, Sir Edward Clark, who as a Q.C. and a Law Officer, was offered the immediate appointment of Master of the Rolls (Sept. 30, 1897) and declined it, saying inter alia, "The great loss of income which its acceptance would involve cannot... be left out of consideration." Edward Clark, *The Story of My Life*, p. 337, N.Y. Dutton, 1919.
their decisions on particular cases" was, and is, often overstated.\textsuperscript{16} The Report of the Commission on Indictable Offences in 1879 defended its proposed Draft Code against the charge that it removed both judicial discretion and the inherent flexibility of the law in strong terms:

The truth is that the expression "elasticity" is altogether misused when it is applied to the English law. The great characteristic of the law of this country, at all events its criminal law, is that it is extremely detailed and explicit and leaves hardly any discretion to the judges . . . We think that [this] is one of its most valuable qualities and that one great advantage of codification would be that in giving the result of an immense amount of experience in the shape of definite rules it would preserve this valuable quality.\textsuperscript{17}

In no area of the law were these rules more explicit than in that of murder and the Commissioners asserted:

For example it could never be suggested that a judge in this country has any discretion at the present day in determining what ingredients constitute the crime of murder or what

\textsuperscript{16} Royal Commission . . .to consider the Law Relating to Indictable Offences, with an Appendix containing a Draft Code (1879) p. 6, British Parliamentary Papers Vol. XX 1878/9.

\textsuperscript{17} Ibid.
principles should be applied in dealing with such a charge
under any possible circumstances; and yet the common law
of murder has in its application received a remarkable
amount of artificial interpretation.\(^{18}\)

The Commissioners, in their Report, set out the law as it was
understood throughout the second half of the 19th century.\(^{19}\) There
were however two such 'artificial' interpretations which must be noted
since they both exercised great influence over the application of the
law in respect of murder in the period under examination.

In 1843, in the aftermath of the celebrated trial of Daniel
M'Naghten, Tindall C.J. and a committee of Judges reported to the House
of Lords on the question of criminal insanity and, in doing so, offered a
definition of criminal responsibility in cases of felony. In what came
thereafter to be known as the M'Naghten Rules they stated that:

Every man is presumed to be sane and to possess a sufficient
degree of reason to be responsible for his crimes until the
contrary is proved to their [the jury's] satisfaction: and that

\(^{18}\) Ibid.

\(^{19}\) They stated the law as follows: "Murder is culpable homicide by any act done with
malice aforethought. Malice aforethought is a common name for all the following states of
mind. a) An intention preceding the act to kill or to do serious bodily harm to the person
killed, or to any other person; b) Knowledge that the act done is likely to produce such
consequences, whether coupled with any intention to produce them or not; c) An intent to
commit a felony; An intent to resist an officer of justice in the execution of his duty:
to establish a defence on the ground of insanity it must clearly be proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it he did not know he was doing what was wrong.\footnote{Royal Commission on Capital Punishment 1948/53.}

In 1864 the Capital Punishment Commission sought to make an equally fundamental definition in respect of criminal intention in murder cases. They sought to distinguish between express ‘malice aforethought’ in cases of deliberate, premeditated homicide and a general or implied malice where intention was in Hale’s phrase, “implied by the law from the wickedness and cruelty of the deed itself.” They proposed that only the former of these two categories was to be a capital offence.\footnote{Capital Punishment Commission 1864/6 - Report, pp. xivii ff, Eyre & Spottiswoode for H.M.S.O., 1868. (Henceforth CPC 1864).} This distinction was not accepted by Parliament but the implicit concept of two levels of murder was to recur repeatedly in attempted reforms of the criminal law, and becomes increasingly evident in the decisions of the Home Secretary in respect of the Prerogative of Mercy.

However constrained in terms of the law which they administered High Court judges were largely free from bureaucratic direction in this
period. Since the Judicature Acts of 1873/75 (36&37 Vict c66) it had, it is true, been the responsibility of the Home Secretary to determine the frequency of circuits and, in consultation with the Lord Chancellor, to review the choice of circuit towns. Both were sensible provisions in view of the former's impending control of the gaols whose prisoners the judges were charged with delivering. Additional circuit tours were occasionally set up, increasing the Assizes from two to three, on busy circuits such as the Northern or Southeastern.\textsuperscript{22} No changes were made however in the circuit towns, affection for traditional places apparently overriding any more material claim in the minds of those ex-barristers who almost invariably held the office of Secretary of State.

Judges were not, however, exempt from the pressures exerted by would-be law reformers in government and elsewhere, or from the intrusive and often undeferential scrutiny of the press. In the former case the most evident and continuing issue was sentencing policy, and the demand for greater judicial consistency went alongside periodic arguments for greater severity, as in the early 1860's, or for shorter sentences in the later decades of the century. In February 1884 the Home Secretary, Sir William Harcourt, in a letter to the Chancellor,

\textsuperscript{22} Alexander, op. cit., p. 86.
Lord Selbourne, summarized the underlying problem of coherence and its relation to one of the central concerns of Victorian penal policy:

One of the main objects which was contemplated and which I think has been accomplished by the consolidation of the local prisons under the central control of the Home Office was to secure greater uniformity in the administration of prison discipline and consequently greater equality and identity in the punishment of crime.

There remains . . . a still greater difficulty viz the means of securing more harmony and uniformity in the extent of punishment and the amount of sentences pronounced in similar cases.\(^{23}\)

This was a pressure that was resisted despite Parliamentary proposals for Royal Commissions in 1889 and 1890. Meetings of the judges were held by the Lord Chancellor in 1892 and 1902 in order to promote more uniform sentencing but gradually demand for such reform fused with the wider demand for a court of criminal appeal and became less obtrusive when such a court was established in 1907.\(^{24}\)

With the rise of a mass media in the national press and the high profile which it accorded to great crimes the Bench could not escape comment, criticism and even ridicule. While for the most part

maintaining a traditional deference, the press might on occasion reflect on the technical ignorance of a judge or on his impartiality. In his conduct of the 'Penge Case' Sir Henry Hawkins was censured on both counts. He was held to have neglected important medical evidence and to have been less than even handed in his summing up. Mr Justice Stephen was even more severely criticized on this account in Florence Maybrick's case in 1889. "Nothing," declared the Pall Mall Gazette in August of that year, "could have been more calculated to prejudice the jury than the reiterated emphasis with which Mr Justice Stephen harped away, over and over again, upon her sexual offence." Its editorial did not stop at this point but went on to ridicule Stephen's own published philosophy. He belonged, it declared:

...to that hard type of philosophers who are morally incapable of appreciating the Christian conception of woman...now a gentleman of this way of thinking may be a very suitable judge when cynical men of the world have to be tried for commercial fraud but he is as incapable as Horace or Seneca of understanding such a woman as Mrs Maybrick.27

26 Pall Mall Gazette, Aug.10, 1899.
27 Ibid.
Few Victorian judges exposed themselves to such assaults but its potential threat was another indication of the increasingly circumscribed world in which they lived.

These changes in the jurisdiction and social environment of the High Courts of criminal justice served to make them more specialized. If taken together with the more professional and state directed character of prosecutions it becomes easier to understand their growing success in the conviction of homicides. Table 3 compares the results of trials at Assize Courts and the Central Criminal Court in the 1860's with those in the first decade of the 20th century. In the former 57% of those charged with murder were set free either by the grand jury or by the petty jury. In the latter only 18% were so treated and 82% were either convicted and hanged or detained either under commuted sentences of penal servitude or as insane. In the more problematical case of manslaughter the proportions change, if less dramatically, but there is a radical reduction, of over 17% in the numbers indicted for this crime, despite a massive increase in population during the period. Concealment of birth, a secondary charge brought against those suspected of infanticide28, is similar in that there is a marked drop in prosecutions, of over 30%, while the

28 See Chapter 2, note 111.
conviction rate continued high amongst this particularly vulnerable group of prisoners.

These change clearly reflect both the greater discretion as well as the improved quality of police prepared and state directed prosecutions. They also had the effect of reducing the latitude of juries especially in the context of murder indictments. There is, moreover, a token of improved defence representation in the increasing proportion of special verdicts of "guilty but insane". A combination of professional witnesses and a growing public acceptance of the concept of temporary insanity not only led to more convictions, and conversely less jury 'nullification', but also enabled many so convicted to avoid a capital sentence. In the last two decades of the period about 38% of all those charged with murder were either found insane on arraignment or guilty but insane.

The increasing authority and professional competence of both prosecution and defence counsel tended to reduce the inquisitorial role of the judge himself and to place greater emphasis on his arbitrative function. In this respect he not only determined the admissibility of the evidence offered but also, in his summing-up, its relative weight and significance. He was less frequently required to intervene to establish the facts or, in Sir Henry Hawkins' self-justifying phrase, "... to

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29 After 1883, The trial of Lunatics Act, 46 & 47 Vict., C.38, this verdict replaced that of "Not guilty by reason of insanity."
ensure that injustice is not done by any omission on the part of counsel.".\(^{30}\)

In one important respect however, the role of the judge was unchanged throughout the period and that is as recorder of the evidence. The judge's notes remained the official account of the proceedings in the only two areas where, at this time, appeals could be considered in criminal cases. In 1848 the Crown Cases Reserved Act \(^{31}\) officially recognized an hitherto informal procedure whereby judges in criminal cases might reserve a question of law, or "state a case," for resolution by their fellows of the Queen's Bench and Exchequer. In such cases the trial judge submitted his notes as the record of the case.\(^{32}\) After the Judicature Acts of 1873/5 this review function devolved on the newly created Queen's Bench Division of the High Court where it continued to lie until the Court of Criminal Appeal was established in 1907\(^{33}\). At this time official shorthand writers were appointed to record all High Court proceedings and copies of their records made available, for the first time, to both prosecution and defence lawyers. The judge's notes were also used by the Home Office in cases where appeals were made to the Secretary of State and to the Prerogative of Mercy. The notes of


\(^{31}\) 11 & 12 Vict. C.78.


\(^{33}\) 7 Edw. VII, C.23.
capital cases, together with a covering letter, are to be found in the H.O. 144 files and constitute an especially valuable record for the purposes of this study. Ranging in length from less than twenty to over two hundred pages they provide an altogether more complete account of the evidence than is generally available in contemporary newspapers. It must however be noted that they do not contain the formal speeches of counsel or the judge's own summing up of the evidence. The latter is however reflected in the usually concise covering notes which went to the Home Office.

The Old Bailey Session Papers, records of a court which after 1834 became the Central Criminal Court, were unofficial but reliable records and, while often abbreviated, provide a useful additional source of information especially in cases where convictions were not obtained. This court accounted for between 20% and 25% of all homicide indictments in England and Wales in the 19th century and, while clearly not wholly representative, its cases provide a useful counterpoint to the Home Office records. It is from these sources then that we may expect to find some further evidence of the changing balance of the judicial trial of murder.

The task of the Assize Court was twofold; first to establish the truth of an indictment and secondly to award punishment if a verdict of guilty was found. In the case of murder the punishment of death was the only one allowed by the law which in this instance had been
established by statute in 1861. Thus the process of trial began with the preparation of an indictment.

The Clerk of Assize, normally instructed by a prosecution solicitor, would draw up a bill of indictment using the depositions from the magistrate's court as his instructions. Upon this bill were endorsed the names of the witnesses for the prosecution. The bill was sent to the grand jury room together with the witnesses for the prosecution. If the grand jury so decided the solicitor for the prosecution might also attend while these witnesses were individually examined. If it was decided that a prima facie case had been made out then the indictment would be endorsed as a "true bill." A minimum of twelve jurors out of a maximum of twenty three were required to establish such a verdict. Throughout the century the grand jury continued to be made up of prominent local citizens and to be drawn from a significantly higher level of society than the petty or trial jury. They were, in Blackstone's words, "usually gentlemen of the best figure in the county." When Thomas Davis and others were surprisingly "nobilled" in the murder of Sarah Ann Short, in November 1890, the Chief Constable of Staffordshire tried to justify this verdict to the Home Office with the comment that "Every gentleman who served on that jury

34 24 & 25 Vict. C.100 S 9.
35 Alexander, op. cit., p. 32.
was, with two exceptions, a J.P. of the county.\textsuperscript{36} Table 3 indicates that grand juries continued to play an active part in the trial of serious crime throughout the second half of the 19th century and that they consistently rejected between 6\% and 7\% of homicide bills in this period. Their role in cases of lesser crime at Assize and Quarter Sessions seems to have been rather less significant and to have diminished as a result, perhaps, of the improved quality of prosecution cases. In 1883, for example they "no-billed" nearly 4\% of the 14,000 cases presented to them in these courts, whereas thirty years later, in 1910, this figure had dropped to only 1.6\%.\textsuperscript{37}

The system of trial on indictment sought to define with the greatest possible precision the task of the court and did so in three distinct parts of the indictment. It first established the relevant jurisdiction of the court in the "venue," next, the nature of the offence in the "statement" and finally its illegality in the "conclusion." If, like murder, the offence was against common rather than statute law, then this last element was invariably expressed as being "against the peace of our sovereign Lady the Queen."\textsuperscript{38} This was a procedure that was intended to establish criteria for the relevance of testimony and

\textsuperscript{36} H.O.144 Series, Case#479/X30759, Thomas Davis, 1890, letter from the Chief Constable of Stafford.
protected the accused against a generalized or wide ranging investigation of his conduct or his antecedents.

When arraigned, at the next stage of the trial, the prisoner was thus required to plead to a very specific charge and normally had only two options - 'guilty' or 'not guilty.' In cases of murder, with its mandatory sentence of death, pleas of guilty were very rare. Even where overwhelming evidence was available as to the act prisoners could deny intention, that essential element of malice aforethought in all such indictments and both courts and counsel were very reluctant to accept such pleas. In June 1866 Jane Revill, an 18 year old servant, was arraigned before Mr Justice Mellor at Nottingham Assizes. When called on to plead this bewildered and distressed young girl persistently pleaded guilty to the murder of her infant child. After a long and unsuccessful attempt to make her change this plea the judge turned to the female warder as follows:

Judge: Do you think she is quite aware of what she is about?
Wardress: I think so.
Judge: She understands that the charge is willful murder?
Wardress: Well, yes my Lord.
Judge: Intentionally killing her child?
Wardress: Yes my Lord

39 Ibid.
Judge: You understand that, prisoner do you?

Prisoner: I had no intention of doing it until the moment I did it.

Judge: Do you mean to say you killed the child intentionally?

Prisoner: No my Lord.

Judge: Well - that is a plea of not guilty.\textsuperscript{40}

In some cases it was apparent that the prisoner was wholly unable to understand the proceedings either through physical disability, as a deaf mute, or through congenital or even temporary insanity. In such cases a jury was impanelled to try the specific issue of their fitness to plead and, as can be seen from Table 3, some 6\% of those charged with murder in this period were found 'unfit' at this point in the process. They were ordered to be held "until her majesty's pleasure be known," which meant a long and indefinite incarceration in a criminal lunatic asylum.

Immediately a plea had been recorded a twelve man jury was formed from a larger number summoned by the Under Sheriff for this duty. While the prisoner was entitled to up to twenty peremptory challenges and an apparently infinite number 'for cause', this was a right which seems rarely, if ever, to have been exercised, in the deferential world of Victorian England. James Fitzjames Stephen,

\textsuperscript{40} H.O.45 Series, Case#57278, Jane Revill, 1\textsuperscript{o}66, Report in \textit{Nottingham & Midland Counties Express.}, July 23, 1866.
commenting in 1882, after a long experience both as barrister and judge, wrote:

This, practically speaking, is a matter of hardly any importance in quiet times in England. In the course of my experience I do not remember more than two occasions on which there were any considerable number of challenges.\(^{41}\)

Indeed challenging the unfamiliar faces of the relatively prosperous jurors must have seemed pointless to most of those in the dock since the social gap between them was so wide. In all counties, except Middlesex, jurors were required by the County Jurors Act of 1825 to be householders with a minimum value of £10, if freehold, or £20 if leasehold. In Middlesex, where property values were relatively inflated, this last figure was £30 and, in the city of London, £100. These qualifications, which continued throughout the century, were consistently more rigorous than any of the contemporary electoral franchises. A typical petty jury might have been that which tried the case of Thomas Brown at Nottingham in 1881 and most of whom later signed a petition for mercy on his behalf. The foreman was the proprietor of the Angel Hotel, still, today, a substantial business in the

town, and other members included a confectioner, a draper, a decorator, a china dealer and a grocer.\footnote{42}

The task of presenting the evidence for both prosecution and defence to the jury was the exclusive responsibility of members of the bar. Daniel Duman has given a valuable account of the development of this small and ancient profession in the 19th century.\footnote{43} He notes that, while one of the smallest, it was socially and politically the most conspicuous of professions. It was, however, highly conservative and in his words "played at best a peripheral role in the professional revolution of the 19th century."\footnote{44} This may well be true in the sense that the Bar lagged behind the medical and other professions in the establishment of those educational qualifications and self-disciplining powers which served to protect and augment their social and economic position in society. It does not, however, take into account the central role played by the Bar in the creation of that discreet nexus of law, bureaucracy and politics which was to form the heart of the emerging governmental 'establishment' of late Victorian England. This establishment not only oversaw the expansion and centralization of government power and gave it its characteristic and

\footnote{42} H.O.144 Series, Case \#A7411, Thomas Brown, 1881, petition of "The People of Nottingham," Aug.11, 1881.


\footnote{44} Ibid, p.1.
highly conservative ethos but also protected the interests of its brothers in the Inns of Court even more effectively than the Councils of the newer professions. Despite a nearly tenfold growth from the end of the 18th century the Bar still comprised only about 4000 members by 1880 and of these less than half practised.\textsuperscript{45} Many of those who did not practise occupied key positions in the civil service and, as politicians, in the government itself. In later chapters their role in the Home Office, in both these capacities, will be considered and in particular their success in imposing a legalistic rationale and practise on the rapidly expanding machinery of central government. Their contribution to the professionalization of government, if not revolutionary, was highly significant and is well illustrated in the H.O.144 files.

It was an even smaller part of the total profession that actually practised criminal law on the six legal 'circuits' of England and Wales. Since barristers rarely changed their circuits they made up small and intimate coteries whose focal point was the Bar Mess. According to Duman the total membership of these circuit messes rose from about 900 in 1860 to nearly 2000 in 1900. However at this time only about half were in practise. This means that by mid-century individual circuit membership was in the range of fifty to one hundred practising members and of these an increasing proportion did not 'go' the full

\textsuperscript{45} Ibid, p.24.
circuit. Instead they made occasional trips from London to handle specific cases or, in growing numbers, found a settled practise in one of the large provincial cities. Thus when Henry Dickens, later a K.C. and Common Serjeant of London, joined the Home Circuit and first attended Maidstone Assizes in 1876 he found "at least seventy men" at the mess's 'Grand Night' celebrations. When he retired from the circuit in 1917 'Grand Night' had become "a skeleton, with only a handful present.". Nevertheless it is evident that the criminal counsel practising at Assizes preserved not only the ancient conventions of their profession but much of the conservative ideology that had evolved around the practise of the common law. They maintained a deep loyalty to the Bar itself, to the concept of an absolute justice and last, and perhaps least, to the interests of their clients.

The evidence of the capital cases in the H.O.144 series provides many examples of both the practical and conventional limits imposed on counsel in the conduct of his brief, whether for Crown or private citizen. Convention demanded that counsel stop short of a total commitment to the interests of his client in deference to a wider sense of justice. When Dr Kenealy, counsel for the Tichbourne claimant, overran those limits in his passionate fight for his client's supposed birthright, he smashed an hitherto outstanding career. By the end of the

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long saga of the Tichbourne case Kenealy gave vent to his frustration at what he saw as the persecution of his client. The Lord Chief Justice, Cockburn, in his summing-up described counsel's final speech for the claimant as "one unceasing torrent of invective, of dirty, foul slime" and Atlay, the editor of the "Famous Trials" series, declared that "never was a prisoner's chance of acquittal more recklessly sacrificed to the almost insane vanity and headstrong wilfulness of counsel.".47 Shortly after Kenealy was banned from the mess of the Oxford circuit and an enquiry by the Benchers of Greys Inn disbarred him. He became a popular journalist and, briefly, a radical member of Parliament. More moderate and more typical was the reaction of Defence Counsel for William Cassidy who was unexpectedly convicted of murder at Lancaster Assize in January 1880. He wrote to the Home Secretary that "the verdict was wholly unexpected and quit contrary to public feeling . . . this is also the general feeling of the Bar." His petition was supported by twenty six members of the Northern Circuit including junior counsel for the Crown.48

Convention required that, in presenting the case for the Crown, counsel do so with the minimum of histrionics, avoiding any attempt to lead his witnesses while allowing their evidence wherever possible to

48 H.O.144 Series, Case# 90738, Wm.. Cassidy, 1879, petition of Thomas Nash, Jan. 29, 180
speak for itself. In an editorial on the notorious Penge case in 1877, where four members of the Staunton family were convicted of starving the eldest brother's wife to death, The Times commented:

One of the most difficult tasks in such a case was to approach an examination of the evidence against the prisoners without a vehement bias. Against this disadvantage our criminal procedure goes far to secure the accused persons. The counsel for the Crown in this country invariably decline to take advantage of adventitious circumstances to snatch a verdict from the sympathies and antipathies of a jury.49

It was an admirable, if idealized, convention made more supportable by the constraints on the professional competence of the defence. We have already noted the paucity of preliminary proceedings and the frequent absence of adequate briefs. The Home Office records add evidence of further constraints, in respect of insufficient time to study the depositions, to meet the client, and to determine the best line of defence. Finally it was more often than not the case that prisoners were allocated the least experienced counsel at a time, and in circumstances, where experience counted for more than professional education. By contrast the Crown was better served in all these respects.

49 The Times (London), Sept.27, 1877.
The competence of prosecution cases, got up in the first instance by the police, was enhanced by experienced legal advice at all levels. In London the Treasury Solicitor employed either Wontner &Co or their own legal staff to prepare prosecution briefs which were increasingly given to one or other of a small group of barristers who came to be known as 'Treasury Counsel'. The two most prominent of these counsel were Henry Bodkin Poland and Montague Williams. Their employment appears to coincide with the appointment of Augustus Stephenson as Treasury Solicitor in the early 1870's but their function was only formally recognized when the office of Public Prosecutor was established in 1879. In important prosecutions they would appear as Juniors to some eminent member of the inner bar, a Queen's Counsel or Serjeant. In the most celebrated cases their leader would be the Attorney General himself. Thus Poland was led by George Denman Q.C. in Watson's case in 1872, by both the law officers, Sir John Holker and Harding Gifford in the Penge case of 1877 and by the famous Serjeant

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51 These were senior members of the "Inner Bar." Serjeants enjoyed a monopoly of work in the Court of Common Pleas but also practised in the Court of Queen's bench. With the demise of Common Pleas in 1875 their order gradually ceased to exist. Queen's Counsel, or Silks from the material of their gowns, practised in all courts of law but could only appear in important, and expensive, cases when supported by "Juniors," who were members of the "Outer Bar." This order grew in importance in the 19th Century and was a vital step towards judicial preferment. Duman, English & Colonial Bar, p.98, estimates that one in six practising barristers "took silk" during the last quarter of the 19th century.
Ballantine in Wingfield's case in 1880. In the 1880's increasing reputation led to their often appearing alone, even in such notorious cases as those of Jacob Riegelhuth in 1883 and Israel Lipski in 1887. When Poland took silk in 1889 the number of Treasury Counsel was increased to four\textsuperscript{52} who included such formidable names as Horace Avory and Forrest Fulton.

In provincial prosecutions a similar if less formal pattern emerged with a senior Q. C. from the circuit leading in important trials but with the mass of less critical cases going to well established juniors and in some cases to counsel who were locally based. This growth of a provincial bar was noted by Duman who cites the case of the Liverpool bar which became a center for the Northern Circuit, 40\% of whose members were locally based by 1895\textsuperscript{53}. Two juniors in Liverpool emerge in the late 1870's as frequent Crown prosecutors. Dr Commins and W.R. McConnell appeared together in the case of Thomas Johnson in 1879, in that of Joseph Macentee in 1881 and Charles Arthur in 1889. In the most notorious of all Liverpool trials, that of Florence Maybrick in 1889, W.R.McConnell was led by J.E.W.Addison Q.C., an M.P. for a Liverpool constituency. All these prosecutions were briefed by the Town Clerk of Liverpool, since this city was not prevented by the Municipal Corporations Act from providing its own legal services.

\textsuperscript{52} Howard, op. cit. p.123.
\textsuperscript{53} Duman, \textit{English & Colonial Bar}, p.86/89.
Indeed it did so with profit, saving considerable sums from the legal allowances made to it by the Treasury.\textsuperscript{54} Thus despite the absence of a formal network of State Prosecutors a pattern of professional specialization appears to match the narrowing focus of the assize courts themselves on the issue of serious crime.

An important factor in improving the efficiency of the prosecution was the quality of the evidence itself which was presented to the jury. Throughout the period much depended on the testimony of simple working people and this, of course, does not change. There is on the other hand a critical difference between the evidence offered by the police and the professional witnesses for the crown in the 1860's and later in the century. In the former case this often reflected the quality of the police' own initial investigation and the inexperience of newly established forces in presenting their evidence. There were, for example, at least two cases in the 1860's where inadequate study of the scene of the crime led to serious doubt about subsequent verdicts and free pardons were granted by the Home secretary.\textsuperscript{55} In the 1870's it seems to have become the practise to open cases with a sketch map of the scene of the crime and in 1881, in Abraham Thomas' case, a model of the house in which this butler was alleged to have shot Christiana

\textsuperscript{54} Ibid, p.123.
\textsuperscript{55} Charles Crew, 1862 & George Lewis, 1864.
Leigh was prepared. In 1885 the prosecution in Boddington's case offered photographic evidence of the victim's body as it lay in Blenheim Park. Experience of giving evidence in court is the common lot of all policemen and traces of at least simple training for this ordeal are evident from the earliest cases in the 1860's. There is no doubt, however, that it became more thorough as the century progressed and use of an official note book more universal. Even less tangible, but probably more significant, was the growing respect which the middle classes, at least, entertained for the police. The gap between the credibility of a police constable and that of most members of the poorer classes is likely to have been substantial.

There seems also to have been a marked improvement in the coherence, if not always in the quality, of the evidence given by medical and technical witnesses. In John Allen's case in 1864 the two medical Doctors who attended the dying Betsy Allen appeared as prosecution witnesses and contradicted each other on the question of the cause of her death. In 1872 two expert prosecution witnesses on

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56 H.O.144 Series, Case #A24246, Abraham Thomas, 1883.
57 H.O.144 Series, Case#41310, Geo. Boddington, 1885.
58 This evidence is tenuous, gained only from the study of the recorded evidence of police witnesses and the impression that it was read in court from an official notebook. In the 1860's such evidence was formally acknowledged as was the evidence of P.C.Gibson in Allen's case cited below "This is the copy I made..." Within a decade no such preamble seems to have been necessary
59 H.O.144 series, Case379311, John Allen, 1864. Dr Morgan v Dr Mules as recorded in Mr J. Chamber's notes.
insanity failed to agree on the symptoms of temporary insanity in the case of the Rev. John Selby Watson. It was a source of weakness that seems to have been overcome by the increasing use of 'professional' witnesses to supplement local expertise. During the 1870's Dr Alfred Swayne Taylor appears as the medical advisor both to the Home Office and to the Treasury Solicitor on the choice of specialist witnesses. It is apparent that over the years a panel of prestigious and reliable experts was assembled. Thus when Charles Murdoch, Chief of the Criminal Department at the Home Office, needed advice in the case of Mary Piercey (1890), an epileptic and possibly insane murderess, he consulted Taylor's successor Dr Southey. In due course Murdoch noted that:

For lunacy he named Dr Savage, late head of Bethlem, who has the largest lunacy practise in London: failing him Dr Maudsley. Neither of these pledged to theories. 

In the early 1880's Dr Stevenson, of Guy's Hospital, began to appear as a Crown witness in poisoning cases and by the end of the decade he is officially referred to as "The Home office Analyst". Despite the widespread controversy about his evidence in Maybrick's case it is

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60 H.O.144 Series, Case #7940, Reverend. John S. Watson, 1872. Dr Shepperd v Dr Begley.
61 H.O.144 Series, Case #52045, Mary E. Piercey, 1890. Murdoch to Lushington, Dec. 15 1890.
62 In press reports of the Maybrick case (1889) and the Cream case (1892) for example.
clear that he enjoyed a high reputation and was praised in the press for his work in the case of the mass murderer Thomas Neill Cream in 1892. More frequent was the courtroom use of Police Surgeons and Prison Doctors as Crown witnesses to report on the victim and the prisoner respectively. This latter group only became a significant extra prosecution resource when, the Prison Act of 1877 put all the local prisons of England and Wales under the control of the Home Office and thus were able to examine all those awaiting trial for murder.

When the Prosecution of Offences Act became law in January 1880 the Director of Public Prosecutions was empowered to sanction local expenditure on the kind of prosecution expenses referred to above. A circular from the Home Office in February read as follows:

The Director. . .will also entertain applications in prosecutions of importance or difficulty for authority to incur special costs for the purpose of -

A) The preparation of scientific evidence.
B) The remuneration of scientific witnesses.
C) The payment of extra fees to counsel.

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63 H.O.144 Series, Case#53460, Thomas Neill Cream, 1892, The Times (London) Oct.18,1892.
64 The Prisons Act 1877, (40 & 41 Vict. C.22.) The willingness of Visiting Magistrates, encouraged by the Home Office, to certify insane prisoners before trial, as in the case of Mary Ann Morgan, was checked in 1885 when, following a judicial protest, the Home Office issued Prison Standing Order #183. This stated that where possible the sanity of a prisoner should be determined by a jury. This is reflected in the increase in such verdicts in the subsequent decade, as seen in Table #5.
D) The preparation of plans or models.

E) In respect of any special matters in such cases as the Attorney General may sanction.65

In the three years which followed such expenditure only averaged £1800 p.a. and was closely controlled by the Treasury. It was, nevertheless an important encouragement for local prosecutors to obtain the best advice in the prosecution of serious crime.

The situation of those defending prisoners was, by contrast, altogether more difficult and continued so throughout the period. As a junior on the Eastern Circuit in 1857, James Fitzjames Stephen was assigned by the judge to defend Thomas Fuller Bacon on the charge of attempting to poison his mother. Bacon was convicted and Stephen petitioned the Secretary of State "to consider the propriety of extending the Queen's mercy" on the unusual grounds of his own failure to properly defend his client. He was, he stated, "assigned at less than an hours notice and no attorney had been retained due to poverty." As a result Bacon was unable "... by poverty and ignorance of the rules of evidence ... to submit to the jury the true grounds of his defence."66 In John Allen's case, a few years later (1864), it was the local community

65 Report of the Select Committee to inquire into the Office of Public Prosecutor, 1883, Parl. Papers, Vol XXIII, 1884.
who protested at the failure of the defence to bring out the widely acknowledged provocations to which the accused had been subject. A local Doctor, Dr Cordwent, wrote, "The prisoner had no money nor inclination to defend himself and no solicitor to collect extenuating circumstances." Allen's employer declared, "I have quite come to the conclusion that had the circumstances been worked up for the jury by a clever lawyer they would have been not unlikely to have returned a verdict of manslaughter." When Enoch Whiston, 'Daft Enoch', was convicted of murder at Worcester Assizes in January 1879, many in his local community of Dudley were convinced that he was insane. 'Lex' wrote to the Dudley Evening Post,

It is certain that a man of weak intellect, and notoriously so, is condemned for a crime, undoubtedly committed, but for which he is apparently neither mentally nor morally accountable. . .

After recounting a mass of locally collected evidence, Lex continued,

Sir, these facts are solemnly affirmed and it is further affirmed that only the want of means to pay legal fees to prepare a case and prove them has prevented their being in evidence.  

67 Allen's case, cited at note 59 above.
68 H.O.144 Series, Case #80702, Enoch Whiston, 1878, Dudley Evening Post, Jan. 1879.
In the case of William Distin, in 1880, the Bristol Mercury noted,
A striking feature of the case was the entirely
friendless condition in which the prisoner
was left at the trial . . . no solicitor, no friend coming
forward to say a word. 69

In August of the following year Charles Gill, already a successful
junior, received a dock brief to defend George Durling for the drunken
murder of his mistress Fanny Mussel. In the face of a prosecution by
Poland and Montague Williams he tried, but failed to set up a plea of
manslaughter. He later wrote to the Secretary of State,
I was instructed to defend the prisoner by the
Sheriff of Kent. Under the circumstances I need
hardly say that my instructions consisted of a
copy of the depositions and what I could learn
from the prisoner while he was in the dock. 70

The pressures imposed on counsel in such circumstances could lead
even the best of them to set up hopeless or mistaken lines of defence
or worse still to offer the jury two defences. Longer consideration
might have enabled more to concentrate on pleas of mitigation and a
recommendation to mercy.

69 Bristol Mercury, Nov. 4, 1880.
70 H.O>144 Series, Case#A7537/2, George Durling, 1881, Letter of Chas.. Gill, Aug.
13, 1881.
When Forrest Fulton was called on to defend John Wingfield, on a charge of murdering his wife, in March 1880, he attempted to explain a brutal and public stabbing with a plea of insanity. He depended on the enthusiastic but inadequate evidence of a local G.P. He might better have concentrated on the provocation of Wingfield's notoriously immoral wife. He failed and Wingfield was convicted. In the event it was the Leader of the prosecution, the old and experienced Serjeant Ballantine, who later went personally to the Home Office and recommended that the evidence of the local doctor be ignored but that the conduct of the murdered wife be investigated.\textsuperscript{71} Mr Foord, to whom fell the defence of John Aspinall Simpson in November 1881 seems to have made an equally false and fatal judgement. Simpson was charged with murdering his pregnant, 17 year-old, sweetheart in a Preston public house. He did this on the very day on which her well-to-do father had consented to their marriage. He sought to set up a case of provocation when clearly to us, as to the local press at the time, a defence of insanity might have carried more weight. In the event neither man was recommended to mercy and both were hanged.\textsuperscript{72}

Needless to say some counsel made outstanding attempts to overcome such problems. The judge in James Williams case described

\textsuperscript{71} H.O.144 Series, Case#90932, John Wingfield, 1880, Note of Mr J. Grove, March 3, 1880 and minute of G.Lushington, Mar.16, 1880.
\textsuperscript{72} H.O.144 Series, Case#A10355, John A. Simpson, 1881 and \textit{Lancashire General Advertiser}, Nov.8, 1881.
the final and unsuccessful plea by Henry Mathews Q.C. as "one of the most remarkable efforts I have ever known." Even so, in this as in so many cases, prior admissions by the defendant made his task hopeless.

It is not easy to define a well conducted defence under such circumstances but clearly a verdict of "not guilty" constituted the highest degree of success and a 'recommendation to mercy', even when a guilty verdict had been returned, represented a positive minimum. In table 4 the results of a sample of 47 murder cases tried at the Central Criminal Court between 1860 and 1900 are analysed and the range of verdicts exposed. In thirteen cases, or 28%, verdicts of not guilty were obtained and in a further ten cases, or 21%, the lesser verdict of manslaughter was found. The remaining twenty-four prisoners, 51% of the sample, were either found guilty as charged or guilty but insane. Of those found guilty rather more than half were recommended to mercy. Thus, at first sight it appears that the honors between prosecution and defence were about even. However it is clear that the defence in these cases was aided by a high degree of 'jury nullification' since eleven of the thirteen prisoners found 'not guilty' were young women charged with the murder of their own infants. While horrified by this crime Victorian jurors were notably reluctant to hang young mothers or even to expose them to the harsh consequences of a commuted death.

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73 Jas. Williams case, cited at Cap. 2, note 95 above.
penalty. Of those persons convicted of manslaughter two were lightly sentenced; one woman convicted of the manslaughter of an infant received two months imprisonment and a young man, successfully defended by Horace Avory on a plea of self-defence, received only four months. The remainder of those convicted on this lesser charge were given an average of nine years penal servitude. They were for the most part convicted of culpable involvement in street brawls or bar-room fights. Of those convicted of murder eight were hanged and the remainder commuted to penal servitude for life or to be "detained until the Queen's pleasure be known" in a criminal lunatic asylum. These figures recall the evidence given by J.F. Stephen to the Capital Punishment Commission in 1864:

I have found that under the term murder there are included so great a variety of offences, of the most varied types, that you get nothing at all from knowing how many people have been tried for murder and acquitted. Where death is caused in an illegal manner, in almost every case there is a committal for murder and it goes down in the statistics... 75

74 See Chapter #7 below.
75 C.P.C. 1864, minute #1976, Evidence of J.F. Stephen Q.C.
While this was evidently less true as the century progressed it is apparent that in most cases of deliberate and illegal homicide of adults not only were committals obtained but also convictions.

In most of these latter cases the role of the defence consisted in qualifying the extent or degree of intention in an admitted homicide and, where self-defence could not be reasonably pleaded, in suggesting a lack of intention due either to provocation or to permanent or temporary insanity. Into this latter category counsel would try to include alcoholism or even drunkenness. Such tasks were made especially difficult under the conditions of the 19th century Assize Court and not infrequently led to a third, and final inquest on murder by the Home Office when the trial was over. These defences are the subject of separate chapters in this work and it is only necessary at this stage to point out that they demanded evidence of a kind that was not quickly or easily mobilized. It could not for example be got in the kind of exchange described by Charles Gill above, over the railings of the dock! A plea of provocation demanded reliable witnesses not only to the nature of the provocation but also to the good prior character of the defendant. Pleas of temporary or permanent insanity required expensive specialist witnesses, briefed in time to thoroughly examine the prisoner. In rare cases, such as that of the Reverend. John Selby Watson in 1874, an energetic defence solicitor was able to arrange for such an examination and to ensure that an experienced leading counsel,
Sjt. Parry, went into court with a clear and well prepared line of defence. More common was the experience of Richard Addington in the same year. No specialist medical evidence was called at his trial and when, after conviction, a public appeal committee retained Dr Thomas Pritchard he was denied access to the convict and forced to rely on an extrapolation of the courtroom testimony, as reported in the press.\textsuperscript{76}

Faced with such problems counsel often elected to concentrate on a plea for mercy and not always as obliquely as William Weightman in Brown's case in 1881. When faced with the apparently hopeless task of defending Brown for the murder of his sweetheart Weightman concentrated on his client's youth and temporary drunkenness. His final plea for acquittal was perfunctory and he concluded his address to the jury with a passage which echoed the words of the presiding judge, J.F.Stephen quoted above:

There were murders and murders and they might return a verdict to which he need not say they might make an appendage, of which he need not remind them.\textsuperscript{77}

Arguably the greatest handicap faced by the defence of innocent persons was the rule of evidence which forbade them, or their spouses,


\textsuperscript{77} H.O.144 series, Case#A74111, Thomas Brown, 1881, Nottingham Daily Post, Jul.29, 1881.
to give evidence on oath in their own behalf. Sir Edward Clark K.C., one of the most experienced and successful of late Victorian criminal counsel, described this rule as "...one of the worst examples of judge-made law which I have ever known." It was one which, in his opinion, "often operated cruelly against an innocent person, but which in nine cases out of ten... was of advantage to the guilty."\textsuperscript{78} It was advantageous because it spared such a person the perils of cross examination on oath. He considered that the change in this rule, in 1898, seriously reduced the opportunities for the advocate. "A brilliant speech before the prisoner is called [to the witness-box] is dangerous; when the prisoner has been called it is often impossible."\textsuperscript{79}

The change in the status of an accused person's evidence was the only substantive change in the rules of evidence in the criminal law during the period, and it occurred right at the end. It remained the Judges' task to monitor the presentation of evidence by counsel and during this time they extended the range of permissible evidence including an increasing reliance on documentary evidence and that of such technical innovations as the photograph. In criminal cases, however, it remained mandatory that an individual be available to attest, under cross examination, the authenticity of such evidence. The

\textsuperscript{78} Sir E.Clark, op.cit. p.144.
\textsuperscript{79} Ibid..
judges also progressively eliminated the license of counsel, widely taken in the 18th century, to impeach hostile witnesses in cross-examination, by direct attacks on their character. Stephen notes, however, that such a witness "... may be impeached by other witnesses who will swear in general terms that he is not worthy of credit on his oath." 80

Underlying the general rules of evidence were two central and related assumptions. First that the prisoner must be assumed innocent until proved otherwise and second that he be "entitled to the benefit of every reasonable doubt." 81 82 The implicit assumptions inherent in the description of the defendant as 'prisoner' and his treatment in terms of clothing and prior incarceration did not appear to worry those concerned with the administration of justice during this period. The inherent looseness of the concept of 'reasonable doubt' did on the other hand give rise to much debate and anxiety. In 1824, Thomas Starkie, in the first edition of his Treatise on the law of Evidence, had formalized the prevailing fear of error in the still wide range of capital cases with the notion of proof as "Moral certainty, to the exclusion of reasonable doubt." He wrote:

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82 Thomas Starkie, A Practical Treatise on the law of Evidence, p. 577, 7th Ed from 3rd English Edn.. Pa, Johnson, 1842. Starkie was an original member of the Commission on the Criminal Law and served throughout its long life, from 1832 to 1845.
On the one hand absolute metaphysical and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of reasonable doubt . . . A juror ought not to condemn . . . unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern to his own interest.83

Writing rather earlier, Jeremy Bentham had been contemptuous of such views:

All these candidates for the prize of humanity have been outstripped by I know not how many writers who hold that, in no case ought an accused person to be condemned, unless the evidence amount to mathematical or absolute certainty. According to this maxim nobody ought to be punished lest an innocent man be punished.84

Bentham's criticism was unacceptable and Starkie's concept seems to have remained a paradigm for his profession throughout the century. In his History of the Criminal Law Stephen added a gloss with the

argument that "... every supposition not in itself improbable which is consistent with his innocence ought to be negatived."85 Nevertheless the inherent relativism of the concept of reasonable doubt was distasteful to a profession still wedded to a belief in absolute justice and Starkie's importation of the mechanism of conscience, of moral conviction, permitted the court to patch the uncertain fabric of evidence with an external, if not supernatural, element of certainty! It was to be an increasingly uncomfortable process.

The force of Bentham's argument became increasingly evident as the courts found themselves forced to entertain the discourse of scientific demonstration in such technical matters as poisoning. In such cases evidence was based on sample tests of the viscera and professional opinions offered on the likely dose ingested and the probable effects on an 'average' person of such a dose. The protests of the medical profession over the conclusions reached on such bases in Smethurst's case in 1859, in Fanny Oliver's cases in 1869, and in the even more celebrated trial of Florence Maybrick in 1889 and the belated response of the judicial establishment, mark a slowly growing willingness to accept that all such evidence is a matter of probability.

Faced with a similar problem in respect of circumstantial evidence in 1881, Lord Coleridge, the Lord Chief Justice, commented to

the jury both on the chain of evidence offered against Percy Lefroy Mapleton and on the closing speech of Montague Williams, the experienced Treasury Counsel, who on this occasion was leading for the defence.

Gentlemen, you were told by the prisoner’s counsel that the evidence is all circumstantial and that though persons have often been convicted on such evidence he does not believe in it, that it is not conclusive and that you must not act upon it because possibly it may be consistent with innocence.

Gentlemen, the law says nothing of the kind. The law says that in this, as in every other case you must act on high moral probabilities. You must in this as in every other case be morally satisfied of the conclusion at which you are asked to arrive. . . . There is no difference between circumstantial and direct evidence in this respect as to the effect it ought to produce on the mind. . . . The only difference that I am aware of. . . is that direct evidence must be believed or disbelieved. It must be either true or false. It admits of no degrees. But we know that almost every crime in the calendar is proved day
after day not by direct evidence but by evidence in its nature circumstantial.\textsuperscript{86}

The pursuit of such an elusive concept as moral certainty in murder cases would have been particularly taxing to the ordinary citizens who made up a typical Assize Court jury had it not been for certain traditional assumptions of the common law of murder. They had not only to be certain about responsibility for the 'act' of homicide but also about the intention of the accused man at the time. They were required to find 'mens rea', a guilty mind. Their task was made much easier by the broad assumption of the law that the use of lethal force, or a deadly weapon, in itself constituted an intention to kill. No premeditation or long standing motive need be established. As a result the crime could be extended to cover an act of recklessness where obvious intention to kill had been absent.

When John Ralph was charged in 1879 with the murder of Sarah Vernon, a married woman with whom he was consorting, it was established that, while he had stabbed her, she died from drowning in a canal into which she had later fallen. Lord Justice Thesiger dismissed a defence plea of manslaughter while declaring to the jury that:

\begin{quote}
  it was not necessary to find premeditation in order to convict of murder but only that the deed was
\end{quote}

\textsuperscript{86} H.O.144 Series, Case #A6404, Percy L. Mapleton, 1881. \textit{The Times} (London) Nov.9, 1881.
committed with what is legally called malice, that
is to say with a wicked or cruel mind.\textsuperscript{87}

In Abraham Thomas' case (1881) defence counsel cited his lack of
premeditation in shooting Christiana Leigh. He had declared that "I did
not think of doing it five minutes before." Blair, the prosecuting
counsel, dismissed this claim with the argument,"... whether this was
true or not would not matter; if it had been only five seconds the
malice would have been just as fatal to the prisoner."\textsuperscript{88} This was a
long established dictum of the common law and, when summing up in
Johnson's case in 1879, Mr Justice Stephen cited Holt CJ's definition
of malice, "He who does a cruel act voluntarily doth it of malice
prevense."\textsuperscript{89} This concept of mens rea was a great deal more far
reaching than another, and much more widely criticized, doctrine, that
of constructive malice. This allowed a court to assume malice if the
perpetrator of an act of homicide was actually engaged in another,
hitherto unrelated, felony at the time of the deed. For example,
escaping from legal custody, poaching, breaking and entering or rape
were all felonies in which consequential homicide would become
murder. In practise it was rarely necessary to rely on such an

\textsuperscript{87} H.O.144 series, Case #86139, John Ralph, 1879, The Times (London), Aug.6,
1879.
\textsuperscript{88} Abraham Thomas' case at 56 above. H.O. 144 Series, Case #83714, Thomas Johnson
(1879), Times (London) May 12, 1879.
\textsuperscript{89} H.O.144 series, Case # 83714, Thomas Johnson, 1879, The Times (London), May
12, 1879.
assumption and only in two broad categories of offence was it commonly employed. Abortionists who accidentally killed their 'clients' were, if found, prosecuted for murder. In the case of Anne Cartledge in 1877 her prior good reputation won her a commuted sentence but three years later, in 1880, Robert and Jane Colmer were hanged having previously been convicted of the same offence. They appear to have been the last abortionists to suffer this penalty. Suicide was a felony throughout this period and in the rare cases of suicide pacts that failed the survivor was charged with murder. They were, if convicted, invariably commuted.  

The judge's summing-up for the jury was more than an opportunity to explain the law of murder. It was an authoritative and critical review of the evidence offered by both prosecution and defence and one that seldom, if ever, ended without a stern admonition to the jurors to do their duty. "They were come into this world to do their duty and they ought now to discharge it," typically declared Mr. Justice Stephen to the jury in Brown's case in 1881. This responsibility was especially stressed in capital cases in view of the supposed reluctance of juries to reach such verdicts. It was a view forcibly expressed by the Hon. George Denman Q.C. when he appeared before the
Capital Punishment Commission in 1864. He argued that capital punishment itself was, in the hands of defence counsel, 

... a powerful weapon which leads to the acquittal of a great many men who, if there were any other punishment but death ... would most certainly be convicted.\textsuperscript{91}

This was a view that was firmly rebutted by those judges who appeared at the Commission's hearings and by other barristers including J.F. Stephen who claimed that in virtually every case of 'real murder', as opposed to manslaughter or infanticide, in his experience, a conviction had been obtained. Sir Samuel Martin, a Baron (or puisne judge) of the Exchequer Court, recollected only one case of a perverse jury in his long experience as a Commissioner of Assize. In this case a jury convicted of murder a man he thought properly guilty of manslaughter and whose reprieve he subsequently solicited.\textsuperscript{92}

In their review of the evidence judges, in most of the cases examined, preserved a dispassionate and equitable point of view, evidently aware of the frequent imbalance in the contending forces of prosecution and defence. In doing so they maintained a respect for their traditional role as protector of the rights of the accused. Any expression of their personal feelings was withheld until they addressed the prisoner before passing sentence or wrote later to the Secretary of

\textsuperscript{91} C.P.C., minute #589.
\textsuperscript{92} Ibid, minute #283.
State when that sentence had been passed. A letter in 1875 from George Denman, by then Mr J. Denman, to Cross, the Secretary of State, reveals another kind of tension to which judges were exposed. In describing his belated support for a jury's recommendation to mercy in Mommsen's case, he wrote,

Having talked it over with more than one person in whose judgement I sh'd be very glad to leave any difficult question, I found that I sh'd be justified in going further than I did and actually supporting the recommendation of the jury... Having as you may probably recollect taken a strong view when in the House of Commons against CP on the grounds that it is so uncertain in its application... I have perhaps felt overreluctant to express any opinion of my own as to whether it should be carried out.93

In his account of the judicial 'role' in the History of the Criminal Law Stephen endorsed this concept of detachment but saw with his normally sharp perception the extreme difficulty of concealing an opinion. He went so far as to say,

I think further that he[the judge] ought not to conceal his opinion from the jury nor do I see how it is possible for him to do so if he arranges the evidence in the order in

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93 H.O.144 Series Case # 42844, Fred.. Mommsen, 1875, letter of Denman, Jul.28, 1875.
which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened and in what relation they stand to each other must of necessity point to a conclusion.\textsuperscript{94}

This penchant for trying to tell the whole story over again to a jury was a technique which many judges wisely avoided, concentrating instead only on those aspects of the evidence that were obscure. It was to earn Stephen some bitter criticisms at the end of his career.

It was, paradoxically, in cases where the issue was least clear and the representation of prisoner and prosecution most evenly balanced that we can see the most obtrusive examples of judicial 'prejudice' and interference. In such cases the judge, forced to play a relatively passive and arbitrative role during the presentation of evidence by experienced and senior counsel on both sides, sometimes gave way to his own sense of the justice of the case during his summing-up. Sensing that the jury might have real problems in choosing between two powerfully argued cases he stepped over the fine line which separates direction in respect of the law and of the verdict. While there were only a handful of notorious cases where well represented prisoners stirred this sense of frustration and outrage in normally impassive judges these were symptomatic of more than

temporary aberration. They highlight the problems of a long period of transition during which the defence of serious felony came to depend less on the judge and more on a well organized defence. Not all judges found this change in role easy to accommodate.

In the cases of Henry Wainwright (1875), of the Stauntons (the 'Penge' case of 1877), of Percy Lefroy Mapleton (1881) or Florence Maybrick (1889) there was evident judicial partisanship which could not be concealed in the summing-up. Of Sir Henry Hawkins in the Penge case, Sir Edward Clark later wrote:

Speaking in a gentle, clear, beautifully modulated voice the Judge set himself up to recapitulate all the facts, however trivial, and unimportant. . . . As an example of tenacious and exact memory it was wonderful . . . but of the judicial fairness which should characterize a summing-up, especially in so grave a case, there was not the slightest trace. There was a constant emphasis upon the facts which told against the prisoners and every point which had been made in their favour was answered or turned aside as being of no importance.\textsuperscript{95}

Clark was himself a member of the strong defence team representing the four members of the Staunton family and clearly biased.

\textsuperscript{95} Clark, op. cit., p.130/31.
Nevertheless his comments seem as just today as they were to many of his contemporaries in both the editorial and correspondence columns of the newspapers. An editorial in the *Medical Times* contrasted the behavior of the Attorney General (Sir John Holker) with that of the judge. The former's conduct of the prosecution was, it declared,

... worthy of the best and highest tradition of the English Bar. Everything was stated against the prisoners with the most studious moderation. If a point could be safely waived, it was waived in their favour. The moderation of the prosecution was in marked contrast to the meddlesomeness of the judge.96

Earlier in the same piece it had commented that "A meddlesome judge is worse and one who will play the role of judge and counsel must infallibly land in mischief." In this case popular opinion shared the sense of outrage against the prisoners which led Hawkins to describe the alleged starvation of Harriet Staunton as ". . . so black and hideous that I believe in all the records of crime it would be difficult to find its parallel."97 His verdict was therefore applauded.

At the end of the long trial of Florence Maybrick on the other hand the verdict of guilty both surprised and dismayed popular opinion. Her indictment for the murder of her husband by arsenic poisoning depended

96 *Medical Times & Gazette*, Oct.6, 1877.
97 *The Times* (London), Sep.27, 1877.
on two assumptions; first that he had died of arsenic poisoning and second that she had administered the fatal dose. On both of these issues there was conflict of evidence and the kind of doubt from which the accused might have been expected to benefit. Much therefore depended on the summing-up. After what was generally agreed to have been a moderate and judicious performance on the first day of a lengthy summing-up, Mr Justice Stephen is reported to have wakened his fellow Judge in the Circuit Lodgings early on the following day. He was walking up and down his room saying as he did so, "That woman is guilty, that woman is guilty."98 The rest of his charge was far from even handed and by heavily emphasizing Mrs Maybrick's admitted adultery contrived to suggest an overpowering motive for an attempt at murder. A tired jury followed the sense of his mind and found the prisoner guilty at eleven p.m. that night. Stephen needed police protection when later he left the court. On the same evening Mrs Maybrick's counsel, Sir Charles Russell (later Lord Russell of Killowen and Lord Chief Justice) wrote to Henry Mathews Q.C., the Secretary of State, pointing out the absence of conclusive evidence either that Mr Maybrick died of arsenical poisoning or that his wife administered it. He continued,

The woman had been unfaithful to her husband and I am

98 Sir H. Dickens, op.cit., p.171.
afraid this fact and her subsequent improper letter to her paramour unsettled Stephen's normally fair judgement.

In a long experience I never heard any summing-up which gave a jury less chance of differing from his clearly conveyed adverse view. Indeed he seems to have told the jury to consider the case as a whole and not to divide its consideration and thus appears to have suggested to them that even if the cause of death was doubtful they might look to other facts - whereas he ought to have said that they were to look to facts bearing on the cause of death and if there was doubt to acquit even tho' the prisoner might have sought to poison her husband.99

Russell and many others including an ex Attorney General, Sir Henry James, were persistent in their efforts to obtain a review of this case. Indeed James wrote to the Home Office shortly after the verdict and described Stephen's address to the jury as "one of the most one-sided charges ever delivered from the bench."100 In 1896 the papers were given by the Home Secretary to the Lord Chancellor, Lord Halsbury, who, as Harlinge Giffard, had been both Attorney General and a distinguished counsel. In his review of Stephen's summing-up and Russell's attack on

99 H.O.144 series, Case#1640/A5067, F.Maybrick, 1889, letter of Sir Chas., Russell.
it Halsbury made some significant comments.\footnote{101} He seems to accept the concept of coherence as a necessary basis for moral certainty, much on the lines of the extract from Stephen's 'History' cited above...

Referring to Russell's own interested criticism Halsbury notes,

I cannot concur with his censure of the judge's summing up. It seems to me to have been most carefully done and although other minds might suggest that too much weight was given to this or that topic and too little to another the Judge's own view of what is right is, I think, more to be relied on than that of an advocate earnestly, and even passionately convinced of his client's innocence.

Of the allegation that the judge failed to 'divide' consideration of the case the Chancellor was also critical:

It is obvious too that breaking each topic by itself as though it were the sole fact upon which the prisoner's guilt was to turn is a very familiar fallacy in as much as the weight of the evidence must be taken as a whole.

What he is saying, in effect, is that the general plausibility of an explanation can have a cumulative effect sufficient to overcome the inherent weakness of any of its parts. If, however, that weight is accounted for by such inherently extraneous matters as the prisoner's

\footnote{101} Ibid, Ld Halsbury, Feb.15, 1896.
morals then a dangerous confusion can occur, as when he later goes on to comment on Mrs Maybrick's adultery:

The evidence of that adultery was not simply pointed to prove that Mrs Maybrick was a profligate woman, which itself would be irrelevant, but that it was part of the motive for murder.\textsuperscript{102}

The motive thus reappears, not to account for intention or mens rea, but as a reinforcing link in a weak circumstantial chain of evidence as to the act of murder. This was a notion that Stephen himself had firmly rejected in his own published account of the law of murder.\textsuperscript{103}

It is in this sense that Michel Foucault's reference to "The shadows lurking behind the case," is so relevant to the experience of those convicted of serious crime in this period. He argues that these 'shadows',

\[
\ldots \text{introduce into the verdict not only circumstantial evidence but something quite different, which is not juridically codifiable, the knowledge of the criminal, one's estimation of him, what is known about the relations between him, his past and his crime and what might be expected of him in the future.}\textsuperscript{104}
\]

\textsuperscript{102} Ibid.


It was precisely this estimation of the prisoner which colored Chief Justice Coleridge's charge to the jury in Mapleton's case. He began by reminding the juror's of their heavy responsibility and that they must . . . pass judgement on the life of a fellow creature who, if found guilty will be cut off in the flower of his age. Therefore it is fit that such a verdict should only come after grave and mature consideration. At the same time it would be unmanly to shrink from doing your duty from a sense of its possible consequences.¹⁰⁵

Coleridge then turned to the characters of the two protagonists in the case - the elderly victim, Mr Gold and his alleged murderer, Percy Lefroy Mapleton:

Let me begin by pointing out to you the kinds of person with whom we have to deal. One [the victim], an elderly man, of good means, retired from business, taking every week £30-£40, regular in his habits but a silent man, who rather shrank from conversation with others . . . The prisoner was a person very different in all respects. He is a young man in his 22nd year. He was without money, curiously erratic in his habits, not scrupulous in regard to honesty and of his early life, how brought up, in

¹⁰⁵ The Times (London), Report cited at note 86 above.
company with what associates we know nothing. These unfavourable circumstances I mention not to suggest that because he would cheat, he would murder, but merely to show the sort of man he was and the temptations to which his life exposed him.

This invidious contrast hangs over the whole of the rest of his charge to the jury and gives a powerful coherence to the whole chain of circumstantial evidence to which Coleridge later referred. He concluded with a further reference to the weight of the evidence,

The question is one of degree of moral probability . . .

and I trust that in a case which involves such a momentous issue it is not taking the awful name of God in vain if I pray that he may guide you to a right verdict.

The tension generated by a sense of moral outrage and a less than perfect body of evidence against the object of that outrage was of course heightened by the absolute simplicity of the verdict required and it is not surprising that the mechanism of conscience was appealed to so often in this period. In the post-trial reviews of capital cases there is a less restrained, because confidential, debate and the concept of relative guilt was allowed to surface since for the Secretary of State a wider range of penal options existed.
The evidence of jury deliberations in the H.O. 144 files is very sparse but it does exist. Such records as can be found tend to confirm the close attention given to the judge's charge even if such charges were occasionally misunderstood. The files also indicate the significance attached to their recommendations both by judges and by the Home Office officials to whom they were effectively addressed. The evidence suggests that juries used the recommendation to mercy for a variety of purposes. In some cases it was an expression of legal doubt and even, occasionally of doubt about the judge's charge. While such doubts arose primarily on the issue of intention they could do so on the facts of the case, as in that of William Habron (1876)\textsuperscript{106}. In other cases they resorted to it as a means of highlighting mitigating circumstances and as a sympathetic reflection either on the prior good character of the prisoner or on the bad character of the victim. Finally their failure to make such a recommendation was subsequently regarded by both judges and bureaucrats as a trenchant comment on the heinousness of the crime.

When Sir George Grey decided to commute John Hall's capital sentence in 1864, it was because it came close to the line between murder and manslaughter in respect of intention. He noted in his minute the reason for his decision - "The concurrence of the judge in the jury's

\textsuperscript{106} See Habron's case, H.O.144, case# 60198, cited in chapter 2 above.
recommendation . . . and the opinion of the jury that he did not intend to kill the keeper."\textsuperscript{107} In this respect he foreshadowed the recommendations of the Capital Punishment Commission of 1866 which sought, unsuccessfuilu, to create two classes of murder and of which the only capital kind would be limited to those "committed with malice aforethought, such to be found as a fact by the jury."\textsuperscript{108} In making this proposal they sought to redefine malice as premeditation. In 1881 Mr Justice Lindley expressed the same principle in a letter to Harcourt about the case of George Durling:

\begin{quote}
In these capital cases I regard the recommendation of the jury as a vital element. It is to be looked at generally as a finding on the question of premeditation . . . its absence in this case makes this one in which I ought not to interfere. \textsuperscript{109}
\end{quote}

Some years earlier the foreman of the jury in Mommsen's case became anxious that the Secretary of State was ignoring the jury's strong recommendation to mercy, and took the unusual step of writing to the Home Office. "I am somewhat anxious in this matter," he wrote in July 1875, "as I see the execution is fixed for the 3rd prox . . . The case was exceedingly close to manslaughter and the jury much divided."\textsuperscript{110} This

\footnotesize
\begin{enumerate}
\item H.O.144 Series, Case #A37986, John Hall, 1862, Min. of Sir Geo, Grey.
\item C.P.C., Recommendations, pp.xvii ff.
\item Case of Geo. Durling cited at note 70 above.
\item Mommsen's case, cited at note 93 above.
\end{enumerate}
doubt was also echoed by the judge, Denman, earlier parts of whose letter to Cross have already been cited. He wrote,

On full reflection I think there were reasonable grounds
for the recommendation of the jury and that if the verdict
had been one of manslaughter I should not have thought it
by any means a perverse one.\footnote{112}

The simple necessity of decision meant that jurors had less chance or
need to express their doubts about the facts of a homicide. When they
did it was not uncommonly expressed in a recommendation to mercy.

When Baron Pigott tried Fanny Oliver for the murder of her husband by
arsenic poisoning in 1869 there was a foretaste of the problems which
were to arise twenty years later in the case of Florence Maybrick.
Fanny Oliver, too, had an adulterous affair and in this case robbed her
husband to support her indigent lover. There was also, in her, case a
serious conflict of scientific evidence over the accuracy of the tests
made for the presence of arsenic in the victim's body.\footnote{113} Pigott wrote
to the Secretary of State, H.A.Bruce, after her conviction with rather
more moderation than Stephen was later to show in Maybrick's case:

On the whole, whatever my moral conviction may be of the

\footnote{111}{Note 93 above.}
\footnote{112}{Ibid.}
\footnote{113}{H.O.144 Series, Case # 20667, Frances Oliver, 1869. The tests used were
Rheinsch's and Marsh's tests.}
guilt founded on other parts of the evidence, I can not say judicially that the medical evidence is satisfactory. I regard the recommendation of the jury as implying a doubt in their minds on the same ground.\textsuperscript{114}

In this case, as in others already discussed, it is evident that both jury and judge found sufficient weight of evidence in the case as a whole to justify conviction and in the event a life sentence of penal servitude.

William Habron was a member of a disreputable family of Irish market gardeners, always at odds with the police in the respectable Manchester suburb of Wythenshawe. When one night in 1876, following an earlier altercation with the family, P.C.Cock was shot to death in the neighborhood, the youngest member of the family, William Habron was a convenient and obvious suspect. He was duly tried and convicted at Manchester Assize in November of the same year, despite the lack of any evidence to place him near the scene of the crime. The Judge, Mr Justice Lindley, wrote to the Home Secretary, Cross, on the following day and expressed views on the subject which seem to have fallen short of 'moral' certainty:

Whether the prisoner was proved by sufficient evidence to be the murderer is open to some doubt . . . and although I am not sure that I should have come to the same conclusion as

\textsuperscript{114} Ibid, letter Jul.23,1869.
they [the jury] I am not prepared to say the verdict was wrong or unsatisfactory.\textsuperscript{115}

Some few days after this letter, on December 3rd five of the jurors signed a petition for clemency suggesting that they too had doubts about William Habron's guilt. These were doubts which, as has already been noted, were fully justified.

In earlier references to the doctrine of constructive or implied malice it has been pointed out that juries could not avoid reaching guilty verdicts even where the intention of the prisoner had not been 'murderous'. They exercised their only discretion in such cases through the recommendation to mercy. Thus when 50 year old Ann Cartledge was convicted of helping her neighbor in Manchester to procure an abortion which proved fatal to the mother the judge noted,"the jury manfully returned a verdict of murder but strongly recommended the prisoner to mercy on account of her age and prior good character". On the other hand when Jane and Robert Colmer, two professional abortionists, were convicted of the same offence there was no such recommendation and the prisoners were hanged.

Sympathy with the guilty must be distinguished from doubt about guilt and jurors had opportunity to express their feeling for an intolerable pressure of circumstance or for some degree of diminished

\textsuperscript{115} Habron's case, cited at note 3 above et al.
responsibility. In extreme cases they could find the prisoner not guilty and, as has already been suggested, often did so in cases of infanticide. In other cases they used the mechanism of a recommendation to mercy. Just how strong this tension between 'duty' and fellow feeling could be is suggested by the words of the note handed to the judge in Edward Abbott's case in August 1873. Although Abbott was never certified as insane, he appears to have been nearly demented when earlier in that year he cut the throat of his three year old daughter and tried to kill himself. He was, apparently unhappily married and had earlier lost two other children through illness. The jury reported that,

We deeply deplore being unable to find sufficient evidence to enable us to return any other verdict than that of 'wilful murder' but desire to strongly recommend the prisoner to mercy on account of previous family bereavements and peculiar domestic circumstances.\(^{116}\)

By her written confession Emma Wade had made her conviction for the murder of her three-year old child inevitable but in the words of the judge, Mr Justice Lush, "the jury hesitated a considerable time but at length did their duty."\(^{117}\)

\(^{116}\) H.O.144 Series, Case #25785, Edward Abbott, 1873, the original note is in the file.

\(^{117}\) H.O.144 Series, Case # 83399, Emma Wade, 1879. Judge's covering letter to his notes.
In arriving at a verdict of guilty but insane jurors had already considered the issue of responsibility diminished by mental illness or congenital defects. They could also express their reservations on this score in terms of youth or old age and contemporary opinions on this topic are considered in some detail in chapter 7. At this point it is enough to note that in every case so far studied of the conviction of a person under the age of 18 a recommendation to mercy was made which suggests that public opinion had long since ceased to endorse the minimum age of legal responsibility at fourteen. There were not even any broad parameters to help define old age and its effects on the mind although, no doubt, the physical appearance of the prisoner in the dock would have influenced the minds of the jury in such cases. The Reverend John Selby Watson was 74 when recommended to mercy in 1872 on account of "his age and prior good character," Richard Townsend was 68 in 1889 and George Boddington only 64 in 1884, when the jury noted "his age and other infirmities."

Juries were also ready to recognize provocation as a mitigating factor, if not as a justification for homicide. Their sympathetic reactions give clear evidence of their assumptions about the limits of masculine self-control and a more traditional tolerance of male violence than the emerging legal establishment. The provocation which led to Friedrich Mommsen's fatal attack on the mate of his ship was physical,
an overreaction to threats of violence. In the case of Charles Arthur, the black Captain's steward on the S.S. Dovenby Hall, his crime was clearly premeditated. However when, in 1888, he killed the Captain with a carving knife it was a response to a long period of bullying and extreme verbal provocation. In this case the jury made this the basis of their recommendation. The inevitable reflection on the character of the victim was more explicit and perhaps less easy for us to understand today in the case of Thomas Quigley, tried for the murder of his wife in 1868. Mr Justice Mellor wrote of his case in a letter to Gathorne Hardy, then Secretary of State,

He was tried before an excellent jury who recommended him to mercy. It was a very serious case of beating and kicking a woman to such an extent that her recovery was impossible and the only wonder is that she survived during four days. She appeared to have been a woman of drunken habits and he entertained a strong suspicion of her fidelity and apparently not without reason. I was not surprised that the jury recommended him to mercy.\footnote{119}{H.O.144 Series, Case #75392, Thomas Quigley, 1868. Letter of Mr J. Mellor to Gathorne Hardy.}
The jury's note to the judge containing their verdict in John Key's trial for the murder of his wife in 1880 is curiously reminiscent of that in Abbott's case although the grounds are strikingly different:

My Lord, we feel compelled to find the prisoner guilty but having regard to the trials and troubles suffered by him at the hands of his wife for a series of years, we in the strongest terms, but most respectfully, recommend him to mercy.\textsuperscript{120}

These were recommendations which, as we shall see, carried weight with the legal establishment who shared the juror's perceptions of proper wifely duty. Such a general view did not extend, however, to lovers or sweethearts and when James Williams pushed his pregnant sweetheart into a canal and left her to drown he drew sympathy from a local jury but none from the Judge. The former recommended him to mercy on the grounds of the 'provocation' of his victim and while J. Wills Q.C., the Commissioner of Assize, described them as . . . "an exceptionally intelligent, grave and thoughtful jury", he commented that the "slight provocation offered deprived that recommendation of some weight" and he did not support it.\textsuperscript{121}

Finally in this context we should note some evidence of the anxieties aroused in jurors minds by this onerous duty. After the

\textsuperscript{120} H.O.144 Series, Case #95073, John Key, 1880. Original note on the file.

\textsuperscript{121} Case of Jas. Williams cited at Chapter 2, note 95.
conviction of William Cassidy, on Jan 26th 1880, for the barbarous crime of burning his sleeping wife to death, the jurors anxiously awaited a response to their recommendation to mercy. When no reprieve was granted first one member of the jury wrote to Lord Justice Brett and, shortly afterwards the foreman himself. In the first letter the juror declared, "I thought your Lordship wished us to take a merciful view of the case," and the foreman even offered "to wait on your Lordship with my notes" in order to explain both verdict and rider.\textsuperscript{122} The Secretary of State, R.A. Cross, dismissed their concern, which had soon spilled over into the press, with a short minute:

\begin{quote}
The whole agitation in this case arises from the fact that the judge was supposed to have desired an acquittal and after the verdict did not say he approved it, and this has disturbed the minds of one or two of the jury.\textsuperscript{123}
\end{quote}

In this case the jurors were not alone in their concern since as already noted numerous members of the Circuit Bar felt the conviction itself to be ill founded.

Opportunities for accused persons to speak on their own behalf were strictly limited. Unless they were conducting their own defence, and no such defence has so far appeared in the H.O.144 records of

\textsuperscript{122} Case of Wm.. Cassidy, cited at note 48 above. Enclosure with letter from Ld.J. Brett.
\textsuperscript{123} Ibid, minute of R.A.Cross, Feb.16, 1881.
capital cases, they were three in number. The first, at the time of pleading to the indictment, has already been considered. It was possible for the prisoner to make a statement during the presentation of his defence by counsel. Since it was not sworn testimony, he could do so without the hazard, or benefit, of examination-in-chief by his own counsel or cross-examination by the prosecution. Such a statement would however be reviewed both by the prosecuting counsel in his concluding speech and by the judge in his summing up. It was a dangerous strategy and one that was rarely adopted since, at best, little weight was given to such testimony. Florence Maybrick was one of the few who chose to speak on their own behalf and claimed that she had "added the white powder" to her husbands invalid food at his own request.\textsuperscript{124} Stephen dealt savagely with this suggestion that a dying man was prepared to give such vague instructions for the use of a deadly poison and the effect of this lame statement and its judicial rebuttal was very damaging to the prisoner's case.

A final opportunity to speak occurred when the jury had returned their verdict and before sentence was pronounced. At this point the prisoner was asked by the Clerk of the Court if there was any reason why sentence of death should not be pronounced. In earlier years, and

\textsuperscript{124} Case of Florence Maybrick, cited at note 99 above.
for less serious felonies than murder, it had been the traditional point at which Benefit of Clergy was claimed by the prisoner, but this escape for the literate was abolished in an Act of 1827\textsuperscript{125}. It remained possible for a pregnant woman to obtain a stay of execution until her child had been delivered and in several cases during this period pregnant women were convicted and their sentences invariably commuted to terms of imprisonment.\textsuperscript{126} Their condition had however been established before their trial. When Christiana Edmunds was convicted in 1874, of poisoning an unrelated child, she failed to understand the question put to her by the Clerk. After its significance had been explained by a wardress, she immediately claimed to be pregnant. According to custom a jury of matrons was at once impanelled from among the spectators in the court and they, together with a convenient medical man, were removed with the prisoner to a private room where an inquest on her 'belly' was conducted. She was not found to be with child and was duly sentenced to death but was later certified as insane.

For a few of those convicted it appeared as a last chance to protest their innocence. Fanny Oliver's appeal to God as a witness of

\textsuperscript{125} 7 & 8 Geo. III, C 28.
\textsuperscript{126} H.O.45 Series, Case #9472, Christiana Edmunds, 1872, \textit{The Times} (London), Jan, 17, 1872.
her innocence did not move the Court but it prompted a later petitioner for her life to write of,

A poor helpless Christian, now under sentence of death, from what I understand to be an unjust charge of having poisoned her husband. Even from her own statement it would be improbable for a guilty person to be in possession of such Christian faith and religious knowledge . . . as this person.\textsuperscript{127}

Henry Wainwright not only chose to aver his innocence, but began an urbane speech of thanks to his counsel and his friends only to be sternly rebuked by Lord Ch. Justice Cockburn, who declared,

I can only deplore that standing as you do upon the brink of eternity, you should call God to witness the rash assertion which has just issued from your lips.\textsuperscript{128}

When two young coalminers, William Siddle and Joseph Lawson, were tried before Sir Henry Hawkins at Durham Assizes in 1884 a more noisy scene occurred. Having been convicted of the murder of Police Sergeant Smith in an affray at Butterknowle Colliery near Durham Siddle began the following urgent exchange:

\textsuperscript{127} Case of Fanny Oliver, cited at note 113 above.

\textsuperscript{128} H.O.144 Series, Case # 48007, Henry Wainwright, 1875, \textit{The Times} (London), Dec. @ 1875.
Siddle: Yes, I've something to say. Am I allowed to speak? you'll let a poor fellow speak wont you? I want to know on what ground I am found guilty?

His Lordship: No. I can not allow this. The jury have disposed of that.

Siddle: I have something to tell you. There has been nothing but lies told here today. I am an innocent man if I am to swing directly. I never saw Lowson that night. I have been fetched up for this man because of that shirt button . . . You cannot say I was there. I am an innocent man I say. I am not pleading not to be hanged: I do not plead for mercy.

(At this point his fellow prisoner Lowson broke in)

Lowson: I am an innocent man . . .

Siddle: Let me finish and then you can have your say. I am an innocent man, I was never there . . .

Clerk: Silence, while sentence of death is being passed on the prisoners!

Hawkins now assumed the Black Cap and began to pass sentence over the continuing protests of both prisoners and as his last words -"and may the Lord have mercy on your souls"- were uttered Siddle broke in again, The Lord will never have mercy on me, I have been found guilty on
lies." He then turned to the crowded gallery and shouted, "Lads, I am innocent, you see an innocent man going down the stairs."129

The sequel to this scene will be discussed in chapter 5 and it is enough to note that reports of the outburst caught the eye of the Secretary of State, Sir William Harcourt and justice was deferred in this case to the bureaucratic tribunal of the Home Office.

129 H.O.144 Series, Case #A35443, Wm.. Siddle & Jos. Lowson, 1884, Newcastle Chronicle, May 3, 1884.
Chapter Four

The Triumph of Rule & Precedent in the Victorian Home Office.

William Siddle and Joseph Lowson were sentenced to death on Thursday, May 2nd 1884. On Saturday morning, May 4th, the Home Office was open for business as usual when a letter arrived from the Governor of Durham Prison, advising the Secretary of State that these sentences had been passed and that their executions were set for Monday May 20th.¹ On the same day a second letter came, from Mr Justice Hawkins, confirming that, in his opinion, "the verdict was a most proper one."²

This correspondence had arrived in a busy office, whose routines were already well established and where the flow of paper was a crucial part of its system. Both these letters were recorded in the Registry, briefly described by a second division registry clerk and, in due course, passed to the Permanent Under Secretary of State, Adolphus Liddell, who minuted simply on the judge's letter, "Ack: & ask for notes." The Registry had been established by Henry Austen Bruce³ in 1870 as a separate function of the Home Office under the management of Alexander Maconochie, son of the

¹H.O.144 Series, Case #A 35443, Wm. Siddle & Jos. Lowson. Letter dated 2.5.84. This date was arranged for the first monday after the third sunday from the date of sentence.
²Ibid, letter dated 2.5.84.
³Home Secretary from December 1868 to August 1873.
innovating Governor of Birmingham Gaol. In 1876 this post of
Superintendent of the Registry passed to Gabriel Moran who, with
six lower division clerks and six copyists kept all the business
records of the Home Office. Divided into two parts, an "In" and an
"Out" section, these clerks opened, registered and docketed all
correspondence and passed them to the most appropriate of the
Office's executive departments. Each paper was given a serial
number and, after Moran's appointment, a prefix indicating whether
it was to be preserved for five, ten or thirty years. The papers in
capital cases were, in addition, almost always marked "pressing", to
reflect the very limited time available for their consideration.

Paperwork is the medium of bureaucracy and the purpose of
this chapter will be to describe how the permanent staff of the
Home Office used it to achieve a measure of control over both its
politically appointed superiors and the separate executive agencies
of law enforcement. The process of this gradual victory was two
fold. In the first place the members of the Criminal Department used
their knowledge of a growing body of precedent to formulate rules
and practises for the present. In this they were encouraged by their

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4 Maconochie Sr had earlier been Governor of Norfolk Island Penal Colony, became
Governor of Birmingham Gaol in 1851 and there introduced the "Mark" system of
prisoner incentives. Under this system the prisoners 'earned' such remission as Prison
Regulations allowed by a combination of physical labour & good conduct.
5 In 1888 C.S.Murdoch reported to the Royal Commission on Civil Establishments that
the Criminal Department was receiving about 26,000 Documents p.a., of which about
5,000 were prisoner's petitions. (Minute #12079).
6 It is likely that this practise was one of the registry's rules, broken only by clerical
carelessness.
legally minded superiors. In due course this knowledge, plus the growing pressure of business on a small establishment, was a basis for extending their contribution from the provision of fact and the execution of instructions to the expression of opinion. Such documented opinions became, slowly but surely, a powerful constraint on those they served. This weapon of rule and precedent was, moreover, to be used to discipline and control their independently minded agencies - the Metropolitan Police and the Prison Commission. This subtle shift in power was not without its benefits of ease and security to those senior executives, Home Secretaries and Permanent Under-Secretaries, who had surrendered it, but it was also fraught with dangers both to the Institution itself and to the public.

During a period in which the Home Office acquired formidable additional powers the staff of its Criminal Department remained limited in outlook and in numbers. It developed a profound and conservative legal ethos, despite the fact that most of its personnel were not lawyers, but it failed to incorporate any representatives of those executive departments which it controlled. No room was available in this bureaucracy for those often practical and energetic men who ran the police, the prisons and the Public Prosecutor's departments. The very pressure of work determined that power be devolved but only to those whose experience and training had been limited to the Office itself. Both the process of this development
and its consequences are clearly to be seen in the Department's work on the Prerogative of Mercy.

The Criminal Department to which these papers were sent was, by 1884, one of three which shared the executive work of the Home Office. The Domestic department was responsible for the supervision of an increasingly diverse portfolio of inspectorates, through whose activities Parliament had sought to regulate and safeguard the changing industrial and social life of the country. These watch-dogs oversaw the conduct of factories and mines, industrial schools, inebriate retreats and reformatories, the use of explosives in industry and of corpses in the teaching of anatomy, the prevention of cruelty to animals and, rather later, to children. To the General Department were allotted many of the formal tasks inherited from the Secretary of State's original role as one of the personal secretaries to the Sovereign, which included the preparation of Warrants of Appointment, Licences and Commissions together with the accounting, statistical and administrative work of the Office as a whole.

This tripartite structure had been established by Richard Assheton Cross7 in 1876 and it survived until 1896 when, on the retirement of Sir Godfrey Lushington as Permanent Under Secretary,

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7 R.A.Cross, Home Secretary from Feb:1874 to April 1880 and from June 1885 to Feb: 1886.
Sir Kenelm Digby, his successor and Sir Mathew White Ridley\(^8\) redistributed the work of the Domestic Department between an Industrial & Parliamentary Department under C.E. Troup and a new Domestic Department under C.J. Knyvett, which added the work of the General Department to some of the minor supervisory functions of the old Domestic Department. Both the Industrial and the Criminal Departments henceforth had their own Statistical Sections. Despite the considerable expansion in the industrial role of the Home Office in the last quarter of the century it was the Criminal Department that had become, by this point, the most prestigious part of the Home Office and, in its broad responsibility for law and order, the one that best epitomized the principal function of the Secretary of State.\(^9\)

This legal preeminence had not always been the case. The Criminal function of the Home Office at the beginning of Victoria's reign had been both numerically small and ill-considered within the Office. There was, moreover, widespread public feeling in the two subsequent decades that the responsibility for law and order was

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\(^8\)Sir M.W. Ridley, Home Secretary from June 1895 to Nov: 1900.


such as to justify a specialized ministry of its own. It was, as much as anything, frustration with the failure of Government to grasp the issues of law reform, and in particular its failure to establish a Court of Criminal Appeal, which led in the 1850's to proposals in Parliament to establish a Ministry of Justice. This concept, which Jeremy Bentham had formulated more than thirty years earlier\textsuperscript{10}, was the subject of a leading article in The Times, in December 1850, where it was proposed to bring together all the legal functions of the Home Secretary, The Lord Chancellor and the Attorney General in one Ministry\textsuperscript{11}. For more than ten years this idea was to be put forward in various guises, including a Board of Justice on the model of the Board of Trade, with the Lord Chancellor as President. Its protagonists even included a Lord Chancellor, Richard Bethell, in 1863, but his intemperate advocacy failed to commend the notion to his fellow peers\textsuperscript{12}.

When The Times made its proposal in 1850 it examined these various legal functions of Government under ten heads and it left little doubt that it expected a Ministry of Justice to play a positive and dynamic role in developing and reforming the law. Three of these functions were then, and have remained since, the responsibility of

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\textsuperscript{11} The Times, Dec: 26, 1850.

the Lord Chancellor who, in conjunction with the Judges, framed the rules of practise in the various high courts, who managed the Government's legal business in the House of Lords, and who exercised senior legal patronage in conjunction with the Prime Minister. One key task, that of formulating and promoting law reform, was then without any responsible minister and indeed it was to continue so until after the Second World War. The remaining six categories of work were either wholly, or in part, the responsibility of the Secretary of State at the Home Office. They included the traditional role of preparing the legal instruments to which one or other of the royal seals were affixed such as charters, letters patent and titles of honor. Of equal antiquity was the exercise of the Prerogative of Mercy, then and for more than fifty years, the only mechanism of criminal appeal. The Home Office's early involvement in the administration of police powers had led to its duty of making annual reports on the state of criminal and, less logically, civil justice. It was also responsible for regulating Assizes, gaol deliveries and occasionally special commissions when the volume of criminal work became locally excessive. The Secretary of State shared with the Attorney General responsibility for directing prosecutions and, much more vaguely, with the Lord Chancellor an oversight of what The Times called "the whole machinery of Justice". During the next fifty years no effective change was made in this portfolio other than the establishment in 1879 of a separate Office of Public Prosecutions responsible to the Attorney General
but appointed by the Secretary of State. Indeed the law and order functions of the Home Office were substantially extended when its responsibility for the supervision of local police forces was instituted in 1856\textsuperscript{13} and for a national prison system in 1877.\textsuperscript{14} These were great additions of power to the Office of Home Secretary but they were not accompanied by any formal recognition that they should be coordinated or that the Secretary of State should have any measure of "oversight of the whole machinery of Justice." Nor was any mechanism created for the effective exercise of this power.

These tasks with the exception of the first mentioned above were in 1860 the special responsibility of George Everett, the Clerk for Criminal Business, who was assisted by F.S.Leslie, the keeper of the Criminal Register, and by two junior clerks. By 1876, when the full impact of the Northcote-Trevelyan and Playfair civil service reforms were at last felt in the Home Office,\textsuperscript{15} what was now called the Criminal Department consisted of one Principal Clerk, one Senior Clerk and two Junior Clerks all of whom were from the "Upper

\textsuperscript{13} County & Borough Police Act(1856), 19\&20 Vict.. C 29.
\textsuperscript{14} Prisons Act 1877, 40\&41 Vict.. C.21.
\textsuperscript{15} The Northcote-Trevelyan Report of 1854, (Report on the Organization of the Permanent Civil Service), had recommended a division of work into a higher, or intellectual category, and a lower, or 'mechanical' class. They had also proposed entry by open examination. Playfair's Civil Service Enquiry Commission of 1875 showed how limited had been the impact of these proposals and sought to establish clear "Upper" and "Lower" divisions throughout the Civil Service, with comparable pay scales in all Ministries and Departments.
Division" and two "Lower Division" clerks. By 1899 the Home Office had won grudging Treasury approval for the expansion of this modest establishment by two additional "Lower Division" clerks, making a total of ten compared with the four who had handled the business in 1860. There had it is true been a significant improvement in the quality of the "Upper Division" entry after the acceptance of the Playfair proposals and the clerks in this category at the end of the century were, at least in educational terms, men of the highest attainments.

Astonishment at the paucity of numbers in this important sub-department, and indeed in the Home Office as a whole which had an establishment of only thirty-six in 1876, must be tempered by the recognition that it remained the personal office of a Minister. Its principal executive functions were carried out by separate sub-units such as the Metropolitan Police and the Prison Commission. It was, in modern parlance, an headquarters unit whose function was to direct and supervise rather than to deal directly with those public matters for which its Minister had ultimate responsibility.

The expansion of the Home Office responsibility for law and order is only partially reflected in the modest expansion in the numbers of its Criminal Department and, after 1876, in the quality

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of its still limited staff. It has also to be considered in the light of the stable management and apparently constant legal culture of its key staff throughout this period. The management environment which the Home Office sustained in the second half of the 19th century was highly favorable to such a development. Despite a succession of political chiefs - there were twelve between 1861 and 1900\textsuperscript{17} - only four Permanent Under Secretaries held office,\textsuperscript{18} and two of these, Adolphus Liddell and Godfrey Lushington, did so for twenty-eight years between them. The next post in the hierarchy, that of Legal Adviser, later Assistant Under Secretary (Legal) was held by only three men, of whom one, Lushington, held the post for sixteen years. It was not until the end of the century (1896) that positions at this level were opened to existing members of staff. On the rare occasions when vacancies occurred in earlier years Ministers looked outside for recruits. This was not the case at lower levels and the position of Principal Clerk in the Criminal Department, until 1876 the Clerk for Criminal Business, was filled from within. It was, however, equally stable. From 1848 to 1876 it was in the hands of George Everest, for the next twelve years in those of Alexander Maconochie and his successor, C.S.Murdoch, held the post until 1896. In that year Murdoch was appointed Assistant Under Secretary and was succeeded by H. B Simpson, an open entry clerk who had joined from Oxford in 1884.

\textsuperscript{17} See Appendix A for a list of these office-holders.

\textsuperscript{18} Ibid.
The legal ethos of the Home Office was assured by the fact that the political appointees to the position of Secretary of State and the permanent civil servants in the senior positions were almost invariably barristers. Of the Home Secretaries only two, H.C.E. Childers, who held office for three months in 1885, and Sir Mathew White Ridley, 1895-1900, were not lawyers. Each of the Permanent Under-Secretaries was a barrister and both Adolphus Liddell and Kenelm Digby were Queen’s Counsel, the former having also been Recorder of Newark before his appointment in 1867 and the latter a County Court Judge. The post of Legal Adviser, created in 1869, or, as it became, that of Assistant Under-Secretary (Legal) was always held by a barrister and both of Lushington’s successors, Edward Leigh Pemberton and Henry Cunynghame, had been in practise before their appointments in 1885 and 1894 respectively. The Principal Clerks of the Criminal Department were not trained as lawyers and despite the wide experience they had gained in this role were for long considered unfit for further promotion. C.S. Murdoch, on the other hand, who had joined the Home Office in 1856 and who had succeeded Maconochie in 1884, was the first Principal Clerk, and the first non-barrister, from any department to reach the level of

19 Ridley was, however, Chairman of his local Bench in Northumberland and was strongly connected with the law through his mother, the daughter of a Chancellor, Lord Wensleydale (Baron Parke).
20 At Bruce’s request, because, apparently, he either found Liddell unable to cope with the volume of work or that his assistance was inadequate. See Pellew, op. cit. p.19
Assistant Under-Secretary. Not until fourteen years later, in 1908, did one of the Home Office's own 'trainees,' C.E. Troup, become Permanent-Under Secretary. Troup, had been the first open-entry and "upper level" clerk to join the Home Office from Oxford in 1880. His appointment to the top position in the Home Office confirmed the then growing acceptance of the idea that a civil servant, of high academic attainments, could be trained for the highest levels of responsibility in the increasingly specialized work of the Home Office itself. By this time the most significant of these specializations had become the administration of law and order in the broadest sense of the word, since it by then embraced not merely the execution of the law but also the preparation of an ever widening network of social legislation through which the generalized purposes of Parliament might be accomplished.

While such a structure with its stability and heavy predominance of legal training and expertise encouraged a growing interest in the mechanics of law and order it was not one that encouraged either change or even the expansion of its role in the criminal justice system. The inherent conservatism that is evident

21 See Pellew's account of his promotion, arguably the result of pressure brought to bear on Lushington by his ambitious subordinates. Op.Cit. p.60.
22 Troup was one of two 'open entry' candidates who, having studied law in one of the Inns of Court on a part-time basis, were 'Called to the Bar', while still working full-time at the Home Office. See evidence of G.Lushington to Royal Commission on Civil Establishments, 1888, Min.#11899.
in the mid-Victorian Home Office was reinforced by the traditional concern of the English landed classes for the preservation of local autonomy. It was an attitude reflecting the social origins both of Secretaries of State and their Permanent under Secretaries. It was to change slowly as pressure of work forced an increasing level of delegation to senior, but subordinate, staff who were less obviously of gentry origin and more wholly committed to the values of their bureaucratic profession. Central to the values of this bureaucracy was a growing body of rules which encapsulated its experience and expertise. The exercise of the Prerogative of Mercy over this period well illustrates how rule and precedent came to constrain the personal idiosyncrasies of its practitioners. Liberal, Conservative or even Radical\(^{23}\), aristocrat, squire, business man or professional lawyer\(^{24}\), Scotsman or Englishman\(^{25}\), Catholic or Protestant\(^{26}\), all were increasingly made subject to a growing bureaucratic practise during this period. As a result the function of the Prerogative of Mercy, an ostensible appeal to the conscience of the Sovereign, underwent a process analogous to that other branch of Equity, the law of the Court of Chancery in the 18th and early 19th centuries. This had been a process in which equity had emerged in what


\(^{24}\) Harcourt, Ridley, Cross and Asquith for example.

\(^{25}\) Troup, Murdoch, Chalmers & Cunnynghame, for example were all Scotsmen in an English Department of the civil Service.

\(^{26}\) H. C. Mathews, Sec: of State (1886-1892)
S.F.C. Milsom has described as "...its modern aspect as an intellectually coherent system of rules." Legal ideology gave to these diverse administrators an increasingly homogeneous character. Indeed it was a constraint that provoked Lushington, when examining the intractable Penge Case, in 1877, to declare in a minute:

There seem to be two main questions,

1. Whether commutation of Alice Rhodes' sentence into a limited term of penal servitude can be logically defended, and if not, [2] whether logic is necessary to be observed in the exercise of the clemency of the Crown.  

The organizational changes and expansion which occurred in the period from 1861 to 1900 were thus not only the result of an extension of Home Office responsibilities, directed at them by Parliament, as Jill Pellew has stressed, but also of a change in the character of the institution itself. It changed from a passive and responsive role to a relatively active managerial and bureaucratically impersonal one, the first step in which process was

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29 Pellew, op.cit, page 64 et al.
forced upon the Secretary of State by the Criminal Law
Consolidation Acts of 1860/61.\textsuperscript{30} This Act abolished the discretion of Judges in respect of Recording, rather than Pronouncing, sentence of death.\textsuperscript{31} In cases of murder a sentence of death was, henceforth, mandatory\textsuperscript{32} and the whole onus of mitigation fell on the Secretary of State personally. However at first such decisions only arose where the Judge personally recommended such an intervention or where an appeal was submitted to the Home Office. Even in the early 1860's, however, such appeals brought almost all capital cases under the scrutiny of the Home Office.\textsuperscript{33}

This was a change which contemporary Home Secretaries regretted since it seemed to emphasize the extra judicial power of their office and invade the proper functions of Judge and Jury. In a debate on a motion to establish a Court Of Criminal appeal in February 1860, the then Home Secretary, Sir George Cornewall Lewis, said of his Prerogative responsibilities:

We have heard of its unconstitutional character, of the dark and secret procedure by which it is brought into

\textsuperscript{30} The Offences Against the Person Act, (24&25 Vict.. Cap 100)
\textsuperscript{31} This discretion allowed Judges to Record a sentence of Death, but to pronounce a lesser and more appropriate one. It was a means of circumventing capital sentences in cases of infanticide and felonies less heinous than murder. It did not preempt the right of the Crown, through the Sec: of State to consider Appeals but emphasized the Judge's critical role in commenting on them.
\textsuperscript{32} Also in cases of Piracy and Arson in Royal Dockyards.
\textsuperscript{33} Home Office Printed Memoranda Vol.15, p.301. In these years every capital sentence was appealed and in the following year 26 out of 28.
effect, of the Secretary of State not being able to examine witnesses and of his setting aside a verdict without giving a judicial investigation [such as that] upon which the decision of the jury was founded. No doubt all these objections . . . have a certain degree of truth . . . but they are founded upon a partial view of the subject . . . the supposition that the Crown has a general power of revising the verdicts of juries. Now the Secretary of State, or the Crown under his advice, has no power of aggravating the consequences of a conviction. The Prerogative only extends to the mitigation or revision of a punishment. The Secretary of State never puts on the Black Cap. He is not armed with the Sword of Justice.34

His liberal successor, Sir George Grey and the Tory Home Secretary, Spencer Walpole, both gave evidence to the Capital Punishment Commission in 1864 and both urged the restitution of a judicial discretion in capital sentencing. Its absence, Grey argued, "increases the apparent interference of the Home Secretary in the judicial process."35 On the other hand both recognized that an appeal to the Home Office made possible the consideration of mitigating circumstances which might be legally irrelevant and inadmissible on the specific trial of an indictment. In Walpole's words:

34 Hansard, Col.410, February 1st 1860.
35 C.P.C., Report (1866) Minute # 1483.
The question is whether there are not certain circumstances which have not been brought before the jury which palliate the matter considerably - that I believe is the real state of the case.

It was, surely, the Chairman continued, "matter which is very proper before the Tribunal of Mercy, but which is very unfit to be brought before a court of justice." To this Walpole replied "Yes, if the public could only bear in mind that the Home Office is not a Court of Appeal but a Court of Mercy."\textsuperscript{36} Only with the greatest reluctance was he led to admit that the Home Office did, occasionally operate as a Court of Appeal, as for example in Smethurst's Case.\textsuperscript{37} Grey confirmed this reluctance to interfere with the work of judge and jury by pointing out that the Home Office only reviewed such cases as were the subject of an appeal which stated facts and circumstances which" on the face of them had a bearing on the case."\textsuperscript{38} This was a category from which he specifically excluded generalized appeals or memorials which protested or sought to change the law as it stood, in particular those from the Anti-Capital Punishment Society.\textsuperscript{39}

\textsuperscript{36} Ibid, Minutes 500/502.
\textsuperscript{37} In Smethurst's Case (July 1859) the prisoner, Thos.. Smethurst, was convicted of poisoning his mistress with arsenic, in order to benefit under her will. A later reexamination of the medical evidence found the evidence for arsenic wholly inadequate & Smethurst was reprieved and then pardoned by Sir Geo. Lewis, then Secretary of State.
\textsuperscript{38} Ibid, Minute # 1505.
\textsuperscript{39} Ibid, Minute # 1503.
This perception of the role of the Home Office had already begun to change by the end of that decade. When Henry Austin Bruce, Home Secretary from December 1868 to August 1873, later recalled the heavy demands made on him by this Prerogative responsibility, he attributed them not to the simple demands of mercy under a strict law but to the inadequacy of the English criminal justice process itself.

A large part of these cases arose from the imperfect inquiry as to the antecedents of the prisoner, with respect to whom, after his trial and conviction, facts often transpired which ought to have been known to the Judge and Jury at the time of the trial.\textsuperscript{40}

He went on to compare the Scottish and English systems of preliminary enquiry and to note that not only was there a higher proportion of convictions to prosecutions in Scotland but fewer appeals and this he attributed to the more thorough work of the Procurator Fiscal at the initial stage of a prosecution.

It was not until 1879 that the establishment of the Office of Public Prosecutor ensured that central government was advised of every capital prosecution and, in the wake of the Prisons Act of 1877, of every pending execution although, as has been noted above a very high proportion of such cases were subject to appeal on behalf of the convicted man. At this point, even the few unprotested

\textsuperscript{40} Hansard, Col.1337, May 27 1879.
convictions were brought to Home Office notice although this did not always involve any subsequent investigation. In every case, however, a positive decision was made either to review or not to investigate in cases where there was neither judicial concern nor public appeal and in the latter cases a file was compiled noting minimally the arrangements for the execution.41

The process of review itself also underwent significant change both in respect of the individuals participating and in terms of an increasingly systematic method of operation. In due course these changes were to be reflected even in the physical character of the documents which made up the Prerogative of Mercy files. From 1876 Moran had, as has been noted,42 begun a formal classification of the 'inward' papers. In 1887 a printed minute form was introduced which did away with the need to find an unused corner of the original "inward" document and which was large enough to accommodate the observations of those additional members of the hierarchy now encouraged to participate. This input from the Principal clerk and his immediate subordinates was primarily a statement of relevant precedent, an attempt to categorize the crime under review and relate it to previous decisions. In due course, however, it extended beyond such an offering of information to become one of opinion.

41 Prior to this date the Home Office had retrospectively received details of capital crimes from local police authorities and had published a summary of such cases in its Annual Judicial Statistics. This practise continued until the revision of the Judicial Statistics in 1893.
42 See p. 161 above.
This is a process which the prerogative cases illustrate very clearly and, in doing so, document the evolution of a bureaucratic method very different from the strictly ad hoc review which successive Home secretaries thought they were conducting. "Each case must stand on its own merits", Sir George Grey had declared in 1864,\(^{43}\) while rebutting the suggestion that any general principles could be adduced from the practise of the Home Office. Herbert Gladstone, Home Secretary between 1905 and 1910, described these decisions as "depending on a full review of a complex combination of circumstances and often on the the careful balancing of conflicting considerations."\(^{44}\) However, after a lifetime of involvement in the process, Sir Edward Troup declared that with experience it was usually possible to judge the outcome very quickly,\(^{45}\) and it is this evolving bureaucratic calculus to which this account now turns.

Spencer Walpole described the practise of the Home Office in the review of capital cases in his day as follows:

> The practise . . . may be stated very shortly . . . When the matter was brought before the Home Office, to examine the

\(^{43}\) C.P.C. Minute #1500
memorial which was sent with reference to the case; to consult the judge who had tried the case; to have a report from the judge of the evidence; to lay before the judge any new facts which had been brought under the notice of the Secretary of State and to request from the judge as to his opinion on the new evidence or upon the matter. Upon all of these materials being brought before the Secretary of State, he was then in a position, not in the least degree to rehear the case, but simply to advise the Crown whether there were any circumstances which would justify the exercise of mercy either in an absolute or a qualified sense; that is to say either pardon or a commutation of punishment.46

As to the method of decision Walpole was less explicit but his dependence on both the trial Judge and his senior permanent adviser was clear:

He (The Secretary of State) always has the Judge's report . . . he always has every information furnished to him by others as well as the evidence produced at the trial . . . He always has a Permanent Under-Secretary of State by his side who is perfectly acquainted with the law of the land. I can answer

46 C.P.C. Minute #483 This extract and the one which follows were clearly regarded as authoritative, to the extent of being cited in the only public enquiry which occurred during the period. (The Departmental Committee into the case of Adolph Beck in 1904)
that in the cases I had before me, Mr Waddington invariably went through them separately from myself. Then I invariably went through them separately from him. I never decided one of these cases without writing down on a slip of paper all the reasons which induced me to arrive at my conclusions. Having done so I conferred with Mr Waddington. . .

The decisions to be made went beyond those of merely allowing the law to take its course, of commuting sentence or even of issuing a pardon. In difficult cases a temporary respite might be granted to allow more time for the consideration or recruitment of new evidence, and, where a commutation was decided upon, an appropriate term of imprisonment or Penal Servitude had to be awarded. Later, appeals for release from the commuted convict came up before the Home Secretary of the day and the circumstances of the original decision had to be reviewed. The following pages of this chapter will consider the changes which occurred in the methods by which such decisions were made. Subsequent chapters will examine the presuppositions which underlay the decisions themselves.

The extent to which Home Secretaries in the 1860's relied on the opinions of the trial judge is indicated in the extracts above.

47 C.P.C, Minute# 489.
48 As for example in Wainwrights Case (1875), in the Penge Case (1877), in Lipski's Case (1887), in Maybrick's Case (1889) and in that of Siddle & Lowson referred to above.
Despite the absence of any initiative to restore judicial powers of mitigation, this official deference to judicial experience and first hand knowledge of the cases continued throughout the period. Thus in 1872 Mr Justice Barnard Byles felt able to write to the Home Office in Watson's case,

In attending to the recommendation of the Judge who heard the case you have only followed the invariable practise, so far as my experience and recollection extend.49

This was not an entirely correct opinion even when it was written but it does reflect an important element of truth. Home Secretaries were deeply reluctant to ignore judicial opinion and in cases where their enquiries produced new evidence, or enhanced prior doubts, were invariably at pains to to obtain the judges agreement to their eventual decision. In rare cases, as in that of A.F.Brown in 1871, other pressures led them to override the expressed views of the judge.50 In 1875, in Mommsen's case, Cross under pressure from both the German Government and the Foreign Office agreed to release the prisoner after less than five years of a life sentence, having persuaded a complacent Judge, Mr.J.Denman, that the earlier conviction might be construed as one of manslaughter.51 Sir William Vernon Harcourt was, in this context, the least deferential of

49 H.O.144 Series, Case#7940, Reverend John Selby Watson, letter dated Feb: 6, 1872.
50 H.O.144 Series, Case#9236, A.F.Brown, 1871. In this case public opinion led by a local M.P. and the Lord Lieutenant of Warwickshire, persuaded Bruce to reprieve the prisoner against the advice of the Judge.
51 H.O.144 Series, Case#42844, Fred. Mommsen, 1875. See above, Chapter 3
Secretaries of State. He ignored Sir Henry Hawkins' strongly expressed views in both Key's case\(^{52}\) and in that of William Siddle.\(^{53}\) In 1881, in Payne's case he accepted Lushington's recommendation to carry out a medical examination despite the opinion of the judge, Mr J.Cave, that there was no evidence of insanity. These cases are, however, only a handful, and can be offset by some examples of the tenacious defence by Secretaries of State of some less respectable judicial views. Such was true of Cross's support of Hawkins' in the Penge case in 1877, in the face of strong reservations about the verdict by Lord Justice Lush and two of his colleagues who had been called in to help resolve this case, but whose advice was ignored.\(^{54}\) It was equally notable in the case of Florence Maybrick, where H.C.Mathews, encouraged by Lushington, defended the much criticized conduct of the case by Mr J.Stephen.\(^{55}\)

In most cases, however, judges became increasingly careful not to intrude on the prerogative powers of the Secretary of State as the period developed. The reaction of Alfred Wills, the Commissioner of Assize\(^{56}\), in the case of James Williams in 1881, seems to become increasingly typical. He wrote to Harcourt on this case:

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\(^{52}\) See note .... below.
\(^{53}\) See note (1) above.
\(^{54}\) H.O.144 Series, Case#64091C, Louis Staunton and Others, 1877.
\(^{55}\) H.O.144 Series, Case# 50678, Florence Maybrick, 1889.
\(^{56}\) When High Court Judges were not available to go on Assize Circuits, Senior members of the Bar, Queen's Counsel, or until 1873, Serjeants could be appointed Commissioners of Assize.
I desire to say that if the Home Secretary should think it a case in which to exercise the Prerogative of Mercy I certainly have no wish to stand in the way of his doing so. I wish also to say that if he desires of me any further comments or information (or opinion), I have not the slightest wish to shrink from the responsibility of giving either . . . I only desire to confine what I have to say within my legitimate province and not to trench on his.57

Few judges continued to feel so deeply involved in the aftermath of their cases as Baron Bramwell in that of Charles Crew and others in 1864.58 After this trial he carried out his own private inquiry among the convicted prisoners and pronounced the verdict of his own jury to be false. "It is not," he wrote to Waddington,"a case where I doubt their guilt, I have no doubt they are not guilty."59 This was an approach on which Waddington noted,

I do not know what we shall come to next, this is an Appellate Tribunal of an entirely novel description which deserves a place in the Chancellor's proposed Bill.60

57 H.O.144 Series, Case#A1691, Jas. Williams, 1881, Letter Feb.4. This letter did, never the less, express a strong opinion on the undoubted guilt of the prisoner.
58 H.O.144 Series, Case#95504, Chas.. Crew and Others, 1864
60 Ibid, Minute Dec.15, 1862.
It did, however, persuade Grey to begin a local police investigation which eventually enabled him to conclude that Bramwell had been correct. The men were pardoned in May 1864 although not before Bramwell had prompted him more than once in the meantime.\textsuperscript{61}. Equally few continued to evince the personal sense of responsibility and sympathy with a prisoner that Chief Justice Erle showed in Hannah Colthorpe’s case in 1866, writing persistently from his circuit lodgings to ensure her reprieve. In his third such letter he declared that "I am very desirous that nothing should be left undone that I can properly do. Under these circumstances I am sure you will excuse any want of form . . . ." Such responses seem to have been a relic of an earlier age when the heavy responsibilities both of ensuring a proper defence of the prisoner and of mitigation lay primarily in the judge’s hands. In succeeding years they seem to have been increasingly content for them to pass into those of the professional bureaucrats at the Home Office.

It seems clear from the records of contemporary cases that Walpole’s account of Home Office practise was substantially correct. Documents from the case-files of the 1860’s carry a brief

\textsuperscript{61} Ibid, April 1864. On this last occasion he wrote," Not having heard from you I am fearful that the matter may have escaped your memory."
synopsis from the Department's Chief Clerk, George Everest and, after 1870, from Alexander Maconochie's new Registry. They are minuted by the Permanent Under Secretary and the Secretary of State himself with only occasional responses by Everest to requests for information or instructions for action from his superiors. Lushington was later to say of this period:

Mr Waddington in his time would not allow any human being to put a minute on papers except himself. He thought minuting was the exclusive function of the Under-Secretary. After his time the power of minuting came to be given to the Senior Clerk [Everest] but even then only for the simplest papers.\textsuperscript{62}

Despite his unparalleled experience Everest was not well equipped to provide the data on which Home Office precedent increasingly depended. In December 1871 Arthur Brown, a seventeen-year-old factory-hand, was convicted of murdering an apparently overbearing supervisor and the question arose as to the minimum age at which convicts were normally hanged. In response to a telegram from the country home of H.A.Bruce, the Home Secretary, Everest replied on January 2nd,

18 is the youngest age at which execution has taken place in the last fifteen years. Search for any longer period will involve a reference to each case & involve considerable

\textsuperscript{62} Evidence of Godfrey Lushington C.B., Royal Commission on Civil Establishments, 1888, Minute#10994.
time, there being no tabular or other general statement as to age. . . . Additional information will follow.

After what must have been an extended evening's work in the Criminal Department, and the study of three more years in the records, Everest was able to telegraph on the following day, "No prisoner under 18 executed during last 18 years." One day later a telegram duly came from Aberdare to Everest, "Send respite for Brown - Ack: receipt of this - Bruce."63

In 1867 the Hon. A.F.O.Liddell QC became Permanent Under Secretary in Waddington's place and he seems to have jealously protected his role of adviser to the Secretary of State in prerogative cases. Thus when Godfrey Lushington was brought in as Legal Adviser at Bruce's request he was obviously not invited to participate in these decisions. The earliest minute found in his hand is in the case of Sylvanus Sweet in 187464, when he was instructed to proceed against the Exeter Magistrates to ensure their financial support of Sweet in Broadmoor. In 1875 R.A.Cross, the new Conservative Home Secretary, promoted Lushington to the rank of Assistant Under Secretary (Legal) and it was Cross who was the first to seek his opinions in the complex Penge Case in 1877. In this case he provided a lengthy summary of both the court proceedings under Sir Henry Hawkins and the opinions of the three Law Lords who

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64 H.O.144 Series, Case #34120, Sylvanus Sweet, 1874. Sweet was found "Not guilty by reason of insanity" in the murder of his wife.
were asked by Cross to review the case.\textsuperscript{65} Thereafter he seems to have participated in virtually every case up to the time of his own promotion to Permanent Under Secretary in 1885.

The addition of the Assistant Under Secretary (Legal) to the review process of capital cases took place simultaneously with an expansion in the role of Principal Clerk in the Criminal Department. In 1875 George Everest retired and Alexander Maconochie was promoted from Superintendent of the Registry to this position. He was clearly a less deferential and passive man than his predecessor, and he took seriously his role as the custodian of the office's practise and precedent. From the start he took to supplementing the Registry's synoptic descriptions of incoming documents. Within a few years he was confidant enough to rebuke an active Home Secretary, Sir William Vernon Harcourt, for what he took to be a questionable decision in Key's case. Harcourt, sympathetic to the provocations of a long suffering husband, commuted Key's sentence and drew from Maconochie the comment,

As the case will hereafter be regarded as a precedent it would be very convenient if the Secretary of State would record in writing his reasons for commuting the capital sentence.\textsuperscript{66}

\textsuperscript{65} H.O.144 Series, Case#64091c, Louis Staunton & Others. This case is also significant in that it is the first case in which a Secretary of State asked other Judges to review a case before making his own decision. (See Cap 5 below.)
\textsuperscript{66} H.O.144 Series, Case#95078, John Key, 1880. Minute July 21 1880.
Harcourt was not to be put out and replied in kind,

In this case I determined to commute the capital sentence
because the jury had recommended the prisoner to mercy
on the ground of his gt provocation received, following
in this respect the cases of Mumford, 80550, Sharratt 83349,
Poplett, 38492. There was also the case of Hall at Birmingham,
dealt with in a similar way by Sir G, Grey in 1864.67

In the following year Harcourt, on Liddell's advice ordered an enquiry
by Drs Orange and Gover 68 into the sanity of William Payne, a middle
aged bolt-forger, who had stabbed his wife of 43 years to death.
When the Doctors reported the man insane Harcourt instructed his
staff to commute the sentence to one of penal servitude for life.
Maconochie corrected him at once:

It was decided in 1879 that convicts under sentence of death,
whose lives are spared on the grounds that they were insane
when the offence was committed should be respited merely
and sent to Broadmoor. See minute 46156/129. ?is this the
right course to follow in the present case ?

67 Ibid July 29 1880.
68 Dr Orange was Superintendent of Broadmoor Criminal Lunatic Asylum from 1870 to
his death at the hands of one of his own patients in 1884. Gover was appointed Medical
Director of the Prison Commission in 1877.
To which Liddell added, "That is the right course," and Harcourt, "Respite accordingly."\(^{69}\)

Even more significant, however, was Maconochie's preparation of tabular records of past cases. In 1882 he drew up a Table of Persons Executed and Respited, 1861-1881, in support of a proposed Bill under which Harcourt sought to amend the law of Murder.\(^{70}\). This contained an analysis of cases, grounds for pleas and reasons for interference. The proposed legislation was not proceeded with but the tables remained as an available record in all subsequent Prerogative of Mercy cases. The records were periodically updated, in 1886\(^{71}\) and in 1895,\(^{72}\) when cases as far back as 1846 were added, and again in 1899.\(^{73}\) In the latter review tables were added illustrating the evolving practise in respect of release dates for both male and female prisoners serving commuted capital sentences and in 1908 a special return was made of women sentenced to death from 1865 to July 1907.\(^{74}\) The format of these Criminal Memoranda and Returns was not in itself rigorously logical since they mix an account of practise, through tables of precedents, with statements of Home Office Rules. Under some 18 to 20 headings broad categories of murder, as diverse as infanticide, abortion and kicking to death

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\(^{69}\) H.O.144 Series, Case#4796, Wm. Payne, 1881. Minutes,17/18 May,1881.
\(^{70}\) H.O.Published Memoranda, Vol.VIII, at page 207ff.
\(^{71}\) Ibid, Vol.VIII at page 313 ff.
\(^{72}\) Ibid, Vol. XV, at p. 301ff.
\(^{73}\) Ibid, Vol.XVIII, at page 61ff
\(^{74}\) Ibid, Vol XXIII, at page 184 ff.
are mixed with lists of the rare cases of presumed innocence or
doubtful guilt and an analysis of common pleas in mitigation such as
provocation, insanity, youth, pregnancy, drunkenness or absence of
intention. Cases where special weight had been accorded to public
opinion are noted as are those few where lengthy lapses of time
occurred between the crime and conviction. Occasionally, as in the
1899 edition, an attempt was made to express a general Home Office
policy towards the principals of intervention. In this case it was
noted that,

Sentences passed by Courts have of late years shown an
undeniable tendency to leniency and in its action the Home
Office has marched with the times. . . The action of the Home
Office has in such cases been directed towards remedying
inequality . . . The four classes of crime where such general
equalization has been thought more possible than others . . . are
abortion, bestiality infanticide and carnal knowledge of girls
of tender years.75

Such a formal admission of an interventionist policy marks the
extent of the change which had overtaken the Criminal department
since mid-century. The notes which followed illustrate the kinds of
rule which had evolved to implement such a policy. In cases of

abortion leading to murder no execution had occurred since 1875\textsuperscript{76} and H.H. Asquith had later laid down the rule that "12 years should be the maximum for this offence." Similarly in cases of infanticide, 126 of which were recorded since 1856, a guideline for commuted capital sentences was given. The penalty of Penal servitude in this case was pro-rated to the age of the infant victim, so that the murderer of a newborn child would receive about 4 years\textsuperscript{77}, if soon after birth, 7 years and, if older, 10 years. The extent of these evolving rules will be the subject of later discussion but at this point it is enough to notice that through such means precedent had become accessible and its ever growing weight imposed evident constraints on those who exercised the Prerogative.

Maconochie's part in the extension of middle rank, bureaucratic influence was more than just that of an archivist. From 1875 onwards his minutes begin to appear as the first Criminal Department entries and to propose courses of action. These were modest proposals certainly, in his early years as Principal Clerk. His minutes appear for example as "?Ask for Judge's Notes," or "?Ask for Medical Report from Governor",\textsuperscript{78} but as time passed and confidence grew they begin to show an element of opinion, to preempt the reactions of his busy superiors and, while always cloaked in the

\textsuperscript{76} The case of Alfred Heap is cited - "A quack Doctor, twice convicted."
\textsuperscript{77} The note actually specifies the improbably exact term of 4 years and 8 months.
\textsuperscript{78} I.E. from the Governor of the Prison in which the prisoner was held.
form of a deferential question, to narrow the likely range of response.

Maconochie clearly felt sympathy for Constance Emilie Kent who, as a neglected sixteen year old, had cut the throat of her young step-brother, and he made several attempts to get a favorable response to her regular appeals for release from the life sentence she began to serve in 1865. In 1878 he wrote the following when she had already served more than twelve years:

Since Lord Aberdare's [H.A.Bruce] minute of 1869 (see 18299) 15 years has been the regular minimum in cases of convicts before 1864. There have been a few exceptions in which release has taken place after 13 or even 10 years (see 25892, 27068, 45023). With respect to convictions since July 1864 the 20 year rule is understood to apply subject of course to exceptions as the Secretary of State may think proper . . . The Directors [of Convict Prisons] do not appear to have been informed in 1869 of the intention of the Secretary of State & for years after Constance Kent was sent to Milbanke the cases of life convicts were submitted after 12 years & she may have no doubt been informed that her case would be submitted for consideration . . . 79.

79 H.O. 144 Series, Case #20/49113, Constance Emilie Kent, 1865.
This explanation of past bureaucratic confusion did not move Cross, the then Home Secretary, who simply minuted, "Too Soon", and two years later, in October 1880, Maconochie made a more explicit appeal under the guise of a routine summary on the prisoner's latest appeal:

It seems worthy of consideration whether this unhappy woman might not now be released. She was sixteen when her crime was committed, the daughter of an insane mother, and the cunning and ruthlessness shown in the commission of the murder and in the concealment of her guilt give reason to suspect that at the time she was under the influence, more or less, of the hereditary taint. Five years afterwards she voluntarily surrendered herself to justice and has undergone fifteen years Penal Servitude.  

The murder of an infant boy was not a crime which Harcourt viewed lightly and he rejected both Constance Kent's appeal and his Clerk's comments upon it. "I do not feel disposed to interfere in this case at present."  

When Maconochie retired in 1884 he was succeeded by a senior First Division Clerk, Charles Murdoch, who had joined the Home Office in 1856. Like his predecessor he came from a successful

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80 Ibid (October 25 1880)
81 Ibid (October 26 1880) It should be noted that Harcourt also under pressure at this time from the Prime Minister, W.E. Gladstone, who had reacted sympathetically to an appeal from the prominent Anglican clergyman to whom Kent had originally confessed.
professional family. As with Alexander Maconochie there is little of Everest's self-effacing deference to be seen in his work. His minutes were authoritative and confident from the start. He was, moreover, well served by one of the new open-entry clerks, C.E. Troup, who had joined the Criminal Department in 1880. From this point onwards the documents that now make up the files on Capital Cases bore at least three careful minutes before they reached the desk of the new Permanent Under Secretary, Godfrey Lushington. Docketed and summarized by Moran's Registry Clerks they went next to Troup who proposed a course of action. This was normally one within the strict pattern of procedure that had been followed since the days of Grey and Waddington, but usually supported with a gloss of opinion on the character of the case and citations of comparable cases in the past. To these Murdoch added his endorsement, rarely a correction, so that by the time the papers reached Lushington he was usually required to do no more than confirm what his staff had proposed.

This level of mature and professional staffwork had evolved at a time when it was to be severely tested by both internal and external pressures of an unprecedented kind. In August 1886 Henry Mathews, an experienced and successful Q.C., became Secretary of State. A wealthy Catholic, educated in France, and only recently

82 Pellew, op.cit. p.206.
83 Lushington succeeded the Hon. A.F.O. Liddell in 1885.
84 H.C. Mathews, later Lord Llandaff, was Sec. of State from 1886 to 1892. A close friend of Randolph Churchill, his appointment was part of the price exacted by Churchill
elected to the House, he evidently lacked any widespread support and sympathy from his fellow Tory members and even more significantly he was without that stolid imperviousness to popular clamor that is the hallmark of a successful Home Secretary. It was an unfortunate moment for such an appointment. During the 1880's an increasingly strident national press had begun to exploit those emerging social issues which had as yet found no effective political voice in the traditional, if crumbling, party structure. Unemployment, urban and rural poverty, European immigration and the social ills to which they gave birth, were to provoke popular expressions on a scale hardly matched since the 1840's. In such an environment, crimes that might have remained of local and passing interest became caught up in the skirts of a greater storm, invested with a social significance they hardly deserved, to ultimately emerge as tests of the Government's resolve and competence, of public confidence in the Police and in the forces of law and order in general.

Two of the most celebrated of these cases, those of Israel Lipski (1887) and Florence Maybrick (1889), will be examined in the later chapters. The former is of special interest because it illustrates not only the extent of the resources deployed by the Home Office in the

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85 These tensions led to riots in Trafalgar Square in 1885 & 1886, and to widespread industrial strikes including the bitter London Dock Strike of 1889.
86 The reputation of the Metropolitan Police, in particular, shaken by the evidence of corruption revealed in the Druscovitch scandal of 1877, was further damaged by the failure of Commissioner Henderson to control demonstrations in central London in 1885 and of its detective force to resolve the Ripper case in 1888.
review of capital cases but also the perils to which a Home Secretary exposed himself if, through over anxiety, he became personally involved in the direction of enquiries. The latter case will be described because it reflects both the ambivalence of both public and bureaucratic reactions to the changing role of women in late Victorian England and the constraints on the Home Office's powers of legal review.

The combination of a confident Principal Clerk, with an energetic subordinate, reporting to an experienced Permanent Under Secretary served in most cases to minimize the involvement of the Secretary of State and even in some cases of the Under Secretary himself. In his evidence to the Royal Commission on Civil Establishments, already cited above, Lushington went on to note this change:

Even in Sir Adolphus Liddell's time every minute was approved by the Under Secretary. Since I have been there my great object has been to try to relieve the Under Secretary of mechanical duties. . .I say to the Principal Clerk "the less of the mechanical work you can send me the better," so now a good deal of this work does not get higher than the Principal Clerk.

87 Royal Commission on Civil Establishments, 1888, minute #11,000.
When, as in the case of Jacob Riegelhuth in 1886, the Home Secretary, Hugh Childers\textsuperscript{88} was an inexperienced non-lawyer, the civil servants were able to resolve the question of his fate with only the most nominal reference to the Secretary of State\textsuperscript{89}. It was Murdoch who alerted Lushington to the dubious fidelity of the victim, Riegelhuth's wife, and who obtained from Assistant Commissioner James Monro of Scotland Yard a report on her antecedents. It was, as Murdoch wrote in his minute,

\ldots a wretched story of the deceased woman's bringing-up, surroundings and married life. Deceased and prisoner factory hands of a low type. Her parents separated & both living in adultery. ? to Judge.\textsuperscript{90}

The judge in the case, J.F.Stephen, replied directly to Lushington, describing the deed as one in which "there was no more moral guilt than in many cases of wounding," and offered to discuss the matter with the Secretary of State. Lushington declined this last offer and proposed to Childers that the the prisoner be reprieved, adding the recommendation that the commuted sentence be "treated as one of fourteen years" Childers then made his only contribution to the case with a minute concurring, "Yes, if that is the usual practise."\textsuperscript{91}

\textsuperscript{88} H.C.E.Childers was Sec: of State from Feb.6 to August 3,1886.
\textsuperscript{89} H.O.144 Series, Case# B185, Jacob Riegelhuth, March 1886.
\textsuperscript{90} Ibid, 17.3.86.
\textsuperscript{91} Ibid, 31.3.86.
The extent to which their familiarity with past 'practise' had emboldened the bureaucrats was well illustrated when, early in 1887, John Jessop, a laborer, was convicted of murder at Nottingham Assizes as the surviving partner in a suicide pact.\(^{92}\). Murdoch minuted on Mr J. Field's notes, a citation of the precedent of George Inkpen in 1861, and a recommendation not just that the sentence be commuted but that a sentence of only 12 months hard labour be imposed\(^{93}\). This was promptly endorsed by Lushington and reluctantly by Mathews, who considered the sentence too light.\(^{94}\) He was not alone in this view and this decision was, later in the year, to draw a rebuke from Queen Victoria, whose secretary wrote that she considered a sentence of 12 months for murder as "unheard of."\(^{95}\)

An unpleasant scandal was narrowly averted in March of the following year by prompt staff work and an already well developed sense of bureaucratic self-protection. In March 1888 the Governor of Armley Gaol, at Leeds, reported that a prisoner, William Sissons, serving 18 months for shooting with intent to do grievous bodily harm, had been judged insane by the Visiting Committee and two doctors. Troup noted that:

He seems from his report enclosed to be a very dangerous

\(^{92}\) H.O.144 Series, Case #A46353, Jan. 1887.
\(^{93}\) Ibid, Jan: 5 1887.
\(^{94}\) Ibid, Feb: 9 1887.
\(^{95}\) Ibid, May 5 1887.
lunatic. It is not, however, usual to send a person under sentence of imprisonment to Broadmoor and in this case sentence will expire in 7 months. ? shall he be sent to Wakefield [a local asylum] or Broadmoor.96 Murdoch responded, on the same day,

... perhaps it wd be best he be sent to Broadmoor. Otherwise it is properly a county case but there is the dangerous nature of his offense and insanity to be considered. ? Broadmoor.

Lushington also saw the papers on the same day and added the single word "confirmed." It was, however, even then too late because Sissons, confined with two other prisoners in a single cell, strangled one of them during the following night. When advised of this on March 12 Murdoch noted:

I am glad to say that as far as the Home Office is concerned the papers were dealt with and the warrant sent off on the same day (March 8th) it was received.

It was as well since two days later a storm of public protest broke out, typified by this letter to Mathews from a conservative supporter in Leeds:

Who was to blame for the poor fellow's life? The convict or the Gaol Authority - for God's sake look into this dreadful affair in the name of Justice and the poor fellow's relatives!

96 H.O.144 Series, Case #18422, Wm.. Sissons. March 8, 1888.
A well managed enquiry by Sir Edmund DuCane\textsuperscript{97} was able to exonerate the Prison authorities and to fasten the blame on the Prison Doctor and so justify Murdoch's confident minute on the letter above "that the case is under careful enquiry and consideration."

The Home Office bureaucracy were highly defensive of rules once established, sensibly recognizing that no coherent pattern of decisions could be maintained if, in every case, the decision must depend on a subjective examination by different people, of the original crime. This was a view which individual Home Secretaries sought to resist despite efforts by their staff to constrain them. They appear to have done so partly in response to their own perception of the relative wickedness of particular crimes and perhaps also out of anxiety about public reaction in cases of special notoriety. It was in the last resort they, and not their anonymous staff, who had to face public opinion in Parliament and the Press. In this respect Sir William Vernon Harcourt's reply to an appeal from John Bright, for the release of George Hall,\textsuperscript{98} is revealing:

The mitigation of the extreme sentence is supported and approved by public opinion because it is felt that the heavy substituted sentence will be actually carried out in the case of murder. . .It appears to me as dangerous to shock public opinion

\textsuperscript{97} Chairman of the Prison Commissioners from 1877 to 1895.
\textsuperscript{98} H.O.144 Series, case #52638/43a, George Hall, 1864.
by the too great laxity of sentences as by the too great severity of the laws. An error in the former direction might lead to a savage reaction calling for more cruel punishments. The resulting tension between the bureaucrats and their political superiors is well illustrated in the debate which developed over the release of capital convicts serving commuted life sentences.

It had since 1864 been the practice to consider life sentences, whether originally imposed by a judge, or awarded by the Home Secretary in commutation of the death sentence, as being ones of twenty years. When this rule was made it was intended, according to a minute of George Everest,\(^9\) that "there should be release after 20 years, but there was no absolute promise of release, and each case was still to be considered on its merits." In a subsequent minute Sir Adolphus Liddell, the Permanent Under Secretary, had noted,

\[\ldots\text{some hope should be left for these wretched men and I think the rule that their cases should be considered after 20 years is reasonable and should not be departed from.}^{10}\]

However both Sir William Vernon Harcourt and H.C.Mathews opposed this rule and sought to reintroduce their subjective reconsideration of the original offence when appeals came from capital convicts. In the case of Daniel Frazer, reviewed in August 1883, Harcourt wrote,

\(^10\) Ibid, citing a minute on case#24150/26, undated & unnamed.
I cannot absolutely accept the principle that a capital sentence commuted for life stands on the same footing as an original sentence of penal servitude for life. It must be remembered that it is now the practise to commute capital sentences in cases where, some years ago, the law would have been allowed to take its course. Perhaps the most convenient practise would be, without interfering with the former rule, that the Secretary of State should make a minute at the time of commutation as to his opinion whether the case was one in which sentence could properly at any time be shortened.\(^\text{101}\)

This was a view that H.H. Asquith was later to cite when, in 1883, he rejected an appeal from the convict James Rutterford. Rutterford had escaped execution only because of "his peculiar neck," and his crime had been, in Asquith's words "as brutal as can well be conceived."\(^\text{102}\)

When Mathews was faced with the review of A.F. Brown's life sentence in 1891 he introduced the factor of public duty in his attempt to resist the 'rule'. He wrote to Troup:

\(^{101}\) Ibid, Minute dated Aug.31, 1883.
\(^{102}\) Ibid, Minute dated Jan.26, 1893, on Case#909660c/27., Rutterford, who had shot a game keeper while resisting arrest in 1870 was one of only six people, four men and two women who served more than twenty years in this period. A deformity of the neck made it likely that execution by hanging would be more than usually "cruel."
This case revives the difficulty I have often felt about commuted death sentences. This man, but for his youth at the time, would have been hanged. His crime was deliberate and vindictive murder. It seems to me an irrational rule that he should be let loose on society because twenty years have elapsed. I have an imperfect recollection of some former case, in which, I thought you represented that I was violating all precedent by refusing to license\textsuperscript{103}. . . It seems to me reasonable to say that if society lets off a murderer with his life, he should be kept out of harm’s way for, practically, the rest of his life or at any rate until he has reached an age when the dangerous passions are cooled.\textsuperscript{104}

Troup replied to this by pointing out that the specific case referred to by Mathews had been one in which an original life sentence had been awarded for an attempted murder and that in such cases there had been no exception to the rule of release after twenty years. In the case of commuted life sentences Troup cited the Criminal Memoranda & Returns which, at this date, showed only three cases of

\textsuperscript{103} The Penal Servitude Act of 1853 (16 & 17 Vict.c99) had established a system of provisional release under ostensible police supervision.

\textsuperscript{104} H.O.144 Series, Case#9236/23, A.F.Brown, minute dated Dec.12, 1891.
which Frazer's, cited above, was one in which exceptions had been made. He added the comment,

The cases of relapse into crime after release from these long sentences are extremely rare. I do not think there have been any such cases among those who have served twenty years penal servitude.

His opinion was promptly endorsed by Lushington but Mathews was unimpressed and it remained for Asquith to release Brown in the following year with the comment that,

I have felt some doubt in this case; but I have come to the conclusion that the man may be released without danger to society.

In the event the bureaucracy, through sustained and consistent pressure, won its argument and in the last 19th century 'edition' of the Criminal Memoranda & Returns in 1900, Sir Godfrey Lushington's 'General opinion' is cited:

My own very strong opinion is that no one should be kept in

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105 The others were Charlotte Winsor a notorious baby-farmer sentenced to death in 1856 and reprieved only after protracted review of her case in the Court of Crown Cases Reserved. She was never released & died in prison in 1894. Isaac Pinnock was a violent criminal, of doubtful sanity, who was judged insane and transferred to Broadmoor in 1887.
106 Ibid, minute dated 26.1.93.
prison more than twenty years unless a criminal who, from
his present condition, is deemed dangerous to society or unless
there is some extraordinary heinousness in his crime. 107

By careful use of its store of precedent the senior staff of the
Criminal Department were thus able to assume a major role in the
exercise of the Prerogative of Mercy and to impose on this process
an increasing coherence and rationality. Space permits only a brief
examination of its equally successful efforts to retain control and
the ultimate direction of its two principal operational sub-
departments, the Metropolitan Police and the Prison Commission. In
both cases the decade of the 1880's, and the tensions which
developed in it, was to prove critical in achieving these victories.108

Pellew has described109 how Lushingon and Murdoch denied
the Commissioner of Metropolitan Police, Sir Charles Warren, the
right to report directly to the Secretary of State and how, in the
style of their colleagues at the Treasury, the traditional office of
the Receiver109, held by a clerk in the Criminal Department, was
retained as a budgetary control mechanism over the active and
independent minded Commissioner. Warren's successful, but
unauthorized, attempts to avert another Trafalgar Square riot in
November 1887, drew public and Parliamentary protest from liberals

107 An undated minute on an unidentified crime, Case #54630.
109 The Receiver of the Met. Police, was the accountant of the metropolitan police rate, a
local tax subscribed for provision of a police service. The office during this time was
held by James Simpson and later by A.R.Pennefeather.
and strong rebukes from the Home Office but it was to be on the issue of policing methods that he was ultimately to be forced into resignation. Sensitive to public demands for the control of prostitution, the Criminal Department demanded an active policy of repression both of street solicitation and of brothels.\textsuperscript{110} To Warren this was a futile diversion of resources from the more important tasks of controlling conventional crime and maintaining law and order. It was also a potential source of corruption among his staff. His decision to issue an unauthorized Police Order in July 1887, outlining what Pellevé has called a "Laissez Faire" policy towards prostitution, led to a direct confrontation with Lushington and to Warren's resignation in the following year\textsuperscript{111}.

Lushington was equally successful in containing the aspirations of Sir Edmund DuCane, Chairman of the Prison Commission\textsuperscript{112}, for operational autonomy. Like Warren, it was DuCane's assumption of the right to report directly to the Secretary of State which led to conflict and in this case it was Lushington's successful defence of his subordinate Troup's authority to minute the Chairman's reports that ultimately resolved this issue in


\textsuperscript{111} In Lushington's words this order promised "Free license to Prostitutes to pursue their calling without interference from the Police." (Petrow, op.cit.,p. 104.)

\textsuperscript{112} DuCane, like Warren an authoritarian ex-soldier, had been appointed Chairman of the Prison Commission on its formation in 1877 & had efficiently consolidated a national system of Prisons.
1886\textsuperscript{113}. Thus when Murdoch gave evidence to the Royal Commission on Civil Establishments in 1888 he was able to claim that "All the questions that the Prison Commissioners desire to submit to the Secretary of State pass through the Criminal Department." They were forwarded to the Secretary of State with that Departments remarks, "according to precedent or . . .our judgement."\textsuperscript{114} In the following year DuCane protested the Criminal Department's alterations in his annual budget but it was not until 1895, in the aftermath of the Report of the Departmental Committee on Prisons\textsuperscript{115} that the Home Office finally asserted its control over this hitherto very independent organization. In that year Evelyn Ruggles-Brise, a career civil servant was appointed to replace DuCane on his retirement and the Prison Commission became truly part of the Home Office establishment.

The main weapon of the bureaucracy, whether conducting defensive actions against their political superiors or civil wars against their technical subordinates, consisted of the cautious use of a deep but accessible knowledge of precedent and practice. The bureaucracy itself had no executive powers yet by judicious use of those of the Secretary of State could discipline the whole machinery of law and order and the next chapter will consider how this growing power was used in the investigation of some

\textsuperscript{113} See Pellew, op. cit. p.45.
\textsuperscript{114} Royal Commission on Civil Establishments, 1888, Minutes # 12054 & 12059.
\textsuperscript{115} This Committee, chaired by Herbert Gladstone, was sympathetic to the rising level of public criticism of DuCane's inflexible and harsh regime.
particularly intractable criminal cases. In these uncertain attempts to grasp the sword of justice, whose use Sir George Cornewall Lewis had earlier disclaimed, the civil servants were rather less successful than in the enterprises so far considered.

Such cases called on the Home Office to act as an independent review body on the decisions of the judicial system, and, in doing so, to activate and direct, as well as to discipline, the various parts of the criminal justice system. Its development had, however, precluded the possibility of it operating effectively in this role. The staff of this private office of the Secretary of State shared a common deference for the judiciary, a deeply conservative respect for the very rules and precedents which they had created and a lack of practical experience of the system over which they had come to exercise so much power. In short it had not become a Ministry of Justice.
Chapter Five

The Home Office as Ministry of Justice:
The Limitations of Bureaucratic Power.

"Lads I am innocent, you see an innocent man going down the stairs," William Siddle had declared when sentenced to death in 1884. He appealed not for mercy but for justice and in doing so called on the Home Secretary to act in the uncomfortable, and wholly unofficial, role of 'Minister of Justice'. This chapter will examine some occasions, in the half century before the establishment of the Court of Criminal Appeal (1907), when Secretaries of State and their Criminal Departments were forced into this position and will end with a review of the report from the Departmental Committee set up in 1904 to investigate an evident miscarriage of justice in the case of Adolph Beck.

The evidence of the Case Files and the Beck Committee illustrate two sorts of limitation on the Home Office when acting in the pursuit of justice rather than mercy. In such cases the Secretary of State was both the head of an unofficial legal review body and also the responsible authority for the executive arms of justice. In neither respect was he well equipped for his task.

In the former, quasi-judicial, capacity the Home Office had no official standing and no formal mechanism for reexamining the facts of a case. The Secretary of State could only overturn the verdicts of courts by an arbitrary act of the Royal Prerogative. He could grant a
pardon to anyone he felt unjustly convicted. He very rarely did so and never without, at least, the tacit agreement of the trial judge. In such cases there was always clear, or at least preponderant, evidence of a miscarriage. More frequent, however, were those cases where no more than a substantial element of doubt existed about the facts. In such cases it became the practise to create an unofficial, and secret, appeal court from the ranks of senior judges in order to reinforce, at least within the closed world of the judicial establishment, the legal judgement and authority of the Secretary of State. In cases where it was concluded that only a conviction for some lesser offence than murder was appropriate, 'ad hoc' strategies were adopted to achieve a supposedly just result without the embarrassment of overturning a verdict. Death sentences were commuted without explanation and sentences of penal servitude awarded, and later reviewed, in line with a new perception of the original offence.

There were further constraints on the effectiveness of the Home Office in resolving cases of legal doubt. It will be argued, in the first place, that the progressive delegation described in the previous chapter had isolated the most experienced and incisive legal minds from all but the most serious cases. It ensured that, even in those cases, they saw only partial and predigested accounts. It will also be suggested that the tensions between the Home Office and its nominally subordinate Departments, including that of the Public Prosecutor, the Metropolitan Police and the Prison
Commission aborted any chance of that routine cooperation and coordination which the Beck Committee considered might have averted the two miscarriages of justice in Adolph Beck's case.

In 1881 Sir William Vernon Harcourt, then Secretary of State, felt confident enough to claim that since the 1850's no innocent person had been hanged\(^1\). Despite some anxiety about two executions, in 1867 and 1877, voiced at the time by the Howard Association\(^2\), no evidence ever emerged to rebut this claim or indeed to cast any serious doubt on the facts of any later 19th century executions. On the other hand both the Home Office and the Howard Association agreed that there had been cases of the conviction of innocent people, and of those of doubtful guilt, but that their lives had been saved by Home Office investigation\(^3\). The Home Office included such cases in a special category of the first edition of its *Criminal Memoranda*, published in 1882,\(^4\) citing eight such cases, out of 509 capital convictions, in the years 1861 to 1881. Of these cases, three were given Free Pardons and the remainder commuted sentences of penal servitude. In the second edition of the Criminal Memoranda, in

\(^1\) Hansard, Col. 1073, June 22 1881. Debate on Joseph Pease's motion to abolish capital punishment.

\(^2\) *A Dangerous Penalty*, The Howard Association, 1884, pp. 3-4. The Howard Ass.;, founded in 1866, inherited both the secretary, WmTallack, and the role of the Society for the Abolition of Capital Punishment when the latter expired in 1869. See Radzinowicz, op. cit., Vol. V, p 679.

\(^3\) Howard Ass.;, op.cit. above.

1895, the numbers in this category had increased to thirteen, including a further three Free Pardons. This was a category which, predictably, the Home Office was reluctant to enlarge since in such cases their task became that of reviewing the jury's verdict rather than that of mitigating the punishment of those already properly convicted. The evidence of those case-files so far examined suggests that even in their internal and unpublished documents, the Home Office underreported the number of such cases that came before them.5

The review of a jury's findings was not limited to rare investigations of the identity of the murderer, or of the facts relating to an act of homicide. Conviction for murder also depended on the jury's determination that the act of homicide had been committed intentionally and with 'malice aforethought.' The Home Office was thus more frequently faced with a second kind of appeal on the facts where it was alleged that the the jury had misjudged the question of the prisoner's intentions and that his proper offence was manslaughter and not capital murder. This category was a much larger one, including all those cases where insanity was claimed as well as those where the act was argued to be accidental.

5 Out of 105 case-files from the H.O.144 & H.O.45 archives sixteen, or 15%, clearly raised doubts and prompted investigation either into the identity of the convicted murderer or as to whether their act had indeed been the actual cause of death. In 12 of these cases sentences were commuted to P.S for life or the prisoner pardoned (which occurred in 3 cases, all of which are in the lists referred to above.)
In this chapter, however, the focus will be on those cases, whether of doubt about the facts of the deed or the intention of the prisoner who had committed it, where the Home Office was called on to reexamine the *verdict* of the court as opposed to the *punishment* which it had awarded. It might be supposed that the evident improvement in the quality of Home Office recruits, in the years following the Playfair Commission's report (1876) and the progressive extension of their involvement in the business of the Criminal Department would have strengthened its investigative skills and even bred a greater degree of self-confidence in challenging the verdicts of an imperfect criminal justice system. This does not seem to have been the case. The bureaucratic weapons of rule and precedent which had served to win an executive role for the Criminal Department's clerks served to isolate the most experienced senior staff and Ministers themselves from the detail of cases and at the same time to inhibit the more junior staff from independent and incisive criticism of both judicial opinion and jury verdicts.

The Capital Punishment Commission of 1864 had proposed an intermediate category of homicide, between the capital crime of murder and the non-capital crime of manslaughter. It proposed to create a class of non-capital murder, where an absence of clear premeditation, or in its words "express malice," would be punished

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6 C.P.C., Report, 1866.
by penal servitude for life, or some other sentence of not less than seven years. Radzinowicz and Hood, in their account of the exercise of the Prerogative of Mercy in Victorian England\textsuperscript{7} were ready to assume that Home Secretaries subsequently used these dubious criteria to create their own category of second degree murder and to commute the sentences of those that fell within it\textsuperscript{8}. It has already been noted how narrowly Victorian criminal courts interpreted the question of intent, and were prepared to accept that the use of a deadly weapon, or deadly force, was, of itself, proof of malice. The evidence of the Prerogative of Mercy files suggests that Home Secretaries rarely took issue with the courts on this matter, and were only ready to commute capital sentences in such cases if some other mitigating factor could be found. The practical difficulty of determining the character of an act according to the supposed

\textsuperscript{7} Radzinowicz, op.cit. Vol V, p.678.

\textsuperscript{8} There is a misleading reference in the 2nd Edition of the \textit{Criminal Memoranda (1895)}, cited by Radzinowicz, under the heading of Intention. This citation of a 1872 minute by H.A.Bruce is the only entry and is supported by no case references which might have suggested that it had become authoritative. The minute reads:

I think the distinction drawn in Gurney's bill between,
1) death caused by an act committed with the intention of causing deadly injury . . . and
2) with the intention of doing bodily harm but not causing the death of a person . . . is just. I take deadly injury to mean an extreme hurt inflicted without absolutely intending to kill but with a reckless disregard whether it kills or not. H.A.B. Dec. 1872.

Like Harcourt, he may have sympathized with this view but there is no evidence that he found opportunity to implement it, and some positive evidence that he ignored it - see below Cap 6.
intentions of the perpetrator is easily grasped - 'no malice' equals manslaughter, a modicum becomes non- capital murder and evident, express malice the mark of the capital variety\textsuperscript{9}. This was a difficulty to which Sir William Vernon Harcourt attested in his response to yet another motion for the abolition of capital punishment, this time in 1886\textsuperscript{10}. While confirming both his own and his predecessor, R.A.Cross's, wish to implement the two tier system, he had not been successful. He had, he said,

\begin{quote}
\ldots tried to frame a definition but he found it was not satisfactory because it included cases which ought not to be included and excluded others which ought to have been included.
\end{quote}

Preeminent among the latter was, of course, the offence of maternal infanticide, often the most clearly premeditated of homicides but one which society considered less heinous than many others. On the advice of Sir George Grey and several of the judges, including both J.F.Stephen and Sir Henry Hawkins, he abandoned the attempt.

In the early part of the period, the Home Office did not itself initiate investigations into jury verdicts. It took, as we have already

\textsuperscript{9} Attempts to make this distinction according to the profession of the victim or the means employed (i.e. of policemen when on duty, or of murder with a firearm) have proved easier to implement. They have not, however, been seen as being more equitable.

\textsuperscript{10} Hansard, Col.782, Response to Sir Joseph Pease Motion, May 11, 1886.
noted, the action of an energetic judge, like Baron Bramwell in Crew's case,\(^\text{11}\) or an outburst of public or professional protest as in the case of Fanny Oliver,\(^\text{12}\) to open up such an issue. The Home Office civil servants were neither willing nor competent to challenge such verdicts themselves. Despite the growing confidence and competence of the Criminal Department this attitude changed little over the period as a whole. It was an attitude which led to a dangerous strategy of compromise in which Home Secretaries would commute as though they were accepting the verdict but had found other, usually unspecified, grounds for mercy. In this way they avoided the possibility of an irreversible miscarriage of justice and left open the possibility of further acts of mercy in the future\(^\text{13}\). The Penge Case in 1877 was such a case, as was that of Florence Maybrick in 1889. Both these cases demonstrate the effects of what amounted to a power vacuum in the criminal justice system.

When, in 1877, the jury in the Penge Case, urged on by the judge, Sir Henry Hawkins, convicted four members of the Staunton family\(^\text{14}\) of starving Harriet Staunton to death, there was an

\(^{11}\) Chapter 3, note 55.
\(^{12}\) Chapter 3, note 113.
\(^{13}\) Or the opposite as occurred in the Staunton's case - below.
\(^{14}\) The four members were Louis & Patrick Staunton (his younger brother), Patrick's wife Elizabeth and Alice Rhodes, her sister, who was also the mistress of Louis. The victim was Harriet, the wife of Louis Staunton. They were accused of starving her to death during a period of about six months in 1876/7, when she was effectively confined to her room in Louis Staunton's house. At the same time he
immediate outburst of protest from members of the medical profession. The initial reaction of the Home Office was relatively passive, consisting largely in the evaluation of the various opinions offered in appeals and 'counter-appeals' by members of the legal and medical professions and their specialist press. Public, and perhaps less informed, opinion seems to have shared the horror of judge and jury at the callous and cruel circumstances of Harriet Staunton's death. It is also evident that public opinion in this case exercised a powerful influence over the Secretary of State, R.A. Cross, and his Legal adviser, Godfrey Lushington.

It was a letter from a leader of the medical profession, Sir William Jenner which first prompted the Home Office to reluctant action. This letter was very critical of the evidence offered by the

not only lived openly with Alice Rhodes who had earlier been engaged as housekeeper, but also appropriated Harriet's inheritance of some £5000.
See H.O.144 Series, Case #64091, 1877.
15 The British Medical Journal, oldest of the medical press, thought the conviction just (Sept 17th 1877, Oct. 6th ) and the Lancet, its new & radical competitor declared it a travesty. (Sept.10 & Oct 6, 1877). The Lancet's editor, James Wakeley, also managed to mount a petition for clemency supported by ten leading consultants including Dr Henry Maudsley.
16 On Sept. 27, 1877, the Governor of Maidstone Gaol wrote to the H.O. confirming the conviction of the prisoners and asking for their removal to another prison to avoid popular demonstrations in Maidstone. After eventual respite they were secretly removed for the same reason. (Case # 64091)
17 Sir William Jenner was one of two Royal Doctors and had recently been rewarded with a baronetcy for his role in saving the Prince of Wales' life.
prosecution and gave a strong endorsement to the professional standing of the two pathologists who had appeared for the defence, Drs Payne and Bristowe. Jenner also agreed with their conclusion that the most likely cause of death was tubercular meningitis, a disease whose terminal symptoms would have been closely analogous to those of starvation and neglect. Cross thereupon gave instructions, on October 6, for Dr Alfred S. Taylor, of Guy's Hospital, to report on the findings of the autopsy carried out on Harriet Staunton. His extremely critical report was, however, to be ignored.  

Rather than attempt to recruit more authoritative technical evidence Cross chose to obtain further judicial opinions on the evidence already offered, and so heavily discounted by Hawkins in his summing up at the trial. Three judge's took part in this review, all members of the new Court of Appeal, Lords Justice Brett, Bramwell and Lush. They observed that there was insufficient evidence to establish either murder in respect of any individual or conspiracy to murder in respect of the prisoners collectively and that in Bramwell's words the verdict was "eminently

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19 Ibid, report received on Oct. 15, Taylor particularly censured the failure of the five doctors present to correctly identify the 'granules' observed in the brain and lungs as evidence of advanced tubercular meningitis. Alfred Swayne Taylor (1831-1877) was latterly Professor of Medical Jurisprudence at Guy's Hospital and effectively chief scientific adviser to the Home Office until his death at the end of this year.

20 Established to review civil cases under the Judicature Act of 1873 and the Appellate Jurisdiction Act of 1876.
unsatisfactory." The judges concluded that Louis, Patrick and Elizabeth Staunton had...

wickedly ill-treated her [Harriet] without a definite intention to kill her and that such a view makes them guilty of manslaughter.

They noted, however, that in Alice Rhodes' case a verdict of murder or manslaughter would have been "wholly unsatisfactory." The three Appeal Court Judges nevertheless stopped short of saying that the verdict should be overturned or of making any recommendations for action, conscious no doubt of their strictly advisory position and of the presence at their deliberations of Hawkins, who continued to strongly assert the guilt of all four prisoners.

Cross was left with a hard decision, between accepting the opinion of the trial judge, widely supported by public opinion, or the views of the Lords of Appeal backed by a significant section of the medical profession. The lengthy and ambivalent advice which he received from Godfrey Lushington did not at first sight help to resolve the problem. Lushington fairly recorded the three Judges' reservations on the verdicts in respect of all the prisoners. His note even goes on to quote Adolphus Liddell's comment on an earlier (1852) verdict, in Kirwan's case, a comment which bitterly summarized the predicament of the Home Office. This was a case in

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22 Case cited above, memo: form Lushington to Cross, October 1877. These papers bear Cross' response on their reverse together with his decision, dated on the following day, Oct. 18.
which an Irishman, Kirwan, had been convicted of murdering his wife in a supposed bathing accident and of which Liddell wrote "this is the man who is shut up for life because it is doubtful whether he killed his wife." If, he noted, there was comparable doubt about the three Staunton prisoners there was even more about the propriety of Alice Rhodes' conviction. Pressed both by the weight of these doubts and his own evident horror at the case Lushington looked for precedent in the arbitrary use of the prerogative and found it in the cases of the Fenians convicted of the murder of P.C. Butt at Manchester, in 1867. In this case two men were convicted some months after several of their confederates had been both convicted and executed for the same offence. They were reprieved "because it was thought enough had been hung for the offence."23 Lushington concluded:

I think I have said enough to show that in my opinion the awarding of any punishment to Alice Rhodes under present circumstances would scarcely admit of a logical defence but that logic is not imperative in the exercise of the Royal Clemency.

He then went on to consider the other prisoners:

The difficulty which has arisen points I think to the expediency of respiting without any indications to the public

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23 This refers to a case in which five men were arrested for the murder of P.C. Butt while attempting to rescue a fellow Fenian from a police van. Lushington also cites cases of doubt in which reprieves were given, those of Habron and Smethurst.
of the reason why clemency is extended - the Secretary of State will thus be more free to deal with the case afterwards.\textsuperscript{24}

This was a compromise which clearly appealed to Cross. He, and his successors, would be free to review the inevitable life sentences on the Stauntons as they saw fit and he would also be absolved from the difficulty of admitting that the murder conviction was wrong in any of the cases. Moreover in letting the verdict stand in the cases of those three who had had a duty to care for Harriet Staunton a measure of justice could be done and public opinion assuaged. The penal results of a manslaughter conviction could be obtained without upsetting a popular jury verdict.

Cross prefaced his response by stressing his respect for the opinions of the trial judge and jury:

I am always most anxious to act in harmony with the judge who tried the case in all instances of this kind. I am also most jealous of disturbing a verdict of the jury except on the recommendation of the judge.\textsuperscript{25}

He went on to emphasize how deeply the conduct of the prisoners in respect both of Harriet Staunton and her child\textsuperscript{26} had affected him,

\textsuperscript{24} Hardly a reflection of what Victor Bailey has chosen to describe as Lushington's "meticulous legal mind" (\textit{Policing & Punishment in 19th Century Britain} page 109/110, Rutgers 1981). There was as much of the politician in Lushington as of the lawyer.

\textsuperscript{25} See note 22 above.

\textsuperscript{26} Although never the subject of charges, the death of Harriet and Louis' infant son in the preceding year, apparently of illness
presenting as he said, "features of the gravest kind." He rejected out of hand Dr. Alfred Swayne Taylor's proposal that all four prisoners be pardoned as "not worth a moment's consideration." While ready to pardon Alice Rhodes he declared that "the other three deserve, in my view of the case, the severest penalty next to death, penal servitude for life."

This stern view of the underlying moral issues of the Penge case was to be characteristic of Home Office reactions to it for many years to come. Patrick Staunton died in prison four years later, in 1881, of tubercular meningitis, the same disease that was claimed by his defence to have killed his sister-in-law. The Stauntons continued, however, to arouse considerable public sympathy. The old 'Radical', John Bright supported by Charles Hopwood\(^{27}\) and Cardinal Manning regularly petitioned the Home Office for reconsideration of the case. In 1883 Sir William Vernon Harcourt, finally moved by a lengthy personal letter from Bright\(^{28}\), referred the case to his colleague, the Chancellor, Lord Selbourne\(^{29}\). Selbourne endorsed the opinion of the three Lords of Appeal in 1877 and pointed out the relatively minor role played by Elizabeth

\(^{27}\) Charles Hopwood, a barrister & Recorder of Liverpool, was a notable campaigner for shorter prison sentences.

\(^{28}\) See case file cited above, letter of John Bright, Oct.13, 1883.

\(^{29}\) Ibid, October 29, 1883, Report of Lord Selbourne to Sec: of State on the Penge Case.
Staunton. Early in the following year Harcourt decided to release her but for Louis he seems to have had no sympathy. He twice turned down petitions for early release as did successive Secretaries of State and the prisoner was only released in September 1897 when he had completed 20 years. In 1894 George Aitken\textsuperscript{30}, a junior first division clerk, received an appeal from Louis Staunton and summarized the case for his chief, C.S.Murdoch, as follows:

There are no medical grounds calling for interference; and if it is the case that he should have been convicted of manslaughter rather than murder, the manner in which he, and the other prisoners for his sake, treated his wife was so atrocious that he appears to deserve well a sentence of penal servitude for life, the minimum for which is 20 years. It was a case of an impecunious man getting hold of a woman of weak intellect . . . and then starving and neglecting her in order that upon her death he might marry his mistress. ? Let him serve the term of twenty years P.S. \textsuperscript{31}

This had clearly become the view of the Home Office establishment and such opinions were reinforced by references to Sir Adolphus Liddell’s view that fifteen years would be "the maximum leniency" in

\textsuperscript{30} See Pellew, op cit., p.211, G.A. Aitken had joined the Post Office in 1883 and transferred to the Home Office, as a junior clerk in 1893.

\textsuperscript{31} Case file cited above, Minute dated Oct. 12,1894.
this case and Lushington's flat statement that "he should serve a minimum of twenty years."\textsuperscript{32}

It has been commonplace to see the trial of Florence Maybrick, in 1889, as a symbol of the application of Victorian 'double standards' and hypocrisy to the case of an adulterous woman who may well have been innocent of the crime of poisoning her husband. The \textit{Pall Mall Gazette} wrote of this verdict that "We have not yet passed out of the old world of 'such should be stoned,' into the new world of equal morals and just judgements between the sexes."\textsuperscript{33} This is an aspect of the case which will be explored in a later chapter. A more recent commentator\textsuperscript{34}, however, while also emphasizing the role of adultery in Mrs Maybrick's conviction, rightly identified the absence of an appeal mechanism as the factor which produced the compromise of her extended imprisonment. It was the same kind of questionable compromise as occurred in the case of the Stauntons.

Maybrick's case was preeminently an issue in forensic medicine. In the original indictment Mrs Maybrick was charged with "murdering her husband by the administration of arsenic" and it was in these terms that the judge, Mr J. Stephen, put the issue to the

\textsuperscript{32}Case file cited above, Sept., 1892. A reference by W. Byrne to A.F.O.Liddell's opinion and a minute by Lushington.
\textsuperscript{33} Pall Mall Gazette, Aug.10, 1889.
jury, and on which she was convicted. It was in the opinion of her
defence counsel, Sir Charles Russell, a dangerous
oversimplification\(^35\). There should have been, he argued, two
questions: did James Maybrick die of arsenic poisoning and, if so, did
his wife administer it? While there was unequivocal evidence that
Florence Maybrick had given her sick husband an unquantified amount
of arsenic in a dose of beef extract,\(^36\) it was not clear either that it
had caused his death or that she had known what she was doing when
she gave it to him. In a conflict of expert testimony which was very
similar to that in Fanny Oliver’s case\(^37\), twenty years earlier,
contending witnesses argued over the accuracy of Rheinsch’s test
for arsenic, over the methods for post-mortem estimation of the
amount of arsenic in a body\(^38\) and over the amounts of arsenic
needed to kill different individuals. Two hypotheses emerged from
this debate. The prosecution argued that, while the amount of
arsenic found post-mortem in the body was very small and largely

\(^35\) See Chapter #3, page . . . above.
\(^36\) In a highly dangerous manoeuvre, Russell had his client make a
"voluntary" statement to the court in which she claimed to have
given her husband, on his instructions, a dose of an unidentified
white powder.
\(^37\) See Chapter #3, page 113 above.
\(^38\) At a Home Office conference on August 16th 1889, Dr Stevenson
declared that when examining the liver & other organs he "snipped a
little bit here and there" and then extrapolated his results, on a
weight basis, to the whole organ. Two other toxicologists present,
Drs Poore & Tidy, declared this to be highly dangerous since arsenic
"forms in pockets." (H.O.Series Case #1638/A 50678D, Aug, 1889)
confined to the liver\textsuperscript{39}, it was sufficient to have killed a man in the condition of James Maybrick, suffering as he was from gastro-enteritis. The defence, and many others in the medical press, argued that such arsenic as was found could be accounted for by his life-time habit of taking patent medicines and that the symptoms at the time of his death were fully accounted for by gastro-enteritis.\textsuperscript{40}

The Secretary of State, Henry Mathews, was faced by a storm of public protest at the unexpected verdict and by the disunity of his own consultants on the toxicological issue.\textsuperscript{41} He compromised but in doing so committed a dangerous error. He reprieved Mrs Maybrick, commuting her sentence to penal servitude for life. This would have been safe enough had he refrained from publicly explaining his decision. Mary Hartman citing \textit{The Times}, has nicely summarized this anomalous decision\textsuperscript{42}:

\ldots although the prosecution had demonstrated that Florence had administered arsenic with intent to murder her husband (it had not), there was reasonable doubt that arsenic had in fact killed him (there was).

It was an ill-judged rationalization which was to give the friends of Mrs Maybrick, the proponents of feminist causes, the advocates of a

\textsuperscript{39} None was found in the stomach, bile, heart or spleen.
\textsuperscript{40} It was widely argued at the time that James Maybrick took arsenic habitually. It was never established, however, that he was an "arsenic eater", or that he took the poison either as an aphrodisiac or to treat himself for syphilis.
\textsuperscript{41} See note 39 above.
\textsuperscript{42} Hartman, op cit, page 246.
Court of Criminal Appeal and journalists looking for a cause, a platform from which to mount their protests. It became what a senior clerk in the Criminal Department was to call "the damnedosa hereditas of Mr Mathews' decision."43 This comment was made at a time, in 1896, when the continuing pressure of public opinion, and of Sir Charles Russell44, on a succession of Secretaries of State had caused a new Minister, Sir Mathew White Ridley,45 to promise a further review of the case. This in turn had led to departmental discussion of various alternatives for justifying Mathews' original compromise. An exchange between W.J.Byrne and the new Permanent Under Secretary is highly revealing. A long memorandum46 from Byrne considers and dismisses the possibility of a Public Enquiry by a panel of Judges. It would be regarded, he says, as an "illegal rehearing of the case" and a "surrender of the Secretary of State's prerogative powers." On the other hand an unofficial and private consultation, on the basis of the precedent set up by the Penge Murder case "would be most proper". "One great advantage", he continued,

would be that it would end the case for ever: if the judges agreed, as they are almost certain to do, with the H.O.opinion,

43 H.O.144 Series, Case #1639/A50678D. Memo: by Mr Byrne, Sept. 30, 1895.
44 Mrs Maybrick's counsel, now Lord Chief Justice of England, had continued, despite his elevation, to support appeals for a review of Mrs Maybrick's case.
45 Sec. of State from June 29, 1895 to Nov 12, 1900.
46 See note 43 above.
the woman would be kept in for 20 years without any further bother: if they said the doubt was too great, then she might be released and even the Home Office would perhaps think she had been fairly severely punished.

An even greater advantage in Byrne's view was that it would make the position of the Secretary of State "perfectly logical and indeed impregnable". Sir Kenelm Digby in a further minute reviewed the evidence in great detail and concluded that "there is some force in the contention that the jury convicted Mrs Maybrick of one crime and she is suffering punishment for another". Despite this he argued that "substantial justice would be done" by treating the convict on "the ordinary footing of a prisoner sentenced to death whose sentence has been commuted to Penal Servitude to life [sic]". This was eminently a case, in Digby's opinion, which "shews the difficulty arising from the absence of any regularly authorized power of revising the verdict of a jury, or having a question such as the 'attempt' submitted to a new jury." Under the pressure of such cases as that of Mrs Maybrick it seems clear that the Home Office, at least, were ceasing to oppose the creation of a Court of Criminal

47 Byrne ended this appalling minute with the observation that "the only objection which I see to the reference I suggest is that if the judge's said there was doubt and if the S.S. released the woman, she would want compensation."

48 Case File cited at 39 above. Minute of Sir K.E.Digby, Sept.19, 1895, Digby had succeeded Sir G. Lushington earlier in that year as Permanent Under Secretary.
appeal.\textsuperscript{49} In this instance Digby recommended an unofficial review and Ridley chose to refer the case to the Lord Chancellor, Lord Halsbury. Halsbury's lengthy justification of the original verdict and his exculpation of Mr Justice Stephen's conduct of the case has already been cited\textsuperscript{50}. It succeeded in mustering that degree of self confidence in the Home Office which was needed "to end the case for ever" as far as the bureaucracy was concerned. Needless to say it did not put an end to the efforts of Mrs Maybrick's friends to obtain her release\textsuperscript{51}.

The absence of any 'regularly authorized power' of reviewing the verdicts of juries was a constitutional limitation on the effectiveness of the Home office which could only be offset by the closest personal cooperation between the judiciary and its most senior staff. This was an intimacy against which the growing formalization of the bureaucracy tended to militate. It was not

\begin{flushleft}
\textsuperscript{49} Opposition continued, however to be strong from the judicial bench, as Radzinowicz, op.cit, Vol V, pp 764/5, makes clear.
\textsuperscript{50} See Chapter 3, above, pp142 ff.
\textsuperscript{51} Hartman, op. cit.pp 285 /6, argues that "There was a force which was powerful enough to prevent the crusaders having their way, and that force was the will of the Queen." There is no evidence in the Case file that, after Halsbury's review the issue of her guilt was ever reconsidered, or that her sentence should be other than Penal.Servitude. for life. There is equally no evidence, extant, of any direct intervention by the Queen. Hartman depends here on a citation by Trevor L. Christie,( Etched in Arsenic, Lippincott, 1968, p.238) from Buckle's Letters of Queen Victoria, at the time of the original reprieve. It suggests there be no further mitigation.
\end{flushleft}
compensated by any marked improvement in investigative efficiency or willingness to challenge the traditional authority of the legal establishment.

The extent of executive delegation in the Home Office establishment by the end of the century is well exemplified in Byrne's minute above, or that of Aitken in the Penge Case. There were, however, dangers inherent in such a development and despite the marked improvement in the intellectual and academic qualities of the upper bureaucracy, which followed open and competitive entry, there was no corresponding improvement in its investigative capabilities. Two unforeseen consequences occurred whose combined effect was to cancel out much of the positive benefit which was anticipated from the wider involvement of better quality staff. On the one hand the top levels of management, still the most experienced and incisive minds in the establishment, were increasingly insulated from the detail of the work, or what Godfrey Lushington had called "the mechanical work." They were encouraged to withdraw by an evident sense of the competence of their subordinates and by the comforting presence of that body of rule and precedent which these same subordinates had created. This staff was now routinely protected from egregious errors of

52 See p. 225 above.
53 There were on the other hand some obvious improvements in bureaucratic methods ranging from the employment of male typists in the early 1890's to significant restructuring of the Criminal statistics in 1893/4.
54 Chapter 4, p.198.
procedure, dependable in their discretion and able to rely on well established practises. On the other hand, this same body of rules positively discouraged career oriented and relatively insecure subordinate staff from challenging judicial opinion or the routines that they and their predecessors had helped to establish. Lacking the personal experience of private legal practise they were also less familiar with the detailed workings of the criminal justice system.\footnote{55}

These limitations on the investigative effectiveness of the Home Office bureaucracy in the later Victorian period were highlighted in the case of William Siddle (1884), when it required the personal intervention of an exceptionally incisive Secretary of State to prevent a serious miscarriage of Justice. In the case of Israel Lipski (1888) popular sympathy and the erratic behavior of a judge\footnote{56} created a situation in which the Secretary of State, Henry Mathews, also felt personally obliged to take over the management of the post-trial investigation. In doing so he exposed some of the organizational weaknesses of his own office and moreover, he did so in the full glare of hostile publicity. The case of Adolph Beck, on the other hand, never reached the highest levels of the

\footnote{33 Peliew, op.cit p.69, note 19. Lushington had opposed Murdoch’s promotion to Ass. Under Secretary in 1894 for this specific reason. Harold Scott, \textit{Your Obedient Servant}, (1959) p.61.}

\footnote{56 Mr Justice Stephen, who was already beginning to show some symptoms of the eventual breakdown which led to his early retirement in 1891.}
establishment. A later Public Enquiry (Nov.1904) was highly critical of the Home Office and particularly of C.S.Murdoch and H.B.Simpson\(^{57}\). It clearly identified the perils of delegation to legally inexperienced middle-rank officials. The shortcomings which were then exposed in the investigative role of the Home Office were to be a major contributor to the final establishment of a Court of Criminal Appeal in 1907.\(^{58}\)

William Siddle was convicted of murdering Police Sergeant Smith on May 2nd 1884\(^{59}\) and his execution set for Monday 20th of May and, as has been seen, his judge, Sir Henry Hawkins had no

\(^{57}\) Murdoch, as Ass. Under Secretary, and Simpson who succeeded him as Principal Clerk in the Criminal Dept.; had been concerned in handling Beck's appeals against an unjust conviction and a lengthy gaol sentence.

\(^{58}\) The Criminal Appeal Act, 1907. (7 Ed.VII, C.23)

\(^{59}\) See Case file cited at 40 below. Three men from the colliery village of Butterknowle, Co. Durham, had been arrested for this murder which occurred on the night of Feb.20th 1884. Sgt. Smith had turned out between 60 & 70 men from the Diamond Public House in Butterknowle at closing time. As they left Siddle was heard to call on some of them "to go back & rib the Sergeant." Shortly afterwards two local doctors, Middleton & Garrick, who had also been drinking, heard cries for help and found the body of Sgt Smith on the hillside below the pub. The policeman had been kicked and beaten to death. Standing near the body was a man whom they later identified as Siddle. This I.D. was corroborated when a shirt button was found at the scene of the crime which could be matched with a garment in Siddle's home. Lowson and Hodgson were separately identified as having been near the scene at the time. All three represented by G. Maw, a solicitor of Barnard Castle, relied on a defence of mistaken identity. Siddle & Lowson were convicted and Hodgson found not guilty.
doubts about his guilt. Nevertheless, one week later, on May 9th, the Governor sent to the Home Office a copy of a letter written by Siddle to his parents and an appeal containing an account of his actions on the 20th February 1884, the night of the murder. In his appeal Siddle claimed that on that night "he was proceeding home with Ralph Blackett and heard the cries of someone in trouble." He left Blackett and went on to find Lowson and Hodgson kicking the fallen body of Sergeant Smith. He claimed to have interfered and to have called for help. Whereupon Lowson and Hodgson ran off. When the Doctors arrived he himself ran off knowing that,

if I said anything about Lowson, he having married my sister, and having two children and her near her confinement, there would be nothing for him but being hanged.

He also claimed that when he told this story to the Solicitor, G.Maw, retained by the Mineworkers Union to defend all three prisoners, the solicitor had said that any statement he made" would not be believed . . . and would bring his brother-in-law into it." Maw persuaded him "to stand his trial with the other men and that he (Maw) would be able to pull all three of them through it."

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60 See Chapter 4, p 1 above.
61 H.O.144 Series, Case #A35443, William Siddle & Jos. Lowson (1884). These two documents were dictated by Siddle in the condemned cell and written by one of the two warders detailed to watch him. Like many such documents in the H.O.144 files, these are clearly a 'translation' by the warder of the thoughts which the prisoner wished to express. Their language is a mixture of the prisoners own words and the 'official' jargon of the prison world.
A copy of this statement went at once to the Judge, Hawkins, who replied on the 16th May that it "had not altered the opinion I have already expressed." It was first seen in the Home Office by C.E.Troup, one of the new open entry clerks, and he minuted on it:

His statements as to his accompanying Blackett and then turning back and as to his speaking to the Doctors are true but do not afford much support to his assertion of his innocence.

The evidence shows that of the three prisoners it was Siddle who had a grudge against the Policeman, and Siddle who suggested they should go back and rib the Police.\textsuperscript{62}

Both Murdoch and Liddell\textsuperscript{63} saw the papers and added nothing further to them and Troup became quickly engaged in trying to resolve a typical bureaucratic conflict between the Under-Sheriff of Durham and the Governor of the Gaol.\textsuperscript{64} The Under-Sheriff wrote to ask that the Governor find accommodation and entertainment for the executioner on the nights preceding the execution. He complained that on previous occasions Marwood had been the object of competition amongst the inn-keepers of the city and had spent the evenings in a place of honor, surrounded by riotous crowds plying

\textsuperscript{62} Case File cited above. Minute of C.E.Troup, May 12,1884.
\textsuperscript{63} Liddell's name is conspicuously absent from these papers. It is possible however that in verbal discussion with Harcourt he contributed to the solution of the problem. See particularly Harcourt's personal note to him on May 20 below.
\textsuperscript{64} Case File cited above. A series of letters between May 11 & 20,1884.
him with drink. The Governor had argued, correctly that it was the responsibility of the Sheriff and that he had no budget for such expenses. Troup resolved this issue by diplomatic pressure on the Prison Commission but seems to have given no more time to the real subjects of Marwood's visit.

It was only when Siddle's statements reached Harcourt on the 16th May, just four days before the execution, that some serious attention was given to the matter. In a long and careful minute to Sir Adolphus Liddell on May 17th Harcourt wrote,"I have an uneasy feeling that the story told by Siddle in his various declarations may possibly be true." He then proceeded to review the statement pointing out that nowhere was it in conflict with the evidence produced by the prosecution. Finally he identified the two areas in which it was especially significant. "What tends to give cholera to it," he declared,
is the fact that whilst Lowson and Hodgson unquestionably made off after the murder Siddle remained at or close to the spot and when Dr Garrick came up he informed him... that the poor policeman was killed and showed him where the body was...

Harcourt went on to discuss the role of the solicitor, Mr Maw, who, he notes, "persuaded Siddle not to make this statement to the Police because, though it would clear himself, it would fatally convict Lowson and Hodgson." In order to test the truth of the matter he

65Case File cited above. Harcourt minute, May 17, 1884.
instructed Liddell to arrange for Maw to be questioned by the Treasury Solicitor and that Hodgson, the acquitted and therefore invulnerable co-defendant, should also be examined. Finally further evidence was to be obtained from the doctors. Since time was so pressing he gave instructions for a weeks respite of execution to be granted.

Harcourt completed this extended minute during the morning of Friday May 17th and by that time he was clearly convinced of the possibility of a miscarriage of justice. He was also fully aware of how little time was left before the execution, due to take place in two and a half days time, on Monday 20th May at 8 a.m..m. He therefore wrote a further note to Liddell:

Hawkins is out of town so we must act on this today.
I send you my minutes upon it. The Cabinet meets at 12 & will probably sit till 2. If you will come to the outer room at 10 D[owing] S[reet] I will come out. . . You had better bring Stephenson.\textsuperscript{66}

It was clearly a busy meeting because Harcourt sent out, on Downing St paper, a draft telegram to the Governor of Durham Gaol ordering the respite of the two prisoners and a separate instruction for Liddell asking him,

. . . to take care that there is someone in charge [at the Home Office] to acknowledge the Durham respite, so as to make sure

\textsuperscript{66} Augustus Stephenson, shortly to become Director of Public Prosecutions (under the Prosecution of Offences Act of 1884) was still Treasury Solicitor.
there is no miscarriage... Murdoch will no doubt take charge of this & not leave until it is certain the respite has arrived... 
Before the enquiries set in hand by Stephenson were complete the matter was dramatically resolved by a voluntary statement from the convict Joseph Lowson. This statement was made on the 19th May, in the presence of the Governor of the prison, but addressed to Sir William Harcourt. It was once again a curious mixture of his own and other's words:

I write these few lines telling you the truth and begging for mercy, hoping you will give me a bit severe punishment and send me home again...

It was a statement that totally confirmed Siddle's detailed account and made clear that Joseph Hodgson, the acquitted prisoner, had been fully involved in the crime."Siddle", he declared, is an innocent lad and you must not keep him another day and we were all in the public house from five o'clock till ten and we were all more or less drunk.67

He added a belated and pathetic footnote "I would rather be hanged than have penal servitude for life."

When Harcourt read this confession, on the 20th May, he wrote a personal note at once to Liddell beginning,"How true our instincts were, we have saved the life of an innocent man."68 An immediate

67 Case File cited above, Letter from Governor of Durham Prison to Home Office. A telegram was sent on May 19 but a copy is not on file. 68 Case file cited above. Note from Sir Wm Harcourt to Hon. A.F.O.Liddell, May 20, 1884.
reprieve was sent for Siddle but in Lowson's case the law was allowed to take its course. On June 6th the Treasury Solicitor's report was received and it clearly confirmed the statements of the two prisoners since Siddle received a free pardon on June 9th 1884. The report of the Treasury Solicitor\textsuperscript{69} is, alas not on the file and we have no account of how Mr Maw justified his suppression of Siddle's original statement.

The case of Israel Lipski, in 1887, comprises one of the largest dossiers in the H.O. archives and its size is a fair reflection of the trouble which it caused.\textsuperscript{70} In the context of this chapter it has a special significance, as an account of the breakdown of the prerogative process. It illustrates the vulnerability of this process when its mantle of secrecy was removed by indiscretion and the successful intrusion of the press. It also reveals more clearly than any other case, before that of Adolph Beck, the relative impotence of the Secretary of State and his Office as judicial investigators.

This account of a fascinating "Locked-Room" murder will therefore focus first on the effects of the breakdown in the confidentiality of the discussions between the Secretary of State and the judge. The result of this indiscretion was to bring about

\textsuperscript{69} The report was prepared by Henry Cuffe, later Lord Desart, and Stephenson's successor as Director of Public Prosecutions. At the time he was Assistant Treasury Solicitor.

\textsuperscript{70} There are over 350 documents in this file, many of great length. An 'average' file is perhaps 10\% of this size.
what the press, in its own words, described as "Trial by Journalism".\textsuperscript{71} In this case, however, there were two men on trial. Lipski and Mathews. Mathews was not put on trial for his illiberal conscience, as might have been the case in a conventional prerogative case, but for his judgement and competence. It was under these circumstances that a second limitation on the great theoretical power of the Secretary of State becomes crucial. No attempt had been made in the preceding decades to create a coordinated and responsible management structure over the various sub-departments for which the Secretary was technically responsible. Since there was no internal mechanism for assigning accountability to those responsible for the investigation and prosecution of this offence, Mathews found himself personally directing a total 're-investigation' of the case, and doing so in a time framework designed only for the consideration of appeals 'in mitigation'. What was a reasonable opportunity for the exercise of his 'official' conscience was wholly inadequate for the conduct of a wide-ranging criminal enquiry.

July 1887 was a particularly difficult and embarrassing month for the Secretary of State, Henry Mathews, and the staff of his Criminal Department. In June a Miss Cass had been arrested for soliciting for immoral purposes in Regent's Street. She was

\textsuperscript{71} Evening News, Aug 16,1887 - "How the Lipski Respite was Worked".
discharged by the Magistrate, who was highly critical of the conduct of the Police in this affair. Mathews, intent on pursuing a policy of repressing prostitution, staunchly supported the actions of the police in the face of a rising tide of Parliamentary and public protest. The former was so effective that on July 6th an Opposition motion to appoint an official enquiry was narrowly passed. While a subsequent enquiry by the Lord Chancellor, which opened on July 6th, absolved the police of corruption or misconduct in the matter, its proceedings made good copy for the libertarian press. To make matters worse Sir Charles Warren, the Commissioner of the Metropolitan Police, proceeded to instruct his men to ignore the Home Office policy of repression, and did so without reference to either Mathews or his staff. For both Warren and Mathews there was the further pressure of rising tension in the streets as groups of London's unemployed continued to gather in Trafalgar Square and to ignore Warren's attempts to ban public gatherings on the dubious authority of the Trafalgar Square Act of 1839. The Home Secretary was being cast by the Liberal opposition into the role of a powerful but insensitive autocrat. There was, however, no indication of an even greater embarrassment ahead, when, on July 29th the

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72 Mr Newton, Stipendiary Magistrate at Marlborough St. Police Court (July 1, 1887)
73 Motion of Mr Atherly Jones.
74 Petrow, op. cit p.118, (31 July 1887)
75 This problem continued to grow throughout the autumn culminating in the successful repression of 'Bloody Sunday' (Nov.13, 1887)
case of Israel Lipski came up before Mr Justice Stephen at the Central Criminal Court. On the following day, July 30th, Lipski was convicted of the brutal murder of Miriam Angel. Since he was convicted and sentenced on a Saturday morning it was possible for the Under-Sheriff of London to fix his execution for Monday August 15th, only sixteen days away\textsuperscript{76}.

The crime of Israel Lipski\textsuperscript{77} seems to belong, with its apparently senseless but horrifying violence, more to the twentieth than the nineteenth century. Indeed the failure of those who, at different stages in this case, tried to find a plausible explanation for it, is an important ingredient in the confusion which ensued. There is here a foretaste of the vastly greater confusion and hysteria which followed a series of equally senseless killings in Whitechapel in the following year - the crimes of Jack the Ripper. The events of this unusual case will be traced in some detail because in the course of its resolution it exposed all the limitations on the judicial power of the Secretary of State. The case falls into three phases. During the first a hurried prosecution convicted Lipski of murder but left many aspects of the case unresolved. In the second a Home Office enquiry disposed, or assumed it had disposed of, a defence petition. In the critical third phase the Home Secretary was forced, by the indiscretion of the

\textsuperscript{76} These sixteen days nevertheless included the traditional minimum of three Sundays between sentence & execution.
\textsuperscript{77} H.O.144 Series, Case # 47465, Israel Lipski, 1887.
Judge, and unprecedented Press attacks, to change his mind and reopen the case. Unable to distinguish between his personal responsibility for the exercise of mercy and his executive role as the Minister responsible for the executive arms of Justice in the Metropolis, Mathews became personally involved in the day-to-day direction of a criminal investigation. This was, it must be observed a distinction which Parliament and public alike also chose to ignore. Mathews was not a Minister of Justice but he was treated as if he had been.

On June 28th 1887 the dead body of Miriam Angel was found on the bed in the room she shared with her husband in Batty St, Whitechapel. She had been beaten about the head and nitric acid had been forced down her throat. Beneath her bed was the apparently insensible body of Israel Lipski. Police enquiries quickly established that a man of Lipski’s apparent age and appearance had purchased an ounce of nitric acid from a local shop on the morning of the crime. The shopkeeper, Mr Moore, was taken to the London Hospital where he identified Lipski as the purchaser. There was no

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78 Israel Lipski was a 20yr old, Yiddish speaking, Jew born in Warsaw. He had been in England for less than two years, one of many refugees who had recently settled in London’s East End. A stick polisher by trade, he had recently taken a workroom in the same tenement house in Batty St as Miriam Angel and her husband, also immigrants.

79 Case file cited above(76). Evidence of Nurse Miles & others in Judges trial notes. The identification was, no doubt assisted by the
evidence of any prior connection between Lipski and the victim and the brisk prosecution by Messrs Poland and (Charles) Mathews, the Treasury Counsel, offered no suggestion of motive. This latter task was quite improperly undertaken by Mr Justice Stephen in his summing-up, when he said that the prisoner might have seen the woman in bed through a window on the stair case, suddenly determined to enter the room for an immoral purpose and killed her when she resisted him. The jury brought in a verdict of guilty after less than ten minutes deliberation and so completed what had been, even by the normal standards of Victorian justice, a very hurried prosecution.\(^{80}\)

The trial had had all the appearances of an "open and shut" case and the staff of the Home Office's Criminal Department followed their now well established routine in capital cases. There is, nevertheless already evidence in the documents of a feeling that that matters might have gone a shade too quickly. Charles Murdoch prepared a more than usually detailed synopsis of the case and with Godfrey Lushington's approval, and with the assistance of the Foreign Office, began enquiries into the antecedents of both Miriam Angel and Israel Lipski.\(^{81}\) On August 3rd Mr Justice Stephen's notes

\(^{80}\) Between crime and scheduled execution less than seven weeks would elapse.

\(^{81}\) Case File cited at 76 above, August 4, 1887, Report of Sir DeVilliers Lister, British Consul at Warsaw. The consul failed to
arrived, 181 pages long. Nevertheless, "There were," he said in a covering letter, "a few impressions in my notes of matters which turned out to be of more importance than appeared at the moment." He suggested that the Home Office might also wish to refer to the Old Bailey Session Papers\textsuperscript{82}.

The initial investigation and the trial itself had, indeed, resolved few questions beyond that of the prisoner's guilt, guilt which rested on a foundation of otherwise inexplicable circumstantial evidence. Even so the case might have remained obscure for ever had it not been for the efforts of an elderly London solicitor, John Hayward\textsuperscript{83}. Convinced that his client, "a quiet, inoffensive, industrious young man," was innocent and that the defence counsel at the trial had failed to present his original brief\textsuperscript{84}, he set about taking his case to anyone and everyone in London who might have influence with the Home Secretary. On August 6th his appeal arrived at the Home Office together with a printed turn up any information on either person. The lack of any official information on these aliens is in startling contrast to the complexity of regulations today.

\textsuperscript{82} Ibid, Letter of Mr J. Stephen, Aug.3 1887. This was normal practise in non-capital cases where Judge's notes were rarely submitted.

\textsuperscript{83} A reporter from the \textit{Evening News} who interviewed Hayward on August 17, when his campaign was at its peak, had "expected to find Mr Hayward a smart young man, full of energy . . ." but he found instead "an absent minded old man."

\textsuperscript{84} Two junior counsel had been employed, Messrs MacIntyre and Geoghan.
pamphlet\textsuperscript{85} setting out Lipski's own account of the events on June 28th and at the same time detailing the main elements of doubt in the prosecution's case. A copy was also sent to every Member of Parliament, to the Editors of every major newspaper and to many prominent men in the City of London. In this enterprise Hayward seems to have had help, probably from those rich and benevolent leaders of London's Jewish community who had rallied to the cause of that other Jewish immigrant under sentence of death, Jacob Riegelhuth, in 1885.

According to Hayward's account Lipski had himself been the victim of two men\textsuperscript{86} whom, it was alleged, had also murdered Miriam Angel. While no direct evidence of this theory was available such credibility as it had rested on doubts about the prosecution's case.\textsuperscript{87}

\textsuperscript{85} The Case of Israel Lipski, now under sentence of Death for the murder of Miriam Angel, Jno.Hayward, Sol: for the Defence, London Hepburn &Co.
\textsuperscript{86} Simon Rosenbloom & Israel Schmuss, two other Polish refugees whom Lipski had brought to to his workroom on the day of the crime as prospective employees.
\textsuperscript{87} There were three weaknesses in the hastily prepared prosecution case:

1) The identification of Lipski as the purchaser of the nitric acid had not extended to identification of the bottle found at the murder scene.
2) The amount purchased was argued to be inadequate to have poisoned both M.Angel & Lipski and destroyed most of Lipski's coat, found at the scene.
3) Lipski argued that other occupants of the house had been involved in the murder. If not they must have heard sounds of the violence being committed in the room below them. (The police had obtained no account of activities of these people up to this point)
These were not inconsiderable doubts but they were insufficient to convince the Home Office. After further investigation of the points raised in the petition, summarized by Lushington and considered by both Mathews and Stephen at a meeting on Friday 12th August, the appeal was rejected. Up to this point the case had been handled as a matter of routine, with minimal involvement by the Secretary of State.

Little might still have come of Hayward’s efforts had he not been introduced to Mr Justice Stephen by Sir Edward Clarke, the Solicitor General. In the following week Hayward had two meetings with Stephen and then retailed his discussions, and more significantly, the Judge’s doubts\(^8\) to one of the contemporary leaders of the popular press.

After his first interview with the judge Hayward had been advised to meet W.T. Stead, the editor of the *Pall Mall Gazette*,\(^9\) and a pioneer of investigative journalism.\(^9\) Stead was quick to see the

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\(^8\) After the first meeting the Judge’s clerk is alleged to have told Hayward
"The governor is terribly worried about it. I have never known him so bothered about a case in all the forty years I have been with him."

\(^9\) Founded in 1865 and edited for some years by John Morley, the *Pall Mall Gazette* had become by the 1880’s one of the most influential of London’s evening newspapers. With strong Liberal connections, it continued to outweigh its rival the *St James’ Gazette*. See Stephen Koss, *The Rise & Fall of the Political Press in Britain*, Chapel Hill, 1981.

\(^9\) Stead became Asst. Editor of the *Pall Mall Gazette* in 1880 and Editor, on Morley’s departure in Aug. 1883. As Editor he had helped provoke the middle class reaction against public prostitution already referred to above and, in particular, against the employment
possibilities of the case and, in particular, of Hayward's interview with Stephen. These were to be political rather than humanitarian issues, vehicles for an assault on the Home Secretary and his conservative and authoritarian exercise of power. Neither Hayward, who was now wholly committed to saving his client's life, nor Stead allowed the confidentiality of that discussion to impede them and on the afternoon of Saturday August 13th there appeared a spectacular special edition\(^1\) of the *Pall Mall Gazette*. Its leading article was headlined -

**Hanging an Innocent Man.**

Conversion of Mr Justice Stephen.

But a reprieve is Refused.

In the paper's account of Hayward's second interview with Stephen it was said of the Judge that,

his anxiety, his agony of mind were obvious. "It would be a terrible thing," he said, "to hang this man when in reality he may have been half-killed by the real murderers. . . . Why was all this not submitted to me before? I can not

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of juveniles in this business. For his sensational 'purchase' of an under-age girl he was justly, if briefly imprisoned. But his apparent martyrdom & his subsequent editorial "The maiden Tribute of Modern Babylon" (July 6 1885) won him fame and increased circulation for the PMG. It also hastened the passage of the Criminal Law Amendment Act which, passed in Sept 1885, greatly strengthened the existing law against procurement, living on immoral earnings and the juvenile prostitution.

\(^1\) *The Pall Mall Gazette* went through five Editions on Sat, Aug. 13. That containing the account of the Stephen interview was the fifth.
tell you what I think, but I can tell you that if I were not I,
I should heartily wish you success.92.

Elsewhere in the paper there was a full review of the case and
finally the pressure was turned on Mathews himself, because he
would not admit to the same doubts as the judge. In an article,
headlined "A legal Murder," it wrote,

Mr Mathews, who was so sure the evidence against Miss Cass
left no doubt she was soliciting in Regent Street, is now
quite sure that the unfortunate Lipski committed murder
in Whitechapel.

Having set up the question of Mathew's judgement, the article
continued with an attack on the secrecy and obscurity of the
prerogative process:

But in the case of Lipski all will be safe. Dead men tell
no tales and the ghosts of the legally murdered never haunt
the corridors of the Home Office.

Lord Salisbury, must, it was argued, insist on a respite for at least
another week to allow the defence time for further investigation
because "The Prime Minister must know by this time that he cannot
trust the judgement of his Home Secretary".

This sudden burst of unwelcome publicity was echoed in the
House of Commons that afternoon when Mathews had to answer
repeated questions on the case from Cunningham Graham.93 Mathews

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92 Pall Mall Gazette, Sat, Aug. 13, 1887.
93 Graham was the Liberal member for South Lanark and a leader of
the protests by London's unemployed in 1886/7. With John Burns and
successfully blocked these questions by recourse to the Parliamentary tradition which did not allow questions on Prerogative of Mercy issues. He did, however, add a comment on the report of Stephen's statement. Reporting that the Judge condemned it as false and irrelevant, he concluded that the Judge, 

...is in no degree dissatisfied with the verdict or my decision ... He says "I did not at the time feel so clear and strong in my opinion as you did but your decision has neither surprised me nor given me the least uneasiness."

This last qualification was particularly unfortunate since it was promptly snatched up as more evidence of a disagreement between Stephen and the Secretary of State and given headlines in the Pall Mall Gazette.94

It is never the less clear that Mathews' self confidence was ebbing since later that day he, himself, agreed to a personal meeting with John Hayward. Of this meeting at the Home Office, also attended by Godfrey Lushington, only Mathews left any record, an ill-written and inconclusive summary of Hayward's arguments entitled, "Things not brought forward at the trial."95

It is, however, not so clear whether at this point Mathews had already decided to change his mind and grant Lipski a respite for

W.T. Stead he was to be a founder of the Law and Liberty League and to stand trial with Burns, for inciting a riot, in the aftermath of Bloody Sunday (Nov.13, 1887). Despite a notable defence by H.H. Asquith both were convicted and gaol'd.

94 Pall Mall Gazette, Monday, Aug.15, 1887.
95 Case File cited at 52 above, Saturday, Aug.13, 1887.
further enquiries or whether his mind was made up for him by a telegram which arrived at the Home Office from Mr J Stephen early on the following day, Sunday 14th August. While denying that he had changed his mind the Judge proposed a respite of one week.

In a letter written on the same day to Lushington, Stephen sought to explain away this apparent vacillation and to offer to assume some of the responsibility for the ridicule which must now fall on Mathews. He had, he said "been so much pressed by other business . . . that I could hardly be sure that I might not, on full and quiet consideration, see grounds to change my mind."

In the event another meeting was held at the Home Office on Sunday morning, and attended by a diverse collection of people. There were present Godfrey Lushington, Dr Stevenson, the analyst, the detectives, Inspector Finial and Sgt.Sims, and Mr MacIntyre, the defence counsel. This strange roll-call, and especially its absentees, is deeply revealing of just how ill-equipped and how ill-experienced the Home Office was for the exercise of executive power. The heads of the two critical Departments, the Department of Public Prosecutions and the Metropolitan Police and the latter's

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96 From Salcombe, in Devon, to which Stephen had gone on holiday, after his last meeting with Hayward.
98 Ibid, Letter of Mr J. Stephen to G.Lushington, Aug.14, 1887. This Mss, which is particularly hard to read, is, both in its script and its convoluted construction, very revealing of the distressed state of its author.
99 It is not clear why no recourse was had in this case to Sir Augustus Stephenson, or his assistant Cuffe. They had managed the
subordinate, the Director of the Criminal Investigation Department were not present. It was these three who properly should have been held responsible for any doubts about the prosecution's case and for organizing any efforts to remedy the situation. No minutes have survived beyond a set of very specific instructions in Mathews' own hand for further enquiries into some critical areas of the evidence - the state of the door-lock, the amount of poison used and the whereabouts of the man Schmuss. At the end of the meeting a telegram was sent to the Queen's Secretary at Osbourne\textsuperscript{100}:

Convict Lipski has been respited for one week merely to enable his solicitor to make enquiries, not from any doubt in the Secretary of State's mind.\textsuperscript{101}

A similar telegram was sent to the Governor of Newgate and, in an unprecedented initiative, to ten leading national newspapers and press agencies.\textsuperscript{102}

\textsuperscript{100} Major Bigge, later Lord Stamfordham. Osbourne was the Queen's country home on the Isle of Wight.

\textsuperscript{101} Telegram to Osbourne, Sunday, Aug.14, 1887.

\textsuperscript{102} The list, which did not include \textit{The Pall Mall Gazette}, was \textit{The Times}, \textit{The Standard}, \textit{The Morning Post}, \textit{The Daily Telegraph}, \textit{The Daily News}, \textit{The Daily Chronicle}, \textit{The Morning Advertiser}, \textit{The Press Assoc.}, \textit{The Central News Agency} and Reuters.
At this highly critical point in the affair it is possible to consider the extent to which the 'normal' operation of the Prerogative of Mercy had broken down. The traditional secrecy of the consultation between Judge and Secretary of State had been discarded. The modest extent of their differences had been revealed and magnified in the public domain. Both the Judge and the Secretary of State had broken the rule firmly established by Sir George Grey, of never giving interviews to petitioners for the Royal Mercy. In the published notice of the Respite Mathews had abnegated the hitherto jealously guarded exclusivity of the Crown in Prerogative enquiries, taking as it were the defence into partnership. In this last development, and in bowing to the need to practise some elementary public relations, Mathews had ensured that every step in the subsequent investigation was going to be public knowledge and his final decision wholly exposed to public controversy. In all of these respects, and particularly in assuming the personal direction of the case, Mathews had stepped outside the protective screen of his own bureaucracy and the rules and practises which they had tried to establish for his safety. Like the walls of Jericho they had fallen before one good blast on the new trumpet of the popular press.

The coincidence of the disclosures in The Pall Mall Gazette and Mathews' abrupt change of front was too striking to escape comment and, while the Monday editions of The Pall Mall Gazette proclaimed it as a triumph for justice, others were more cynical. The Evening
News declared that Lipski's life had been saved for a week by "Trial by Journalism."\textsuperscript{103} The Birmingham Post ponderously observed:

Whalebone is doubtless an admirable provision of nature in the huge fish . . . but it makes a poor backbone for a Home Secretary and neither in the Cabinet nor the Country are Mr Mathews weight and authority likely to be much strengthened by his latest exhibition of pliancy and vacillation.\textsuperscript{104}

The Glasgow Herald was blunt when it asked,

What made Mr Mathews reverse the decision he had previously come to? What conclusion can we come to but that it was the Pall Mall Gazette that frightened the Home Secretary and that another step in the direction of Government by Journalism has been taken.\textsuperscript{105}

For the rest of the week Mathews was to be the target of questions in the House of Commons and of daily abuse in the press, particularly in the Pall Mall Gazette which ran a continuous column under the heading "The Race for Lipski's Life." The only silver lining to this otherwise cloudy week was the fact that Mr Justice Stephen, now thoroughly alarmed\textsuperscript{106}, kept a low profile.

\textsuperscript{103} Evening News, Aug.16,1887, "How the Lipski Respite was Worked."
\textsuperscript{104} Birmingham Post, Aug.16,1887.
\textsuperscript{105} Glasgow Herald, Aug.16, 1887.
\textsuperscript{106} In his letter to Lushington, cited above, the Judge had written ". . . his[Hayward's] conduct has made it absolutely impossible for me to hold any further communications with him, either direct or indirect."
The parallel enquiries of both Mathews and Hayward were energetic but diffuse and unproductive. Lipski's prospective employee Schmuss, one of those he claimed had murdered Miriam Angel, was found in Birmingham and brought to London amidst great publicity. He was interviewed in Mathews' own presence and his clothes were examined by Dr Stevenson for traces of acid. No evidence could, however, be found linking him to the crime. The door-lock from Batty Street was removed to the Home office and declared to be both new and in good working order. Despite reports that a second man had purchased a quantity of nitric acid in Whitechapel on the morning of the murder he was never located. On August 18th Inspector Trowbridge of Scotland Yard submitted a 25 page report on these new investigations but offered no new explanations. On the following day Godfrey Lushington, himself, summarized the evidence on the issues raised by Hayward and wrote against each item - "Nil". It was perhaps the most decisive document in the case since it restored Mathews' self-confidence. On the afternoon of the next day, Saturday 20th August, less than forty eight hours from the postponed execution, Mathews met Stephen at the Home Office and they agreed to let Lipski hang.

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107 An event which allowed the Birmingham Papers, *The Herald, The Post & The Chronicle*, to rehearse the whole case all over again. (Aug.19, 1887)
108 Report of Dr Stevenson, Aug 17, 1887.
The editor of *The Pall Mall Gazette*, aware, perhaps, of just how little had been accomplished for Lipski during the week, ended it on a more modest note, with an appeal for "The benefit of the doubt" and strongly featured an appeal for mercy that had been got up in the House of Commons. This appeal, which had over one hundred signatures,\(^{110}\) was, it claimed, to be presented to the Speaker that very day, by Mr Cunningham Graham. There was, however, both in the House and in the Press, the beginnings of a backlash at the violence of the attacks on Mathews and the petition was properly rejected by the Speaker that evening, to widespread applause. Mr Labouchere's paper, *The Rock*, did, indeed, continue to pursue its satisfying policy of mixing an issue of high principle, the establishment of a Court of Criminal Appeal, with simultaneous abuse of Mathews:

> It is perfectly clear that to place a human life at the mercy of one man, who may be nothing more than a timid and backboneless official, is highly dangerous and disgraceful to our code.\(^{111}\)

*The Morning Advertiser*, on the other hand, came out strongly on Mathews behalf:

> Mr Mathews has bestowed on this extraordinary case the closest and most anxious consideration, accepting every tittle of evidence that could be adduced in favour of the culprit,

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\(^{110}\) *Pall Mall Gazette*, Sat. Aug.20, 1887. It appears to have been heavily subscribed by both Liberal and Irish members.  
\(^{111}\) *The Rock*, Friday, Aug.19, 1887.
everything being received, to quote his own words, with an open and impartial mind. It must be remembered that he is assisted by men of the greatest experience . . . including the learned Judge who presided at the trial and thus is constituted a Court of Criminal Appeal that should inspire the public with confidence.\textsuperscript{112}

There was, however, more substantial relief at hand for the beleaguered Mathews. On the Sunday morning preceding his execution Lipski made a full confession, in front of both a Rabbi and Colonel Milman, the Prison Governor\textsuperscript{113}. News of this dramatic development reached Mathews on Sunday afternoon and, having summoned Stephen to the Home Office, a coded telegram was sent to the Queen at Osbourne. He received in reply what may have seemed to him a rather perverse reminder of the normal and proper function of the Prerogative of Mercy. Also in code, the message read:

Glad he confessed but are there any extenuating circumstances which would justify a commutation to penal servitude for life?

\textsuperscript{112} \textit{The Morning Advertiser}, Sat Aug. 20, 1887.

\textsuperscript{113} The original Mss of this confession was sent at once to the H.O. and is on file. In it Lipski admitted to entering Miriam Angel's room to steal money. When she woke "she cried out, but very softly," and he stifled her cries. Then, remembering the bottle in his pocket, bought, he said "for the purpose of putting an end to himself", he poured some down her throat and took the rest himself. Hearing footsteps on the stairs he hid beneath the bed. He withdrew the accusations against Rosenbloom & Schmuss without reservation.
Then, at ten minutes past eleven on Sunday evening, Mathews had the last words:

The matter was fully considered by the Judge, in consultation with me today. It was a most cruel murder, committed in the prosecution of a felonious purpose and without any extenuating circumstances. I fully concur with the Judge that the law must take its course. I thank your Majesty for your gracious suggestion.\textsuperscript{114}

The process of internal promotion and executive delegation continued, despite such episodes, to develop within the comfortable framework of established rule and precedent. In 1895 Sir Godfrey Lushington retired and was succeeded by Sir Kenelm Digby as Permanent Under-Secretary. Charles Murdoch was promoted to the position of Assistant Under-Secretary and H.B. Simpson, who had joined the civil service as an open-entry clerk in 1884, succeeded to his place as Principal Clerk of the Criminal Department.\textsuperscript{115} Simpson inherited a much enhanced responsibility. By the end of this last decade of the 19th century the Criminal Department had confirmed its authority over the Metropolitan Police and the Prison Commission but had taken no steps to improve its management of

\textsuperscript{114} All three telegrams are on file in decoded versions. A copy of the final message tantalizingly overlies the original ciphers, revealing insufficient detail with which to explore this interesting method of royal communication.

\textsuperscript{115} C.E.Troup at this point also became a Principal Clerk - of the newly established Parliamentary & Industrial Department.
their collective responsibilities. It was, moreover, dealing with nearly five thousand criminal petitions each year of which only those in capital cases invariably reached the Secretary of State. It was a substantial, if obscure concentration of power. These developments came, however, under intense and unexpected public scrutiny when, in 1904, a Public Enquiry was forced on Aretas Akers Douglas, then Secretary of State, into the Case of Adolph Beck, twice wrongly convicted of fraud. The Enquiry concluded, in 1905, that, among many failures in different parts of the criminal justice system, the Home Office had failed as "the reviewing authority to detect the flaw and redress the wrong." There was, however, a greater failure at which the report only hinted in its penultimate paragraph:

Our only other suggestion is that the different Public authorities should be brought into such coordination as to make it impossible that material information acquired by one of them affecting a prisoner should not be placed before all.

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116 Report of the Commission of Enquiry into the Case of Adolph Beck, Cd 2315 (1905) In an Appendix to this report a memorandum by Sir Kenelm Digby describes the Home Office procedure in respect of appeals & notes the volume of this work. Thus in 1900 there were 3966 appeals from prisoners serving sentences and 1377 from prisoners relatives and friends. These figures are fairly steady for the next five years. The Department took some action, under the Prerogative of Mercy, in 375 of these cases.


The Report of the Enquiry is the closest we can get to an objective and contemporary appraisal of the workings of the late Victorian Home Office bureaucracy. It is clear, from the tale which it told of Adolph Beck's misfortunes, that the power assembled in the Criminal Department was not being positively exercised and that the minds of those who held it were ruled by timidity and inertia.

In 1877 a man "calling himself John Smith"\textsuperscript{119} was convicted of defrauding prostitutes of cash and jewellery in return for bad cheques and promises of future luxury.\textsuperscript{120} In December 1894, after a rash of similar offences, one of the latest victims, Otilie Meissonier, saw Adolph Beck in Victoria street and identified him as the culprit. Beck was arrested and his identification confirmed not only by several other prostitutes but also by a retired Police Constable Spurrell, who had originally arrested Smith some nineteen years before.

The prosecution was conducted by the Director of Public Prosecutions, whose Assistant, Mr Sims, also obtained from the Prison Commission details of the 'identification marks' of John

\textsuperscript{119} Ibid, Report page ii. He also called himself Lord Willoughby or Lord Winton De Willoughby and no positive identification ever emerged in the Enquiry.

\textsuperscript{120} He promised to set them up in an establishment which he claimed to own in St John's Wood - to this day a district of expensive but morally suspect property.
Smith. With the aid of the Metropolitan Police, he concluded that Smith and Beck were one and the same person. At his arraignment Beck was charged on five counts, including a repetition of the specific offences for which Smith had been convicted in 1877. In order to prove these latter offences Sims produced expert evidence that the handwriting on the exhibits in 1877 and 1896 was identical. When, however, after long delays, Beck came up before Mr Forrest Fulton, the Common Serjeant, at the Central Criminal Court. He was indicted on only one count, specifically relating to the recent offences and in the name of Adolph Beck. His experienced Counsel, Charles Gill, attempted to set up a defence of alibi and to do so in two stages; first to prove that the handwriting in the Crown's exhibits, cheques and letters, was identical to that of the 1877 offender and then to prove that his client had been in Peru at that time! This defence failed because the Treasury Counsel, Horace Avory, objected that such evidence was irrelevant to the specific indictment being tried and he was sustained by the Judge. Beck was convicted and sentenced to seven years penal servitude. Once in Gaol the Prison Commission assigned him the same number as that once held by John Smith and the distinguishing clothing of a recidivist.

121 Finger prints had not been in use in 1877 and the marks were records of height & weight and some bodily scars, whose lack of coincidence was overlooked. 122 The Common Serjeant was the Senior Magistrate of the the City of London. While not a Judge of the High Court he was a permanent Commissioner of Assize at the Central Criminal Court, where he sat with other more senior Judges.
Beck began immediately to petition the Home Office on the
grounds of mistaken identity but his appeals were rejected on the
grounds that both the Judge and jury had specifically addressed this
question and accepted evidence that Beck had committed the frauds
in 1894. Such evidence was, in the Judge's words "overwhelming."
Neither H.B.Simpson nor Charles Murdoch noted that the common
identity of the handwriting in the two cases, which had been
established at the preliminary hearings, made the question of alibi
central to a proper defence. A Home Office minute on one of Beck's
early appeals reads as follows:

Mr Gill tried very hard to raise and press the point put forward
in the memorial that the writing of the cheques was the
writing of the man convicted in 1877 and if he had succeeded
he had witnesses to prove that Beck could not be the man as he
was out of the country. Mr Avory objected & the Judge
supported him. It was a clever ruse because how could his
witnesses' evidence be disproved, it would have been very
difficult indeed I should think.\footnote{Report cited above at note 104. The writer of this minute is not identified in the Report. It was probably Simpson since Pellew, op cit, p.241 note 22, suggests that he received, or felt he had received, most of the internal blame for the Department's shortcomings in this affair.}
Despite these rejections the prisoner's solicitor, T. Duerdin Dutton, persisted and in 1898 succeeded in getting the Home Office to reopen the case. In the course of this investigation it emerged that, towards the end of his sentence, John Smith had applied to the Prison authorities to be treated as a Jew and had offered as evidence his circumcision. The Prison doctor had confirmed this fact but had not noted it on his physical record. Beck on the other hand had never been circumcised. This new evidence was immediately sent to the Judge, Sir Forrest Fulton, who was not impressed. This time Murdoch wrote a minute which was countersigned by Sir Kenelm Digby:

The Common Serjeant has not the slightest doubt that Beck is the man who robbed the women in 1895: whether he is also the man who was convicted of a similar offence in 1877 is open to doubt but this is really immaterial as Beck is being punished only for the offences proved in 1896. Nil. let the Convict be given a fresh Prison Number so that his identity with D523 should not be affirmed.

Beck continued to serve his sentence and was released on license in July 1901 only to be arrested again in April 1904 when a further outbreak of this unusual crime led the police to consider him as a prime suspect for such offences. He was once again convicted

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124 Dutton was an experienced criminal lawyer who had represented, among others, Percy Leroy Mapleton in the Brighton Train Murder in 1881.
but on this occasion the Judge, Mr J. Grantham, delayed sentence for further enquiries. While these were in progress and Beck still in custody, the solution to the puzzle of identity was finally revealed. Smith was arrested again for his original offence. Beck was pardoned and released. His case was promptly taken up by the Press, first by the Daily Mail and later by The Times and the Home Secretary forced to appoint a Committee of Enquiry\textsuperscript{125}

In their Report the Committee properly identified the Judge's ruling, on the inadmissibility of the handwriting evidence, as crucial to the subsequent miscarriages of justice. Their criticism of his judgement was, never the less, muted and they pointed out that this was the sort of issue for which the Court of Crown Cases Reserved existed and recommended that the law be changed to allow Counsel, as well as Judges, to refer such purely legal points to that Court. The Prison Commission were censured for failing to record important elements in the physical description of their convicts, and the Police for failing to check the original identification of Beck. Their criticisms of the Home Office bureaucracy, however, were both more extended and more specific.

\textsuperscript{125} The Committee consisted of the Master of the Rolls, Sir Richard Henn Collins, a retired civil servant, Sir Spencer Walpole and an ex-member of the Council of India, Sir John Edge.
In his evidence Sir Kenelm Digby\textsuperscript{126} had submitted a memorandum describing the role of the Home Office in its exercise of the Prerogative of Mercy. In its broad outline of procedure it closely followed that given half a century before by Spencer Walpole to the 1864 Commission on Capital Punishment.\textsuperscript{127} Digby also stressed that the Home Office was not a court of review but a court of mercy and that it could only rarely, and in cases of the most obvious doubt, challenge the verdict of a court on issues of fact. He defended the necessity of delegation in the face of the great volume of work and in a particularly revealing passage declared that:

It is continually borne in mind that it is a matter of cardinal importance that the Home Office should act in cooperation with the Judges and a decided expression of opinion by an experienced Judge . . . is hardly ever disregarded. Any ill-considered action in opposition to judges might deprive the Home Office in the future of the friendly assistance it now received . . .\textsuperscript{128}

The Commission did not dispute this fact of establishment politics but did suggest that Sir Kenelm Digby might have questioned the verdict had he been better briefed by his staff.

That accomplished lawyer who then held the post of Permanent

\textsuperscript{126} Digby had recently retired and was called back to give evidence as the Senior Permanent official at the time of the 1896 trial.

\textsuperscript{127} See Chapter 4 above, p.176.

\textsuperscript{128} Report cited at 115 above, appendix p.3.
Under-Secretary could not have failed to realize the extent of the miscarriage had he felt himself at liberty to canvass the ruling of the judge.\textsuperscript{129}

The Enquiry focussed, instead, on the extent of delegation, and the lack of legal experience and judgement in the Criminal Department. The short fact is that if there had been any one in the Home Office in the chain of subordination, up to the Permanent Under-Secretary, whose legal training had enabled him to convey in a minute the real nature of the miscarriage, the attention of that official must have been attracted to the case in such a way as to compel intervention.\textsuperscript{130}

Sir Kenelm Digby was thus absolved from the duty of reading the papers in front of him before he signed them. The Report concluded: It is therefore, in our opinion, of the highest importance that the persons upon whom these duties are devolved should, at every link in the chain be lawyers.\textsuperscript{131}

When the Report came to be debated in Parliament both Akers Douglas and Herbert Asquith, a former Home Secretary\textsuperscript{132}, rallied to the defence of the Home Office. Akers Douglas claimed that, in a very proper attempt to shield the Judge, the Committee had "cast an

\textsuperscript{129} Ibid, page xiv.
\textsuperscript{130} Ibid, Report, page xvii.
\textsuperscript{131} Ibid, page xv.
\textsuperscript{132} Asquith was Home Secretary from Aug 1892 to June 1895.
undue proportion of blame on the Home Office."\textsuperscript{133} He also argued, with Asquith's support, that the legal resources of the Home Office were fully adequate. Never the less, in the following year, an additional Under-Secretary (Legal) was appointed\textsuperscript{134} and attempts were made to rid the Criminal Department of all but strictly criminal business.

A more significant consequence, however, was the creation in 1907 of a Court of Criminal Appeal. This Act\textsuperscript{135} permitted criminal appeals on issues of fact as well as of law and thus further reduced, if it did not wholly eliminate\textsuperscript{136}, the role of the Home Office as a review body in respect of the facts of a conviction. In cases where such facts gave rise to doubt it was, henceforth, open to the Home Secretary to refer them to the new court for a fuller review than he was capable of undertaking. The role of the Home Office as a tribunal of mercy continued, however, unchanged.

\textsuperscript{133} See Pellew, op cit., page 69. Hansard, cols 688-701, 21st March 1905.
\textsuperscript{134} Sir Ernle Blackwell (1906)
\textsuperscript{135} Criminal Appeal Act, 7 Edw.,VII, c.23.
\textsuperscript{136} The case of William Dickman, 1910, is described anonymously, but in detail, in Randolph S Churchill,\textit{Winston Churchill, Vol II} 1901-1914, Companion Volume, pp.1191 ff. Even after confirmation by the Court of Appeal of Dickman's conviction for an act of murder and robbery committed in March 1910, on a train, Churchill was very worried about the facts of the case and rehearsed them at length with Ernle Blackwell. The case is almost a carbon copy of the crime of Percy Leroy Mapleton in 1884.
Chapter Six

The Home Office as Tribunal of Mercy (1)

Coming to terms with insanity.

The three chapters which follow will examine the Home Office bureaucracy in its role as a 'Tribunal of Mercy'. In this capacity it was concerned to evaluate the circumstances of capital convictions, rather than the propriety of the verdicts themselves, and to determine whether there were any mitigating circumstances which might reduce the convict's strict liability to the punishment of death. These cases will be considered in three broad categories, all of which involved some elements of diminished personal responsibility although this generalized concept was unknown to the Common Law\(^1\). Such mitigating factors might be discovered either in the person of the convict or in the circumstances of their offence.

The first of these categories will reflect the reactions of lawyers and bureaucrats to the question of mental incapacity, whether due to immaturity, old age or disease. The second will

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\(^1\) The concept, was, on the other hand, long established in Scottish law. A formal verdict of not-guilty by reason of diminished responsibility was not recognized in English law until the Homicide act of 1957. (5&6 Eliz..II, c.11).
examine their response to contemporary ideas about the supposed physical and social limitations of women and young girls. The qualifications and exceptions to full adult liability which were admitted in both these categories help to define normative Victorian perceptions of fully responsible and autonomous adults. A third category of factors, including various sorts of provocation, drunkenness and in rare instances, extreme deprivation, illustrate the extent to which external social factors were allowed to have overstepped Society's reasonable expectations of self control and autonomy in such individuals.

In the legal trial of a murder indictment the circumstances of the prisoner and his motives were, as has been argued above,\(^2\) usually irrelevant, and such evidence inadmissible. They were, however, important elements in the exercise of the Prerogative of Mercy, when civil servants were striving to reach a coherent explanation of an offence and to determine its relative heinousness both in abstract moral terms and as a general threat to society. We have seen how, in the case of Israel Lipski, the failure to arrive at such an explanation led to much of the confusion which that case entailed. Stephen's supposition that it was a sexual crime was temporarily satisfactory, even if

\(^2\) See chapter #3, page 29, above.
unsupported by any direct evidence. Both Stephen and Mathews were ultimately content with the convict's own admission that he was intent on robbery and yet Lipski's confession is a confusing assertion both of his intent to rob and of his suicidal despair. In different circumstances such a statement might have led to questions of the man's insanity and, perhaps, only the total inability of those two officials to identify with this deracinated and culturally bizarre individual prevented such an explanation from occurring to them.

The decisions made in these cases naturally reflect the moral and social preconceptions of the legal and governmental establishment but they were also tempered by the need to reflect the views of a wider constituency. Throughout the period there was a political sensitivity to both national and local sympathies and a recognition by Secretaries of State that they must balance the demands of strict liability under the law and a more elusive concept, "the general ends of Justice." An earlier Home Secretary, Sir James Graham, expressed this practical, and utilitarian, aspect

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3 For example, Sir Geo. Grey in *Hansard*, Col 693, April 24, 1863:- "Altho' it was a clear case of murder, such a strong feeling prevailed that very great provocation had been given to the prisoner that the Lord Lieutenant, the Sheriffs and other persons of influence represented that public opinion would be shocked at the execution of the man and I felt that the sentence . . . could not be carried out with due regard to the general ends of Justice."
of Justice when he said:-

I think that it [mercy] is a distinct part of Justice, that it is a very solemn and awful trust resting on these principles. The Government is bound to preserve the peace of society, to see full protection given to life and property and it is bound to do so with the smallest infliction of suffering, even on the guilty, compatible with the attainment of that object.4

This chapter is in two parts. It begins by examining the efforts of the Victorian legal establishment to accept new, and more extensive, ideas about the limitations on legal liability due to insanity while, at the same time, protecting "life and property". It will also consider how traditionally narrow perceptions of childhood and old age were extended to embrace a changing sensibility in respect of the capital punishment of the young and the old. In both these respects the prerogative powers were used to achieve the kind of compromise which Sir James Graham described.

It was, and indeed still is, the assumption of the Common

4 Sir James Graham, Hansard, Col. 890, March 10th 1846.
Law "that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their [a jury's] satisfaction".\textsuperscript{5} This ready assumption of a common adult normality has proved, from the early 19th century, to be increasingly difficult to accommodate. The concept was rooted in an almost universal acceptance of a mind-body duality and as components of the former esoteric organ a combination of natural and supernatural elements. The reasoning mechanism located in the brain and the conscience, or will, as a supervening control, enabled man to direct and master his bodily, or animal 'propensities'. In normal operation a mind so constructed was as 'sound' as good lungs or an efficient heart. When two leading medical authorities, J.C. Bucknill and Daniel Tuke, looked for a definition of such 'soundness' or health in 1858 they cited a French writer from earlier in the century, Solomon Maimon. Maimon had written, "Mental health consists in that state of mind in which the will is free and in which it can exercise its empire without any obstacle"\textsuperscript{6}.

During the 19th century both the genesis of the moral

\textsuperscript{5} Royal Commission on Capital Punishment 1949-53, Report, p 391, The Rules in M'Naghten's Case, Question III, Answer II.
\textsuperscript{6} John Charles Bucknill and Daniel H. Tuke, A manual of Physiological Medicine, Philadelphia, 1858, page 89.
control mechanism and its normal operation were increasingly perceived by members of the medical profession to be the results of social and physiological factors. Such natural determinism clearly circumscribed the free-will of the individual and his full legal autonomy. The legal profession, while slower to accept this aetiology, were ready to accept that without adequate reasoning power, due to a defective or damaged brain, the dictates of conscience, the affective faculties, were powerless to moderate and direct human behavior. While the absence, or relative absence, of such reasoning powers was not hard to observe and to categorize by physical or verbal examination as congenital idiocy, cretinism

7 For example Henry Maudsley, Responsibility in Mental Disease, London, King, 1874 p.60, wrote "The medical physiologist must hold that the best of the argument concerning the origin of the moral sense is with those who uphold its acquired nature."
or imbecility and feeble-mindedness,8 defects of the will were less easily determined. They were, however, to be observed, as Isaac Ray noted, in the social behavior of individuals,

in a morbid perversion of the natural feelings, affections, inclinations, temper, habits and moral disposition, without any notable lesion of the intellect or knowing or reasoning facilities."9

During the 19th century the paradigmatic assumption that all abnormality of the mind was due to physical causes, to congenital defects of the brain, to its interrupted development or to subsequent lesion, by wound or disease, was extended by the

8 The Gower Commission Report in 1953 (Royal Commission on Capital Punishment (1949-53) noted (p.117) four categories of mental deficiency;
 a) Idiots... persons in whose cases there exists mental defectiveness of such a degree that they are unable to guard themselves against common physical dangers.
 b) Imbeciles... defectiveness which, though not amounting to idiocy is so pronounced that they are incapable of managing themselves or their affairs... 
 c) Feeble minded persons... mental defectiveness which, though not amounting to imbecility is yet so pronounced that they require care, supervision & control for their own protection... 
 d) Moral defectives... mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision & control for the protection of others.
 These categories, of the Mental Deficiency Act of 1927, had survived as the criteria of Government from the middle of the 19th century - Lunatic Asylums Act 1853 - where they were seen as degrees of imbecility. It is significant in this context that this scale of defectiveness is described entirely in terms of the social problem of control which it presented.

medical profession to include comparable, but not necessarily related defects of the "affective faculties." This was substantially as a result of the efforts of Ray and Prichard in promoting the earlier work of the Frenchmen Esquirol\(^\text{10}\) and Pinel\(^\text{11}\). It came to provide a common medical explanation for what was described as partial or temporary insanity.

The potential for conflict between the medical and legal professions during such developments was considerable. In their pursuit of authoritative professional status those 19th century medical men who specialized in mental 'illness', sought to develop a rigorous and natural scientific basis for their practise. In doing so they increasingly looked for either physical or socially determining forces in their theoretical explanations of the behavioral problems of their subjects. The lawyers, by contrast, whose enterprise, in so far as it was a science, was a practical and normative one, were professionally obliged to make routine judgments and impose penal sanctions on such behavior and to do

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\(^{11}\) Pinel, Esquirol's teacher, author of *Traite Medico-philosophique sur L'Allentation Mentale*, (Paris 1801)
so on the basis of a law whose authority still lay in a supernatural moral order\textsuperscript{12}.

While it is not surprising that these differences of objective led occasionally to conflict in determining criminal responsibility it is important to understand that these conflicts were rare. In almost all cases of marked behavioral deviancy the common Victorian 'therapy of choice' was incarceration and by the beginning of the last quarter of the 19th century both penal and mental health institutions were substantially under the control of the central government.\textsuperscript{13} In 1844 the Commissioners in Lunacy estimated a national population of rather less than 20,000 certified lunatics of whom less than 10,000 were held in County Asylums or Licensed Houses. By 1890 the number of those held in national or county institutions had risen to 62,000 while a further 4,500 were held in Licensed Houses.\textsuperscript{14} The former group comprised more than 55,000 pauper lunatics, whose combination of indigence and eccentricity made them an intolerable burden on society. It


\textsuperscript{13} D.J.Mellett, \textit{The Prerogative of Asylumdom}, New York, Garland 1982, has demonstrated how the character of British lunatic asylums changed in the 1860's and 1870's, and increasingly emphasized the need for restraint and discipline in contrast to the more relaxed and humanitarian regimes promoted by John Conolly in the 1840's.

\textsuperscript{14} Ibid, pp 54 & 55.
also included 926 criminal lunatics held in one or other of three Criminal Lunatic Asylums.\textsuperscript{15} Over the same period the prison population of England and Wales had dwindled to less than an annual average of 18,000 men and women\textsuperscript{16}. A compromise had thus been achieved in pursuit of those "General ends of Justice" which to which Sir George Grey had paid tribute.

Capital cases, on the other hand, because of their finality and public drama served to highlight the tension between lawyers and alienists. Once again, in most cases, juries were ready to accept the evidence of traditionally "strict" prison doctors and find obviously incompetent prisoners unfit to plead but in a small proportion of less clear cut cases dispute arose over the issue of responsibility. While there were a few instances of dispute over the extent of the mental impairment of those who might be described as idiots, or just simple minded\textsuperscript{17}, most such disputes arose over the issue of partial or temporary insanity. This, too, proved to be an area in which compromise could be reached.

There were two elements which seem to have underlain

\textsuperscript{15} Broadmoor, Fisherton or Woking. See also Table 4(a) below.

\textsuperscript{16} This is of course a potentially misleading comparison. About 160,000 persons were committed to Prison annually in period 1880-1890 but the majority for an average sentence of less than 3 months. (Report of Dept'nal. Committee on Prisons, 1894, Appendix III (viii))

\textsuperscript{17} See for example the case of Enoch Whiston, 'Daft Enoch', described below page 305.
the growing willingness of the legal and bureaucratic establishment to accept verdicts of criminal insanity as an alternative to normal penal sanctions. The first is to be found in the gradual extension of a framework of legal powers and public institutions which placed the criminally insane even more firmly in the grasp of central government than it did the merely criminal. The second was the development of a working relationship between the Home Office and medical specialists in the area of insanity. From these two sources grew a confidence to accept, in all but the most egregious cases, the verdict of medicine. This was a working compromise which enabled the Home Office to fulfill that overriding objective of public security which Sir James Graham had propounded\(^{18}\) and at the same time to discreetly set aside the verdicts of juries. It was not, as will be seen, accomplished without protest from the judicial Bench.

The Home Office had had, since the year 1800, the power to hold in custody all those judged criminally insane and, since 1863, a State Institution, at Broadmoor, in which to do it. In Hadfield's case in 1800, a prisoner was acquitted of attempting to murder the Sovereign, George III, on the grounds of his evident

\(^{18}\) See Page 274, above.
insanity. A Bill was immediately passed into law specifying that in all cases where a "Special Verdict" of 'not guilty by reason of insanity' was returned the prisoner was "...to be held in strict custody until his Majesty's pleasure be known." This class of offender became known in Victorian times as "Queen's Pleasure Lunatics". In 1864 an Act was passed ensuring that the sanity of those in prison, or awaiting trial, should only be pronounced upon by a minimum of two Doctors appointed by the prison's Visiting Magistrates. Such prisoners were called "Secretary of State's Lunatics" since the term of their detention depended in name, as well as in fact, on the Home Secretary.

The opening of Broadmoor in 1863 not only provided a

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19 Hadfield appeared to exhibit the clearest possible correlation of physical injury and mental abnormality. When this veteran cavalry soldier took his hat off, as his counsel instructed him to do in Court, it was possible to see the membrane of the brain itself - laid open by the edge of a French sabre.

20 An Act for the Safe Custody of insane Persons charged with offences. 40 Geo.III, c.94. Nigel Walker, op. cit., p.74, points out that this Act merely formalized recent practise.

21 Until the Criminal Lunatics Act of 1884 (47 & 48 Vict. c.64) this meant until the Secretary of State judged him fit to release. After 1884 regular medical and behavioral reports were required as a basis of such a judgement.

22 Insane Prisoners Act (Amendment Act) 1864, 27 & 28 Vict. c. 29. An Act to correct the anomalous situation in which a prisoner, Geo. Townley, was declared insane by Doctors, of his family's choosing, after his conviction for murder and thus escaped hanging. He was later found sane by a Home Office investigation led by Dr Meyer, of Bethlem & Broadmoor, but committed suicide before his case could be resolved.
secure place of incarceration for criminal lunatics\textsuperscript{23} of both sexes but introduced the Home Office to alienists. Dr William Orange\textsuperscript{24}, who was promoted to Medical Superintendent in 1870, and his successor Dr Nicholson in 1884, became routine advisers to the Home Office and both appear regularly in the H.O.144 case files in this capacity. In 1878 Orange was joined by the new Medical Inspector of the Prison Commission, Dr R.M.Gover, and both made many hurried journeys to different Prisons to determine the sanity of persons on capital charges. Government patronage extended, at least indirectly, to the many large County Asylums created in the second half of the 19th century. The posts of Superintendent at these institutions represented the most prestigious, if not the most remunerative, positions in this subdivision of the medical

\textsuperscript{23} The case of John Francis in 1859 (H.O.144 Series, Case#36804) may well mark the final impetus to create such an institution for prisoners who were at once too dangerous for County asylums and too irrational to submit to the complicated routines of the new penitentiaries. After Francis had assaulted staff at both Bethlehem (an asylum) and Milbanke (a gaol) Waddington the Permanent under-Secretary at the Home Office, minuted on his file in March 1858:

I agree with the opinion [of the Sup of Bethlem] but it is extremely difficult to deal with desperate subjects like these who are unfit to be at large and can not be sent to Prison. I would be glad to legislate for such cases if I could see how.

A way was found since in October of the same year Col. Jebb, the Surveyor of Convict Prisons, refers on his file to the time "when the new establishment at Broadmoor will be completed."

\textsuperscript{24} Dr Meyer the original Superintendent in 1863 appears only once in this role, in Townley's case. Dr Orange, on the other hand was regularly retrained from at least 1872. Meyer was attacked & crippled by an inmate in 1870. Orange, his deputy & successor was killed in a similar way in 1884.
profession. In this way the possibility of conflict was muted in the common membership of a governmental establishment.

Nigel Walker has noted that with the passage of the Prisons Act 1865\textsuperscript{25} there began to be a marked increase in the numbers of those found insane on arraignment, possibly as a result of the appointment of Doctors to local prisons.\textsuperscript{26} This was certainly the case when a later Prisons Act in 1877 placed all Prisons in England and Wales under the central direction of the Prison Commission. This was followed by the routine medical examination of all prisoners and an increase both in insanity verdicts and the prior commitment of insane prisoners to Broadmoor. Indeed this had become so prevalent by 1885 that it produced protests from the Judges that the right to trial was being infringed. As a result the Home Secretary, Sir William Vernon Harcourt, felt obliged to issue a circular to the effect that the sanity of prisoners should "if possible be publicly decided by the verdict of a jury".\textsuperscript{27} This was clearly an effective step since the numbers extracted from the judicial process, either before or after trial, fell dramatically in subsequent decades. The courts began again to be the principal forum in which issues of diminished

\textsuperscript{25} Prisons Act, 28&29 Vict.c.126.
\textsuperscript{26} Walker, op.cit., p. 226.
\textsuperscript{27} Ibid, Prison standing Order #138.
responsibility were determined. (See Table 6) It is tempting to see in this reassertion of the court's role not just an improvement in the quality of the medical evidence offered by Prison Doctor's but also a somewhat belated change in the attitudes of judges and their directions to juries. What is, nevertheless, clear is that by the end of the 1870's the Home Office, itself, had effectively come to terms with the medical profession and had established a working compromise which ensured the safe incarceration of a steadily increasing proportion of those charged with homicide. If not capitally punished they were put to penal servitude for life or held in asylums for the criminally insane for as long as a cautious bureaucracy thought fit. (See Table 5)

The Case files in the H.O.144 series provide some valuable perspectives on this process of medical change and bureaucratic accommodation. At the same time they demonstrate the problems faced by the defence in trying to establish a plea of insanity. They also reveal, however, that in some cases an explanation of insanity was the only way in which the establishment could make sense of an act of murder. The case of the Reverend. John Selby Watson, a homicidal historian, was a case
of this kind.

In August 1871 the Reverend John Selby Watson completed the last of four volumes of a History of the Papacy to the Reformation and sent it to the publisher, Longmans, a company that had already published his biographies of the scholar Richard Porson and the divine, William Warburton. For the previous twenty-seven years this scholarly cleric had been headmaster of Stockwell Grammar School in South London. He had, according to a leading article in the Times "passed a long career marked by exemplary industry and steadiness." It had been in the words of the celebrated alienist Dr Henry Maudsley, "An isolated and secluded life...one of incessant and ill-requited toil." Maudsley was also to note that "this self-absorbed, reserved and eccentric character...always appears to have entertained an exaggerated idea of the value and importance of his literary work." He had married late in life and had had no children. Now aged sixty-seven "the feebleness and it might be supposed, the softness of age were
growing upon him." The Governors of Stockwell Grammar School certainly seem to have thought so since, in October of the previous year, they had, without any previous warning, dismissed him. Thereafter his friends noted a sharp change in both his appearance and conduct. He seemed, as a witness was later to state, to be "completely crushed." A few weeks after finishing his book, on Sunday October 8th 1871, he went to church with his wife, ate lunch with her and then savagely clubbed her to death with an antique horse-pistol. For two days he concealed her body, eating his meals regularly, dealing with tradesmen, paying his rent and working on his papers. After this exhibition of apparent normality he took prussic acid in an abortive suicide attempt where upon the whole tragedy was exposed.

In the subsequent investigation, trial and Home Office review of this case we can find an excellent example of the Victorian response to the dilemma of "temporary insanity" in criminal cases. This case, and others in the Home Office archives, provide an unique perspective on this debate. For the most part they record only those cases where capital convictions had already been obtained. They thus tend to include only those "difficult"

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31 *The Times*, London, Jan:12, 1872.
32 Evidence of Mrs Baugh, *The Times*, Jan 12, 1872
cases where defence pleas of insanity had failed before a jury and post-trial petitions or judicial doubts had prompted further investigation into claims of insanity\textsuperscript{33}. They may, therefore, be taken to represent that crucial interface between the idealist and scientific discourses of the legal and medical professions which was so clearly contrasted in Roger Smith's \textit{Trial by Medicine} \textsuperscript{34}. It will, however, be argued that this dichotomy has been inflated both in terms of its scale and its effects on the judicial process. Compromise rather than confrontation was a more evident characteristic of this developing dilemma.

There was, nevertheless, a real dilemma. The Common Law, with its doctrines of unqualified free-will and strict individual liability, required an absolute verdict of guilty or not guilty and in cases of murder the absolute punishment of death. Scientific determinism, on the other hand, implied a concept of free-will qualified by a plethora of social, economic and physical factors whose implications, if exposed and accepted, made nonsense of such absolute liability and such an undiscriminating punishment. In practise, however, the Common Law accepted a


concept of diminished responsibility\textsuperscript{35} but left its implementation to those jurors, judges and bureaucrats who managed its operations, so that the law itself might better preserve its apparent integrity.

In order to grasp the extent and changing character of this compromise we must note that both murder indictments and capital convictions were themselves very rare in Victorian England. Between 1860 and 1910 there were, despite a fast rising population, only some sixty-five committals for murder each year and that this remarkably constant figure was matched by an equally constant forty percent of convictions.\textsuperscript{36} In the early decades of this period the sixty percent who escaped conviction did so largely through acquittal by the jury although even then some fifteen to twenty percent were either found insane on arraignment or not guilty by reason of insanity\textsuperscript{37}. In the later decades there is a marked shift from jury acquittal to findings of insanity and of the fifty-eight percent who escaped normal conviction in the years 1900-1910 only twenty-three percent were acquitted and thirty-

\textsuperscript{35} A formal verdict of diminished responsibility was not recognized by English law until the Homicide Act of 1957. (5\&6 Eliz. II, c.11)
\textsuperscript{36} See Table 2
\textsuperscript{37} See Table 5.
five percent were found insane - half as many again as the total of those hanged.

Instances of unresolved dispute about insanity in murder cases were thus very few in number. A Home Office printed memorandum of 1895\textsuperscript{38} cites only nine cases between 1862 and 1899 but this is misleading since it refers to cases in which clear insanity pleas were rejected. In practice the problems of mounting a defense of this kind, which are discussed below, meant that allegations of insanity were often confused with other defenses such as provocation or else only emerged in petitions after conviction. In the cases so far examined such allegations arose in about thirty percent of those cases where convictions were obtained. However nearly half of these (45%) were reprieved by the Home Secretary. If we talk, therefore, of a failure of the Victorian legal system to accommodate medical accounts of criminal insanity, we are talking, at most, of between three and four cases per year.

It is also evident that the legal profession and the bureaucracy were not strangers to the developing 'scientific' discourse of contemporary alienists and that both experienced counsel and judges were familiar with and in some cases accepted

\textsuperscript{38} \textit{Home Office Printed Memoranda}, Vol XV, 1895
contemporary accounts of extreme behavioral abnormality. The need to do so was, in a measure, implicit in their wider endorsement of a voluntarist and rational world view. A theory of 'temporary insanity' was a convenient, if not a necessary, explanation of the occasional aberrations of those whose patterns of life they otherwise wholly endorsed\(^{39}\). A perception of anomaly was then, as now, a vital ingredient in any presumption of insanity. Such a presupposition, when unsupported by obvious physical or behavioral abnormality, depended on the incongruity of the prisoner's act and its dissonance with the patterns of his previous life and the image that his 'peers' had formed of his normality. The demonstration of such dissonance was clearly easier for the rich than for the poor and for those who had espoused convention rather than for those who had flouted it.

The case of the Reverend. John Selby Watson and his putative insanity is a classically difficult case but in its investigation and trial it was by no means typical of its kind. Despite his modest means the schoolmaster was an eminently middle-class man, the character of whose previous life and conduct was in extreme contrast to the violence and fury of his

\(^{39}\) Dr Henry Maudsley, in *Responsibility & Mental Disease*, London, King, 1874, wrote, p.289: "Insanity is simply a discord in the universe - the result and evidence of a want of harmony between an individual human nature and the nature surrounding it."
act. There was, as prosecution counsel was to observe, "an antecedent improbability in the deed which would lead everyone in the first instance to seek an explanation in insanity". Such an assumption was much less easily made when lethal violence invaded the already violent lives of the poor. Baron Martin observed, in his summing up of a contemporary case, "a poor person was seldom inflicted with insanity but it was common to raise such a plea when people of means were charged with the commission of crime". In only six out of more than one hundred cases, from the years between 1860 and 1895, were the defendants identifiable as middle-class. In five out of these six insanity was alleged or proved and in the sixth (the celebrated Penge murder case) the accused persons made elaborate, if unsuccessful, use of medical evidence to deny the act of murder itself.

Immediately after his arrest the Reverend Watson retained his family solicitor, W.J.Fraser, and a defence was mobilized. It was a defence which from the beginning was to depend on the plea of not guilty by reason of insanity. In addition to

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40 The Times, London, Jan 11, 1872.
41 The case of Christiana Edmunds, reported in The Times, Jan. 17, 1872. Baron Martin’s experience of affluent insanity included the celebrated case of George Victor Townley in Dec. 1863.
the evidence of the family doctor, Dr Rugg, Fraser obtained 
permission for three specialists, Dr George Fielding Blandford, Dr 
Joseph Rogers and Dr Henry Maudsley to examine his client in 
Horsemonger Lane Prison. The cost of this service, excluding that 
of later attendance at court, was likely to have been of the order of 
£100 - £150 or between three to four year’s income for an 
agricultural laborer. In addition a number of family friends, ex- 
colleagues and old pupils came forward to testify both to his 
blameless character and to the marked change in his behavior that 
had occurred during the last year. Equally important was their 
ability to retain Mr Serjeant Barry, one of the leading forensic 
counsel of the day. In each of these respects the Reverend. 
Watson’s experience was highly unusual and reflects his favoured 
social and economic status.

There were, on the other hand, aspects of this case which 
were wholly typical and of these the most important was the legal 
problem which it presented both to the prosecution and to his 
defence. The prosecution for its part must prove two facts to the 
jury. First it must be proved that the accused had committed an

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42 This estimate is based on Home office correspondence with various consultants at this 
time. In Jan. 1872 Sir Wm. Gull received 50gns for a single examination of Christiana 
Edmunds.

43 In this same year Barry and Henry Hawkins Q.C. were chosen to represent the Crown 
versus the Tichbourne claimant in the 'finale' to the chief cause celebre of the decade.
illegal act of homicide. That is to say that accused's act was "the immediate and distinct cause of the death of the deceased," and that it was not protected by any legal or professional privilege. Second it must be proved that the accused intended his act to cause death or else was reckless of such a consequence. This was a less formidable task than it might appear. It was not necessary to establish premeditation or to discover any evident motive for the deed. It was sufficient to show that such lethal force had been used as would lead any reasonable man to expect a mortal consequence. Such an assumption was sufficient to establish malice aforethought - that mens rea - which was the distinguishing feature of the felony of murder, as it was indeed of all felonies.

Of the more than one hundred cases so far examined only seven hinged on the first of these questions - did he do it? A further five involved a medical question as to whether the act actually caused death. In the remaining cases only one person pleaded guilty so that, effectively, all the others were offering a single plea - "I didn't mean to do it." The special character of the sample in the Home Office records, (they were all cases of

convictions in the High Courts), means that this kind of defence had already failed in a magistrate's court and before a Grand Jury. In those cases where the offence was seen as falling within the tolerated limits of social or domestic violence manslaughter indictments would have been brought in since the essential element of deadly intention would have been missing. Where an intention to kill was provable there were only two significant defences. The first was provocation, a plea about which the law was very tightly drawn. Only such provocation as might create a reasonable fear of death could justify homicide and even in such circumstances a manslaughter conviction was more likely than an acquittal. It was an especially poor defence where wives, lovers and children were concerned. On the other hand the protracted provocation of an unfaithful or drunken wife might move an all male jury to recommend mercy and a Home Secretary to grant a reprieve (which occurred in almost 10% of the capital convictions so far examined) but such mitigating factors would not traverse a murder indictment.

The law thus assumed that the lethal act of a reasonable man represented a voluntary intention to kill. Youth, old age or the pressure of a husband's will might appear to qualify that voluntary reason sufficiently to mitigate the punishment of a convicted
murderer but never to absolve it. Only insanity could annul the inherent felony and even here, after the Trial Of Lunatics Act of 1883, the verdict became "guilty but insane" instead of the earlier "not guilty by reason of insanity." In such cases the onus was laid on the defence to prove that the accused was, by reason of mental disease, unable to appreciate "the nature and quality of the act he was doing or if he did know it that he did not know it was wrong."45 The M'Naghten Rules, which contained this phrase, were a test of criminal responsibility rather than a test of insanity and, as has already been suggested most contemporary cases of criminal insanity fell within them. Current descriptions of congenital idiocy, of senile dementia, of the apparent effects of epilepsy together with the potential effects of physical trauma, such as occurred in child-birth, were all sufficiently coherent explanations to convince a jury of their significance. Evidence of persistent delusions such as was established in Hadfield's case46 or even in that of M'Naghten47 was enough to permit an assumption of mental

45 See above Chapter#3,p.6.
46 See above Note #2, page 6.
47 M'Naghten was tried in 1843, for the murder of Edward Drummond, the private secretary to the Prime Minister, Sir Robert Peel. Alexander Cockburn established that he suffered from persistent delusions of persecution. He argued, citing Isaac Ray, "that [the mind of a person who] was sane upon many points might be under the influence of morbid passion . . . which made him the creature and the victim of . . . ungovernable impulse." The Times (London), March 6th, 1843.
disease and to allow the defence to "extend" their description of it to embrace a single outrageous act of violence and establish temporary insanity. It was altogether more difficult, however, to do so in cases where none of these factors was present, and it was in such situations that then, as now, most conflict arose. The failure of an individual's will to control his action could be argued to be the result of a developing disease, frequently being described as a symptom of monomania, or it could be seen as a case where the accused just "lost his temper". It was a dilemma exacerbated by the apparent fact that both in court and during post-trial appeals such insanity was a frequent "last resort" of the defence and its friends. It was a defence to which the prisoner often failed to contribute and the actions of the Revd. John Selby Watson were no exception.

Before his attempted suicide, on October 10th 1871, the Reverend Watson had written three "suicide notes". One was an extempore last will, one a reflection in Latin on his failure to deal successfully with the women in his life\(^\text{48}\) and the last a sort of apology for his wife's death. It was an apology which left no doubt

\(^{48}\text{The Times, (London), Jan.11th 1872. When translated this reads as follows: "I was happy in almost every aspect of my life except those which related to women. To one who often loved, love was almost always harmful."}
that he understood, at least two days later, the nature and quality of what he had earlier done.

I have killed my wife in a fit of rage to which she provoked me. Often, often has she provoked me before but I never lost my restraint over myself... till the present occasion, when I allowed fury to carry me away. Her body will be found in the room adjoining the library... I trust she will be buried with the attention due to a lady of good birth.\textsuperscript{49}

The trial opened on January 10th 1872 at the Old Bailey. Serjeant Parry was well aware of the likely effects on the jury of the graphic and gory accounts of Mrs Watson's body given at the preliminary hearings by the maid and the policeman who had found her. Such ghastly details would, he argued, excite a feeling of repulsion against the perpetrator. Nevertheless, he continued, pity was a more proper response. The act itself was extraordinary and not to be explained by any ordinary reasoning: "...did not the deed itself prove that it was the result of reason overthrown and of the ferocity and violence of a madman\textsuperscript{50}.

\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid.
The Hon. George Denman Q.C.\textsuperscript{51}, leading for the prosecution, argued, on the other hand, that this "suicide note" and Watson's behavior before and after the crime proved that he was fully aware of his actions. His argument to the jury took the incongruous and uncharacteristic barbarity of this act at face value and used it to demonstrate intention:

The heavy weapon, the horse-pistol, must have been brought from the drawer in which it was kept for the purpose of committing the murder. His learned friend had said that there had been unnecessary violence but how could they possibly tell? Repeated blows might have been necessary to accomplish his object.\textsuperscript{52}

Thus the act itself became the focus of argument in this, as in almost all cases where intention was disputed.

In order to develop these contradictory arguments the Reverend. Watson had been examined by two "teams" of medical specialists before the trial. The Prosecution depended on Dr Edgar Sheppard and Dr George Begley who were Superintendents respectively of the large public asylums at Colney Hatch and

\textsuperscript{51} Denman, the son of a former Chief Justice, was himself a notable opponent of capital punishment and gave evidence in this sense to the Capital Punishment Commission in 1864. He later became a High Court Judge himself.

\textsuperscript{52} The Times (London), Jan. 12, 1872.
Hanwell, and thus very much part of the governmental establishment. They, together with the Prison Doctor, had examined the prisoner four times and both attested to his depression and dejection but argued that it was only to be expected in one who had committed a great crime.\textsuperscript{53} Sheppard, under pressure from Sjt. Parry, accepted that these symptoms, and the suicide attempt, were also consistent with melancholia and that the symptoms of the latter included outbursts of madness when "the reason and the judgement were gone." Denman responded by bringing out the opinion that at such times "the reasoning powers were \textit{altogether} gone," and that Sheppard would expect to find some other signs of insanity besides a single act of violence." He did not believe that "a great act of this kind could be committed without very manifest symptoms beforehand."\textsuperscript{54} Dr Begley was notably more non-committal during his examination-in-chief but under fire from Sjt Parry conceded that after the third interview with Watson "He had eventually made up his mind, or nearly so, that he was of unsound mind."\textsuperscript{55} Denman did not reexamine and there is no other instance of Begley's employment as a Crown witness! Dr John Rowland Gibson, Surgeon to the Prison at Newgate, was altogether

\textsuperscript{53} Ibid.
\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid.
more precise and consistent as befitted a prison doctor of 16 years standing. His evidence, never the less, reflects the obvious limitations, then as now, on any attempt at instant diagnosis of an unfamiliar and undocumented patient. The observation of symptoms and their attempted correlation to a short "menu" of commonly recognized signs of insanity was all that could be attempted.\textsuperscript{56} \textit{The Times} reported his evidence as follows.

From the time he first saw Mr Watson he had paid particular attention to his mind. He had seen him daily and sometimes more frequently ... he had always found him rational and remarkably self-possessed. He had not observed any incoherence or inconsistency in his conversation. Sometimes he was more depressed than others, and at times his conversation approached cheerfulness ... The depression the prisoner suffered appeared to be nothing more than might be expected in a person in such a position. \textsuperscript{57}

\textsuperscript{56} Bucknill and Tuke, op. cit., p. 276, offer a contemporary view of this problem. If he [the physician] is so unfortunate as to have absolutely no history of his patient, he will have observed in him one of four things. Either firstly a vacant and meaningless expression and a childish absurdity of action. . . .or secondly a facial expression of deep & concentrated sorrow; or thirdly indications in physiognomy, or demeanor, of strangeness and irregularity; or fourthly no outward sign of mental disease."

\textsuperscript{57} \textit{The Times} (London), Jan.12,1872.
The defence then followed and brought on a number of witnesses, including friends, neighbors and ex-colleagues, to establish first the normality and rectitude of the prisoners former life and second the visible changes that had followed his dismissal in October 1870. Henry Rogers, a neighbor, testified that immediately before the crime the prisoner, whom he had known for twenty years, was "walking down the Clapham Road, his eyes glaring in a most unusual manner, making a gurgling in his throat and throwing about his hands in a very strange way". The Vicar of Stockwell noted an "uncharacteristic levity and disjointedness" in his conversation during a visit to the gaol.\textsuperscript{58} There then followed the defence’s chief witness, Dr Henry Maudsley, Professor of Medical Jurisprudence at University College and author of several leading texts on criminal insanity.\textsuperscript{59} He had, he deposed, examined the Reverend. Watson for an hour in November and concluded that, at that time, he was not of sound mind. He agreed in the main with Dr Sheppard’s description of melancholia but disputed that evident symptoms would always precede some outburst. Suicide was a common symptom and homicidal behavior a rarer one. On the other hand callousness and indifference to the consequences of such an

\textsuperscript{58} The Times (London), Jan 12, 1872.

\textsuperscript{59} See, in particular, H.Maudsley, Responsibility in Mental Disease. London 1874.
outburst were common. He described such acute melancholia as a form of "impulsive insanity". The next two witnesses, Drs Blandford and Rogers, attempted to extend this description or paradigm of impulsive insanity so that it would fit around the evidence of Watson's behavior in the last twelve months. Dr Joseph Rogers' evidence well illustrates this task and contrasts with that of Dr Gibson above. It also closely follows the technique described by Bucknill and Tuke for the examination of an unfamiliar subject.

A person might be in low spirits with sound health but melancholia was a disease of the brain. The prisoner had no delusions. Melancholia was an exaggeration of extreme low spirits. At the first interview he put the prisoner in a good light, and watched his countenance while conversing with him. He had a generally dazed appearance and when his countenance was at rest he seemed lost. He showed great and singular indifference to the whole affair. As an instance of his irrational conduct... while the conversation was going on, he picked a piece of fluff from his trousers and, jumping up, gave himself a regular "shake-down". He said that he was entitled to some consideration for what he had done in the past. That seemed to witness
to be extremely irrational, seeing that he had only been a schoolmaster. 60

On the last day of an unusually long three day trial Serjeant Parry gave his final address to the jury. He was forced to rely upon the assumption, from such evidence, that his client suffered from some unspecified mental disease and that this, in itself, gave rise to the dangerous conclusion that any apparently irrational act could be attributed to this disease. It was a theory whose implications were shocking to much Victorian opinion and of which James Fitzjames Stephen had earlier written,

The consequences of the doctrine that the disease, and not the results of the disease, entitle madmen to exemption from punishment are so monstrous that when stated I can hardly imagine anyone bold enough to maintain it.61

Indeed Denman responded in remarkably similar terms, and, referring to the prisoner’s undisputed depression, he declared,

It would be unsafe to lay down the doctrine that any

60 The Times (London) Jan.13, 1872.
61 James Fitzjames Stephen, “Maintaining the limits at present imposed on the criminal responsibility of madmen.” In Papers read before the Juridical Society 1855-58 (London, Stevens, 1858)
amount of such depression could be tolerated as a defence to the crime of murder ... where was the difference between melancholia and low spirits ... none of the medical men had been able to draw the line ... the jury must judge from the admitted facts the probable condition of the prisoner at the period in question. 62

This was a view clearly endorsed by the Judge, Mr Justice Barnard Byles. In his summing-up he repeated that the Jury must look at the act itself and say "whether they believed upon the evidence the prisoner was or was not in a condition to know what he was doing". 63 While the Judge's charge was clear it contained an unusual gloss on the law of murder. Byles declared that "he was perfectly aware that doubts on the universal applicability of this rule had been expressed by many eminent persons ... but if it was to be changed it must be altered by ... Parliament" 64.

The Jury evidently did consider 'the act itself', and after about ninety minutes returned a verdict of guilty. They did, however, add the rider "We wish strongly to recommend him to the mercy and clemency of the Crown on account of his advanced age and previous character." Watson was then sentenced to death.

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63 Ibid.
64 Ibid.
In this extended trial the prisoner had experienced an altogether fuller inquest on his mental condition than was usually the case and in the interval between sentence and execution date, in early February, he was to receive an equally atypical measure of support both from his legal advisers and from his many friends. They cannot have been encouraged, however, when, on the day after the trial The Times ran a leading article on the case. It congratulated those concerned in the conduct of the trial, noted its moderation and sense of responsibility and echoed the jury's feeling of compassion for the prisoner. Nevertheless it strongly endorsed the verdict. There was, it said, "nothing but mere opinion and this formed after the event to show that either his mind or his conscience was really diseased". It then went on to speculate on the role of the Home Secretary and continued, "justice must be impartial before she is merciful" and the effects of injudicious clemency might be "to offer to others a dangerous hope".

Despite this the Home Office received on the same day, January 14 1872, the first of many collective and individual appeals produced on Watson's behalf. Fraser, the defence solicitor, submitted a certificate of insanity signed by the three defence medical witnesses and Dr Rugg, the family doctor. Fraser pointed

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65 The Times (London), Jan. 14, 1872.
out that the certificate gave an opinion as to Watson's insanity at the time of the deed "Which, as you are aware, the medical gentlemen were precluded by the rules of evidence from stating in court." This certificate and a lengthy affidavit from Maudsley were at once referred to the Judge.66

The Judge's reply arrived on the 19th of January. The letter is cited at length since it is markedly at variance with his summing-up. After reference to his notes, received earlier, the Judge continued:

I have now to add that having regard to the medical evidence for the prosecution no less than for the prisoner, I am of the opinion that this is not a case in which the sentence should be carried out. Although I do not desire to throw any portion of so serious a responsibility on another, I trust I may, without impropriety be permitted to add that the Lord Chief Justice of the Queen's Bench67 agrees fully and decidedly with this opinion ... 68.

67 This was Lord Chief Justice Cockburn, who as Alexander Cockburn Q.C. had successfully pleaded insanity in M'Naghten's case.
The Hon. A.F.O. Liddell Q.C., the Permanent Under-Secretary of State and head of the Home Office bureaucracy, passed this letter directly to his chief, the Secretary of State, the Liberal Henry Austin Bruce. Bruce simply minuted, on January 20th "commute to P.S.L." 69. No action was, however, taken on this instruction. Instead, three days later the execution, originally set for February 3rd, was respited for one week. Furthermore, no information about the reason for this temporary delay was given to the defendant's solicitor, or to the numerous other petitioners until February 9th, when Watson's sentence was formally commuted to penal servitude for life. The file offers no explanation for this uncharacteristic delay and the answer may lie in an apparently unsolicited letter from the Judge on February 6th. Once again the Judge's letter is quoted at length.

The reasons for recommending that the sentence in Watson's case should not be carried out were shortly these. There was a strong body of evidence in the case for the prosecution, no less than for the Prisoner, that he laboured under disease of the brain, not merely functional but structural. That the characteristic of the disease is that of mania, both homicidal & suicidal.

69 Ibid, Jan. 19, 1872.
My opinion was that the prisoner acted under the influence of uncontrollable maniacal frenzy. And if the law had allowed the Judge to take the opinion of the jury on this point, I have no doubt whatsoever that they would have so found. Under this view I thought that the jury's recommendation to mercy should be attended to & that it would be unjust as well as inexpedient to carry out the sentence ...

Feeling, however, the heavy and painful responsibility that lay on me, I consulted the highest authority in the criminal jurisprudence of the country ... who coincided with my view of the case and authorized me to say so.

In attending to the recommendation of the judge who heard the case you have only followed the invariable practise so far as my experience and recollection extend ...\(^70\)

\(^70\) Ibid, Feb.6,1872.
practise. In giving him this support Mr Justice Byles seems to have relied more on his instinctive sense of the inherent incongruity of Watson's act than upon the evidence. Nowhere in the Judge's transcript, or even in Maudsley's affidavit, is there any evidence offered of structural disease of the brain. Indeed no one then had been able to correlate an observed lesion or abnormality of the brain with any related pattern of behavior - let alone observe a diseased conscience. Byles, whatever his personal experience may have been, was also wrong in assuming that the Secretary of State invariably followed the recommendation of the trial judge in prerogative cases. In cases where disputes arose about criminal insanity it had already become the practise to refer the matter to two or more leading, but uninvolved, consultants. Just one month later in February 1872, the case of Christina Edmunds (The convict in the famous Brighton Poisoning case) was referred in this way to Sir William Gull and Dr Orange, the Assistant Superintendent of Broadmoor Criminal Lunatic Asylum. However the most revealing words in this letter are the reference to the Reverend Watson's execution as "unjust as well as inexpedient". This implies that if it would be unjust in the light of Byles' apparent acceptance of the current medical paradigm of mental disease, it would no doubt be socially inexpedient to hang a clergyman of the established church
for an act of uncontrolled violence more characteristic of the lowest orders of society. It seems in fact that the Judge, the Lord Chief Justice and the Secretary of State were only able to make sense of this case if they began with an assumption of Watson's temporary insanity.

The Reverend John Selby Watson survived to serve twelve long and unhappy years in prison, dying of erysipelas in 1884 at the age of eighty\(^7\). His case demonstrates the problems of diagnosing temporary insanity in criminal cases and how much such a diagnosis depended on the presuppositions of individual normality. It suggests, not surprisingly, that such perceptions of anomaly were more easily arrived at where the anomaly was most blatant. Yet the increasingly high level of insanity verdicts in the later decades of the century warn us against glibly assuming that such anomalies were not perceived across class lines. The case does not, of itself, refute the reductionist argument that between the voluntarist assumptions of lawyers and bureaucrats and the increasingly deterministic materialism of their medical colleagues lay a theoretically unbridgeable gap. It does, however, show us something of the mechanics of compromise. The common empiricism of the English tradition ensured that where plausible

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\(^7\) H.O.144 Series, Case # 7940, Report from Gov. Woking Prison.
evidence could be adduced, scientific explanations were fairly weighed on all sides. Nevertheless in cases of difficulty the label of temporary insanity was useful to both doctors and lawyers and, with its help, an illogical consensus could be reached.

No such compromise was needed in the case of Richard Addington whose trial took place some six months earlier than that of the Reverend. John Selby Watson, and in whose aftermath both Mr J. Byles and R.A.Bruce were, once again, personally involved. Addington, a farm laborer, was convicted at Northampton Assizes in July 1871 of savagely murdering his wife with a cobbler’s knife. This was a case which, in contrast to that of Watson, seemed easily understandable to those who had to review it.

As in the case of the Reverend. Watson there was no dispute that Addington had killed his wife. In Addington’s case, however, he could afford no solicitor and he received no legal advice until he appeared at the Northampton Assizes where a court-appointed barrister took charge of his defence. The latter was only given the depositions made at the Magistrate’s Court and had neither the time nor the money to mount a considered plea of insanity. In the event he made a common error and offered an ambiguous defence, claiming on the one hand a lack of intention and
on the other hinting at insanity through a sketchy history of prior abnormality. Neither line carried conviction and Addington was convicted of murder and sentenced to death.

The convict's brother, who had been one of only two witnesses to possible insanity, mounted a petition\textsuperscript{72} and included with it an affidavit from the proprietor of a local asylum, Dr Thomas Prichard. The latter claimed that on the basis of the evidence given at the trial, and his subsequent conversations with relatives and friends of the convict, he considered this to be a case of homicidal mania accompanied by persistent delusions.\textsuperscript{73} Several witnesses had, indeed, testified that Addington was mistakenly obsessed with the idea of his wife's infidelity. Prichard further argued that such a condition was consistent with a severe head injury sustained some years earlier. Thus while Prichard's description of monomania is very close to Maudsley's account of impulsive insanity, the former was able in this case to add evidence both of a motivating delusion and a probable cause.

\textsuperscript{72} In this case, as in that of so many poor prisoners, it seems to have taken the shock of a death sentence to promote the flow of funds. As in this case they often came too late to affect the issue.

\textsuperscript{73} H.O.45 series, Case\# 5490, Richard Addington. 1871. Affidavit of T.Prichard M.D. July 22nd 1871. It is not clear whether T Prichard was a son or other relative of James Cowles Prichard, the pioneer of Isaac Ray's work in England.
These implications of the poorly presented defence did not, moreover, escape the Judge, Mr J. Barnard Byles. In a letter of July 27th, to the Under-Secretary of State, The Hon. A.F.O. Liddell, which accompanied his notes, he confirmed that the jury had determined that the prisoner knew what he was doing and that he knew it was wrong. He had no reason, he said, "as the law now stands", to be dissatisfied with their verdict. However, he went on to say that:

some portions of the evidence...and information supplied since may induce a reasonable doubt whether the prisoner, altho' legally responsible, was master of his own actions.  

How far this should be allowed to interfere with the sentence was, Byles concluded, "a matter entirely for the Secretary of State."

Later in this decade this opinion would almost certainly have led to a medical examination. But there is, however, in Liddell's response no sense of any incongruity in Addison's act or sympathy for the idea of insanity. There were not, he minuted to H.A. Bruce, the Home Secretary, sufficient grounds for commutation in this case. The only evidence of insanity was that of several

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74 Ibid, Letter Mr J. Byles July 27, 1871.
75 Ibid, Minute of A.F.O. Liddell, July 28, 1871.
witnesses "who spoke to odd demeanor at times - chiefly after beer." He noted that the village Doctor, who had earlier treated him for the kick, " had seen him going about the village and never noticed anything strange about him." It was, he argued a case of insanity or murder since in view of a proven quarrel and the many wounds on the victim's body there was no doubt that death was intended. Liddell dismissed the judge's doubts in these words:

Is the opinion of a mad Doctor, founded on the statement of a man who was a witness at the trial . . . enough to justify a commutation on the vague and unsupported notion of homicidal mania. I, for my part, think not.

Bruce endorsed this opinion in a minute which reveals not only how little he subscribed to a concept of "Second Degree Murder,"\textsuperscript{76} but also that he, like Liddell, saw nothing incongruous in the crime. On the question of premeditated intention he declared:

The plea of there having been no malice prepense must be dismissed - a man who inflicts three mortal wounds, in different parts of the body, must be assumed to have intended to kill.\textsuperscript{77}

\textsuperscript{76} See above Chapter 5, note 9.
\textsuperscript{77} Ibid, Minute of H.A.Bruce, July 28, 1871.
The question of whether Addington had "command over his will" was one which he was prepared to judge strictly in terms of the evidence offered at the trial, and in this case it "was entirely wanting." That a man in Addington's situation, a rough, middle-aged farm laborer, given to drink, should give way to such violence was not surprising to him or to his Under-Secretary and they let him hang.

During the decade of the 1870's the Home Office made increasing use of its own professional advisers, and occasionally of 'reliable' figures from the medical profession at large, to examine cases of possible insanity. There were, however, evident limits to the extent to which such advice was credible and in some cases it was rejected either because it seemed superfluous to more obvious explanations of homicide or because of the paramount needs of exemplary justice. There are two pairs of cases which illustrate this tension. In the first two cases, those of John Wakefield and William Payne, doctors from the 'establishment' argued that the prisoners' acts were the result of impulsive insanity but in only one case was this view acceptable. In the second group, which includes the cases of Christiana Edmunds and Enoch Whiston, evidence of congenital insanity, as opposed to
temporary insanity, was produced but was accepted only in Edmunds' case. 'Simple mindlessness' was not enough unless some clear evidence of an inability to tell right from wrong was also available.

In April 1880 John Wakefield walked into Derby Police Station and told the Superintendent, "I have committed a murder." This was sensational enough news to bring out the Chief Constable, Col Delacombe, who returned with Wakefield to his home where the body of a nine year-old girl was found, her throat cut with a table-knife. At Wakefield's trial at Derbyshire Assizes, in July 1880, it was established that he had never seen the child before, that she had called at his cottage to sell combs and that within minutes of admitting her, he had killed her. There was no physical evidence of any sexual assault. During the trial the Prison Doctor, who had observed Wakefield during his long pre-trial confinement, testified that he was then sane and knew the difference between right and wrong. However, under cross-examination by defence counsel, the Doctor agreed that in this case, where there was no apparent motive and no attempt at concealment, the only explanation was

78 H.O.144 Series, Case File # 95782, J.Wakefield, 1880.
79 The Times (London), July 30, 1880 & Baron Huddleston's notes.
"an uncontrollable impulse, an homicidal mania analagous to what was called kleptomania." At such a time the person would "know what they were doing was wrong" but be unable to resist the impulse. Despite such testimony Wakefield was convicted and when Baron Huddleston sent his notes to the Home Office he wrote:

The defence was "uncontrollable impulse" . . . I need scarcely say that such a defence if recognized too lightly as an excuse for crime would be most dangerous.80

This was, moreover, a particularly heinous crime and one whose motive, even without any evidence, was all too easily assumed. The Judge went on,

although there were no signs upon the body of the child that would indicate that a rape, or attempted rape had been committed, I am by no means satisfied that there had not been some libidinous conduct on the part of the prisoner towards the child.

When the Under-Secretary of State, Sir Adolphus Liddell, minuted this letter he endorsed both the comments on what he termed "the uncontrollable impulse theory" and the suspicion of "some attempted rape or indecency." He concluded that "this is a very

80 H.O. Series 144, Case File # 95782, Letter from Baron Huddleston, Aug.7, 1880.
remarkable case but I don't see my way to any interference."\textsuperscript{81} The Home Secretary, Harcourt, agreed and Wakefield was hanged. All three officials clearly saw this case as one of a sexually motivated assault on a young child, one in which the needs of exemplary justice overrode any suggestion of diminished responsibility.

In the case of William Payne, on the other hand, the crime was clearly less shocking if no easier to explain.\textsuperscript{82} It was a case with many parallels to that of Addington described above. Payne, like Addington, was a middle-aged working man with an overpowering conviction of his wife's infidelity, a conviction which clearly seems to have been delusive. Payne's defence was, however, better organized. The local Doctor appeared for the prosecution to swear that he had known Payne for five years and "should certainly say he was sane" and he was followed by the Prison Surgeon from Stafford who declared that in his opinion the prisoner was "in sound mind."\textsuperscript{83} In this case, however, Payne's Solicitor produced an experienced alienist, George Fowler Boddington, who testified that Payne had a "fixed delusion" of his wife's infidelity which had "become more exaggerated as time

\textsuperscript{81} Ibid, Minute of Sir A.F.O.Liddell, Aug.9, 1880 & Sir W.V.Harcourt, Aug.13,1880.
\textsuperscript{82} H.O.144 Series, Case File # A4796, Wm. Payne, 1881.
\textsuperscript{83} The Times (London) May 8, 1881 & Judge's notes.
went on." This evidence was supported by the man's family and several of his neighbors. Although Payne was convicted, and his case referred to the Home office, it was upon this testimony, written into the court record, and not offered as an afterthought, as in Addington's case, that Liddell wrote his minute and upon which he formed his own explanation of the crime.

I must say this looks to me very much a case of unsoundness of mind. He had lived with his wife for 40 yrs & had numbers of children but was everlastingly accusing her of going out with other men with out the slightest foundation. She left him owing to his treatment. He got into a despondent state, takes her a jug of beer & stabs her to death. . . . ? should there be an enquiry.84

Drs Orange and Gover were sent at once to Stafford and promptly reported that they found him insane.85 They noted his continuing delusion of his wife's "total promiscuity" and that he was in a debilitated physical condition, " a man whose nervous system is much impaired." Harcourt decided to commute this sentence

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84 Case File # A4796, Minute of A.F.O.Liddell, May 9th 1881.  
85 Ibid, May 12th 1881.
without even referring it to the judge. The domestic nature of this crime clearly posed less public risk than that of Wakefield, the defence had offered a plausible explanation of the crime and the bureaucrats were becoming more comfortable with their own specialists.

Congenital or other permanent defects of the brain, such as epilepsy or physical damage, were more readily identified at all stages of the criminal justice system then partial, or temporary, insanity. Those found unfit to plead, and, in most cases, those found guilty but insane were usually in this category. Even so the actions of individual homicides so afflicted could be used by the prosecution to indicate a level of intelligence and moral sense sufficient to bring them within the scope of the M’Naghten rules. Both Christiana Edmunds and Enoch Whiston committed carefully planned, if clumsily executed murders, whose cautious preliminaries demonstrated that they knew what they were doing and that it was wrong.

86 Ibid, "write to the judge and inform him of the terms of the respite." Sir W.V.Harcourt, May 13th 1881. Note also Maconochie's strictures on this occasion, Cap.4, above, page 190
87 See Table 6.
Christiana Edmunds went to considerable lengths in planning the death of a young doctor for whom she had conceived a passion, one that was wholly unreciprocated. She purchased strychnine under a false name, bought several boxes of the then (and now) celebrated Maynard's Chocolate Creams, poisoned some and returned the rest to Mr Maynard. Unfortunately she returned the wrong ones and they were sold to a young child who died as a result of eating one. The doctor escaped unharmed to testify later on her behalf.

It was apparent from the Doctor's evidence, and that of her mother, that Christiana had been 'simple' from the time of her birth into a family that, while comfortably-off, had been ravaged by insanity. Despite the efforts of a well managed defence and plentiful evidence of her lifelong abnormality she was convicted on the evidence of her powers of dissimulation and organization. In this case it was her Judge, Baron Martin, who first decided to find a solution in insanity. In his report to the Home Office of her conviction and sentence, he stated that "my own impression is

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88 H.O.144 Series, Case File # 9472, Christiana Edmunds, 1872. This case was known as the Brighton Poisoning Case.
89 Ibid. Her father had died in an asylum, one brother was both idiotic and epileptic and one sister, already dead, had been subject to hysteria. See report of Drs Gull & Orange, Jan.23rd 1872.
90 Which included a plea of pregnancy when sentence was about to be passed upon her. See above Cap #3, page...
that, although capable of knowing right from wrong, she is affected by the hereditary taint of madness." He concluded with a strictly personal explanation of her insanity, as Mr J. Denman had done in Watson's case. "The improper attachment she formed for Dr Baird caused or increased a morbid state of mind." She was, in his opinion, "insane to a considerable extent." 91 Baron Martin reported that he had discussed the issue with "several of the judges", some of whom thought she should be executed "but the majority were of the contrary opinion." He recommended that the Secretary of State follow the 'precedent' of Townley's case 92 "viz that her state of mind should be investigated by some competent & indifferent medical men." H.A. Bruce, the Secretary of State took his advice and chose Sir William Gull, a physician rather than a professional alienist but an establishment figure of the highest standing 93 and Dr Orange. Their report described an interview lasting more than four hours 94. They concluded that the acts referred to were "the fruit of a weak and disordered intellect with confused and perverted feelings of a most marked insane character." The convict,

91 Ibid, Baron Martin to Hon. A.F.O. Liddell, Jan. 18, 1872.
92 See above note 22.
93 As Physician in Ordinary to the Prince of Wales he had shared with Jenner the honors in overseeing the Prince's recovery from Typhoid in November 1871. (They included a baronetcy)
94 Case File # 9472, Report of Sir Wm. Gull and Dr Orange, Jan. 23, 1872.
they said, "presented those marks of low control and feeble cerebral organization which characterize this sort of criminal," but forebore to record them. On this report Christina Edmunds was respited and committed to Broadmoor.

'Daft' Enoch Whiston was the simple minded son of a poor but respectable widow from the Black Country town of Dudley.\textsuperscript{95} Like Christiana Edmunds he developed an unreasonable passion for an unattainable object, in his case, the daughter of a successful shopkeeper. In 1878, in order to finance this project he obtained a revolver and ambushed the wages clerk of a local factory, killing him in the process. When arrested on suspicion of the crime he readily showed the police both his weapon and his loot. His subsequent defence was, moreover, poorly managed. He had no solicitor and his counsel was a dock-brief. His brother gave evidence that he had been mentally defective since an attack of smallpox at the age of eight and while more substantial evidence of congenital defects emerged in petitions after the trial, little was available during the trial\textsuperscript{96}. The prosecution's account of his clearly premeditated crime was sufficient to convince the jury

\textsuperscript{95} H.O.144 Series, Case File# 80702, Enoch Whiston, 1878.
\textsuperscript{96} Ibid, the petitions of the Revd.. Naish, S.Bapty (a former employer) et al.
that he knew what he was doing and that it was wrong. It was only after his conviction that the Chairman of the Visiting Magistrates at Worcester Prison reported to the Home Office that "The Governor, chaplain, Surgeon and other officials are of the opinion that the above [E.Whiston] is very weak in intellect". Despite the opinion of the judge, Baron Huddleston again, that there was "nothing in the evidence to justify him in thinking that the prisoner was not responsible for his acts," the Secretary of State, R.A.Cross, decided to hold a medical enquiry. By this time the practise of 'reinforcing' the bureaucracy's own staff with "competent and indifferent" outside specialists had largely ceased, and in this case Sir Edmund Ducane arranged for two Prison Commission doctors, Gover and Campbell to serve. Their conclusions were not dissimilar to those in Edmund's case and they reported:

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97 Ibid, Report of Chairman of V.Magistrates, Jan. 30,1879.Despite the "nationalization" of all local prisons in the preceding year, it is evident that a system of automatic pre-trial medical examinations had not yet been established.  
98 Ibid, Baron Huddleston to A.F.O.Liddell, Feb 1st,1879.  
99 Two reasons suggest themselves - it was cheaper and it was easier to ignore their reports if circumstances made this desirable!  
100 Chairman of the Prison Commissioners from 1877 -1895.  
101 Campbell was Med. Superintendent of the criminal lunatic asylum at Woking. (This facility was not officially accorded this status until 1884 but had been so used at least from the early 70's)
(i) Enoch Whiston has been partially imbecile from birth: that he was in this condition when he took the life of Alfred Meredith and his responsibility is much diminished.

(ii) He is now, and must remain to the end of his life of defective intellect, that is to say partially imbecile.\(^{102}\)

Had the doctors left matters here it is possible that their conclusion might have been accepted but they did not - they elaborated!

\[\ldots\text{he can form no abstract ideas & his power of judgement is limited. His animal passions are morbidly strong and it was to gratify an imperious sexual passion that he required money.}\]

His voluntary power to control himself and "regulate his conduct" was in their view well below that of "a man of average moral and intellectual development." They finished with the dangerous generalization that,

\[\text{criminal actions are often induced by the seduction of circumstances, such as that to which he was exposed and in the presence of which he was helpless.}\]

\(^{102}\) Ibid, Report of Dr Gover, Feb.5, 1879.
They had unwittingly described something close to the prevailing paradigm of the 'criminal classes' and the judge was not favorably impressed by their report. He wrote to Cross that "I know nothing of these gentlemen and it must rest with you to say how much weight you attach to their opinion." Their theory of the "seduction of circumstances" was he noted somewhat alarming and their conclusion "scarcely amounted to a legal definition of insanity"\textsuperscript{103}. Cross agreed with him and noted that "I should be very wrong in interfering." Armed robbery was a rare and awful crime in the Victorian calendar and the prosecution's account of Whiston's offence, and his motives, left little gap in credibility which might demand an explanation of insanity. Thus Whiston did not escape the gallows.

\textsuperscript{103} Ibid, Huddleston to Cross, Feb.7, 1879.
quantitative growth was not hard to accept but the idea of its qualitative development was clearly less easy to formulate. In the absence of such a paradigm any qualification on the criminal liability of young persons or the aged seem to have been judged in terms which appear as a mixture of convention and sensibility.

The Common Law, having no general definitions of childhood or adult status, was dependent on convention. In the place of general rules the law had evolved specific parameters to match specific situations. As early as the 12th century it had determined that in respect of the inheritance of property and its administration the age of 21 was quite young enough to risk the deleterious effects of youthful enthusiasm or the vulnerability of juvenile heirs.¹⁰⁴ On the other hand, at least by the end of the 14th century it was, in Holdsworth's phrase, "well settled" that children below the age of 7 could not be guilty of felony and that between the age of 7 and 14 there was a rebuttable assumption of their 'capacity' for such a crime.¹⁰⁵ Once over 14 there was no argument about this capacity and this age continued to mark the threshold of full criminal liability up to the Children's Act of 1908. What did

¹⁰⁵ Sir Wm Holdsworth, A History of the English Law, Vol VIII, pp 438ff. The legal term for this assumption was 'Doli Capax'
change, however, were both ideas and feelings about the punishment and rehabilitation of young persons. Thus, while 19th century reformers were developing special facilities for the punishment and training of juveniles, public sensibility ensured that the age of liability to capital punishment was, by mid-century, raised to 18 in all but a handful of cases. It was only in the Children’s Act of 1908 that this convention became law and no person under the age of 18, at the time of committing an offence, was in future to be hanged; they were instead to be detained during his Majesty’s pleasure and therefore effectively treated as being of diminished responsibility.

Despite a continuing anxiety about the depravity of contemporary youth\textsuperscript{106}, murder was a rare crime among Victorian teenagers. In the fifty years from 1861 to 1910 there was an annual average of only two such convictions. Moreover the proportion executed fell steadily; during the decade of the 1860's thirteen out of twenty-one convicts under the age of twenty were executed whereas in the first decade of the new century only six out of nineteen were hanged, and all of these were aged over nineteen years. During the period as a whole only five sixteen year

olds, all boys, were sentenced to death and all were reprieved. By 1888 a convention had been established that no seventeen year old should be executed.\textsuperscript{107} The significance of sensibility in this respect was underlined by the fact that when, in the following year, William Gower was executed he was just 18 but had been 17 when he and Charles Dobell shot a watchman at Tunbridge Wells. It was the fact of hanging rather than the responsibility for his crime which was uppermost in the minds of those in authority. Only a detailed study of court records would answer the question as to whether juvenile homicide was as rare as these figures suggest or whether the same sensibility found expression in jury mitigation, converting teenage homicide into manslaughter convictions.\textsuperscript{108}

An awareness of juvenile wickedness and the need for a stern framework of restraining law were in evident tension with a growing willingness to recognize the unbalanced and impressionable turbulence of adolescence. In 1888 Godfrey Lushington wrote a minute which admirably expresses this

\begin{footnotesize}
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\item The last such execution was that of Joseph Morley in 1887.
\item The study of four sample years of \textit{Old Bailey Session Papers}, at decennial intervals, from 1861 to 1901, does not support this latter view. There were only three manslaughter charges brought against teenagers in these four sets of records and no murder charges.
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conflict, and, for once, thoroughly merits his 'schoolmasterly'\textsuperscript{109} reputation in the Civil Service. In a macabre 'end of term' report to H.C. Mathews he said of Dobell and Gower\textsuperscript{110}:

A more deliberate and cold blooded murder it would be hard to conceive . . . but there is this to be said for them: they were very young and the whole thing if it had not been followed by such fatal consequences would have seemed a mere boyish freak.

. . . The two seem to have been reading about the exploits of notorious criminals and to have conceived the ambition of themselves becoming great criminals. They must be thoroughly bad fellows . . . they have deserved the extreme penalty and I believe also, though this is a point on which I know opinions differ, that the example would be salutary to others.

\textsuperscript{109} Sir Algernon West, \textit{Contemporary Portraits}, p.151, New York, Dutton,(undated). West wrote of him:

"He was a hard worker and with a certain ability but wanting in his bonhomie and popularity. He had about him much of the schoolmaster - honest, laborious and painstaking but lacking in personal interest in the subjects which came before him."

\textsuperscript{110} H.O.144 Series, Case File \# A49141, Dobell & Gower, 1888. Minute of G. Lushington, 21st December 1888.
Mathews was brief, noting that "although there is much of boyishness in their act there is also much of deliberate spite and depravity. Nil as to both prisoners."\(^{111}\)

The incidence of murder by the elderly in Victorian England was low enough to lend color to H.C.Mathews' assumption that we become safer to our fellow men as we get older and "the dangerous passions cool."\(^{112}\) In the fifty years from 1861 to 1910 only six persons, all male, over 70 years were convicted of murder and only two were hanged\(^{113}\). The remainder were all recommended to mercy by their juries, usually "on account of their age and other infirmities." In a period when a lifetime of physical labour and indifferent diet could accelerate the appearance of the stigmata of age this was a verdict sometimes accorded to much younger men like George Boddington who was convicted at the age of 64. However, in such cases there was usually some other factor present if they were reprieved, such as mental degeneration or, as in Watson's case, prior good conduct. Boddington killed a fellow estate worker at Blenheim in 1885 after a brief quarrel in which

\(^{111}\) Ibid, Minute H.C.Mathews, Dec.22, 1888.
\(^{112}\) See above, Chapter 4.
\(^{113}\) Both crimes were particularly heinous; One man stabbed a policeman who was arresting him on suspicion of theft and the other a prostitute with whom he was arguing.
the victim had called him "a scamp and a vagabond."\textsuperscript{114} He had promptly reported the occurrence and was convicted at Oxford Assizes. The judge endorsed the jury's recommendation to mercy and Lushington clearly felt confident enough of the case for reprieve that he resisted Cross's proposal for a medical enquiry since "under the circumstances such an enquiry would seem to be a needless expense."\textsuperscript{115} In the event he was seen later by Dr Orange, while in Oxford gaol and the doctor reported a history of mental disorder. Boddington, like the Reverend. Watson, served his time in Woking Asylum.

The extent of governmental power conferred by the legal apparatus in respect of criminal lunacy, and the growing confidence which the bureaucracy felt in their exercise of it, are both illustrated by cases which occurred in the 1880's. In December 1879 an Assistant-Collector in the Presidency of Madras, T.J.Maltby, shot and killed two of his servants while on tour. He did so, he claimed, because they were conspiring to kill him. He was, nevertheless, charged with murder but found unfit to

\textsuperscript{114} H.O.144 Series, Case File # A41310, G. Boddington, 1885.
\textsuperscript{115} Ibid, Minute of G.Lushington, Nov.3, 1885.
plead.\textsuperscript{116} He was promptly, and conveniently, removed from the jurisdiction of the Indian courts, under medical escort, and returned to England. He was sent to Broadmoor on a warrant signed by Godfrey Lushington. His family, who were clearly affluent, began to petition for his release and when these pleas were ignored, to threaten a writ of Habeas Corpus. The Home Office compromised, agreeing to his transfer to a private asylum where he was to remain at his family's expense. Despite Dr Orange's reservations\textsuperscript{117} the Commissioners in Lunacy raised no objection\textsuperscript{118} and Maltby was transferred to a licensed private asylum. In the following year he escaped, with the connivance of his wife, and crossed to Brussels where he lived for the next three years, returning only when the India Office threatened to cut off his pension. He was arrested, in the India Office itself, on the original Home Office Warrant and taken directly to Broadmoor by cab. He was held there for the rest of his life, making regular appeals to be returned to India to face trial for his unresolved crime. At no time did this embarrassing man appear in an English court, nor had he been convicted by any

\textsuperscript{116} H.O.144 Series, Case File # 60/9354, T.J.Maltby, 1880.
\textsuperscript{117} Ibid, Report of Dr Orange, June 12, 1880. Orange noted that he had "some strange ideas about the Duke of Buckingham."
\textsuperscript{118} Ibid, Report of Chas.. Spencer Perceval, July 8th, 1880.
court of any crime, yet he spent his life in Broadmoor as a criminal lunatic.

This too was the fate of Mary Ann Morgan who killed her two year-old child in 1883.\textsuperscript{119} This wife of a respectable local official appeared before the Swansea Magistrates and was committed for trial at the next Assizes. However, on the advice of the Home Office, she was examined by the Visiting Magistrates, and two doctors whom they appointed, and certified as insane. Within six days of committing her crime she was in Broadmoor and remained there until her death.

The status of criminal lunatics and the powers which the Secretary of State exercised over them were the subject of a Departmental Committee\textsuperscript{120} set up by Sir William Vernon Harcourt in 1882. The Committee heard evidence from a small group of figures who are now familiar in this account. Alexander Maconochie, "the head of the Criminal Department at the Home Office", Dr Orange, by now Superintendent of Broadmoor, Dr Gover "Medical Superintendent of the Government Prisons", Dr Sheppard, Superintendent of the Asylum at Colney Hatch and two Visitors, appointed by the Commissioners in Lunacy. From this well chosen

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sample of the official establishment no radical views emerged nor any major attempt to limit the powers of the Home Office. Indeed the reverse was the case when the committee's recommendations were translated into law in the Criminal Lunacy Act of 1884.\textsuperscript{121} The concern of those responsible for County Asylums to avoid housing lunatics with criminal records encouraged the Committee to permit those who, on completion of criminal sentences, were judged insane to be retained in asylums for the criminally insane. The establishment of such asylums was also extended and the State became responsible for their cost\textsuperscript{122}. The powers of the Secretary of State over the criminally insane were broadly endorsed\textsuperscript{123}, embracing "all those lunatics of whatever kind . . . in custody by virtue of an order of a court of law." Regular medical reports were, however, to be made so that those deemed 'safe' might be released on license. "No criminal lunatic", they concluded," could be discharged without a warrant signed by the

\textsuperscript{121} Criminal Lunacy Act 1884. 47&48 Vict.. c 64.
\textsuperscript{122} Up to this date the maintenance of the criminally insane had been a local fiscal responsibility. The Parish of the lunatic being assessed by Quarter Sessions for the cost (14/- per week in 1883).
\textsuperscript{123} Report, Conclusions, para.4.
Secretary of State."\textsuperscript{124} While the latter was indeed the case, the former assumption of a court order was hardly true.

These powers which remained in place throughout the period permitted an alliance of bureaucrats and medical men to supplement the verdicts of courts and to impose extralegal incarceration independently of the legal process. Use of this power was clearly restrained in the last decades of the period but only when the courts had proved willing and able to undertake the task itself.\textsuperscript{125} Once convicted a capital convict might avoid execution as a result of a post-trial enquiry or, more commonly, a non-capital prisoner might be judged criminally insane and be exposed to an indeterminate future of incarceration. In 1949 the Lord Chief Justice, Lord Goddard, told the Royal Commission on Capital Punishment:

It happens over and over again, that where the issue of insanity has been tried and decided by a jury, who have found a prisoner sane, an enquiry has been held . . . an enquiry be it observed held in private with no representation of the prosecution or the convict,

\textsuperscript{124} A standard format for such reports came into use almost immediately. The reports made in cases of capital convicts reflect the frightening responsibility inherent in such judgements - as does the Home Office reaction to them. Decisive statements were avoided wherever possible unless they provided evidence of a continuing threat.

\textsuperscript{125} See Table 5.
by persons not guided by a judge and who give no reasons for their findings, with the result that the verdict of the jury is reversed.\textsuperscript{126}

This is, as the figures in Table 6 suggest, an exaggeration in respect of the period under review and in the following fifty years there was little increase in the number of insanity enquiries. Enquiries were held in 16\% of cases of capital conviction and in one quarter of these certificates of insanity were given.\textsuperscript{127} It was however an area, if a modest one, in which the Home Office, had learned to act independently of the Judiciary. During this period the Home Office had come to terms with a changing perception of criminal responsibility. It had achieved a measure of balance between the demands of exemplary justice and public safety on the one hand and a growing awareness of the social and physical limitations on the free will of what once were supposedly autonomous individuals.

Chapter Seven

The Home Office As Tribunal Of Mercy (ii)

- Gender as a factor in the mitigation of criminal responsibility in the 19th century.

Above the rotunda of the Central Criminal Court at the Old Bailey the blindfolded figure of Justice balances its scales in one hand and its sword in the other. She was, the Sovereign apart, the only female participant in the administration of criminal justice in 19th century England. It is a male symbol, "with a foggy glory round his head, softly fenced with crimson cloth," who, in Charles Dickens' phrase, seems better to epitomize that process and to give rise to the notion of Victorian law as 'Patriarchy'.

Judges are preeminent among that "social audience" to whom society accords the task of determining and interpreting its cultural and behavioral norms. In Marvin E. Wolfgang's awkward phrase they are "public response agents" and among the "chief elements in the manufacturing of criminal deviance." This was a role which, in the

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1 Bleak House, Chapter 1. The Lord Chancellor sitting in Chancery.
second half of the 19th century, they had increasingly come to share with the legally minded, if not always legally trained, civil servants of the Home Office. The recovery of their collective assumptions about the nature and role of women in Victorian society is thus an important task for the historian of its culture as well as of its crime. Nevertheless, despite the innovative work of Daniel Duman\(^3\) and Jill Pellew\(^4\), the leading figures of the legal establishment of Victorian England remain obscure and inaccessible to the historian. Their family origins, their education and training and even their wealth have been explored but their moral and social preconceptions remain matters of speculation. They left few 'paper trails' and their obituaries and memoirs are as discreet as their rare public utterances.

This study of the Prerogative of Mercy in Victorian England has exposed a valuable new source of insight into this aspect of criminal justice. The Home Office (Series 144) files contain a mass of correspondence from Judges on the character and culpability of those they tried in capital cases. Being assured of complete confidentiality, these exchanges with the Home Office were relatively uninhibited.


After 1861\(^5\) their subjects were virtually all murder cases and since murder is, for the most part, a domestic crime women figure extensively both as offenders and victims in the files.

The concept of mitigation which traditionally underlay the Prerogative of Mercy was one of compromise. It was a compromise which allowed the Common Law to preserve simple, broadly defined and absolute definitions of felony while at the same time recognizing both degrees and shifts in the community’s perception of guilt and blameworthiness. Two doctrines contributed to this useful ‘fiction.’ From its earliest times the law maintained a strict standard of personal liability which held the individual accountable for all the consequences of his actions. At the same time it assumed that such actions were done voluntarily or with intention. However, long before the emergent determinism of the 19th century, it had accepted that this element of free-will could be qualified by various factors including immaturity and old age, fear of death or injury or the pressure of other human wills and that while only insanity or extreme youth, among such factors, could anull the sin and expurgate the guilt of an illegal act, all might constitute grounds for mitigation of punishment. During the 19th century the antithesis between a

\(^5\) Offences against the Person Act (24 & 25 Vict. c.100).
reinforced individualism and a growing awareness of the plethora of constraints on free-will is manifest in all areas of the law. However, in the discussion of just sentencing these tensions are especially evident.

The ends of justice' required the Judge to express an unflinching opposition to crime and immorality, and to identify and condemn both the evil that had been done and the evildoer. At the same time prudence, if not compassion, dictated that the law must recognize social perceptions of relative guilt and realize that too harsh an adherence to the full measure of punishment allowed by the law would turn public satisfaction into a sympathetic aversion. The question thus arose as to how to balance these tensions and to assess in mitigation the extent of deviance from social norms. The judges and bureaucrats who were involved in this process seem to have measured deviance and criminality against a shadowy paradigm of human normality. Over the period, however, it was the Home Office civil servants who attempted, in the construction of 'rules', to achieve a consistency in mitigation which would preserve the law's integrity

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6 J.Fitzjames Stephen, cited at Chapter 1, p.30, above.
7 For example Sir George Grey, chapter 6, note 3.
while satisfying popular sentiment. In doing so the bureaucrats were
themselves to be guilty of a formalism that satisfied no one.

This chapter will examine the judicial and bureaucratic
perception of womanhood that this correspondence reveals. It will
argue that while gender alone was never an exculpatory factor in
serious crime, establishment perceptions of femininity shaped their
judgments of women both as perpetrators and victims of murder. Two
apparently conflicting elements will become apparent. On the one hand
was a paternal sensitivity to the weakness and vulnerability of women,
conceived in both emotional and physical terms. On the other hand
there was an assumption of moral strength and arising from it a clear
perception of wifely duty. This apparent paradox was often the result
of no more than two different male perspectives of a single paradigm,
that of the evolving life-time role of the woman.

The inherent innocence, physical weakness, emotional instability
and vulnerability of the young girl seem to have been widely assumed.
Virtuous when secure in the proprietary family matrix, she was easily
corruptible when that protection was lost. With maturity, marriage
and child bearing this vulnerable innocence gave way to strength and
instability to dependable, temperate virtue. It was, nevertheless, a
strength dependent on the acquired sinews of religious and moral
education. Two celebrated mid-Victorian alienists expressed this concept forcefully in their standard text-book on insanity\(^8\). They declared that every medical man would acknowledge, ". . . that religious and moral principles alone give strength to the female mind and that when these are weakened or removed by disease the subterranean fires become active and the crater gives forth smoke and flame."

The superimposition of social and moral values on the perceived phases of physical growth gave a specious coherence to the total paradigm. Childhood, adolescence and womanhood became three overly distinct phases, each with its standards of normative behavior both for the female herself and for those who related to her. During childhood and adolescence the female must offer docility, deference and service in return for paternal and family protection. After some five years, approximately between the ages of fifteen and twenty, in that pre-marital limbo, which Mary Hartman\(^9\) has described so perceptively, the now adult woman was expected to have acquired the moral strength which encompassed a tolerance of pain, patience, temperance, frugality, modesty and, of course, fidelity. In return she might expect not only the protection of her husband and sons but a general social

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\(^8\) Bucknill & Tuке, op. cit., p.273.
respect and esteem. The law and public policy had, therefore to positively censure deviation from this paradigm and to reinforce the protection which it called for at each stage. It often did better at the former than the latter and it is the treatment of women as homicide offenders that will be considered first.

The tally of convicted Victorian murderesses is short and one that will support few generalizations. Between 1861 and 1910 there was an annual average of only four capital convictions of women. During this period, however, the absolute number of female murders fell as did their crime as a proportion of all murders. Thus if one argues, as does Hartmann, that such cases dramatically epitomize the stresses and tensions of female social life, one must always begin by noting how successful the vast majority of women were in containing such tensions without resort to extreme violence or alternatively how crafty they were in concealing their crimes when they could not avoid committing them. The figure quoted above represents only that proportion of "all murders known to the Police" that the authorities could successfully prosecute\textsuperscript{10}. In the decade of the 1860's this was about 7% and even with more frequent inquests and extensive policing this total rose to only 10% in the first ten years of the 20th century.

\textsuperscript{10} See Tables 1 & 2.
One suspects that, in view of the particularly domestic nature of female homicide, with its unrivalled opportunities for both commission and concealment, the proportion of undetected and unconvicted female murderesses was even larger than these figures indicate. In the early years of the period almost 80% of female murderesses were convicted of killing their own children, 10% of murdering other peoples children and 4% of murdering their husbands or lovers with the small balance of victims almost wholly accounted for by parents or other relatives. These proportions changed during the period so that by the turn of the century murderesses, now much fewer in numbers, killed significantly more men and adult women and took a substantially lower toll of their own unwanted children. In this respect better birth-control and slowly rising prosperity were obviously important factors.

No category of crime reveals the tensions inherent in Victorian justice more clearly than that most common of female crimes — infanticide. The ends of exemplary justice were met by an occasional, and seemingly capricious, murder conviction accompanied with harsh punishment, while the great mass of offenders either avoided indictment altogether or were convicted of lesser offences. This task

11 See Table 7.
12 See Table 9.
of unofficial mitigation fell to magistrates or to juries while in those few cases where a murder conviction was unavoidable, it was the task of the Judge to express the full measure of social disapprobation.

Domestic and family complicity ensured that few cases of infanticide were reported to the police - about 130 p.a. - and of these rather less than 20 were prosecuted as murder (Table 7). Of this small total juries convicted no more than 2 or 3 women each year. Nevertheless when, due usually to the remorseful 'self-conviction' of an impoverished and legally unassisted young mother, a conviction was obtained the law was ready to make an example although it was an example rarely made by hanging. After 1849 no woman was hanged for killing a new-born infant but in the following half century there were five cases of women hanged for the murder of their infants or young children. The more usual 'tariff' of punishment consisted of a term of penal servitude of from 5 to 20 years. The judge's opinion of the character and circumstances of the offender was considered against a

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13 Yet as Rose points out, op.cit., p.64, an energetic Coroner, in 1860, could find as many as 170 such cases in Middlesex alone.
14 By the end of the century his tariff had become formalized to the extent of appearing as a table in the 1899 Edn... of the Home Office Printed Memoranda, (Vol xviii, Feb 1899, p.107):
   Infanticide at Birth- 4 years & 8 months*
   Soon after birth- 7 yrs
   older- 10 yrs
(* clearly an average figure)
developing framework of Home Office 'rules' as the bureaucrats sought to rationalize the inevitable subjectivity of the bench. The heinousness of the crime evidently increased as each day after birth increased the age of the victim. Equally as the age of the offender rose so did her culpability. When Mr J. Field proposed a generous term for an older offender in 1876\textsuperscript{15}, a Home Office minute noted "Infanticide by a woman of 35 is not the same thing as by a girl of 20."

The perception of the culpability of this offence seems, nevertheless, to have undergone a distinct moderation as the period progressed. There were two superficially distinct elements in this change. On the one hand there was a growing sympathy among both judges and bureaucrats for the social pressures to which young mothers of illegitimate children were exposed and on the other an increasing willingness to accept medical accounts of puerperal insanity. In 1899 the Home Office Criminal Memoranda noted that sentences on infanticides in the early period [1861-1880] were for an average of 10 or more years whereas those convicted in the 1880's averaged about 7 years. In a contemporary minute C.S.Murdoch noted\textsuperscript{16} "It is important

\textsuperscript{15} H.O.45 Series, Case File #56783,The case of Lucy Lowe. Lowe was a servant who killed her 2-3 week old illegitimate baby. The H.O minute on her case noted that she committed the crime "to conceal her shame and enable her to return to service."

\textsuperscript{16} H.O.144 Series,Case File #A61455,1899.
to reserve the milder punishment of 7 years penal servitude for those cases where the crime is committed actually at the birth of the child."\textsuperscript{17} In an earlier (1895) minute Murdoch had developed this view:

More cruel cases, where e.g. the mother or the child is older, the temptation of distress not so strong, are reserved for 10 years. Some very few bad cases are detained for 15 or even 20 years. The milder punishment of treating as a seven or six year sentence is usually reserved for those cases where the baby is killed absolutely at birth.\textsuperscript{18}

This rather clumsy minute equates the degree of cruelty not just to the age of the child but to that of the mother, assuming a greater fortitude in the older person. It recognizes too the extent of the trauma of childbirth itself, in an age without any general availability of anaesthetic or relaxants. When the children of all classes were commonly delivered at home, this was an event where an account of temporary insanity could unite both sympathy and personal experience. In 1872 Henry Keating, a distinguished judge and ex-attorney General, wrote of an infanticide:

\begin{quote}
All cases of infanticide, confining the term to new
\end{quote}

\textsuperscript{17} H.O.\textit{Printed Memoranda}, 1899, p.113. Minute of C.S. Murdoch.
\textsuperscript{18} Ibid, p.113.
born children, involve the great difficulty of properly estimating the state of mind of the mother in the midst of unaided physical suffering of the most agonizing character, provoking necessarily a certain amount of mental disturbance.19

When Isaac Ray had first published his "Treatise"20 he had noted that "another curious form of homicidal insanity occurs in women and seems to be connected with those changes in the system produced by parturition, menstruation and lactation." He went on to comment that "with scarcely an exception" the victim is always "her own or some other young child." He had no generalized explanation for this phenomenon but merely went on to cite a series of cases observed by Esquirol and others earlier. Twenty years later when Bucknill and Tuke produced their "Manual"21 the concept of puerperal insanity had become formalized. The observations of Dr Reid, at the General Lying-in Hospital in Westminster and at Bethlem, and the work of Dr James Macdonald at Bloomingdale, in New York, had enabled them to describe a distinct, and temporary, 'mania'. The characteristics were a loss of

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19 H.O.45 Series, case File#14725, Ann Hawkins, 1872
self control, of modesty and often a "strong aversion to her child and husband."22 Under acute conditions suicide or violence to their offspring were possible. By the 1870's this physically generated explanation of female behavioral disorder had been extended to include the insanity of lactation and climacteric insanity associated with the menopause.23 These scientific explanations were, however, only relevant to the decisions of officials when they reinforced existing presuppositions about 'normal' female behavior. When women stepped outside the normal parameters of such conduct both officialdom and their own communities found little room for mercy or science.

The marked contrast in the fates of Emma Wade24 and Selena Wadge25 illustrate the extent of this potential divergence. In 1878 Selena Wadge killed her 2 year old illegitimate child and was hanged; one year later Emma Wade poisoned her 5 month old son and served less than a year at hard labour.

Selena Wadge killed the child of one father in order to run off with another man who would not accept it. A domestic servant of 27,
she was no longer 'youthful' and already of an age when she should have been respectably married. She seems to have appeared as a selfish and willful woman. The Hon. George Denman who presided at her trial was a devout evangelical, and in his youth a vocal opponent of capital punishment\textsuperscript{26}. While he described Selena as "a strong fine young woman with rather determined and intelligent features"\textsuperscript{27}, he remained quite unengaged on her behalf. A neighbor reported to the police that "she was always a bad girl", while even her own family contrived to destroy her reputation. "She was always a liar", stated her Aunt, and her mother admitted "She was very determined to go away with him." The Jury as well as the Judge were clearly horrified by her rebellious sexual motivation and found no grounds for any recommendation to mercy.

Emma Wade, on the other hand, won the chivalrous support not only of the Judge, Mr J. Lush, but also of the jury and many local notabilities. The 17 yr old daughter of a respectable family, her father a policeman, she had been seduced by a local shop-assistant but was allowed by her father to raise her child at home. This generosity upset her mother, who, it appears, resented both the expense and the social

\textsuperscript{26} See the Capital Punishment Commission, 1864, Minutes, #589 ff.
\textsuperscript{27} Case File 75879, above, Judge's notes.
humiliation which it involved and therefore pressed Emma to board the child and return to domestic service. While under this harsh pressure she found a bottle of strychnine-based vermin killer. After writing a touching and repentant suicide note she gave half to the baby and took the rest herself. However she omitted to "Shake the Bottle" and thus gave most of the active ingredient to her baby, who died, while she survived. She had provided incontrovertible evidence both of the act of homicide and of her intention to kill. After a long delay, the jury, in the Judge's words "did their duty" but added a strong recommendation to mercy. Mr J. Lush then sentenced her to death. Two days later\textsuperscript{28} however, he wrote to the Home Secretary endorsing the recommendation. It was, he said "a case deserving of exceptional clemency." He continued,

"The woman, it is clear, was not actuated by any bad motive such as ill-will towards the child, or towards any other person or the desire to get rid of the child . . . On the contrary it was her love for the child which prompted her to take away its life. She had been goaded to the verge of despair by her mother

\textsuperscript{28} Case File #83399, above,Lush,J to Sec.of State, May 5th 1879.
who I have no doubt felt the disgrace brought on the family and rather than go out to again to service . . . she made up her mind to poison both herself and the child. Under the circumstances I do not think a severe punishment is called for, either by way of example in the interests of society or to deter the woman from a repetition of the offence. I think that the ends of justice will be answered by a years imprisonment.

The Member of Parliament for Grantham, Sir John Dalrymple Hay, expressed the local feeling when he endorsed and personally delivered a large local petition on Emma Wade's behalf. "It was," he wrote,"as sad a story as Effie Deans', without a sister to plead for her life". He asked that "Her Majesty may be advised to remit the sentence of death by commutation to such a punishment as will satisfy the ends of justice."

This tension between the ends of expressive justice and paternalistic pity is well illustrated in the case of Elizabeth Benyon who killed her 12 month old child in 1863. The local stipendiary

30 Sir W. Scott, The Heart of Midlothian.
31 H.O.45 Series, Case File #27066, Eliz..Benyon, 1863.
magistrate wrote of her case, "She was driven nearly non compos mentis by the cruel and fiendish conduct of her father compelling her to have incestuous intercourse . . . and then driving her and her baby away out of doors to perish." On the advice of the Assize Judge, Mr J. Blackburn, later an eminent Lord Chief Justice, her sentence was commuted but only to penal servitude for life. It was a sentence that normally meant 20 years, with a reduction to 15 for good conduct. Blackburn clearly felt that the prisoner shared some of the guilt with her father. However when, ten years later, her petition for early release was referred to him by the Home Office, the Judge wrote:

I have little to add to the report which I made in 1863. . . . The question now seems to me whether the remission of her sentence would produce any ill effects on others. . . . I should think that after 10 yrs P.S. and under the peculiarly painful circumstances it would produce no bad effect if any respectable persons will undertake to provide for her at first so that she may not be driven to evil courses by destitution at first start.32

The role of the Judge as an agent of public response is well exemplified in a note written by Mr J. Crompton on the case of Mary Prout, a 22 yr old servant who was tried before him at Pembroke Assize in 1864 for the murder of her 6 month old baby. He wrote of this "sombre and downcast character" that:

I think it would be very inexpedient to carry out the sentence of death in this case. A great sympathy wd be created for the prisoner and I think the usefulness of the conviction wd be lessened by her execution & it wd have a tendency to prevent juries in this part of the county from giving proper verdicts in similar cases. Instead he proposed commutation to penal servitude for life "or 20 years at least." She served a total of 14 years, earning near maximum remission.

The highly subjective character of the judicial response is evident in the case of 18 yr old Elizabeth Trevett tried at Winchester in 1874 for the murder of her 3 month old child. A Local memorial pleaded for her life and noted the petitioners' "deepest pity for her on account of her youth and in consideration of the gross wrongs she has

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33 H.O.45 Series, Case File # 35924, Mary Prout, 1864.
35 H.O.45 Series, Case File # 31576, Eliz.. Ellen Trevett, 1874.
endured at the hands of her seducer." Mr J. Quain clearly shared this view and wrote that "a moderate period of punishment wd meet the justice of the case." He went on to recommend 3 calendar months as "sufficient punishment." In this case his compassionate advice was rejected by the Home Office, where it was minuted on his letter that "This would establish a most inconvenient precedent." The Home Secretary followed his advisors and awarded 6 years.

In that same year of 1874 Sarah Ann Liddell was found guilty at Worcester Assizes of an infanticide that might well have gone unrespite\footnote{H.O.144 Series, case File # 40090, Sarah Ann Liddell.}. She was 38 years old, the aura of youthful innocence long departed, and her child was more than 2 years old. However her circumstances so engaged the sympathy of Mr J. Balliol Brett that he pleaded on her behalf to the Home Secretary and obtained a reduced sentence of 15 years, which with remission became 10 years. Brett wrote to the Home Secretary, R.A. Cross and, after describing the abject poverty of the convict, her sister and mother who together subsisted on only 8/- per week, continued,

The prisoner had been deserted by her husband for eleven years. She had, when not in the work-house been a burden to her mother. She had been in trouble
for all those 11 years. She was a weak and immoral woman, but you will observe that she was by reason of her weakness a prey to the infamous and hard people about her...\textsuperscript{37}

It seems that, in this instance at least, the Judge recognized a case where the privileges of adolescence were more appropriate than the duties of maturity.

The problem of unwanted offspring was rarely, if ever, solved by infanticide in the case of middle-class mothers. Young women of this class were likely to be better protected from the temptations of adolescence both by moral "education" and by a supervisory network of female relatives and governesses\textsuperscript{38}. It is scarcely surprising therefore that the mixture of alarm and sympathy aroused by working class infanticide in the respectable classes was far exceeded by their horror of non-parental murder of infants, where in most cases a breach of trust and duty was also involved. Thus murder by nurses, foster parents or "baby-farmers" was almost invariably met with capital punishment. This group, while small in itself, represents the largest

\textsuperscript{37} Ibid, Brett J, to Sec of State, Dec. 20, 1874.
\textsuperscript{38} They could, moreover, afford the less hazardous strategies of adoption or baby-farming if the protective system failed. See for example Annie Took's case below.
identifiable class of female offenders who were executed\textsuperscript{39}. The cases of the "baby farmers" Charlotte Winsor (1865), Margaret Waters (1870) and Amelia Sachs (1903) are perhaps the closest that that age came to mass-murder and, although Charlotte Winsor escaped execution on a technicality, their trials aroused great emotion\textsuperscript{40}. The case of Annie Took (1879) attracted similar hostility although the scale and circumstances were less sensational\textsuperscript{41}. She had agreed to foster the illegitimate child of a prosperous Devon farmer's daughter. The farmer's son, anxious to divert the wrath of his parents and spare his sister's shame, undertook to pay the foster-mother, who already had four children of her own, £12 p.a. to raise the child as her own. Annie Took, a 44 year old needlewoman, while apparently a kind mother, was both improvident and given to drink. In financial straits, she killed the child and kept the money. When its dismembered body was found the real mother was traced, arrested and forced to confess the whole story. While Annie Took denied the crime she was convicted and neither the jury nor Mr J. Lopes could find any ground for mitigation. Despite a

\textsuperscript{39} See Table 7.
\textsuperscript{40} The case of Charlotte Winsor was on of those rare criminal cases referred by the judge to the Court of Crown Cases Reserved. The time taken to convene the judges and confirm the propriety of the verdict was such that the Home Sec, Sir George Grey, commuted her sentence on the grounds of her already extended suffering.
\textsuperscript{41} H.O.144 Series, Case File #85718, Annie Took, 1879.
modest local appeal based on her extreme poverty she was hanged but not before the Prison Authorities had persuaded her to sign a positively liturgical and somewhat improbable confession:

I hereby acknowledge . . . that I am justly to suffer for my dreadful crime for which, as for all my many sins, I do most humbly repent and pray God's mercy for the sake of his dear son, my only Lord and Saviour Jesus Christ.42

What Mr J. Crompton had referred to (above) as the "usefulness of the conviction", the expression of social horror at the crime was thus enhanced by the pious repentance of the criminal - which was, of Social horror readily overcame any inhibition about hanging maternal infanticides when profit seemed to be the motive. The growing availability of cheap life and burial insurance was a temptation that some Victorian mothers could not resist. In 1873 there were two such convictions. Ann Barry43 poisoned her child with strychnine and Mary Ann Cotton, an infirmary nurse, poisoned her 7 yr old stepson for less than £5. A few years later in 1887 another nurse, Elizabeth Berry was hanged for poisoning her 11 year-old child and in

43 She obtained the poison from her lover, Edwin Bailey, a chemist. He provided it in a bottle marked "Soothing Powder". (Jud. Stats. for England & Wales, 1874, Parl. Papers, Vol. LXXI)
the following year Ellen Heesom was convicted of poisoning not only her two children but her mother as well. She was, somewhat surprisingly, reprieved because of a history of mental disorder. The effect of such cases, and some other domestic crimes for the same purpose, was as Lionel Rose has demonstrated to tighten up the requirements for certification of natural death. 44

By comparison with children, husbands were rare victims of convicted female homicides. During this period they amounted to no more than 7% of an average annual total of four cases, or one every three or four years. They were, however, almost without exception cases of great popular interest. This was because this crime, unlike infanticide, often reached into the ranks of the respectable middle classes. It was, moreover, rarely a crime of the young. Instead of the exploited adolescent, forced by economic and social pressures to dispose of her unwanted offspring, we have a mature woman driven to homicide by the lure of illicit sex or greed. It was the ultimate deviance from the paradigm of wifely duty. It was moreover a deviance which had since the earliest times raised the crime from simple felony to that of treason. Where high treason was, in Blackstone’s phrase 45,

45 Blackstone, op.cit., Book iv, Cap.xiv, pp 203 & 204.
"a breach of natural relation" in respect of the Sovereign, petty treason was a similar breach in respect of the natural relation of faith and obedience which a servant owed his master, a priest to his ecclesiastical superior or a wife to her husband. While it no longer attracted the special punishments\(^{46}\) that had endured into the 18th century, petty treason remained an especially heinous crime in 19th century England. Such crimes were, again in Blackstone's words, "murder in its most odious degree."

Adultery or inheritance were common features of many famous cases in this category, including those of Fanny Oliver (1869), Florence Bravo (1876) Adelaide Bartlett (1886), Florence Maybrick (1889) and indirectly of both Elizabeth Staunton and Alice Rhodes (1877). In these cases the law was called on to protect the institution of marriage itself and if it was no more successful in convicting husband killers than infanticides it was not for want of trying. In such cases acquittals or commutations were not tokens of covert sympathy or class cohesiveness. The convicted infanticide typically confessed to her clumsy crime and went to trial without legal help and, if she escaped conviction or execution, it was because of the tacit understanding she gained thereafter. The middle class criminals

\(^{46}\) In the case of a man the punishment was to be drawn and hanged and in the case of women to be drawn and burned. (Blackstone, op. cit. Book iv, cap. xiv, p.203.)
referred to above adopted methods that were then extremely difficult to prove and unobligingly refused to admit that they had done it. They were, moreover, in most cases well represented at all stages of their prosecution. In each of the cases cited above the accused appears to have been engaged in adultery and in each case, except those of Elizabeth Staunton and Alice Rhodes, it was alleged that poison was used. In the latter cases the even more conjectural accusation of deliberate starvation was made. In all these cases the technical evidence was confused and uncertain. Florence Bravo\textsuperscript{47} and Adelaide Bartlett\textsuperscript{48} were well served by counsel and were acquitted. In all the other cases the weakness of the forensic evidence evoked such profound public and professional protest that the death sentences were reluctantly commuted or, in the case of Alice Rhodes a free pardon given.

The reluctance of both Judges and bureaucrats to mitigate in such cases is well illustrated in the case of Fanny Oliver in 1869\textsuperscript{49}. Fanny Oliver, then 28 years old, was accused of poisoning her husband with arsenic. Clear evidence was offered of her adultery and that she had

\textsuperscript{47}This case is described by Mary Hartman, op.cit.Cap.#4 and, more thoroughly, in Yseult Bridges, \textit{How Charles Bravo Died}, Jarrold 1956.

\textsuperscript{48} See also, Hartman, op.cit., Cap.5 and Sir John Hall, \textit{The Trial Of Adelaide Bartlett}, London, Hodge, 1927.

\textsuperscript{49} H.O.144 Series, Case File#8/20667, Frances Oliver, 1869.
been taking money from her husband's savings account to support her lover. However of the two tests then available to prove the presence of arsenic in a corpse, one proved negative and the other showed only traces in the liver. These traces were no more, as one technical witness pointed out, than the test itself might have left behind\textsuperscript{50}. Nevertheless the jury found her guilty but added a recommendation to mercy. Baron Pigott, the Judge, summarized the legal dilemma of the establishment:

\ldots on the whole whatever my moral conviction may be of the guilt, founded on other parts of the case, I cannot say judicially that the medical evidence is satisfactory. I regard the recommendation of the jury as implying a doubt on the same ground.\textsuperscript{51}

This doubt was reinforced by a major petition from the medical and scientific community of Birmingham\textsuperscript{52} but despite such reservations that might well, in other circumstances, have earned a pardon, the Home Office as well as the judge continued to assume her guilt. While her sentence was commuted it was to penal servitude for life. A later Home Office minute on one of her frequent appeals stated,

\textsuperscript{50} Ibid, Judge's Notes, July 23, 1869.
\textsuperscript{51} Ibid, Judge's covering letter, July 23, 1869.
\textsuperscript{52} Ibid, Petition, July 31, 1869.
The woman has been 11 years in confinement and, assuming her guilt, the case is as bad as possible. ? no interference (33)

This minute was endorsed by Sir William Harcourt, the Home Secretary, and she was only released after serving 17 years, when terminal cancer was diagnosed. The moral censure implicit in this attitude towards her punishment has to be contrasted with the willingness of eminent members of the Birmingham community to petition for her life in 1869. While notable for their hatred of capital punishment, the non-conformist leaders of Birmingham were also renowned for an unflinching hatred of sin. Despite this the petition was signed by three members of the Cadbury family, two Albrights and an Avery as well as by the Lord Mayor. Even in the 1860's the "sense of public justice in the community" which, they declared, would be outraged by her execution, was not overcome by a sense of outrage at her sins. By the end of the century most of those who appealed for Florence Maybrick's life were equally motivated by perceptions of social injustice although there is much less evidence of opposition to capital punishment.

In the case of Catherine Churchill\textsuperscript{53} the motive assumed for the murder of her husband in 1879 was money. The fifty year old wife of a

\textsuperscript{53} H.O.144 Series, Case File #83678, Catherine Churchill, 1879.
prosperous small-holder, she was by no means 'middle class' and when she learnt that this eighty-two-year old man was about to change his will she killed him in a suitably agricultural fashion. She is alleged to have struck him down with blows from a bill-hook and rolled his body into an open fire, claiming later that "he had fallen in a faint". There seems to have been little doubt about the facts in this case and when her numerous supporters, of both sexes, petitioned for her life, it was on the grounds of provocation.

There are extenuating circumstances which, though not recognizable by the law, may yet be recognized by mercy. The character of the deceased can not be overlooked. . . .it was as is well known exceedingly bad . . . having first dragged her to the depths of womanly degradation, he treated her as his wife very often with great cruelty . . .

The unhappy woman has all her life been under evil influences surrounded by evil examples in her family relationships but that, so degraded, she won the character of a hard working woman.55

54 Ibid, Notes of Baron Huddleston, May 22, 1879.
Despite support by the local justices and most of the local clergy, this petition presented by the M.P. for the division, B. H. Paget, was ignored both by the Judge, Baron Huddleston, and the Home Office. Her motive and the object of her murder put her crime at the extremity of horror and she was hanged. On the other hand it is questionable whether, had the roles had been reversed, the result would have been the same. It is significant of slowly changing self-perceptions among women that in this case a separate petition was raised by the women of the district which also stressed the provocation to which the prisoner had been exposed. Its signatories were almost entirely identified as "Gentlewomen" or the "Wife of" some local male figure and they, like the female supporters of Florence Maybrick, chose to appeal directly to the Queen. They did not obtain any more comfort from that source than "The Women's International Maybrick Society" a decade later.\[^{56}\]

The inaccessibility of divorce as a means of terminating an unsatisfactory marriage was a pressure which drove a handful of women to murder. Despite the Matrimonial Causes Act of 1857 divorce was to remain inaccessible to all but the most resolute and financially

\[^{56}\] Ibid, May 22, 1879. The Petition was addressed to the Duchess of Atholl, Lady of the Bedchamber, who passed it to Ponsonby, the Queen’s Secretary, and he sent it to the Home Secretary. It arrived after Churchill had been executed.
independent women\textsuperscript{57}. When 44 year old Mary Ann Ashford murdered her husband in 1866, it was simply "To be rid of him."\textsuperscript{58} This also seems to have been the motive for Mary Lefley's crime in 1884 when she poisoned her elderly husband with arsenic, a crime for which this 49-year-old woman was duly hanged\textsuperscript{59}. The motives in the more celebrated "Liverpool Poisoners" case, which occurred in the same year, are more uncertain since Margaret Higgin's husband was insured when she and her friend, Catherine Flanagan, poisoned him with arsenic\textsuperscript{60}. All of these women were members of the working classes and all were middle aged. They aroused little sympathy among their own or the opposite sex. In an even more celebrated Liverpool poisoning case in 1889, however, the accused woman was both affluent, young and beautiful. Her case stirred many, often conflicting reactions among her contemporaries on the issue of the justice and fairness of her trial and conviction for the murder of her husband, James Maybrick. This was a case where justice

\textsuperscript{57}The annual average number of divorces grew slowly from a 148 in the first decade after the Act to nearly 600 in the last decade of the century. Separations and maintenance orders were, after the Mat. Causes Act of 1878, more easily obtained, nearly 9000 a year being granted by Magistrates Courts by the end of the century. (Manchester, op.cit. p.380.)

\textsuperscript{58} Jud... Stats for England & Wales, 1866. Parl... \textit{Papers Vol. LXXVI. 1867}

\textsuperscript{59} Jud...Stats. for England & Wales, 1884, Parl... \textit{Papers Vol. LXXXVI 1885.}

\textsuperscript{60} Ibid. Flanagan was 55 and Higgins 41
and the fairness of the judicial process were very differently perceived.

The legal and bureaucratic establishment saw the issue from the viewpoint of the evidence offered in court. In effect they did what Spencer Walpole had disclaimed as the role of the Home Office, they retried the case on the basis of the record\textsuperscript{61}. In their investigations both in the immediate aftermath of the trial, in August 1889, and later in 1896, the Home Office concluded that a murder conviction was unjustified because of the uncertain medical evidence that James Maybrick died of arsenic poisoning. On the other hand it was the consensus that a conviction for attempted murder would have been eminently just. Her own account of her actions during her husband's terminal illness was, in Lord Halsbury's phrase, "absolutely conclusive of her guilt"\textsuperscript{62}. The assumption that it was proper to punish her according to the law in respect of this latter crime\textsuperscript{63} was never questioned. It is significant that the member of the legal establishment who most vehemently criticized the verdict, Sir Charles

\textsuperscript{63} Ibid. Halsbury cites the Crimes against the Person Act of 1861, 24 & 25 Vict... c.100, Sec..14.
Russell, Mrs Maybrick's counsel, did so on the basis of misdirection of the jury in respect of the indictment\textsuperscript{64}, and it was his complaints which were the main concern of Mathews in 1889 and subsequent Secretaries of State.

For many others the question of the weight of the evidence was less important than the apparent fairness of the trial itself. In the words of the \textit{Daily Telegraph} - "The issue was to depend on far broader lines than were drawn by the skilled evidence viz on moral principles and motive."\textsuperscript{65} In other words would Florence Maybrick have been convicted at all, had the judge not chosen to make clear his own views on the question of her guilt. These were views which, in the opinion of many, were formed by his horror at both her adulterous conduct and her failure of wifely duty during her husband's illness. It is hard to avoid the conclusion that had Stephen not used the evidence of Florence Maybrick's adultery, and her continuing relationship with her lover, to supply motive and coherence to an otherwise shaky circumstantial case, the jury would in all probability have acquitted her. The desire to be free from her husband and to continue her affair with Alfred Brierly gave the prosecution case a force and credibility which it otherwise

\textsuperscript{64} Ibid. Russell argued that Stephen should have put two contingent questions to the jury. Did Maybrick die of arsenic poisoning and if so, did his wife administer it?

\textsuperscript{65} \textit{Daily Telegraph} (London), Aug.10th 1889.
lacked. Halsbury later argued that nothing in the summing-up
overstepped the proper limits of judicial conduct and that the evidence
of Florence Maybrick's "unlawful passion for Brierly" was a "relevant
and proper consideration for the jury."\textsuperscript{66} He never considered, however,
the cumulative effect of the judge's one-sided address on a tired jury.

In the eyes of Mrs Josephine Butler the conduct of the trial had
not merely been unfair but an example of an hypocritical double
standard:

\begin{quote}
Feeling as I do the sin in such conduct, probably
more keenly than most people, I yet must express my
surprise that such strong expressions should be
reiterated ad nauseam when dealing with a woman
while they are not made use of at all in the case
of men of high rank who have been notoriously
unfaithful to their wives\textsuperscript{67}.
\end{quote}

\textbf{The Pall Mall Gazette} raised this question in another form when it
asked if Mrs Maybrick would have been convicted had her position and
that of her husband been reversed and had the judge and jury all been
women.\textsuperscript{68} This response does not, however, seem to have been

\begin{footnotes}
\item[66] Report cited at note \#8, above.
\item[67] \textit{Pall Mall Gazette}, Aug.1889.
\item[68] Ibid.
\end{footnotes}
indicative of any widespread shift in public perceptions of the proper roles and behavior of men and women.

The twin issues of the justice of Mrs Maybrick's conviction and the fairness of her trial remained alive for the whole of the last decade of the 19th century. This support was due in part to the efforts of individuals whose commitment is readily understood. Her mother campaigned tirelessly on her behalf as did her solicitor and her counsel, Sir Charles Russell. Russell continued to press for an enquiry even after his elevation to the office of Lord Chief Justice in 1895 and, as has been noted it was his effort which, more than any other, produced Lord Halsbury's unofficial enquiry in 1896. In the wider context of public opinion it is possible to distinguish at least three constituencies.

In the immediate aftermath of her unexpected conviction in August 1889 there was a widespread, and heterogeneous, response on her behalf. In The Times' account of the public meeting at the Great Eastern Hotel on August 10th 1889, and in the correspondence of its organizer, Alexander McDougall, it is possible to detect a chivalrous, predominantly male, response to the plight of a young, handsome expatriate woman unjustly convicted. It was a group who found many

69 The Times (London) August 9 & 10, 1889.
supporters in Liverpool and even in Parliament.\textsuperscript{70} It was a response, perhaps, to the prospect of her execution because it rapidly evaporated when she was reprieved. It seems unlikely that had she been poor and middle aged her case would have stirred such a response.

There was a comparable, if less immediate, response in her native country, the United States, where her mother was able to arouse a sense of outrage at the unjust fate of a native born American and to touch a wider spectrum of that society than was possible for her friends in England. While a petition came in 1892 from congressional leaders, signed by the Vice President, the Chief Justice and the Speaker of the House\textsuperscript{71}, it was preceded by another from a group of prominent American women, signed by, amongst others, the wife of the President\textsuperscript{72}. While arguably representative of a less traditional society than that of late 19th century England this response was, first and foremost, a nationalistic one.

\textsuperscript{70} Hartman, op.cit above p.281 & note 117., notes that over 1000 members of the Liverpool Cotton Exchange, Jas Maybrick's erstwhile colleagues, signed the Petition for her life as did 90 M Ps. The petitions prepared by Florence Maybrick's solicitor, R.S.Cleaver, are on file, but the signatory sheets are not & it is not possible to check Hartman's claim that 500,000 people signed.

\textsuperscript{71} Case File cited above,Letter from U.S.Minister to Lord Salisbury, May 27, 1892. Lushington noted on this petition. "A truly astonishing document. For if ever there was a criminal not entitled to mercy it was Mrs Maybrick..."

\textsuperscript{72} Ibid, Oct. 1891, Petition of Caroline Harrison, Harriet Blaine et al.
The response of feminists in both England and America, on the other hand, was both novel and sustained. The Women's International Maybrick Society, founded in 1891 by a group of prominent English women with support from the United States\(^7\), this group raised sufficient money to mount its own legal enquiry which was led by a distinguished Q.C., Harry Bodkin, and supported by Fletcher Moulton Q.C. and Alexander McDougall. The Society's initial broadsheet, in 1891, is revealing of the real state of public opinion, when the reprieve had defused the initial sense of shock. "She did not have a fair trial", they declared, and went on to state that "prejudice and hostility against her have been so great that until recently a discussion of the facts in the public prints has been impossible." This Society contrived to sustain its active interest in Mrs Maybrick's fate up to the time of her release in 1904. However neither this group, nor those described above, was able either to shorten her sentence or to shift the apparently general acceptance of her guilt.

During the period of this study women became increasingly significant as the victims of male murderers. However, since the level

\(^7\) The President was Dr Helen Densmore and the V-P, an American journalist, Katherine Prindiville. Hartman, op cit p.285, notes that the founder was Mary Dodge, but this is not indicated in the Society's literature. She notes that an "Executive Committee", presumably in the the U.S, included Julia Ward Howe, Elizabeth Cady Stanton and Ida Tarbell.
of murder indictments remained constant, at about sixty p.a., and the population grew substantially, this fact must be treated cautiously. During the 1860's more than half of the victims of male murderers were men whereas in the first decade of the 20th century this figure had dropped to only 24%. Women as victims, whether wives, sweethearts or lovers had risen from 43% to 67% and children, of both sexes, from 6% to nearly 10%\textsuperscript{74}. The special character of the sample used here, convicted murderers, precludes any confident generalization about this trend. This is at best evidence of a diminishing tolerance by the courts towards domestic and family violence which, in itself, led to more of such homicides being indicted as murder rather than manslaughter or even accidental homicide. At the same time it is tempting to see an apparent domestication of serious violence as a result perhaps of the more intensive policing of the streets together with a consistent, if not rising, tension in the domestic life of 19th century England. This was a domestic life, which, it must be remembered was rapidly changing in character as the proportion of families living in new urban environments increased at the expense of more traditional rural life styles.

\textsuperscript{74} Tables 8 & 9.
The Home Office 'sample' focuses on convicted murderers. It thus excludes cases where the complicity of wives or relatives produced evidence of domestic accident or lack of intention sufficient to avoid a murder indictment. Where such mitigation failed, however, in cases of the murder of children by men, we see the Victorian law at its most severe and uncompromising. This is as true where a man's own children were concerned as those of others since the paternal duty to protect his family was a central tenet of the paradigm. We see the law at once reinforcing moral and social duty and protecting its defenceless subjects. Those men who killed children were hanged whether their motive was domestic despair and frustration or sexual perversion. The only exceptions were rare cases where insanity was found, as in the case of Edward Abbott who killed his own child in 1873\(^7\). Abbott had been both a good father and a modestly successful local tradesman and he enjoyed the support of many in the local community. When Abbott was found insane by Dr Orange the Home Secretary, Robert Lowe, wrote to Liddell that he was "delighted that

\(^7\) H.O.144 Series, Case File # 25785, Ed.Abbott, 1873. It took a determined effort by Sir Adolphus Liddell to obtain evidence of insanity. An investigation by the Metropolitan Police discovered that Abbott, a Somerset man, had attempted suicide in the Thames three yrs earlier following the death of three other children in an epidemic. This and later local information tended to confirm that he had been unbalanced ever since that tragedy. Dr Orange was sent to Taunton Gaol on the eve of the execution and, with the help of the Prison Doctor, Henry Liddon, certified the man insane.
the report has closed all the questions . . .", and provided an explanation for an otherwise motiveless and unnatural crime.

The fate of those who sexually violated and killed male or female children was especially short and unsympathetic. The cases of Charles Surety (1879), John Wakefield (1880) and Alfred Gough (1881) were all ones where, under other circumstances, defences of insanity might have succeeded but their pleas received no credence from the Judges or Home Office officials involved. These were, however, all "outsiders", without funds or relatives to assist them, they won no local support even from the 'professional' opponents of capital punishment. There were no cases of such offences being prosecuted against family members.

The duty to protect the young and innocent extended into adolescence and those convicted of murdering their sweethearts and fiancées were, regardless of their often obscure motives, usually hanged. Insanity pleas were rarely successful and the case of John George Townley in 1862 was highly atypical. In this latter case the son of a prosperous merchant family cut his fiancées' throat because she refused to proceed with the marriage. Using a loophole in Lord Normanby's Act(1842), his family contrived to have him privately certified after his trial and conviction and, despite a subsequent
certification of normality by official Doctors, Sir George Grey, the Home Secretary did not return him for execution. More usual was the treatment of William Brownless who also killed his fiancée in 1880\textsuperscript{76}. Despite a recommendation to mercy by the jury Mr. J. Field refused to intervene, arguing that he had found "no absence of premeditation". Both he and the Home Office also rejected the arguments of subsequent petitions that he had been "considered of weak intellect from birth" and that due to poverty had had no legal representation.

Those related to their victims less conventionally did not fare differently. In such cases the character of mistresses, paramours or prostitutes and their tarnished morality were not considered relevant. While the extent of the protection which they enjoyed was not diminished the guilt of the male offender was unquestionably enhanced. Male pleas of drunkenness, provocation or temporary insanity were discounted and in every case so far examined the murderer was hanged. The readiness of the law to protect those whose moral character was least esteemed points up the danger of trying to deduce from the proceedings of courts some simple and common scale of values placed

\textsuperscript{76} H.O.144 Series, Case File #68/98781, Wm.. Brownless, 1880. In this case two local petitions, one of which was signed by the family of the victim, urged that the prisoner had been simple from birth. But in this case, as in others, the defence was a dock-brief and no evidence was presented on this issue.
by society on different human lives\textsuperscript{77}. The High Courts seem clearly to have exercised a stricter interpretation of the law in such cases than those at lower levels where a more discretionary view is likely to have prevailed. If the lives of prostitutes were protected, violence short of homicide was widely tolerated in the community at large. This is a distinction characteristic of the the gap that still existed between the standards of the establishment and community justice.

The case of an American sailor, James B. Simms, in 1879 serves both to illustrate a perception of feminine guilt in such cases and its irrelevance\textsuperscript{78}. A 41 year old sailor, on shore leave in London's East End, Simms fell in with a notorious prostitute - "Big Annie" Graham - who took him on a drinking spree that lasted for three days, until all his money was spent. It appears that she then took his overcoat in lieu of cash and that, discovering the theft, Simms cut her throat with his razor. The American Minister, John Welch, pleaded for Simms' life. The sailor had been exposed he argued:

\begin{quote}
...to the very worst influences to which sailors are subjected even in this Christian land and how difficult it is for this useful but unfortunate class of
\end{quote}

\textsuperscript{77} See for example Blackstone, op.cit, Vol.V, p.212, who notes the equal protection enjoyed by "common strumpets" against the offence of rape.
\textsuperscript{78} H.O.144 Series, Case File #81910, Jas.B.Simms, 1879.
men to escape the snares by which they are surrounded and how natural it is that, being entangled in the net of a wicked woman, under the influence of a long debauch, with repeated provocations... he should resort to violence.\(^{79}\)

Such pleas left Mr J. Hawkins unmoved - "I have carefully considered the document forwarded to me but I am sorry to say that I cannot discover any ground which, in my opinion, would justify me in recommending the convict to the consideration of the Crown." Cross, the Home Secretary, agreed that it was impossible to interfere and Simms was hanged. Temptation was not to be confused with provocation and neither alcohol nor sexual desire were mitigating factors in such a case. Henry Wainwright who shot his mistress in 1875 had undergone an even more protracted "debauch" than the sailor. A once prosperous brush maker in the East End of London, the father of five children, a School Manager and a churchgoer, Wainwright was, in his own view, ruined by his obsession for a woman who had been both prostitute and 'kept-woman' at different times in her life.\(^{80}\) His plea that she had pursued him with threats of exposure and demands for ever

\(^{79}\) Ibid, Letter of John Welsh (U.S Minister) to Sec of State, March 13th, 1879.
\(^{80}\) H.O.144 Series, Case File # 48007, John & Thomas Wainwright, 1875.
increasing amounts of money offered no basis for the mitigation of his brutal crime.

In marked contrast to these cases was the fate of those who killed their wives, about one in five of all murder convictions. In such cases it seems to have been altogether easier for pleas of female provocation to have touched the hearts of the male juries, Judges and senior civil servants involved. Of the nineteen such cases so far examined almost 70% were reprieved. In one of these cases the reprieve was almost certainly due to doubts about the medical evidence and in two cases to doubts about the convict's sanity. In the balance however it seems clear that the murderer benefitted from a strict perception of the duty and role of the married woman and evidence that the victim had fallen far short of such standards. The judicial and bureaucratic perceptions of the male role in Victorian domestic life seem to have been altogether less distant and formalized than their view of womanhood. It was of course also both inconsistent and incoherent. On the one hand we have seen the outrage, at all levels of society, which was aroused by the failure of the Staunton brothers to fulfill their duty to protect and care for Lewis Staunton's wife, Harriet. On the other there is evidence from the proceedings of lower courts of a tolerance of violence and brutality towards wives that seems utterly
at odds with such pretensions. The study of the Old Bailey Session Papers, already referred to, showed that in the four decennial years examined there were 16 indictments for homicide in respect of wives, of which nine were for murder and seven for manslaughter. Of the murder charges six were proved, including one special verdict, and three found not guilty. But of the manslaughter charges five were found guilty, one not guilty and one no-billed. This indicates a high level of conviction but also a willingness of prosecutors, and juries, to accept the 'unintentional' nature of much domestic homicide. The expectation was that the lives of the poor would often be violent. Typical of this attitude was the case of John Boyce who killed his wife in 1880 by throwing a lamp at her. He was charged with manslaughter, convicted and sentenced to 12 years penal servitude. When Timothy Desmond beat his wife with his fists in 1871, she died as a result. The autopsy showed that she had "valvular heart disease", of which he was apparently ignorant and he was acquitted. On the other hand had either man taken a knife or a gun he would almost certainly been convicted of murder. Once a magistrate's court, and later a grand jury, had been convinced that there was a deliberate intention to kill, whether from the choice of weapon or from other circumstances of the act, then this crime, like all other varieties of murder became subject to the strict
rules which governed that offence. Once proved only a successful plea in mitigation could save the convict from execution. Of these provocation was the most successful.

Such wifely dereliction came in a variety of forms. The most obvious was, of course, infidelity and while the English courts had never recognized sexual provocation and 'crime passionelle' as exculpatory, its judges took it seriously. In November 1881, at Manchester Assizes, Mr J. Kay tried James Johnson for the felony of wounding his wife's lover with intent to murder. Having found him in bed with the lady, Johnson struck him about the head with a meat cleaver and put him in hospital for several weeks. At the Judge's direction the charge was reduced to that of unlawful wounding and, when Johnson was so convicted by the jury, Mr J. Kay declared that he would not further punish him since his provocation "had been one of the greatest a man could receive". "It was", the Judge continued,

The unexpiable wrong, the unutterable shame
that turns the coward's heart to steel, the sluggard's blood to flame.\textsuperscript{81}

Johnson was then bound over to keep the peace for one year.

After John Allen had been convicted of the murder of his wife in 1864 by cutting her throat it required a substantial local petition to

\textsuperscript{81}The Times (London), Nov.8, 1881.
produce evidence of her shortcomings and of the provocation he had received. It had been a subject on which the Judge at the trial . . . "could get no information. . . the utter silence on all these matters struck me as extraordinary." 82. It appeared that, despite being 48 years old and the mother of 9 children, Betsy Allen was planning to elope with their lodger. This was a man whom the villagers tauntingly described as "Allen's fancy lodger." A local clergyman, the Reverend Voules, added a pious note to the petition confirming that Betsy Allen had admitted her adultery and that he "treated her case as one of very grievous sin". Allen was reprieved and at Grey's insistence the grounds were recorded as ones of legal doubt, but the file leaves no doubt that Sir George Grey shared Mr J. Kay's views on female adultery.

The extent of wifely provocation was, however, much more broadly interpreted and understood than merely consisting of infidelity. Drunkenness, improvidence and even persistent scolding were cited as mitigating circumstances and, while never formally recognized as such, could contribute to the merciful commutation of capital punishment. When, for example, 23 year old Jacob Riegelhuth was convicted of stabbing his wife Joanetta to death in 1886, the jury added a recommendation to mercy "on account of his youth and her drunken

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82 H.O.144 Series, Case File #32/79311, John Allen, 1864.
habits." The Permanent Under-Secretary at the Home Office, Godfrey Lushington, asked the Commissioner of the Metropolitan Police for a report,. . .generally as to their relations." Commissioner Monroe duly reported in terms that a Home Office minute described as,

"A wretched story of the deceased woman's bringing up, surroundings and married life. Both the deceased and the prisoner were factory hands of a low type, her parents separated, both (now) living in adultery"."83 The Judge in the case, Mr J.Stephen, helped resolve any doubts in the mind of the new Liberal Home Secretary, H.C.F.Childers with the following note:

Between ourselves I do not think the case was a bad one. There was no premeditation. The stabs, of which one was fatal, were inflicted in a moment. It was clearly a murder but there was not more moral guilt in it than in many cases of wounding which do not end fatally. I do not write officially because I feel a delicacy in doing so unasked."84

Riegelhuth was duly reprieved and served only ten years.

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83 H.O.144 Series, Case File # B185, Jacob Riegelhuth, 1886. Minute of Chas.. Murdoch, Mar.17. 1886.
However it is perhaps the case of John Key\textsuperscript{85} which best characterizes this confused male perspective of the marriage contract and of the tensions to which it could give rise. It also shows the extent to which establishment opinions could differ on the question of wifely provocation. Key was a 58 year old printer to whose prior good character and industry both his employer and his neighbors were to testify, as they were to his wife's persistent drinking and abuse. However one night at 4. 00 a.m. in the morning he beat his wife to death with a flat-iron as she lay in bed. Despite a clearly specious claim that she had attacked him with a poker, he was convicted of murder but with a rider from the jury which declared,

\begin{quote}
We feel compelled to find the prisoner guilty but, having regard to the trials and troubles suffered and endured by him at the hands of his wife for a series of years, we in the strongest terms, but most respectfully, recommend him to mercy.\textsuperscript{86}
\end{quote}

This recommendation did not meet with the approval of that celebrated "hanging judge" Mr. J. Henry Hawkins\textsuperscript{87}. He did nevertheless add a note that he would have endorsed it if it had been a case of an unlucky blow.

\textsuperscript{85} H.O.144 Series, Case File # 95078, John Key, 1880.
\textsuperscript{86} Ibid, Judge's Notes, July 7, 1880.
\textsuperscript{87} Ibid, Letter of Sir H.Hawkins, July 13, 1880.
Godfrey Lushington, on the other hand was more sympathetic. It was, he considered,

"a clear case of murder. . .he having killed her in bed without any provocation. His real provocation was the miserable life she led him by her drunkenness and dissipation and he himself appears to have been a respectable man.\(^8\)

He did, however, note Hawkins' comments on "the mode in which the murder was committed (the woman was battered to pieces) " and went on to express his doubts as to whether this was a case in which the Secretary of State should intervene. Nevertheless he included with his minute the files of those cases which in his view provided "the nearest precedents" he could find, all of which were favorable to the prisoner. Sir William Harcourt, the Home Secretary, clearly shared the jury's feelings and gave instructions for Key's reprieve\(^9\). This was rather too much for the Head of the Criminal Department, Alexander Maconochie, who foresaw the creation of a precedent where earlier any comparable expression of sympathy had been less specifically described. He suggested that Harcourt should write a minute on the

\(^{8}\) Ibid, minute of G.Lushington, July 13, 1880.
\(^{9}\) Ibid, minute of Sec Of State, July 16,1880.
case\textsuperscript{90} and his concern was echoed by Sir Adolphus Liddell on the same day. Harcourt responded in a minute which gave the jury's recommendation and the "great provocation" which the prisoner had received as the reason for his decision.\textsuperscript{91} He also cited the cases provided by Lushington as ones which he had "followed" in making it. In all of these cases the jury had made a recommendation to mercy on the grounds of provocation. In that of William Sherratt, in 1879, the victim had been "a drunken and profligate woman."\textsuperscript{92} Thomas Mumford was a ship's steward who returned, in 1879, to a drunken wife who taunted him "with not being the father of the child she was carrying."\textsuperscript{93} This was also the reason given for the commutation of George Hall's sentence by Sir George Grey in 1865, which Harcourt also cited.

The occasional and explosive reactions of otherwise respectable married men to the tensions of Victorian married life were understood by the men who tried them. The external constraints of public opinion and the general unavailability of divorce made of the Victorian marriage a pressure vessel whose hazards they acknowledged. Where respectable male offenders could not be found insane, then extended

\textsuperscript{90} Ibid, minute of A.Maconochie, July 21, 1880.
\textsuperscript{91} Ibid, minute of Sec of State, July 29, 1880.
\textsuperscript{92} Jud... Stats. England & Wales, Parl.. Papers 1880, Vol LXVII.
\textsuperscript{93} Ibid.
provocation could be argued in mitigation. There is, alas, no apparent
case of a virtuous wife dealing thus summarily with a delinquent
husband (that of Catherine Churchill above comes closest). In other
cases, as for example that of Florence Maybrick, where the victim was
clearly failing as a husband, the woman herself also stepped outside
the framework of paradigmatic virtue and, moreover, committed her
offence in a manner that was far from spontaneous.

As recently as 1958, a senior Scotland Yard official, Commander
G. H. Hatherill commented on the modest scale of homicide in London
saying, "There are only about twenty murders a year in London and not
all are serious, some are just husbands killing their wives" 94. It was a
statement replete with echoes from the criminal justice history of the
19th century and more than just those that reflect on a "distant" legal
view of women. There was a smug satisfaction that despite the size of
the city, its population was then nearly nine million, a combination of
internalized self-control and heavy policing had made it the most
overtly law abiding megalopolis in history. The public had learnt the
lessons of Victorian legal and penal policy. There is moreover a
reflection of an hierarchy of establishment anxieties about crime that
carried over from its 19th century past, which saw domestic, in-door

violence as altogether less heinous than violence on the streets or in the workplace. Finally there is the assumption that a little steam may sometimes escape from the best constructed pressure vessel and that men not sharing the typical patience and fortitude of women, will from time to time, vent their tensions on their wives.
Chapter Eight.

The Home Office as Tribunal of Mercy (iii)
- Provocation and the reasonable limits of self-control.

The two preceding chapters have considered cases in which the liability of convicted murderers was judged to have been diminished because of their permanent or temporary incapacity to form the intention which distinguished the capital crime of murder from that of manslaughter or accidental homicide. In cases of domestic homicide it was evident that the decisions made both by judges and civil servants were heavily influenced by traditional views of the normal behavior expected of men and women, and of husbands and wives. This chapter will examine similar decisions made about cases from a wider range of social situations and in doing so will consider how both the immediate circumstances of an act, and the factors which had provoked it, could affect their conclusion. At the heart of this matter lies the fact that, while the law was strict and inflexible in its definition of 'mens rea', the guilty intention of the murderer, and ready to impute its presence in a wide range of circumstances, the element of provocation was considered a matter of fact to be found by the jury. It has been demonstrated\(^1\) that very few homicides were judged to be murder

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\(^1\) See Table 1.
and only about half of these so clearly heinous as to deserve the capital sentence. Throughout the judicial process, through the deliberations of grand and petty-jurors and later of judges and civil servants, it was the social significance of homicidal acts which was critical since as Brian C.J. observed " the devil himself knoweth not the thought of man." 2 How then were these administrators of the law to judge the recurrent plea of the prisoners who came before them that they "did not mean to do it"?

The decisions discussed below suggest an increasing establishment intolerance for violence and disorder as the century developed. While this trend was often in tension with popular traditions of justice and fairness, there were, however, signs that the gap was narrowing as a growing proportion of the population came to share 'respectable' establishment values. The changing views of these two constituencies on homicide are a measure of this shift. During the period there was a general decline in all homicides known to the police which fell from 1.8 cases per 100,000 of the population p.a. in the 1860's to 0.8 in the first decade of the 20th century. During the same period the ratio of murder convictions to manslaughter verdicts rose from about one in five to nearly one in three (from 18% of all homicide convictions to 28%).

2 Chapter 1, p.16.
The distinction between murder and manslaughter is a relatively recent development in the Common Law since before the 16th century all homicides were felonious but at the same time pardonable. Henry VII and his successors began a process under which an increasing range of homicides were excluded from the general pardon of clergy and in the specific exclusions of petty treason and 'willful murder prepensed' effectively distinguished two categories of unlawful homicide which became murder\(^3\). It is possible to see in these initiatives the beginnings of an attempt to enforce a growing measure of personal discipline and self-control upon the conduct of a notoriously violent population. It was an effort which continued into the 19th century and, although no substantive changes were made in the law relating to homicide after the 16th century, the administrators of Victorian Justice pursued this objective vigorously.

As a result of the identification by tudor legislators of specific crimes as unclerigiable, manslaughter became a residual category distinguished by the absence of intention or of any special relationship of duty or deference to the victim. Chief Justice Coke writing in the early 17th century noted that "murder is upon malice aforethought" whereas "manslaughter be upon a sudden occasion and therefore is called chance medley". He, nevertheless restored and refurbished a doctrine of 'implied malice' which made possible an

\(^3\) J.F.Stephen, 'History', Vol iii, pp.44 ff. The critical Acts were those of 13 H7 & 4 H8 c2.
extremely strict definition of intention in homicide. This doctrine allowed the courts to assume malice if 'the act itself was unlawful', that is to say if the offender was engaged in any activity outside the law. Subsequent commentators contributed to this process of tighter definition. In the later 17th century Chief Justice Holt ruled that "He who doth a cruel act voluntarily doth it of malice prepense." In this distinction, which was much cited in the 19th century, the focus was further concentrated on the character of the act itself and, in the minds of lawyers trained in the rationalist tradition of Bentham and Austin, onto the presumed consequences of that act. Malice could thus be implied from a single lethal blow, from the use of a deadly weapon or even from the reckless use of plain bodily force. The doctrine of implied malice had thus become a powerful tool with which to offset popular conceptions of justifiable violence. I the hand of resolute judges such a doctrine made it possible to restrict the freedom of juries to mitigate crimes of extreme violence and to offset a traditional tolerance of such behavior. The form in which the issue was put to the jury enabled the judge to impose his own subjective view of mens rea upon them. In trying to explain these developments J.F. Stephen remarked that such a strict construction of murder was encouraged by the parallel extension in the 18th century of the

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4 Coke, 3rd Institute, p.56
calendar of capital crimes and the general pardon of Benefit of Clergy. Both of these developments had led to an increased level of mitigation which the mid-Victorian bench sought to correct. Manslaughter remained clergiable until 1822 and an offender commonly escaped with a branded thumb and a year or less in gaol. Just how wide a range of supposed culpability was encompassed in this offence is indicated by the range of punishments allowed in the Act which abolished Benefit of Clergy, extending from transportation for life to a simple fine. This range of penal options was maintained in various Acts up to, and including the Criminal Law Consolidation Acts of 1861 where this study begins.

A second body of doctrine had grown up during this time to determine the extent of provocation sufficient to negate the presumed malice of a sudden killing. In this area too there was a progressive narrowing of definition which served to exclude as excuses an increasing number of those incidents in everyday life which could give rise to what an 18th century commentator, Sir Michael Foster, termed "the sudden transports of passion which, through the benignity of the law, are imputed to human infirmity." This restraint on the use of excessive force in the defence of person and property was noted by Sir Mathew Hale in the late 17th

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7 3 Geo 4, c 38.
8 24 & 25 Vict. c 100.
9 Sir M. Foster, Reports of Criminal Cases, 1762, p. 256.
as well as by Foster and Blackstone in the 18th centuries\textsuperscript{10}. It remained nevertheless an intractable area where the subjective perceptions of jurors and judges made any rational prediction of the verdicts of courts difficult. It was thus an area which attracted much attention from 19th century law reformers, but their efforts were, as has been noted, abortive. In the last major attempt, in that century, to codify the criminal law a commission in 1879, under the chairmanship of Lord Blackburn C.J., attempted to summarize the law on murder and manslaughter and to define the provocation needed to distinguish these offences\textsuperscript{11}. In the description of provocation which it included in a proposed 'Draft Code' of criminal law it states that:

murder may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self control may be provocation, if the offender acts upon it on the sudden and before he has had time for his passion to cool. \textsuperscript{12}

The Draft Code goes on to note that "whether any particular act or insult . . .amounts to provocation", shall be questions of fact and thus matters for the jury to decide. It adds the rider that no one

\textsuperscript{10} J.F.Stephen, \textit{History}, vol iii , p 64.ff.
\textsuperscript{11} Report of the Royal Commission . . .to consider the Law relating to Indictable Offences: with an Appendix containing a Draft code.(C.2345) Parl..Papers,1879, Vol XX.
\textsuperscript{12} Ibid, Draft Code, para. 176.
shall be deemed to have given provocation if they were doing what they had a legal right to do. The Draft Code drew heavily on the earlier work of one of its members, J.F.Stephen's *Digest of the Criminal Law* (1877), an account of the law as he supposed it to stand at that time. In section 224 of this work he cites a handful of examples of circumstances which may amount to provocation and they include an assault of such a nature as to inflict actual bodily harm, the sight of one's wife committing adultery\(^\text{13}\) or a man's son being sodomized. In cases where two persons fight upon equal terms, and upon the spot, armed or unarmed, each gives provocation to the other. In a further important clause it is noted that:

no words or gestures or injuries to property, nor breaches of contract amount to provocation, except (perhaps) words expressing an intention to inflict actual bodily injury, accompanied by some act which shows that injury is intended.

The deliberate choice of the Commissioners to avoid giving examples is highly significant of the problem they faced. The decision to leave the matter to juries as an issue of fact reflects the conclusion that in such cases the behavior of the homicide and his victim can only be judged by their peers and the prevailing social standards of the time. In the event, and despite the active efforts of the Attorney General, Sir John Holker, the Draft Code as a

\(^{13}\text{In this case both parties to the adultery had given provocation and were exposed to the consequences.}\)
whole failed to win parliamentary approval. Its simplifications had made it, in the opinion of judge's and lawyers, unworkable\textsuperscript{14}. In the case of homicide this made little difference since the 'Code' had not addressed the essential paradox of this aspect of the Common Law. The law of murder remained, as Stephen observed\textsuperscript{15}, strict and inflexible but its administrators recognized that, in respect of this one particular, the interpretation of the facts must depend on the significance accorded to them by society. Stephen also perceptively noted that, "the whole law of provocation rests upon an avowed fiction . . . the fiction of implied malice."\textsuperscript{16} Only cases, he concluded, can tell you how much, or what kind of provocation will rebut the implied malice of "sudden killing". What he is saying, and what this review will examine, is that what we mean when we talk of provocation is some factor which diminishes the implied malice of an act, a factor which makes it less wicked or less socially intolerable. This chapter will follow Stephen and look at cases.

This work is naturally limited by its source material to a study of those cases where juries had already decided that provocation was insufficient to reduce a murder indictment to one of manslaughter. It cannot consider that mass of homicide cases (See Table 3 below) where those charged were either acquitted or

\begin{footnotesize}
\begin{enumerate}
\item[14] Radzinowicz, op.cit. vol.5, p.738 ff.
\item[15] See above, Chapter #3, p.93.
\end{enumerate}
\end{footnotesize}
convicted of manslaughter\textsuperscript{17}. However, in their review of capital cases, and in those instances where it was decided to mitigate capital punishment, the Home Office were exploring the border line between these two offences, the limits of the ordinary man's power of self-control. Their judgements, which reflect both establishment views of this normality and a sensitivity to those of a wider body of opinion, constitute a valuable perspective on the society in which they lived. This chapter will argue that, in respect of provocation, and unlike its response to other aspects of mitigation, the Home Office was careful to avoid formulating rules which might become the basis of a dangerously inflexible set of excuses for murder. In this respect its reaction was like that of Lord Blackburn and his colleagues on the Commission of 1879. It will become apparent that of the two key factors which operated in this arcane calculus, the malice which could be imputed to different sorts of crime and the extent of the provocation offered to the 'passions' of the criminal, mitigation was far more commonly attributed to doubts about intention than to some specific provocation. The bureaucrats, like the lawyers, shied away from erecting some scale of legitimate provocations which would be at

\textsuperscript{17} This table demonstrates, that at least by the end of the century the % acquitted of manslaughter was three times as high as that for murder. The borderline between manslaughter and accidental killing, homicide 'per infortunium,' was evidently even more uncertain than that between manslaughter & murder.
once difficult to implement and a source of invidious excuse and comparison. Both, moreover, became notably less benign in their judgement of human infirmity.

England in the middle of the 19th century was still an hierarchical society despite the great social and economic changes which it was undergoing. The process of industrialization and the relocation of much of the population from rural to urban communities had not brought about such a social reconstruction as would make it helpful to describe this society in simple 'class' terms. If there were 'classes' there were very many of them. In this still traditional society, behavioral deviance was not seen as a departure from a single and uniform standard of reasonable conduct, nor yet from the discrete standards of a simple triad of working, middle and upper classes. Deviance was measured from an infinite variety of social norms appropriate to the 'station in life' of the individual subject. Thus when the law chose to look upon all its adult subjects as 'reasonable' men, who might be expected to understand and obey the broad and simple prescriptions of the Common Law, it made no such comprehensive assumption about their manners.

18 Despite their inclusion in Stephen's "Digest", 'crimes passionel' were never regarded by the Common Law as automatic excuses for homicide.
The compromises reached in respect of the extreme social deviance of 'criminal insanity' have already been noted, as has the complex and traditional paradigm of 'normal' female conduct which underlay bureaucratic judgements of female homicide. For those homicides who fell outside these categories 'mercy' depended upon an evaluation which one Home Secretary described as "a full review of a complex combination of circumstances and often on the careful balancing of conflicting considerations". Even so it was possible for for judges and bureaucrats to come to prompt and emphatic conclusions about the relative heinousness of acts of murder. Stephen concluded that "from long experience I can affirm that the cases in which capital punishment will . . . be inflicted can be distinguished almost at a glance by an experienced person." It was a view that Sir Charles Troup, after many years as Permanent Under Secretary at the Home Office was to endorse almost verbatim. Thus Stephen, in his role as judge, could say of the crime of Jacob Riegelhuth "between ourselves I do not think the case was a bad one" or Sir Henry Hawkins of Thomas Wheeler's deed that it was " as foul, as wicked , as cruel, as diabolical a murder as was ever committed." No formula existed to make

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20 Stephen,'History',vol iii,p.87.
22 Chapter 7, page 368. The murder of his 'delinquent' wife.
23 Case File# 98426,,cited in Chapter 2, p.75.
such confident calculations possible and in this area more than any other the mitigation of capital punishment, which involved the revision of jury verdicts about the facts, was "in the last resort, a question of policy and judgement."24 On the other hand in the experienced mind of a judge or in the case files of the Home Office there existed a body of conventional assumptions which measured both the reasonable and necessary limits of individual self control. In what follows the parameters of mercy will be considered in case-terms, ranging from groups of cases in which virtually no set of factors could have been expected to offset the malice implied, to others in which mitigation frequently occurred. In the first place the issue of 'implied malice' will be considered and the fate of those whose conduct, regardless of homicide, was in Coke's term "unlawful." A second section will look at the provocation of the innocent and the chapter will conclude by looking at the evident tension between popular perceptions of provocation and the stricter interpretations of the late 19th century legal establishment.

The general imputation of malice possible in cases of particularly atrocious crime was the most certain way to prove its presence in court. In cases where the criminal had demonstrated "a general malignity and ill-will"25 by engaging in criminal acts,

24 Sir W. V. Harcourt, Hansard, Feb 22 1885,
25 Capital Punishment Commission, Minutes, Nov.29 1864, Baron Sam. Martin.
particularly rape, robbery, or attempts to escape from police or penal custody, it was possible to assume an intention to kill and at the same to discount the most extreme provocations. Those criminals who had surrendered to the "seduction of circumstance" forfeited their status as "ordinary individuals". The only common cases where such criminal incompetence earned reprieve were abortionists who killed their patients, since their intention was manifestly not to kill the mother, but the foetus, an offence which was not considered to be homicide. The killing of policemen when on duty was assumed to have been intentional and between 1863 and 1882 only two cases of reprieves were recorded\(^\text{26}\). One was that of William Habron in 1875 where justified doubts existed about his identity and the other that of Gerald Mainwaring in 1879. Mainwaring was a rare 'gentleman murderer' who killed a policeman when the latter tried to arrest the drunken prostitute with whom he was driving. He came from a well-connected family and his father was a clergyman so that one must assume that he had both influence and sympathy on his side\(^\text{27}\). Rapists who killed their victims benefitted from none of those male reservations about female behavior which made it so hard to convict ordinary offenders on this charge. Only two such convicts escaped execution.

\(^\text{26}\) See Table 11 below.

\(^\text{27}\) This is an easy but very dangerous assumption to make. No file exists on his case and it is one of the very few instances discovered where influence or 'social class' seems to have directly affected a prerogative decision. (that of Jas Scott in 1888 is another - see below.) Cases of 'insanity' are a different matter.
between 1863 and 1882, in both cases on the grounds of youth. Stephen records the case of one who was not reprieved, a young man from Fordingbridge in Hampshire, who stuffed a girl's shawl into her mouth to stifle her cries for help. She suffocated and he was convicted of murder despite his plea that he had not intended to kill her and that, in Stephen's words, "by doing so he frustrated his own object."28 He should have anticipated the consequences of his action. More common still was the incidence of murder in the course of robbery and, here too, reprieves were granted only in exceptional circumstances. Out of 17 such cases between 1863 and 1882 only five were reprieved. Two of these were on grounds of youth and one for what can only be called sentimental reason's. Joseph Gaydon robbed and killed an old woman at Chingford, in Essex, in 1857 and gave himself up for the crime 22 years later, in 1879. He was convicted on his own testimony and reprieved.29 The remaining three cases, two men and a woman, were convicted of robbing and so beating an old man that he died. They were reprieved on the grounds that they could not have known that their victim suffered from a severe heart condition and that the presumption of an intention to kill was therefore absent30. Coke's celebrated example of 'implied malice', the hypothetical case of a poacher who shoots

28 Stephen, 'History', vol. iii, p. 83.
30 Ibid, Vol. xcv, 1881. This case is also reported by Stephen 'History, vol.iii, p.57, note #3.
at a game-bird and hits a "boy that is hidden in a bush" had several parallels in this period\textsuperscript{31}. However the attitudes of both judges and jurors was evidently more ambivalent to this time-honored form of rural 'redistribution' than to less sporting forms of theft. Keepers were usually armed and traditionally hard men. The willingness of courts to accept that poachers who had killed keepers had not intended to do so seems, however, to have owed less to the unpopularity of game-preserving or hostility to landlords than to a realistic understanding of the tumult of nighttime clashes. In such circumstances death might well be the result of that other scenario of Coke - the "chance medley" of manslaughter\textsuperscript{32}. The case of John Hall, at Oxford in 1862, was evidently one in which people of all classes could share this feeling.\textsuperscript{33} The jury gave a strong recommendation to mercy and the Judge, who endorsed it, noted the lack of premeditation in an incident in which the keepers had "approached stealthily, and the man had fired before he had finished turning round"\textsuperscript{34}. Later the High Sheriff of the county submitted a powerful petition, signed by the mayor of Oxford and many heads of colleges, which cited the evidence of a poor gun and the lack of premeditation\textsuperscript{35}. Hall's sentence was commuted. The case of Charles

\textsuperscript{31} Coke, 3rd Institute, p. 56.
\textsuperscript{32} Philips, op.cit., p.253, notes the rarity of prosecutions for serious offences in this category and that such cases as were prosecuted were usually armed gangs.
\textsuperscript{33} H.O.144 Series, Case File # A37986, John Hall, 1862
\textsuperscript{34} Ibid, Judge's notes, March 1862.
\textsuperscript{35} Ibid, Petition of High Sheriff, March 13th,1862.
Crew and others has already been cited as an example of judicial pertinacity in the pursuit of truth\textsuperscript{36} but it also illustrates the practical problems of poaching cases. When Crew and his fellows were eventually pardoned it had emerged that no less than two parties of poachers were at work in the same wood near Gainsborough on the night the keeper was killed.\textsuperscript{37}

Despite the evident desire of the authorities to reduce urban violence, and to rid the streets of crime, the imputation of malice was equally uncertain in cases which took place against a background of disorder and drunken violence. In such cases where the 'choice' of the victim had been to some extent accidental, the specific detail of the act helped determine its outcome. When, in 1869, John McGonville fired a revolver at random into a crowd of men, fighting outside a public house, he killed a bystander, was convicted of murder and executed. His wildly reckless action was made more readily comprehensible by the fact that he was a known Fenian \textsuperscript{38} In 1865, on the other hand, Serafini Polioni was reprieved and eventually pardoned for the murder, by stabbing, of a fellow Italian in a "drunken public house brawl". Several men it appeared had been stabbed on that occasion and "the verdict was not considered satisfactory."\textsuperscript{39} The latitude which such circumstances

\textsuperscript{36} See above, Chapter 4, p.185.
\textsuperscript{39} Ibid, Vol.lxviii, 1866.
allowed to courts is well illustrated by the case of Ben Payne who was convicted of manslaughter at the Old Bailey, in April 1871. Mr J. Lush declared that "it was a fair fight" and sentenced Payne to 4 days imprisonment. On the other hand the demands of exemplary justice could produce very different results. When two parties of feuding English and Irish miners from the Durham coal field met in 1873 James Turnbull killed an Irishman by "jumping on him and kicking him". He was convicted of murder but reprieved.

Next to the implication of malice from a simultaneous felony, the clearest test of a murderous intention was the nature of the weapon used. The possession of a lethal weapon tended to negate any suggestion of an impulsive and spontaneous response to provocation. Table 12 shows that, in the 20 years between 1863 and 1882, 165 men were convicted of murdering other men and that 62% of them were hanged. Of those using firearms 80% were executed whereas less than 50% of those using their hands and feet suffered this punishment. Even this latter figure is misleadingly high since out of nine men hanged for "kicking" seven were involved in 'gang' crimes, where several men set upon one man and kicked him to death. These were crimes which aroused evident horror and

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40 O.B.S.P., 6th session, April 3rd, 1871.
41 Hansard, July 12th 1877, col. 1671/2. Sir Joseph Pease, in a speech aimed at demonstrating the ineffectiveness of Capital punishment, described how efforts to stem the violence associated with "a large tide of mercantile prosperity" in Durham had failed. The law had "come down with an iron hand between Jan 1873 and July 1876 when 15 men were hung in Durham".
the Criminal Department's annual report records the motives of such crimes as "mere brutality" or as in the case of three Leicestershire colliers, who beat an old peddler to death, "no motive but drunken brutality."\textsuperscript{42} Such cases were the antithesis of the "fair fight" and the imputation of malice a natural consequence as was the case in the trial of William Siddle and Joseph Lawson, where despite its unusual outcome, a minor grievance was vented in an explosion of drunken brutality.\textsuperscript{43}

Physical violence was a common feature of mid-Victorian life among the poor and was widely accepted provided its outcome did not extend beyond a few broken bones. There was, however, a growing constituency which saw its principal cause in the ritual week-end drinking which followed six days of drudgery and self control. Temperance movements had been a feature of non-conformist activism since the second quarter of the century and had won considerable support among women of the working classes\textsuperscript{44}. By the last quarter of the century this pressure group had become much wider and had found allies amongst a growing number of those who sought to control violence and improve public morality. Penal reformers had also begun to recognize that drunkenness was a major direct or indirect cause of crime. In 1854 John Clay gave his

\textsuperscript{43} See above, Chapter 5, p. 224.
\textsuperscript{44} Dorothy Thompson, The Chartists, Cap.7, London, Pantheon, 1984.
opinion to a House of Commons committee that "at least 35% of crime must be set down as a direct effect of drinking in beer-houses."\textsuperscript{45} Half a century later Cardinal Manning declared that drink was "the source directly or indirectly of 75% of crimes committed."\textsuperscript{46}

It was one thing to observe the evidently destructive effects of alcohol abuse on family and community life and another to see this 'cause' of crime as an excuse for it and in cases of homicide it was rarely seen as even a mitigating factor. "Drunkenness is ordinarily neither a defence nor an excuse for crime", declared Mr Justice Coleridge in 1849.\textsuperscript{47} In a clear statement to a jury, of the law in respect of implied malice, he continued:

Because you can not look into a man's mind to see what was passing there . . . what he intends to do can only be judged by what he does or says, and if he says nothing then his act alone must guide you. Juries ought to presume a man to do(sic) what is the natural consequence of his act.

He then turned to the question of alcohol and noted that if the defendant was proved to have been intoxicated "the question

\textsuperscript{45} Radzinowicz & Hood, op.cit. Vol 5.p.62. Report of the Select Committee on Public Houses. Clay had been chaplain of Preston Gaol and was a well known statistical commentator on crime & the penal system.


\textsuperscript{47} O.B.S.P. Reg. v Monkhouse, Nov Session 1849.
becomes . . . was he rendered entirely incapable of forming the intent charged?" In such circumstances juries must consider the "quantity of spirits taken" as well as his previous conduct. Despite this reasonable and important decision\(^{48}\) juries and judges were reluctant to see even chronic alcoholism as precluding malice in homicide. Only when such a condition merged into permanent insanity as in Boddington's case\(^{49}\) does it seem to have been an acceptable factor in mitigation. Even prisoners with delirium tremens were considered to have retained sufficient reason and self-control to be liable for the consequences of their acts.\(^{50}\) At the end of the century this strict interpretation was included in the revised edition of the Home Office's Criminal Memoranda which cites an earlier opinion of the Hon A.F.O. Liddell, endorsed by R.A. Cross, as Secretary of State:

> Unless the effects of drink were such as to produce the existence of a condition of insanity, according to the legal definition of the term, at the time of committing the crime, the Secretary of State ought not to interfere.

It seems that they rarely did so and that as the century progressed took an even more severe view of this vice. Table 14 suggests, moreover, that in respect of murder at least drunkenness was a less

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\(^{48}\) See Bovill J, below.

\(^{49}\) See above, Chapter 6, p.301.

\(^{50}\) Jud. Stats. England & Wales, Parl. Papers, vol. lxxix, 1877. Case of Jas, Bannister: "he killed his wife with a coal axe which he had taken to bed with him. He had delirium tremens & pleaded insanity." He was executed, having presumably demonstrated intent by carrying his axe to bed.
frequent "direct" factor than Clay or Manning suggest, although it may have played its part as an antecedent cause of a final eruption of violence. In less than 20% of the cases recorded in the annual Home Office reports on murder between 1863 and 1882 was drink, or drunkenness, cited as a factor and in about half of these cases the murderers were reprieved. In almost all of these latter cases the victim was also drunk. In cases where the drunken victim was a woman reprieves were only granted when that woman was the wife of the prisoner and other assumptions of sustained provocation came into play. Even when the victim was a drunken prostitute, as in the case of the American sailor, James B. Simms, her provocative behavior was no excuse.

In the eyes of the law those found to have been accessories either before or after the fact of murder shared equally, then as now, in the guilt of the deed. In those cases where collective attempts at robbery were undertaken or in such desperate enterprises as the abortive rescue of Fenian prisoners at Manchester, in 1867, when police-sergeant Brett was shot, prisoners were jointly charged and no attempt was made to distinguish degrees of guilt or malice. It was recognized, however, that in such large scale crimes there were leaders and followers and that any common purpose might not have extended to murder. Such crimes were most commonly undertaken against those in some sort of official authority, the forces of law and order or the
captains of ships. During the period 1863 to 1882 11 out of 33 persons convicted of such crimes were reprieved as accessories. All of these were involved in five cases of what the Home Office Criminal Memoranda describe as "capital cases in concert"\textsuperscript{51}. In such cases it was noted "a relative level of guilt and premeditation is established", and in each of the cases listed at least one person was hanged and one person reprieved. The process itself has already been described in the account of the Penge case in chapter five. In some cases, as in that of Dobell and Gower in 1888, no such distinction could be made and both men were allowed to hang\textsuperscript{52}. That such distinctions when made were liable to be highly artificial as is indicated by Godfrey Lushington's comment on the fate of those men last convicted in the murder of Sgt. Brett. They were spared, it will be remembered, "because it was thought enough had been hung for the offence"\textsuperscript{53}.

\textsuperscript{51} H.O. Printed Memoranda, vol 15, 1895 p. 301 ff.
\textsuperscript{52} The 'Saw- mill' murder at Tunbridge Wells, see Chapter 6, p.309/10.
\textsuperscript{53} See above Chapter 5, p. . . .

The cases so far considered have been ones where the character of the crime or the criminal had, in varying degrees tended to negate the plea of provocation by an overwhelming presumption of malice. It is now possible to turn to cases where the offender was a person of apparently good character but who
gave way to some "sudden transport of passion" and committed homicide. In such cases there was no common standard of forbearance expected of "the ordinary person" as Blackburn and his colleagues suggested but many.

The social functions of several important groups of people demanded special self control on the part of their fellow men. Thus policemen, Prison Warders, Officers and N.C.O's in the army and ships officers were groups whose conduct tended to be provocative. Such group extended to include 'all persons in authority' since it included employers and their managers and even such public officials as railway staff, as the fate of the station master at Dover suggests.\textsuperscript{54} All these people could, in greater or lesser measure exercise their power over the individuals who were subject to them and in some cases do so very harshly. Very few prisoners were able to prove that they had done so excessively. Just as social convention required that those who administered the law should protect the innocence of young women or the institution of marriage, so it laid on justice the task of protecting its hierarchy. They seem to have done so with the minimum of intrusive investigation. Apart from a single incident of mutual drunkenness\textsuperscript{55} no soldier killed his superior officer and obtained mercy, at least in the period 1863 to 1882. Their crimes were the very exceptional

\textsuperscript{54} Jud., Stats England & Wales, Parl. Papers, vol Ixviii, 1869. In 1868 Francis Wells "a youth with a liking for firearms, shot the Station Master at Dover when reproved for firing a pistol in the station." He was hanged.

\textsuperscript{55} Ibid, vol. Ixxvii,1883. Alfred Harris stabbed his Sgt when both were brawling.
products of the commonplace tensions of military discipline. In 1874 Thomas Smith "shot the captain of his company when at target drill, in revenge for a punishment"\textsuperscript{56}. In 1869 William Taylor shot his corporal "who discovered him on parade with an empty knapsack"\textsuperscript{57}, while in 1877 Patrick Byrne, an ex-sergeant stripped of his rank, shot two sergeants in his regiment and like those above was hanged\textsuperscript{58}. In each case it it is not hard to imagine the provocation which underlay the bald reports from the Criminal Department or to believe that the convicted men were ill-fitted for the rigorous life into which they had strayed. There was no place, however, for judicious mercy in such a world. There was even less in the enormous merchant fleet then sailing under the British flag where the nationals of many countries served under British officers.

In 1861 the Criminal Law Consolidation Acts eliminated almost all capital offences apart from murder. It had been retained for two other offences in recognition, no doubt, of the central role of sea-power in the security and economy of the nation. The crimes of piracy, even without homicide, and arson in Royal Dockyards, remained capital offences. There appears to have been only one conviction for piracy in the period and none for arson. In 1874 John Johnson was convicted of 'piracy with violence' on the sailing ship

\textsuperscript{56} Ibid, vol.lxxxi, 1875
\textsuperscript{57} Ibid, vol.lxiii, 1870
\textsuperscript{58} Ibid, vol. lxxix, 1878.
"Satsuma". Sentence of death was recorded and he was reprieved.\textsuperscript{59} On the other hand exemplary justice was meted out to those members of the crew of the merchant ship "Flowery Land" who mutinied in 1864 and killed the captain. Five men, an English man and four Spaniards were among the last to be publicly executed outside Newgate Gaol in London.\textsuperscript{60} As with the military cases referred to above the extent of the provocations experienced by these alien sailors can only be guessed at. There were, however, two cases in which, due to special circumstances, a more thorough investigation was made and a glimpse provided of the violent conditions and tyranny which the demands of maritime discipline permitted.

The case of Frederick Mommsen has already been discussed in the context of the problems of jurisdiction and organization which it presented to the prosecution\textsuperscript{61}. In this context it shows how difficult it was legally to prove the existence of provocation. Mommsen, a German sailor on the British ship "Barbadian" stabbed the second-mate to death in November 1874, while the ship was in the Java Sea. After committal proceedings in a specially convened admiralty court in Batavia\textsuperscript{62}, he was sent back to London where, in July 1875, he appeared, on a charge of murder,

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\textsuperscript{59} Ibid, vol lxxxi, 1875.
\textsuperscript{60} Ibid, vol lii, 1864. Two more convicted men were reprieved in this case, as accessories. In a similar case in 1876 four Greek sailors were convicted and executed for the murder of the Master and the 1st & 2nd officers of the S.S. Lennie.
\textsuperscript{61} H.O.144 Series, Case File #42844, Fred., Mommsen,1875.
\textsuperscript{62} A court over which the British Consul, Thos.. Gray, presided.
\end{flushleft}
at the Old Bailey. He received no legal advice until immediately before his trial, when a solicitor and counsel were retained by the German Consul. His defence was unable to find any witnesses from among the crew, who had been discharged in Glasgow\textsuperscript{63}. However the evidence given by the prosecution witnesses established two important facts. Mommsen had had a good record as a sailor and during the confrontation strong language had been used on both sides. The mate had been both threatening and armed, with that traditional weapon of sailing ships, a belaying pin. Mommsen had carried an equally conventional sailor's knife. The jury convicted but added a strong recommendation to mercy on the grounds of provocation. For reasons already noted the Judge, George Denman, did not endorse this rider and in his notes referred only to a 'verbal altercation' between the men. Later, however, the German Consul, in his appeal, included the account from the Old Bailey Session Papers in which witnesses described a physical fight between the mate and Mommsen\textsuperscript{64}. In a separate appeal the defence counsel declared that there had been "no malice, no premeditation, only the hot blood of a physical confrontation."\textsuperscript{65} Even the foreman of the jury wrote after the conviction to report that "the case was exceedingly closely allied to manslaughter and the jury much divided\textsuperscript{66}. Denman

\textsuperscript{63} A problem initially faced by Treasury Counsel. See Cap.2 p.58. . . .
\textsuperscript{64} Case File cited above, Mem. of German Consul, July 28, 1875.
\textsuperscript{65} Ibid, Letter of Mr Collins, July 30, 1875.
\textsuperscript{66} Ibid, letter of July 23, 1875.
also changed his opinion and conceded that he would not have considered a manslaughter verdict "as perverse". He added that:

The evidence does not explain all that took place . . . before the blow was struck, so that the provocation may have been much greater than the words proved would indicate and thus to have caused the gesture to have a more aggravated character than it appeared to.67

R. A Cross, the Secretary of State, agreed to a reprieve and when the diplomatic pressure continued, his successor, Sir William Harcourt, agreed with Denman to an early release, and to treat the case as though it had been one of manslaughter68.

The case of the captain's steward on the S.S."Dovenby Hall" demonstrates that less dramatic, but more sustained, provocations could also serve to mitigate the severe expectations of maritime discipline69. Charles Arthur was a black British sailor who had served Captain Bailie from the start of a long round-trip from Liverpool to San Francisco in 1888. About a month after leaving San Francisco on the return voyage he took the Captain's breakfast and a carving-knife to his cabin and stabbed him to death. When he was tried at Liverpool later in the year the ship had paid-off and its crew dispersed. The only evidence available was that of the prosecution witnesses, and chiefly that of the officers who had

67 Ibid., Letter from Denman, J, July 23 1875.
68 Ibid, Dec. 1880, Mommsen was conditionally released, on the understanding that he would leave the Kingdom.
69 H.O.144 Series, Case File # A47165, Chas. Arthur, 1888.
discovered the crime. Arthur was a popular member of the crew and had an excellent record. There was conflicting evidence in court about the Captain's character but it was agreed that he had been harsh in his treatment of the steward. Arthur had, however, admitted to the dying Captain, before witnesses, that there had been no physical provocation on the morning of the act.\textsuperscript{70} This admission together with the fact of his arming himself with a carving knife ensured his conviction. In his charge to the Jury Mr J. Stephen declared:

Mere ill-usage is no provocation - the only thing which had this effect was a serious actual assault or possibly such threatening gestures as if a man was to make such an assault\textsuperscript{71}.

The jury accepted this guidance and found the man guilty but added a recommendation to mercy on the grounds of provocation. As citizens of an old and violent seaport the jurors were ready to read into the evidence more than in reality it would bear. Thus, when asked by Lushington to comment on the recommendation, Stephen replied that the evidence offered in court was not sufficient to justify such a recommendation. However, he went on to say that he had since seen evidence from the Governor of the Prison which "suggests a course of tyrannous conduct which would be sufficient.

\textsuperscript{70} Ibid, Judge's notes, Aug. 12, 1888.
\textsuperscript{71} Ibid, \textit{Liverpool Evening Express}, Aug. 3, 1888.
He proposed that further enquiries be made. It was Thomas Williams, of the Liverpool Seaman's Mission, who really began to produce the necessary evidence both from men who had sailed on the fatal voyage and from others who had served previously under Captain Bailie. His petition noted that eleven members of the crew had jumped ship in San Francisco as a result of the Captain's bullying conduct but that he had shown a special dislike for Arthur. It was probably a letter from the Directors of the Globe Shipping Co, owners of the "Barbadian" that made this evidence conclusive. The Captain had been reprimanded on several occasions for his treatment of his stewards and that while an excellent seaman his manners were "overbearing and bullying." H.C. Mathews agreed to reprieve Arthur but did not accept a suggestion from the judge that he serve "fifteen to twenty years" which would have been equivalent to a stiff penalty for manslaughter. Instead his sentence was commuted to penal servitude for life. His friends continued to petition for his early release and in 1897 the Home office reviewed the case. "The question is whether the release of this man before he has served twenty years would be justifiable?", wrote F.J. Dryhurst, a senior 1st division clerk. Mathews, he noted, had commuted solely on the basis of the recommendation to mercy and

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72 Ibid, Letter to Lushington, Aug. 12, 1888. A number of crew members, including a former mate, wrote to the Governor on Arthur's behalf.
73 Ibid, Petition of Thos.. Williams, Aug 17, 1888.
75 Ibid, Minute of F.J. Dryhurst, June 18, 1897.
no evidence had been offered of any 'immediate' provocation or physical threats by the Captain. The Chief Clerk, J.B.Simpson, did not dispute this but noted that "it would be inconsistent with normal practise to keep him for the full term of twenty years. ? let him serve as for a 20 year sentence"76. C.S.Murdoch, now Asst:- Under Secretary was more sympathetic. "I feel", he wrote, that the probabilities as to immediate provocation are against the prisoner . . . but in favour of his being subject to a course of tyranny which rendered him desperate. . . . I am inclined to think that the judge's more lenient alternative might be adopted and the sentence treated as one of 15 years.77

Sir Kenelm Digby, the Permanent Under-Secretary and the minister, Sir Mathew Ridley, agreed with Murdoch and Arthur was released on license in 1899 having served, with remission, eleven years, the equivalent of a severe manslaughter sentence.

The private lives of Victorians, while often less narrowly prescribed than those of people in the public service, were replete with tension and demanded a strong measure of self-control. The catalogue of convicted murderers contains as many who

76 Ibid, Minute of J.B.Simpson, June 19, 1897.
77 Ibid, Minute of C.S. Murdoch, July 2, 1897. He also added an important and innovative rider, "Whatever decision be adopted the convict, I think, might be informed." This humane policy seems to have become normal practise at this time and similar advice was given to Louis Staunton and Florence Maybrick in the following year.
gave way in rage to its provocations as to the seductions of circumstance. These domestic and social provocations were both sustained and immediate and, for the most part, they are sadly familiar to a twentieth-century reader. It has already been noted how the long course of tyranny exercised by a dissolute or unfaithful wife was sometimes accepted by jurors, judges and bureaucrats as a basis for the mitigation of a husband's homicide. While deferential patience was not a quality expected of working men in their homes, or in public houses at the end of the week, it was demanded in most other aspects of their lives. The disposition of cases of 'provocation' tells us something of the limits of these expectations. The fact that an increasing proportion of all those indicted for murder were convicted indicates that as the century progressed these limits were being extended. Juries as well as judges and civil servants were becoming increasingly intolerant of extremes of violence and misbehavior.\(^78\)

One of the most obvious needs of an emerging industrial society is a disciplined and subordinate workforce and in the aftermath of Chartist, that last political manifestation of the individual craftsman, there was little sympathy for the occasional violent responses of workmen to their personal crises. Even so they rarely went as far as homicide. In 1864 Joseph Welsh, a 42 year old painter, stabbed his employer "for not paying him his wages". It was

\(^78\) See Table 1 below.
an altogether excessive response to a common complaint and he was executed.\textsuperscript{79} When Henry Marsh, a 58 year old blacksmith, was fired in 1877 he killed his master and a fellow workman and he too was hanged.\textsuperscript{80} The same experience befell Herbert Snell, a farm laborer, in 1882, and he beat his master to death with a pitch-fork. He escaped hanging because he was only 17 at the time.\textsuperscript{81} It is hard to understand why James Scott, a writing-clerk, who shot his master in 1867 when his embezzlements were discovered, was not hanged since his crime seems to have combined so many fatal features. It seems that his mother successfully enlisted a powerful advocate on his behalf and the Home Secretary, Gathorne Hardy was susceptible to the pleas of John Bright.\textsuperscript{82}

The excitement and bitterness of industrial disputes bred tension not only in the workers involved but also in the legal authorities. The provocations involved were speedily discounted in the interests of law and order. This was the case with Stephen Gambrill during a strike of Kentish farm workers in 1879.\textsuperscript{83} He killed his master's son who found him breaking a new mechanical reaper. The anxieties of the local bench have already been noted and his claim that he was attacked by his victim was never seriously considered as a factor in mitigation. The imputation of malice in

\textsuperscript{80} Ibid, Vol. lxxxix, 1878.
\textsuperscript{81} Ibid, vol. lxvii, 1883.
\textsuperscript{83} See above, Chapter 2, p.52.
his act was universal, at all stages of the judicial process. It did not help Peter Bray, a 24 year old Durham miner, that he was "hopelessly drunk" when, in 1883, he beat a strike-breaking fellow worker to death with a hedge stake. Like Gambrill, his case demanded exemplary justice but also exposed a clear source of malice. George and Henry Tidbury were both on strike when they went poaching in 1877. They were discovered by two policemen and escaped only after shooting one and stabbing another. Their case comes close to the apogee of heinousness and the evident malice of their crime might only have been enhanced had they chosen to rob a grocer rather than a landlord. In such cases no reference has so far been discovered to any pleas of circumstantial need, like hunger or the consequences of arrest and imprisonment on already impoverished families. In the case of adult men, supposedly autonomous individuals, there is an astonishing lack of interest in the impact of such factors. Concerns which are common in the cases of young women, to whom a paternal society owed a duty of care, are wholly lacking in evaluating the conduct of the opposite sex. That this was not merely an establishment attitude is reflected in the petitions presented on behalf of those convicted. When offered on behalf of young infanticides poverty and destitution figure high on the list of mitigating factors in both judicial letters and local petitions. This perception was even extended to older women as has
been noted in the case of Sarah Jane Liddell\textsuperscript{84} and Annie Took. In the latter’s case her crime of killing the child entrusted to her was due "to poverty, drink and a moment of despair"\textsuperscript{85}. The factor of poverty is totally missing from similar appeals on behalf of male homicides. It is often mentioned but only in the context of an inadequate defence due to lack of funds. One is led to conclude that to admit the impact of such elements would have been to diminish the presumed moral autonomy of an adult man in a generally unacceptable way. There is one celebrated case which is perhaps the exception which proves this rule. In the case of the Captain and Mate of the yacht "Mignonette", Thomas Dudley and Edwin Stephens, the accused men experienced an extreme of circumstantial privation\textsuperscript{86}. Marooned in an open boat in the South Atlantic for several weeks, eventually without food or fresh water, they killed the cabin-boy and ate him. They were tried and eventually convicted of murder despite widespread feeling that their conduct had been sanctioned both by necessity and by ancient tradition of the sea.\textsuperscript{87} This conviction may indeed only have been obtained by what A.W.B.Simpson describes as "the devious bypassing of the jury" by the judge, Baron Huddleston. Huddleston transferred the case from a Cornish assize court at Launceston, to the full court of Queen’s

\textsuperscript{84} See Chapter 7, p.351.
\textsuperscript{85} Ibid, p.352.
\textsuperscript{86}H.O.144 Series, Case File # A36934, Thomas Dudley & Edwin Stephens, 1884.
\textsuperscript{87} A.W.B.Simpson, \textit{Cannibalism & the Common Law}, Univ.of Chicago, 1984. , which gives a thorough & entertaining account of this story.
Bench in London and ensured that local sympathy was minimized. The Attorney-General, Sir Henry James, noted at the time that if the case had remained in Cornwall and the defence would have sought to obtain a verdict of manslaughter the jury would certainly have found the verdict and no judge would have inflicted more than three months imprisonment.\(^8\) When the men were eventually convicted the Home Secretary, Sir William Harcourt, was faced with the problem of reviewing the sentences of death. He discussed the case in a letter to his son and wrote:

> It is exactly to withstand an erroneous and perverted sentiment in such matters that we are placed in situations of painful responsibility. Everyone knows that the vulgar view of this subject was that the men had committed no crime. . . . The judgement of the Court in this case pronounces that to slay an innocent . . . person to save one's own life is not a justification or an excuse, and it is therefore on moral and ethical grounds, not upon technical grounds, that the law repels the loose and dangerous ideas floating about in the vulgar mind that such acts are venial. . . . \(^9\)

However, since the principle of the case had been established and the law on the issue laid down clearly and publicly by Lord Chief

Justice Coleridge, Harcourt felt free to be merciful and commuted the sentences to 6 months imprisonment.

England in the later 19th century was fast becoming a peaceful and law abiding society. Nevertheless the experience of unexpected violence or crime, was evidently still a more meaningful provocation than the less dramatic assaults of indigence. The experience of being robbed was not, and is not, uncommon. It was not, and is not, an excuse for homicide. Catherine Henley was 50 years old and an "apple-stall woman" in Lancashire. In 1873 she stabbed and killed, with her pocket knife, a boy whom she suspected, apparently unjustly, of stealing her apples. She was reprieved on the grounds of "absence of premeditation" rather than of provocation. The implication is that there was doubt as to whether the blow was meant to kill, and, whereas the provocation was wholly incommensurate with the response, the implication of malice was uncertain. This same distinction ensured the execution of John Webber, a Glamorgan fisherman, in 1876. He suspected a man of stealing planks from his boat and, instead of responding at once, fetched a gun and shot him. The clear malice that could be imputed to such an action far exceeded any provocation offered.

The provocation of innocent people by intimidation and bullying was not, any more than robbery, an excuse for overreaction.

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Thus when, in 1865, Henry Hughes was "jostled and disturbed by a party of idle young men, when in the company of a woman of the town", he stabbed one of them to death. He was convicted of murder and sentenced to death. When he was reprieved it was on the ground of "doubtful intention" rather than provocation. While his mind was no doubt on other things than murder there was a real danger for the Home Office in admitting that any form of street provocation was 'excuse for killing. There was no doubt, however, about the intention of William Hancock when, in 1875, he shot and killed a man who had "previously beaten him severely with a hedge stake." He was reprieved in what must have been a very marginal decision and in which the interval between beating and response, the time needed for his "passion to cool", would have been critical.

A case which demonstrates the close interconnection between the factors of diminished intention inherent in a physical confrontation and the loss of mental control due to an unexpected provocation was that of John Anderson in October 1878. Anderson, a Northumberland stonemason, was walking home from work across the Otterburn Fells when, in passing the cottage of John Kiddell, a shepherd, he failed to shut a farm gate. This discourtesy so incensed Kiddell, whose sheep the gate enclosed, that he insisted Anderson return and close it. When Anderson refused he struck him across the face and dragged him back by the

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92 Ibid, vol lxxxi, 1876
93 H.O.144 Series, Case File # 78506, John Anderson, 1878.
ear. According to a later petition Anderson was "an inoffensive little man being of a highly nervous temperament," but he nevertheless drew a pocket knife and stabbed Kiddell, who died later from the wound. When Anderson was tried for murder there was little dispute about the events leading up to the act since they were seen and reported by Kiddell's son who had been present. The jury convicted Anderson but added a recommendation to mercy and when Mr Justice Lopes later reported on the case he wrote:

I think the verdict was right but also think that the jury was right in recommending the prisoner to mercy. They did so no doubt on account of the provocation that they thought he had received from the deceased.

This was the theme of several petitions from the neighborhood. Anderson's employer wrote that,

Anderson has been for many years in my employ and from my humble knowledge of his character I feel convinced that he would not be guilty of such a crime without the greatest provocation.

Over three hundred of Anderson's neighbors endorsed this opinion and reported that "he had lived in the district all his life and had never previously been before any court of criminal jurisdiction upon

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95 Ibid, Notes of Mr Justice Lopes, Nov. 1 1878 & The Times (London), Oct. 29 1878.
96 Ibid, letter of Mr J. Lopes, Nov 1.
97 Ibid, Petition of Wm. Green, Nov. 4 1878.
a criminal charge." Cross, the Secretary of State, was sympathetic to these views and reprieved him but only by a commutation to penal servitude for life, clearly showing that, like the judge, he thought the verdict 'right'. To others like the Northumberland gentleman, John Brewer, and his friends the offence was a clear case of manslaughter "since Anderson had no intention of killing Kiddell prior to the physical assault made upon him." Brewer wrote from the Carlton Club in London, a stronghold of Tory gentry, and was clearly the kind of material from whom grandjuries were still recruited. The difference between his 'traditional' view and the official view of this case suggests the tighter definition of manslaughter that was being imposed by the legal establishment. Blackstone, and his 18th century contemporaries, would probably have taken Brewer's view:

So also if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though this is not excusable 'se defendendo' . . . yet neither is it murder for there is no previous malice, but it is manslaughter. 100

Implicit in Blackstone's statement is the need for a judgement by a man's peers of what amounted to a great indignity in his case. The amount of dignity and respect that a man had available

98 Ibid, 'Elsdon' Petition at note 5 above.
to lose was still a critical factor in this kind of decision in Victorian times. The social significance of a provocation could only be measured in such terms. 'Demon' Johnson who stabbed his paramour to death in Liverpool in 1879 did not have any social credit of this kind! 101 His counsel, the experienced Thomas McConnell, pleaded provocation and diminished intention but had to do so in circumstances which stripped his client's act of that dissonance with his normal life which gave credence to such a plea. According to The Times,

The prisoner seemed to be a well known character among some of the lower classes in Liverpool and passed by the name of 'Demon'. The whole case presented a very disagreeable picture of life in the lower parts of that town. 102

Johnson and his girl, Eliza Patten, "a woman of bad character" had been drinking in "a house of bad repute kept by a colored man called M'Camus." In an argument Patten struck Johnson with a candlestick and he immediately stabbed her 103. McConnell claimed that there was no malice and that "the act was done on a momentary impulse and only bad luck made it homicide." 104 The judge, J.F.Stephen rebutted this claim in his summing up quoting Holt C.J's impossibly comprehensive definition of malice "He who doth a cruel act

101 H.O.144 Series, Case File # 83714, Thos.. Johnson, 1879.
103 Ibid.
voluntarily doth it of malice prepense."\(^{105}\) Later he was to say that the only mitigating circumstance he could see in the case was the prisoner's youth (he was 20 years old). "The crime in other respects was one of extreme brutality."\(^{106}\) Liddell agreed with him, minuting that it was "a very bad murder"\(^{107}\) and when the Home Secretary, Cross, refused to interfere Johnson was hanged. Even 'Demon' Johnson had friends and his solicitor, Mr Quelch, was able to mount a petition which stressed the gap between popular perceptions of murder and contemporary constructions of the law by its administrators\(^{108}\). It was the petition argued "a sudden and unpremeditated act" and then gave its own definition of premeditation:

Your petitioners do not mean to use the term in its legal sense or to contradict the findings of the jury but simply to apply to it the general acceptation [sic] of its meaning namely that although the act was done with "presumed malice" yet it was not done with actually premeditated malice aforethought as that term is generally understood.

As was noted in Anderson's case general understanding had evidently lagged behind the determination of the legal

\(^{105}\) See p.3 above.
\(^{107}\) Ibid, Minute May 26, 1879.
\(^{108}\) Ibid, Petition of F. Quelch & others, May 20, 1879.
establishment to pursue a strict construction of the law of homicide.

Perhaps the most obvious example of a persistent difference between popular opinion and those of the late Victorian establishment concerns the provocation of infidelity and consequent 'crimes of passion'. It was, as has been noted already, at best an inequitable perception, which rated female infidelity as an altogether more serious provocation than the misconduct of men. In the event, during the twenty years of the period in which the Home Office published detailed accounts of capital cases, there were no cases of homicide by married men or women following the discovery of their partners 'in flagrante'. There were only three cases of men killing their wife's lovers and in each case they were reprieved. As has been observed there were many more in which 'infidelity' or 'profligacy' was included in the catalogue of wifely delinquency used to reprieve homicidal husbands. It appears that the custom was to take the less hazardous course and seek revenge from the guilty woman, a somewhat decadent version of the once bloody traditions of a paternalistic society.

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The apparently random and inequitable way in which the common pressures of life bear down upon individuals and the occasional desperation with which they react was even harder to
explain in the context of a trial on indictment in Victorian England than it is today. The evidence of police, medical and social workers which is now offered before sentence had no counterpart in the Assize Court. The Home Office, on the other hand, was relatively well equipped although it was constrained by the short period between sentence and execution. Police reports were used not only to investigate the facts of those cases where doubt existed that the prisoner had actually committed the crime but also to obtain information about the character of both criminal and victim. Its only counterpart of the social worker's report lay in the stilted prose of personal or group petitions testifying to the prior character and good behavior of the convicted man. Their purpose was as much to establish the uncharacteristic nature of the offence as to explain its wider significance. In doing so they sought to reduce the implicit malice of the act and to emphasize any element of provocation which helped to explain so "sudden" and unusual a response. In some cases this was not an easy task. The efforts of the Reverend A.A. Morgan on behalf of George Pavey, in 1880, were untypical in several ways. Pavey was a 29 year old house painter who had murdered and raped an 11 year old child. Sir Henry Hawkins, in characteristic style, said of his offence,
it is impossible to conceive a more atrocious or a more
cruel crime . . . difficult to find any words to express
the horror and barbarity of the act you committed.109

Morgan took up the case of this obviously unpopular man but he also
sought to explain his offence. Pavey had been partially deformed
since birth and Morgan argued that this physical deformity had
disturbed his mind. It was an unusual but an unsuccessful plea.

Public petitions served, occasionally, an important
function in unearthing evidence of insanity or persistent
provocation which an ill-prepared defence had been unable to find.
However in many cases, and increasingly as the period progressed,
there were no petitions at all. The widespread opposition to capital
punishment, so characteristic of the 1860's, hardly outlived that
decade and with its decline went much of the organization and
impetus for appeals in capital cases.

The abomination which many Evangelical Christians felt
for the wasted opportunities of redemption implicit in capital
punishment withered with the decline of the movement's own
momentum in an increasingly secular world. It lost force too, when,
after 1868, the periodic spectacle of a public hanging ceased to
operate as an incentive to these feelings. As the once cohesive
society of rural England was diffused in its new cities the
unpopular task of trying to save the life of an anonymous criminal

109 H.O.144 Series, Case File #98875, Geo Pavey, 1880. The Times (London), Dec 2
  1880.
came increasingly to depend on the efforts of solicitors and a few morally committed people. Whereas a typical rural appeal of the 1860's was got-up by the Vicar and supported by local gentry its urban equivalent was organized by non-conformist businessmen and their wives and devoted as much space to their general principles as to the specific case of the convict. In many of these latter cases the Anti-Capital Punishment Society, and its secretary, William Tallack, were also involved. The Society was merged with the Howard Association in 1869 and its efforts diffused behind the more generalized social and penal reform objectives of that organization. As the century progressed such urban petitions became rarer although those from the countryside continued in the traditional form. In those cases studied from the last two decades of the 19th century the Temperance Movement appears as an opponent of capital punishment, using the not infrequent cases of

110 Such petitions have already been cited in John Hall's case (Oxfordshire 1862) A.F.Brown (Warwicks 1872) Abbott (Somerset 1873) Catherine Churchill (Somerset 1879) Emma Wade (Lincolnshire 1879) Wm. Brownless (Co. Durham 1880) Jas Williams (Staffs 1880) Dobell & Gower (Kent 1888)

111 Typical of this category were those from Birmingham on behalf of Fanny Oliver (1869) and Sarah Ann Liddell (1874), from Bath for John Allen (1864). The last major petitions so far noted from this 'constituency' were those on behalf of Wm. Distin (Bristol 1880) led by the Fry's and that for William Cassidy (Manchester 1880) which also was supported by Quakers - the Reckitts.

112 Tallack was Secretary of both organizations and delivered appeals in many cases including those of Fanny Oliver (1869) the Rev. Watson (1872) and H. Wainwright (1875). His Society's undiscriminating support of even the most disreputable criminals was the subject of a comment by Sir Geo Grey in his evidence to the CPC (1864) when he declared that he always ignored it.
drunken homicide to publicize its pleas for abstinence. In arguing that the effects of alcohol were no different to those of temporary insanity its protagonists held that a society which permitted a man to get drunk had no right to hold him liable for the consequences of his actions when he was intoxicated. While the Movement does not seem to have operated on any coordinated national scale in this aspect of its campaign, its local supporters intervened in many alcohol related cases, and that of John Wingfield, in 1880, was not untypical. Wingfield, a heavy drinker, murdered his wife in broad daylight because she had deserted him. Opinions differed among his supporters as to whether this was due to the provocation of her misconduct, to insanity or to drink. Those who took the latter view, in this case the Kilburn Temperance Society, convened a meeting at the Kilburn Public Baths and their conclusion, that Wingfield "killed his wife while labouring under a fit of temporary insanity," was duly reported in The Kilburn Times. The Secretary of the Society, Mr Griffiths sent a copy with his appeal. A few days

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113 Brian Harrison, Drink and the Victorians, p.353, argues that at least up to the 1870's the Temperance movement was closely allied to Evangelicalism and saw drunkenness as a symbol of individual moral failure. In later decades it began to perceive a more collective responsibility for this failing.

114 The only person to operate on such a scale was a Mr Jas Unwin of Greenwich whose appeals appear in the files for nearly twenty years from the early 1870's. He was treated with the formal courtesy proper to a gentleman and the lack of interest accorded to a pest.

115 H.O.144 Series, Case file # 90932, John Wingfield, 1880. See Chapter 2, p.76., for the efforts of his prosecutor, Sjt. Ballantine, on his behalf.

116 Ibid, A local Doctor, John Ring, was convinced that this was the case.

later an independent appeal arrived from Mr Unwin of Greenwich making precisely the same argument.

Murder cases which had been commonly reported only in local papers in the 1860's, although trial reports appeared in The Times, became of more general concern later in the century. During the final decades of the century a new force emerged in a national popular press and its papers occasionally took up the case of a convicted person. Their purpose was even less disinterested than the moralists of earlier times but, in some celebrated cases, had considerable impact on the Home Office. They were as likely, however, to congratulate the courts on a conviction\textsuperscript{118} as they were to plead for a convict's life\textsuperscript{119}.

The impact of this new force was not lost on the Home Office and it is possible to detect in the 1880's and thereafter a growing nervousness about exposing itself and its practises to public debate. The increasing volume of press-cuttings in the Home Office files at this time reflect this anxiety. Once used as an additional source of facts, to supplement the judge's notes, news-copy was increasingly being collected to reflect public opinion. These fears were reinforced by the changing character of parliamentary membership. The social homogeneity of the House and its respect for convention was being eroded by Radicals and Irish

\textsuperscript{118} As in the cases of the Stauntons, Henry Wainwright, Percy Lefroy Mapleton, Neill Cream etc. Even the conviction of the Rev. J.S.Watson was applauded by The Times.

\textsuperscript{119} As in the cases of Israel Lipski or Florence Maybrick.
alike and as we have seen, members were learning to use the national press as allies. While the Home Office was forced to begin to release guarded bits of information to the Press there was a growing formality in its correspondence and increased use of standard modes of expression. Underlying this trend was a more widespread use of internal standard forms to report its activities. Partly the product of attempted improvements in efficiency such developments served also as a protective device in the event of unexpected enquiry. In 1883 the Criminal Department ceased to explain to Parliament why its Minister had reprieved murderers in its Annual Judicial statistics and ten years later removed the case details of those who had been executed. At the same time, as has been noted in Chapter Four, it began to accumulate and categorize the details of its own internal decisions. Less information for the public and more for its own staff made any public debate of specific cases increasingly difficult.

There are no accessible Home Office 'policy' documents on such abstract issues as the general reduction of social violence or the limits of the provocation that an ordinary man might support. It is highly unlikely that there ever were any. On the other hand the editors of the 1895 Criminal Memoranda & Returns\textsuperscript{120} reveal their Department's attitudes on this latter subject by the cases which they include in the category of "Provocation" and some conclusions

\textsuperscript{120} H.O. Printed Memoranda, vol 15, p. 301 ff.
are possible. In the period from 1846 to 1894 there are 41 cases listed and of these 38 were cases in which men killed their wives. Only three cases of 'man to man' provocation are cited and on the evidence of two of these, whose details are available, each was one of deliberate homicide. Charles Arthur's case has already been discussed. James Donaghue was a publican who killed a customer in 1878 who had stolen a sovereign from him. He beat "him to death with a loaded whipstock." The third case was that of Frederick Windham who "shot his bullying father" in 1893. There are two obvious conclusions; first, that the category of "Provocation" was a special one effectively for those men provoked to homicide by the misconduct of their wives and second, that the Home office was very reluctant to include any other cases in it. It is also significant that this perception of domestic provocation seems to have been shared by the public at large. The Memorandum has a section headed "The weight to be attached to popular opinion." Under this heading are listed five cases which clearly sparked widespread popular support for mitigation. All but one of these are cases of wife killing and two feature in Sir William Vernon Harcourt's minute quoted above\textsuperscript{121}. The last case is that of James Hall, the poacher, whose case has also been discussed.\textsuperscript{122} In the mind of the editing civil servant these were two categories of crime where the intrusion of public sympathy was legitimate and understandable.

\textsuperscript{121} Chapter 4, p.190.
\textsuperscript{122} Chapter 3, p.139.
The question which remains is how to interpret this evidence on the bureaucratic estimate of the limits of self-control in ordinary men. There are at least two broad categories of explanation. It might be argued that the legal establishment held the crime of wife killing to be less socially threatening than others\textsuperscript{123}. This was a domestic event which rarely spilled over into the public domain and it was not one that was likely to be repeated. Such an utilitarian view might well be reinforced by the still strong traditional assumptions of the duties owed by wives to husbands and even by a general unwillingness to value the life of a woman on the same level as that of a man. Against such a 'minimalist' argument one might set the perception of sexual provocation as the most powerful to which a man's self-control could be exposed. In a broad sense all the provocations which led juries, judges and civil servants to recommend wife-killers to mercy had a common sexual theme, the deprivation of sex by desertion, the destruction of sexual tranquility through dissipation and the ultimate provocation of sexual profligacy. If the institution of marriage, whose purpose was to tame the most powerful and socially destructive characteristic of Victorian man, was destroyed by a woman a provocation had been offered. The arguments are not by any means mutually exclusive but it must be observed that the latter was perhaps more widely held by both men and women at that

\textsuperscript{123}This was clearly the position of Commander Hatherill, the 20th century policeman, quoted above.
time than the former. The recorded views of Secretary's of State can only be taken at face value. In the 'Memorandum' the opinions of three of them and a Lord Chancellor are cited and they indicate that it was public opinion which pressed them to accept this kind of provocation and that, as public opinion slowly shifted, the establishment tightened up even in this narrow area of provocation. When George Hall murdered his wife, a woman "who refused to cohabit with him and even sued him for threatening her", both Sir George Grey and the Lord Chancellor, Selbourne "held that such provocation should not exempt a man from the consequences of his act." Selbourne minuted that:

Cases of adultery occur constantly & often under circumstances of the greatest provocation to the injured husband and it would be of the most dangerous consequences to society if such provocation were accepted as a reason for not capitably punishing the husband when he commits a coolly premeditated murder.

Hall was, nevertheless, reprieved as was Peter Morris in 1875, of whose case R.A.Cross wrote, after a strong plea by Liddell:

\[124\] On the grounds that the attitude is still to be observed in contemporary criminal justice. Susan Edwards, Gender, Sex & the Law, Croom, Helm, 1985.

\[125\] H.O.Printed Memoranda, vol 15, section 11.
In favorem vitae I will give this man the benefit of the doubt, as I did in the Hampshire case, but it is with great difficulty that I do so in the case of wife murder\(^{126}\).

Most other cases of what might have been popularly held to be provocation were treated as ones of diminished or uncertain intention. They were cases where the judge could, in practise, limit the freedom of the jury to assess the element of provocation by doing what Stephen did in 'Demon' Johnson's case - using Chief Justice Holt's dictum of the voluntary cruel act - to preclude the issue of provocation other than as a rider to their verdict. It is clear that this is also what the Home Office did in their review of capital cases. By doing so they preserved a measure of flexibility and an opportunity for the consideration of the social implications of the crime and the social bona fides of the criminal. Moreover by avoiding any deliberate formalization of a scale of relative seriousness, in what was after all the most serious of mortal sins, they were better able to repel the "loose and dangerous" ideas of an increasingly materialist and relativist society.

\(^{126}\) Ibid.
Chapter 9
The Quality of Bureaucratic Mercy
in Victorian England

In the context of the criminal law mercy means mitigation, the reduction of a legally mandated punishment where some element of doubt exists about the full criminal liability of a convicted person. It is a matter of compromise between the strict standards of an absolute law and subjective perceptions of relative blameworthiness. This disjunction had its origins in the way in which the criminal law developed and in the character of the common law itself. The efforts of 19th century reformers to standardize legal administration and to rationalize the law itself were only partially successful and opportunities for mitigation remained a feature of the Victorian criminal justice system at every level. The administration of the Prerogative of Mercy in capital cases was only the most conspicuous example of this process. It was a task which the Secretary of State and his staff fulfilled conservatively, protecting both the absolute standards of the criminal law and the moral order of society as they saw it.

This traditional function remained with the Home Office because of a compromise in the evolution of a national system of criminal justice. The tension between regional and national interests aborted efforts to establish a comprehensive Ministry of
Justice. The Home Office, which inherited the responsibility for administering the new central powers of policing, of prosecution and penal management which Parliament reluctantly assumed, was not invested with responsibility for legal reform or for the overall development of criminal justice policy. It was, perhaps, as well because the structure which evolved in the Home Office was peculiarly ill-suited to become an engine of legal or social change.

During this period it was able to fulfill this compromise role in a highly conservative way because the gap between popular perceptions of justice and those of the governmental establishment was narrowing. Although civil servants at the Home Office in the 1880's may not have always thought so, they were living in relatively quiet times. A colleague said of Godfrey Lushington that "he fell on days when there was no trouble"1. The Criminal Department itself certainly believed that this gap had diminished in the years covered by this study. In 1900 H.B.Simpson wrote:

We have witnessed a great change in manners; the substitution of words without blows for blows, with or without words; an approximation in the manners of different classes, a decline in the spirit of lawlessness2.

This conclusion was symptomatic of an apparent change in opinion which this work can do little to illustrate. It was, however,

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1 Sir Algernon West, op.cit., p.151.
supported by satisfactory evidence of a declining level of crimes of violence\(^3\) and a widening awareness of this trend encouraged a relaxation of the typically severe attitudes of lawyers and civil servants to criminal justice policy. The first decade of the twentieth century saw renewed efforts to attack the 'residual' problems of Victorian justice, those of juveniles, first offenders, recidivists or alcoholics. Specificity was the characteristic of the solutions offered and a greater willingness to look for the individual springs of deviance. That this trend affected the Home Office is suggested by the comment of a Judge to a senior civil servant on the regime of the new liberal Home Secretary, Herbert Gladstone, in 1907:

I confess that I have very little hope of doing anything effectual as long as the present regime at the Home Office continues. The reprieves which have taken place shock me. Kennedy [another judge] told me that two of the very worst murderers . . . men who, if capital punishment existed, were amongst those who most richly deserved it, were reprieved without even the formality of consulting him\(^4\).

It is evident therefore that this study which begins, in 1861, at the end of a period of reform and experimentation in the treatment of crime, ends at the beginning of another. During the interval the

\(^3\) This evidence is summarized in Gatrell, op cit p. 238 ff.
\(^4\) Mr J.Wills to Evelyn Ruggles-Brise, May 23, 1907. Box 5, Private Papers E. Ruggles-Brise.
predominant concern of the legal establishment and the Home Office bureaucracy was to contain and repress the apparent surge in criminality that had marked the preceding decades and to extend the rule of law and order across the new face of urban and industrial England.

There is a very long-standing tension in the Common Law between the conservative and customary practises of local and community courts and the expansionist ambitions of Royal Justice. These goals, which looked to a single unitary system of law and justice, included the establishment of an increasingly strict and homogeneous standard of social conduct within the framework of the "King's Peace." In its progressive extension of the Pleas of the Crown the authority of central government relied on a short range of very broadly defined offences and a concept of strict individual liability to ensure that as many cases as possible were extracted from the uncertain and unprofitable outcome of local jurisdictions and resolved in crown courts. This process of administrative centralization was to be accelerated in the 19th century when the traditional methods of the criminal justice system proved inadequate to cope with the demands of a new urban society on the one hand and the decay of a traditional rural order on the other. These twin factors helped break down the deep-seated suspicion of central government which was shared by both a conservative gentry and the commercial and professional classes who made up mid-
Victorian parliaments. Further centralization of the criminal justice system was not imposed but called for, as the costs and inefficiencies of local administration became increasingly evident. It was, however, a compromise between present needs and traditional fears and the solutions found were piecemeal and uncoordinated. In the thirty years between 1850 and 1880 a semi-national police organization was established, prisons were nationalized and a system of public prosecution for serious offences was set up. Even before this period, improved policing and prosecution on the one hand and a growing intolerance of petty crime had led to a major increase in the volume of criminal cases.

Jurisdiction over such offences began to be devolved to the local courts of Petty and Quarter Sessions. At the same time the Assize courts, the itinerant commissions of High Court judges who brought crown justice to the provinces of England, became increasingly specialized in the trial of serious crime. It was a development matched by the growing professionalism of the lawyers who practised in these courts. In this system of justice there were, however, only modest improvements in the position of those accused of crime.5 Despite its random evolution the criminal justice system became more effective if less balanced. As Gatrell has argued:

In so far as the machinery of law and order had positive effects upon Victorian criminality, it was because those

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5The most significant were the Prisoner’s Counsel Act (1844) at the beginning of the period and the Criminal Evidence Act (1898), at its end.
who broke the law were not well defended against those who sought to bring them to justice. The agencies of the law were, in that sense, appropriate to their task.\textsuperscript{6} No single authority, however, had executive responsibility for this diffuse but formidable concentration of power. There was no Victorian Ministry of Justice nor any central engine of social policy towards crime. The purposes of Ministers and bureaucrats must most often be deduced from the detail of their work.

The impetus to modernize the administration of criminal justice and to standardize its procedures, was accompanied by a comparable drive to reform and rationalize the criminal law. The target of this enterprise was that very feature of the Common Law which strong Kings, from Angevins to Tudors, had used to gain control over local justice, the broad definition of felony. It was this characteristic of the law which, in the opinion of its 19th century critics, from Bentham to Austin, made it impossible for reasonable men to interpret or courts to fairly administer. Efforts to replace widely defined crimes, all subject to an undifferentiated and "high liability" to sanction, with minimal and precise definitions and a scale of circumstantial "aggravations", failed. Efforts to codify the existing law were equally unsuccessful.

Victorian England therefore continued with a criminal law where the traditional factor of mitigation remained as the only

\textsuperscript{6}Gatrell. op. cit. p. 258.
mechanism through which society could recognize the relative blameworthiness of felons. This factor operated at every level of the criminal justice system. Despite the operation of a Public Prosecutor and the increasing role of the police in the handling of prosecutions, the critical decisions to prosecute remained substantially with the victims of crime and their evidence and that of their neighbors, determined the character of the charge laid before a magistrate. While the prosecutorial powers of Magistrates were much reduced they retained powers of decision over the evidence offered and the right to dismiss uncertain charges. A similar power remained with, and was exercised by grand-jurors before any formal indictment reached an assize court. Once in this last stage of the formal legal process both petty jury and judge had an opportunity to exercise a subjective judgement on the significance of the offence. In the case of the jury it was their task to find mens rea, the necessary intention in felony and in the case of the judge to reflect in his sentence a relative perception of the guilt inherent in the crime. At each of these stages an element of mitigation was possible and, in all but the last perhaps, the Judge's sentence, an opportunity existed for the expression of local and community feelings, whether of sympathy or outrage. There was thus a continuing tension between local perceptions of guilt and blameworthiness and the efforts of an evolving legal establishment to achieve both more uniform and more demanding standards of social conduct.
The cases in this study, drawn from the period 1861 to 1900, share two characteristics; they are all murder cases and they are almost all ones in which convictions had been obtained and sentences of death passed. When presented to the Secretary of State at the Home Office the only possible indication of such relative perceptions of guilt consisted in a recommendation by the jury to mercy. Those whose homicides had been found to be accidental (per infortunium) or lawfully in self-defense (se defendendo) would have already gone free. Those whose crime was judged culpable, but without the intention to kill, would have been convicted of manslaughter and sentenced to terms of imprisonment, from a few days to ten or more years at penal servitude. The decisions made by the Secretary of State and his advisers were nevertheless of special significance since they represent cases where there was the broadest measure of consensus about the guilt of a criminal which the system could express. Such judgements were varied or overturned only with the greatest reluctance and most commonly because of evidence which, in an unbalanced prosecutorial system, had not been exposed in the courts.

The failure of attempts to establish a Ministry of Justice in the 1850's left the Secretary of State for the Home Department, the Home Secretary, as the residual legatee of the wide powers over the central administration of justice which Parliament took in the
ensuing decades. These were powers which were used hesitantly by ministers in the early part of this period. Sir George Grey, and both his whig and tory successors, were reluctant to trench on the traditional authority of local interests, of which they themselves were representatives. They were, moreover, supported by very limited administrative resources.

The Criminal Department of the Home Office which developed to handle the growing legal responsibilities of the minister preserved throughout the character of a private and personal office. Only towards the end of the period is it possible to detect signs of that self-confident independence and quasi-professional expertise which has come to distinguish British bureaucracy in the 20th century. It was not yet characterized by that arrogance of power and certainty that was to be experienced by ministers in some recent administrations\(^7\). The process had, however, begun.

Pressure of a growing workload, the recruitment of higher caliber personnel and the experience of long tenure, led to a slow erosion of the tradition which had excluded all but the highest levels of staff from any active participation in decision making. By the end of the period the new graduate intake were positively encouraged to contribute. They had, moreover, the support of a growing body of 'case-law' and 'rules' which, over time had evolved

in the Department. This 'professional' equipment enabled the permanent staff of the Home Office to begin to constrain the decisions of their political chiefs and to establish a measure of independent authority. This self confidence was also reflected in the successful establishment of its authority over the semi-independent executive arms of the Home office, the Metropolitan Police and the Prison Commission. Nevertheless these very strategies bred passivity, a lack of initiative and an unwillingness to take subjective decisions. While they served to protect their political masters from the consequences of rash decisions they served less well when the Department was called on to investigate possible failures in the criminal justice system or to reform itself. It took, for example, a major public outcry and a minister of exceptional self-confidence, H.H. Asquith, to reform the penal system in 1894/5.8

The Home Office bureaucracy which developed in the period was also shaped by a profound legal tradition. Home Secretaries in the period were almost invariably lawyers reflecting the compromise over a Ministry of Justice and their increasing responsibilities in this area9. Senior members of their staff were always lawyers. As a result even those unspecialized members of their staff acquired a legal cast of mind. In such an environment it is not surprising to find a characteristic common law suspicion of

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8 Following the Report of the 1894 Departmental Committee on Prisons, which Asquith set up, significant changes were made in both the management & policies of the Prison Service.
9 Whereas their immediate predecessors, Peel, Graham and Palmerston were not.
subjective decision or that the individual decisions called for in prerogative cases should have been subordinated to an increasing body of 'rule'. In this respect the internal practise of the Home Office had a close parallel in the wider context of equity practise in the 19th century. The new graduate recruits who began to enter the Home Office in the 1880's were not lawyers but in this environment soon captured the prevailing ethos of the office.\textsuperscript{10} It was not an environment which recognized any need for more specific specialization. Where, on occasion, medical, scientific or technical knowledge was needed outside 'experts' were retained on an ad hoc basis. More serious was the exclusion from the management group of those experienced in the subordinate activities of the Home Office. The knowledge and energy of such successful executives as Howard Vincent, Edmund DuCane and A.K. Stephenson\textsuperscript{11} was kept at arms length. The Criminal Department was thus ill-equipped to mobilize the formidable resources over which it had at least nominal responsibility. Relationships with the judiciary were by contrast close and deferential, always mindful "that any ill-considered action in opposition to the judges might deprive the Home Office of the friendly assistance it now receives."\textsuperscript{12}

The close relationship of Secretaries of State, of both political parties, and their Home Office officials with the Judges is well documented in their correspondence. It provides substantial

\textsuperscript{10} One or two, including C.E. Troup & H.B. Simpson, became qualified barristers later.
\textsuperscript{11} See Chapter 2, above.
\textsuperscript{12} Sir Kenelm Digby, Report of the Beck Committee, Appendix A.
evidence of a common purpose to protect the viability of an absolute law, grounded in Christian morality, from the assaults of a 'modern' relativism on the one hand and the lingering and permissive traditions of a turbulent populace on the other. This task of forging an "approximation of manners" and subduing "lawlessness" was, however, a pragmatic one which demanded flexibility as well as moral consensus.

Nowhere were the expressive functions of the law more important than in the highly visible decisions of the Prerogative of Mercy. In determining the limits of criminal responsibility, in the most odious of crimes, the Secretary of State and his advisers were protecting standards in the field of criminal justice as a whole. At different times Sir William Harcourt expressed both of these aspects of the task.

The fact is that the exercise of the Prerogative does not depend on principles of strict law and justice. Still less does it depend on sentiment in any way. It is really a question of policy and judgement. . .13

Executions which stirred compassion for the culprit, rather than indignation at his crime were, in his view, a "great evil" and made it more difficult to "maintain the punishment of death at all." Yet underlying such practical considerations was the "painful

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responsibility" of denouncing "on moral and ethical grounds . . .the loose and dangerous ideas floating about in the vulgar mind."14

The Home Office's own Criminal Memoranda provide a summary of the way in which the prerogative was exercised, of the changes that occurred in this practise and finally, in the classifications used, a revealing glimpse of the underlying ideology of its bureaucracy in this period. When the staff of the Home Office converted these preconceptions into 'practise', and 'practise into 'rules', their superficiality is soon evident. These rules which consolidated past practise existed both in respect of decisions to mitigate capital sentences and to determine the length of the commuted prison sentence. In the Memoranda summarizing the former type of decision there is no rigorous classification or analysis. The categories into which they are divided are an assortment of 'pleas', such as provocation or "lack of intent," circumstances such as pregnancy, types of crime such as abortion, 'kicking' or factors such as drunkenness or insanity. In the event there is a superficial formalism about the information produced which would make it possible at any time to identify some broadly similar cases from the past and to ensure the plausibility of present decision and provide a possible defence in the event of public or parliamentary protest. While comparison has been made with the development of Equity law in the same period the rigor of the

14 Letter to L.Harcourt, Chapter 8, p.414 above.
process is not to be compared. There was evidently a great reluctance to formulate policy or doctrine, to establish any "fixed principles" which the public or the press might deduce from practise and use to predict or to challenge the outcome of prerogative reviews. More importantly such principles would have limited the flexibility of future practise. There was less need for public prudence in determining the fate of those soon forgotten convicts whose sentences were commuted. The rules made in respect of commuted sentences were also treated flexibly and often reflect a clearer picture of the bureaucratic judgement of their crime: in cases where real doubt existed about their conviction, it might be treated as manslaughter and in others as deserving the full twenty year term of a life sentence.

It is evident that in two important areas the traditional community tolerance of violent male behavior was increasingly unacceptable. While never of itself an "excuse" for homicide the factor of drunkenness had become increasingly irrelevant by the end of the period and, by 1900, the 'rule' in this respect was that it only became a consideration when its symptoms could be equated with permanent insanity. The case data in this category is limited but suggests that this trend was already evident in the 1880's. There

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15 Lord Eldon, one of the architects of 19th century Equity law declared that "The doctrines of this court ought to be made as uniform and as well settled as those of the common law, laying down fixed principles, but taking care that they are applied according to the circumstances of each case.. Gee v Pritchard, 2 Swanston. 414. cited by Veeder, Select Essays in Anglo-American Legal History. Boston, Little, Brown, 1907. 16 See Table 5 below.
is also evidence to suggest that the traditional license accorded to wife beating, and the inevitable homicides that it gave rise to, was less tolerable to the late Victorian establishment. On the other hand the extent to which such cases dominate the category of "provocation" suggests that even at the end of the century there was a persistent belief, at all levels of male society, that wifely delinquency was the most potent of threats to masculine self-control.

The narrow definition of provocations which could be considered in mitigation is itself a reflection of the determination of the establishment to avoid all possible qualifications on the free-will of its adult citizens. There are no categories in the Home Office records labelled "necessity" and neither in its internal correspondence, nor in that of its petitioners, any but the most occasional attempts to explain the desperate acts of impoverished men in materialist terms. When any suggestion of "the seduction of circumstance" did occur it was condemned as a "dangerous doctrine." In a classic, and exceptional, case of 'necessity', that of the officers of the yacht "Mignonette", these victims of prolonged hunger and thirst were deliberately removed from the mercy of a local jury, so that they might be condemned to death and saved only by the Royal mercy.

The legal perception of the moral autonomy of the individual was, nevertheless, qualified in one important respect during this period. There was a steady increase in the number of
those indicted for murder who were found insane at some stage of the criminal justice system. Despite a fundamental conflict between legal and scientific perceptions of criminal responsibility, this was a development to which the Home Office, and its subordinate, the Prison Commission, positively contributed. Indeed it is possible to say that the Government helped lead this movement. During the late 1870's and 1880's there was a marked increase in the numbers of those found insane *after* conviction for murder. This was only possible with the active agreement of the bureaucracy and the cooperation of its own medical men. Later there was a correspondingly large increase in the numbers of those found *unfit to plead or guilty but insane*. Such verdicts in most cases depended on the evidence of prison doctors. Two reasons are advanced for this compromise between lawyers and medical men. In the early part of the period the Government acquired control of its own facilities for the care of those judged criminally insane, and by reason of its prerogative powers, an indeterminate power of restraint over them. This factor, plus its growing confidence in the reliability of its own 'medical establishment,' made a relaxation of the strict definition of legal liability a safe expedient. Even for those, perhaps the majority of the governmental establishment, who did not accept contemporary accounts of 'temporary' or 'partial' insanity, it provided a necessary explanation of cases where the dissonance between the 'normal' conduct of a prisoner and some exiguous act of violence could be surmounted in no other way. It is not surprising that such
explanations were more easily grasped in cases where the offender came from a respectable position in society.

The rationale behind the mitigation of capital sentences on infanticides was similar. When a medical explanation of temporary 'puerperal' insanity became increasingly common it was met by a legal willingness to accept any coherent explanation of so unnatural an act. In this case it provided an opportunity to exercise mercy without acceding to the widespread public sympathy for the circumstances of such offenders.

There were circumstances where the prospect of such public sympathy led to a further narrowing of full penal liability. Without comparable 'scientific' explanation the capacity of the young to form the malicious intention necessary to an act of murder was extended to 18 years from the traditional age of 14 and a comparable assumption of mental decay was made in the rare cases of elderly offenders. A handful of other cases where reprieve was the apparent result of "sentiment" are more easily explained in terms of avoiding the danger of public sympathy for the victim. Where long delays occurred between crime and conviction or between conviction and execution the offenders were sometimes

17 William Sharwood who killed his wife in 1851 and confessed in 1869 was executed whereas Jonathan Gaydon who gave himself up in 1879 for a murder in 1857 was reprieved.
18 Catherine Winsor's case was referred by the judge to the Court of Crown Cases Reserved and a long delay ensued. Her conviction was upheld for a particularly bad case of baby farming but she was reprieved. She was held, however, at penal Servitude until her death 29 years later - the longest sentence served by any woman in the 19th century.
reprieved. When the executioner failed to spring the trap beneath John Lee on three occasions he was reprieved\textsuperscript{19} as were no less than eight other convicted men during the period, all of whom suffered from deformities of the neck or wounds which made a 'tidy' execution unlikely and public outcry inevitable.\textsuperscript{20}

The Home Office was most careful to avoid formulating 'rules' in respect of the one factor whose judgement underlay every prerogative decision - that of intention. When at the beginning of the period the Capital Punishment Commission had recommended the establishment of a dual category of murder it had recommended that capital murder be limited only to cases of "express malice aforethought."\textsuperscript{21} In practise, however, the judges and a succession of Home Secretaries came to recognize that this was an unworkable concept and that malice can in practise only be detected by imputation. The decisions which they came to in this respect are at once the most important indications of the values which they sought to protect and the most elusive.

Despite the legal conventions which had grown up about the doctrine of mens rea this concept was, in the broadest sense socially determined. The most comprehensive statement of this

\textsuperscript{19} Case of John Lee 1885. The trap-door of the scaffold at Exeter Prison had become warped.

\textsuperscript{20} The outrage at the bungled, and grisly execution, of Wm. Brownless at Durham in 1880 was widespread, provoking a short lived burst of anti-capital punishment feeling and a Depart'ral Committee into methods of execution, The Aberdare Committee.

\textsuperscript{21} Capital Punishment Commission 1864-6, Report, Sec.12 1, London, Eyre & Spottiswoode, 1866.
doctrine, that of a 17th century Chief Justice, that "he who doth a cruel act voluntarily doth it of malice prepense," is in the last resort a tautology. It still requires that some "social audience" determine whether an act is "cruel", or reckless or accidental and only a knowledge of the actor's intention can resolve that issue. Since Victorian criminals did not give evidence in court and while frequently admitting the act of homicide, rarely admitted that they had intended to kill, this factor could only be deduced by observation of the circumstances of the crime. Thus judgements of malice made at the various stages of a prosecution for murder, including that of the post-trial prerogative review, depended upon an assessment of the social meaning of the act of homicide and upon the social status and social credit of the criminal.

The fact that acts of homicide were so often evaluated in abstract moral terms does not conceal the practical considerations which went to make up such judgements. Judges and civil servants talked of "not a very bad murder" or "an atrocious crime" and commonly they agreed in these opinions. Even so it is an elusive polarity. Who was killed, how was it done and where was it done, were all questions whose answers seem to have affected the imputation of malice. Thomas Wheeler killed his ex-employer by shooting him with a gun while breaking into his house. His crime was considered unspeakably atrocious. Jacob Riegelhuth killed his delinquent wife in their home with a kitchen knife and his offence was declared to be "not a very bad murder."
Among the factors to be considered were the person, social position and character of the victim and the relationship of the offender to the victim. The protection of the social hierarchy against homicide was traditionally an explicit function of the law, and the killing of people in authority more heinous than ordinary murder. While the Sovereign continued to be defended by the Statutes of Treason the laws in respect of petty-treason had been in abeyance long before they were repealed in 1861. Even so their shadow remained and offered an implicit protection to those to whom a special degree of subordination was due. Some persons in authority, such as policemen enjoyed virtually absolute protection when on duty since all citizens owed them respect and consideration. Others such as army officers, ship's captains, prison warders and even railway officials were similarly protected against those over whom they had special or temporary authority. Game keepers, the private security guards of rural England, were less clear-cut symbols of the social order and their slaying a less certain basis for imputing malice. The duty of subordination extended into the workplace and the assumption of malice involved in the killing of employers was rarely qualified. The character of such authority figures was not easily impugned and only occasionally to an extent sufficient to justify mitigation.

The concept of petty-treason included husbands and fathers of families and the special status which it reflected must underlie, at least in part, the disproportionately serious view taken
of patricide or the murder of husbands compared with male crimes against family members. The duty owed to an hierarchical superior was conceived in terms of deference and self-control. The total rejection of this practical and moral prop of the social order that was implicit in homicide made an imputation of evil intention inevitable. The question is how long was this shadow of a fading social order and was it still determining the social meaning of an act of homicide as strongly in 1900 as it was in 1860? There is no evidence to suggest that in this particular context attitudes were changing or that the legal establishment took a more lenient view of such crimes at the close of the century than forty years earlier.

The issue is of course a broader one since it calls in question the survival of traditional perceptions of a much wider range of social values. Attitudes towards women and children as victims depend upon their relationship with the offender. Men who killed women other than their wives, regardless of any unofficial relationship, were usually hanged as were men who killed either their own or other people's children. In the case of their own children it is less certain that this rule applied at every stage of the process and probable that juries returned verdicts of manslaughter or accidental death in many cases of domestic violence. The ambiguity of popular feeling about child abuse - a reluctance to intrude upon the privileged authority of a father in his home and a growing distaste for cruelty to children were paralleled in attitudes to wives as victims. The special respect and deference due
to husbands was matched by the duty which he was expected to fulfill in terms of care and protection towards his wife and family. The failure of women to fulfil the former expectation was not uncommonly considered provocative. In both of these areas, however, there is evidence of change in the period. It is to be seen in a reduction in the numbers of reprieves given to wife-killers as well as in the comments of later Home Secretaries.22

Lawyers and civil servants read about murder. The accounts that reached them were in the moderate prose of judge’s notes or the columns of ‘family’ newspapers. Although photographs of crime scenes were sometimes introduced as evidence, pictures of the victims were not. Perhaps it was this detachment from the bloody detail of murder which ensured a general disinterest in the relative horror and barbarity of particular acts. The weapons of murderers were on the other hand significant indices of malice and there is, for example, a clear relationship between the degree of malice imputed to those who used firearms and those who killed with their hands and feet. An intention, or readiness to kill, could reasonably be assumed from such a fact. The same kind of assumption could be made about the location of a crime. One committed on another man’s property was more certainly malicious than the violent outcome of a chance encounter in the street. Domestic murders, the most common of all, offered no comparable

22 The reduced number of such cases in which petitions were raised is less significant since petitions as a whole became rarer towards the end of the period.
basis for the presumption of malice. They were, however, less socially threatening and less likely to be repeated.

The second critical perspective in the determination of mens rea was that of the social status and social 'credit' of the offender. Just as an imputation of malice might be made from the character of the weapon used or the scene of the crime, so evidence that the prisoner had been engaged in crime or was a person of bad and violent reputation would help to shape bureaucratic ideas about his or her intention. The explanation that a man of habitual violence had committed one more such act, this time with fatal results, was not hard to accept. Conversely, good evidence of respectability required a more elaborate explanation. The social 'credit' that the friends of a convicted man tried to pile up had the effect of making his act appear uncharacteristic, sudden, the result of unusual provocation and unlikely to be repeated. Such evidence could give the crime an appearance of manslaughter or, if the evidence of deliberate intention was overwhelming, suggest that the offender had been temporarily insane. The expectations of both 'respectability' and 'normality' reflected the perceived status of the prisoner and were in some cases more demanding for those of higher position in society. Nevertheless the rare homicides from the middling or professional classes benefited from the apparent

\[\text{23 It is, for example, very unlikely that the charge of murder by deliberate neglect & starvation brought against the Stauntons would have been prosecuted in the case of a labouring family in the East End of London.}\]
dissonance of a violent act with the patterns of their normal life and were more apt to be found insane than working people.

There is virtually no evidence extant of successful personal intervention or influence from interested people in the prerogative process and no overt social bias. This is not surprising since very few people with connections to the ruling classes found themselves in this situation and those who did were usually 'rejects' from that society. On the other hand the perspective of bureaucracy, while scrupulous and detached, was remote and distant. It judged the normality and respectability of its subjects against its own standards. These were the standards of men, from an increasingly diverse range of professional, commercial and minor-gentry backgrounds, who came to make up the governmental establishment. Sharing a modest affluence, a high level of education and a common indoctrination in the service of the law they are not readily described in class terms, but they nevertheless came to share the basic social preconceptions of the ruling classes as a whole. The people whose crimes they judged and whose intentions they investigated were overwhelmingly poor and ill-educated. Between the two groups there was an immense gap. Just how wide it seemed is illustrated by the evidence which Baron Martin gave to the

24 An intervention by W.E. Gladstone on behalf of Christine Kent was, for example, resolutely rejected by Harcourt in 1882.
25 As for example the Stauntons, Florence Maybrick or Percy Leroy Mapleton.
26 For example - Liddell was a member of the nobility, if a younger son of a minor family, Lushington a member of a professional family, whose origins were 'minor gentry' and Troup a clever son of the manse who acquired his status through his own professional achievements.
Capital Punishment Commission in 1864. He said of the effects of capital punishment:

For the purpose of forming a judgement . . . you must have recourse to people who are well acquainted with the the lower classes in this country and no man who is not, is competent to give an opinion . . . If I had the means of going among them, if I could ascertain that they are as afraid of of penal servitude for life, as they are of death when a violent temptation comes upon them . . . I would be glad to do away with the punishment of death altogether.\textsuperscript{27}

In the absence of such acquaintance the establishment was forced to fall back on the assumption that a man's actions were the surest guide to his intentions and to base their evaluation of his guilt upon the twin indices of the circumstances of his crime and his character. While, as educated men they were clearly familiar with prevailing arguments on the social determination of human behaviour and upon the extent of free-will, they were not professionally exposed to them. Nor were their views widely challenged either by the public or the press.

In the early part of the period there was a substantial volume of of petitions on behalf of capital convicts. Those from rural areas, often presented by local M.P's or county magnates sought to reinforce the perception of respectable 'normality' and good

\textsuperscript{27} C.P.C. Minutes, Nov. 29 1864, # 242/306.
character while those from urban areas, where knowledge of individuals might be more ephemeral, were often mounted by 'abolitionists', leading commercial figures, who felt a general aversion to executions. Where the former implicitly endorsed the judicial process, the latter challenged it. They did so, however, only from general principle, at the taking of life. They offered no alternative explanations of crime. In both cases the impact of material and social circumstances were pleaded only in the cases of those to whom, like boys and young mothers, convention already allowed a measure of diminished liability. The volume of all petitions fell over the period, persisting in traditional form in still integrated country districts, but becoming rarer and less substantial in urban areas with the decline of the evangelical impetus. Solicitors, clergymen, social workers and trade unions took the place of the anti-capital punishment movement as organizers of urban appeals and their constituencies were small. Their pleas remained traditional with the exception of the temperance movement who began in the 1880's to use capital cases as a means of promoting their cause and to argue that society shared the responsibility for violent crime when it tolerated, even encouraged, the sale of liquor.

The emergent national press of the late 19th century whose circulations were grounded in that growing "approximation of the manners of different classes" frightened bureaucracy but did not challenge its basic tenets. Attacks on its efficiency and competence
led to a growing atmosphere of secrecy in its operations and reinforced the impetus to formalize its practises. This new press was, however, to be an essentially conservative force more interested in the arrest of criminals than the mitigation of their punishments.

It was nevertheless on grounds of efficiency that the prerogative powers of review were supplemented in 1908 by the creation of a Court of Criminal Appeal. In the aftermath of the Case of Adolph Beck, it was the press which, according to the Secretary of State, had "led the public to believe that miscarriages of justice are an every day affair".

The effect of this development was to effectively eliminate from the work of the Home Office those cases where there was doubt over the facts of the case. Such cases were effectively retried in the higher court. The new court was also empowered to receive appeals on the length of prison sentences imposed in lower courts and attempted to rationalize the subjective practise of judges in this respect. There were, however, as in the past, few homicide cases where the facts were in dispute and, since no change was made in the law of murder, no latitude for the Appeal Court to review the mandatory sentence of death. Prerogative review of capital cases continued as a Home Office function until the abolition of this sentence in 1958. Despite the existence of a Court of Appeal the proportions of those executed and those commuted or found insane remained at approximately the same level as in the

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19th century. The judiciary who had, throughout the later 19th century, tightened the construction of the law of murder and resisted any attempt to excuse it on determinist grounds, proved no more uncertain of their duty in the century which followed.

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29 In the period from 1861-1900 55.5% of those convicted of murder were executed. In the period 1900-1949 the figure rose to 57.5%. 

Appendix A

**Victorian Home Secretaries**

1860 - 1900

<table>
<thead>
<tr>
<th>Name</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sir George Cornwall Lewis, Bart.</td>
<td>June 18 1859</td>
</tr>
<tr>
<td>Sir George Grey, Bart.</td>
<td>July 23 1861</td>
</tr>
<tr>
<td>Spencer Horatio Walpole</td>
<td>July 6 1866</td>
</tr>
<tr>
<td>Sir George Gathorne Hardy (Later Earl of Cranbrook)</td>
<td>May 17 1867</td>
</tr>
<tr>
<td>Henry Austen Bruce (Ld Aberdare)</td>
<td>Dec. 9 1868</td>
</tr>
<tr>
<td>Robert Lowe (Viscount Sherbrooke)</td>
<td>Aug. 9 1873</td>
</tr>
<tr>
<td>Sir Richard Assheton Cross (Viscount Cross)</td>
<td>Feb. 21 1874</td>
</tr>
<tr>
<td>Sir William Vernon Harcourt</td>
<td>Apr. 2 1880</td>
</tr>
<tr>
<td>Sir Richard Assheton Cross</td>
<td>Jun. 24 1885</td>
</tr>
<tr>
<td>H.C.E. Childers</td>
<td>Feb. 6 1886</td>
</tr>
<tr>
<td>Henry Mathews (Viscount Llandaff)</td>
<td>Aug. 3 1886</td>
</tr>
<tr>
<td>Herbert Henry Asquith (Earl of Oxford and Asquith)</td>
<td>Aug. 18 1892</td>
</tr>
<tr>
<td>Sir Mathew W. Ridley, Bart. (Viscount Ridle)</td>
<td>Jun. 29 1895</td>
</tr>
<tr>
<td>Charles Thompson Ritchie (Lord Ritchie)</td>
<td>Nov. 12 1900</td>
</tr>
</tbody>
</table>

(Source: J. Pellew from F. Newsam, *The Home Office*, pp.211-212)
Home Office Officials
1861 - 1900

Permanent Under-Secretary of State:
(1848)-1867 Horatio Waddington
1867 -1865 Hon. Adolphus F.G.Liddell
1885 -1895 Godfrey Lushington
1895 -1903 Kenelm E. Digby

Legal Adviser (After 1875 Assistant Under-Secretary (Legal)):
1875 - 1885 Godfrey Lushington
1885 - 1894 Edward Leigh-Pemberton
1894 - 1913 Henry H. Cunynghame.

Chief Clerk:* 
1849 - 1865 H.J.Knyvet
1865 - 1868 C.R.Fitzgerald
1868 - 1876 F.S.Leslie
1876 - 1885 C.Erskine

* This post, but not the title, was abolished in 1876.

Clerk for Criminal Business (Later Principal Clerk, Criminal Department):
1868 -1876 George Everest
1876 - 1884 A.Maconochie.
1884 - 1896 Charles Murdoch
1896 - 1908 H.B.Simpson

(Source: Pellew, The Home Office 1848-1914, pp.208-212)

<table>
<thead>
<tr>
<th>Decade</th>
<th>Homicides Known to Police</th>
<th>Comm'd to Trial</th>
<th>Convicted Man'slter or Murder</th>
<th>Acquitted/ not Proc'd with</th>
<th>% Known to Police Convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1861/70</td>
<td>3600</td>
<td>3336</td>
<td>1399</td>
<td>1937</td>
<td>39.0</td>
</tr>
<tr>
<td>1871/80</td>
<td>3892</td>
<td>3012</td>
<td>1415</td>
<td>1597</td>
<td>36.3</td>
</tr>
<tr>
<td>1881/90</td>
<td>3931</td>
<td>2736</td>
<td>1282</td>
<td>1454</td>
<td>32.6</td>
</tr>
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<td>1891/00</td>
<td>3194</td>
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<td>1099</td>
<td>1367</td>
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<tr>
<td>1901/10</td>
<td>3031</td>
<td>2151</td>
<td>991</td>
<td>1160</td>
<td>32.6</td>
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<tr>
<td>Total</td>
<td>17648</td>
<td>13701</td>
<td>6186</td>
<td>7515</td>
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</table>

(Judicial Statistics - England & Wales, Parliamentary Papers)
### TABLE 2

#### The Successful Prosecution Of Murder in Victorian England

<table>
<thead>
<tr>
<th>Decade</th>
<th>Committed Murder</th>
<th>Insane or Unfit to Plead</th>
<th>Acquitted or not Prosecuted</th>
<th>Convicted of Murder</th>
<th>% Acquitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1861/70</td>
<td>678</td>
<td>99</td>
<td>337</td>
<td>242</td>
<td>50</td>
</tr>
<tr>
<td>1871/80</td>
<td>646</td>
<td>115</td>
<td>264</td>
<td>267</td>
<td>41</td>
</tr>
<tr>
<td>1881/90</td>
<td>671</td>
<td>154</td>
<td>236</td>
<td>281</td>
<td>35</td>
</tr>
<tr>
<td>1891/00</td>
<td>599</td>
<td>160</td>
<td>202</td>
<td>237</td>
<td>34</td>
</tr>
<tr>
<td>1900/10</td>
<td>677</td>
<td>232</td>
<td>153</td>
<td>292</td>
<td>23</td>
</tr>
<tr>
<td>Total</td>
<td>3271</td>
<td>760</td>
<td>1192</td>
<td>1319</td>
<td>36</td>
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</table>

(Judicial Statistics - England & Wales 1861-1910)
<table>
<thead>
<tr>
<th>Year</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>G</th>
<th>H</th>
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<td></td>
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<td></td>
</tr>
<tr>
<td>1860</td>
<td>49</td>
<td>5</td>
<td>3</td>
<td>23</td>
<td>2</td>
<td>16</td>
<td>57</td>
<td>43</td>
</tr>
<tr>
<td>1870</td>
<td>41</td>
<td>4</td>
<td>4</td>
<td>16</td>
<td>2</td>
<td>15</td>
<td>49</td>
<td>51</td>
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<td>5</td>
<td>20</td>
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<tr>
<td>1890</td>
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<td>5</td>
<td>5</td>
<td>17</td>
<td>18</td>
<td>24</td>
<td>32</td>
<td>68</td>
</tr>
<tr>
<td>1900</td>
<td>51</td>
<td>2</td>
<td>4</td>
<td>17</td>
<td>18</td>
<td>20</td>
<td>18</td>
<td>82</td>
</tr>
<tr>
<td></td>
<td>Manslaughter</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>1860</td>
<td>208</td>
<td>13</td>
<td>-</td>
<td>111</td>
<td>1</td>
<td>33</td>
<td>62</td>
<td>40</td>
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<tr>
<td>1870</td>
<td>227</td>
<td>19</td>
<td>-</td>
<td>111</td>
<td>1</td>
<td>96</td>
<td>57</td>
<td>43</td>
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<tr>
<td>1880</td>
<td>205</td>
<td>27</td>
<td>1</td>
<td>94</td>
<td>1</td>
<td>81</td>
<td>60</td>
<td>40</td>
</tr>
<tr>
<td>1890</td>
<td>94</td>
<td>7</td>
<td>-</td>
<td>82</td>
<td>2</td>
<td>103</td>
<td>46</td>
<td>54</td>
</tr>
<tr>
<td>1900</td>
<td>172</td>
<td>20</td>
<td>-</td>
<td>81</td>
<td>-</td>
<td>71</td>
<td>59</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>Concealment of Birth</td>
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<td></td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>1860</td>
<td>110</td>
<td>13</td>
<td>-</td>
<td>24</td>
<td>-</td>
<td>73</td>
<td>34</td>
<td>66</td>
</tr>
<tr>
<td>1870</td>
<td>90</td>
<td>11</td>
<td>-</td>
<td>22</td>
<td>-</td>
<td>57</td>
<td>37</td>
<td>63</td>
</tr>
<tr>
<td>1880</td>
<td>182</td>
<td>10</td>
<td>-</td>
<td>13</td>
<td>-</td>
<td>59</td>
<td>28</td>
<td>72</td>
</tr>
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<td>1890</td>
<td>51</td>
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<td>-</td>
<td>18</td>
<td>-</td>
<td>25</td>
<td>51</td>
<td>49</td>
</tr>
<tr>
<td>1900</td>
<td>36</td>
<td>1</td>
<td>-</td>
<td>4</td>
<td>-</td>
<td>31</td>
<td>14</td>
<td>86</td>
</tr>
</tbody>
</table>

(Judicial Statistics for England & Wales 1860-1900)

- **A** = Number committed to trial, for murder, at Assizes.
- **B** = Number No-Billed.
- **C** = Number found insane on arraignment or otherwise unfit to plead.
- **D** = Number found Not Guilty.
- **E** = Number either 'Guilty but Insane' or, 'Not Guilty by reason of insanity'
- **F** = Number found Guilty
- **G** = % Set Free
- **H** = % Executed or detained under a commuted sentence of penal servitude or, if insane, 'During H.M. pleasure'.
### TABLE 4

**Trials For Murder at Central Criminal Court 1860-1900**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Not Guilty</th>
<th>Guilty Man'ter</th>
<th>Guilty Insane</th>
<th>Sent'd Death</th>
<th>Rec. to Mercy</th>
</tr>
</thead>
<tbody>
<tr>
<td>1860</td>
<td>7</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>1870</td>
<td>6</td>
<td>4</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>1880</td>
<td>10</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>1890</td>
<td>13</td>
<td>2</td>
<td>3</td>
<td>5</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>1900</td>
<td>11</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>total</td>
<td>47</td>
<td>13*</td>
<td>10</td>
<td>9</td>
<td>15</td>
<td>8</td>
</tr>
</tbody>
</table>

* 11 of these verdicts were on counts of murder of new-born infants.

(Old Bailey Session Papers 1860 - 1900)
### TABLE 5

**Coming to Terms with Insanity in Victorian England.**

<table>
<thead>
<tr>
<th>Decade</th>
<th>#Committed for trial</th>
<th># Acquitted</th>
<th># Found C/Insane*</th>
<th>Total(i)</th>
<th>Total(ii)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1861/ 1870</td>
<td>678</td>
<td>337</td>
<td>103</td>
<td>238</td>
<td>341</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>49.7</td>
<td>15.2</td>
<td>35.1</td>
<td>50.3</td>
</tr>
<tr>
<td>1871/ 1880</td>
<td>646</td>
<td>264</td>
<td>123</td>
<td>259</td>
<td>382</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>40.9</td>
<td>19.0</td>
<td>40.0</td>
<td>59.1</td>
</tr>
<tr>
<td>1881/ 1890</td>
<td>671</td>
<td>236</td>
<td>175</td>
<td>260</td>
<td>435</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>35.2</td>
<td>26.1</td>
<td>38.7</td>
<td>64.8</td>
</tr>
<tr>
<td>1891/ 1900</td>
<td>599</td>
<td>202</td>
<td>160</td>
<td>237</td>
<td>397</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>33.7</td>
<td>26.7</td>
<td>39.6</td>
<td>66.3</td>
</tr>
<tr>
<td>1901/ 1910</td>
<td>677</td>
<td>153</td>
<td>238</td>
<td>286</td>
<td>524</td>
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<td>%</td>
<td>100</td>
<td>22.6</td>
<td>35.0</td>
<td>42.2</td>
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<tr>
<td>Period Totals</td>
<td>3271</td>
<td>1192</td>
<td>799</td>
<td>1280</td>
<td>2079</td>
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<tr>
<td>%</td>
<td>100</td>
<td>36.4</td>
<td>24.4</td>
<td>39.1</td>
<td>63.6</td>
</tr>
</tbody>
</table>

* = The sum of those found Unfit to plead, Guilty but Insane or Certified by a Home Office Enquiry after conviction.
Total (i) = sum of those convicted as charged.
Total (ii) = sum of those convicted as charged, and either executed or put to penal servitude for life Plus those incarcerated at the pleasure of the Queen or the Secretary of State.

(Source: The Judicial Stat's for England & Wales - Parl. Papers)


TABLE 6


<table>
<thead>
<tr>
<th>Decade</th>
<th>Total Found C/Insane</th>
<th>Unfit to Plead</th>
<th>Special Verdict*</th>
<th>Post trial Certification**</th>
</tr>
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<tbody>
<tr>
<td>1861/70</td>
<td>103</td>
<td>37</td>
<td>62</td>
<td>4</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>35.9</td>
<td>60.1</td>
<td>3.8</td>
</tr>
<tr>
<td>1871/80</td>
<td>123</td>
<td>51</td>
<td>64</td>
<td>8</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>41.4</td>
<td>52</td>
<td>6.5</td>
</tr>
<tr>
<td>1881/90</td>
<td>175</td>
<td>94</td>
<td>60</td>
<td>21</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>53.7</td>
<td>34.3</td>
<td>12.0</td>
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<td>160</td>
<td>41</td>
<td>119</td>
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<tr>
<td>%</td>
<td>100</td>
<td>25.6</td>
<td>74.4</td>
<td>-</td>
</tr>
<tr>
<td>1901/09</td>
<td>238</td>
<td>51</td>
<td>181</td>
<td>6</td>
</tr>
<tr>
<td>%</td>
<td>100</td>
<td>21.4</td>
<td>76.1</td>
<td>2.5</td>
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* Prior to 1883 - Trial of Lunatics Act (46 & 47 Vict. c 38) this verdict was recorded as "Not guilty by reason of insanity."

** The result of an enquiry set up by the Home Office, after conviction, because of doubts about the convict's sanity.

(Source: Judicial Stats: England & Wales - Parliamentary Papers)
### TABLE 7

**Victorian Murderesses and their Victims.**

<table>
<thead>
<tr>
<th>Decade</th>
<th>Own Child Under 1yr</th>
<th>Own Child Over 1yr</th>
<th>Other Children</th>
<th>Husband</th>
<th>Other man</th>
<th>Other woman</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1863/72</td>
<td>31</td>
<td>4</td>
<td>7</td>
<td>2</td>
<td>-</td>
<td>1</td>
<td>45</td>
</tr>
<tr>
<td>#Hanged</td>
<td>-</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>-</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>1873/82</td>
<td>2</td>
<td>9</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>9</td>
<td>47</td>
</tr>
<tr>
<td>#Hanged</td>
<td>-</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>1900/09</td>
<td>14</td>
<td>4</td>
<td>-</td>
<td>2</td>
<td>2</td>
<td>5</td>
<td>27</td>
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<tr>
<td>#Hanged</td>
<td>n/k</td>
<td>n/k</td>
<td>n/k</td>
<td>n/k</td>
<td>n/k</td>
<td>n/k</td>
<td>5</td>
</tr>
</tbody>
</table>

**SOURCES -**

1) The Judicial Stats: England & Wales (Annual Parl. Papers.) provide varying details of convicted homicides between 1863 and 1892. However from 1884 onwards only the names and ages of reprieved persons are given, in line with a growing bureaucratic tendency to secrecy on prerogative matters.

2) The Report of the Royal Commission on Capital Punishment 1947-53, Appendix 3, includes an analysis of murder victims from 1900-1949 but does not indicate the categories of crime of those convicts who were hanged.)
TABLE 8

Victorian Murderers and their Victims.

<table>
<thead>
<tr>
<th>Dec'le</th>
<th>Own Child Under 1yr</th>
<th>Own Child over 1yr</th>
<th>Other Child</th>
<th>Wife</th>
<th>Lover</th>
<th>O/man</th>
<th>O/woman</th>
<th>Total</th>
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<tbody>
<tr>
<td>1863/72</td>
<td>1</td>
<td>7</td>
<td>38</td>
<td>22</td>
<td>100</td>
<td>24</td>
<td>186</td>
<td></td>
</tr>
<tr>
<td>#Hanged</td>
<td>3</td>
<td>1</td>
<td>6</td>
<td>19</td>
<td>16</td>
<td>53</td>
<td>15</td>
<td>113</td>
</tr>
<tr>
<td>1873/82</td>
<td>5</td>
<td>10</td>
<td>53</td>
<td>39</td>
<td>86</td>
<td>20</td>
<td>221</td>
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<td>-</td>
<td>8</td>
<td>33</td>
<td>36</td>
<td>53</td>
<td>11</td>
<td>146</td>
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<tr>
<td>1900/09</td>
<td>4</td>
<td>12</td>
<td>9</td>
<td>58</td>
<td>70</td>
<td>61</td>
<td>43</td>
<td>257</td>
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<td>#Hanged</td>
<td>n/k</td>
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<td>n/k</td>
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(Sources: as for Table 6)

TABLE 9

A Changing Pattern of Victims

<table>
<thead>
<tr>
<th>Decade</th>
<th>% Male Victims</th>
<th>% Female</th>
<th>% Children</th>
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<tbody>
<tr>
<td>1863/72</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Murderers</td>
<td>51</td>
<td>43</td>
<td>6</td>
</tr>
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<td>Murderesses</td>
<td>4</td>
<td>2</td>
<td>93</td>
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<td>1873/82</td>
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<td></td>
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<tr>
<td>Murderers</td>
<td>40</td>
<td>50</td>
<td>10</td>
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<td>13</td>
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<td>68</td>
</tr>
<tr>
<td>1900/09</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murderers</td>
<td>24</td>
<td>67</td>
<td>9</td>
</tr>
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<td>Murderesses</td>
<td>14</td>
<td>19</td>
<td>67</td>
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(Sources: as for Table 6)
### TABLE 10


[The proportions of men and women left to hang for the murder of all persons other than infants under the age of one year.]

<table>
<thead>
<tr>
<th>Decade</th>
<th>1863-72</th>
<th>1873-82</th>
<th>1900-09</th>
</tr>
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<tbody>
<tr>
<td>% Men Executed</td>
<td>61</td>
<td>66</td>
<td>60</td>
</tr>
<tr>
<td>% Women Ex'ed</td>
<td>43</td>
<td>37</td>
<td>19</td>
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</table>

### TABLE 11

Malice in Murder

- Men convicted of murdering other men between 1863 and 1882.

<table>
<thead>
<tr>
<th>Category of Crime</th>
<th>Executed</th>
<th>Reprieved</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>1 2 3 4 5</td>
<td>1 2 3 4 5</td>
</tr>
<tr>
<td>total</td>
<td></td>
<td>Total</td>
</tr>
<tr>
<td>21 5 12 20 34 102</td>
<td>11 2 5 19</td>
<td>26* 63</td>
</tr>
</tbody>
</table>

* Including 11 reprieved accomplices of executed 'principals'

1) 'Persons in Authority' (Police, Prison Warders, Army Officers, etc)
2) Employers & their Managers.
3) Victims of Robbery etc
4) Victims of street brawls, affrays etc
5) Others.

(Source: Judicial Statistics for England & Wales, Parliamentary Papers 1864 to 1883)
### TABLE 12

**Victorian Murder Weapons 1863-1882 (I)**
- used in the murder of other men.

<table>
<thead>
<tr>
<th>Category of weapon</th>
<th>Executed</th>
<th>Reprieved</th>
</tr>
</thead>
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<tr>
<td>Total 12</td>
<td>102</td>
<td>19</td>
</tr>
<tr>
<td>1</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td>3</td>
<td>32</td>
<td>8</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>5</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>63</td>
<td></td>
</tr>
</tbody>
</table>

1) Knives, razors etc
2) Blunt instruments - Bludgeons, hedge stakes, sticks etc
3) Firearms - pistols, shot guns etc.
4) Poison
5) Others - Hands & feet, burning, gunpowder, etc
### TABLE 13

**Victorian Murder Weapons (ii)**
- All Murder Convicts 1861 -1890*

<table>
<thead>
<tr>
<th>Period</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1861/70</td>
<td>50</td>
<td>35</td>
<td>35</td>
<td>9</td>
<td>16</td>
<td>18</td>
<td>52</td>
<td>215</td>
</tr>
<tr>
<td>1871-80</td>
<td>90</td>
<td>39</td>
<td>37</td>
<td>12</td>
<td>16</td>
<td>33</td>
<td>41</td>
<td>268</td>
</tr>
<tr>
<td>1881-90</td>
<td>56</td>
<td>32</td>
<td>25</td>
<td>10</td>
<td>8</td>
<td>20</td>
<td>32</td>
<td>183</td>
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</table>

(Weapon Category)

1) Knives
2) Blunt Instruments
3) Firearms
4) Poison
5) Drowning
6) Hands & Feet
7) Other - Includes Starvation, Gunpowder, Arson, Abortion, Hanging & some cases where no method was reported.

(* Source - Judicial Statistics for England & Wales, Parl. Ppaers. Details are incomplete for yrs 1861/2 and for yrs 1885/90)
**TABLE 14**

**Drunkenness & Mercy**
- Drunkenness of murderer or victim as a factor in mitigation.

<table>
<thead>
<tr>
<th>Period</th>
<th>Executed</th>
<th>Reprieved</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>[</td>
<td>]</td>
</tr>
<tr>
<td>(1863/72)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Males</td>
<td>Convict</td>
<td>Victim</td>
</tr>
<tr>
<td>Total Drunk</td>
<td>Drunk</td>
<td>Exec</td>
</tr>
<tr>
<td>Convicted V/sober</td>
<td>v/sober</td>
<td></td>
</tr>
<tr>
<td>183</td>
<td>33</td>
<td>16</td>
</tr>
</tbody>
</table>

(1873/82)

| 221 | 42 | 18 | 9 | 27 | 3 | 12 | 15 | 36 |

| 404 | 75 | 34 | 9 | 43 | 9 | 23 | 32 |   |

* There were no cases of murder by females in which drunkenness of convict or victim was alleged.

(Source: Judicial Stats. England & Wales, Parl Papers 1864 - 1883)
Appendix C.

BIBLIOGRAPHY

Primary Sources:

British Parliamentary Papers.


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<td>1887</td>
<td>1888</td>
<td>CVIII.I</td>
</tr>
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<td>1864</td>
<td>LVII</td>
<td>1888</td>
<td>1889</td>
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<td>LII</td>
<td>1889</td>
<td>1890</td>
<td>LXXX.I</td>
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<tr>
<td>1865</td>
<td>1866</td>
<td>LXVIII</td>
<td>1890</td>
<td>1890/91</td>
<td>XCIII.I</td>
</tr>
<tr>
<td>1866</td>
<td>1867</td>
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<td>1891</td>
<td>1892</td>
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</tr>
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<td>1867</td>
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<td>1892</td>
<td>1893/4</td>
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<tr>
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<td>1893</td>
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<td>1895</td>
<td>1897</td>
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1876 1877 LXXXVI.I 1901 1903 LXXXIII.I
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1884 1885 LXXXVI.I 1909 1911 CIII.I

(* Change of Format)

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