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The Criminal Law Reforms of Sir Samuel Romilly

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THE CRIMINAL LAW REFORMS OF
SIR SAMUEL ROMILLY

by

Martin Francis Conley

A Thesis Submitted to the Faculty of the Graduate School
of Loyola University in Partial Fulfillment of
the Requirements for the Degree of
Master of Arts

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PREFACE

This is the study of a man and his times. It is also a study of one of man's noblest works, the law. This paper shows one small segment of the eternal struggle to bring the law into balance with man's nature and environment.

Very special thanks are due to Professor William Trimble for his kindness and helpfulness.
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CHAPTER I

SIGNIFICANCE AND SCOPE OF THIS PAPER

This is a study of the English legal reforms of the early nineteenth century, Sir Samuel Romilly being the principal figure under consideration. It is not a study of what Romilly did or tried to do. Rather, the purpose is to discover his motives and his influence on later reformers, to consider the English legal system at the end of the eighteenth century and the writings of various contemporary liberal and conservative thinkers, and to show the effect of these philosophers on Romilly's program of reform.

This essay has several important aspects. Any serious study of the legal thinking of a period is significant because it may be indicative of the currents of economic, moral, political, and social thought; a study of the laws passed and repealed during any era is a gauge which shows the interests of the people. Such a study further indicates much about the intelligence, morality, and sincerity of the legislators and philosophers of pre-Victorian England.

Romilly's reform measures are of particular importance since they were the start of the reform movement which is so prominent
in nineteenth century England. It might be going too far to state that the whole reform movement sprang from Romilly's work. It is, however, quite true that this group of reforms gave the initial impetus to the liberal movement. This liberal movement is not only important in England but in all of Europe. For at the end of the Wars of the French Revolution and Napoleon, England was the leading nation of Europe. The destruction and ruin of the war had not been felt in England, which had led the nations of Europe during twenty-two years of conflict and at the peace table that leadership was maintained. The war also made England wealthy by allowing British businessmen to capture the world's trade. During the period between the end of the wars and the beginning of magnificent isolation, all the liberals of Europe looked to England for inspiration, afterwards trying, with varying success, to duplicate in their homelands the reforms of England. Therefore, this period in English history gives a profound insight into the history of modern Europe.

Still another important reason for this study is that the United States and almost all of the individual states based their legal systems on the unrefomed English law. The American nation in its early years adopted a code of law known to be in need of reform. The only reform of this code in this country has been at the hands of judges who have interpreted it to bring it into line with our society. At best this is a haphazard process. It is the hope of this writer that studies such as this may show the means by
which our legal system can be totally revised.

For the purposes of this essay, we shall consider chiefly criminal law. A legal code in general is set up to do one or more of the following things: protect the external and internal security of the state; protect the life and property of the citizens; provide for the general good of society. These purposes can be accomplished in several ways. The laws can be set up to terrify the general citizenry so that they will not break the peace. They can be set up to prevent the criminal from offending again. They can be set up to reform the offender. The first method is the most common; the third is the rarest. All criminal codes are built on these principles and are oriented to one or more of these goals. It is obvious that various ages and areas can interpret this system in a variety of ways.

Legal systems are founded on two types of law. The first is customary law, that is the law which has grown out of the life of the people. It can be either written or unwritten. Normally this law is written down after it has been practiced for a long time. Since this law has developed from the actions of the people it is well known and well observed; after many centuries, however, it has a tendency to become contradictory as new situations and ways of life replace older ones.

A second type of law generally comes into being after the customary law has become unworkable. This is code or "made-up" law. It is always written and originates with a king or legisla-
ture, and is generally a reorganization of the customary law to bring it into line with the times. It can also be a totally new system. Sometimes, unfortunately, a new legal system will lack the support of the people and will not be enforceable.

Law can come into being in a third way by judicial interpretation. This occurs when a judge decides that an old law, either customary or code law, extends to a situation that it was not originally written to cover. This is a very common procedure and it is what makes the study of law so difficult.

England, like most modern states, has a legal system based on both customary and code law; due to the age and stability of the English government there is an unusually large amount of judicial precedent in English law.

The two basic types of crime are moral and social. Moral crimes constitute acts which violate the moral law, and are normally considered wrong in all nations, Christian and non-Christian. Certain immoral actions for various reasons are not considered to be crimes in certain nations or during certain periods.

Social crimes are actions in violation of the various laws society has set up to provide a desired uniformity or order in situations where no moral law applies. An example of this can be found in the regulation that requires all automobiles to keep to the right. It makes no difference to which side they keep if everyone follows the same rules. If there were no regulations, chaos would result. Social laws make up the bulk of any criminal
code and they vary tremendously according to time and area. A danger of social legislation is that it may make an indifferent action a crime, as in the case of prohibition. They can also change certain acts from minor moral crimes into major social crimes.

The second half of the criminal law is concerned with punishment. Punishment is the penalty imposed for breaking a certain regulation and differs widely as to types and severity. As we saw earlier, law may be established to terrify the populace. This can be done by using extremely brutal punishments for all crimes, but carries with it the danger of turning the nation into a collectivity of brutes. Punishment can also be used to protect society from the criminal by imprisoning or killing the offender. More desirable is that type which reforms the criminal and allows him to return to society as a useful and peaceful citizen, but it is highly difficult to set up and operate.

Punishment will be very carefully studied in this paper since it was the primary interest of Romilly, a reformer who concerned himself less with adding to or removing from the list of crimes than in systematizing and civilizing the punishments inflicted under those laws.
CHAPTER II

ENGLISH CRIMINAL LAW PRIOR TO 1800

It is impossible to study the reform movement without making a short investigation of the English Criminal Law as it existed in the second half of the eighteenth century. It was, then, a blend of customary law, statute law, and judicial precedent. Many of these laws were centuries old and had been established to deal with situations that no longer existed, or had changed so radically as to make the old laws barriers to normal living. New laws had been passed without the old ones being repealed. Many crimes were covered by so many laws that it was almost impossible for even a lawyer to determine which one applied in a particular case.

In 1765 William Blackstone wrote his Commentaries on the Laws of England, which is a reliable guide through the maze of English law. Neither Blackstone, nor any other man, could completely overcome the confusion caused by enacting legislation without giving proper thought to the existing laws on the subject. Many legal situations were so confused that pages of explanation were needed to clarify what should have been a simple matter. Some laws were so badly confused that no amount of explanation could penetrate the fog that enclosed them. In describing the crime of destroying game, the best Blackstone can say is that "there is
another offence, constituted by a variety of acts of parliament, which be so numerous and so confused, and the crime itself of so questionable a nature that I shall not detain the reader with many observations thereon."

The laws were made even more difficult to understand by the fact that, in some cases, a less serious crime would carry a much harsher punishment than a similar and graver crime. In at least one crime, that of sending live sheep out of the kingdom, the penalty for the first offence was much more brutal than that for the second. The laws were further encumbered by such seeming trivia as the time of the crime and the presence or absence of witnesses. Romilly states that:

We find that under certain circumstances a man may steal without being a thief, that a pickpocket may be a highway robber, a shoplifter a burglar, and a man who had no intention to do harm to anyone a murderer; that to snatch a watch out of a man's pocket on the street is highway robbery; that to steal fruit ready gathered is a felony; but to gather it and steal it is only a trespass; that to force one's hand through a pane of glass at five o'clock in the afternoon in winter to take out anything that lies in the window is a burglary even if nothing be actually taken; though to break open a house with every circumstance of violence and outrage at four o'clock in the morning in summer for the purpose of robbing or even murdering the inhabitants is only a misdemeanour; that to steal goods in shops if the thief be seen to take them is only a transportable offence; but, if he be not seen, that is, if the evidence be less certain, it is a capi-


tal felony, and punishable with death . . . 3

This tremendous confusion, as mentioned previously, makes the study of English law quite difficult. It becomes even more so because it was divided not only into the usual classes of statute and customary law, but the customary law was further divided into a general law that applied to all of England and Wales, several groups of laws that were peculiar to certain parts of the kingdom, and a third set of customs peculiar to certain courts and jurisdictions.4 The situation was further complicated by the fact that the laws of England were not always applicable in other lands ruled by the crown. The English law, written and unwritten, applied in full only in England and Wales. However, the courts of Wales were independent of those of Westminster so the judicial precedents of the two countries were quite different. Scotland was bound only by certain provisions of the written law and by almost nothing of the common law. Ireland was held to all acts of parliament passed before the reign of Henry VIII and by such acts of later reigns as mentioned Ireland in particular or were designed for the empire in general. To complicate an already absurd situation, Ireland had its own parliament which passed laws in the same haphazard way as the Westminster Parliament. Norman law was (and still is) in use in the Channel Isles. The German

4Blackstone, bk. 1, p. 63.
possessions were bound by their own legal codes. The colonies were bound in some cases by acts of their own legislatures, in others by the general English law, and in still others by special imperial legislation.5

Law is supposedly based on reason. By now it should be obvious that English law was based on anything but reason. It was an outstanding example of the bad effect attendant upon making laws for expediency and self-interest and without foresight.

Confusion was not the only evil of the law. Brutality was an outstanding quality of the criminal codes. Blackstone held that criminal law should be based "upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the inalienable rights of mankind; though it sometimes (provided there be no transgression of these external boundaries) may be modified, narrowed, or enlarged . . ."6 While admitting that the English law did not always adhere to these principles and stating that it was certainly in need of revision and amendment, Blackstone never advocated a reform movement. He recognized the confusion that arose from leaving old laws in effect which contradicted new ones. Yet he offered no solution to the problem. Rather, he seemed con-

5Ibid., pp. 93-110.
6Ibid., bk. iv, p. 3.
tent to let things remain as they were.\footnote{Ibid., p. 4.}

Blackstone was undoubtedly one of the leaders of his profession. This is obvious not only from the great stature that his work attained but also from the fact that he was solicitor general to the Queen and professor of law at Oxford. His attitude can certainly be considered as representative of the best legal thinking of his period. What was his attitude? Simply, that something was wrong and that there was nothing that could, or should, be done.

This attitude is also found in the writings of William Eden, Baron Auckland. He was a friend of Blackstone and a writer on crime and penology. According to Eden's theory, the purpose of law is to prevent crime rather than to repress the criminal. The offence should be treated severely while the offender should be treated mercifully.\footnote{Eden, p. 6.} Eden's opinion, difficult as it might be to understand or put into practice, was commonly held in the legal circles of the time. Many judges and lawyers thought that the penalties for even slight crimes should be very severe, but that they should not be enforced.

They therefore set up many legal loopholes that allowed persons to escape from the severity of the laws. Foremost among these were the judge's right to use discretion in passing sentence
and the government's right to grant pardon. These loopholes were not open to all. The judge's use of discretion was in many cases based on the number of character witnesses that testified for the accused. A man might be of excellent character but if he were being tried away from home he might not be able to get witnesses to speak for him. To appeal to the government for a pardon was a long and expensive process that many deserving but poor felons could not afford. Probably the most famous of the loopholes was benefit of clergy. This was a principle established in the Middle Ages to protect clerics from lay courts. It was often altered and by this period it meant that any person who could read or write (and all peers and peeresses, literate or not) could, when charged with certain capital felonies, plead benefit of clergy. This would protect them from the death penalty and in many cases it would completely release them from any punishment. At other times a light punishment might be imposed. Benefit of clergy could only be pleaded once by an individual. This would appear to be a fairly safe out for many criminals. Unfortunately, the statute was so complex and vague that many persons did not know they could use it. Also the literacy rate was so low, particularly among the poorer classes, that many criminals could not have used it even if they knew about it. The value of the loopholes, dubious as it might be, was more than counterbalanced by the fact that in many capital trials the defendant was required to defend himself without benefit of counsel. This led to a situation in which
there were two legal systems in effect. One applied to the nobility, gentry, and wealthier merchants and contained all the safeguards that were intended for the protection of the whole nation. The other was the law as it applied to the poor, who did not understand it and so could not take advantage of its vagaries. As a result, they felt the full weight of the law for even the smallest infraction.

Punishment during this period was quite severe and the great number of capital offences would lead one to believe that the prime object of punishment was to protect the state from the numerous criminals. Eden, however, held that the English government should be ruled by leniency in its treatment of criminals. He considered severity to be a sign of barbarism and thought it would lead the nation down the road to despotism. 9 Blackstone agreed with this and went on to speak against the theory that punishment was meant to be the atonement or expiation for the crime. He held atonement can be exacted only by God and the state had no right to claim it. He thought this could be accomplished in one of three ways: either by reforming the criminal, or by deterring others by making a dreadful example of convicted felons, or by depriving the criminal of the power to do further mischief. 10

These theories of Blackstone and Eden are quite sound and

9Ibid., p. 10.
10Blackstone, bk. iv, p. 12.
humane with the exception of that of making a dreadful example of the criminal. Unfortunately, except for the idea of example, they were never really observed. The main object of punishment, perhaps the only one, that can be seen from studying the penalties set by the law was to prevent the criminal from ever committing another crime by either executing or imprisoning him for a long period of time.

Over one hundred and sixty crimes carried the death penalty. Many of them were ancient laws that were no longer enforced but sixty-three of them had been passed during the reigns of George II and George III. Some of the ancient laws were revived from time to time. All of them could be revived at any time the government desired. A multitude of other crimes carried such penalties as transportation for a period of seven years to the colonies. Since the people sent to the colonies were rarely equipped physically or mentally for the hardships they would have to face they were condemned as surely as if they had been sent to the gallows. Other crimes carried sentences of many years in prison, which were in most cases damp, filthy, windowless, and disease-ridden and where the prisoners were mixed in large groups with no regard to age, health, type of crime, or previous record. In some places they were not even segregated by sexes. It might be hard to believe that there could be anything worse than the regular prisons. Yet, the hulks, the old dismantled ships anchored in the Thames and other rivers, were used as receptacles for the overflow of the
jails. In them the situation was almost indescribable.

A man could be hanged for breaking the wall of a fish pond if any of the fish escaped. He could be hanged if under certain conditions he stole goods to the value of 12d., under other conditions to the value of 5s., and under still other conditions to the value of 40s. He could be hanged for chopping down a cherry tree in an orchard, or for living a month with gypsies. If a man were to break a bridge in London, Westminster, or Putney he would go the gallows; if it were done in Brentford or Blackfriars he could plead benefit of clergy and get a prison sentence of no more than a year. A smuggler might be fined, transported, or hanged depending on how much daring or cleverness he had shown. A man who was transported to the colonies and escaped and returned to England could be hanged. If a man were to commit a robbery wearing a mask, he could be hanged. This was true whether the robbery was attended by violence or not. Even if the masked man did nothing more serious than steal rabbits from a warren he risked dancing at the end of a rope.

As time went on, the great mass of brutal and repressive law became totally repugnant to the British people. Since there was no one who would take the lead in a reform movement, the people's only recourse was to resist the law passively. A man who was injured might not press charges. A witness might not remember. A jury might not convict. This type of resistance reached its high-points in two trials that took place in the first decade of the
nineteenth century. On November 21, 1808, a woman was charged in London for stealing a £10 note. The jury found her guilty, but said that what she stole was not worth 39s. In 1807 an apprentice to a lapidary was charged with stealing his master's purse containing £30 in notes of the Bank of England. Again the jury returned a verdict of guilty of stealing less than 39s. These examples show that the people had lost faith in the law. No steps, however, were being taken to remedy the situation, although there was some discussion of the problem and this eventually led to reform.

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CHAPTER III

VARIOUS OPINIONS ON REFORM

As we have seen, the legal profession in general showed great indifference to the existing situation and was not at all interested in any plan of reform. In this chapter we shall take the opinions of several prominent English writers representing various segments of the learned classes. Many individuals who were not actively engaged in the legal profession wrote on this question and presented the case both for and against reform. Political labels, such as whig and tory or conservative and liberal, do not have much meaning in this discussion.

Martin Madden, an Anglican clergyman, who had written several books on moral theology, was one of the first men in this period to write on the subject of law. His Thoughts on Executive Justice, published in 1784, had a large, though fortunately short-lived, effect on the judges of the time. His work was supposedly based on the principle that "the certainty of punishment is more efficacious than its severity for the punishment of crimes."¹ This principle sounds very mild and was in fact one of the argu-

¹Coleman Phillipson, Three Criminal Law Reformers (London, 1923), p. 49. The original is unavailable.
ments advanced by the reformers. However, Madden misapplied it and used it in such an unusual way that his book was actually a condemnation of any judge or minister who showed leniency either in passing a sentence or in granting a pardon. He thought that the English criminal law was just and not at all severe, and that treating convicts with leniency was nothing more than encouraging them to commit further crimes. His book attracted a great deal of attention both in judicial and governmental circles and, according to Romilly, it led to the number of death sentences imposed the year after its publication being twice that of the previous year. There was no increase in crime sufficient to justify this increase in death sentences. Fortunately, Madden's influence died as quickly as it was born. Within a few years his book was no longer read or believed. His book was last published in 1786 and is now so rare that it is not even listed in the catalogue of the British Museum Library. One of the reasons for his decline from popularity may have been his Thelyphthora, which advocated polygamy and was, of course, severely attacked.

Another writer of prominence who defended the existing law was William Paley. His philosophy, a cross between Christian conservatism and Utilitarianism, is not always easy to follow.

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3William Paley (1743-1805) was Archdeacon of Carlisle, sometime lecturer at Oxford, and the author of several works on morals and theology.
since his reasoning seems at times to be at cross purposes. He described the legal system of England as being analogous to an old house that had undergone many remodelings to suit it to the tastes and needs of several generations. He conceded that these remodelings had no plan or proportion and that to an outsider they might have the appearance of eyesores. He says that this appearance in a house is immaterial if the house suits its inhabitants. He then stretched the analogy to state that the English legal system suited the people the same way the house suited its tenants.\(^4\) The errors in this analogy are fairly obvious. It will be sufficient to point out the most glaring, that when a house is remodeled all that is unserviceable or outmoded is scrapped, while the English law kept everything whether it was still serviceable or not.

Paley thought that the number of crimes punishable by death was not excessive if one considered the composition of English society—"the frequency of executions in this country," he held, "owes its necessity to three causes—much liberty, great cities, and the want of a punishment short of death possessing a sufficient degree of terror."\(^5\) Paley had some strange ideas on the types of liberty that made death sentences so necessary. According to him, one of the things that was most conducive to crime

\(^5\)Ibid., p. 541.
was "the spirit of the laws and of the people will not suffer the
detention or confinement of suspected persons, without proofs of
their guilt."\textsuperscript{6} Needless to say, a society that did allow such
imprisonment would be a totalitarian state. This is not a liberty
conducive to crime, rather it is a barrier against runaway govern-
ment. The dangers that came from living in big cities were not as
important in the capital crimes as Paley would have his readers be-
lieve. Many of these crimes were agrarian in nature and could not
be committed in cities. What dangers did arise from the cities
could be combatted by doing something for the wretched creatures
who dwelt there.

One of the most repulsive features of Paley's book is that
he did not think the gallows struck the populace with sufficient
terror, and he suggested more terrible methods of execution. One
of these was that criminals be thrown into a room with wild
beasts, the room to be so constructed that sight would be blocked
off while sound would not be interfered with. He thought that
listening to animals devour a man would create such vivid pictures
in the imaginations of the audience as to discourage them from any
thought of crime.\textsuperscript{7} Paley not only defended the English law as it
stood but tried to make it even more barbaric.

Oliver Goldsmith looked on the criminal and the civil laws of

\textsuperscript{6} Ib\textit{id.}

\textsuperscript{7} Ib\textit{id.}, pp. 547-548.
his day with a great complacency. He thought that this strange hodgepodge was actually a blessing. In his *Citizen of the World* he has his protagonist say:

In England, from a variety of happy accidents, their constitution is just strong enough, or if you will, monarchical enough, to permit relaxation of the severity of laws, and yet those laws still 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 at the same time 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, even without the necessity of abrogation.9

This theory would have been excellent had it been true. As we have seen, laws that were forgotten for some classes or occasions were fully enforced against other classes or on other occasions. Even those that were left unenforced could be revived without warning and used with full force against a populace that was ignorant of the law.

Among this group could be found such statesmen as Sir Robert Peel.9 Peel's defence of the system was quite simple—it worked. He was seconded in this position by Lord Liverpool, who also advocated expediency as a justification for the system.

Sir Walter Scott and others of his literary circle held that

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9Robert Peel (1750-1830) was in early years an opponent of any reform; later, as Home Secretary (1822-27) he forced the reform of the law.
these laws must be good for under them Englishmen had become richer and freer than the inhabitants of any other nation on earth. This position carried a great deal of weight since it was partly true. England was the richest nation on earth and its people had an exceptional degree of freedom; no one could prove whether this was because of the law or in spite of it. Many other factors also contributed to this happy state, and looking from our place in history we can see that the reforms that did take place made England even richer and freer.

The defenders of the system had a great many intellectuals in their camp, yet their arguments were intellectually bankrupt. Their only point was that the system was in existence and it worked. One group of conservatives could find nothing better to say than to repeat the demand of the barons at Merton that "the laws of England must not be changed."

Some of the proponents of legal reform were actually conservatives who crossed over to liberalism to enact one or two specific measures. Foremost among these was Lord Thurlow, one of the leaders of the conservative party, who had pushed through reforms securing property rights for women and allowing them to sue for divorce on grounds of physical cruelty.

John Wade, writing at the end of our period, deserves mention since he attracted so much support for reform by spotlighting
corruption. His Black Book, originally published in 1820, was directed primarily at corruption in government and in the state church. It attacked the legal stagnation of the period by pointing out examples of the ill effects of putting incompetent men into office. This book was a piece of political literature and its author was no better than a party hack but, as is often the case with sensational literature, it had a large circulation and ran through several editions in a short period.

Sydney Smith, among the clergy, demanded reform. His wit and ability to write struck many telling blows at the old system from the pulpit and from the pages of the recent Edinburgh Review. He was particularly interested in preventing the landowner's use of traps and spring guns to discourage poachers. These deadly instruments, which claimed the lives of the innocent as well as the guilty, were sanctioned by the English Courts, although outlawed in Scotland. Smith was particularly active in attacking the law that denied a prisoner on trial for a felony the right of defence by counsel.

Patrick Colquhoun became a proponent of legal reform as a

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10 John Wade (1788-1875) a newspaper writer who wrote several books attacking various abuses current in his time. None of his later works received as much attention as his Black Book.

11 Sydney Smith (1771-1845) was the canon of St. Paul's. In his youth he had been a member of a Jacobin club in Normandy. He devoted much of his time and money to charitable causes and reform movements both in England and in Scotland. He was a thorough-going liberal and a great pamphleteer.
result of his attempts to establish a more efficient police for the city of London.  He attacked the confusion of the criminal code as a barrier to police work since the average policeman would rarely be able to charge properly a criminal since no one but a lawyer could tell what law was broken.

Edmund Burke lent his great talents to the reform movement. Once in speaking on a bill for the relief of Protestant Dissenters he attacked the whole legal situation of England. He considered laws not put into operation as dangerous, for they either allowed wrongs to go without penalty or they were checks on innocent action which might be enforced at any time. He thought this situation could lead to a number of evils, among which might be numbered enslavement of a part of the population, corruption of the executive, and the introduction of private malice into the law courts. He further charged them with being out of step with the times.

This speech of Burke's represents a damning indictment of the existing system, but like most liberals he was interested only in a particular reform. Actually this was one of the great weaknesses of the reformers. They had many men of ability, but none of them had a whole new system to propose. They were like men trying

12 Patrick Colquhohn (1745-1820) was a London magistrate who wrote several books on police regulations. He did much charitable work among the poor of London.

to back up a breaking dike with grains of sand rather than sandbags. The reform movements could never hope for general success until they united into a single comprehensive program.
"They won't tell a man before hand what it is he should not do. they won't so much as allow of his being told; they lie by until he does something they say he should not have done, and then they hang him for it."¹ This is one of Jeremy Bentham's milder outbursts against the confusion and barbarity of the English criminal law. He charged that the laws were a mass of confusion and secrecy so arranged as to be intelligible only to the lawyers who grew fat on the work provided them by the system. He further charged that the system represented a positive danger to the people and accused the lawyers of indifference and complacency in the face of this situation.

Jeremy Bentham, born in 1748, was the son of a London attorney. His mother was the daughter of a small merchant. The family was typical of the rising middle class, a fact that would have a great effect on his philosophical writings. A precocious child, he mastered reading quite early and soon after learned French and Latin. He had a great interest in music and gardening but his

¹Jeremy Bentham, Truth Versus Ashurst (London, 1823), p. 11. The underlined words are italicized in the original text.
father decided that the child should someday be Lord Chancellor and so tried to mold his mind to the law. The father attempted to form his mind by making him read only the most serious type of writing; the son, however, read as he pleased. His particular interests were history, biography, and romantic fiction. As a result of his father's high ambition the youngster was sent to the finest primary and secondary schools that he might have a proper education, in manners as well as knowledge, for the high post it was hoped that he would occupy. Bentham then went on to Oxford, where he received his degree of Bachelor of Arts in 1763 and his Master of Arts in 1766. The latter year he was called to the bar at Lincoln's Inn.

Several things had happened during his youth that had adversely affected his personality. Aside from the conflict with his father over the type of books he would read, he had had other difficulties with this very domineering man. The death of his mother, to whom his dislike of his father had attached him deeply, was a shock from which he recovered slowly. He was never able to reconcile himself to his father's second marriage. In addition, he was badly influenced by the family servants who filled his head so full of tales of fairies and witches that he felt throughout his whole life that his imagination was warped. In his public school days his classmates gave him the rather rough and brutal treatment that is often the lot of a precocious child. That these things combined to make Bentham a very withdrawn individual who
wanted friends but was afraid of being hurt or rebuffed is evidenced in his relations with the men who were interested in his philosophy and wanted to work with him. He knew that if his program were to succeed he needed assistance, yet he constantly rebuffed even those who most wanted to help him.

He practiced law for a few years but soon became discouraged with the legal system and with his fellow lawyers. He retired from active practice and devoted himself to a life of scholarship. He began writing at this time, and his works are full of attacks on lawyers. He mentions that a Mr. Justice Ashurst when he was a practicing lawyer, "would never take less than a guinea for doing anything, nor less than half a guinea for doing nothing. He durst not if he would: among lawyers moderation would be infamy."²

As his disinterest in law grew, he began to read deeply in contemporary European and English philosophy, becoming seriously convinced of the utilitarianism of Hume. He read most of the works of Montesquieu, Helvetius, and Priestly as well as Beccaria, whose legal and penal theories strongly influenced him. He traveled extensively on the continent and saw that conditions in the rest of Europe were no better than those in England, or even worse. For years he absorbed the knowledge of others and checked this against his own experiences. Finally, in 1777, he began to write, without any plan or organization. He would begin one book,

²Ibid., p. 6.
switch to another, start a third, dash off a pamphlet or two, and finally come back to the first book only to drop it for something else. Some of his books were published as soon as they were finished while others would stay in manuscript form for years. 

Truth Versus Ashurst was written in 1792 and was not published until thirty-one years later. The rough drafts of some books were given to his friends who revised and published them. His Theory of Legislation and the Rationale of Punishment as well as other important works were first published in French by Etienne Dumont. They were not published in English until years after their first appearance on the continent. Many of his works remain unpublished and some were never finished. This erratic system makes it quite difficult to tell how much of Bentham's philosophy was known to the general public or to even the educated classes during his lifetime.

The principle that all actions are determined by either the desire to seek pleasure or the desire to avoid pain is the basis of Utilitarianism. There can be no question that the average person is governed to a large extent by these motives. Bentham built his whole philosophical system around this one idea. His difficulty was that he could not understand that certain individuals will accept a present pain in the hope of a future pleasure.

While realizing that this is true for short periods, he was unable to accept it as a basis for long term action. Rather, he considered ascetics and others who accepted suffering in this life to
attain an eternal reward as somewhat eccentric. He also failed to understand the compulsions that can be placed on a man by a strong sense of duty or honor. Undoubtedly the principle of Utility can best be stated in Bentham's own words:

By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the part whose interest is considered; if that party be the community in general, then the happiness of the community; if a particular individual, then the happiness of that individual. The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what?--the sum of the interests of the several members who compose it. It is vain to talk of the interest of the community without understanding what is the interest of the individual. A thing is said to promote the interest, or to be for the interest of an individual, when it tends to add to the sum total of his pleasures: or, what comes to the same thing, to diminish the sum total of his pains. An action then may be said to be conformable to the principle of utility, or, for shortness sake, to utility, (meaning with respect to the community at large) when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.

Bentham concluded that since the principle of utility is a first principle it is both impossible and unnecessary to prove it.

Pleasures and pains are to be judged by their influence on the community as a whole. The total number of pleasures and pains

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5Ibid., p. 4.
that will flow from an action must be considered. If their total
is on the side of pain, the action is bad; if on the side of
pleasure, the action is good. He gives a list of all possible
pleasures, pains, and the various factors which may cause actions
to be more or less pleasureable, and he expects that all legisla-
tors and judges will keep these lists in mind while performing
their duties. He hopes that in this way justice will fall with
the same weight on all people.6

Bentham set down not only the principles on which the laws of
England should be reformed, but also the methods by which the re-
forms were to be carried out. In discussing the need for reform
he gives as an example Lord Chief Justice Hale, who occupied the
top judicial post around 1700. Hale confessed that he did not
know what was meant by the term theft. Bentham points out, "There
was then no statute law to tell what was or what was not, theft;
no more is there to this day; and so it is with murder and libel;
and a thousand other things . . . ."7 He despairs that "the lies
and nonsense the law is stuffed with, form so thick a mist that a
plain man, nay even a man of sense and learning, who is not in the
trade, can see neither through nor into it."8

Bentham's position was that law was a science while the old

6Ibid., p. 67.
8Ibid., p. 7.
common laws of England had grown haphazard out of the people's customs and had neither order nor reason. He considered them to be simply a mass of contradiction and confusion containing some that was good but mostly composed of trash. He therefore proposed that the whole system be scientifically reorganized according to the principle of utility.

The principle of utility is impracticable as a standard of personal ethics, for it rules out almost completely the higher feelings of man. Utility, however, is specifically designed to determine the greatest good for the greatest number. It is satisfactory therefore as a legal code since all legislation is intended to provide for the common good. This statement of course cannot be taken in a purely literal sense. Rather it is the function of Benthamism to set up a society in which every individual will have an opportunity to prosper and achieve his own happiness. In this lies the second of Bentham's principles of law reform; that the end of law is the promotion of human happiness. Bentham's next principle was that all legislation should be intended to remove all restrictions on individual liberty not needed to protect the liberties of other individuals. He thought that the existing laws contained thousands of unnecessary restrictions on individuals. He held that Utilitarianism could not function unless these

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restrictions were removed.\textsuperscript{10}

Bentham's middle class sentiments manifested themselves in several of his reform programs and particularly in the method by which he thought the law should be reformed. One of his major theories, that every man is to count for one and no man is to count for more than one, is certainly an outgrowth of the struggle for political equality of the middle class with the aristocracy and landed gentry. Another outgrowth of Bentham's middle class background was not really conducive to the good of society. He firmly opposed any restrictions that the state might place on the citizen's right to contract, which led him to hold that usury "cannot merit a place in the catalogue of offences unless the consent were either unfairly obtained or unfreely: ..."\textsuperscript{11} This demand for freedom of contract led in a few years to the Combinations Laws, which in theory allowed an individual to bargain for himself so that he could get his best advantage. Actually, they seriously injured the working classes by not allowing them to bargain collectively or unite to obtain what was best for the group involved. Bentham's position on contracts undoubtedly stemmed from the fact that he came from a family engaged in trade and had been dependent on the validity of individual contracts.

Bentham's middle class heritage was also one of the main

\textsuperscript{10}Bentham, \textit{Truth}, p. 8.

\textsuperscript{11}Bentham, \textit{Introduction}, p. 252, note 1.
factors in his choice of Parliament as an instrument of reform. He was convinced that reform would never come out of the legal profession. "Not an atom of this rubbish will they ever suffer to be cleared away. How can you expect they should? It serves them as a fence to keep out interlopers." He was just as certain that the judiciary could not be counted on as the leaders of reform. "What Mr. Justice Ashurst nor Mr. Justice Anybody-else has ever done or ever will do is teach what is, from what is not, a libel . . ." He maintained that the judges were co-conspirators in the attempts of the legal profession to keep the law a secret. His middle-class sentiments were the basis for his opposition to an initiation of reform by the Crown, for the middle-class had struggled too long against the power of the Crown ever to entrust it with a power that could be carried out by another agency. Parliament was his instrument of reform provided that Parliament itself could be reformed. He bitterly attacked the theory of virtual representation, the same theory that had caused the American Revolution. "'Happily for you' said Muley Ashmael once to the people of Morocco 'happily for you, you are bound by no laws but what have your virtual consent; for they are all made by your virtual Representative, and I am he.'" This was Bentham's cynical

13 Ibid., p. 9.
14 Ibid., p. 10.
comment on the way in which the liberties of Englishmen were administered.

Benthamite legal reforms always had three characteristics: they were humanitarian; they sought adequate protection for the rights of individuals; and they sought to extend personal freedom. Among his humanitarian measures were those for the abolition of the stocks and the pillory, as well as laws against cruelty to animals. The whole program of legal reform as well as the special programs for the reform of court procedure and the rules of evidence can be traced to his desire to protect human rights. Also in this group can be placed the various attempts to reduce the exorbitant legal costs of the day. To extend personal freedom he promoted the abolition of slavery and the broadening of habeas corpus.

Bentham considered all legislation evil since it infringed on personal liberty; he contended that it is the legislator's prime duty to see that the evil inflicted by the law is less than the evil that would exist if the law were not made.\(^\text{15}\) He goes on to state that legal evils actually produce good in that the only ones hurt by the laws are evildoers who would not have been hurt had they behaved properly.\(^\text{16}\) Bentham reminds the legislators that their duty is to make laws, not to try to establish norms of

\(^{15}\text{Bentham, Theory, p. 48.}\)

\(^{16}\text{Ibid., p. 53.}\)
morality. He considered that morality was more encompassing than law, and that it was able to set rules in matters that legislation could not touch. He urged that legislation be arrived at by a process of reasoning and that the reasoning not be based on antiquity, authority of religion, fear of innovation, arbitrary definitions, metaphors, legal fictions, or the prejudices of society. The only base he would accept as proper for legislative thinking was that provided by the system of Utilitarianism. 17

This has been a short explanation of Benthamite philosophy and its general program of legal and social reform. The section of Bentham's thought that will be considered in detail is that which deals with the reform of the penal codes. Bentham divided the penal code into three parts: the first deals with the nature of crimes; the second covers preventive measures; the third treats of the theory of punishment.

Bentham considered an offence to be either an act which violates an existing law or an act which should be legislated against. Offences were put into four classes:

1. Those which injure a particular person, or persons, other than the malefactor. These are called private offences.
2. Those in which the malefactor injures only himself. These are reflexive offences.
3. Actions which if they take place will injure a part of the

17 Ibid., pp. 66-87.
community, or semi-public offences.

4. Those offences which affect the whole community or an undeterminable portion of the community, and are called public offences. 18

This grouping seems to cover all the segments of society that can be injured by a crime and is a workable base for the building of a legal system.

Bentham listed the various ways in which the several groups can be injured. Private offences are those which injure an individual in his body, his property, his reputation, his condition (that is his civil and social relationships) or any two or more of the preceding. Reflexive offences damage the offender in the same way that private offences injure the person offended. Semi-public crimes fall into two classes: those which in some way can lead to a disaster or calamity—this is the type of crime committed when a plague bearer breaks quarantine; the second class are those contained in acts of pure malice directed against any group of persons particularly a religious or social group. Semi-public offences need only the overt act and the malicious intent or negligence to be crimes. They do not need to be completed successfully. Bentham set up so many types of public offence that it would be futile to attempt listing them here; it is sufficient to say that they are generally actions that endanger either the security or

18 Ibid., p. 240.
the authority of the state.

Bentham listed many circumstances which tend to increase or diminish the severity of the crime. While they are undoubtedly useful to the legislator and the judge; they do not require a detailed treatment here. It is adequate for our purposes to state that Bentham considered that the magnitude of a crime should be judged according to the position of the criminal, the amount of alarm engendered by the crime, the justification for the offence, and whether the crime is a simple one or a compound of two or more.19

In his discussion of crime prevention, Bentham advanced the theory that the prime function of legislation is the prevention of crime. He held that when total prevention is impossible it should be the intention of the legislature to provide a system by which a crime in progress can be suppressed before it gets out of hand. This suggestion, of course, applies almost exclusively to public and semi-public offences. He considered reparation, satisfaction, and/or punishment for a crime already committed to be preventive measures of sorts in that they might prevent potential criminals from acting, lest they be brought under the penalties of the law. Bentham treated punishment separately and his treatment shall be followed in this chapter.

The systems Bentham proposed for directly preventing and

19 Ibid., pp. 246-270.
suppressing crimes were in the main dependent on the action of the judiciary. They required that a judge act if he had the slightest suspicion that an individual had a criminal intent. It is rather amazing to see that Bentham proposed a measure that would infringe so greatly on the right of individuals. He stated that all citizens had a duty to prevent the commission of any crime that might take place in their presence. The ideas expressed in this section are, generally speaking, not too practicable. The only one that was really worthwhile was a plan for dispersing mobs in other ways than by the reading of the Riot Act.

His ideas on reparation and satisfaction, while not easy to put into practice, were on the whole quite sound. He defined satisfaction as "a good received in consideration of a damage suffered. If the question relate to an offence, satisfaction is an equivalent given to the party injured on account of the damage he has sustained."\(^{20}\) He listed six kinds of satisfaction which can actually be reduced to three major types and an alternate method. The first is by material reparation either in cash or in kind. The second method, to be used in the case of libels, requires that the offender publish the truth of the matter and do whatever else might be necessary to restore the good name of the injured party. The third method requires punishment in a physical way for doing physical injury or by making the offender ridiculous (by means of

\(^{20}\text{Ibid., pp. 280-281.}\)
court imposed actions or costumes) for humiliating some one else. The alternate method is intended primarily for use in material reparations and requires that a person in authority, though not actually a party to the crime, assume the liability for crimes committed by people under him. This would require that the liability be met by parents for minor children, by masters for servants, and by husbands for wives. This alternate method would also require the state to make satisfaction if the offender is too poor or if, as in the case of a war, no particular person can be proved to have done the damage.

In discussing reparation for insults or libels, Bentham held that some satisfaction must be immediately settled upon because the only solution extant at the time he wrote was that to be obtained by dueling. He objected to dueling because it gave no certainty of satisfaction. He barely mentioned that it was illegal in the England of his time and he totally ignored the abuses that dueling was subject to. He also failed to mention the immorality of taking another person's life in this manner.

The primary difficulty in his system of reparations was that it was almost impossible for him to find a way of satisfaction in cases where it could not be done in cash or in kind. Even in cases of material damage it is sometimes difficult to set a value on articles that are of great rarity or that have a particular

21Ibid., p. 299.
sentimental value. Bentham tried to avoid this difficulty by suggesting that judges should be allowed wide latitude in setting reparations.

Bentham next took up the question of punishments and stated that the legislator, when considering the subject, should propose to himself the following:

1. His first, most extensive, and most eligible object, is to prevent, in as far as is possible, and worthwhile, all sorts of offences whatsoever; in other words, so to manage, that no offence whatsoever may be committed.

2. But if a man must needs commit an offence of some kind or other, the next object is to induce him to commit an offence less mischievous, rather than one more mischievous: in other words, to choose always the least mischievous of two offences that will either of them suit his purpose.

3. When a man has resolved upon a particular offense, the next object is to dispose him to do no more mischief than is necessary to his purpose: in other words to do as little mischief as is consistent with the benefit he has in view.

4. The last object is, whatever the mischief be which it is proposed to prevent, to prevent it at as cheap a rate as possible.²²

This sounds as though it were a discussion of prevention rather than of punishment, but it must be remembered that Bentham considered punishment to be a branch of prevention. He stated that "the principle end of punishment is to prevent like offences. What is past is but one act; the future is infinite. The offence already committed concerns only a single individual; similar offences may effect all . . . however great may be the advantage of the offence the evil of the punishment may be always made to out

Bentham stated that in proportioning the punishment to the offence great care should be taken that the more doubtful the chance of inflicting punishment the greater should be the severity of the punishment inflicted. He also stated that when two crimes are commonly committed in connection, the greater offence must carry a proportionately greater punishment so that the malefactor will commit only the lesser crime. The obvious example of this is kidnapping and murder. The two crimes carry, in most states, the death penalty. Therefore, there is no reason why kidnappers should let their victims live to be witnesses against them. From this, he developed the corollary that trivial offences should carry trivial punishments. He also stated that punishment ought to vary with condition—that is, according to age, sex, intelligence, fortune, social position, and so forth.

From these principles he derived a lesser rule which can be quite simply stated: punishment must be capable of being proportioned according to the gravity of the crime (fines and imprisonment can be proportioned while death has a dreadful indivisibility). Punishments should be capable of being compounded if the crimes are compounded. They must bear a relation to the offence in form, when possible, and always in motive. They must serve as a warning to the community. Punishments should produce no more evil than is necessary for the accomplishment of their goal and

they should be capable of remission or revocation. Their first purpose must be to reform the offender, if possible; and when that is not possible, they must be set up in such a way as to prevent him from again offending. They should be of a nature that will indemnify the injured party when possible. Punishment must never shock established prejudices. Bentham went into great detail on the types of punishment that best suited certain crimes. In general, he favored fines and punishments that inflicted ignominy or dishonor and opposed capital punishment as a very poor method that was excessively practiced. While holding that imprisonment was good because it could be proportioned, he opposed it until such time as the English prisons were reformed. In a statement that is vaguely reminiscent of some modern penologists, he charged that "an ordinary prison is a school in which wickedness is taught by surer means than can ever be employed for the inculcation of virtue." Bentham attempted to remedy this situation and in his book Panopticon set down the plan for a new type of prison. The scheme is quite interesting in that he attaches an unusual importance to such mechanical details as the shape of the building and the system to be used for watching the prisoners. Major parts of his plan called for vocational training and moral guidance along Utilitarian lines. In 1800, he offered to supervise the construc-


tion and operation of such a prison but nothing ever came of the plan.

Benthamite legal reform must be rated as a good attempt to clear up a messy situation but it had several defects that kept it from being a final solution. One of its greatest drawbacks was Bentham's materialistic approach to ethics. He totally disregarded the possibility that higher motives might lead a man to behave in a manner beneficial to society. Another defect was Bentham's rather strange attitude toward sex crimes. He opposed them only if they were accomplished through force or deceit or if they had an adverse effect on the population. He saw nothing wrong with perversion and approved of infanticide in certain cases.

However serious these faults may be, they cannot detract from the fact that Bentham was the first man to present an organized program of legal reform in modern England and that his thought was the first fresh breeze of the gale of reform that was to soon sweep over England.
CHAPTER V

THE EARLY LIFE OF SAMUEL ROMILLY

Where Bentham was interested in writing and studying in a quiet scholarly atmosphere, Samuel Romilly was an exponent of a more active political life. In this short sketch of his education and background from his birth until his entry into the House of Commons, we will see that he was in many ways similar to Bentham even though they lived vastly different lives. His legal philosophy will only be considered in passing in this chapter and will be treated in greater detail in the next. Romilly left a large collection of letters, diaries, personal papers and two short autobiographies that were edited by his sons and contain a wealth of information about his life.

The Romillys were a Huguenot family which had migrated to England after the revocation of the Edict of Nantes. They had been a family of some consequence, with a great amount of property and wealth, all of which they lost when they migrated. Samuel's father, a London jeweler, returned to France and dwelt there for several years before coming back to England where he settled down and married the daughter of another Huguenot family. Their first six children died in infancy; the next three lived. Samuel, born
on March 1, 1757, was the youngest child. His mother was a permanent invalid who had very little to do with the upbringing of her children and she is barely mentioned in his writings. Romilly thought highly of his father who was a man of fine character, filled with tenderness and consideration for his children. Romilly's early education was supervised by a Mrs. Margaret Facquier, a relative of his mother. Unfortunately, Mrs. Facquier was a partial invalid, and when she was too sick to care for the children, Mary Evans, a tender, affectionate but not too intelligent servant, looked after them. She could do nothing to help the children develop intellectually. One of the strongest factors in Romilly's early youth was the tremendous stimulation along morbid lines that his imagination received. The servants filled his head with tales of witches, demons, and murders and he was strongly impressed by the pictures he found in the lives of the martyrs and in the Newgate Calendar. In his adult life he was never able to free his mind from the awful fancies of his youth. It is impossible not to notice that Bentham and Romilly had almost the same difficulty in regard to their imaginations. Romilly also suffered from a terrible fear that his father would die or be injured in some way. He admitted to taking a perverse delight in tormenting himself with these fears.¹

His father had a great attachment to the memory of his French

ancestors which led him to worship in the Huguenot church in London. At this time the church was old and in poor repair, the congregation small, the minister an ineffectual speaker. Due to these circumstances, religion made little impression on the youngster. This French influence led the elder Romilly to send his sons to a school that's only claim to fame was the fact that a large number of children of Huguenot descent were educated there. Perhaps educated is not the right word; for the school was poor, the master ignorant, and the education inferior. Romilly loathed the school, the master, and most of his fellow students. Yet his father was determined that he should enter the legal profession. However, the only lawyer with whom young Romilly was acquainted was a Mr. Liddel, whose appearance and behavior were so disgusting that they repelled the youth. He persuaded his father to find him another career.² At first his father tried to place him with a family connection who was one of the heads of a large commercial house. Before all the arrangements could be made, the friend died. Romilly was given some training in both bookkeeping and jewelry work and for a time was employed in his father's business. He had little work to do and was able to devote most of his time to reading particularly in ancient history. He taught himself Latin and studied the works of most of the major Latin writers. An attempt to learn Greek without instruction proved futile, and so he con-

²Ibid., p. 18.
tentd himself with reading translations of the works of the Greek masters. As time went on he was able to extend his readings so that he had a little knowledge of almost any subject.

After a few years in the jewelry business, Romilly abandoned his aversion to law and decided to enter the profession. He hoped to become one of the Six Clerks in Chancery, a position that paid well and did not entail as much traveling as regular law. Accordingly, at sixteen, he was apprenticed to William Lally, a chancery clerk, for five years. He was not really interested in law and determined to practice it only to provide for his income and to seek his fame by literary efforts. His friends had convinced him that he had great literary talent and they were at least partly correct. His narrative writing is quite good. His style even on the most difficult subjects is clear and simple. That he would ever have become a great writer is impossible to determine, since none of his fiction or poetry has survived.

During this period the old minister of the Huguenot church died and was replaced by a polished, effective, and learned speaker, John Roget, a native of Geneva. Roget and the Romilly family became quite familiar. Roget introduced young Romilly to the philosophy of Rousseau and the youngster was at first totally captured by these ideas. Although he later saw their errors, he always held a certain fondness for them. Romilly and Roget corresponded about philosophy, law, and other intellectual subjects for a great many years. It is from these letters that we get one of
our best insights into Romilly's ideas on legal and social problems. Roget married Romilly's sister in 1778.

Lally talked Romilly out of a literary career and his lack of fortune, a deficiency which would be remedied in time, prevented him from buying the position of Clerk in Chancery. He was, therefore, forced to enter into the legal profession as a practicing attorney. Gray's Inn was the scene of his legal studies and while there he used his spare time to resume his classical studies. His health broke under the strain of his work and he was forced to go to Bath to take the waters. On his recovery he returned to London and his studies just at the time the Gordon Riots were breaking out. The Inn's of Court were among the rioters' main targets. Gray's, which had a large number of Catholics, was particularly marked for attack. In order to protect themselves, all the residents were forced to set up an armed watch during the riots and this strain proved too much for Romilly's newly recovered health. However, his letters to Roget present a clear picture of these troubled times and show in great detail the evils that can arise from prejudice and bigotry.3 Romilly was astonished by the deceits and frauds that were used to inflame the mob. He was pleased by the fact that the government used only legal means in coping with the situation even though the rioters were intent on breaking down the legal structure of the country. These

3Ibid., pp. 113-134.
letters to Roget show that whenever Romilly discussed a controversial subject he presented both sides of the picture. This procedure is followed so regularly that any departure from it stands out in bold relief. One example of a one-sided presentation takes place in a letter discussing the evils attendant on the transplantation of British law to India. It seems that the procedure was handled so badly that many Englishmen were deprived of their rights at the same time that the natives were being subjected to a legal system so complex that "years of study are requisite to enable even Englishmen to acquire a knowledge of it." Romilly described at great length the dangers that could come out of such a situation. This is probably his first statement on the evils of misapplied laws.

In the spring of 1781, Romilly took a vacation and traveled on the continent in the hope of recovering his strength. Travel notes make up most of the contents of his biography and letters for this period. He was an acute observer who presented a clear picture of what he saw. He visited Paris, where he met Etienne Dumont, who was to be his friend for many years. Dumont, it should be remembered, edited much of the writings of Bentham. He also met Diderot at this time and was for a time greatly impressed by him. He soon changed his mind and after a few months he stated that atheists such as Diderot and D'Alembert were a stupid and

\[1^{4}\text{Ibid.}, \text{p. 157.}\]
pitiful group. The Dauphin was born while Romilly was in Paris and he had the opportunity to observe that while many people celebrated the birth they did so not out of joy but in obedience to the orders of the government.

On returning to England, Romilly broke off his autobiography and did not resume it until 1783. His letters for this period are not too important except for a few that contain long detailed discussions of the proposals for peace with the United States. However, one of these letters contains a brief statement of Romilly's views on the penal code. Roget had written him a letter condemning the death penalty and Romilly answered with a defence of capital punishment in certain crimes. He then went on to say that he was not satisfied with the criminal code of England, since it punished too many crimes with death. Romilly was admitted to the bar in the spring of 1783. When shortly afterward Roget died the shock to Romilly was very great. He was forced to leave England and go to Lausanne to attend to his widowed sister's affairs and bring her back to England. On this trip he met Benjamin Franklin and was pleasantly surprised by the originality and frankness of this remarkable man.

By the time Romilly returned to England the long vacation of the courts was under way. As with most lawyers, Romilly spent the

5Ibid., p. 198.

6Ibid., pp. 278-279.
early years of his career drawing up briefs and pleadings and scarcely ever appearing in court. His particular interest was still chancery law, but until he could build up a practice he was forced to take whatever work he could get. He therefore went on the circuits. He picked a small circuit near London so that he could hurry back to the Courts of Chancery if his presence were required. Since the Midlands circuit was small and not too active it drew an odd assortment of lawyers. The senior lawyer was a man named Hill, who thought that all statutes passed since the Revolution should be abolished. The man's contempt for any modern or scientific approach to law knew no bounds. Another member of the circuit is not identified, but simply referred to as a man without talent, learning, or any other qualification for law. He was a great success however because he enjoyed the friendship of an unidentified judge. None of the other attorneys on the circuit was in any way distinguished except Sutton, who later became Chancellor of Ireland and a peer. Although Romilly travelled this circuit for many years, he was never too satisfied with it. He did, however, become quite successful on it; he finally gave it up because it took too much time away from his Chancery work.

In 1784, Romilly's father died of a palsy. The son experienced deep grief at this death, following as closely as it did upon the death of Roget. His father's death left Romilly in good

7Ibid., p. 72.
financial position as did the death of a distant relative who left a large estate. During this year Romilly met the Count de Mirabeau, who was in England to publish an attack on the Order of the Cincinnati. He requested Romilly to translate this work from the original French and during the course of the translation the two became quite intimate. Mirabeau amazed Romilly with the ease and indifference with which he made enemies as well as with the positive and intolerant way he had of asserting his theories. Through Mirabeau, Romilly met Lord Landsdowne, who pressed him to write some work that might distinguish him in the legal profession. This pressure led Romilly to write his Observations on a late Publication Entitled "Thoughts on Executive Justice." This was a rebuttal of Madden's book and was published anonymously. His friends and associates who knew it to be his work praised him highly for it. He had previously published a tract on juries, also anonymously, so this was not his first piece of legal writing. The book did not draw much attention, and so Romilly temporarily laid aside his pen and returned to his practice. A better grade of lawyers was beginning to appear on the Midlands circuit and Romilly got a great amount of enjoyment from their company. He began to attend the quarter sessions in Warwick to help build up his practice.

During the long vacation of 1788 Romilly went to France to

\[^8\] Ibid., p. 88.
visit Dumont. They journeyed at length through the provinces and at last went to Paris, where Dumont introduced Romilly to many men who were soon to become famous in the Revolution. They also met Thomas Jefferson, then serving as the United States' ambassador to France. While in Paris Romilly and some of his friends visited the hospital and prison at Bicêtre. He was deeply shocked by the conditions he found there and wrote down his impressions of the place, giving this manuscript to Mirabeau who translated it and had it published under the title of Lettre d'un Voyaguer Anglais sur la Prison de Bicêtre. It was suppressed by the Paris Police.9

Romilly was still in France when the King called the meeting of the Estates General. He commented on the great joy and enthusiasm with which this announcement was received. All members of the educated classes thought that a new era of peace and prosperity was beginning and they were overjoyed that they might be allowed to take part in its birth. No one dreamed that the convening of the Estates would lead to the total extinction of the existing order and the start of one of the greatest periods of turbulence that the modern world has seen. However, Romilly listed an occurrence that clearly shows the possibility of danger coming from the meeting of the Estates. The Count de Sarsfield wrote to Romilly and requested a book that explained the rules of order used in the House of Commons, for the French had never had occa-

9Ibid., p. 97.
sion to develop such rules nor did the Count feel that they had anyone qualified to draw up an order book. Romilly could not find a book that would suit the Count's needs since the only manual of parliamentary procedure in England (that of Hatsell) omitted the normal rules on the ground that they were known to everybody and only gave the unusual rules. Therefore, Romilly, with the aid of Sir Gilbert Elliot and Mr. Leigh, the assistant clerk of Commons, drew up a set of rules. The French did not bother to use these rules and proceeded to make up parliamentary procedure as they went along, a circumstance which probably had a great deal to do with the confusion attendant upon the meeting of the Estates. 10

Romilly brought out a small pamphlet full of enthusiasm for the revolution. He returned to France during the late summer of 1789. By this time the Assembly had done away with all tithes and feudal rights. Romilly thought these actions were good, but he did not care for the way in which they had been done. He was concerned because there had been no thought given to the consequences of these acts or to the rights of the individuals damaged by them.

It is at this point that the autobiography comes to a final close, and the rest of Romilly's career must be pieced out from his letters. During the next three or four years most of his letters are to Dumont, who was acting as the editor of the Courrier du Provence. The letters deal almost exclusively with the Revolution.

10 Ibid., pp. 101-103.
and other associated topics. One contains a defence of Bentham's position on the stupidity of usury laws. In October of 1794 he wrote to a Madame G- and told her that his legal practice was increasing rapidly and that he had twice turned down a seat in Commons.11

The letters went on for a few more years and were devoted in the main to discussions of the Revolution and the wars that flowed from it. A letter to Madame G- written in 1798 announced his marriage and gave this glowing description of his wife: "Were I to speak of her only as she appears to me, you would imagine I was exercising my talents in drawing the model of female perfection rather than describing a person who really exists."12 This gives a slight idea of the great love that Romilly bore for his wife; it continued at this same tempo all through their lives, and when his wife died Romilly's life also ended.

He wrote to Madame G- again in September of 1800 to describe the riots that were then sweeping England. He lays part of the blame for these outbreaks on the ideas generated by the French Revolution. He puts the major portion of the blame, however, on the rise in prices caused by the war and profiteering. He expressed a great amount of sympathy for the poor wretches who were forced to starve or to resort to violence to obtain food.

11 Ibid., p. 44.
12 Ibid., p. 66.
In June of 1802 he wrote to Dumont who was just then finishing his work on the Traités de Legislation. Romilly expressed great impatience as he awaited this important work. He went on to mention that Bentham was also eagerly awaiting the book so that he may "know what his own opinions are."  

Romilly visited France again in the late summer of 1802 and on this trip he kept a diary of sorts. While in France he had the opportunity to visit the courts, where he noticed that judges were very highly skilled and exceptionally learned but he felt that the law did not give the prisoner any protection of his personal rights equivalent to that granted by the laws of England. He dined with Talleyrand and noted that he had taken on a very pretentious air and lacked the charm and friendliness that had impressed him on their first meeting. Bonaparte's behavior seemed, to Romilly, to show a contempt for the people. Napoleon's countenance seemed quite mild and Romilly thought that the court artists who painted him tried to make him appear much more stern and impressive than he actually was. Romilly was given an opportunity to be presented to the Emperor, but since he considered him to be a tyrant and usurper he excused himself and did not attend the reception. The anti-English attitude then prevalent in France greatly attracted Romilly's attention. He found that the average Frenchman had a rather high opinion of Pitt's abilities but

13Ibid., p. 75.
thought him to be continually attempting to trap the French into some ill-advised action.

In the fall of 1802 Romilly returned to England, and from that time until 1805 his life was comparatively quiet. In the latter year he was appointed Chancellor of Durham. The appointment was controlled by the Bishop of Durham, who, while he had never met Romilly, had formed a good opinion of him from reading a paper of his on the prevention of cruelty to animals. This paper also brought Romilly to the attention of several Cabinet ministers who were impressed favorably by his plan and promised to support it.

The Prince of Wales offered Romilly a seat in the House of Commons shortly after he was made Chancellor of Durham. He did not deny that some day he would like to be a member but he did not care at this time to give up his legal practice, which was growing rapidly and making him a very wealthy man. Romilly was also fearful that the Prince would put too much confidence in him and depend too much upon him, thereby limiting his freedom of action. He wanted to buy his seat, rather than be indebted to any man's favor or committed to any man's cause. He handled himself so diplomatically in this business that he maintained the friendship of the Prince and was empowered by him to act in the investigation of and the proceedings against the Princess Caroline.

He was quite fortunate that he did not accept the Prince's offer for, on February 8, 1806, he was appointed Solicitor General
in the Grenville cabinet. Since he had done nothing to procure this position he felt that he could accept it without committing himself too deeply to the Government's program. On February 12, he was installed in his office and knighted. On February 21, he was elected to Commons by the town of Queenborough. Since the town was controlled by the Whig party he ran unopposed, the old member having stepped down to make room for him.

This is the end of the biographical sketch. From 1806 to the end of his life we shall consider only such of Romilly's actions as were devoted to the cause of legal reform, plus a few incidents that had a large bearing on his work.

We have seen in this chapter that Romilly was a highly respected and quite able lawyer who had made a favorable opinion on the ruling classes entirely through his own efforts. He was an earnest and hard-working man who had come from the lower middle class and had attained a position of great wealth and influence. He had traveled extensively and made the most of this opportunity, for he had become acquainted with many of the great philosophers and politicians of his time. Because of this, he was well informed about the social and political theories current in both England and Europe at this time. He had in several small ways already distinguished himself as a reformer. His legal writings had drawn favorable comment. Considering all these things, it is obvious that he was in a good position when he entered Commons for he had already made his reputation and had support in high places.
that was not paid for by political subjection to the wishes of these patrons. These factors coupled with his financial independence allowed him a freedom of action rarely found in political figures and indispensable to a reformer.

The only things that could be counted against him were his health which could not be considered as very good, his emotional nature, and his lack of practical political experience.

Balancing these things against each other, his abilities outweighed his deficiencies. He was in an excellent position to work for any reforms that he might choose.
CHAPTER VI

ROMILLY'S THEORY OF REFORM

Romilly's theories were not so well organized nor so lengthy as those of Bentham. He did not intend them to be principles for the guidance of others as was the case with Bentham; they were simply rules of thumb designed to guide one in the making of law. His system is intensely practical and quite simple. It is a system designed to work in the Courts of Law and has a certain legal crispness and finality to it.

The system differs from Bentham's in that there is no single book or group of books devoted entirely to expounding it. The basic ideas are scattered through Romilly's speeches, letters, and parliamentary diary. The only book Romilly wrote totally devoted to the reform of the legal system was his Observations on the Criminal Law of England, and this was only a pamphlet attacking the excessive number of crimes that carried the death penalty. Romilly was also opposed to the confused code of law, the abuses of power, cruel and unusual punishments, and unnecessary laws that were all prevalent in his day; unfortunately, the arguments he put forth against these evils are scattered through pages devoted to personal reminiscences and political history.

His primary concern was with punishments. This was in his
opinion the crucial point of the whole program of law reform, for if punishment could be brought into proportion the other abuses would either disappear or become so rare as to cause no trouble. He was very interested in removing certain outmoded and unneeded laws, but this was secondary to his main efforts. Nor were his interests confined just to the home islands but encompassed the whole empire and all its inhabitants, both slave and free. Unlike Bentham, he had little interest in legal affairs outside of the empire and he was not inclined to compose model law codes for any and every nation.

At best, Romilly would have experienced great difficulties in his attempts to get his reform program through Parliament. However, the circumstances of the age weighed so heavily against him that he actually failed to accomplish more than a fragment of what he attempted. Fortunately, his supporters carried on after his death and brought his plans to a final success. One of his major problems was that the public and even Parliament were so absorbed by the wars that they were apathetic to his program. He also suffered from the legal influence of the French Revolution which turned many Englishmen against liberal or reform measures. The little interest in reform was limited to the removal of the civil disabilities of Dissenters and Catholic Emancipation. These two questions took up the first thirty years of the nineteenth century and extended back into the eighteenth. All of these militated against Romilly. At the beginning of his parliamentary career he
rarely had the opportunity to address more than a bare quorum in the House. As the years went by, he began to receive public attention and gather support; he finally acquired a few disciples.

Romilly's main premise was that "no principle seems to be more clear than this, that it is the certainty much more than the severity, of punishments which renders them effacious." He admits that this axiom is taken from the writings of Beccaria, the Italian legal reformer of the eighteenth century. Madden, Paley, and Bentham had all presented this principle to the English people (with different interpretations of course) so it was nothing new nor startling. Objectively this principle seems quite true, and has the obvious corollary that "no man would steal what he was sure he would not keep; no man would by a voluntary act, deprive himself of his liberty, though but for a few days." This then is the whole basis of his system of legal reform—light punishments invariably given rather than dreadful ones rarely used.

Romilly devoted a major part of his writings to considering the purpose of punishment. He came to the conclusion that it was threefold—to inflict terror on society; to prevent the criminal from again offending; and to reform the offender. This bears a

3Romilly, Speeches, I, 247.
striking similarity to Bentham's statements on the same subject but it is much more concise. One of Romilly's major complaints was that while capital punishment definitely accomplished the second of these principles it did not always accomplish the first, and of course it could not accomplish the third. It is impossible to reform a corpse. The first purpose of punishment was but rarely accomplished for the laws were so often unenforced that they lost all possibility of terror and instead inspired disgust. An example of this lack of enforcement can be found in the statute that made it a capital felony to steal to the value of 5s. from bleaching grounds in England or to the value of 10s. from those in Ireland. The law was actually a dead-letter because the owners of these yards would rarely prosecute. They would rather be robbed than risk sending a man to the gallows for such a trivial offence. When they did prosecute, they found witnesses would not testify and the courts would not convict. Since the criminal element of the two countries knew about this strange situation and took advantage of it, a law designed to terrify became an invitation to rob. There were many other laws of this same type.

Romilly charged that the penal system did nothing in the way of reform and this can be easily proved by considering the types of non-capital punishments then in vogue. The first alternative to the gallows was transportation, generally to Australia, some-

\[4\]Ibid., p. 326.
times to the West Indies, and usually for seven years. This system suffered from two defects. The first was that many individuals who were transported had served part of their sentence in England and therefore they had only a short time to serve in Australia and the other colonies; these persons were generally city-dwellers and needed long periods of agricultural training before they became useful in the colonies. By this time their sentence was up. The second difficulty was that, as long as more criminals were sent out, there was no opportunity for the freedmen to gain employment in the colonies. They had to return to England. Their poverty, however, made this difficult; and when they got back to the cities their farm training was valueless. As a result it became true that "criminals return to their native land far more desperate and depraved than when they left it." 5

The English prisons, considered from a standpoint of ability to reform, were as bad as, if not worse than, transportation. There were two types of prison—regular ones somewhat like the ones we have today in physical structure and the hulks. Most prisoners were sent to the hulks—old dismantled warships anchored in the Thames. They were not designed to accommodate the numbers they contained, even in the basic necessities of life—certainly not to provide room for the facilities necessary for moral and vocational guidance. The regular prisons were almost as bad. They

5Ibid., p. 252.
differed from the hulks only in that they were not so damp or overcrowded. In these places criminals were thrown with no regard to age, type of crime, or even mental stability, making them breeding places for the worst vices and training schools for the greatest crimes. Romilly, greatly concerned with such problems, made continuous pleas for prison reform.

His greatest attacks, however, were reserved for the excessive number of capital punishments provided for in the penal code. In his opinion English Law "may, indeed, be said to be written in blood..." He did not, as some of his opponents contended, think that the death penalty should be totally abolished; rather, it should be used against the criminal who would not submit to other forms of punishment, who escaped, or who, upon release, renewed his course of crime. Romilly also thought that certain crimes were so enormous as to deserve and necessitate the execution of the criminal but these, he held, were very few in number.

He contended that to make many crimes punishable by death was to make them all equal in the eyes of the law. There was thus no distinction between stealing 5s. and committing high treason except in the way the body would be treated after death. To that group which argued that laws were only intended to be enforced to their full extent in extreme cases and that in normal circumstan-

6Romilly, Life, I, 279.

7Ibid., p. 278.
ces the judges would use their discretionary powers to mitigate the sentence, he answered that while the judges were men of honesty and learning they could not be expected to be so well informed on all details of both the crime and the criminal as to be certain of inflicting the death penalty always and only when justified. Romilly thought that this discretionary use of death penalties was bad in that it encouraged criminals to speculate on the sentences that might be given for a crime they intended to commit. Some criminals had studied the matter with such care that they were able to pick the time and place for their law-breaking so that, if caught, they would be tried by a judge noted for his leniency. Conversely, first offenders were often executed simply because they were tried before what were called in the early days of the American West, "hanging judges." Another danger Romilly saw in this excessive number of death sentences was that many of the men condemned expected to be pardoned or at least to have their sentences commuted by the government. Therefore, the offender would ignore the judge's exhortation to prepare himself for death and would delude himself with the hope of delivery. Then, if among those actually ordered to be executed, he would become so despondent or so enraged that he would refuse the consolation of reli-

8Romilly, Observations, p. 60.
Romilly also thought that pardons were granted on the wrong grounds and that the consideration that moved the government should be who deserved mercy rather than who should be made an example.

Another of Romilly's complaints against the system of capital punishment came from the method in which executions were carried out. Prisoners were taken in groups and executed publicly amid scenes of gaiety and celebration. The crowds that turned out came to be amused by a spectacle of human suffering. They knew little and cared less why the men on the scaffold deserved death. Romilly thought that in some way the people should be made acquainted with the reasons for the execution, which would have a considerable effect in carrying out the principle that punishment should so terrify the populace as to make them afraid of committing crimes.

Another point about these public executions is that they offered magnificent opportunities for all the pick-pockets and prostitutes of the area.

Romilly also thought that in the overly large number of capital punishments there was a great danger to the whole framework of the English legal system. As we mentioned in the section on Blackstone, English juries had on occasion returned verdicts that

9 Romilly, Speeches, I, 242.
10 Romilly, Observations, pp. 31-32.
11 Ibid., p. 23.
were clearly opposed to the truth rather than risk sending a man
to his death for a comparatively minor crime. Blackstone had de-
fended this action as a "pious perjury." Romilly insisted that
any legal system which forced honest men to deny the truth and to
violate their oaths would end in destroying its own purposes. Romilly insisted that
any legal system which forced honest men to deny the truth and to
violate their oaths would end in destroying its own purposes. It is obvious that such a system instead of strengthening and re-
inforcing the moral structure of the nation, could only end in
destroying it by making men pit their emotions and sensibilities
against their ethical concepts. Romilly saw that the crisis was
fast approaching and that positive action had to be taken lest
there should be a moral disaster.

Romilly, unlike Bentham, never attempted to set up a definite
system of proportioning the punishment to the crime. All that he
did was to lay down a few principles and condemn certain types of
punishment; his most important principle would appear to be that
"the best punishments are those which inflict the least suffering
on the convict, but inspire the most terror in others." His
position was that the excessive severity of the English law had
long been tried and had had little success. It was obvious that
the number of crimes was increasing and that further brutality in
punishment was revolting to the sensibilities of the English peo-
ple. Therefore, the law needed to be reborn in mercy. He hoped

12Romilly, Speeches, II, 41.
13Ibid., I, 279.
that this rebirth would lead people to cooperate with the law enforcement agencies and to assume cheerfully the citizens' obligations to support the forces of law and order and to oppose all violations of the peace.¹⁴ If this were to be accomplished, Romilly thought, capital punishment "should never be resorted to but where the public security requires it."¹⁵ "What the public safety requires is that crimes should be prevented by the dread of death, whenever the dread of a lesser evil will not be efficacious. In no other way can the public safety require the death of any individual."¹⁶ Romilly, as we have seen, opposed both the terrible penal institutions of his day and the idea of transportation; solitary confinement he considered to be too terrible a punishment and one too easily abused.¹⁷

Romilly made only a few constructive suggestions concerning prison reform, since his main interests were to remove the abuses current in his day. He made vigorous attempts to end overcrowded conditions and enforced idleness, which were considered unavoidable by most of his generation. He wanted criminals to be segregated according to age, sex, and type of crime, to be given moral and vocational guidance while in prison and to be supervised for a

¹⁴Ibid., p. 354.
¹⁵Romilly, Observations, p. 31.
¹⁶Ibid., p. 34.
¹⁷Romilly, Speeches, I, 262-280.
time after their release. Several times he proposed in Commons that committees be set up to investigate prison conditions. He also attempted to have carried into effect some of the prison-reform law passed in the early years of the reign of George III and allowed to lie dormant ever since. He attacked severely the vicious penal practices used in the British Army. He particularly opposed the habit of excessive flogging. One can see him shuddering when he mentions sentences of 500 to 1000 lashes. Since no man could possibly endure a beating so vicious, the floggings were stretched out for days or weeks. A doctor would take the prisoner's pulse all during the flogging and stop it at the last possible moment. The prisoner would be allowed to rest until he regained his strength and then the process would be repeated. This barbaric spectacle so revolted Romilly that he termed it worse than death.18

He continually and strenuously opposed any attempts to deprive Englishmen of their civil rights. In 1810 a case arose concerning a Mr. Gale Jones, secretary of a small debating society, who had posted notices advertising a discussion that his society would conduct concerning the sincerity of the Parliamentary investigation of the military disaster at Walcheren. He was arrested by order of the Speaker of Commons and imprisoned for "gross

breeches of the privileges of this House,"19 and held without trial. The normal procedure in such cases was for the offender to present himself before the bar of Commons on his knees and beg the forgiveness of the House. Mr. Jones, evidently considering the exercise of freedom of speech to be no violation of the law, would not present himself. Instead, he chose to remain in prison. Romilly rose in the House to speak in his behalf. He reminded the members that justice is best tempered with mercy and went on to say that the mind cannot be forced. "The greatest tyranny—the most impotent tyranny, is that which attempts to influence the workings of the human intellect; it is an attempt which Justice contemns, and which power has seldom made but to its own defeat."20 Unfortunately, the motion for Jones' release was lost and Sir Francis Burdett, the member for Westminster who had originally made the motion, was committed to the Tower for attacking the Government's action in an article in Cobbett's Weekly Register.

Romilly also supported attempts to lift the disqualifications against Catholics. When running for Parliament from Bristol, where strong anti-Catholic feelings existed, he stated that he opposed the various religious laws "not on account of Catholics alone, but because I considered that it would naturally lead to the removal of all those disabilities under which dissenters of

20Romilly, Speeches, I, 230-231.
every description from the established church now labour."

This attitude had a great deal to do with his subsequent defeat in the election. Another of his projects, one that met with no success, was to compensate prisoners for the time they spent in jail prior to trial if they were not convicted.

On several occasions Romilly attributed his philosophy of legal reform to Bentham. On one occasion when a Mr. Frankland, a fellow member, challenged him with being too much taken with Bentham's philosophy, Romilly answered that "my errors have been traced to an author with whom I am, indeed, proud to be associated; . . . and in future times when we and our differences are alike forgotten in the grave, this acquisition to English philosophy will be claimed and its merits duly appreciated by this country."

On many occasions differences arose between the two. Most of these misunderstandings were caused by Bentham's lack of practical political experience. He thought Romilly was not pushing the reform program with sufficient vigor. Romilly was forced to maneuver in Commons in order that his reform measures would have the best chance of passing. At times Bentham became angry at Romilly and attacked him viciously. When the latter stood for Westminster in 1818, Bentham assailed him as an unfit candidate. Romilly, used

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21 Romilly, Life, III, 32.
22 Romilly, Speeches, I, 342.
to such attacks, passed it off by saying of Bentham "he is too honest in his politics to suffer them to be influenced by any considerations of private friendship." Romilly was right in his estimate of the situation, for as soon as the election was over Bentham made efforts to reestablish their friendship and Romilly accepted his overtures. This example is typical of what happened often. Romilly never let these outbursts of pique bother him.

Romilly often suffered the charge of being motivated by mistaken notions of humanity. He did not consider this to be a reproach, but he denied being moved primarily by sentiments of humanity. On one occasion he said that he was moved primarily to legal reform in order to get laws that would be more likely to suppress crime than the existing ones. He did, however, admit to having some humanitarian motives, quite noble ones. "I have long thought that it was the duty of every man, unmoved either by bad report or by good report, to use all the means which he possesses of advancing the well being of his fellow creatures, and I know not any mode by which I can so effectively advance that well being, as by endeavoring to improve the criminal laws of my country."25

23 Romilly, Life, III, 365.
24 Romilly, Speeches, I, 238.
25 Ibid., p. 318.
CHAPTER VII

ROMILLY'S REFORM MEASURES

Almost as soon as he had taken his seat in Commons, Romilly began his work toward reform. Of course, as a very junior member, he did not at once assume a position of leadership on the floor; rather he supported other reformers and tried to use his influence to help clear up some bad situations.

One of his first moves, within two months of his entering the House, was to try to persuade Grey, the First Lord of the Admiralty, to end cruel and unusual punishments in the navy. Grey neatly avoided the issue by contending that interference with the methods of discipline during time of war would be bad for the service.¹

In early May he spoke both in support of Wilberforce's bills to end the slave trade and in favor of removing some of the loopholes in the Bankruptcy Laws. This latter bill proved successful.

At the end of January, 1807, he moved a bill to make freehold estates assets for the payments of debts even though the debtor had died. The merchant classes supported the bill but the landed gentry formed a spirited opposition and the measure met defeat. He amended the bill by making it apply only to persons in trade

¹Romilly, Life, II, 134-135.
and in this way it passed without opposition. The gentry were afraid that if this bill were applied to them it would lead to the destruction of their class by ending primogeniture. It is difficult to see how they arrived at this conclusion.

In May of 1808, he moved to abolish the Elizabethan statutes defining picking pockets as a capital offence. At the same time he moved that those tried for felonies and acquitted should be compensated for the time spent in prison before trial. The first bill passed after much debate. Parliament was prorogued before the second could be attended to. The same session, it should be noted, passed a bill making oyster stealing a capital felony. Romilly opposed it but to no avail.

In the session of 1809 he did nothing of importance, but in 1810 he brought in several important bills which we shall briefly mention here and consider more fully in the chapter on opposition to reform. He moved that the death penalty be removed from such crimes as shoplifting to the value of 5s. and stealing to the value of 40s. in dwellings or in vessels in rivers. The bills would have changed the maximum sentence to transportation. The bills relating to houses and ships were defeated and that dealing with shops was passed in Commons but lost in Lords. At the time that he became involved in the Gale Jones case mentioned above, he moved that a committee be set up to inquire into the conditions of prisons. Although this was defeated, the House voted to consider the matter in the next session. He also supported bills to alle-
viate conditions in Ireland, and to eliminate bribery and corruption in Parliamentary elections.

Romilly took the unusual step in the session of 1811 of supporting a bill to make a new capital felony. It was to be imposed on those who took part in the slave trade or who outfitted ships for the slave trade. He again brought in his bills of the last session about stealing. In still another bill he proposed to remove the death penalty from the crime of stealing from bleaching yards. At the same time he presented a petition from the great majority of the yard owners in support of his bill. All of these passed Commons but only that respecting bleaching grounds passed Lords. He was successful in having a committee formed to investigate the effects of transportation and imprisonment in the hulks. This committee also was charged to study the possibility of building new prisons of a modern type. He achieved a notable victory when he blocked the passage of a bill that would in effect have made the inmates of poorhouses the slaves of the directors.

In the session of 1812 he obtained the passage of a bill to remove the death penalty inflicted on soldiers and sailors who begged in the streets without a pass from a magistrate or from their commanding officer. Further he supported a bill, which Parliament passed, to reform the military code by allowing courts martial to give prison terms where formerly they were restricted

\(^2\text{Ibid.}, p. 375.\)
to corporal punishment. He also secured a bill for the investigation of conditions in the jail at Lincoln.

In 1813, Romilly again proposed his shoplifting bill which once more passed the Commons, suffering defeat in the Lords. He also moved that the penalty of corruption of the blood be removed along with that part of the treason sentence that required the convict to be drawn and quartered. The former was lost in committee and the latter was never brought in for a third vote.

Again in 1814 he proposed removal of corruption of blood. It passed but was amended so that it did not apply to traitors, murderers, or accomplices to murder. The bill to modify the penalty for treason was passed in the guise of a bill abolishing drawing but permitting quartering. The only argument advanced in favor of retaining quartering was that it was the only means allowed to the Crown by the Constitution of ordering attainted traitors beheaded. It does not really make much difference to the traitor if he is beheaded after he is already dead. The barbarous act of desecrating a body can have a great effect upon the crowd. However, the supporters of quartering remained firm. In October he resigned as Chancellor of Durham because the pressures of his extensive legal practice and of his political career did not allow him to attend to the duties of Chancellor.

Again in 1815, Romilly brought in his bill to make freehold

3 Ibid., III, 100.
estates assets for the payment of simple contract debts, which passed Commons and failed of passage in the Lords. He moved that the Mutiny Bill be amended so that no court martial could order the infliction of more than one hundred lashes. The Judge Advocate, Manners Sutton, asked him to withdraw the motion until the military authorities could be consulted. He acquiesced, stating he would bring the matter up in the next session. A Mr. Bennett brought in the same bill later in the session, but Parliament was prorogued before it could be discussed. Very little was accomplished in this session due to Bonaparte's return and the Hundred Days. After Waterloo, Romilly went on a tour of the Continent.

In 1816, he again moved the freehold estates bill. This as usual passed Commons and was defeated in Lords. The shoplifting bill went through the same process. Upon its rejection by the Lords, the Dukes of Gloucester and Sussex entered a formal protest against its rejection. The support of the royal dukes may have resulted from the fact that during the debate a ten-year-old boy suffered the full rigors of this law. For most of the session he busied himself with inquiring into reports that the French Protestants were being persecuted by the Bourbons.

In 1817 he unsuccessfully moved the amendment of the act which made it a capital felony to be found after dark in possession of any equipment for catching or killing game, and he strongly opposed the bill for suspension of habeas corpus, but to no avail.
Again in 1818, Romilly brought in the shoplifting bill. He was supported by Robert Peel, then Secretary of State for Ireland, who promised that if this bill passed he would move a similar bill for Ireland. It should be noted that Peel also proposed the removal of the death penalty from the Irish pickpocketing bill. Both bills unfortunately were lost. Romilly also became interested in trying to protect the rights of slaves in the West Indies, although success in this endeavour proved slight.

On September 13, when Mrs. Romilly was taken ill, her husband became greatly worried. His diary from here on consists almost entirely of omissions and of one line statements. On October 29 his wife died. Completely overwrought, he lost his desire to live. In all probability his mind gave way for on November 2 he slashed his throat. He and his wife were buried on the tenth.

At first Romilly's record as a reformer does not look too impressive. He proposed only a handful of measures to ameliorate the criminal law; almost none of them passed. The few that did pass were so amended that they did not fulfill their intended purpose. But there are other factors to consider. This paper deals only with criminal law. It has mentioned only a few of the changes he made in the civil laws, and only one of his efforts to improve the poor laws. It takes no account of his attempts to reduce legal costs and to speed up court actions.

Also in estimating the success of Romilly as a reformer his influence on others through his writings and his actions must be
considered. This will be done in a later chapter.
CHAPTER VIII

OBJECTIONS TO THE REFORMS

In this section we shall consider in some detail the objections that were raised to three of Romilly's reform measures. The measures to be considered are those first introduced in the session of 1810. They were intended to reduce the penalty from death to transportation for a theft to the value of £40 in dwellings or in vessels on rivers and for shoplifting under 5s. These bills never passed. We will only consider the arguments raised against them in 1810. The reason for restricting the discussion to one group of bills and one session is simply that the same arguments were used against every bill Romilly introduced. Most of these opposition speeches were made in early May of 1810. We will study the arguments in full and then consider the answers that Romilly and his supporters gave to them.

Romilly introduced these bills and gave a long speech explaining his reasons for seeking their passage. Mr. Herbert, the member for Kerry, was the first to speak in opposition. He introduced himself as a friend of the old law and went on to state that this was a dangerous alteration of the legal structure. Further, its passage would be the equivalent of an admission that the laws of England were defective. He maintained that punishment is in-
flicted to prevent the commission of future crimes by the influence of example. That according to Mr. Herbert, was the original intention of these bills; they were never intended to be used in their full vigor, but that vigor was to be reserved as an instrument of terror. If the death penalty were removed that terror would go with it. Mr. Herbert went on to charge Romilly with intending to introduce into England such barbarous punishment as the knout, solitary confinement, and others used on the continent that were repugnant to the English people.¹

Mr. Davies Giddy was the next to oppose the bills. He repeated some of Herbert's arguments and went on to charge Romilly with being excessively moved by sentiments of humanity. He agreed that the laws were too severe but he considered the reforms as being great and violent changes. He held that the discretionary powers of the judges were sufficient to prevent grave injustice. His speech then wandered away from the topic as he described the dangers that would come from removing the death penalty for sheep-stealing, a measure that no one had proposed. He concluded his speech by saying that while he thought the death penalty should be removed from shoplifting he was opposed to its removal in the other bills.²

The next attack was delivered by Mr. Windham who denied that


²Ibid., pp. lvi-lviii.
the certainty of punishment was more important than the severity. He also contended that precise laws could not be arrived at nor could precise legal definitions be formed. He stated that the impossibility of arriving at precision required that the laws be widely written so that they could be interpreted to the various circumstances peculiar to the particular case. He mentioned that a club supposedly for the abolition of capital punishment was one of the main movers in the French Revolution. He stated that the vast majority of judges disapproved of these bills.3

The Attorney General rose to disagree with the arguments that excessive penalties caused injured parties not to prosecute and juries not to convict. He contended that he knew of no incidents of this sort. He defended the bills in question as having produced a great deal of good without doing a corresponding amount of evil. He feared that passage of these bills would undermine the whole English legal system.4

Mr. Frankland in his opposition to the bill echoed Mr. Windham's statement that large numbers of judges opposed the measures. He also held that judicial discretion was a safeguard against the rigors of the laws. He feared that any lessening in the severity of the laws would lead to widespread increases in crime and that the government, in order to restore peace, would have to resort to

3Ibid., pp. lviii-lxv.
4Ibid., pp. lxix-lxx.
the use of secret police and other tyrannical practices. He therefore opposed the bill as a step toward the destruction of English liberties. 5

Lord Ellenborough stated that repeal of this law would lead to a great frequency in shoplifting so that "the poor industrious tradesman, particularly if he dealt in certain articles, would, with all his precaution, sustain such weighty losses from time to time, that would eventually cause his bankruptcy." 6 Lord Ellenborough went on to paint an equally dim picture of the injury that these bills would do to Householders. "Repeal this law and see the contrast--no man can trust himself an hour out of doors, without the most alarming apprehensions, that on his return, every vestige of his property will be swept off by the hardened robber." 7 He feared that these laws were but the forerunners of a whole program that would destroy the English law. While admitting that no amount of property had a value equal to that of a human life, he still held that this law was good because of the terror it inspired. He agreed with Mr. Windham's doubts that any workable law could be drawn up. 8

The Lord Chancellor stated his opinion of Romilly in these

5 Ibid., p. lxxiii.
6 Ibid., p. lxxxviii.
7 Ibid., p. cxix.
8 Ibid., p. lxxxvii.
words: "If my opinion could be warped or influenced by circumstances of personal consideration, the learned and honorable gentleman who introduced this Bill in the other house of parliament is the individual of all others who would have the greatest weight with me, ... ." He went on to oppose the bills on the grounds that a similar reform of the pickpocketing law had led to a great increase in that crime. He agreed that in many instances the injured parties would not prosecute but he attributed this more to parsimony than humanity.

Most of the objections to these measures were along the same lines. One point that was particularly raised—every speaker had mentioned it—was that these bills were of a speculative nature and that they would not work in practice. Lord Lauderdale met that charge by delving into the history of the law which these bills were intended to amend, showing that they were originally speculative as it was never intended that they be put into practice. He went on to say that since the proposed bills were intended to be used they were actually returning the law from a speculative to a practical one.10

Lord Holland who had introduced the bills into Lords met Lord Ellenborough's fearful pictures with a deft insult. He spoke of how he had been worried to find Ellenborough opposing him.

9Ibid., p. cix.

10Ibid., pp. cv-cvi.
"Certainly until I had heard what has fallen from him, I felt a degree of diffidence as to the soundness of my own judgement, which has however been completely removed by the manner in which he has treated the subject."¹¹ That was about all the answer that Ellenborough's emotional rhetoric deserved.

Sir John Newport attacked Mr. Herbert's arguments about the relative values of certainty and severity. This subject has been touched on so often in this paper that it requires no discussion here. He stated that the supposed terror that was intended to be present in the English law was lost due to the fact that everyone expected the judges to be lenient. He went on to state that since the letter of the law was at variance with the spirit of the people, the law obviously was in need of change.¹²

The contention of the Attorney General and the Lord Chancellor that lack of prosecution was not caused by fear of causing a death for a small grievance was met by the Master of the Rolls and the Earl of Suffolk. The Master gave the arguments that have been given earlier in this paper and went on to tell about a friend of his who out of humanity had refused to prosecute a man charged with chopping down trees in an orchard. The Master stated that this dislike of prosecution was known to many criminals and they often acted in the expectation that they would not be prosecuted.

¹¹Ibid., p. xciv.

¹²Ibid., pp. liii-liv.
He further stated that jurors would not convict in many cases, but he offered no proofs of this. The Earl of Suffolk recounted his own experiences when faced with the problem of what to do with a trusted servant who had taken advantage of his absence to steal a large quantity of his silver and several other valuable items. "I was constrained to turn loose upon the public an individual certainly deserving of punishment, because the law of the land gave me no opportunity of visiting her with a castigation short of death..." 14

On the Attorney General's statement that he did not know of any juries that had been swayed by the death penalty, we can consider that argument refuted by the two cases mentioned on page 15 of this essay.

Charges such as Mr. Herbert's that Romilly wanted to introduce barbaric punishments into England can be set down simply as libels. This same statement can be applied to Mr. Windham's remarks on the French Revolution. The charge that Romilly was excessively moved by his feelings of humanity has already been answered. 15

The only charges that were not answered in the course of the debate were that the judges opposed the bills and that a similar

13 Ibid., pp. lxv-lxix.
14 Ibid., p. cv.
15 Supra, p. 73.
bill had brought about an increase in the number of pickpockets. We shall now see what Romilly had to say about these charges.

He used the argument that pickpocketing had increased as an argument for the bills. He pointed out that all the Lord Chancellor could prove was that the number of prosecutions had increased and that this was a proof of the efficiency of the law as it was amended. It indicated that people were no longer intimidated by the fear of sending a fellow creature to the gallows. This was exactly what he had contended when he proposed the bill. In describing the fact that many more prosecutions are preferred he states "this is the very fact which these men, blinded by their gross prejudices, put forward as proof that the measure has been unsuccessful. It is, on the contrary, the strongest proof of its success; ..."16

The only objection raised to the statement that so many judges opposed the bills was that no evidence of this was produced by the men proffering it as an argument.

Some of the arguments were good; others were childish; all of them could be easily refuted. Yet they were enough when coupled with apathy and the anti-liberal sentiments of the times to stop a worthy program of law reform. The best argument for the reforms could not be advanced at the time, but looking at the situation from our historical perspective we can see that the amelioration

16Romilly, Life, II, 326-327.
of the laws when it did come produced none of the evils its opponents predicted. Rather, it produced much good; more than Romilly could have dreamed.
CHAPTER IX

THE SUCCESS OF THE REFORM PROGRAM

Even though Romilly failed in his attempts to reform the criminal law, after his death the goal he had sought for so many years was attained by others. Let us now look at the two men, Sir James Mackintosh and Sir Robert Peel, who did the most to put Romilly's plans into operation.

Sir James Mackintosh would appear the most unlikely person ever to be the successful proponent of anything. Born near Inverness in October of 1765, he was the son of an army officer who was the owner of a small estate in the vicinity. He received his early education at nearby schools and later attended King's College at Aberdeen. In his college days his habits earned him the nickname of Poet. He was interested in philosophy and was the co-founder of a debating society. In 1784, he went to Edinburgh to study medicine and he graduated in 1787. The following year he moved to London where he lived with a relative. Becoming interested in politics he joined several discussion groups. He paid little attention to business and often got into financial difficulties. His money problems were not solved when on his father's death he sold the family estate. In 1787, he married Catherine Stuart the sister of Daniel Stuart, a newspaperman and eventually
editor of the *Morning Post* and the *Courier*. His wife tried to make him attend to business and for a time she appeared to be successful. He even started writing a book on insanity, which was then arousing a great deal of curiosity due to the unfortunate condition of George III. But Mackintosh could not keep out of politics and he began to devote his time to campaigning rather than to his patients.

In 1790, he visited Belgium, where he developed a fair ability to speak French. On his return he began to write for the *Oracle*. The money received from his articles was his primary source of support. Angered by Burke's *Reflections on the French Revolution*, he answered it with the book *Vindiciæ Gallicæ*, which was a literary and philosophical work, less liberal than Tom Paine's famous answer to Burke.

Mackintosh resolved to take up the study of law and was called to the bar at Lincoln's in 1795. He had evidently found his field, for by 1798 he was teaching a course at Lincoln's Inn on *The Law of Nature and Nations*. In 1796 he met Burke and became his devoted friend and follower, even dropping his old opinions on the Revolution.

He began to plead briefs before parliamentary committees, particularly in cases of constitutional and international law. He joined the Norfolk circuit. In the spring of 1803 he gave up his practice to accept the post of Recorder of Bombay, a post that carried knighthood with it. In February of 1804 he arrived in
India and in 1806 he was promoted to judge in the court of vice-
admiralty in Bombay. He read widely during the time he spent in
India and seemed to acquire a superficial knowledge of many sub-
jects. The climate had a bad effect on his health and that of
his younger children. He was forced to send his wife and children
home in February, 1810. He remained for a while because he need-
ed the money, but in December, 1811, he had to resign the post or
suffer damaging illness.

In April of 1812 he arrived in England and was almost im-
mediately offered a seat in Commons which he refused because it
required a promise that he would resist Catholic Emancipation. He
was elected for Nairn in 1813. In parliament he supported Romilly
and other reformers in their attempts to get liberal legislation.
He retired for a time from active politics, devoting himself to
study and to the writing of history. About the time of Romilly's
death he became more active and pushed for legal reform. He car-
rried on Romilly's struggle until Peel took up the cause. The rest
of his life was devoted to studying, lecturing, and writing. Be-
sides his most important historical work, his History of the Revo-
lution, which was greeted with high praise, he brought out several
other works on the Stuarts. In 1832 he died of a throat inflama-
tion.

Mackintosh first came into contact with Romilly through a
dinner club known as the King of Clubs, where they were both mem-
bers. They became fast friends before Mackintosh left for India.
Mackintosh thought highly of Romilly and describes his moral character, "which I think stands higher than that of any other conspicuous Englishman now alive. Probity, independence, humanity, and liberality breathe through every word; ..."¹ On Romilly's side the friendship is not as clearly marked. He makes only slight reference to Mackintosh in any of his writings. When Mackintosh returned to England he spent a good deal of his time in working for the support of Romilly's program. On Romilly's death he took the leadership. He admitted his debt to Romilly in a speech to the House on the subject of criminal law. "It is impossible to advert to the necessity of reforming this part of the law, without calling to mind the efforts of that highly distinguished and universally lamented individual, by whom the attention of Parliament was so often roused to the subject of our penal code."² He goes on to eulogize Romilly at length. There is no doubt to whom Mackintosh owed the inspiration that led him to this work.

Sir Robert Peel was a very different individual. He was born in 1788, the son of a textile manufacturer. Peel's father destined him from birth for a political life. He was sent to school first at Bury and later at Harrow, both Tory strongholds. In 1806

¹Sir James Mackintosh, Memoirs of the Life of Sir James Mackintosh, ed. by his son (London, 1836), II, 34.
²Sir James Mackintosh, Miscellaneous Works, III, 376.
he entered Oxford where he was the first student ever to graduate first in both classics and mathematics. In 1809 a seat was procured for him representing Cashel in Ireland.

During his first year he did nothing notable. In his second year he was chosen to second the Speech from the Throne, an honor generally accorded to younger members of the majority party who were expected to rise. Lord Liverpool chose him to be his private secretary and in this position he attracted the king's attention. In 1811, he was promoted to Undersecretary for the Colonies. He held the post of Chief Secretary for Ireland from 1812 to 1818, where he is sometimes credited with having established the first efficient police force, although this claim is disputed by the supporters of Sir Arthur Wellesley.

Peel pressed for schools for all Irish children regardless of religious beliefs, which he insisted should be intended for education rather than conversion. On the other hand, he was resistant to Catholic Emancipation. He became involved in a ridiculous duel with O'Connell, which was never fought although it attracted a good deal of attention. He resigned his Irish post in 1818 and took a long vacation in Scotland. On his return he became interested in the movement to put the currency of England on a sound footing and end the inflation caused by the late wars. Unfortunately, the resumption of cash redemption of paper notes, Peel's great contribution to financial reform, was in part responsible for the disturbed state of English finances for the next decade.
At the death of King George III, Peel resigned from office and stayed out of public life until George IV and his queen had finished publicly airing their scandals. This was a wise move and kept Peel from having to commit himself on either side of this heated but ludicrous affair. In 1820 he married Julia Floyd, the daughter of a distinguished colonial official. In January of 1822, he was offered the Home Office and accepted. It was in this position that he undertook to accomplish Romilly's reform on a scale never before dreamed of.

The whole attitude of the nation toward criminal law reform had changed since Romilly's death. He had made the people conscious of the need for reform and they began to press the government for it. On January 25, 1819, the Corporation of London presented a petition to Parliament requesting an amelioration of the criminal laws. They were so severe that "Injured persons refuse to prosecute, because they cannot perform a duty which is repugnant to their natures, by being instrumental in the infliction of severity contrary to their ideas of adequate retribution..."\(^3\) They went on to say that juries would not convict and to give so many of Romilly's oft repeated arguments that it sounds like one of his speeches. This was the attitude of business interests whom the severe laws were presumably to protect. No one could accuse these hard headed men of the City of being moved by senti-

\(^3\)Hansard, Debates, XXXIX, 82-83.
ment; they were realists in the extreme. They understood the danger of the laws and demanded change. The Quakers and some of the municipal corporations also entered petitions about the same subject.

Mackintosh took advantage of these petitions to move for the appointment of a select committee to consider the criminal laws punishable by death. There was some opposition but the motion passed by a small majority against the wishes of the Cabinet. Mackintosh was appointed chairman of the committee.

Nothing much was accomplished and the reform program was allowed to lag for several years. On May 21, 1823, Mackintosh moved a whole series of bills for the abolition of capital punishment. They include all of Romilly's old bills on stealing from shops, houses, and boats as well as several new ones. Among the new measures he advocated were abolishing the death penalty for all crimes committed while masked except arson and shooting, for forgery, for the stealing of cattle, sheep, and horses, and for those crimes covered by the Marriage Act.

Peel took an odd position in this matter; he opposed the particular measures but admitted their principles. He pledged himself to bring in measures for the amelioration of the laws.4 Mackintosh's measure was lost primarily due to the government's opposition.

4Ibid., second series, IX, 429.
Faithful to his word, Peel introduced into the house in that session bills for the wholesale reformation of the criminal law. These bills removed nearly one hundred crimes from capital punishment and empowered the courts to grant mercy in all other capital cases other than murder if the criminal appear to be deserving. The bills also did away with the indignities formerly practiced on the bodies of suicides. In 1825 he straightened out a curious confusion in the laws regulating pardons. In 1826 he managed to reform the procedure followed in criminal cases. In 1828, he put through a bill to consolidate parts of the criminal law so as to bring into existence a true criminal code. All of these measures met with only slight opposition. Romilly would never have believed that so much could be accomplished so quickly.

What were the reasons for Peel's success where others had failed? In part it can be attributed to the work done by Bentham, Romilly, and Mackintosh; in part to the change in public opinion noted above. Most of the credit must go to Peel himself. He was both a trained politician who knew just how far to go and when to go, and an organizer and administrator who was able to draw up a huge reform measure in a short time. He was also a man of daring. Where his predecessors had been content to try to put through one or two measures, Peel had the audacity to try for a wholesale reform. All of these factors contributed to his success.

We have seen that Mackintosh openly admitted his debt to Romilly, which Peel never did. The reason why has puzzled many of
his biographers. W. Cooke Taylor comments that: "The lamented Sir Samuel Romilly had identified his memory with all efforts for the improvement of the criminal law; Sir James Mackintosh had been recognized as his legitimate successor in the advocacy of Legal Reforms; and hence there was a feeling that Mr. Peel was attempting to grasp the laurels which others had won." Justin McCarthy feels that Peel gave Romilly enough acknowledgement by taking up his program and carrying it to completion.

Mr. Peel was in an ambiguous position as far as giving credit went. As a statesman he saw the need for reform. As a politician he did not care to aid the other party by praising its members or admitting that he was carrying out their program. He took the simple way; he reformed and did not worry about credit. It did not really matter so long as the job was done.

6Justin McCarthy, Sir Robert Peel (New York, 1891), pp. 89-90.
CHAPTER X

CONCLUSION

This paper has no real conclusion, for Romilly's struggle is still going on. Laws even in the most civilized nations still have some taints of barbarism. No one can deny that the English legal system is still very confusing and that one must be an initiate of the legal profession to understand and use it. But Romilly must not be marked down as a failure, for in the end his practical goals were reached and, more important, he achieved the true goal of all reformers—he got people to think.

Unfortunately, Romilly is the forgotten man of the legal reform. Very few people know anything about him. As a philosopher he is overshadowed by Bentham and as an organizer he is dwarfed by Peel. His role in the reform was an important but little noted one. He translated the philosophy of Bentham into the practice of Peel. He was the intermediary between these two vastly different men. Yet he was more than that. He was also the publicist of reform and, while we do not normally think of him in this aspect, the writers of his own age could not separate his name from the cause of legal reform.

He would not mind our ignoring him, for like all men devoted to a cause he was much more interested in the success of that
cause than he was in any personal success. We will not attempt to state to what degree he personally was responsible for this success. That would be pure guesswork. All that can positively be stated is that he was greatly influenced by the misery he saw in his professional career. He was a humanitarian, and the plight of the unfortunates he daily saw in court moved him deeply. He could not accept the legal philosophies propounded by Madden and Paley; these he attacked bitterly. He saw in Bentham's work the answer to the problem that so deeply hurt him. He accepted this solution and tried to put it into practice. He failed but in failure he inspired others to carry on. They were not necessarily motivated by the same things as he, but they sought the same goal and they achieved it.
BIBLIOGRAPHY

I. PRIMARY SOURCES


-----. *The Speeches of Sir Samuel Romilly in the House of Commons.* Edited by his sons. London, 1820.


II. SECONDARY SOURCES


APPROVAL SHEET

The thesis submitted by Martin Francis Conley has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

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Date: May 16, 1957

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