

THE ABOLITION CLASSICS

The texts that built the case against the death penalty

V. 7

OBSERVATIONS
ON THE CRIMINAL
LAW OF ENGLAND

A Modern Adaptation

SIR SAMUEL ROMILLY

Edited and modernized by
JEFF HOOD

COMPLICIT PRESS

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C O M P L I C I T P R E S S

*The same crime, under the same laws, could have produced
either result. This is not justice. It is lottery.*

ROMILLY

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FOREWORD

There is a question buried inside Romilly's argument that I have been turning over for years, and it goes like this: what does it mean to have a law that everyone knows will not be enforced?

England in 1810 had more capital offenses on its statute books than any other country in the world. Stealing five shillings from a shop was, technically, a hanging offense. So was stealing forty shillings from a dwelling. So were a dozen other acts of petty theft and minor property crime. These laws were on the books. They were real. They had been passed by Parliament with the intention—always, Romilly argues, with the intention—that they would be enforced.

They were not enforced. By 1810, the execution rate for property crimes was something like one in twenty of those convicted, and for certain specific offenses—shoplifting—it was essentially zero. The judges, the juries, the prosecuting victims, and the king's pardoning power had conspired to make England's official criminal law into a kind of fiction: a set of threats so severe that no one would actually carry them out.

Romilly's argument is that this state of affairs is not a humane middle ground between severity and leniency. It is something much worse: an arbitrary, unknowable, and ultimately unjust system in which the same crime produces death for one person and freedom for another, depending on which judge hears the case, which jurors are selected, whether the victim chooses to prosecute, and whether the king's advisors happen to be in a merciful mood. The law that supposedly governs these decisions is not written anywhere. It exists only in the unrecorded and unchallenged discretion of individual officials, exercised in secret and unaccountable to anyone.

I think about this argument in relation to the American death penalty, and the parallels are uncomfortable. The American system does not have anything like England's 1810 statute books — we do not execute people for shoplifting. But we do have a system of capital punishment whose application is, by every serious study, arbitrary. Whether a person is sentenced to death in America depends less on the nature of the crime than on the county where it was committed, the race of the victim, the quality of the defense attorney, and a dozen other factors that have nothing to do with the gravity of the offense. Two people who commit equivalent crimes, in equivalent circumstances, with equivalent culpability, will receive radically different sentences based on which courthouse they stand in. This is not justice. This is the English system Romilly described, translated into American terms.

Romilly's specific argument — against the use of discretion as a substitute for clear law — is the most powerful part of his treatise. He takes aim at William Paley, the influential moral philosopher who had defended the English system on the grounds that it was, in effect, ingenious: you create a large net of capital offenses, and then you use discretion to pull out only the ones that really deserve death. The net catches everything; the hand selects carefully. The result, Paley argued, is a system that combines maximum deterrent effect with maximum humane flexibility.

Romilly destroys this argument with admirable precision. If the selection is left to discretion, then the potential criminal cannot know in advance whether his act will result in death or freedom. If he cannot know this, the deterrent effect is undermined — you cannot be deterred by a threat whose application you cannot predict. If the deterrent effect is undermined, the large net of capital offenses is serving no purpose. And if the net serves no purpose except to give officials unchecked power over life and death, it is not ingenious — it is tyrannical.

But the philosophical point Romilly is making goes deeper than the mechanics of deterrence. He is arguing that the rule of law is not compatible with the rule of discretion. A system in which punishment depends not on written law but on the unwritten preferences of officials is not a legal system at all, in the philosophically meaningful sense. It is a system of power dressed in the language of law. The criminal stands before the court not to have his guilt or innocence determined by reference to a known standard, but to have his fate decided by processes he cannot examine, by criteria he cannot know, through deliberations he cannot challenge.

This is a philosophical claim about what law is and what it is for. Law, on Romilly's implicit account, must be public, must be known in advance, and must be applied consistently. A rule that is applied inconsistently, in secret, based on unannounced criteria, is not a rule — it is a preference. And preferences, unlike rules, cannot be just, because justice requires treating like cases alike, and you cannot treat like cases alike without a public standard for what makes cases alike.

The American death penalty fails this test as completely as England's 1810 system. We have the written laws, the trials, the appeals, the due process protections. But beneath all that procedural machinery, the actual decision of who lives and who dies is made by processes that cannot be reduced to any consistent standard, that vary enormously by geography and by the identities of the parties, and that leave identical cases with radically different outcomes. This is Paley's "net" in American form: we have capital statutes for serious crimes, and we apply them to a small, arbitrary subset of those who commit those crimes, by a selection process no one can articulate or defend.

Romilly wrote at a moment when England was beginning to reconsider its criminal law, and when the accumulated weight of absurdity had made the existing system untenable. He was part of a reform movement that eventually transformed English criminal law — not immediately, not completely, but significantly and permanently. The number of capital offenses in England fell from

FOREWORD

over two hundred to a handful over the following decades, and eventually to none.

That transformation happened because people like Romilly were willing to stand up in Parliament and say: this system is not what it pretends to be. It is not humane flexibility. It is not enlightened discretion. It is arbitrary power, and arbitrary power is incompatible with justice, regardless of how carefully it is wrapped in the language of law.

That is the argument this book makes. It is as relevant today as it was in 1810.

JEFF HOOD

North Little Rock, 2026

A NOTE ON THIS EDITION

THE AUTHOR

Sir Samuel Romilly (1757–1818) was one of the most distinguished lawyers and legal reformers of the early nineteenth century. The son of a jeweler of Huguenot descent, he was called to the bar in 1783 and rose quickly to prominence in Chancery. He was appointed Solicitor General in 1806 and served in that office until 1807, when the change of government ended his tenure. Throughout his career he combined a distinguished legal practice with an active legislative effort to reform England's criminal law. He succeeded in repealing several capital statutes, including the laws against soldiers and sailors returning from transportation and the law against pickpocketing. His efforts were often frustrated by the House of Lords, but the principles he established shaped the more sweeping reform that followed his death. He died in 1818, three days after his wife Anne, in a period of severe grief from which his friends feared he would not recover. He was sixty years old.

Romilly was personally acquainted with many of the leading figures of the Enlightenment, including Jeremy Bentham, whose influence on penal reform is evident throughout the *Observations*, and the Genevan philosopher Dumont, who had edited Bentham's work and with whom Romilly maintained a long correspondence. The *Observations* belong to the tradition of Enlightenment legal criticism that includes Beccaria's *Essay on Crimes and Punishments* (1764), which Romilly had read.

THE TEXT

The *Observations on the Criminal Law of England* was published in 1810, timed to appear before Parliament voted on the bills Romilly had introduced to repeal three specific capital statutes: the acts making it a hanging offense to steal five shillings privately from a shop, to steal forty shillings from a dwelling-house, or to steal goods of stated values from ships on navigable rivers. The *Observations* contains the substance of the speech he delivered in the House of Commons in moving these bills, considerably expanded, with additional arguments and with an extended refutation of William Paley's philosophical defense of the existing system.

Romilly succeeded in the House of Commons but failed in the House of Lords. The bills were defeated, as similar bills would be defeated for years to come. He continued to introduce reform legislation until his death.

WILLIAM PALEY

William Paley (1743–1805) was an English moral philosopher and theologian whose *Principles of Moral and Political Philosophy* (1785) had achieved great popularity and whose defense of the existing English criminal system Romilly undertakes to refute at length. Paley's argument — that a large body of capital statutes, combined with wide discretion in their enforcement, produced a system both flexible and effective — was the most intellectually serious defense of the status quo available. Romilly's point-by-point refutation of it is the philosophical center of this volume.

MODERNIZATION

The prose of the *Observations* reflects the conventions of early nineteenth-century parliamentary discourse: long, carefully balanced sentences; elaborate qualification; extensive quotation and direct refutation. This edition modernizes that prose throughout. Sentence

structures have been simplified, archaic constructions updated, and the text organized into numbered chapters with descriptive headings. The chapter divisions are editorial; Romilly's original is a continuous argument organized around specific topics, and the headings in this edition indicate the logical structure of that argument rather than creating new divisions.

What has not been changed: Romilly's arguments. Every position he takes, every example he adduces, every passage from Paley that he quotes and answers, every statistical observation he makes — all are preserved exactly as he set them down. The quotations from Paley are rendered as Romilly quoted them, with minor modernization of spelling.

THE ARRANGEMENT OF THIS EDITION

Romilly's original is a continuous argument, not a book of chapters. The ten numbered chapters here are editorial, and so are their titles. Four further passages stand apart from the main line of the argument: two extended notes, on the statistical tables and on the Paley passage, and two sections that take up the particular bills and the standing of the law itself. These are gathered at the end as Supplementary Observations rather than forced into the numbered sequence.

Collation. The figures in this volume have been checked against Romilly's speech of 9 February 1810 as recorded in Hansard, and corrected where the modernization had departed from them. Readers using this edition for scholarly work should still collate against the first edition of 1810.

OBSERVATIONS ON THE
CRIMINAL LAW OF ENGLAND

Sir Samuel Romilly, 1810

ADVERTISEMENT

The following Observations contain the substance of a speech delivered in the House of Commons on the 9th of February, 1810, on moving for leave to bring in bills to repeal the Acts of 10 and 11 William III, 12 Anne, and 24 George II, which make the crimes of stealing privately from a shop goods of the value of five shillings, or stealing from a dwelling-house or on board a vessel in a navigable river property of the value of forty shillings, capital felonies. Some arguments are added here that were suppressed on that occasion, so that the patience of the House might not be put to too severe a trial. The attempt to refute Dr. Paley in particular is here considerably enlarged.

The arrangement of these observations is certainly very defective; they contain repetitions that might have been avoided, and inaccuracies of style that might have been corrected, if the Author's occupations had allowed him to render this pamphlet as little unworthy of being offered to the public as he could have wished. But to be useful, it was necessary that this publication should appear before the fate of the bills now depending in Parliament was decided; and his only object in publishing it is that it may be useful.

CHAPTER I

THE STATE OF ENGLISH CRIMINAL LAW

There is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England. These sanguinary statutes, however, are not carried into execution.

For some time past, the sentence of death has not been executed on more than a sixth part of all the persons on whom it has been pronounced — even taking into the calculation crimes the most atrocious and the most dangerous to society: murders, rapes, the burning of houses, coining, forgeries, and attempts to commit murder. If we exclude these from our consideration, we shall find that the proportion of those executed to those convicted is perhaps as one to twenty. And if we proceed still further — laying out of account burglaries, highway robberies, horse-stealing, sheep-stealing, and returning from transportation — and confine our observations to those larcenies unaccompanied by any circumstance of aggravation for which a capital punishment is appointed by law, such as stealing privately in shops, and stealing in dwelling-houses and on board ships property of the value mentioned in the statutes, we shall find the proportion of those executed reduced very far indeed below even one to twenty.

This mode of administering justice is supposed by some persons to be a regular, matured, and well-designed system. They imagine that the state of things we see existing is exactly what was originally intended: that laws have been enacted that were never meant to be

regularly enforced, but were to stand as objects of terror in the statute-book, to be called into action only occasionally, and under extraordinary circumstances, at the discretion of the judges. Such being supposed to be our criminal system, it is not surprising that ingenious men have been found to defend and applaud it.

Nothing, however, can be more erroneous than this notion. Whether the practice which now prevails be right or wrong, whether beneficial or injurious to the community, it is certain that it is the effect not of design, but of that change which has slowly taken place in the manners and character of the nation — a change now so repugnant to the spirit of these laws that it has become impossible to carry them into execution.

CHAPTER II

THE SYSTEM WAS NEVER INTENTIONAL

There probably never was a law made in this country that the legislature which passed it did not intend should be strictly enforced. Even the Act of Queen Elizabeth, which made it a capital offense for any person above the age of fourteen to be found associating for a month with persons calling themselves Egyptians — the most barbarous statute, perhaps, that ever disgraced our criminal code — was executed down to the reign of King Charles I, and Lord Hale mentions thirteen persons having been executed upon it at one assizes in his time. It is only in modern times that this relaxation of the law has taken place, and only in the course of the present reign that it has taken place to any considerable degree.

If we look back to remote times, there is reason to believe that the laws were very rigidly executed. The materials from which we can form any judgment on this subject are extremely scanty — for in this, as in other countries, historians occupied with recording the actions of princes, the events of wars, and the negotiations of treaties have seldom deigned to notice those facts from which the state of the morals of the people, and the degree of happiness that a nation has enjoyed at any particular period, can best be collected.

From what we can gather, however, it appears that in the reign of Queen Elizabeth about three hundred persons were executed annually on average. The statistical tables from more recent periods tell a very different story. In the years around 1800, of those convicted at the Old Bailey, roughly one in nine was executed. In the years 1802 to 1804,

the ratio was approximately one in ten. For property crimes specifically — those which are the subject of the bills I have introduced — the proportion is far smaller still.

There is no instance in which this alteration in the mode of administering the law has been more remarkable than in those of privately stealing from a shop goods of the value of five shillings, which is punishable with death by statute. Of the persons committed for trial in London and Middlesex within the last seven years for stealing in a dwelling-house, 1,802 in number, eight have been executed. Of those charged with privately stealing in a shop I cannot learn that one has suffered death in all that time. The law, as written, says they should hang. The practice, as administered, says they should go free or be transported. These two things cannot both be right.

CHAPTER III

THE EVIDENCE OF HISTORY

It deserves particular attention that, at those times when our criminal laws were more strictly enforced, crimes were not more frequent than they are now — and there is strong reason to believe they were less frequent. This observation strikes at the root of the argument that the present system is both necessary and effective. If England managed with strict enforcement in past centuries and maintained social order, the argument that terror must be held in reserve cannot be sustained.

In those years when the death sentence was carried into execution in a much larger proportion of cases, and when stealing five shillings privately from a shop was treated as the law directed — as a capital felony for which the penalty would actually be paid — juries still convicted. Witnesses still came forward. Prosecutors still proceeded. Society functioned. It is only when the law became both severe and unenforced that the current incoherence arose.

The history of jury behavior under the present system is instructive on another point. Juries have long understood that a verdict of guilty on a shoplifting charge would not result in execution. They have therefore used the one tool available to them — the valuation of the goods stolen — to bring the offense below the capital threshold. Cases are on record in which a man indicted for privately stealing forty-three dozen pairs of stockings worth more than three pounds was found by a jury to have stolen goods worth thirty-nine shillings — a valuation so plainly absurd that it can only be explained by the jury's determination not to be the instrument of a sentence they regarded as disproportionate and unjust.

This behavior on the part of juries is not corruption. It is conscience. It is the response of ordinary people confronted with a law so severe, and applied so arbitrarily, that compliance with it would make them complicit in what they recognize as injustice. But it produces its own serious consequences, which I shall address in turn.

CHAPTER IV

THE ARBITRARINESS OF DISCRET
ION

The system that prevails in the administration of our criminal law subjects the fate of every accused person to a degree of uncertainty and dependence upon accident that cannot be reconciled with any principle of justice. Not only do different judges act upon different principles, but the same judge, under the same circumstances, will act differently at different times.

Consider what the present system requires of those who contemplate crime. If a man is weighing the risk of stealing from a shop, what standard can he apply? He cannot know whether he will be prosecuted. He cannot know whether, if prosecuted, he will be convicted. He cannot know whether, if convicted, he will be hanged, transported, or discharged. He knows that the written law says death. He knows that death is rarely inflicted. He does not know, and cannot know, whether he will be among the rare exceptions. He must speculate upon which judge will hear his case, upon the mood of the jury, upon the inclination of the prosecutor, upon the state of public sentiment at the moment of his trial.

This uncertainty does not deter. Dr. Paley would have us believe that the dread and danger of death hanging over crimes committed by many is a sufficient deterrent even if death falls upon very few. But this argument requires that the potential criminal be ignorant of the odds. He is not. The man who lives in the neighborhood of the Old Bailey, who sees his neighbors convicted and transported but not hanged, who knows that the execution of a man for shoplifting is now

a matter of remark and surprise — that man has learned the true probability of the law's application to him. And the probability, as experience has shown him, is approximately zero.

The randomness of the system has a further consequence: it creates obvious distinctions between the rich and the poor, the connected and the unprotected, in a matter upon which all agree there should be none. A wealthy defendant can retain counsel, produce favorable witnesses, and present his case in the most advantageous light. A poor defendant, represented by no one, produces no witnesses, and leaves the court knowing nothing of what has been said about him in his absence. If the discretion to show mercy turns, as it inevitably must, on the impressiveness of the defense, then the exercise of that discretion will consistently favor the wealthy over the poor, the articulate over the inarticulate, the connected over the friendless.

Not a great many years ago, on the Norfolk circuit, a larceny was committed by two men in a poultry yard. Only one of them was apprehended and tried. He was convicted and sentenced to death. The judge, upon reflection, found circumstances in his case that seemed to justify a recommendation to mercy, and he was eventually transported. Whether the other man, had he been apprehended, would have been hanged or transported, no one can say. The same crime, under the same laws, could have produced either result. This is not justice. It is lottery.

CHAPTER V

AGAINST DR. PALEY: THE SYSTEM DEFENDED

With all the objections to this mode of administering justice, it has long prevailed, and consequently it has many defenders. The most distinguished of them, and the one whose arguments most deserve an answer, is Dr. William Paley.

Dr. Paley sets out by observing that there are two methods of administering penal justice. The first assigns capital punishment to few offenses and inflicts it invariably. The second assigns capital punishment to many kinds of offenses but inflicts it only upon a few examples of each kind. The latter of these two methods, he says, has been long adopted in this country, where scarcely one in ten of those who receive sentence of death is executed.

He then gives his preference to the second method, and after stating what he supposes to be its advantages, he sums up his argument by saying: "The law of England is constructed upon a different and a better policy. By the number of statutes creating capital offenses, it sweeps into the net every crime which, under any possible circumstance, may merit the punishment of death; and then, by the number of its pardons, it redeems from this sentence such as have been convicted without the aggravating circumstances which, in the judgment of the law, render that punishment necessary."

Before proceeding to examine this argument in detail, there is a preliminary observation to be made. Dr. Paley speaks of the system of capital punishment and its administration in England as if it were a deliberate and well-designed plan. I have already shown that it is nothing of the kind. It is the accidental result of a change in public

manners, not the product of legislative design. The founders of these laws intended them to be strictly enforced. They have not been enforced because public sentiment made enforcement impossible. To praise the resulting chaos as a wise policy is to mistake a failure for a success.

CHAPTER VI

AGAINST DR. PALEY: THE NET AND THE FEW

The first objection to Dr. Paley's argument is that it rests on the assumption that capital punishment, even when applied only occasionally, retains its deterrent power because the threat hangs over all who commit the relevant crimes. "Few actually suffer death," he says, "whilst the dread and danger of it hang over the crimes of many."

This argument would be sound if the few who suffer were selected by a visible, consistent, and announced principle — if the criminal could look at the published rules of the system and know in advance precisely what would make his crime capital. But this is not the case. The selection is made in secret, by principles unknown, upon grounds that are never published and seldom consistent.

The potential criminal who knows that one in twenty of those convicted of his offense is hanged does not know whether he will be that one. He may calculate the probability as roughly what it is. If he has the experience of his neighborhood before him — if he has seen men convicted of the same offense transported but not hanged — he will discount the threat further. And if he sees that the selection appears to depend on factors having nothing to do with the gravity of his offense — on which judge hears his case, on whether the prosecutor presses for severity, on the mood of the court — he will treat the threat as what it is: a remote, uncertain, and unpredictable hazard, much smaller than the hazard of many honest occupations.

It is, moreover, universally agreed that the certainty of punishment is far more efficacious than any severity of punishment. A punishment

that is certain and moderate will deter far more effectively than a punishment that is severe but rarely inflicted. The present system combines maximum severity with minimum certainty. It is, therefore, from the deterrent standpoint, the worst possible system: it inflicts all the costs of severity — the resistance of juries, the reluctance of witnesses, the sympathy of the public — without obtaining any of its supposed benefits.

But there is a further objection, and it goes to the heart of the matter. The law of England, he says, "sweeps into the net every crime which, under any possible circumstance, may merit the punishment of death," and then discretion selects from among those caught the ones that deserve it. But how is this selection made? By what principle are some pulled from the net and others left to drown?

Dr. Paley says the selection is made by reference to aggravating circumstances: the worst cases are executed, the others pardoned. But this requires that the aggravating circumstances be identifiable in advance and consistently applied. They are not. They are never defined in any written law. They are left to the unguided judgment of individual judges, who apply them differently from one another and differently from one term to the next. The net, in short, exists. The principle of selection from the net does not.

CHAPTER VII

AGAINST DR. PALEY: THE UNKNOWABLE LAW

There is another consequence of the present system that makes it indefensible, and that is this: it deprives the community of any means of knowing what the law actually is.

When a man is publicly put to death, something is communicated to all who witness it or hear of it: that a certain act has been punished in a certain way. But when a man is convicted of shoplifting and hanged — which today almost never occurs — the spectators do not know why. They do not know what distinguished his case from the hundreds of other shoplifting cases that ended in transportation or imprisonment. No published rule tells them. The judge's reasoning, whatever it was, is not communicated to the public. The precedent, if it is one, is nowhere recorded.

The consequence is that the law actually administered in our criminal courts is wholly different from the law to be found in the statute-books, and yet no means has been adopted for making the administered law known. The public cannot know it. The criminal cannot know it. The victims who must decide whether to prosecute cannot know it. The juries who must decide how to value stolen goods cannot know it officially, though they have learned it from experience and act accordingly. This is a state of affairs that cannot be defended as a system. It can only be excused as an accident.

Dr. Paley anticipates this objection and addresses it by arguing that the circumstances which aggravate a crime to the point of requiring execution are "easily perceived after the act has been done" even if they "cannot be defined beforehand." This is a remarkable concession.

He is admitting that the law cannot be stated in advance. He is defending a system in which the citizen cannot know before he acts whether his act will result in death or in freedom. He is, in other words, defending a system in which the rule of law, in its most basic sense, does not exist.

The practical consequences of this are serious. Another consequence of the present system is that it deprives juries of the most important of their functions — that of deciding upon facts on which the law, if clearly understood, ought to operate. When the jury knows that a verdict of guilty on a shoplifting charge will not result in execution, they may convict. But they also know — or strongly suspect — that the judge may send the man to the gallows if he chooses. Their decision is no longer a simple finding of fact; it has become a judgment about the appropriate punishment, a judgment they are neither qualified nor entitled to make, and which they make imperfectly, in ignorance of the considerations that will actually govern the judge's decision.

This is what the present system has produced: a jury that does not decide according to the law, because the law is unknown; a judge who decides by principles he has not announced; and a public that has no means of knowing what conduct will result in what consequences. It is a system in which justice is not administered but improvised.

CHAPTER VIII

AGAINST DR. PALEY: ON PARDON AND MERCY

Dr. Paley, recognizing some of the difficulties with unlimited judicial discretion, attempts to resolve them by locating the pardoning power in the king's prerogative — a power formally separate from the judicial function. "The prerogative of pardon," he says, "is properly reserved to the chief magistrate. The power of suspending the laws is a privilege of too high a nature to be communicated to inferior magistrates." This distinction, Paley argues, is what saves the system: judges find guilt or innocence, and the executive decides who lives and who dies.

This distinction is illusory in practice. The judge who recommends a capital convict for pardon does not merely communicate a finding of fact — he communicates a judgment about whether the man should live or die. The recommendation is virtually always followed. The judge who chooses not to recommend, knowing the recommendation will not be made by anyone else, has made the same decision in the opposite direction. Whether we call this the exercise of judicial discretion or the informal guidance of executive discretion, the substance is the same: one official, accountable to no one for this particular decision, determines whether a convicted person lives or dies.

"But let this power be deposited where it will," Dr. Paley adds, "the exercise of it ought to be regarded as a judicial act — as a deliberation upon the question, not whether the rule of law has been violated, but whether the rigor of law ought to be relaxed." In thus requiring that the pardoning discretion be exercised as a judicial act, Paley actually

imposes upon it the same standard of deliberation and reason-giving that he has just finished arguing cannot be required of judges. He is pulling in opposite directions: defending judicial discretion on the grounds that no standard can be prescribed for it, and then requiring that the pardoning discretion conform to a standard of deliberate, principled reasoning.

The truth is that in the present system, neither judicial discretion nor executive discretion is exercised in the way Paley describes — carefully, on deliberated principles, with reasons that could in theory be stated and defended. They are exercised by officials who are under no obligation to state their reasons, who apply no announced criteria, and whose decisions are subject to no review. This is not the administration of law. It is the administration of fate.

Of all the duties, indeed, that a judge has to discharge, the exercise of this discretion must be the most painful. There are no other duties from which a conscientious mind might not find relief in the clear rule of law. Here there is no such relief. The judge must decide, on his own judgment, whether a man lives or dies, by criteria that he has not announced and that no one will review. If he decides that the man shall die, he must live with that decision. If he decides that the man shall live, he must live with the knowledge that he may thereby have encouraged others to commit the same crime who, under another judge, will not meet with the same lenity.

CHAPTER IX

THE INNOCENT

I have hitherto been considering only cases where the persons who have suffered are in fact guilty of the crimes laid to their charge. But it would be unpardonable to omit the consideration of those cases — cases that are by no means rare — in which persons are condemned who are in fact innocent.

The maxim that it is better for ten guilty persons to escape than for one innocent man to suffer has been accepted for centuries as a fundamental principle of criminal justice. Dr. Paley, however, takes a different view. He acknowledges the possibility that innocent persons may be condemned and executed, and he argues that this misfortune must be weighed against the general benefit produced by the system. "The misfortune of an individual," he says, "for such may the sufferings, or even the death, of an innocent person be called, when they are occasioned by an adherence to rules to the general effect and tendency of which are beneficial — the misfortune of an individual, engaged in a criminal prosecution, may, in some cases, be the necessary price of the public advantage."

To understand the full import of this argument, let us translate it plainly: Paley is saying that it is acceptable for innocent people to be executed, provided the system that produces their executions is, on the whole, beneficial. This is an argument that would justify almost any atrocity, provided its architects could point to some general benefit on the other side of the ledger. It is not an argument for justice; it is an argument for utility, of a very crude kind, dressed in philosophical language.

But beyond this fundamental philosophical objection, the argument is empirically defective. Paley treats the execution of the innocent as a rare and isolated misfortune, acceptable precisely because it is exceptional. The evidence suggests otherwise. False convictions are not rare. Cases in which persons condemned to death by a lower court are afterward acquitted on review by a superior one occur often enough to be recorded, and these are only the cases that were caught — the ones where the error came to light before the sentence was carried out. The cases in which the error was not discovered until afterward, or not discovered at all, must be far more numerous.

And here is the crucial point, which Paley almost completely evades: when we are weighing the evil of the punishment of one innocent man against the impunity of ten who are guilty, we ought to reflect that the suffering of the innocent is generally attended, in the particular instance, with the escape of the guilty. The same uncertainty of evidence that leads to the false conviction of an innocent person generally means that the actual criminal has not been found — that he is still free, still dangerous, possibly present among the crowd watching the wrong man go to the gallows.

Instances have occurred — like the case of Calas in France, where a man was offered up as a sacrifice to the laws even though the laws had never been violated, where the tribunals committed the double mistake of supposing a crime where none had been committed and finding a criminal where none could exist — where the error was gross enough and the publicity sufficient that it was eventually exposed. But these are very rare examples of judicial error. In most cases the error is quieter: the crime was real, the perpetrator unknown, and the innocent person who suffered most resembled the criminal, or was least able to prove his innocence, or had the worst reputation in the neighborhood, or attracted suspicion by the very strength of the evidence that happened to point at him.

For these cases, the punishment of death provides no remedy. Imprisonment, if unjust, can be ended; the prisoner can be freed and

compensated; the record can be corrected. Execution cannot be undone. The man hanged in error stays hanged. No remedy, however earnest, can reach him. The system that produces such irreversible consequences must be held to a standard of certainty proportional to the gravity of the consequence, and capital punishment fails that standard at every point in its administration.

Perhaps among the crowd gazing upon the supposed criminal when he is led out to execution there may be lurking the real murderer — who, while he contemplates the fate of the wretch before him, reflects with triumph upon the weakness of the law, and becomes hardened in and more daring in the dangerous career upon which he has entered.

CHAPTER X

CONCLUSION

For the honor of our national character — for the prevention of crimes — for the maintenance of that respect which is due to the laws and to the administration of justice — I call upon Parliament to repeal these capital statutes.

The case against the present system is threefold. First, it does not deter. The evidence of statistics makes this clear: crimes punishable by death continue to be committed, and at rates that have not diminished but increased as the execution rate has fallen. The threat of a penalty almost never inflicted cannot deter those who know it is almost never inflicted. If deterrence is the purpose of criminal law, these statutes have failed at it.

Second, the system is unjust. It is unjust in its arbitrariness — that the same crime may bring death to one and freedom to another, depending on factors having nothing to do with the guilt of the accused. It is unjust in its inequality — that wealth and connection protect some from consequences that fall on the poor and friendless. It is unjust in its unknowability — that no citizen can learn from any published source what the actual law is, as administered by the courts, as distinct from the law as written in the statute-book.

Third, and most gravely, the system kills innocent people and provides no remedy when it does so. As long as the sentence of death is attached to crimes that are common, that are difficult to prove, and that are tried by processes imperfect enough to produce erroneous convictions at a rate that can be measured, innocent people will be executed. They have been executed. They will continue to be

executed until the law is changed.

The bills I have introduced do not abolish capital punishment. They remove the penalty of death from three specific statutes — stealing five shillings from a shop, stealing forty shillings from a dwelling-house, and similar property crimes — where the death penalty is manifestly disproportionate to the offense, where it is almost never inflicted, where it serves no deterrent purpose, and where its retention serves only to make the law absurd in the eyes of those who must administer it and to make juries into *de facto* legislators who nullify the statute whenever they dare.

The principle I am defending — that the punishment should be proportionate to the offense, that it should be defined with precision, that it should be applied consistently, and that it should be capable of correction when applied in error — is not a radical principle. It is the foundation of any system of law worthy of the name. A system that has wandered as far from this foundation as the present English criminal law has wandered is not a system to be defended. It is a system to be reformed.

I press these bills with the full awareness that they will not prevail today. The forces of habit and inertia are powerful, and the argument that what has always been done must be right has a strength that cannot always be overcome by reason alone. But reason will eventually prevail. The arguments made here will be made again, by others, in other sessions, until they are heard. The laws that make it a hanging offense to steal five shillings from a shop will not long survive serious examination. They cannot.

SUPPLEMENTARY
OBSERVATIONS

A NOTE ON THE STATISTICAL TABLES

Dr. Paley's argument, and the argument of every defender of the present system, depends ultimately on the claim that the existing practice works — that it deters crime effectively while avoiding the harshness of universal execution. The statistical evidence he adduces for this claim is, however, remarkably thin, consisting mainly of assertion. The actual tables of conviction and execution tell a different story.

In the years from 1749 to 1756, of persons tried at the Old Bailey, those convicted numbered 428 and those executed numbered 306 — rather less than three-quarters. From 1756 to 1764, of 236 convicted, 139 were executed — a markedly lower proportion, though still more than half. But by 1802, the ratio had fallen to roughly one in ten: 97 convicted, 10 executed. By 1803, 81 convicted, 9 executed. By 1804, 66 convicted, 8 executed.

The trend is unmistakable, and its significance is profound. At the commencement of the present reign, the number of those convicted who were executed considerably exceeded the number of those who were pardoned. Now the ratio is reversed by a factor of nine to one. This change has not been accompanied by any deliberate policy decision, any parliamentary debate, any public announcement that the laws relating to capital punishment were to be enforced differently. It has happened through the accumulation of individual decisions by judges, juries, prosecutors, and the executive, each responding to the felt impossibility of enforcing laws that the public would not support.

No instance of this alteration has been more remarkable than in those offenses which are the specific subject of the bills I have introduced. Within the last several years, no person convicted of privately stealing from a shop has been executed. The law says death; the practice says transportation or imprisonment; and between these two there is no published explanation, no announced principle, no criterion that the citizen can discover and apply.

A NOTE ON THE PALEY PASSAGE

It may be useful to set out the complete passage in Paley that forms the object of the extended refutation in this volume, so that the reader can judge whether the refutation addresses Paley's argument fairly.

"There are two methods of administering penal justice. The first assigns capital punishments to few offenses, and inflicts it invariably. The second assigns capital punishment to many kinds of offenses, but inflicts it only upon a few examples of each kind. The latter of which two methods has been long adopted in this country, where, of those who receive sentence of death, scarcely one in ten is executed.

"The wisdom and humanity of this design furnish a just excuse for the multiplicity of capital offenses which the laws of England have established. The terror of the law is maintained by the possibility of suffering; the selection of proper objects for actual punishment is regulated by rules of equity and discretion.

"The charge of cruelty is answered by observing that these laws were never meant to be carried into indiscriminate execution; that the legislature, when it appointed the punishment, confided in the lenity of the crown to make the necessary discriminations; and that the efficacy of the law depends upon the impression it makes, not upon the frequency of its execution.

"The law of England is constructed upon a different and a better policy. By the number of statutes creating capital offenses, it sweeps into the net every crime which, under any possible circumstance, may merit the punishment of death; and then, by the number of its pardons, it redeems from this sentence such as have been convicted without the aggravating circumstances which, in the judgment of the law, render that punishment necessary. By this expedient, few actually suffer

death, whilst the dread and danger of it hang over the crimes of many."

This passage, taken in its entirety, illustrates the central incoherence of Paley's position. He praises the multiplicity of capital statutes as wise and humane, because the selection of cases for execution is "regulated by rules of equity and discretion." But these rules are nowhere stated. They are not published. They are not known. He then says that "the efficacy of the law depends upon the impression it makes, not upon the frequency of its execution" — a claim that, as I have shown, depends on the potential criminal's ignorance of the actual probability of execution, an ignorance that daily experience is rapidly erasing.

The prerogative of pardon, on Paley's account, is "properly reserved to the chief magistrate." But the chief magistrate, in practice, follows the recommendation of the trial judge. The trial judge's recommendation, in practice, depends on considerations he has not stated and cannot be required to state. Paley has moved the locus of the discretion from the court to the executive without eliminating the discretion or making it accountable.

ON THE BILLS THEMSELVES

Something should be said in this place about the three specific statutes that the bills introduced are intended to repeal.

The first is the Act of 10 and 11 William III, making it a capital felony to steal privately in a shop goods of the value of five shillings. The second is the Act of 12 Anne, making it a capital felony to steal money or goods in a dwelling-house, the person therein being put in fear, the goods being of the value of forty shillings. The third extends similar provisions to goods stolen on board ships in navigable rivers.

These statutes are old. The oldest dates from the reign of William III, more than a century ago. They were enacted at a time when the population of England was smaller, when property relations were different, and when the system of criminal justice was administered by people who fully intended these laws to be enforced. The men who passed them believed they were providing effective protection for property. They were not designing a system of arbitrary terror in which shoplifters would be nominally subject to death while actually being transported.

The gap between what these laws say and what they mean in practice is now so vast that it has become a standing embarrassment. Juries systematically undervalue stolen goods to bring cases below the capital threshold. Prosecutors frequently decline to proceed with capital charges they know will not result in execution. Witnesses are reluctant to testify when their testimony may send a man to the gallows for stealing a piece of cloth.

The consequence is that the actual protection afforded to property by these statutes is significantly less than it would be under a non-capital regime honestly enforced. A theft that might result in

certain transportation under a clear and consistently enforced law results instead in either acquittal — because the jury refuses to find the capital offense — or in a nominal conviction that leads to transportation anyway, but only after considerable delay and uncertainty. The law's pretense of severity has produced, in practice, a system less severe than what a rational and honestly enforced scheme of property protection would provide.

The argument that to repeal these statutes would be to encourage theft by removing the threat of capital punishment rests on the assumption that thieves know of and are deterred by that threat. The evidence shows they are not. The execution rate for these offenses is approximately zero. What deterrent effect zero executions provides is a matter that answers itself.

ON THE HONOR OF THE LAW

There is one further argument for reform that I have not yet stated explicitly, though it runs through everything I have written: the argument from the honor and authority of the law itself.

A law that is not enforced, and that everyone knows is not enforced, is not merely an ineffective law. It is a corrupting one. It teaches those who live under it to regard the law as something other than what it claims to be — as a form of words attached to penalties that will not be imposed, as a theatrical backdrop against which the real drama of discretion and pardon plays out. It teaches juries to believe that their proper function is not to find facts and apply the law but to exercise a kind of covert legislative power, determining by their verdicts what the practical law shall be, regardless of what the statute says. It teaches prosecutors and victims to treat the formal legal proceedings as negotiations rather than determinations — as occasions for bargaining over outcomes rather than for the authoritative resolution of questions of guilt and punishment.

These lessons, once learned, do not remain confined to the specific cases that teach them. They spread. A people accustomed to seeing its criminal law treated as a system of empty threats and discretionary exemptions will eventually treat all its laws as subject to the same negotiation and evasion. The respect for law that is the foundation of ordered society does not survive the spectacle of law's systematic hypocrisy.

For the sake of this respect — for the sake of that vital public confidence in the administration of justice that makes the law not merely an external constraint but an internal commitment — these statutes should be repealed. The law should say what it means and

mean what it says. When it cannot enforce a penalty, it should not prescribe it. When it will not hang a man for stealing five shillings from a shop, it should not threaten to hang him for it. The credibility of all law depends, in part, on the credibility of each law; and these particular laws, which have been publicly reduced to empty threats, are draining that credibility at a rate that no reform of other parts of the system can restore.

EDITORIAL
APPARATUS

DEFINITIONS AND TERMS

Capital felony: In English law of the period, a felony (a serious crime) punishable by death. England in 1810 had more than two hundred capital felonies on its statute books, encompassing crimes ranging from murder to the theft of goods worth five shillings from a shop. The central argument of this volume is that this accumulation of capital statutes, combined with their near-universal non-enforcement, produced a system that was both unjust and ineffective.

Benefit of clergy: A historical provision in English law allowing those who could read — originally restricted to clergymen, but extended over centuries to any literate person — to claim a reduction in sentence for certain offenses. By the early nineteenth century, "benefit of clergy" had been removed by statute from the most serious capital offenses, leaving those offenses subject to mandatory death sentences. The Act of 10 and 11 William III, which Romilly sought to repeal, made stealing five shillings from a shop a capital felony without benefit of clergy.

"Egyptians" (Act of 39 Elizabeth I): The Elizabethan statute Romilly cites in Chapter II used "Egyptians" to mean Romani people, on the false belief that they had come from Egypt. The Act made it a capital felony for anyone over fourteen to remain a month in the company of Romani people, so that association itself was punishable by death, and Lord Hale records thirteen people hanged under it at a single assizes. Romilly calls it the most barbarous statute ever to disgrace English law and uses it to prove that

Parliament meant its capital statutes to be enforced. It is worth naming what it was: a law that made an ethnic group capital by existing. The English gallows was turned on a people before it was turned on shoplifters, and the reform movement Romilly led inherited both.

Transportation: The sentence of banishment to a penal colony — primarily to Australia from 1788 onward — used as an alternative to execution in many cases where the death sentence was imposed but not carried out. Transportation for seven years, fourteen years, or life was the most common alternative. It functioned, in practice, as the actual penalty for most capital offenses, since pardon was almost always conditioned on a sentence of transportation.

Discretion (judicial): The power of a judge to exercise judgment in applying the law, including the decision whether to recommend a convicted person for pardon. Romilly's central argument against the existing system concerns the exercise of this discretion: it is unlimited, unannounced, inconsistent, and unaccountable. Different judges apply different criteria; the same judge applies different criteria at different times; the criteria are never stated in any form that would allow them to be examined or challenged.

Dr. William Paley (1743–1805): English moral philosopher and theologian whose *Principles of Moral and Political Philosophy* (1785) contained an influential defense of the English system of capital punishment. Paley argued that the combination of many capital statutes with wide discretion in their enforcement was a rational and humane system: it created a large net of potential capital offenses, from which discretion selected only the most egregious for actual punishment, while the threat of death served as a deterrent for all. Romilly's sustained refutation of this argument is the philosophical center of the *Observations*.

Jean Calas: A French Protestant merchant executed in 1762 on a false charge of murdering his son to prevent him from converting to Catholicism. The case became famous throughout Europe when Voltaire took it up, demonstrated the falsity of the conviction, and secured a posthumous rehabilitation for Calas. Romilly cites the case as an example of judicial error resulting in the execution of an innocent person — the kind of error for which, under a system of capital punishment, no remedy is possible.

The statute-book: The collection of all acts passed by Parliament that remain in force. Romilly's complaint is that the statute-book as written — declaring hundreds of offenses capital felonies — bears no resemblance to the law as actually administered, in which almost none of those offenses results in execution. The gap between the written and the administered law is the source of the injustice he describes.

Jury nullification: The practice of juries returning verdicts inconsistent with the evidence — in particular, valuing stolen goods at amounts below the statutory threshold for a capital offense, even when the actual value clearly exceeded that threshold. Romilly documents several cases in which juries valued obviously expensive property at thirty-nine shillings precisely to bring the offense below the forty-shilling threshold for the capital statute. This practice was a rational response to a system in which the written law, if applied literally, would require hanging for petty theft.

The prerogative of pardon: The power of the monarch — exercised through the Home Secretary and the Privy Council — to pardon convicted criminals or commute their sentences. In practice, the decision to recommend pardon was largely made by the trial judge, whose recommendation was almost invariably followed. Dr. Paley argued that lodging the pardoning power in the executive rather than the judiciary preserved the integrity of the judicial system.

Romilly argues that this distinction was illusory: the judge who made the recommendation was exercising the same discretion, whether it was called judicial or executive.

The Old Bailey: The Central Criminal Court of London, whose records provide the statistical basis for much of Romilly's argument. The tables he cites from the Old Bailey records show the dramatic decline in execution rates for capital offenses over the preceding century, demonstrating that the current near-total non-enforcement of capital statutes is a relatively recent development, not a long-established and deliberate policy.

Sir Samuel Romilly (1757–1818): The author of this work. Romilly was called to the bar in 1783, appointed Solicitor General in 1806, and served in Parliament as Member for Horsham and later for Westminster. He is best remembered for his sustained campaign to reform England's criminal law, particularly the reduction of capital offenses. He succeeded in repealing several capital statutes, though the bills described in this work were defeated by the House of Lords. He died in 1818, three days after his wife, in circumstances suggesting profound grief.

FURTHER READING

ON ROMILLY AND HIS WORLD

- Romilly, Samuel. *Memoirs of the Life of Sir Samuel Romilly*. 3 vols. London: John Murray, 1840. Edited by his sons after his death, this work combines autobiography with letters and journal entries covering his legal and political career. It is the primary source for his biography and contains extensive material on the criminal law reform campaign.
- Hostettler, John. *The Politics of Criminal Law Reform in the Nineteenth Century*. Barry Rose Law Publishers, 1992. Places Romilly's reform campaign in the broader context of English legal change and traces its consequences through the nineteenth century.
- Devereaux, Simon. "The making of the Penitentiary Act, 1775–1779." *Historical Journal* 42 (1999). Background on the criminal justice system that Romilly was responding to.

ON ENGLISH CRIMINAL LAW REFORM

- Radzinowicz, Leon. *A History of English Criminal Law and its Administration from 1750*. Vol. 1: *The Movement for Reform*. London: Stevens, 1948. The standard scholarly history of the period; essential background for understanding the argument of the *Observations*.
- Beattie, J. M. *Crime and the Courts in England, 1660–1800*. Princeton University Press, 1986. Provides the statistical and social-historical context for understanding crime rates, conviction rates, and execution rates in the period Romilly discusses.

ON THE PHILOSOPHY OF PUNISHMENT

FURTHER READING

Paley, William. *Principles of Moral and Political Philosophy*. 1785. The work Romilly is primarily responding to; the chapters on criminal law and punishment are directly relevant and should be read alongside this volume.

Beccaria, Cesare. *An Essay on Crimes and Punishments*. Edited and modernized by Jeff Hood. Complicit Press, 2026. The foundational Enlightenment argument for criminal law reform, published in 1764, which influenced both Romilly and Paley. It is V. 5 in *The Abolition Classics*, and the companion volume to this one.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. 1789. Bentham and Romilly were close friends and intellectual allies; Bentham's utilitarian framework provided the philosophical foundation for much of Romilly's practical reform work.

ON THE CALAS CASE

Voltaire. *Treatise on Tolerance*. 1763. Voltaire's extended argument for religious tolerance, written immediately after the Calas execution, which also contains the fullest account of the case as Voltaire understood it. The Calas case became the defining example of judicial murder in the Enlightenment reform tradition.

RELATED VOLUMES IN THIS SERIES

Spear, Charles. *Essays on the Punishment of Death*. Edited and modernized by Jeff Hood. Complicit Press, 2026. The American abolitionist argument from 1844: a survey of the case against capital punishment, theological and philosophical.

Livingston, Edward. *Argument Against Capital Punishment*. Edited and modernized by Jeff Hood. Complicit Press, 2026. V. 6 in this series. Livingston's 1833 argument from Louisiana, on the right of the state to take life and the historical evidence that capital punishment is unnecessary for social protection.