LORD ELLENBOROUGH AS CRIMINAL LEGISLATOR

Ellenborough became Lord Chief Justice of England and entered the House of Lords in 1802. The personage was well-known for his espousal, both as judge and as legislator, of the exclusively deterrent theory of criminal punishment forming part of the doctrine of theological utilitarianism embodied in William Paley's PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY. The period, by contrast, was notable as that of the first emergence of the liberal disciplines of criminology and penology and of rational and humane proposals for the reform of the criminal law.

As Lord Chief Justice, Ellenborough encountered the more widespread movement for political reform when called upon to try a succession of prosecutions for the quasi-political offences of treason, seditious libel and libels upon the king and members of the government.[1] As legislator, he became the spokesman in the House of Lords for the party opposing reform of the criminal law: and since his opposition rested ultimately upon cogent theological grounds it carried considerable weight. This study is concerned to examine Ellenborough's parliamentary career in the light of his position as the Paleyan system's most important public representative.

Biographical background

Ellenborough was born Edward Law on 16th November, 1750, at Great Salkeld, Cumberland, the fourth son of Edmund Law, who was then rector of that parish and later Master of Peterhouse, Cambridge.[2] In 1767 Law matriculated at Peterhouse and in the following year his father became Bishop of Carlisle.

It was at Cambridge, where Paley had become a junior Fellow of Christ's two years previously, that Law first came under the influence

1 See Crago, *Lord Ellenborough's State Trials* (1976) 12 UWAL Rev 235.

2 Edmund Law, unlike the majority of the minor clergy was a Whig and strongly attached to the Low Church Party. Edward remained at home until the age of eight when he was sent to Norfolk to live with his maternal uncle, a clergyman called Sir Humphrey Christian. In 1762, the year of his mother's death, Edward was sent to the Charterhouse where he remained six years and became Captain of the school.

of the future author of the MORAL AND POLITICAL PHILOSOPHY.[3] Paley was already acquainted with the family through his intimacy with Law's eldest brother, John, one of Paley's colleagues. He also maintained the connection both through Bishop Law's patronage and through the life-long friendship with Edward Law which now began. When the bishop published a pamphlet in 1774 in the course of the famous controversy over subscription to the Thirty Nine Articles Paley published an anonymous *Defence* thereto. In the following year Bishop Law gave Paley the small living of Musgrave in Cumberland and after Paley's marriage in 1776 (when he resigned his fellowship) the parish of Dalston, which in 1777 was exchanged for that of Appleby. In 1780 Paley was made a Prebendary of Carlisle and, finally, in 1782 Archdeacon of Carlisle, a sinecure. When the MORAL AND POLITICAL PHILOSOPHY was published in 1785 Paley appropriately enough dedicated the work to Bishop Law.

But it is with Paley's relationship with Edward Law that we are here concerned. Their contact at Cambridge was close. Lord Campbell recorded that

> (Ellenborough), when Chief Justice, has been heard to say, 'Although I owed much to Paley as an instructor (for he was practically my tutor at college), I was much more indebted to him for the independent tone of mind which I acquired through his conversation and example; Paley formed my character; and I consider that I owe my success in life more to my character than to any natural talents I may possess'. Law corrected for Paley the proof-sheets of some of his works as they were passing through the press; and in Law's house, in Bloomsbury Square, there was an apartment which went by the name of 'Paley's room', being reserved for the Archdeacon when he paid a visit to the metropolis.[4]

Law himself seemed destined for the church. On his father's insistence he remained at Cambridge for two years after taking his bachelor's degree in order to obtain a fellowship, which he did at Trinity in 1773. But he then immediately quit the University for Lincoln's Inn. The tremendous capacity for work which Law brought to his professional life has been considered to be partly due to his

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3 William Paley (1743-1805) in addition to his literary and ecclesiastical career maintained through his life a considerable interest in the administration of the criminal law, as well as in the theory of punishment which is discussed below pp 504-505. In later life he became a Justice of the Peace and regularly attended trials at the Old Bailey as a spectator. As a JP he was said to be 'irascible'.

4 Campbell, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND Vol IV, 152.

desire to succeed in a career which he had chosen against his father's wishes.[5] To this end Law entered upon the study of special pleading with George Wood, its most distinguished instructor, and devoted several years to its mastery as well as to securing connections with some leading attorneys before being called to the Bar in 1780.

In March of that year Law joined the Northern Circuit[6] and by 1787 had acquired 'such a reputation in addressing juries as nearly to throw out of business several black-letter special pleaders who were his seniors . . . . There was, therefore, a general wish that he should have silk.'[7] Despite some initial difficulty over his Whig principles, he was made a King's Counsel on the 27th June and on the 16th November elected a bencher of the Inner Temple. Law was thus in 1789 sufficiently well established to make overtures of marriage to the only daughter of George Phillips Towry Esq. RN, a lady, in Townsend's words, 'of celebrated beauty'[8] and wealth.

In 1787 Law had received a brief which was the turning point in his career—a general retainer to defend Warren Hastings.[9] Having until now been confined to the Northern Circuit, Law at once appreciated the significance of his position. The managers of the impeachment—Burke, Fox, Sheridan, Windham and Grey—represented the finest public oratory in England.[10] It was not for four years, however, that Law's turn came to open for the defence on 14th February, 1792. His speech lasted three days, beginning perhaps poorly but ending a complete success. Thus Brougham:

> . . . the finger passages have rarely been surpassed by any effort of forensic power . . . and would have ranked with the most

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5 Ibid 108.

6 In this circuit he quickly obtained the rewards of family connections, including retainers from several firms.

7 Campbell op cit 114.

8 Townsend THE LIVES OF TWELVE EMINENT JUDGES Vol 1, 307. Townsend records that she was said 'to have been so exceedingly lovely that passengers would linger to watch her watering the flowers—such was the fashion of the day—on the balcony of their house in Bloomsbury Square': ibid.

9 Erskine had been offered the brief but declined to accept it for personal and party reasons.

10 'In our judicial history no English advocate has ever had such a field for the display of eloquence as counsel for the impeached Warren Hastings': Campbell, op cit 117.
Early in these protracted proceedings, which began on 13th February, 1788, Law scored two successes against the managers: first, in persuading the Peers to hear the evidence on all charges before the defence was called upon, and second, in his insistence that the trial should proceed according to all the rules governing the admissibility of evidence in a normal criminal trial.

> successful exhibitions of the oratorical art had they been delivered in the early stages of the trial.[11]

In April, 1795, Warren Hastings was acquitted on all charges. Law's professional standing, as well as his fees, had risen considerably, and he was now regarded as second only to Erskine.

With the French Revolution in 1789 Law deserted the Whigs and went over to the government;[12] in November 1793 he became Attorney-General of the County Palatine of Lancaster and during the ensuing decade participated in numerous of the celebrated prosecutions which marked that turbulent period. In 1801 the Pitt government resigned and, in Addington's administration, Law became Attorney-General. He was knighted in February and entered the House of Commons for the borough of Newtown in the Isle of Wight in March of that year.[13]

By virtue of his office Law would naturally have expected, in 1802, to have succeeded to the Lord Chief Justiceship upon Lord Kenyon's death,[14] and if so, he was not disappointed. He was sworn in before the Lord Chancellor (Eldon) on 12th April, created Baron Ellenborough of Ellenborough by letters patent on the 19th, sworn into the Privy Council on the 21st and took his seat in the House of Lords on the 26th of the same month.[15]

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11 Brougham, HISTORICAL SKETCHES, Third Series 205.

12 There were several such defections. 'In society he acted the part of a strong Pittite, and he was accused of displaying "renegade rancour" against his former political associates:—but his friends asserted that "he had only been a Whig as Paley, his tutor, had been a Whig, and that he uniformly was attached to the principles of freedom, though he was always, for the good of the people, a friend to strong government.' Campbell, op cit, 2nd ed 134.

13 As at the Bar, so in the House, Law was known as being 'fearless, full of matter, and copious in diction, a hard hitter even when he spoke carelessly': Townsend op cit 325.

14 But Lord Campbell's account of the matter raises some doubt:

> 'I happened to be sitting in the students' box in the Court of King's Bench, on the 5th of April, 1802, when a note announcing Lord Kenyon's death was put into the Attorney-General's hand. I am convinced that at this time he had received no intimation respecting the matter in which the vacancy was to be filled up, for he looked troubled and embarrassed, and immediately withdrew': Campbell, op cit, 161.

15 Many of Ellenborough's judgments were to be superseded by statutory changes later in the century, although he contributed to the development of the common law, especially in the areas of contract and tort.

Ellenborough declined the offer of the Lord Chancellorship by Lord Grenville and Fox in 1806, but in the same year accepted a position in the 'All-Talents' Cabinet, an action which led to serious charges of unconstitutionality. After George III became permanently insane and the Regency

Contemporary conflicts in penal philosophy

In 1802 the criminal law stood in urgent need of reform. Chief among its defects was the extremely large number of capital offences, although the precise total was uncertain. In the first edition of the COMMENTARIES, Blackstone, in 1769, put the figure at 160;[16] by 1819 Sir Thomas Fowell Buxton gave the number as 223.[17] Ellenborough himself, as we shall see, was instrumental in adding significantly to this total. Sir Samuel Romilly, the principal figure in the movement for the reform of the criminal law during the period of Ellenborough's reign, said in the House of Commons in 1810 that '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.'[18]

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was established in 1811, he was a member of the Queen's Council and assisted in the formal duties attaching to the custody and care of the King. Early in 1816 Ellenborough's health began to fail and he made his last speech in the House of Lords on the 12th May, 1817. He remained on the bench until the 6th November, 1818, when he executed a deed of resignation. Ellenborough died at his house in St. James' Square on the 22nd of November, 1818, and was buried at the Charterhouse.

Although the present study is concerned directly with Ellenborough's parliamentary career it is worth noticing that he enjoyed a reputation for possessing a vigorous intellect, immense legal erudition and for being a strong judge.

Lord Campbell's conclusion was:

> 'Not only had he the incorruptibility now common to all English Judges, but he was inspired by a strong passion for justice, and he could undergo any degree of labour in performing what he considered his duty. . . . The defects in his judicial attitude were a bad temper, an arrogance of nature, too great a desire to gain reputation by despatch, and an excessive leaning to a severity of punishment': op cit 163-4.

Of his judicial method Brougham wrote:

> 'On the bench, it is not to be denied that Lord Ellenborough occasionally suffered the strength of his political feelings to break forth, and to influence the tone of temper of his observations. That he ever, upon any one occasion, knowingly deviated one hair's breadth from justice in the discharge of his office, is wholly untrue . . . (He) was not one of those judges who, in directing the jury, merely read over their notes and let them guess at the opinions they have formed; leaving them without any help or recommendation to form their judgments. Upon each case that came before him he had an opinion; and while he left the decision to the jury, he intimated how he thought himself. This manner of performing the office of judge is now generally followed and most commonly approved': WORKS, Vol IV, 192.

16 4 Comm 18: See generally, Radzinowicz, A HISTORY OF ENGLISH CRIMINAL LAW, Vol 1, 3-5.

17 39 Parl Deb (H of C) 808 (1819).

18 19 Parl Deb (H of C) appendix iii-iv (1810). 'In compliance with the wishes of several subscribers' a more complete record of the parliamentary debates upon Romilly's three bills of 1810 than is contained in the official Hansard

Many of the capital offences were of recent origin: thirty-three such offences were created in the reign of George II and no less than sixty-three in the first fifty-six years of the reign of George III.[19] Nor were the advocates of these measures without doctrinal support. The year 1785 saw the publication both of Madan's THOUGHTS ON EXECUTIVE JUSTICE and Paley's MORAL AND POLITICAL PHILOSOPHY. In the former book the author attributed the rising crime rate to the uncertainties of penal administration—in particular the frequent remission of the death penalty. The remedy, he argued, lay in the implementation of the full rigour of the law.

But Paley's work was much the more formidable. Within a limited compass this book was by any standards a comprehensive treatment of its vast subject, and its influence was enormous. It immediately became, in effect, the ethical text-book of the University of Cambridge. Chapters VIII and IX of Book VI are given to an exposition of the general administration of justice and of the philosophical bases of capital punishment respectively. On the latter subject Sir Leon Radzinowicz has said that 'it is impossible to over-estimate the importance of this book, which for many years exercised a potent influence on the trend of English criminal legislation.'[20] Paleyan doctrine became 'the *credo* of all opponents of the movement for reform in the criminal law.'[21]

What, then, was the Paleyan theory of criminal punishment? Paley's fundamental doctrine, like that of Madan, was that the sole purpose of criminal punishment is to prevent crime. Neither reformation, which he believed to be impracticable, nor retribution, which he was content to leave to God, formed any part of Paley's system.[22] It followed that punishment should be related not so much to the gravity of the offence as to its deterrent effect in a given situation. The essence of Paley's philosophy of punishment is contained in the following passage:

> The fear lest the escape of the criminal should encourage him or others by his example, to repeat the same crime, or to commit different crimes, is the sole consideration which authorizes the infliction of punishment by human laws. Now that, whatever it

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is published as an Appendix to Vol 19 thereof from a Pamphlet published at the request of the 'Society for the Diffusion of Knowledge respecting the Punishment of Death and the Improvement of Prison Discipline'.

19 Radzinowicz, op cit 4.

20 Ibid 248-9.

21 Ibid 257.

22 Paley, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY in COLLECTED WORKS, 1853 edition, Book VI ch IX.

> be, which is the cause and end of the punishment ought undoubtedly to regulate the measure of its severity. But this cause appears to be founded, not in the guilt of the offender, but in the necessity of preventing the repetition of the offence: and hence results the reason, that crimes are not by any government punished in proportion to their guilt, nor in all cases ought to be so, but in proportion to the difficulty and necessity of preventing them.[23]

It followed, for example, that the offence of stealing from a shop should, in Paley's view, be punished more severely than stealing from a house to the same amount, or even to a greater amount, because the former was an easier crime to commit; and sheep stealing and horse stealing received the death penalty, not because they were more heinous than many other felonies but 'because the property, being more exposed, requires the terror of capital punishment to prevent it.'[24]

Whatever defects may be attributed to the Paleyan system by the findings of modern social science it had the dual merits of rationality and self-consistency. Paley tended to deplore what he saw as the necessity for the death penalty. But there were objections both to transportation and imprisonment, he thought, in that in each case the sufferings of the convict were hidden from general view and to that extent served as poor examples. He therefore conceived of hanging as the most effective deterrent.[25] Unlike Madan, Paley favoured a large number of capital offences with extensive discretions rather than a small number in which implementation of the punishment was inevitable. The former, he thought, satisfied the dual values of presenting the potential criminal with the terror of uncertainty and the Crown with the power to remit in appropriate cases. Paley—like Ellenborough, as we shall see—believed implicitly in the deterrent effect of 'terror', even if the sanction invoking it were only occasionally employed: 'few actually suffer, whilst the dread and danger of it hangs over the crimes of many.'[26]

The movement for criminal law reform was originated by William Eden, although in the field of penal administration John Howard's work THE STATE OF PRISONS published in 1777 and the efforts of indi-

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23 Ibid 661.

24 Ibid 663.

25 Although the idea of casting murderers into a den of wild animals is said to have attracted him because 'they would perish in a manner dreadful to the imagination, yet concealed from view': an admitted concession to delicate sensibilities. See Radzinowicz op cit 253.

26 Paley op cit 663.

viduals such as James Nield, Samuel Hoare, Fowell Buxton and Elizabeth Fry reflected Wilberforce's liberalising influence[27] in a related field at about the same time. Eden published his PRINCIPLES OF PENAL LAW in 1771, forsook the bar for politics in 1774 when he entered the House of Commons, and is said to have interested Pitt in the subject of criminal law reform.[28] Eden agreed with the deterrent theory of punishment espoused by Madan and Paley but unlike them believed that the severity of the punishment should be related to the seriousness of the crime. He advocated the repeal of many capital and obsolete statutes, the consolidation of the criminal law and proper evaluation of methods of punishment.

More important for present purposes is the work of Sir Samuel Romilly who between 1808 and 1819 ranged over almost the entire field of the criminal law and its administration in writings and in bills introduced into the House of Commons. He had been influenced by Howard's book[29] and by Beccaria.[30] Romilly regarded a criminal jurisprudence based on the death penalty as tending to promote public insecurity, and to encourage crimes. He argued that imprisonment could replace the death penalty with equal effectiveness. With the support of the radical press, Romilly was able to stimulate substantial public discussion on the criminal law and attracted fierce criticism as well as enthusiastic support. In 1786 Romilly had attacked Madan's book in an anonymous pamphlet entitled *Observation on a Late Publication Entitled, Thought on Executive Justice.* He was not to develop his own penal doctrine fully until twenty years later, but the pamphlet contains the germ of his thought. In 1810 Romilly introduced his bills to repeal the death penalty for stealing to the amount of forty shillings privately in a dwelling house, to the amout of five shillings privately in a shop, and for stealing on navigable rivers.[31] In a lengthy speech in the Commons he took this opportunity to launch a frontal attack upon the entire Paleyan system. We shall see that when these bills reached the House of Lords Ellenborough defended both his mentor and his philosophy in the principal speech on the issue in that House.

In his MEMOIRS Romilly also attacked Ellenborough for his public interpretation of the effects of Madan's book:

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27 Radzinowicz op cit 345.
28 Ibid 302.
29 Ibid 314.
30 Ibid 315.
31 19 Parl Deb (H of C) appendix xviii and ff (1810): vide infra 10-13.

> Lord Ellenborough, who seems to consider himself as bound to defend the conduct of all judges, whether living or dead, has lately, in the House of Lords, in his usual way of unqualified and vehement assertion, declared that it was false that this book had any effect, whatever, upon either judges or ministers. To this assertion I have only to oppose these plain facts: in the year 1783, . . . before the work was published, there were executed in London only fifty-three malefactors; in 1785 . . . after it was published, there were executed ninety-seven, and it was shortly after the publication of this book that was exhibited a spectacle unseen in London for a long course of years before, the execution of nearly twenty criminals at a time.[32]

Romilly had some cause for bitterness: despite his best endeavours the criminal law remained practically unaltered on his death in 1819. This fact bears witness both to the prevailing popularity of the Paleyan system and to the general unreadiness for change, both of which were epitomised in the person of Ellenborough himself.

It was thus that the reformers and their opponents were deployed during the period of Ellenborough's reign: on the one hand, the lawyers Eden, Romilly and Bentham,[33] deriving support from Blackstone (who had advocated reform of the criminal as a chief object of punishment), and supported by a host of writers of varying influence including Oliver Goldsmith, William Cowper, Coleridge, Southey, Byron and, later, Shelley, together with a great host of lesser essayists and pamphleteers; on the other, Madan, Paley and the twelve common law judges, whose spokesman in the House of Lords was Ellenborough.

Ellenborough in the House of Lords

Ellenborough took his parliamentary duties very seriously. In a debate on Romilly's bills he said that 'when he was appointed to the situation he filled, he made a covenant with himself, that he would

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32 Romilly MEMOIRS Vol 1, 89.
Radzinowicz op cit notes that although the figures are exact, they may be misleading. He states that 'a year later—in 1786—the incidence of executions in London fell to less than one in two, fifty executed out of 127 sentenced to death, while in 1787 it was again very high: ninety-two executed out of 113 sentenced to death. These figures are therefore no proof that Madan's tract had any durable influence on the administration of criminal justice, though the possibility of some short-term influence cannot be altogether dismissed': 244-5.

33 Bentham agreed with the deterrent theory of punishment but was almost alone in recognizing the liberality of criminal procedure as possibly the major cause of the apparent ineffectiveness of capital punishment in preventing crime. Bentham does not appear to have had any influence on Ellenborough one way or the other, and no record has been found of any contact

always appear in that House, and state to their Lordships all the knowledge with which he might be supplied from experience, as to the making, altering, or repealing of the laws of the land.'[34] The remark, characteristic of Ellenborough's high sense of public duty, was to be borne out by his career as legislator, no less than that as judge. He frequently spoke on bills affecting the criminal law—often vehemently to reject proposals for its moderation, particularly in regard to penalties.

Ellenborough's speeches in the House of Lords relating to the present subject are divisible into two categories: first, those in which he opposed Romilly's bills, and second, those relating to other matters, including the protracted issue of insolvent debtors, debtors' estates, indictments, cruelty to animals, the liberty of the subject, freehold estates and, not least in importance, abolition of the pillory. It is proposed to deal with these matters in accordance with the foregoing division and not chronologically.

Romilly had decided to launch his legislative campaign for the reform of the criminal law in 1807. When he introduced his first bill into parliament in January 1808 he was 'determined to attempt the repeal of (the statutes) one by one'; and his programme began 'with the most odious of them, the Act of Queen Elizabeth,[35] which makes it a capital offence to steal privately from the person of another.'[36] Romilly was acutely aware of the extent of judicial opposition to his designs and had therefore chosen for his first exercise in reform a statute which had been left largely inoperative due to the great disproportion between the sanction it authorised and the crime most often falling within its terms, that of picking pockets, an activity which had increased enormously in its incidence during the eighteenth century. Even Paley approved of the repeal of the death penalty of 8 Eliz c 4[37] and Romilly's bill was passed by both Houses[38] in 1808 without adverse comment. Ellenborough did not speak on this bill at any stage.

Thus encouraged, Romilly introduced three bills in 1810 to repeal the death penalty in cases of stealing privately in a shop above the

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between them in public or in private life. His work is therefore not directly relevant to our purpose, although it is useful to notice that his main objection to the existing criminal law is in striking contrast with that of Paley.

34 20 Parl Deb (H of L) 300 (1811).

35 8 Eliz 1 c 4.

36 Romilly, op cit, Vol 2, 239.

37 Ibid 256.

38 48 Geo III c 129.

value of five shillings,[39] stealing in a dwelling-house above the value of forty-shillings[40] and of stealing on board vessels on navigable rivers above the value of forty-shillings.[41] Because the first two of these offences constituted a large proportion of all non-violent crimes against property it is clear that repeal of the death penalty would have meant a very substantial change in existing penal policy. When first introduced by Romilly, the second bill was defeated in the Commons and the third was indefinitely postponed. The first bill, however, was adopted by the Commons on the 4th May and debate followed in the House of Lords on the 30th May, 1810. It soon became evident that the bill would be thrown out. Both Ellenborough and Lord Eldon opposed the bill: Ellenborough's two speeches were a complete endorsement of Paleyan doctrine. But they are also perhaps the best evidence available to us of Ellenborough's attitude both to the reform of the criminal law and to the functions of criminal punishment: for these reasons it is worth reproducing substantial passages from them. He said:

> This Bill, I presume, is only one part of a regular system against the present administration of the criminal law. An act was introduced into the last session of parliament, which, in unison with the principle of this system, remitted the punishment of death upon the offence of privately stealing from the person; and what has been the result? From my knowledge, and the general information of the judges, I am certain, that the increase of that class of offenders has become, in this short period, enormous: it is the exact species of offence to which they now apply their dexterity; and knowing they are no longer exposed to the danger of incurring the penalty of death, we have information of their depredations in our public streets and in the open day. Much has been said about humanity, and the general severity of our criminal code; but, whatever may be the penalties and terrors held out against the commission of crimes, I believe no one can charge the administration of justice with a want of clemency; nor can any one show the slightest ground for such insinuations. It is, my lords, a mistaken notion that these severe penalties denounced by the law are pregnant with cruel severity: on the contrary, they are productive of a less quantity of human suffering; for if the terror prevents the commission, it promotes the humane object of all good laws, the prevention of crimes.[42]

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39 10 and 11 Will III c 32.
40 12 Anne St 1, c 7.
41 24 Geo II c 45.
42 Vol 19 Parl Deb (H of L), appendix lxxxviii-lxxxix, (1810).

He later continued:

> . . . scarcely any crime, my lords, against property can be weighed in the same scales with man's life. But, in all these cases, the end of the law is the prevention of crime; and I am persuaded, no penalty less than the terror of death would amount to anything like prevention of these offences now under consideration . . . (T)he law, as it stands, is seldom carried into execution, and yet it ceases not to hold out that terror which alone will be sufficient to prevent the frequent commission of the offence. There are criminals, my lords, so hardened, that no milder punishment would intimidate, but under this law they have been oftentimes brought to a serious consideration of their wickedness. Upon their minds scarcely anything would have produced a serious consideration except the terror of death; and those who have witnessed such scenes in a court of justice, must have beheld its effect upon those hardened characters, alarmed at the terror impending over their very existence.[43]

At a much later stage of the day, after Erskine had spoken in favour of the bill and Eldon against it, Ellenborough closed the debate with a rhetorical speech in the course of which he said:

> My lords, depend upon it, it is that fear, and that alone, which keeps some men in obedience to the laws. My lords, the punishment of transportation has no terrors for men such as these. Believe me, transportation to Botany Bay, is, nine times out of ten, looked upon as no more than a summer's excursion in an easy migration, to a happier and a better climate . . . There is a dangerous spirit of innovation abroad upon this subject, but against which I ever have been, and always will be a steady opposer. I seek no praise, I want no popular applause, all I wish is, that the world may esteem me as a man who will not sacrifice one iota of his duty for the sake of public opinion.[44]

On Ellenborough's motion the bill was defeated by 31 votes to 11. It is crucial to notice that these speeches are practically a synopsis of Chapter IX of Part VI of Paley's *Principles of Moral and Political Philosophy*: the emphasis on terror, on the prevention of crime as the chief object of punishment, and the use of discretion in applying the death penalty show the extent of coincidence between Ellenborough's view and Paley's.

In the following year, 1811, Romilly succeeded in getting through the House of Commons his two bills that had failed to pass in the previous year; but they were again rejected by the Lords. Both

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43 Ibid lxxxix.
44 Ibid cxix-cxx.

Houses did pass his bills repealing the death penalty for stealing above the amount of 10 shillings from bleaching grounds in England and for stealing above the amount of 5 shillings from bleaching grounds in Ireland. The bills had been supported by petitions signed by a hundred and fifty proprietors of bleaching grounds in Ireland and a larger number of calico-printers in England, and Ellenborough in his speech made it clear that the bills received his support for this reason. In 1812 Romilly secured the repeal of an obsolete statute[45] under which it was a capital offence for soldiers or seamen to be found vagrant without their passes. In 1814 his bill to abolish corruption of blood was passed by both Houses, but in an emasculated form, and in the same year he attempted to amend the treason sentence.[46] The treason bill became law in 1815, but Ellenborough and Eldon insisted on an amendment whereby the body was cut into quarters. Apart from these measures, then, and despite several attempts to repeal the death penalty for stealing privately in a shop above the value of five shillings, Romilly's only positive achievement in reform was the act of 1808 removing the death penalty in cases of stealing privately from the person. It was not least the judges who, by relying upon the doctrine of terror, had substantially prevented progressive legislation in the field.

It remains for us to discuss Ellenborough's speeches in the House of Lords on matters other than Romilly's campaign for the reform of the criminal law.

The only piece of legislation initiated by him was, in fact, an act (known as Lord Ellenborough's Act)[47] which, in 1804, created ten new capital offences, although he did, as we shall see, propose amendments to a number of bills during debate in the House of Lords. The act which bore his name can be regarded as progressive only in that it redefined the offence of murdering bastard children;[48] otherwise it stands almost as a historical curiosity representing the Paleyan

45 39 Eliz I c 17.

46 The treason sentence was a colourful example of the barbarism still prevalent in the criminal law. Its requirements were as follows: 'That the prisoner be taken from the court to the place from whence he came, and from thence be drawn on a hurdle to the place of execution, and there hanged by the neck, but not until he was dead, but that he be taken down again, and whilst he was yet alive, his bowels be taken out and burnt before his face; and that afterwards his head be severed from his body, and his body be divided into four quarters, and his head and quarters be at the King's disposal'.

47 43 Geo III c 58.

48 Repealing 21 Jac 1, c 27.

influence in criminal legislation. It prescribed capital punishment for the following offences: administering poison or any other noxious or destructive substance with intent to cause a miscarriage; shooting at, or attempting to shoot, stabbing or cutting any person, with intent to murder, maim, disfigure, disable or to do grievous bodily harm and to resist lawful apprehension. Lord Campbell wrote of it that 'the revolting severity of our criminal law was scandalously aggravated. Some of these [offences], which before were only misdemeanours, might without impropriety have been made clergyable felonies, punishable with long imprisonment or transportation; but punishing them with death raised a cry against capital punishment, even in cases of murder. . . . '[49]

But the temporary victory gained by the exponents of terror was to be short-lived: the movement for reform of the criminal law flourished after Ellenborough's death and his statute was repealed in 1828.[50]

A recurring subject of debate in the House of Lords relevant to our purpose was the problem of insolvent debtors, in which the overcrowding in gaols was off-set, as Ellenborough saw it, by the interests of creditors and of the community generally in maintaining confidence in commercial credit. Imprisonment for debt, he thought, remained the only sure way to protect both interests, and Ellenborough made numerous speeches in the course of the protracted legislative attempts to deal with the problem. In January 1805, it is true, he moved an amendment to the *Insolvent Debtors Bill* then before the House which would give clear effect to an earlier, and ambiguous, statute affording relief to certain imprisoned insolvent debtors. He said that the amendment was prompted by

> . . . numberless applications . . . by persons who had been in prison during the full period required by the act, praying for a mandamus on the keepers of the different prisons, to rectify their lists, according to the different circumstances of the case which presented themselves. But, after the most deliberate consideration, and after a consultation of all the judges on the subject, it had been deemed beyond the power of a court of justice to afford that relief which, they were nevertheless convinced, it was in the contemplation of the legislature to have bestowed . . . In this situation he had thought it his duty to endeavour to procure the earliest possible relief to unfortunate persons in the predicament he had mentioned.[51]

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49 9 Geo IV c 31.
50 Campbell, op cit, 241.
51 3 Parl Deb (H of L) 51 (1805).

On the general principle of relief from imprisonment, however, Ellenborough stood firmly conservative. In May 1806 he said in further debate on the question of insolvent debtors that:

> . . . the professed principle upon which the bill, in the first instance, proceeded, was highly objectionable, namely, that the gaols were overloaded with prisoners. It was his opinion, that persons threw themselves into prison in order to take the benefit of an insolvent Act; and, therefore, that such an Act, in relieving such a description of persons, produced great injustice . . . The injurious result which must ensue . . . from such a measure as the present, would have the effect of placing many [creditors] in the situation of their present debtors.[52]

Later on the same day he said that he objected to the act because it contained no principle of discrimination but that 'it went to set all at liberty, to discharge the whole in gross . . . If this bill should pass into a law, the prisoners would be forever discharged as to their persons, without any satisfaction to their injured creditors.'[53] Again, in March 1808 Ellenborough strongly opposed a bill[54] to relieve debtors from being subjected to indefinite imprisonment at the hands of their creditors. He said that:

> . . . as to arrest, it was, generally speaking, the best means of producing a payment or a composition of the debt, and did produce that effect in five cases out of six. The creditor was more frequently an object of compassion than the debtor, from the frauds practised on him. He was decidedly hostile to the bill, and thought it ought not to go to a committee.[55]

Despite these tirades, it is nevertheless significant that on 2nd May, 1808, recognizing the valid claims of some imprisoned bankrupts to release, Ellenborough himself presented a bill to relieve debtors from prison where the debtor had been imprisoned for twelve months and the debt did not exceed twenty pounds. He hoped that ' . . . it would afford some relief to persons imprisoned for small debts without having any injurious effect upon commercial credit.'[56] But he later affirmed that in principle he 'could not consent to give up imprisonment for debt, which was the security to the creditor.'[57] In 1811 Ellenborough opposed the passage of the *Insolvent Debtors Bill*[58]

52 7 Parl Deb (H of L) 146 (1806).
53 Ibid 158.
54 Insolvent Debtors' Bill.
55 10 Parl Deb (H of L) 1070 (1808).
56 11 Parl Deb (H of L) 100, (1808). The bill was passed: 48 Geo III c 123.
57 Ibid 252.
58 Enacted as 52 Geo III c 165.

which permitted an insolvent debtor's release from prison after six months, provided the debt had not been contracted with criminal intent. He thought that 'to the common retail dealers in trade this Bill would be absolute destruction',[59] adding that 'his own time and attention would, perhaps, be better directed to the discharge of his various duties in another place.'[60]

In the next session, 1812, Ellenborough introduced an amendment to the new *Insolvent Debtors Act.* The Act contained a clause extending relief from prison to debtors confined for sums exceeding £2,000. Ellenborough remarked that difficulty had arisen in the administration of this clause. Under the Act imprisoned debtors were able to be brought before a barrister appointed by each Court, under the Chief Justices and the Chief Baron, who would examine the debtor's case for release, but no provision had been made by the Act to protect gaolers from liability in case the prisoner escaped. Further, no directions had been given in the Act as to how a debtor's discharge was to be effected once the barristers had reported in his favour. Ellenborough's amendment was designed to remedy these defects by giving the barristers more discretionary power and also provided for the investment of the prisoner's property, in the hands of the clerk of the peace in the county, for the benefit of the creditors. The amendment was adopted.[61]

Finally, in 1813, the gaol situation demanded a further measure of reform and again it is instructive to notice that Ellenborough himself sponsored it, proposing a temporary Act to relieve the King's Bench prison from overcrowding. A representation had been made to him, he said, that in the King's Bench prison, where there was only convenient accommodation for two hundred prisoners, there were now no less than nine hundred prisoners. The marshall had found himself compelled to give some of them the rules, upon slender security, at his own risk, it being impossible to accommodate them within the prison.[62] He added that 'it was absolutely indispensable that somthing should be done without further delay, for the relief of persons who had given in notices under the Act.'[63] Accordingly, Ellenborough moved the first reading of the *Insolvent Debtors Bill* (1813)[64] which provided for the

59 19 Parl Deb (H of L) 1169 (1811).
60 Ibid 1172-1173.
61 53 Geo III c 6.
62 27 Parl Deb (H of L) 163 (1813).
63 Ibid 164.
64 Enacted as 53 Geo III c 102.

repeal of the existing Act and the release from prison of debtors, in certain circumstances, in the discretion of the Court for Relief of Insolvent Debtors which was established by the Act. As in the case of Ellenborough's earlier amendment to the Act of 1811 the emphasis is on the sanction (imprisonment) with discretionary power to discharge the prisoner in appropriate circumstances, and to this extent is an application of Paleyan penal theory

In other matters Ellenborough showed himself to be a thoroughgoing champion of the *status quo*. In July 1814 he spoke against Erskine's bill to render freehold estate liable for the payment of simple contract debts of deceased debtors. In the next session he again spoke against the bill in June, saying that 'the adoption of such a measure would be like putting on, for the sake of a little inconvenience, a huge blistering plaster which would corrode and gangrene the whole system.'[65]

During 1808 the *Indictment Bill* was before the House which provided that every person prosecuted for an offence should be compelled to give bail on pain of committal to the county gaol. Ellenborough, supporting the bill, thought that its provisions of the bill were 'humanely adapted to give relief to the prisoner', and that 'the bill would also prevent a person sent to prison for want of bail, from remaining there . . . for years without the means of bringing on his trial.'[66]

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65 31 Parl Deb (H of L) 1038 (1815).

66 11 Parl Deb (H of L) 420 (1808).

On the question for the third reading of the Indictment Bill, Ellenborough appeared in his worst parliamentary manners: he 'considered the opposition to it no better than a tub thrown out for the purpose of catching popular applause, added, that he could not avoid observing, that he, as Chief Justice of the King's Bench, was entitled to some degree of respect, but he had been grossly calumniated by an indivdual of that house having compared him to those monsters, who in former reigns had disgraced the bench of justice, such as Scroggs, Jeffries, etc. But he should treat the calumny and the culmniator with contempt. On the former occasion he had been blamed for his taciturnity, for which he would not apologise to that individual but he would explain the reason to that House.' The bill was passed: 48 Geo III c 58.

In 1810 Erskine introduced a *Cruelty to Animals Bill*. In the committee stage, Ellenborough objected to the words 'cut, wound', 'for when the law came to be applied, he was not sure but that the term "cut" might be extended to the cutting of a whip'. He therefore proposed an amendment 'that the words "cut, wound" be left out, for the purpose of inserting, "kill, stab", which would be less dangerous in their application'. Erskine replied that 'he conceived that the words which preceded those objected to by his noble and learned friend, would have prevented their misinterpretation'. Ellenborough rose when Erskine had finished indicating his disagreement. He observed

In 1815, Ellenborough spoke against a bill authorizing an individual judge to issue a writ of *habeas corpus* during the vacation on the ground that this had been a practice of long standing and that the bill was unnecessary. The bill also authorized a judge to allow the return of the writ to be traversed and to liberate the party if the return were false. Ellenborough opposed this on the ground that although the common law did not recognize such a power, he had never known any cases of hardship arising from the lack of it. But in the next session he did not object to the bill being committed because 'at present the opinion was, that each individual judge had not the power of liberating in vacation; and he had no objection to agree to the extension of the remedy, so far as to empower individual judges to liberate where imprisonment seemed questionable.'[67]

Also during 1815 the House debated the *Pillory Abolition Bill* which had been presented following Cochrane's trial in 1814.[68] Ellenborough remained firm in his opposition to a measure in which he doubtless saw considerable disapproval of the sentence he had himself imposed. He said during the committee debate that he objected to the bill because 'there were several offences [such as perjury and fraud] to which [the pillory] was more applicable than any other that could be found. If a person were so totally degraded as not to feel the disgrace of this exposure in his own person, the example would be salutary in its effect on others.'[69] He went on to observe that 'he himself had never inflicted the punishment when alone on the circuit, except in one instance, where he had ordered two persons to be put in the pillory for having taken a bribe for assisting in the escape of French prisoners.'[70]

Ellenborough made his last speech in the House of Lords relating to the criminal law in 1816 on an another attempt by the reformers to

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that 'in no country under the sun was there any system of legislation for the protection of animals, except so far as related to the interests of man'. He also objected to the bill being extended to sheep and pigs, remarking that 'those animals were very apt to trespass; and the provisions of the bill, if applied to them, might lead to great oppressions. A pig might get into a cottage and be eating the cottager's potatoes; the cottager might strike the pig with a shovel, and for thus wounding the pig might under the bill be imprisoned for a month': 16 Parl Deb (H of L) 880 and ff (1810). The bill was not passed.

67 34 Parl Deb (H of L) 680 (1816). The bill was passed: 56 Geo III c 100.

68 See Crago, *Lord Ellenborough's State Trials* (1976) 12 UWAL Rev 235.

69 31 Parl Deb (H of L) 1124-1125 (1815).

70 Ibid 1125. The Pillory Abolition Act 56 Geo III c 138 (1816) abolished the pillory as punishment except in cases of perjury.

repeal 10 and 11 Will. III c 32 prescribing the death penalty for stealing privately in a shop above the value of five shillings. Both Ellenborough and Eldon opposed the bill: it was once more defeated and Ellenborough again put the Paleyan viewpoint that

> . . . the effect of removing the penalty of death from other crimes has rendered me still more adverse to any new experiment of this kind. Since the removal of the vague terror which hung over the crime of stealing from the person, the number of offences of that kind had alarmingly increased.[71]

Lord Ellenborough's speeches in the House of Lords gave authoritative expression to the Paleyan system of theological utilitarianism, which in its legal aspect represents the deterrent theory of criminal punishment in one of its most extreme forms. Ellenborough's tenure of the Lord Chief Justiceship of England coincided with the birth of an articulate and informed criminological movement aimed in precisely the opposite direction. In these circumstances Ellenborough proved a formidable and successful champion of the conservative forces both on the bench, where he was often a harsh and intolerant criminal judge, and in the House of Lords, where his Paleyan jurisprudence received its most explicit formulation and its most powerful expression.

However misguided the Paleyan system may now be thought, there can be no doubt that Ellenborough acted from the highest motives. The attitude most prominent in his personality is that of duty: to the law, to society and to himself. It is the conjunction of this ideal with that of a systematic, moralizing Protestant theology based on a rigorous ethic of rewards and punishments that is the key to Ellenborough's conduct in public life. It is not too much to say that, with Paley, and probably because of him, Ellenborough saw the criminal law as the proper guiding force in public morality and the statute book as the uniquely appropriate place for the application of that force.

But to the extent that his view of the penal system reflected an exclusive preoccupation with public security his jurisprudence was a primitive one; and his parliamentary career a rearguard action destined to be lost.

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71 34 Parl Deb (H of L) 684 (1816).

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