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JAMES MACKINTOSH AND EARLY NINETEENTH-CENTURY CRIMINAL LAW

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ABSTRACT. *This article examines the criminal law reform career of James Mackintosh (1765–1832). As Recorder of Bombay (1804–11), writer and Whig MP (1813–32), Mackintosh engaged with diverse aspects of criminal law. His view of the organic relationship between law, society, and public opinion, which was shaped by his Scottish intellectual background and Foxite Whig politics, was distinct from the radical and liberal political perspectives most often associated with criminal law reform. The article traces the implications of Mackintosh's approach for the practice of politics and legislation in the period and suggests cause to revise assessments of its outcomes.*

Early nineteenth-century critics argued that English criminal law had lost its authority. They labelled it a 'bloody code' and contended that the selective enforcement of an unwieldy mass of capital offences was not an effective means of deterring and preventing crime. According to one argument, the discretionary and arbitrary nature of the law's administration was the core problem and the solution was a uniform law that was applied consistently and centrally formulated according to fixed principles. The aim as set out by the Whig law reformer, Samuel Romilly, was 'by rational rules of evidence, by clear and unambiguous laws, and punishments proportioned to the offender's guilt' to approach as near to certainty 'as human perfection will admit'.[1] A second line of argument focused upon the law's severity, which, it was contended, had alienated public feeling. According to another prominent Whig, James Mackintosh, the law had to be 'brought more into accordance with the feelings of men. He would fain make the penal laws of his country the representative of the public conscience, and would array it with all the awful authority to be derived from such a consideration.'[2] In this analysis, the law's authority was based firmly on its alignment with public opinion.

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[1] S. Romilly, *The speeches of Sir Samuel Romilly in the House of Commons* (2 vols., London, 1820), I, pp. 127–8.

[2] 2 Parliamentary Debates (PD) 9, 418, 21 May 1823.

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These arguments overlapped in the critical parliamentary debates on criminal law reform in the 1810s and 1820s, but they were distinct. Those in favour of precise and detailed statutory regulation did not necessarily favour mild punishments and, conversely, those who contended that the law had to reflect public opinion did not always demand more prescribed statutory content or more certainty in the law's administration. Proponents of both arguments were frequently allied in parliamentary debates, but attention to the political and ideological distinctions that they reflected is necessary if our account of the politics of criminal law in this period is not to be dominated by the 'dreary dialectic between reform and reaction'.[3] Work that traces the histories of particular crimes through the period or which analyses the contribution of specific groups has highlighted the variegated structure of the criminal laws, the ways in which public opinion was constructed, and the uneven effects of the legislation that emerged.[4]

Individuals provide a valuable focus for the exploration of these themes.[5] This article focuses on a leading law reformer who exposes key strands in Whig thought and politics: James Mackintosh. A lawyer, judge, philosopher, historian, and MP (1813–32), Mackintosh took up the Whig leadership of the penal reform cause in parliament after Samuel Romilly's death in 1818.[6] He has been overshadowed by other figures, notably Romilly and Robert Peel, but his career deserves closer scrutiny, not least because it bridged the philosophical, political, and legal aspects of the issue. Mackintosh had direct experience of the criminal law as a barrister in England and as Recorder of Bombay (1804–11).[7] He engaged actively in the philosophical debates that bore on the subject and became a key figure in the political and parliamentary arenas in the critical decades of the 1810s and 1820s.

[3] D. Eastwood, 'The age of uncertainty: Britain in the early nineteenth century', *Transactions of the Royal Historical Society*, 5th ser, 8 (1998), pp. 91–115, at p. 95.

[4] R. McGowen, 'Managing the gallows: the Bank of England and the death penalty, 1797–1821', *Law and History Review*, 25 (2007), pp. 241–82; V. A. C. Gatrell, *The hanging tree: execution and the English people, 1770–1868* (Oxford, 1994), pp. 325–444; P. Handler, 'Forgery and the end of the "Bloody Code"' in early nineteenth-century England', *Historical Journal*, 48 (2005), pp. 683–702; P. Handler, 'Judges and the criminal law in England, 1808–1861', in P. Brand and J. Getzler, eds., *Judges and judging in the history of the common law and civil law* (Cambridge, 2012), pp. 138–56.

[5] See in particular the recent studies of Robert Peel: B. Hilton, 'The gallows and Mr Peel', in T. Blanning and D. Cannadine, eds., *History and biography essays in honour of Derek Beales* (Cambridge, 1996), pp. 88–112; S. Devereaux, 'Peel, pardon and punishment: the Recorder's report revisited', in S. Devereaux and P. Griffiths, eds., *Punishing the English* (Basingstoke, 2004), pp. 258–84. See also Gatrell, *The hanging tree*, pp. 566–85.

[6] For biographical information, see J. Mackintosh, *Memoirs of the life of the right honourable Sir James Mackintosh*, ed. R. Mackintosh (2 vols., London, 1836); P. O'Leary, *Sir James Mackintosh: the Whig Cicero* (Aberdeen, 1989); J. Rendall, 'The political ideas and activities of James Mackintosh 1765–1832' (Ph.D. thesis, London, 1972); C. Finlay, 'Mackintosh, Sir James, of Kyllachy (1765–1832)', *Oxford dictionary of national biography*, online edn, Jan. 2010.

[7] He also stood unsuccessfully for the post of Recorder of London in 1824. See *Times* 1, 12 Apr. 1824; Gatrell, *The hanging tree*, pp. 509–10.

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A study of Mackintosh illuminates the different dimensions and axes of debate and brings the aristocratic or Foxite Whig view of criminal law into sharp focus. This perspective has not been clearly recognized in accounts of the law reform movement, which have assimilated Whig views with the 'triumph of liberal notions of justice'.[8] In contrast, recent studies of the political, social, and intellectual dimensions of Whiggism have distinguished it much more carefully from Liberalism and emphasized the Whigs' distinctive contribution to the government and politics of the period.[9] In the context of criminal law reform, this influence can be traced through into the 1830s and the approach of Lord John Russell who made the sweeping and transformative changes that seemed unattainable in the 1810s and 1820s. If the liberal character of Peel's legislation made a significant contribution towards making them attainable, a focus on Mackintosh highlights their Whig foundation.[10] The first two parts of the article outline Mackintosh's ideological position and general view of criminal law. The third part attends to Mackintosh's role in the politics of law reform and the fourth examines the implications of Mackintosh's approach for the practice of legislation.

I

Mackintosh's wide-ranging interests and activities make him worthy of close study but also make his influence difficult to evaluate. His reputation, as he feared it would be, is of someone who did not quite fulfil his potential and make a lasting mark in any of his chosen fields of activity.[11] He achieved widespread fame with the publication of *Vindiciae Gallicae* (1791), but he did not go on to produce a major work of history or moral philosophy and his temperament and health did not allow for sustained success in the political or legal arenas.[12] According to one historian of philosophy, the 'greatest difficulty in understanding Mackintosh is perhaps that of not overrating him, while taking him seriously enough to be worth investigating as more than a purely political

[8] R. McGowen, 'The image of justice and reform of the criminal law in early nineteenth-century England', *Buff. L. Rev.*, 32 (1983), pp. 89–125, at pp. 97–8. See also L. Radzinowicz, *A history of English criminal law and its administration from 1750: the movement for reform, 1750–1833*, 1 (London, 1948); R. Follett, *Evangelicalism, penal theory, and the politics of criminal law reform in England, 1808–1830* (New York, NY, 2000); J. Hostettler, *The politics of criminal law reform in the nineteenth century* (Chichester, 1992).

[9] See P. Mandler, *Aristocratic government in the age of reform: Whigs and Liberals, 1830–1852* (Oxford, 1990); R. Brent, *Liberal Anglican politics: Whiggery, religion and reform, 1830–1841* (Oxford, 1987); J. Parry, *The rise and fall of Liberal government in Victorian Britain* (New Haven, CT, 1993); W. Hay, *The Whig revival, 1808–1830* (Basingstoke, 2005).

[10] For the argument in favour of Peel as a liberal law reformer, see Hilton, 'The gallows and Mr Peel'.

[11] See O'Leary, *Sir James Mackintosh*, pp. 185–6; Finlay, 'Mackintosh'.

[12] J. Mackintosh, *Vindiciae Gallicae: defence of the French Revolution and its English admirers* (London, 1791).

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creature'.[13] Mackintosh's philosophic creed did not provide a consistent or comprehensive theoretical framework to guide his approach to criminal law, but there were revealing points of interconnection.

Mackintosh's view of criminal law and its development was grounded in his belief that the law had to be in harmony with the particular state of society and opinion at any given time. This owed much to Scottish intellectual thought and the influential teaching and writings of Dugald Stewart, chair of moral philosophy in Edinburgh (1785–1810).[14] Mackintosh commented that Stewart's 'disciples were among his best works' and he could certainly be counted as one, alongside the Edinburgh Reviewers Francis Horner, Francis Jeffrey, and Henry Brougham and other prominent Whigs, including Russell.[15] A central tenet of Stewart's approach was that society progressed through different stages of development, a process that was driven by enlightened opinion and growing political wisdom. For Stewart, this progress was inevitable, and would ultimately result in less need for legislation, but it required guidance from the advanced intellects of the age through education and gradual political reform.[16] Mackintosh was less sanguine than Stewart about the inevitability of progress, but he shared his view about the importance of history, opinion, and the need for an intellectual elite to elucidate a principled and moral basis for progression.[17] In England, the state of society allowed for this to be achieved through gradual reform and education. In contrast, Mackintosh initially supported the French Revolution on the basis that the spread of enlightened ideas meant that such radical measures were an appropriate and necessary response to repression. Subsequent events in France prompted him to revise his assessment of the extent to which those ideas were established and withdraw his support in favour of the view that change had to be effected through more moderate means.[18] This shift helps towards an understanding of his approach to law reform. It suggests a familiar trajectory,

[13] K. Haakonssen, *Natural law and moral philosophy: from Grotius to the Scottish Enlightenment* (Cambridge, 1996), p. 265.

[14] In 1785, Mackintosh precociously put himself forward for the chair that went to Stewart (O'Leary, *Sir James Mackintosh*, p. 10).

[15] J. Mackintosh, *Dissertation on the progress of ethical philosophy*, in J. Mackintosh, *The Miscellaneous works of the right honourable Sir James Mackintosh* (3 vols., London, 1854), I, p. 215. For the influence of Stewart, see S. Collini, D. Winch, and J. Burrow, *That noble science of politics: a study of nineteenth-century intellectual history* (Cambridge, 1983), pp. 23–62; K. Haakonssen and P. Wood, 'Dugald Stewart: his development in British and European context, introduction' (Special Issue) *History of European Ideas*, 38 (2012), pp. 1–4.

[16] See Collini, Winch, and Burrow, *Noble science*, pp. 39–44; Haakonssen, *Natural law*, pp. 232–48.

[17] See J. Mackintosh, *A discourse on the law of nature and nations*, in Mackintosh, *Works*, I, pp. 375–6. For a detailed assessment of Mackintosh's relation to Stewart, see, Haakonssen, *Natural law*, pp. 265–93.

[18] Mackintosh expressed his support in *Vindiciae Gallicae* but changed his position over the course of the 1790s. See Rendall, 'Political ideas', pp. 30–101; S. Deane, *The French Revolution and Enlightenment in England, 1789–1832* (Cambridge, MA, 1988), pp. 43–57.

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from a radical to a more conservative and gradualist position, but it also emphasizes the significance of time, place, and context in his approach to legal and constitutional change.

Mackintosh's organic Whiggism can be contrasted with the dominant Benthamite or mechanical political ideology of the period in which society was conceived as static: a machine that had to be regulated by neutral laws that allowed individuals to make free, self-interested, and rational choices.[19] In the context of criminal law and punishment, this ideology found expression in Beccarian-influenced penal philosophies, in which offences and punishment were to be organized according to fixed principles and which therefore demanded system and regularity in the criminal law.[20] This applied to punishment and to the substantive criminal law, the authority of which was to be sought in the formal sources of law: in statutes and the binding decisions of the higher courts.[21] The ideology was also deeply linked with evangelical religion, which was central to its appeal and widespread dissemination.[22] Evangelical arguments for the penal laws to be made precise and to be reformed in order to reflect the strict economy of providence had much in common with such demands for a strictly regulated law.[23] Historians have characterized the early nineteenth-century criminal law reform movement as a whole in terms that reflected the mechanical political ideology of the period. The criminal law in the first half of the century has been described in terms that emphasize the emergence of 'a more restrained, rule-governed, predictable, depersonalised process'.[24] The policy of law reform, in this view, was to make it more mechanical in holding people unremittingly responsible for their own actions.

Mackintosh was closely associated with the group of law reformers who propagated Benthamite or Beccarian arguments, albeit in a moderated form, to a sceptical parliament in the 1810s and 1820s.[25] The extent of Mackintosh's sympathy with these arguments can be gauged by his fluctuating attitude towards Bentham. He took considerable interest in Bentham's work on penal reform,

[19] For the nature and pervasive influence of this ideology, see B. Hilton, *A mad, bad and dangerous people?: England 1783–1846* (Oxford, 2006), pp. 309–71.

[20] See Radzinowicz, *History*, pp. 268–395.

[21] On the criminal law codification debates, see L. Farmer, 'Reconstructing the English codification debate: the Criminal Law Commissioners, 1833–1845', *Law and History Review*, 18 (2000) pp. 397–426. M. Lobban, 'How Benthamic was the Criminal Law Commission?' *Law and History Review*, 18 (2000), pp. 427–32.

[22] See B. Hilton, *The age of atonement: the influence of evangelicalism on social and economic thought, 1795–1865* (Oxford, 1988).

[23] 'Penal laws in states, like those of the Divine Legislator, indicate not hatred to those whom they are proclaimed, for every man is at liberty not to break them.' H. More, *Christian morals* (4th edn, London, 1813), I, pp. 69–70, quoted in Hilton, *A mad, bad and dangerous people*, p. 320.

[24] M. Wiener, *Reconstructing the criminal: culture, law and policy in England, 1830–1914* (Cambridge, 1990), p. 65. For a similar conclusion, see J. Beattie, *Crime and the courts in England, 1660–1800* (Princeton, NJ, 1986), p. 636.

[25] See Radzinowicz, *History*, pp. 526–66.

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especially while serving as Recorder of Bombay, where the legal and administrative framework was relatively new and, in Mackintosh's view at least, the scope for corruption was very wide. It therefore appeared to Mackintosh as suitable territory for experiment and for some of the more radical measures proposed by Bentham.[26] Indeed, in January 1804 shortly before departing for India, he met Bentham and expressed support for his ideas and his intention to act on them in India.[27] In 1806, he went so far as to declare: 'I never sit in a criminal court without being mortified by the consciousness of how little I can do to apply his (Bentham's) forces.'[28]

This suggests a close affinity but their agreement that punishment should be made milder has, in accounts of penal reform at least, obscured some basic differences in philosophical approach.[29] Indeed, one historian has described Mackintosh as the 'very antithesis of Bentham's and Mill's. Where they saw society as a mechanism, he saw it as an organism. They appealed to reason; he appealed to history.'[30] Mackintosh was critical of the 'selfish' system of morals and ethics espoused by the 'modern advocates of utility' and their inability to accommodate benevolence in their concept of virtue.[31] This conventional critique, despite Mackintosh's claims to originality, was not a significant contribution to contemporary moral philosophy, but the emphasis on benevolence and sympathetic feeling informed his approach to the criminal law.[32] These higher virtues were so subtle as to 'escape the distinct contemplation of all but the very few who meditate on the acts of the mind'.[33] For Mackintosh, as well as Stewart, the study of moral philosophy and cultivation of mind needed

[26] His disillusionment with Bombay prompted him to think of other possible territories for reform, one of which was Botany Bay, see Mackintosh to Sharp, 15 July 1807, *Memoirs*, I, pp. 342–3.

[27] See J. Bentham to E. Dumont (Jan. 1804), J. Bentham to S. Bentham (Sept. 1804), J. Bentham to J. Mackintosh (1808), in J. Dinwiddy, ed., *The correspondence of Jeremy Bentham*, VII (Oxford, 1998), pp. 258–9, 278–9, 464–6.

[28] Mackintosh to Dumont, 18 Dec. 1806, Bibliothèque Publique et universitaire de Genève, Dumont papers, 33/3, fos. 1–3, as quoted in Rendall, 'Political ideas', p. 176. In 1807, he expressed his gratitude to 'Bentham and Dumont, not only for the instruction which I have received from them, but perhaps still more for the bent which they have given my mind.' Mackintosh to Sharp, 14 Aug. 1804, *Memoirs*, I, p. 215. He also expressed disappointment that, as a new prison had recently been built in Bombay, he would have no opportunity to establish one based on Bentham's panopticon (Mackintosh, *Memoirs*, I, pp. 210, 215).

[29] A notable exception is Hilton's persuasive reassessment of Peel's credentials as a criminal law reformer in which he argues that Peel's approach was in many respects more Benthamite than Mackintosh's. See Hilton, 'The gallows and Mr Peel', pp. 102–3.

[30] W. Thomas, *The philosophic radicals: nine studies in theory and practice, 1817–1841* (Oxford, 1979), p. 125.

[31] Mackintosh, *Dissertation*, p. 200.

[32] On the importance of feeling and sympathy in the early nineteenth-century debates on criminal law, see R. McGowen, 'A powerful sympathy: terror, the prison, and humanitarian reform in early nineteenth-century Britain', *Journal of British Studies*, 25 (1986), pp. 312–34.

[33] Mackintosh, *Dissertation*, p. 202.

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to access these virtues as a means to provide the far-sighted leadership in public life that would allow for the wider spread of enlightened opinion.[34] This active intervention and leadership was a prerequisite for social progress; individuals could not be left to make unguided decisions on the basis of rational self-interest.

The differences in approach were clearly manifest on questions of political and constitutional reform, where Mackintosh's moderate position clashed with that of radical Benthamites.[35] On criminal law, there was more overlap and on many substantive issues, there was common ground. The distinctiveness of Mackintosh's ideological position was evident in three key areas: the measure of punishment, judicial discretion, and the relationship between law and national character.

II

Opposition to the death penalty united many of those who argued for some measure of criminal law reform in the early decades of the nineteenth century. Mackintosh was not an abolitionist, but he was firmly opposed to the widespread use of capital punishment. His time as Recorder of Bombay gave him the opportunity to put his ideas into practice.[36] On his arrival there, Mackintosh announced that he was 'very desirous of trying an administration of criminal justice milder than any which has been attempted in any part of the British dominions'.[37] On the eve of his departure, he was able to declare that the 'experiment' had been a success on the basis that there had been no increase in crime, although Mackintosh did not fulfil his expressed hope of leaving Bombay with a 'bloodless ermine'.[38]

If there was common ground on the need to mitigate punishment, Mackintosh's view of the purpose of punishment rested on a different foundation from that which underpinned the position of those who viewed criminal law in mechanical terms. They proposed that punishment should be set at the minimum level necessary to deter individuals from engaging in the

[34] See Collini, Winch, and Burrow, *Noble science*, pp. 43–5, Haakonssen, *Natural law*, pp. 264–5.

[35] In 1808, Mackintosh declared Bentham's scheme for judicial reform in Scotland as 'Profound – original – useless!', Mackintosh, *Memoirs*, II, p. 404. See also J. Mackintosh 'Universal suffrage', *Edinburgh Review*, 31 (1818), pp. 165–203; Collini, Winch, and Burrow, *Noble science*, pp. 97–9.

[36] For Mackintosh's time in Bombay, see O'Leary, *Sir James Mackintosh*, pp. 73–103; Rendall, 'Political ideas', pp. 164–215.

[37] Judicial Proceedings of Bombay, British Library (BL) India Office Records, P397/38, fos. 1436–58, as cited in Rendall, 'Political ideas', p. 176.

[38] Mackintosh, *Memoirs*, I, p. 215. In 1811, he sentenced an English soldier to be hanged for what Mackintosh described as the 'cruel murder of a mean Hindu'. Mackintosh, *Memoirs*, II, pp. 116–17.

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prohibited conduct. The graduated scale of punishments that this calculation would produce was aimed at minimizing judicial sentencing discretion.[39] Bentham, after some vacillation, found no room for the death penalty in his scheme of punishments, but there was nothing in principle to prevent his affixing it to the most serious offences.[40]

Mackintosh's opposition to overly severe punishments also stemmed from a belief in their ineffectiveness, but he did not measure effectiveness with reference to any universal principle. In his view, punishment had to be calibrated according to the particular state of society. A milder system of punishment, which commanded widespread public support, would be more effective in preventing crime than one based on severity. 'Punishment is exemplary when it inspires a fear of committing the offence. But if it be repugnant to the moral sentiments of the community it may excite other adverse feelings which will prevail over fear. No punishment can be exemplary with which the community do not sympathise.'[41] If punishment was to be set according to community standards, the circumstances in which a severe punishment might be necessary could not be fully set out in advance. In sentencing, judges had to take account of feelings and the offender's motives in order to assess the degree of moral depravity and to calculate punishment. Mackintosh was therefore fundamentally opposed to Bentham's measure: 'There could be no greater error in criminal legislation, than to suppose the mischief of an action was to be the sole regulator of the amount of punishment to be attached to it.' Criminals did not act as a result of deliberation, but were 'hurried away by the strong passions that were imprinted in their nature'.[42]

This view demanded much more flexibility in the measure of punishment than would be allowed for in a system in which punishment was precisely

[39] For details of Bentham's classificatory scheme, see J. Bentham, *An introduction to the principles of morals and legislation* (1789), ed. J. H. Burns and H. L. A. Hart, reprinted with a new introduction by F. Rosen (Oxford, 1996). For discussion of Benthamite legislative schemes in the nineteenth century, see K. Smith, 'Criminal law', in W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden, and K. Smith, *The Oxford history of the laws of England*, XI–XIII: *1820–1914* (Oxford, 2010), XIII, pp. 122–3.

[40] Bentham's views on capital punishments were set out in three essays written in 1775, 1809, and 1830. The essays of 1775 and 1830 were integrated into, and published as, 'Principles of penal law', in J. Bentham and J. Bowring, *The works of Jeremy Bentham* (11 vols. Edinburgh, 1843), I, pp. 441–50, 525–32. The 1809 essay was not published: 'Law versus arbitrary power: a hatchet for Paley's net', University College London, Bentham manuscripts box 107, fo. 259. See J. E. Crimmins, 'A hatchet for Paley's net: Bentham on capital punishment and judicial discretion', *Can. J. L. & Jurisprudence*, 1 (1988), pp. 63–73.

[41] Mackintosh papers, BL Add. MS 78775A, fo. 77 'Notes on criminal law' (1823). See also Mackintosh, *Memoirs*, II, p. 371.

[42] 2 PD 9, 404–5, 21 May 1823. In his notes on criminal law, he designated as a 'false principle': 'That the criminal generally acts deliberately and calculating the consequences of his crime weighing advantages against punishment', Mackintosh papers, BL Add. MS 78775A, fo. 77, 'Notes on criminal law' (1823).

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calibrated by legislation.[43] Sentencing an elderly custom-master of Bombay in 1807, Mackintosh argued that the judge should take into account the 'natural consequences' of the offence for the particular offender when determining the 'legal punishment'. If the character and family of the accused meant that the 'natural' punishment was greater, the legal punishment could be reduced.[44] The courts should cultivate virtue through a compassionate regard for age in sentencing. Conversely, Mackintosh was willing, if the occasion seemed to require it, to use his sentencing discretion to produce a very different sort of effect. In 1810, he had to sentence an Irish artilleryman who had killed 'a poor, old, unarmed and unoffending seapoy of police' with a sword and the only mitigating circumstance was the fact that the offender was 'mortally drunk'. Mackintosh determined to pronounce the death sentence and then 'after letting the terror of it hang for some time over his head' to respite him. He based his decision on the pragmatic ground that an execution would not 'deter drunkards from murder', but his manipulation of his sentencing discretion to produce an effect did little to promote the certainty of the law.[45]

On the question of judicial discretion, the implications of Mackintosh's basic disagreement with Bentham's 'selfish system' of morals and neglect of feeling and intuition were far-reaching.[46] James Mill condemned Mackintosh's 'sentimental system' which encouraged judges to take a criminal's motives into account when sentencing, thereby licensing them to act arbitrarily.[47] Yet for Mackintosh, feeling and intuition were essential parts of the morality that was the foundation for judicial decisions about criminal responsibility and punishment. The position of judges and magistrates was crucial to the effective administration of the law because they could apply it in ways that were sensitive to social conditions and likely to promote moral values. This linked with Mackintosh's wider view of the need in public life for the active, expert intervention and guidance of an intellectual elite.[48] Criminal law and justice could not be set to run mechanically and systematically; it required management from judges and magistrates for whom Mackintosh envisaged a broad educative role. He aimed to make the law 'the fruit of moral sentiment, in order to render it the school of public discipline'.[49]

[43] This is not to suggest that such schemes made no allowance for judicial discretion. Bentham, for example, accepted the need for some, albeit limited, flexibility in sentencing; see Bentham, 'Principles of penal law', pp. 516–17.

[44] *The whole proceedings on the trial of Robert Henshaw* (London, 1807), pp. 240–3. See further BL Add. MS 78763, Mackintosh to Moore, 1 Mar. 1806, fo. 161; O'Leary, *Sir James Mackintosh*, p. 80.

[45] Mackintosh, *Memoirs*, II, pp. 16–17.

[46] See Deane, *The French Revolution*, pp. 43–57, 55. See also Mackintosh's discussion of Bentham in Mackintosh, *Dissertation*, pp. 236–64.

[47] J. Mill, *A fragment on Mackintosh* (London, 1835), p. 38.

[48] See above n. 17.

[49] 2 PD 9, 418, 21 May 1823.

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This approach was evident in Bombay where Mackintosh viewed the provision of general moral guidance to the community as a critical part of his judicial role. He placed considerable emphasis on his speeches to the grand jury, and his strictures on the moral qualities of the native population sometimes caused offence.[50] He viewed the discretion that he exercised in sentencing and interpreting the law as being of critical importance in adapting English law to Indian society. For example, he considered the Statute of Frauds very ill adapted to the 'commercial habits of the people', but when trying a forger felt able to exercise discretion 'without which I should be guilty of constant and horrible injustice'.[51] He used his sentencing and pardoning discretion to avoid the use of the death penalty, but when a sufficiently serious case did arise in 1811 he reflected that he had 'never signed a paper with more perfect tranquility of mind' than when signing the offender's death warrant.[52]

Mackintosh's time in India also illustrated to him the potential dangers of judicial discretion. He attributed many of the problems associated with the administration of justice in Bombay to the corrupting influence of the despotic power held by its officials.[53] This was particularly manifest in the context of police administration where the uncontrolled power of the police drew sharp criticism from Mackintosh. In the aftermath of a high-profile trial of a police superintendent for corruption, he recommended the replacement of the superintendent with three magistrates and the consolidation and revision of the police regulations as one means of restoring public confidence.[54] If the revision of the regulations might have obtained (qualified) approval from Bentham, his recommendation in a subsequent full report that the continuous presence of 'one of the principal English gentlemen of the community' to act as a public magistrate would 'always be a sufficient security against oppression' would not.[55]

Mackintosh's fears concerning the dangers of corruption and unchecked power in Bombay did not apply to England. He contrasted the position of the Bombay police superintendent with that of the English judge who had little

[50] In one sentencing speech, he suggested that the natives 'are beyond every other people of the earth addicted to these vices which proceed from the weakness of natural feeling and the almost total absence of moral restraints' (*Bombay Courier*, 19 Apr. 1806). For the resulting controversy, see Rendall, 'Political ideas', pp. 182–3.

[51] See Mackintosh to Adam, 20 Feb 1805. Blair Adam papers as quoted in Rendall, 'Political ideas', p. 181.

[52] Mackintosh, *Memoirs*, II, pp. 116–17.

[53] See Mackintosh to Wishaw, 20 Feb. 1808, National Library of Scotland Add. MSS 2521, fo. 135, as quoted in Rendall, 'Political ideas', p. 174.

[54] For the trial, which Mackintosh presided over, see G. Osborne, *The trial of Charles Joseph Briscoe* (Bombay, 1811). For Mackintosh's subsequent report, see J. Mackintosh, 'Letter from the Honourable Sir JM, with a report on the police of the island of Bombay, October 1811', in W. Morley, *An analytical digest of all the reported cases decided in the supreme courts of judicature in India* (2 vols., London, 1849), II, pp. 501–45.

[55] Mackintosh, 'Letter from the Honourable Sir JM', p. 522.

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scope to do much evil because 'the wisdom of our ancestors' had surrounded him with the 'numerous and wholesale restraints of laws, of juries, of a vigilant Bar and an enlightened public'.[56] Bentham viewed the discretion held by English judges as being dangerously wide, arbitrary, and potentially corrupt.[57] Mackintosh objected to the scope of judicial discretion: 'It was by the extent of discretion left to the judge in criminal cases, that we were now distinguished from, and opposed to every other country in the world.'[58] This might seem to be in line with Bentham's view, but his real objection was to the power that individual judges had over life and death. The problem was not judicial discretion per se, but the fact that 'the life of man should depend on temporary or local policy, on the necessities of a particular district, or the interests of particular classes'.[59] This was unacceptable because it appeared unjust to the public. The solution was not to abolish judicial discretion altogether, it was to mitigate the punishment that made it objectionable. In Mackintosh's view, the practice of including death within the range of judicial discretion was problematical because it was 'so modern' and not grounded in history or principle.[60] Mackintosh made no demand to fetter other aspects of the judicial role in the administration of criminal justice.

At the heart of Mackintosh's view of criminal law was its relationship with national sentiment. His initial high hopes of using his position as Recorder of Bombay to promote virtue and make a general improvement in the character of the people quickly gave way to disillusionment. 'The opposition between the sentiments of the people here and mine is so great that I see no means of doing good.'[61] These views are explicable, at least in part, by Mackintosh's view of the state and limited progress of civilization in Bombay. In his whiggish and organic view of historical development, England had advanced much further down the path of progress although problems remained. At the core of these problems lay the dissonance between the sanguinary character of the laws and the moral state of the nation. 'It is one of the greatest evils which can befal [sic] a country when the criminal law and the virtuous feelings of community are in hostility to each other. They cannot be long at variance without injury to one, perhaps to both.'[62] English criminal law was 'in many respects admirable and well adapted to the habits and feelings of the Country' and Mackintosh cited the independence of the judges and their restraint by juries, public opinion, and a free press as key strengths.[63] Yet the law's authority

[56] Ibid., p. 512.
[57] See Bentham, 'Law versus arbitrary power'.
[58] 2 PD 7, 794, 4 June 1822.
[59] 2 PD 9, 411, 21 May 1823.
[60] Mackintosh papers, BL Add. MS 78775A, fo. 56, 'Notes on criminal law' (16 May 1821).
[61] BL Add. MS 51451a, Mackintosh to Sharp, 14 Mar. 1807, fo. 39, quoted in A. Gust, 'Empire, exile, identity: locating Sir James Mackintosh's histories of England' (PhD thesis, London, 2011), p. 155.
[62] 1 PD 39, 784, 1 Mar. 1819.
[63] Mackintosh papers, BL Add. MS 78775A, 'Notes on criminal law' (1823), fo. 68.

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was undermined by the severity of the law. Mackintosh told the House of Commons that the 'final separation' of law and practice had been brought about by the 'ripening' of the humane feelings of the country.[64] The capital laws were the 'mushroom growth of modern wantonness of legislation' and were unsuited to a society that was 'growing more civilized and humane'.[65]

For followers of the mechanical political philosophy, what was needed was a system that would minimize the scope for discretion and allow the criminal justice system to operate according to clear established rules. Mackintosh shared the desire for more certain laws, but thought this could be achieved by moderate legislative and judicial reforms. A new fixed code was unnecessary and inappropriate. He believed in a fundamental and universal moral framework, but this took effect in a variety of historically particularized forms and laws had to be adapted to the stage of society. He criticized Bentham and other philosophers for conflating law and morality and supposing that a universal principle of utility could determine law and guide individual actions.[66] For Mackintosh, laws had to be fashioned in the light of historical analysis and understanding of social and moral development. In early nineteenth-century England this, above all, required the law to be mitigated in order to restore it and to realign it with the customs and habits of the people.

> Altogether to abolish a system of law, admirable in its principle, interwoven with the habits of the English people…would be too extravagant and ridiculous to be for a moment listened to…My object is to make the laws popular, to reconcile public opinion to their enactments, and thus to redeem their character.[67]

Mackintosh focused most of his arguments on those aspects of the criminal justice system that appeared most objectionable and, in his view, least consonant with public sympathy. Mitigating punishment would minimize the disincentive to prosecute and convict and establish the necessary congruence between law and opinion.[68] This did not demand any reformulation of law according to abstract principles of justice and punishment. Mackintosh's analysis of the law and its problems was based on history and the failure of modern legislation.[69]

Mackintosh's view of criminal law and society in England attracted the attention of Samuel Taylor Coleridge, whose work provided the principal ideological counterweight to Benthamism in the early decades of the nineteenth century.[70]

[64] 1 PD 39, 788, 1 Mar. 1819.
[65] 2 PD 9, 405, 21 May 1823.
[66] Mackintosh, *Dissertation*, pp. 206–8.
[67] 1 PD 39, 784, 1 Mar. 1819.
[68] 'The most effectual means, in his opinion, for the detection of crime would be the mitigation of punishment. If the laws were more mild, no stigma would attach to the discovery of crime, the hearts of men would go with its detection' (2 PD 7, 796, 4 June 1822).
[69] For a clear exposition of this argument, see Mackintosh's speech: 2 PD 9, 397–420, 405, 21 May 1823.
[70] Hence Mill's comment that 'every Englishman of the present day…holds views of human affairs which can only be proved on the principles either of Bentham or Coleridge', J. S. Mill,

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The personal relationship between the two men, which dated from the 1790s, was chequered by disputes but recently uncovered correspondence reveals some convergence of view on the issue of criminal law.[71] A month after one of Mackintosh's lengthiest parliamentary speeches on the subject in 1822,[72] Coleridge wrote to Mackintosh to express his 'heartfelt admiration of your parliamentary conduct'. On the criminal law, he noted the 'perfect correspondence of your principles, arguments and objects to my strongest convictions – and this I can say of no other man in either house'.[73] It is difficult to gauge the extent of the correspondence in detail because Coleridge did not anywhere set out his views on criminal law. The most obvious connection is in their shared organic view of the law and its mode of development, but the association is also suggestive and, initially at least, rather puzzling in political terms. Coleridge provided intellectual sustenance to high Tories in their view of the state and the constitution. Criminal law reform was one of the issues upon which they made a concerted effort to resist the attempts of men like Mackintosh to mitigate the laws.[74] High Tories such as Lord Eldon are thus ranged at the opposite end of the political field to reforming Whigs like Mackintosh. This clear opposition was certainly manifest on the question of the severity of punishment, but when the content and means of developing the substantive law were in issue Mackintosh was more Coleridgean than Benthamite.

III

Mackintosh's ideology or mode of thinking about criminal law and its relation to society underpinned his approach to the politics of law reform in the 1810s and 1820s. By the time he entered parliament in 1813, he had firmly recanted his earlier, more radical, political views and adopted a moderate and conservative position. Indeed, on Mackintosh's return from India, the prime minister, Spencer Perceval, offered him a position in the Tory administration. He declined on the grounds of his disagreement on the Catholic question and

'Coleridge' (1840), in J. Robson, ed., *Essays on ethics, religions and society: collected works of John Stuart Mill* (33 vols., London, 1963–91), x, pp. 120–1. For the importance of and the contrast between these ideologies, see Hilton, *A mad, bad and dangerous people*, pp. 309–14; M. Lobban, 'Theories of law and government', in Cornish, Anderson, Cocks, Polden, and Smith *Oxford history*, pp. 90–102.

[71] For Mackintosh and Coleridge's relationship, see J. Beer, 'Coleridge Mackintosh and the Wedgwoods: a reassessment, including some unpublished records', *Romanticism*, 7 (2001), pp. 16–40.

[72] See 2 PD 7, 790–805, 4 June 1822.

[73] This broad agreement was qualified by scepticism on some 'minor points' of criminal law theory, namely whether 'justice is prospective and exemplary and never properly punitive' (S. Coleridge to J. Mackintosh, 1 July 1822, BL Add. MSS 7873, fo. 87). The letter is reproduced and discussed in E. Garratt, '"Lime blossom, bees & flies": three unpublished letters of Samuel Taylor Coleridge to James Mackintosh', *Romanticism*, 7 (2001), pp. 1–15.

[74] See Hilton, *A mad, bad and dangerous people*, pp. 312–15; Lobban, 'Theories of law and government', pp. 91–4.

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entered parliament the following year as a Whig.[75] He became a significant figure in the party, at the heart of the Foxite Whig circle at Holland House and closely involved in developing party strategy.[76] He fitted into these circles alongside other Scottish educated intellectuals and Edinburgh Reviewers such as Brougham, Horner, and Jeffrey, but unlike them he was not much interested in the science of political economy or the principles of free trade.[77] His main interests were in history and the constitution and in this he was much more closely affiliated to aristocratic Foxites, such as Russell, with whom he was regularly allied on the question of constitutional reform.[78] He shared their view that the landowning class was best placed to govern impartially and in the interests of the nation as a whole, as were independent men (such as himself) who were ill equipped to fight popular elections. Above all, Foxite Whigs viewed themselves as particularly sensitive to popular feeling and public opinion and as trustees of the interests of the people in parliament.[79] This did not make them democrats: as natural governors, they had to use their discretion and judgement in accommodating such opinion. They did not support outdoor agitations of the sort that seemed to threaten the authority of parliament. Nonetheless, when there was a body of popular opinion apparently in favour of a particular cause, the Whigs viewed themselves as the proper guardians of that interest, against any possible abuse of authority by the crown.[80]

The fluctuating fortune of the Foxite Whigs in the 1810s and 1820s was, at least in part, a reflection of the fact that the growth in the importance of public opinion was not inexorable or uniform in its development. As Wahrman has argued, it acquired different meanings and associations and had differing impacts in the early decades of the nineteenth century. It was particularly salient in the post-Napoleonic war period and at the end of the 1820s.[81] On the question of criminal law, there was no consensus at any

[75] Mackintosh, *Memoirs*, II, pp. 251–3; James Mackintosh to Spencer Perceval, 11 May 1812, BL Add. MS 78764, fo. 75.

[76] See Rendall, 'Political ideas', pp. 258–302. For the structure and politics of the Whig party in this period, see A. Mitchell, *The Whigs in opposition, 1815–1830* (Oxford, 1967); Hay, *The Whig revival*.

[77] See Rendall, 'Political ideas', p. 275.

[78] See Mackintosh to Lord John Russell, 14 Oct. 1819, 12 Jan. 1820, in R. Russell, ed., *The early correspondence of Lord John Russell, 1805–1840* (2 vols., London, 1913), I, pp. 205–6, 210–12; Rendall, 'Political ideas', pp. 291–302; O'Leary, *Sir James Mackintosh*, p. 186.

[79] See, for example, Mackintosh's speech on the Parliamentary Reform Bill: 3 PD 4, 669–99, 4 July 1831.

[80] See Mandler, *Aristocratic government*, pp. 19–22; L. Mitchell, 'The Whigs, the people, and reform', in T. Blanning and P. Wende, eds., *Reform in Great Britain and Germany, 1750–1850* (Oxford, 1999), pp. 25–42.

[81] See D. Wahrman, 'Public opinion, violence and the limits of constitutional politics', in J. Vernon, ed., *Re-reading the constitution: new narratives in the political history of England's long nineteenth century* (Cambridge, 1996), pp. 183–222; D. Wahrman, *Imagining the middle class: the political representation of class in Britain, c. 1780–1840* (Cambridge, 1995), pp. 190–9; Parry, *The rise and fall of Liberal government*, pp. 27–34, 58–65.

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given point and it is difficult to discern, even with hindsight, a reasoned body of opinion that assumed pre-eminence in a growing public sphere.[82] Expressions of popular interest on the question of criminal law reform were sporadic. Opinion on the subject was not only divided but, for significant periods in the 1810s and 1820s, weakly expressed. Romilly's main difficulties in his parliamentary efforts related more to the general lack of interest in his subject than to opposition from Lords Ellenborough and Eldon.[83]

Public opinion was nonetheless a key feature of the political landscape in the first three decades of the nineteenth century; no politician could ignore it and many appealed to it. Even as they acknowledged its unparalleled influence, some were distrustful of it. Peel expressed substantial misgivings. He defined public opinion as 'that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy and newspaper paragraphs'.[84] He was sensitive to its influence on criminal law, but did not explicitly let it guide his legislative proposals or, indeed, his exercise of the Royal Prerogative of mercy.[85] Mackintosh, in contrast, demanded that it be accommodated: 'There were some who thought that parliament should not be in any way swayed by public opinion: but it seemed to him that on such a question it was of peculiar value.'[86] He considered the value of it in relation to criminal law 'widely different from its value in every other province', so important indeed that in some instances reason should be subordinate to it. Where understanding could be deluded by sophistry, feeling could not, hence the primary importance of 'national opinion' or the 'opinion of the age'.[87]

In Mackintosh's clearly expressed view, public opinion underpinned the authority of the criminal law. He was very careful to define it as the 'well-grounded persuasion of that numerous and respectable class of society' and to distinguish it from popular clamours.[88] This association of opinion, change, and the respectable middle classes was one that Mackintosh returned to throughout his political career. In 1791, he identified the middle ranks as the primary agent of political revolution and 'among whom almost all the sense of virtue of society reside'. This view, expressed in support of the French Revolution, had

[82] See Gatrell, *The hanging tree*, pp. 396–416; Handler, 'Forgery and the end of the "Bloody Code"'.

[83] See S. Romilly, *Memoirs of the life of Sir Samuel Romilly with a selection from his correspondence*, edited by his sons (2nd edn, 3 vols. London, 1840), II, p. 317.

[84] Peel to Croker, 23 Mar. 1820, in L. J. Jennings, ed., *The Croker papers: the correspondence and diaries of the late John Wilson Croker* (3 vols., London 1884), I, p. 170.

[85] 'It seems to me a curious crisis – when public opinion never had such influence on public measures, and yet never was so dissatisfied with the share which it possessed' (Peel to Croker, 23 Mar. 1820). On Peel's approach to criminal law and the prerogative of mercy, see works cited above n. 5.

[86] 2 PD 9, 418, 21 May 1823.

[87] Mackintosh papers, BL Add. MS 78775A, fo. 77, 'Notes on criminal law' (1823).

[88] 1 PD 40, 1536, 6 July 1819. For a contemporary exploration of 'respectable' opinion', see W. Mackinnon, *On the rise, progress and present state of public opinion* (London, 1828).

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changed by 1815 when he described the middle class as 'inert and timid and almost as little qualified to defend a throne as they are disposed to overthrow it'.[89] The advantage that England enjoyed over France in Mackintosh's view was the presence of the landed gentry in parliament to protect against any possible abuse of authority by the crown.[90]

The claims made by reformers that the opinion of the respectable classes of the community was set against the capital laws cannot be taken at face value, given the fragmentary and conflicting evidence. Public opinion, as it was referred to in the political discourse, did not reflect any social consensus or majority opinion even among those classes designated respectable. It was constructed and manipulated by those who appealed to it.[91] When Mackintosh took up the Whig leadership of the cause of penal reform following Romilly's death in 1818, he immediately focused his activities on the forgery laws. Forgery executions had caused more scandal and provided more evidence of public feeling than any other aspect of the hanging laws.[92] The crime accounted for a very high number of executions in London and England.[93] Forgery also linked the issue of criminal law reform with the most pressing political issue in the post-Napoleonic war years: the question of when cash payments should be resumed. In the period 1818–21, the radical press honed in on the issues, decrying the Bank and its paper system.[94] For the Whigs, this provided an excellent opportunity to combine an attack on the Bank of England with one on the criminal laws more generally. Mackintosh took the lead in exploiting this popular agitation in the Commons. He collaborated with the extensive evangelical and Quaker networks to mobilize that constituency of respectable opinion at critical points in the penal reform debates.[95] In 1819, he secured the appointment of a highly influential select committee on the criminal laws.[96] Mackintosh chaired the committee, which included Russell,

[89] Mackintosh, *Vindiciae Gallicae*, p. 129; J. Mackintosh, 'France', *Edinburgh Review*, 24 (1815), pp. 505–37, at p. 525, quoted in Wahrman, *Imagining the middle class*, p. 157.

[90] 'An ascendancy, therefore, of landed proprietors must be considered, on the whole, as a beneficial circumstance in a representative body', Mackintosh, 'Universal suffrage', p. 176. See also Mackintosh's speech on franchise reform in 1828: 3 PD 18, 1285, 1290, 21 Mar. 1828.

[91] See McGowen, 'The image of justice', p. 123.

[92] See P. Handler, 'Forging the agenda: the 1819 select committee on the criminal laws revisited', *Journal of Legal History*, 25 (2004), pp. 249–68; Handler, 'Forgery and the end of the "Bloody Code"'.

[93] There were 68 executions for forgery out of a total of 214 executions in London in the period 1805–18. In England and Wales, there were 204 executions for forgery out of a total of 1,035 (*Report of the select committee appointed to consider so much of the criminal law as relates to capital punishment in felonies*, Parliamentary Papers (PP), 1819, VIII, Appendices Nos. 1 and 2).

[94] See P. Handler, 'The limits of discretion: forgery and the jury at the Old Bailey, 1818–1821', in J. Cairns, and G. McLeod, eds., *The dearest birthright of the people of England: the jury in the history of the common law* (Oxford, 2002), pp. 155–72.

[95] See letters from T. F. Buxton to J. Mackintosh, 21 July 1819, 4 Aug. 1819, BL Add. MS 78767, fos. 19, 33.

[96] See Handler, 'Forging the agenda'.

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and focused on forgery because, as he explained to Lord Grenville, executions for the crime had 'chiefly contributed to produce a general call for reformation in the penal system'.[97]

This was a significant victory for Mackintosh and the Whigs in the face of government opposition. The 1819 committee excluded evidence from judges in favour of that from traders, commercial men, and other respectable members of the middling ranks. The emphasis on this commercial community evident in the report and in subsequent parliamentary debates suggests that Mackintosh had revised his opinion of the middle class again to afford them much greater prominence in effecting political change. They appeared as the constituency to which the legislature had to respond most readily on matters of criminal law. Yet this was a constituency constructed for political purposes during a time of great popular and radical unrest. Mackintosh's fears, expressed in an essay of 1820, that the bonds of society were 'rapidly loosening' had seemed on the verge of being realized in 1819, particularly in the aftermath of the events of 'Peterloo'.[98] The 1819 committee and subsequent debates on the issue of penal reform took place against this backdrop of unrest. Mackintosh wanted to demonstrate that respectable commercial men supported the law and moderate reform.[99] As Wahrman notes, Mackintosh's appeal to the authority of the middle class in this period 'originated at a given moment as a product of very specific circumstances, serving a very specific political agenda, and not as a detached observation of the impartial social scientist'.[100]

The subsequent collapse of popular interest in the question of penal reform emphasizes the contingency and unstable nature of the influence of public opinion. Introducing motions on criminal law in the House of Commons in 1822 and 1823, Mackintosh remarked upon the difficulty of attracting attention to a subject that was calculated to 'do anything other than to excite general interest'.[101] It was only in 1830, in the wake of renewed public scandal surrounding forgery and in a political context much more conducive to the Whigs' appeal to public sentiment, that his interest was reignited. The execution of the forger Joseph Hunton in 1828 and subsequent outcry had prompted the groups behind the campaigns in the period 1818–21 to recommence their efforts to mobilize opinion. The result was a petitioning effort

[97] James Mackintosh to Lord Grenville, 15 Apr. 1819, Dropmore papers, BL Add. MSS 58964, fo. 157.

[98] J. Mackintosh, 'Speech of Lord John Russell', *Edinburgh Review*, 34 (1820), pp. 461–501, at p. 463.

[99] The 1819 committee was appointed in Mar. and reported in July, before Peterloo (16 Aug.). The key debates on its proposals took place in 1820 and 1821. See Radzinowicz, *History*, I, pp. 526–66.

[100] Wahrman, *Imagining the middle class*, p. 248.

[101] 2 PD 7, 791, 4 June 1822; 2 PD 9, 397, 21 May 1823.

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on an unprecedented scale as far as the issue of criminal law was concerned and which bore comparison to the most pressing political issues of the day.[102]

Mackintosh and the Foxite Whigs had no compunction about responding directly to such expressions of popular feeling and opinion. Mackintosh's parliamentary activities on penal reform were focused on the years 1818–21 and 1829–30, when outdoor agitation and public opinion were at their height. The political style of the Foxite Whigs was at its most effective in those periods, when they emphasized their role as trustees of the popular interest.[103] Mackintosh did not propose to replace the authority of aristocratic leaders in parliament with that of the middling ranks. His approach was bound up with an aristocratic model of governance, in which an elite continued to play a key guiding role. If the criminal justice system had been blighted by capital legislation that was out of touch with public opinion, the solution was not to remove it and apply impersonal, fixed rules. Parliament had to mitigate the law in order to realign it with public sentiment but the detailed content and mode of its application by judges could not be legislated.

IV

It follows that Mackintosh viewed the role of the legislator as being prescribed and limited by public feelings, which were 'at once his instrument and his materials'.[104] His proposed bills and amendments were based on this principle which was in some senses limiting, in others potentially far-reaching. It was limiting in that there were many parts of the criminal law upon which very little public feeling was expressed. In these areas, Mackintosh adopted the conservative legislative theory associated with Francis Bacon.[105] Bacon argued that the problem with the statute law was 'an excessive accumulation of laws' and that the legislature therefore had to intervene to repeal obsolete laws and, periodically, enact a digest to consolidate and clarify the law's provisions.[106] There were two key limitations on Bacon's approach: first that legislation should not produce any substantive change in legal policy and secondly that statute should not be used to transform or uproot the common law. Romilly's, Mackintosh's, and Peel's efforts to reform the law in the 1810s and 1820s were all closer to Bacon's theory of legislation than to Bentham's more

[102] See Handler, 'Forgery and the end of the "Bloody Code"', p. 16; P. Jupp, *British politics on the eve of reform: the duke of Wellington's administration, 1828–1830* (Basingstoke, 1998), pp. 220–1.

[103] See Mandler, *Aristocratic government*, pp. 13–22, 33–43.

[104] BL Add. MS 78775A, 21 May 1823, fo. 64, 'Notes on criminal law'. For the relationship between Mackintosh's approach to legislation and his moral philosophy, see Haakonssen, *Natural law*, pp. 261–93.

[105] For Bacon's legislative theory, see D. Lieberman, *The province of legislation determined: legal theory in eighteenth-century Britain* (Cambridge, 1989), pp. 182–5.

[106] F. Bacon, *De Augmentis Scientiarum* (English trans.), p. 98, as quoted in Lieberman, *Province of legislation*, p. 182.

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radical conception.[107] They were directed at digesting and consolidating the laws rather than producing a new and complete code.

Romilly and Mackintosh departed from Bacon in their insistence that the use of the death penalty be reduced, something which demanded a change in the policy of the law. As Lieberman points out, Romilly's approach contained the potential for a more radical use of legislation because he did not look to history for guidance, but to first principles of punishment.[108] Peel also wanted to frame the laws according to his fixed view of human nature and the possible effects of punishment.[109] In contrast, Mackintosh appealed to history and to the progress of society in order to determine the need for legislation. Criticizing Bentham's approach to legislation, he argued that 'The art of legislation consists in thus applying the principles of jurisprudence to the situation, want, interests, feelings, opinions and habits of each distinct community at any given time.'[110]

This approach prompted Mackintosh to direct his legislative efforts towards the forgery laws, which had caused more public outcry and claimed more scaffold victims than almost any other. The most important and controversial bill that resulted from the 1819 Select Committee Report was the 1821 Forgery Punishment Mitigation Bill. It was directed mainly at the punishment affixed to the crime and made little change to the definition of the offence. It proposed to abolish the punishment of death for all first offences of forgery except forgeries of Bank of England notes. It did not set out any new graded system of punishment; indeed, Mackintosh sought to increase the judges' sentencing discretion to allow transportation for a minimum of three and a maximum of fourteen years.[111] The bill proposed to make the prosecution and punishment of the offence of uttering 'no longer subject to discretion, but to positive rule' for the reason that, anomalously, the discretion was exercised by the Bank of England. Mackintosh maintained (with no evidence) that the Bank would be 'glad to be relieved of so painful, so invidious and so unpopular a discretion'.[112] The Bank's wide prosecutorial discretion and its perceived influence over post-trial procedures were two key causes of the opprobrium that had attached to forgery cases over the preceding few years.[113] Mackintosh's approach was therefore consistent with his general view that discretion was objectionable insofar as it attracted public antipathy. Ironically, one of the reasons the bill failed was the apparent inconsistency in retaining the death penalty for one species of offence

[107] See Lieberman, *Province of legislation*, pp. 199–216.

[108] Ibid., pp. 213–14. For a full discussion of Romilly's efforts, see Radzinowicz, *History*, pp. 497–525.

[109] See Hilton, 'The gallows and Mr Peel'.

[110] Mackintosh, *Dissertation*, pp. 289–90, as quoted in Haakonssen, *Natural law*, p. 288.

[111] For the debates on the bill, see 2 PD 5, 893–971, 23 May 1821, 999–1001, 25 May 1821, 1099–114, 4 June 1821.

[112] 2 PD 5, 1103–4, 4 June 1821.

[113] On the Bank's prosecution practices, see McGowen, 'Managing the gallows'.

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(forgery of Bank of England notes), which opponents and some supporters argued was an unprincipled exception as other types of forgery were equally damaging.[114]

The 1821 bill was lost by a narrow margin in the Commons and with it went the Whigs' political momentum on the issue.[115] The resumption of cash payments in 1821 almost immediately alleviated the problem of forged Bank of England notes, and public interest in the question faded rapidly. This, together with Peel's arrival in the Home Office, prompted Mackintosh to change tactics in the House of Commons. In 1822 and 1823, he proposed general resolutions committing the House to mitigating the law's undue rigour. The focus of the motions was on the severity of the law, but while Mackintosh delivered long and wide-ranging speeches proposing the motions, he did not propose any legislation.[116] The more pragmatic Peel objected to this general approach and then drew the sting from Mackintosh's criticism by maintaining that he planned to pursue a programme of law reform from within government. He also claimed, disingenuously, that the difference between himself and Mackintosh was 'only as to degree'.[117] This, combined with the lack of evidence of public opinion, severely blunted the Whigs' ability to use the issue to attack the government for the remainder of the decade. For much of his period in office, the Whig opposition left Peel to pursue his programme of reform, despite the fact that it did little to mitigate the law.

This emphasizes the importance of public opinion and its manifestation out of doors to the project and prospects of success of criminal legislation in this period. On taking office in 1822, Peel recognized the momentum that had built up for law reform, but nonetheless set out to contain it in a strategy which he outlined to the prime minister:

> [I]n the present spirit of the times, it was in vain to attempt to defend what is established, merely because it is established…[T]he best policy [is] to take to ourselves the credit of the reform, and that by being the author of it we should have the best chance of presenting limits to the innovation.[118]

This strategy worked for much of the 1820s. Peel's legislative efforts involved a much more systematic revision of the criminal laws than that proposed by Mackintosh's committee. His achievements were far more substantial in terms of the range of offences that were reformed, but his Acts were consolidatory in effect and had only very limited mitigating effects. Peel's approach was methodical. He wanted to make the law as 'precise and intelligible as it can be made' so as to restrain the scope for judges and magistrates to exercise discretion.[119]

[114] See 2 PD 5, 1109, 4 June 1821.
[115] See Handler, 'Forging the agenda', p. 261.
[116] 2 PD 7, 791–805, 4 June 1822; 2 PD 9, 397–433, 21 May 1823.
[117] 2 PD 9, 421, 21 May 1823.
[118] Peel to Lord Liverpool, 12 Oct. 1822, Liverpool papers BL, Add. MSS 38195, fo. 120.
[119] 2 PD 14, 1214, 9 Mar. 1826.

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He sought to introduce a more disciplined and uniform system of secondary punishments and new police. He worked closely with lawyers and judges in his efforts to legislate on theft and forgery and the chief value of the legislation that resulted lay in the rationalization of notoriously complex areas of law.[120] Offences were defined more closely and there was some attempt to regulate and control the ordinary operation of discretion in sentencing, to the point where even Bentham was willing to give Peel some credit, even if he was impatient of the slow pace and limited scope of his reforms.[121] The extent of Peel's ambitions was circumscribed by his pragmatism, but also by his commitment to the death penalty.

Mackintosh showed little appetite for sustained and detailed attention to the intricacies of legal provisions. This had been evident in Bombay where his plans to instigate reforms of the legal system came to little. It was also manifest in his approach to law reform in England where his focus was on those aspects of law that appeared likely to result in some political gain for the Whigs. After 1823, when those gains appeared unlikely to be realized and the Whigs were at a particularly low ebb, he seemed to lose interest in the subject.[122] When Mackintosh turned his attention to the forgery laws again, in 1830, the political climate generally was more conducive to high Whig politics because of the popular agitation for religious and constitutional reform. Peel's forgery bill of that year and Mackintosh's amendment clearly illustrate their different attitudes towards legislation. Where Peel's bill was detailed and systematic, Mackintosh's amendment was directed at removing the death penalty.[123] The amendment was carried in the Commons (leaving Peel privately 'quite disgusted'), but lost in the Lords.[124] Nonetheless, Mackintosh's victory in the Commons had very considerable political value and arguably marked the point where opinion on the specific issue of capital punishment was perceived to have turned.[125]

V

Mackintosh's ideological and political position does not fit easily within current explanatory frameworks for criminal law reform in the period. He wanted mild punishment, but had no objection to the operation of discretion in the criminal

[120] For detailed accounts of Peel's legislative programme, see N. Gash, *Mr Secretary Peel: the life of Sir Robert Peel to 1830* (London, 1961), pp. 308–43; Radzinowicz, *History*, pp. 567–607.

[121] Peel and Bentham kept up a sporadic correspondence. See Gash, *Mr. Secretary Peel*, pp. 333–4. See also K. Smith, 'Anthony Hammond: Mr Surface Peel's persistent codifier', *Journal of Legal History*, 20 (1999) pp. 24–44.

[122] He drafted a plan for a bill to present in the first parliamentary session of 1826, but he does not appear to have acted upon it. See Mackintosh papers BL Add. MSS 52449, fo. 11.

[123] For Peel's draft bill and Mackintosh's proposed amendments, see PP, 1830, I, 417–34.

[124] E. Law (Lord Ellenborough), *A political diary, 1828–1830*, ed. Lord Colchester (2 vols., London, 1881), II, p. 264 (8 June 1830).

[125] See Handler, 'Forgery and the end of the "Bloody Code"'.

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law unless it had manifestly alienated the public. He did not seek measures that went beyond the aim of consolidating the law unless to remove capital punishment. His view of criminal law and its organic development ran counter to the dominant mechanical ideology of the era. His professed aim of aligning public opinion with the law did not bring with it a commitment to ensuring that the law operated neutrally according to that opinion. Just as the aristocratic elite was best suited to respond to popular concern in parliament, so in the administration of criminal justice, judges and magistrates had a leading role to play in interpreting and applying the law in order to educate and to sustain virtue and national character. Mackintosh's attempts to legislate were premised on the idea that the removal of the death penalty, without more, would be enough to restore the character and authority of the laws.

This is significant for two principal reasons. First, it suggests that it is important to distinguish carefully between the death penalty and other aspects of law reform in the period. There were important differences between those designated reformers and common ground between those usually cast on opposite sides of the political debates. The clear gulf between Mackintosh and the judiciary on the question of capital punishment does not mean that they were opposed on the question of how the law should be administered. Indeed, they had much in common in their view that the law should develop incrementally, according to no fixed rules or detailed statutory prescription. This not only complicates understandings of the nature of the debates on criminal law reform, it also suggests cause to re-evaluate its outcomes. The collapse of the 'bloody code' in the 1830s provides unequivocal evidence that the argument against capital punishment was successful, but the extent to which a mechanical approach to law shaped legislative policy or established itself in the higher criminal courts demands more scrutiny.

Mackintosh's position in the political debates on law reform also suggests cause to disentangle Whiggism from Liberalism on this issue. Mackintosh's views may in some ways have anticipated the mid nineteenth-century liberal view of the law progressing harmoniously alongside an advancing society, but they should not be assimilated.[126] During a socially turbulent period, Mackintosh seldom looked forward with confidence to the future; he was much more likely to appeal to the wisdom of the past. His arguments were premised on the idea that there was a profound and potentially dangerous discontinuity between law, its historical roots, and the state of society. The public opinion to which he appealed was not a stable liberal consensus on the need for a proportionate and certain justice system, according to which individuals could regulate their conduct. It was a volatile mix of popular and respectable opinion. The aristocratic Foxite Whigs were those most willing to govern with those interests in view and it was to that political constituency that

[126] See Hilton, *A mad, bad and dangerous people*, p. 350; Parry, *The rise and fall of Liberal government*, pp. 38, 122–3.

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Mackintosh belonged. This put him at odds with the liberal Tory Home Secretary Robert Peel in the 1820s and with the more radical parts of his own party.[127]

When Russell piloted the legislation that repealed England's capital laws in the 1830s, he announced his objective as being 'to make the law in accordance with the feelings of the public at large and with the opinions of the judges who were now charged with the administration of it'. The legislation aimed to 'meet the spirit of our law, and the humanity of the country'.[128] Russell's Acts made only a limited attempt to rationalize or transform the content of the laws. His focus on public opinion prompted him soon after his appointment as home secretary to instruct the Royal Commission on the Criminal Laws to switch focus from a complete revision and digest of the laws to capital offences. He wrote to the commissioners to express his view that it would not be expedient to wait for such a comprehensive review, before pressing ahead with his own law reform programme.[129] His scheme of legislation, which contained considerable scope for judicial discretion, particularly in sentencing, brought forth objections from those who sought to put the criminal law on a fixed footing. Peel argued in vain for a graduated scale of secondary punishments to replace the death penalty. More radical law reformers such as William Ewart and Henry Brougham objected to the extent of judicial discretion in Russell's scheme and the failure to engage in a systematic and complete overhaul of the criminal laws.[130] The legislation that repealed the 'bloody code' was therefore a disappointment to those who saw the world in mechanical terms. In contrast, the judges, having finally conceded the argument on capital punishment, supported Russell's measures.[131] If he had lived on, Mackintosh would surely have supported them too.

[127] Notably Brougham who secured the appointment of the Royal Commission on the Criminal Laws in 1833 which had as its initial objective to digest all of criminal statutes into one statute and all common or unwritten law into one statute. See *Royal Commission on the Criminal Laws First Report*, PP, 1834 (537), xxvi, 35; Smith, 'Criminal law', pp. 193–205.

[128] 3 PD 38, 914, 19 May 1837.

[129] *Correspondence between his Majesty's principal secretary of state for the Home Department and the commissioners*, PP, 1837 (76), xxxi, 31, pp. 33–8.

[130] 3 PD 38, 257, 24 Apr. 1837; 3 PD 38, 1786, 4 July 1837.

[131] 3 PD 38, 1774, 4 July 1837, per Lord Denman LCJ, reporting the views of the judges to the House of Lords.

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