

**The London School of Economics and Political Science**

*In the Shadow of the Prison Gates: An Institutional Analysis of  
Early Release Policy and Practice in England and Wales, 1960  
– 1995*

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## **Declaration**

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## Abstract

This thesis explores the historical development of early release policy and practice in England and Wales between 1960 - 1995. The evolution of criminal justice as a public policy concern has attracted considerable interest within the literature but this has tended to focus on the role of individuals as key agents of policy change or the 'big picture' socio-economic shifts associated with late twentieth-century modernity. Comparatively little attention has been paid to the mediating role of institutions at the intersection between policy and politics.

This thesis builds the case for a systematic and historically grounded analysis of public policy and examines the important, but often overlooked, influence of political institutions on the trajectory of criminal justice in England and Wales. Building upon detailed archival research this thesis considers three critical junctures in the evolution of early release policy and practice; the introduction of a modern system of parole in the *Criminal Justice Act 1967*; the complex policy debates that surrounded the extension of release on licence to short sentence offenders in the 1980s; and the steps taken to rationalise the operation of early release by the Carlisle Committee and *Criminal Justice Act 1991*.

These detailed historical case studies reveal a complex picture of continuity and change. The archival records draw attention to the complex, messy and contingent nature of criminal justice administration, the strong path dependent effects of public policy choices and the critical role of uneven power differentials in both impeding and catalysing the development of early release policy and practice between 1960 - 1995. Finally, this thesis reflects upon the methodological implications of this dynamic view of policy change and the benefits of a grounded historical institutionalism that examines public policy 'as life is lived' rather than taking a snapshot of those interactions at one point in time.

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# **1. Criminal justice in historical perspective, 1960 – 1995**

## **1.1 Introduction**

It has been said with truth that it is easy to imprison a man; the difficult thing is to release him (Home Office 1959 p.19).

In this study I examine the various ways in which the liberal democratic state seeks to justify, and in turn, administer an effective criminal justice system. In particular I argue that a systematic and historically grounded study of public policy can help to illuminate the evolving aims and techniques of criminal justice in England and Wales between 1960 - 1995.

In this introductory chapter I outline the central concerns of this study and reflect upon how criminal justice has evolved as a public policy concern since 1960. The broad contours of this historical shift have been well mapped within the criminological literature (see Bottoms and Stevenson 1992; Garland 2001; Windlesham 1993). In short, this general picture suggests that as classical theories of punishment fell into decline in the late nineteenth century a modernizing project began to gather pace, which saw punishment re-cast primarily as a means of rehabilitating offenders (Allen 1981; Garland 1985). Over time this perspective grew in sophistication and exerted increasing influence over the administration of criminal justice in post-war England and Wales. By the 1960s this had crystalized into a policy framework Garland has described as '*penal welfarism*', a complex web of values and attitudes united by a common belief that, '*penal measures ought, where possible, to be rehabilitative interventions rather than negative, retributive punishments*' (2001 p.34).

Just as this framework reached its highpoint it began to break down (Garland 2001). Disrupted by significant socio-economic and political change, the continued rise in recorded crime and negative research findings that challenged the rehabilitative value of prison many of the underlying assumptions of penal welfarism began to unravel in the 1970s (see Downes 1992; Morris 1989). In time the temperature of penological debate began to rise and the '*expert*' driven discourse of a '*liberal elite*' gave way to a more populist law and order agenda (Loader 2006 p.561). The politicisation of

criminal justice has fundamentally re-shaped criminal justice policy. Where the operation of the criminal justice system had once been seen as a bipartisan matter with a strong humanitarian impulse, the emergence of a highly charged ‘penal populism’ has often seen ‘*penal effectiveness sacrificed at the altar of electoral advantage*’ (Roberts *et al* 2003 p.5; see also, Bottoms 1995; Lacey 2007).

Comparative historical analysis offers a unique insight into the significant reconfiguration of the criminal justice landscape since 1960 (Farrell *et al* 2014). L.P Hartley famously wrote that ‘*the past is a foreign country: they do things differently there*’ (Hartley 1953) and this neatly encapsulates the appeal of historical study, it reminds us of the contingency of seemingly stable social structures and forces us to confront taken for granted ideas and assumptions about the political world. ‘*Distilling the frenzy*’ of contemporary historical events (Hennessey 2013) focuses our attention on the changing knowledges, understandings and techniques of government as well as the various actors, ideas and struggles that came to define the administration of criminal justice in the latter half of the 20<sup>th</sup> century. For these reasons Loader and Sparks have argued that, ‘*an account of change in the criminal justice arena is best approached as a special case of an historical enquiry into politics*’ (2004 p.6). It draws attention to the ‘*struggles over the meanings and import of such ideas as order, authority, legitimacy, freedom, rights and justice*’ that go to the heart of public policy (Loader 2006 p.562). But most importantly it speaks directly to evolving conceptions of the ‘right’ and the ‘good’ society (Rawls 1999; Sandel 1998).

How do we account for these changes? How can we gain traction within this debate given the proliferation and density of existing criminological research? In his seminal work ‘*The Culture of Control*’ David Garland draws our attention to the unavoidable tension between ‘*broad generalization*’ and the ‘*specification of empirical particulars*’ when researching the social and political world (Garland 2001 p.vii). The broad terrain of criminal justice may have been well mapped but the ‘*capillaries*’ through which power is produced and transmitted within the micro, meso and macro levels of social structures remain relatively uncharted (Foucault 1980 p.39; see also Hunt and Wickham 1994). In this study I will explore these capillaries and position my research in the ‘middle range’ (Merton 1967) between empirical particulars and ‘grand theory’ in order to build a historically grounded and theoretically rich analysis

of criminal justice policy. In so doing my point of entry will be the evolution of ‘early release’ policy and practice from 1960 – 1995, thirty-five years characterised by continual legislative and administrative reform in England and Wales (a theme I return to in Chapter 3 of this study).

I will argue that contemporary discussion of crime control and penal policy has focused to a significant degree on the entry points into the criminal justice system, most notably, the politicisation of law and order (Downes and Morgan 2007), the role of the police (Newburn 2003; Reiner 2000), sentencing behaviour (Bottoms 1995; Roberts *et al* 2003) and the centrality of the prison within our penal ‘imaginary’ (Mathiesen 2005; Pratt 2007). But this is only one part of the story. Criminology has had relatively little to say about the termination of prison sentences (Padfield 2007; 2012a). The extract above from the White Paper *‘Penal Policy in a Changing Society’* (Home Office 1959) is so interesting (and seemingly counter-intuitive), because it shifts the locus of penal enquiry from the sentence of the court and the quantum of punishment to the day-to-day operation of the penal system and the decision to release prisoners back into society. In that sense this is a study of what goes on behind the scenes of our criminal justice system. It is a study of what happens in the shadow of the prison gates.

In this introductory Chapter I outline the central concerns of this study and expand upon why the reconfiguration of criminal justice in England and Wales is such an important topic for scholarly enquiry. I begin with a detailed review of the primary data and secondary literature and what they reveal about the evolution of criminal justice between 1960 – 1995. Having examined the broad contours of this historical shift I turn to the evolving role of early release within the administrative apparatus of the criminal justice system. Here I argue that ‘early release’ has been a relatively unexplored area of public policy that merits further scrutiny. Finally, I offer a summary of my research questions, the contribution of this thesis and an overview of the chapters that follow.

## **1.2 Continuity and Change within the Criminal Justice System**

How has criminal justice evolved as a public policy concern in England and Wales? Why does it matter? It is now widely accepted that criminal justice, like many areas

of public policy, has become an altogether more complex pursuit since the 1960s and the breakdown of the post-war consensus (Dutton 1997; Kavanagh and Morris 1994; Marsh *et al* 1999). But this is as much a story of continuity as change (Faulkner 1991). Penal administrators operating in 1960 would have recognised many of the central concerns of criminal justice at the close of the 20<sup>th</sup> century and yet, the re-configuration of criminal justice and the role of the liberal democratic state within that process would no doubt seem extraordinary and deeply troubling for a generation of penal administrators shaped by the world-view of penal-welfarism and active, if often reluctant, participants in the emergence of a more muscular brand of penal populism (Pratt 2007). The literature detailing these shifts is far-reaching and cannot be reviewed in detail here. Instead I draw attention to three particularly significant dimensions of change within the criminal justice field; the politicisation of criminal justice, the operational implications of a more punitive conception of punishment and the critical role of the Home Office at the inter-section between politics and policy.

### *1.2.1 The politics of crime control*

The first and arguably most striking feature of change has been the steady erosion, either real or perceived, of the liberal democratic state as the pre-eminent guarantor of social order (Garland 1996), a trend that has gone hand-in-hand with the emergence of crime as a subject of intense political and public debate (Garland 2001; Loader and Sparks 2004; Newburn 2007b p.425).

Drawing upon evidence from police recorded crime figures and the Crime Survey of England and Wales<sup>1</sup> (CSEW) it is possible to trace the broad contours of this historical shift. In so doing it is necessary to proceed with caution. There has been a tendency amongst politicians and other commentators to treat these statistics as an objectively ‘true’ or ‘real’ picture of crime but in reality both data sources offer a partial perspective that can both illuminate and obscure an analysis of crime trends (Maguire 2007 pp.253-254). Recorded crime statistics have been collected since 1851 and allow for a broad historical survey of the incidence of crime made known to the police. However, these figures are subject to variations in police accounting and limited in scope to ‘notifiable offences’ that ignore the prevalence of less serious, ‘summary

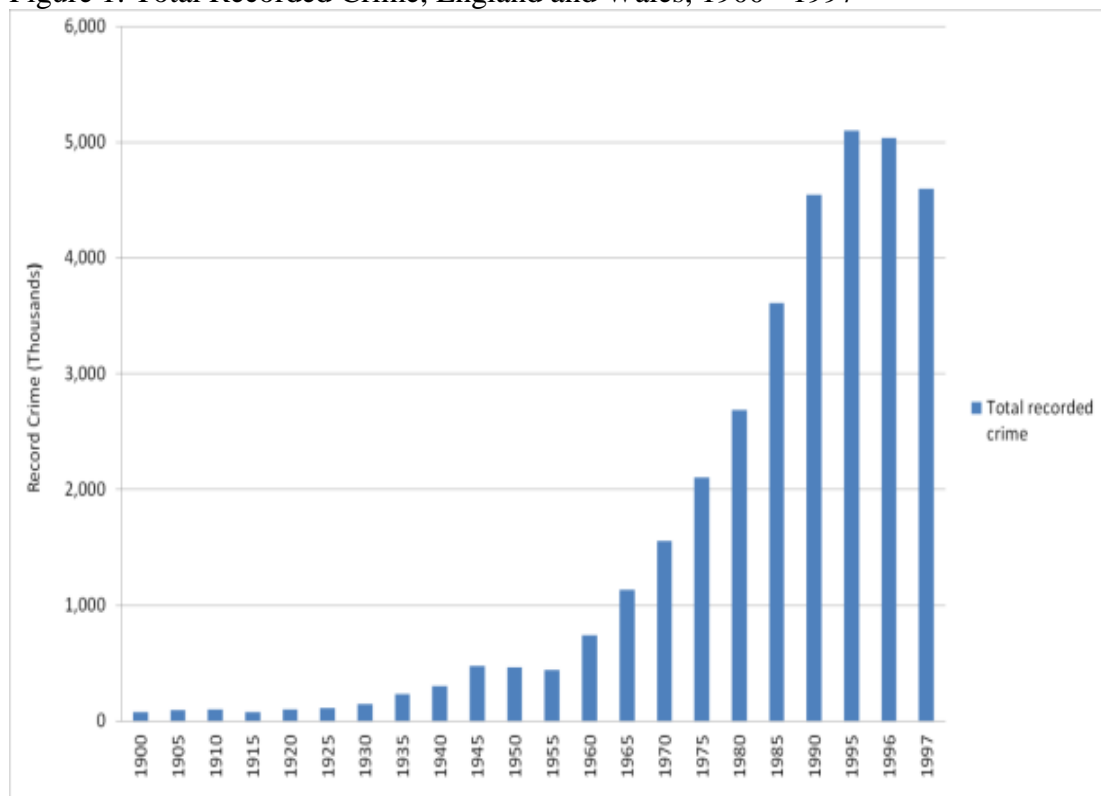
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<sup>1</sup> Previously known as the British Crime Survey (BCS)

offences’ (Newburn 2007b). In comparison, the CSEW is generally seen as a more reliable measure for many classes of criminal activity. However, it does not cover some serious crimes like murder or so-called ‘victimless crimes’ like drug abuse, while the more recent origins of the survey can make longer-term historical comparisons difficult (Maguire 2007 pp.241-301).

For these reasons extrapolating long-term historical trends is challenging and value-laden. Nonetheless, there does appear to be a degree of convergence in the data, at least for the period 1960 - 1993<sup>2</sup>. The recorded crime statistics suggest that the incidence of crime increased markedly in the post-war era before beginning to fall around 1995. As Figure 1 reveals, a total of 743,713 crimes were reported to police in England and Wales in 1960, a figure that grew steadily through the 1970s before accelerating to 5,100,241 in 1995.

Figure 1: Total Recorded Crime, England and Wales, 1900 - 1997



Source: Home Office (2012)

Over time the steep rise in recorded crime became highly contested and a significant focus of political debate (Maguire 2007 pp.253-254) but the headline figures can

<sup>2</sup> For analysis of the divergence in the statistics thereafter see Newburn 2007b

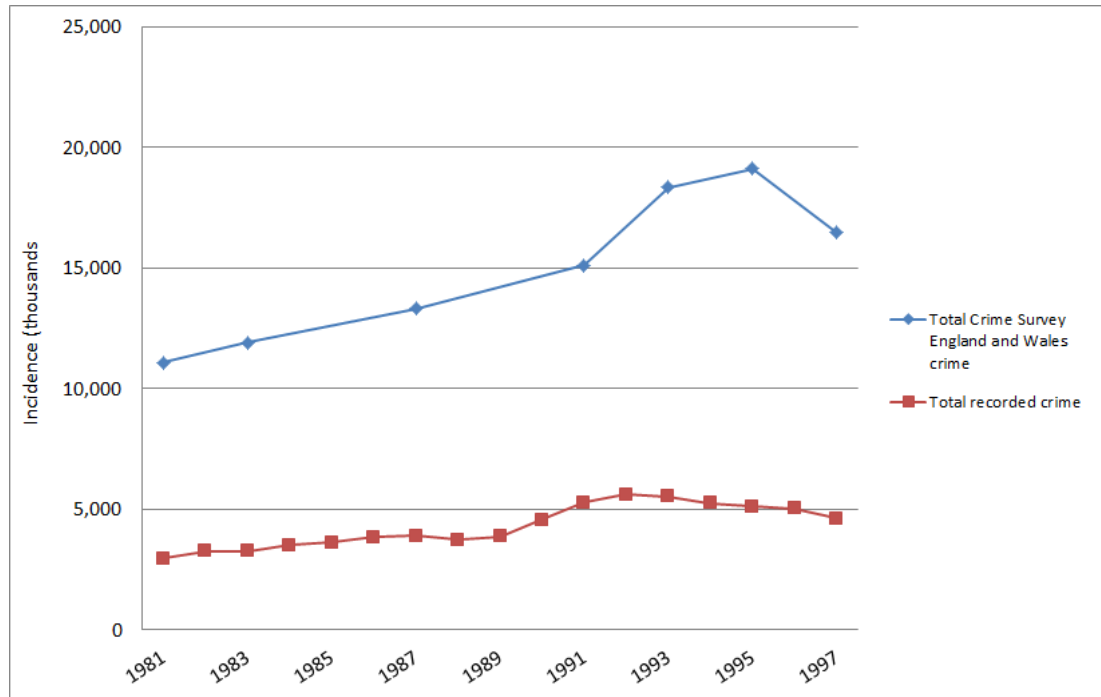
obscure subtle differences in the incidence of crime over time, between rural and urban settings as well as individualised, lived experiences of crime. Significant variation can also be found between classes of criminal offence. Total violent crime, including assault and homicide increased from 49,439 reported incidents in 1960 to 310,936 cases in 1995, a rise of 529% in thirty years (Home Office 2012). Property offences also increased markedly albeit from a higher baseline. To take one example, the incidence of theft and the handling of stolen goods increased from 763,561 in 1960 to 2,452,109 in 1995, a rise of 221% (Home Office 2012). More difficult to quantify is the relationship between recorded crime rates and the so-called 'dark figure' of actual crime (Biderman and Reiss 1967). For example, Reiner (2010) has suggested that it is possible to distinguish a number of distinct phases within the recorded crime rise. Drawing on evidence from the General Household Survey (GHS), Reiner argues that between 1955 - 1983 much of the rise in recorded crime, particularly in relation to property offences, can be attributed to the increasing propensity of victims to report crimes to the police (2010 p.254). Thereafter, reporting rates began to stabilise and the available evidence does confirm that crime grew at an unprecedented rate between 1983 – 1992, before beginning to fall after 1993.

A broadly comparable picture can be found in the CSEW. Established in 1981 as the British Crime Survey (BCS), the survey indicates that the recorded crime statistics significantly underestimate the incidence of crime while also appearing to reinforce the conclusion that crime increased markedly in the 1980s before beginning to fall in the mid-1990s (see Figure 2). Total reported crime increased from 11,066,000 in 1981 to a peak of 19,109,000 in 1995 before falling thereafter. Allied to this there was also a worrying increase in the risk of victimisation. The percentage of households that reported they had been victims of crime once or more in 1981 was 27.7%, a figure that would increase to 39.7% in 1996 before beginning to fall. The impact of this transformation in the basic conditions of social life led the sociologist Jock Young to describe rising crime rates as '*the major motor in the transformation of public behaviour and attitudes, in the development of the crime control apparatus...*' (1999 p.17). The shift to a high crime society has also been a key driver of new public policy responses. In '*Crime and Criminal Justice in Britain since 1945*' Terry Morris traced the emergence of the 'modern crime problem' in the late 1950s and examined how



policy-makers sought to deal with the inexorable rise in recorded crime, especially amongst young people (1989 p.93).

Figure 2: Overall Crime, CSEW and Recorded Crime, England and Wales, 1981 – 1997



Source: ONS (2013)

Morris suggests that governmental responses to crime progressed through four discreet phases in the post war period. In the aftermath of World War Two deterrence and the ‘certainty of detection’ emerged as the primary tools of crime control. In the 1960s this gave way to a *‘period of optimism and the power of rehabilitation’* (Morris 1989 p.106). Ultimately this proved short lived and the 1970s ushered in a period of scepticism about ‘rehabilitation’ defined by a belief that ‘nothing works’ (often attributed to the much misquoted Martinson 1974). In time this fatalism was supplanted by a more pragmatic focus on situational crime control and a ‘just deserts’ sentencing philosophy premised upon the belief that punishment should be proportionate to the harm caused by the offence (von Hirsh 1976 and 1985; von Hirsh and Ashworth 1998).

This adaptive response also serves to remind us that the politicisation of law and order has been but one element of a wider public policy response and should be recognised as a phenomenon of relatively recent origin (Downes and Morgan 2007; Garland

2001). For much of the post-war period crime control was a bi-partisan matter to be administered by experts away from the glare of party politics (Windlesham 1987, 1993, 1996, 2001). This undoubtedly had political benefits so long as the bipartisan equilibrium was maintained but it also reflected a strong civilising impulse to manage such an emotive issue in the right and proper way (Loader 2006). As Roy Jenkins made clear in his maiden speech as Home Secretary to the House of Commons on 2<sup>nd</sup> February 1966,

In my view crime is a most unsuitable subject for strict party conflict, and as long as I am Home Secretary I hope that we can prevent it from becoming a subject for strict party conflict. It is a most unsuitable subject because it is one in which, more than most, passion and emotion are very bad counsellors. We all have a duty to encourage the nation to look objectively at the facts and to see which reasoned conclusions about prevention and punishment can be drawn from them. It would be most unwise to introduce politics into the question of crime to the extent of suggesting that this most difficult situation was the fault of this Government (HC Deb 2 February 1966 vol 723 c1121).

This worldview began to unravel in the 1970s (Loader 2006). Shaken by continued rises in recorded crime, negative research findings and declining levels of public trust in government, criminal justice emerged as a more contested electoral issue. Downes and Morgan have traced the development of law and order in this less certain world through successive editions of the Oxford Handbook of Criminology (2002; 2007; 2012). They argue that the politicisation of law and order was shaped by, *'the perceived need to respond to the almost continued rise in recorded crime, the reduced potency of certain informal controls, the growth of illicit drug taking, and the threat of politically inspired terrorism'* (2007 p.234). Mirroring public policy trends more generally, this political response has evolved over time. In the immediate post-war period law and order had been relatively insulated from party politics by a cross-party liberal ideology. This spirit of bipartisanship, the so-called post-war consensus (Marsh 1999), broke down in the 1970s as the parties began to fight for control of the law and order terrain. At first this was a rather asymmetric divide. While the Labour Party remained wedded to an orthodox social democratic understanding of crime (Young 1988) the Conservative Party were particularly successful in developing a law and order proposition that linked public fear of crime and insecurity to a wider political narrative,

The Conservatives fused the issues of law-breaking and order defiance. They attacked not just the policies but the integrity of Labour. They refashioned their traditional claim to be the natural party of government, representing the order of established authority. They successfully pointed to Labour's responsibility for the alleged 'ungovernability' of Britain. They capitalized on widespread public fears about: national decline; loss of economic competitiveness and bad industrial relations; the growth of permissiveness and declining public morals; fear of crime, inner city decay, and the extravagances of youth fashion and street protests. They made restoring the 'rule of law', which they claimed Labour had undermined, one of their five major tasks... (Downes and Morgan 2007 p.204).

The 1979 election had been won, in part, on '*the most radically tough law and order ticket the Conservatives had ever produced*' (Downes and Morgan 2007 p.213) but away from the rhetoric government policy for much of the 1980s continued to rest upon a complex blend of classic liberalism, one nation conservatism and an emerging 'new right' agenda that blended elements of neo-liberalism and neo-conservatism (O'Malley 2000). Reiner (2010) has described law and order in the 1980s as a rather phoney '*war on crime*' and with the notable exception of public order argues that there was a systematic attempt to make greater use of non-custodial sentences, to implement findings from the nascent field of situational crime control and recast crime control as a social issue for which everybody must take a share of the responsibility (2010 pp.8-9). This 'Indian summer' (Windlesham 1993) came to an end following the 1992 General Election as the Major government grappled with the mass unemployment associated with the 'Lawson boom', the destabilising effects, both political and economic, of 'Black Wednesday' and the steps taken by Kenneth Clarke and Michael Howard to move government policy in a more punitive direction (Downes and Morgan 2007 p.258).

There is also some evidence to suggest that the 'clear blue water' established by the Conservatives did contribute to the diminishing electoral prospects of the Labour Party, at least in the short term (Downes and Morgan 2007 p.204). Whether this resonance with the electorate was real or perceived the Labour Party responded with a gradual toughening of its law and order platform (Tonry 2003), a process that accelerated under Shadow Home Secretary Tony Blair and over time became a central plank of the New Labour project. Crime was highlighted as the unacceptable social

cost of Conservative economic mismanagement; the *Criminal Justice Act 1991* was heavily condemned for focusing on the offence rather than the offender; while the now famous ‘tough on crime, tough on the causes of crime’ slogan came to signify New Labour’s embrace of a more muscular approach to law and order. So much so that by the mid-1990s the main political parties were converging around a more punitive law and order agenda and, ‘*a new second order consensus emerged. No party could any longer afford to cede the law and order ground to the opposition: all parties felt obliged to address it in some way*’ (Downes and Morgan 2007 p.204).

### 1.2.2 The ‘punitive turn’

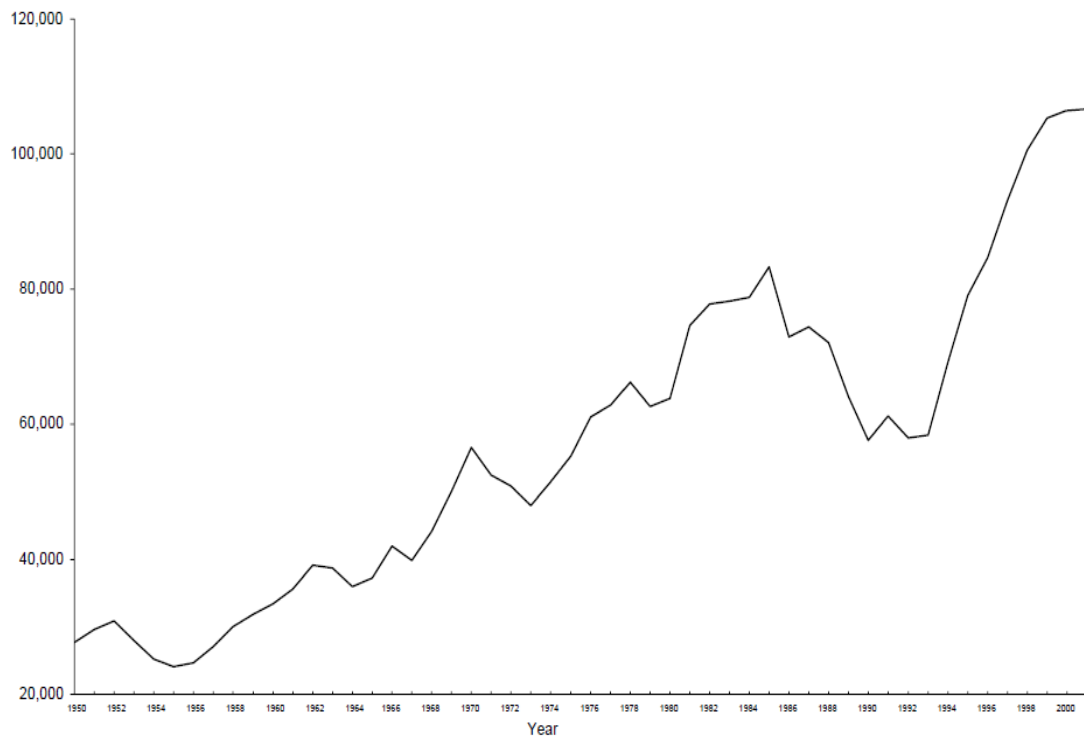
The decline of the ‘rehabilitative ideal’ (Allen 1981) and subsequent politicisation of law and order had a profound impact upon the emotional tone of penal policy and justifications for punishment (Garland 2001; Pratt 2007). As the demand for more retributive forms of justice increased so too did the ‘toughness’ of punishment and the centrality of the prison within the modern penal imaginary (for a dissenting view see Mathews 2005; 2010).

The impact upon the prison population was particularly pronounced. Between 1960 - 1995 the courts demonstrated a growing propensity to sentence offenders to custody and for longer periods of time. Figure 3 reveals that in 1965 approximately 40,000 persons found guilty of criminal offences were sentenced to immediate custody. By 1985 this figure had doubled to more than 80,000 before concerted effort by the Home Office, the Lord Chief Justice and the Magistrates’ Courts resulted in year-on-year reductions in the use of custody between 1985 and 1994 (Home Office 2002) at which point the use of immediate custody began to rise sharply. Similar trends can be found in sentence lengths. In 1969 the average sentence length for males aged 17 or over was 11.5 months. By 1986 this had increased to 13 months cementing the position of England and Wales as one of Europe’s most prolific incarcerators (see Home Office Criminal Statistics England and Wales, 1960 – 1995).

The causal relationship between crime rates and imprisonment remains fiercely contested and largely outside the scope of this study but there does appear to be some support for the conclusion that sentencing trends are anchored within wider social attitudes towards crime (see Roberts and Hough 2002). As Newburn has noted, there

is, ‘growing evidence that sentences are affected not only by the legislative context in which they work but also by the general mood, or what Tonry refers to as “sensibilities” – the penal zeitgeist’ (2007 p.459).

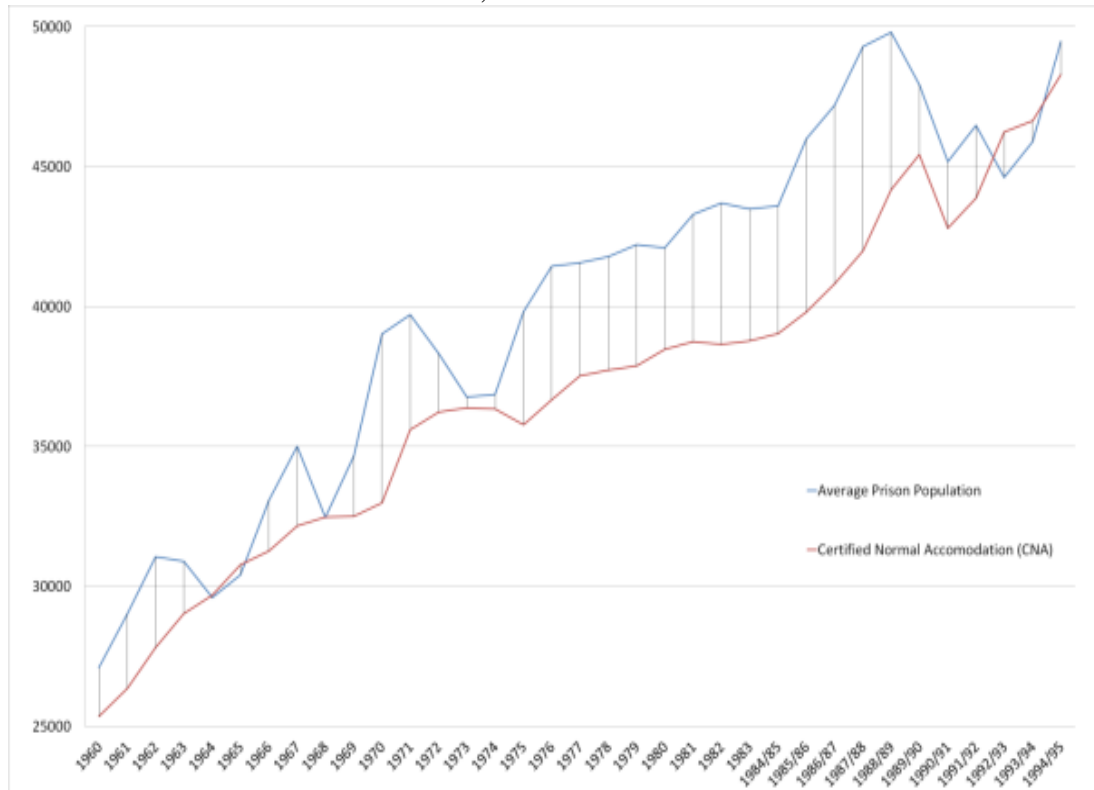
Figure 3: Persons Sentenced to Immediate Custody, 1950 – 2000



Source: Home Office (2001 p.18)

As the penal zeitgeist toughened the prison population increased from 30,421 in 1965 to 49,471 in 1995 (see Figure 4). Over time the cumulative through-flow of prisoners into the prison system generated significant overcrowding within a predominantly Victorian prison estate that had been built to service a very different penal regime. Figure 4 illustrates the prison population in relation to the Certified Normal Accommodation (CNA) of the prison estate, defined as the Prison Service’s own measure of how many prisoners can be held in ‘*decent and safe accommodation*’ (Jewkes and Bennett 2008 p.38). This reveals that the CNA of the prison estate rose from 25,354 in 1960 to 48,291 in 1995, a rate of growth that was rarely adequate to meet the needs of the average prison population in the intervening years. For the majority of the period in question there was a significant shortfall in prison capacity and the Prison Service was forced to rely upon cell sharing to accommodate more and more prisoners. In 1965 a total of 5485 prisoners were held either two or three to a cell, this reached a high of 18,983 in 1987/88 before declining thereafter.

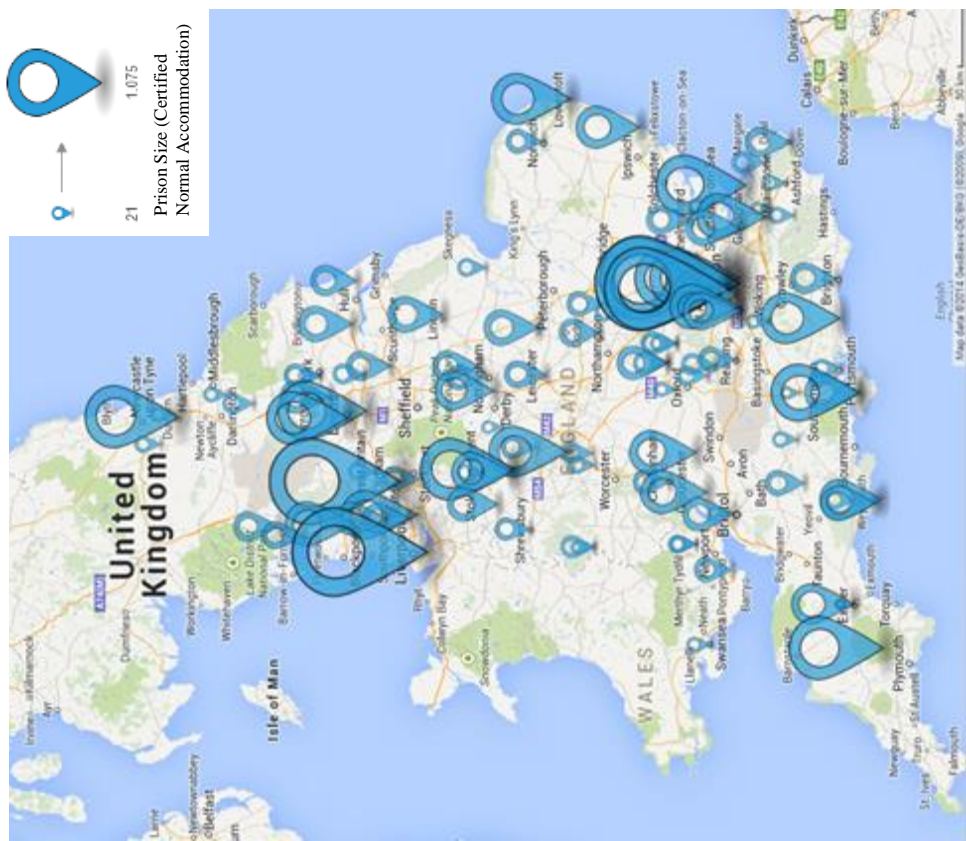
Figure 4: Average Prison Population in Comparison to the Certified Normal Accommodation of the Prison Estate, 1960 – 1995



Source: Various, Home Office Report on the Work of the Prison Department 1960-1987. Home Office, Report on the Work of the Prison Service 1988 – 1991, HMPS Report on the Work of the Prison Service, 1992 - 1996

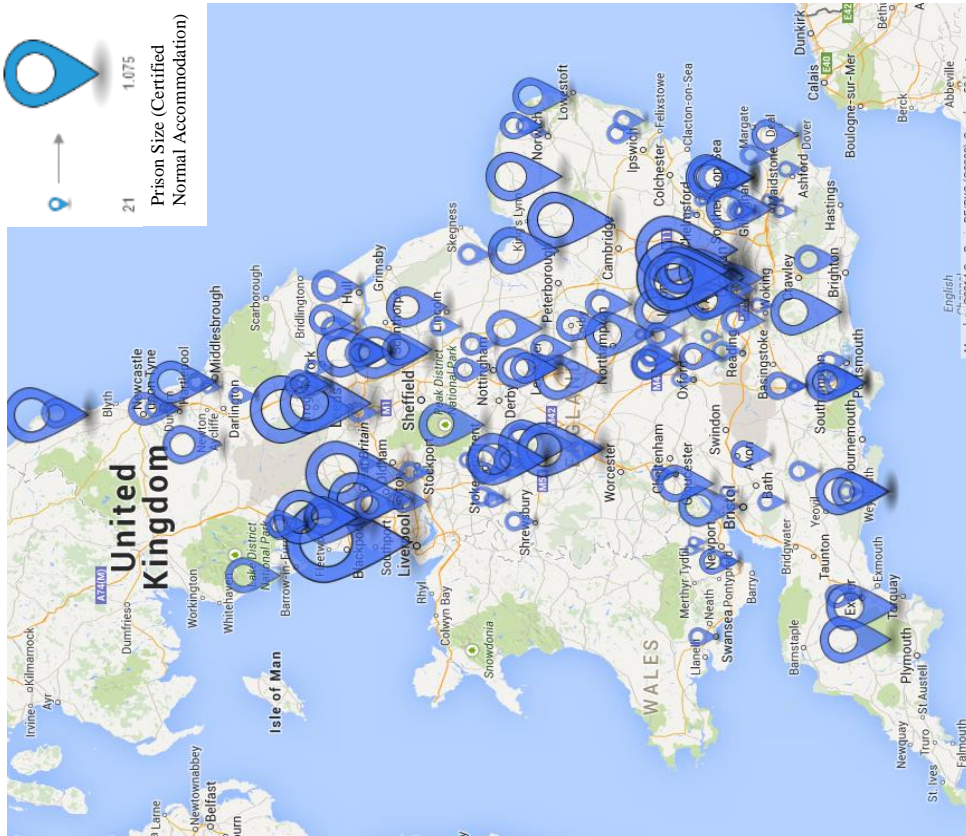
A rising prison population also saw the emergence of a new form of ‘*tactical management*’ as the Home Office sought to maximise the use of accommodation within the prison estate (Faulkner 2014 p.41). In 1965 the Prison Service operated 108 facilities in England and Wales, a figure that increased to 165 establishments in 1995 as the Government shifted its focus from large urban prisons towards the flexibility of a greater number of medium-sized facilities. The geographic spread of prison institutions in England and Wales between 1960 and 1996, along with an indication of prison capacity can be found below at Figure 5 and Figure 6. At a strategic level this logic was understandable but in practice the efforts of the Prison Service to even out the distribution of prisoners within the estate presented a series of operational challenges. Tactical management of the prison estate saw the regular use of ‘*overcrowding drafts*’ to transfer prisoners to less overcrowded prisons. These drafts often saw prisoners moved far away from their families and quickly emerged as a major contributor to prison disorder (Faulkner 2014 p.41).

Figure 5: Geographical Spread of Prison Estate England and Wales, 1965



Source: Home Office (1965a)

Figure 6: Geographical Spread of Prison Estate England and Wales, 1995



Source: HMPS (1995)

Conditions in local prisons were particularly poor while the landmark Mountbatten Report (Home Office 1966c) into prison security and the Prison Department's subsequent adoption of a policy of dispersal served to promote a focus on control and risk management to the detriment of the rehabilitative programmes associated with penal welfarism (Ryan 203 p.28).

In part, these operational pressures appear to be the administrative by-product of wider shifts in the moral basis of punishment and the politicisation of penal policy. For the first half of the twentieth century punishment was largely rehabilitative in its focus and orientated towards the successful integration of offenders back into society. It is important not to overstate this point, Ryan (2003) has written persuasively about the underlying disconnect between the rhetoric and reality of the 'rehabilitative ideal', but there is no doubt that this guiding philosophy exerted considerable influence on those working within the criminal justice system. Perhaps the archetypal expression of this policy position can be found in the 1959 White Paper '*Penal Practice in a Changing Society*',

The constructive function of our prisons is to prevent the largest possible number of those committed to their care from offending again. Since the report of the Gladstone Committee in 1895, it has been accepted that this end will not be reached by a regime designed simply to deter through fear. The object should be, in the words of that Committee, to send the prisoners out "better men and women, physically and morally, than when they came in" (Home Office 1959 p.11).

This optimism began to evaporate as policy-makers came to terms with the facticity of a high crime society and sought to establish their 'tough' on crime credentials with an ostensibly punitive electorate (Downes and Morgan 2007). The reasons for this shift are legion and it is important to avoid overly reductive explanations. For example, Bottoms (1995) has examined the complex interplay between a 'just deserts' penal philosophy, human rights, managerialism, 'the community,' and 'populist punitiveness' in driving the changing politics of punishment. While Bottoms interprets the former as important, albeit foreseeable long-term pressures on the criminal justice system, the largely unpredicted emergence of a populist punitiveness which saw '*politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance*', has come to exert a defining influence over



sentencing behaviour (Bottoms 1995 p.40). The impact of this shift upon the prison estate has been considerable. Roberts *et al* have suggested that a central feature of the punitive turn has been a tendency to '*allow the electoral advantage of a policy to take precedence over its penal effectiveness*' (2003 p.5) with the result that an increasingly tough political stance has often gone hand in hand with an administrative or technocratic discourse of 'crisis'. The following description of the prison estate from Dennis Trevelyan, Director General of the Prison Service in the 1980 Prison Service Annual Report is typical of this outlook and will be explored in greater detail in Chapters Four, Five and Six of this study,

Conditions for prisoners, already poor in many prisons, deteriorated still further; the risk of serious disorder inevitably increased; main services ranging from power supply to the drainage never designed to cope with such numbers were overloaded. The prison service at all levels was driven to concentrate on crisis management which even before 1980 had absorbed so much of its energy and resources as to inhibit more constructive work (Home Office 1980b p.3).

This review of the evidence does suggest that punishment has become an altogether more emotive and politicised issue in England and Wales. The operational implications of this shift have been profound. As the prison population has grown, costs have escalated and everyday conditions within the prison estate deteriorated for much of the period in question. In turn penal administrators have been forced into a series of adaptive strategies to deal with the new realities of mass incarceration. This has seen the emergence of a 'grim realism' within the Home Office (Faulkner 2014 p.41), growing calls for the use of non-custodial measures and a discourse of crisis that has seen many policy-makers, practitioners and penal reformers internalise the belief of a prison estate in turmoil and on the brink of catastrophic breakdown.

### *1.2.3 The Home Office*

The third, and arguably least developed, issue within the existing literature concerns the role of the Home Office as both a catalyst and brake upon policy change.

The American political scientist Theda Skocpol once remarked that, '*as politics create policies, policies also remake politics*' (1992 p.58) but this dialectic remains a rather unknown quantity within the criminal justice sphere (Barker 2009 p.89). While there has been a great deal of discussion of the politics of law and order and the operational

challenges of a high prison population (Howard League 2009; Mathiesen 2005) comparatively little is known about the role played by the Home Office at the intersection between these forces. How did the internal workings of the Home Office influence the development of public policy? What role did its culture and ethos play in the trajectory of criminal justice? How did the Department relate to other key stakeholders within the criminal justice ecosystem?

The first point to note is that discharging the various responsibilities of the Home Office became an altogether more complex and administratively burdensome task between 1960 – 1995, not least because the Home Office was responsible for a uniquely broad and disparate portfolio of interests. In part this reflected the Home Secretary's residual responsibility for the Royal Prerogative and the historic position of the Home Office as the *de facto* administrator for tasks that had not been allocated to other Government Departments. As both a Minister of State and Secretary of State at the Home Office few were better qualified to reflect upon this unique challenge than Douglas Hurd when he noted that,

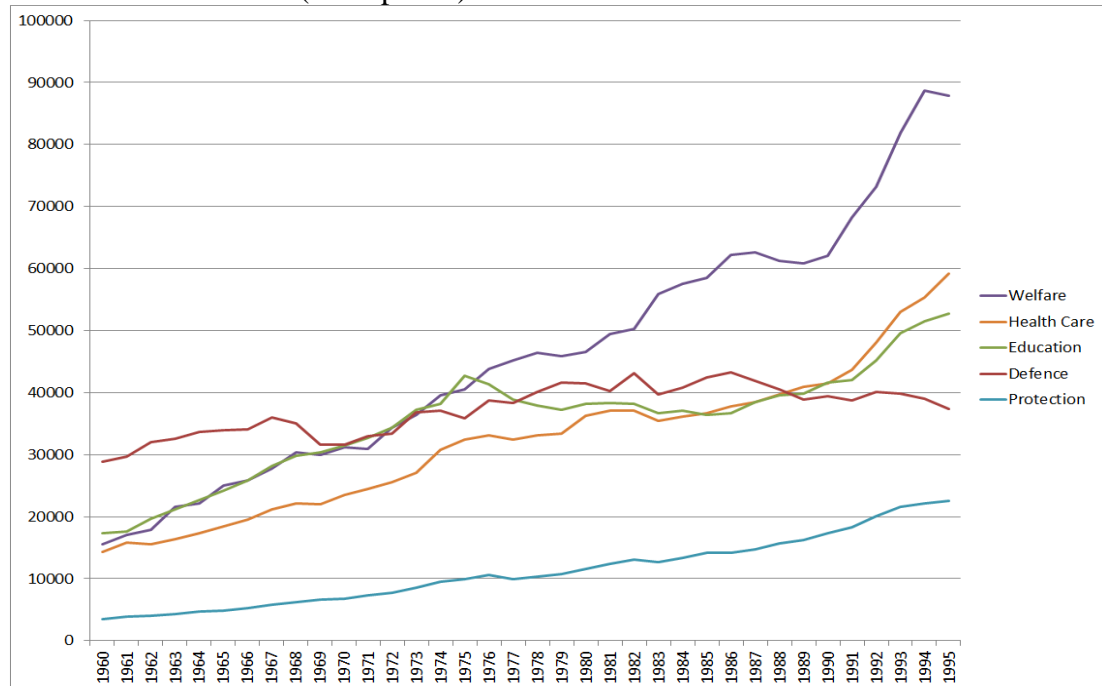
... the Home Office in 1983 handled a more bizarre ragbag of unconnected matters than it does today. As the senior Minister of State I found myself at once coping with criminal justice, the police, the regulation of broadcasting, civil defence, gambling, racing and anything else which happened at the time to need a ministerial presence or signature. Each of these subjects had its own hierarchy within the Home Office, and its array of pressure groups outside' (Hurd 2003 p.288).

This diverse portfolio required a large executive. Mirroring increases across Whitehall total staff numbers (industrial and non-industrial) at the Home Office and its various subsidiaries grew from 20,861 in 1970 to 49,353 in 1992. During this time the junior ministerial team also grew in size and stature. In 1970 the Home Secretary could call upon the services of one Minister of State and two Parliamentary Under-Secretaries. By 1995 this had expanded to three Ministers of State and one Parliamentary Under-Secretary supported by a team of special advisors.

Despite a reputation as one of the Great Offices of State the influence of the Home Office cannot be reduced to spending power alone. Figures from the UK public spending website suggests that investment in 'protection' which includes the police,

prisons and the courts grew from approximately £3.5bn in 1960 (at 2014 prices) to £22.5b in 1995, a budgetary increase that represented comparable real term growth to investment in Education, Health and Welfare albeit from a far lower baseline (see Figure 7).

Figure 7: Government Expenditure on Welfare, Healthcare, Education, Defence and Protection in Millions (2012 prices)

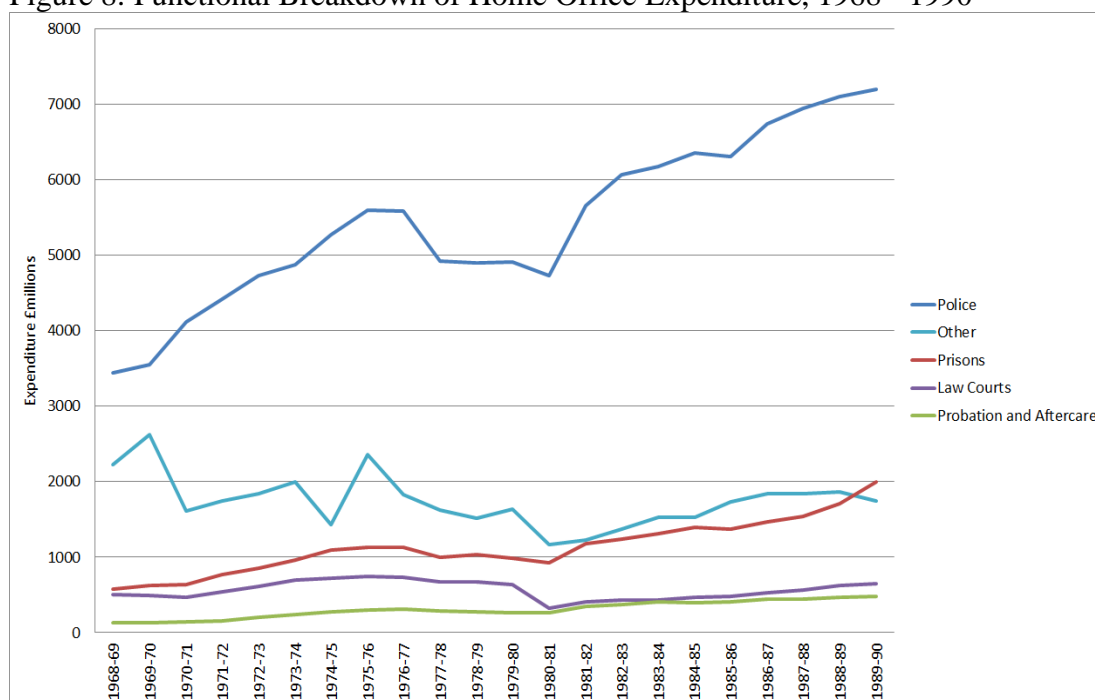


Source: UK Public Spending, [www.ukpublicspending.co.uk/](http://www.ukpublicspending.co.uk/)

While the overall budget was modest in Whitehall terms it is perhaps more significant that some elements of Home Office expenditure were protected from austerity measures and political interference. The 1979 Conservative Party Manifesto declared that '*we will spend more on fighting crime, while we economize elsewhere*', and to some extent this commitment was honoured while in government (McLaughlin 1994 p.115). This political commitment created winners and losers within the various functional Divisions of the Home Office. Historically the Home Office was an asymmetric department and the Police Service dominated in terms of power, resources and influence. Figure 8 reveals that the lion share of Home Office funding was allocated to the Police Service who saw investment rise from £3.4billion in 1968/69 to £7.2billion in 1989/90 (2014 prices). During this time total police strength in England and Wales grew from 83,296 in 1965 to 127,222 in 1995 (Home Office 2000).

In contrast investment in the Probation and Aftercare Department was marginal while the Prison Service budget grew from £578m to £2billion as additional investment came on stream in the 1980s. In part this reflected the rising cost of accommodating prisoners as the average annual cost of accommodating an adult male offender grew from £6,983 in 1965 to £32,021 in 1995 (at 2014 prices). But it also represented a significant capital outlay, the centre-piece of which was the Thatcher governments' £1 billion investment (1987 prices) in a prison building programme, the largest of its kind since the Victorian era.

Figure 8: Functional Breakdown of Home Office Expenditure, 1968 - 1990



Source: Various, HMSO Government Expenditure Plans 1968 - 1991

In the early years of the Thatcher government the Home Office enjoyed considerable financial and political autonomy but it was not immune from outside influence. As the 1980s progressed the Department was heavily, albeit reluctantly, influenced by the administrative changes associated with 'new public management' (Faulkner 2006; McLaughlin 1994). A cornerstone of the Thatcher project, new public management was predicated upon the belief that public administration could be improved by applying the techniques and expertise of the private sector. In 1979 the Rayner Efficiency Unit had been set up with a view to generating improved efficiency within Whitehall (Jones 1993 p.187). This was followed by the Audit Commission (1984) handbook, *Improving Economy, Efficiency and Effectiveness in Local Government in*

*England and Wales*’ and a series of initiatives including the Next Steps Agencies and Citizens Charter intended to open up public administration to private sector discipline and rigour (Jones 1993).

As McLaughlin has noted, the Home Office was one of a few Departments that *‘steadfastly refused to publish an annual report, set targets or construct benchmarks against which its performance could be measured’* (1994 p.118). But this began to change as the financial outlook for the United Kingdom deteriorated and it became clear that the government’s commitment to law and order was not delivering substantive reductions in recorded crime, re-offending or increases in police clear-up rates (McLaughlin 1994 p.115). Faced with the inability or unwillingness of various criminal justice agencies to respond to increasing criticism and *‘put their houses in order’* (McLaughlin 1994 p.115) the government responded in the late 1980s by opening up the criminal justice system to investigation from the Public Accounts Committee, the National Audit Office and Audit Commission (Jones 1993 p.198). This process began to fundamentally re-shape the Department leading to the establishment of the Prison Service as an Executive Agency in 1993 and the appointment of Derek Lewis, a former chief executive of Granada Television as Director General, the first non-career civil-servant to hold the post. As Faulkner has argued, the eventual embrace of new public management principles by the Home Office proved to be a double edged sword,

The new public management undoubtedly brought important benefits – an increase in efficiency, a discipline of quantitative and cost-conscious analysis, a focus on achieving results rather than administering a process, sometimes improvements in safety or openness and accountability. It broke down some sense of the secrecy, and some of the professional mystique, in which some professions, for example the law, medicine and the police had been able to operate... None of these benefits should be underestimated. But it also, sometimes, brought a loss of trust, a culture of blame, and a loss of respect for equity, loyalty and even integrity. Public administration came to be portrayed as it if were a technical matter, indistinguishable from other forms of management, in which values or principles had no place... (2006 pp.29-30).

More generally, the impact of new public management thinking on the culture of the Home Office is difficult to quantify, not least because of the strong casework focus and policy coordination function of the Department (Faulkner 1991). What literature

there is has tended towards internalised accounts that prioritise descriptive rigour over explanatory power. For example, glimpses of life in the Home Office can be found in the reflections of Roy Jenkins (1991) and his 1975 article, *'On Being a Cabinet Minister'*, as well as the memoirs of William Whitelaw (1989) Douglas Hurd (2004), Kenneth Baker (1993) and David Waddington (2012). Other notable contributions to this area include the 1976 Cropwood Round-Table Conference *'Penal Policy Making in England'* (Walker and Giller 1977) and an interview with Michael Moriarty on the subject of law-making within the Home Office for the BBC documentary series *'Westminster and Beyond'* edited by King and Sloman (1973).

A more considered treatment of the topic can be found in the 1982 RIPA publication *'The Home Office: Perspectives on Policy and Administration'* to mark the Bicentenary Anniversary of the Home Office. Among the many contributors, former Home Secretary James Callaghan offers a fascinating insight into the centralizing tendencies of the Department, the autonomous workings of each Directorate, a heavy legislative workload and a rather myopic outlook that prioritised short term crisis management over long-term strategic planning (Callaghan 1982 pp.9 - 22). More recently, a comprehensive overview of life in the Home Office has been offered by David Faulkner, a former Deputy under Secretary of State, in his publication *'Servant of the Crown'* (2014). Faulkner offers a fascinating account of his career as a civil servant and the ascendancy and subsequent decline of a liberal disposition towards the problem of crime. But I would argue that *'Servant of the Crown'* is at its most interesting for what it reveals about the Home Office as an institution, its culture and configuration. One gets the sense of a Department struggling to keep pace with rapid social, economic and political change. For example, Faulkner describes a Prison Service in a 'constant state of crisis' and indicates that the department struggled to respond to multiple and complex social problems in a holistic way because, *'it was part of the culture of the Home Office that the different departments, and the divisions within them, did not interfere with each other's business'* (2014 p.69).

Unsurprisingly, the insider perspectives offered by Faulkner and others often lack a critical edge and it can be difficult to piece together a balanced assessment of how successful the Home Office was in balancing the interests of the State and the citizen. A far more critical account of the Home Office can be found in *'Prison Secrets'* a joint

publication from Radical Alternatives to Prison and the National Council of Civil Liberties (Cohen and Taylor 1976) or the interesting debates that built up around the 1985 Social Democratic Party proposal to create a Ministry of Justice (Clement-Jones 1985). For example, Tony Gifford criticised the Byzantine machinery of government that linked the Home Office, Lord Chancellor's Office and the Attorney General (1986 pp.16-23). Anthony Lester QC (as he then was) criticised the '*institutional schizophrenia*' of the Home Office he attributed to a Departmental conflict of interest between its 'justice' and 'security' responsibilities (1984 p.139). While the SDP Working Party concluded that, '*over the last 20 years the Home Office's legitimate concerns to maintain order and security have increasingly overshadowed its role in safeguarding liberty*' (Clement-Jones 1985 p.2), an assessment that strongly suggests that the Home Office was not a neutral arbiter in disputes between public safety and individual liberties.

In this section I have examined the evolution of criminal justice as a public policy concern in England and Wales between 1960 – 1995. My review of the primary data and secondary literature has revealed a complex picture of continuity and change. It is apparent that administrative concerns such as resource prioritisation, public presentation delivery are just as important today as they were in 1960 but over time these choices have been transformed by the politicisation of criminal justice; the 'punitive turn' in justifications for punishment and the changing role of the Home Office at the intersection between politics and policy. This suggests a significant reconfiguration of criminal justice in England and Wales with important implications for the humanity, fairness and effectiveness of the system (Lacey 2007) and the relationship between citizens and the state (Faulkner 2014).

### **1.3 The evolution of 'Early Release' in England and Wales**

Having traced the development of criminal justice policy in England and Wales since 1960 I now turn to the question of 'early release'. As we have seen the broad contours of the criminal justice terrain have been well mapped within the literature but this has tended to focus on the 'front end' crime control capabilities of the liberal democratic state; the political narratives that have framed governmental responses to crime, the operation of the police and the sentence of the court. Far less is known about the activities that take place in the shadow of the prison gates; the everyday operation of

the criminal justice system, the termination of sentences and the release of offenders back into the community. As an area of public policy that impacts so profoundly upon individual liberty, early release is inherently bound up with societal justifications for punishment and the legitimate role of imprisonment within a liberal democracy (Padfield 2007; Padfield *et al* 2012a). Equally, the termination of prison sentences is an extremely challenging legal-administrative task that merits detailed study in its own right. It requires effective oversight of a detailed caseload, coordination between a variety of different agencies and the careful balancing of individual liberty and public safety (Morris and Beverley 1975).

In this section I examine the historical development of early release policy and practice in England and Wales. I begin by defining my terms and unpacking the central concerns of this study. I then explore this process of policy change in more detail. Early release was subject to almost continual reform between 1960 – 1995 and I will argue that three dimensions of this historical shift are particularly apparent within the primary data and secondary literature; the shifting normative basis for early release; growing interest in human rights and procedural justice; and efforts to improve the day-to-day administration of the parole system. My analysis reveals that there has been very little historical study of early release and by implication few systematic accounts of how these forces coalesced over time to shape the long-term historical trajectory of early release policy and practice in England and Wales. It is these concerns that have informed my research questions and the central findings from this study set out in Chapter Seven.

### *1.3.1 Conceptualising 'early release'*

For the purposes of this study, early release is defined broadly as the various administrative mechanisms by which a custodial sentences handed down by the courts may be varied by executive action (Shute 2003; West 1972). This broad definition captures a number of practices including the exceptional use of emergency powers, adjustments to the tariff for offenders serving life sentences and the Home Secretary's residual power to exercise the Royal Prerogative of Mercy. In this study I want to concentrate on the non-exceptional, 'steady state' operation of early release in England and Wales for adult offenders serving determinate prison sentences. This largely consists of; remission, parole and the various species of 'release on licence' that were



advocated throughout the period in question. While each of these mechanisms has resulted in the release of determinate sentence offenders before the end of the sentence imposed by the court their historical antecedents, legal basis and practical operation have differed markedly.

The concept of remission was originally introduced by prison authorities as a tool of control to assist with the maintenance of order within the prison estate (Padfield *et al* 2012a p.968). Remission of a prison sentence could be earned by a prisoner for positive co-operation with the prison authorities while indiscretions would typically result in the forfeiture of accumulated benefits. For this reason, remission was a discretionary privilege in the gift of the Prison Governor but over time it evolved into a presumptive entitlement to only be withheld from prisoners in cases of bad behaviour (Home Office 1989c; McConville 1981). This entitlement was eventually codified after the Second World War when the Prison Rules were amended to the effect that all prisoners in England and Wales serving determinate prison sentences were eligible, subject to good behaviour, for unconditional release after serving two-thirds of their sentence (Fox 1952). This makes quantitative analysis of remission difficult. Because remission time applied to all sentences, subject to good behaviour, no information was collected by the Home Office on a systematic basis making it impossible to trace the development of remission with any confidence. In this sense remission exerted a strong gravitational pull within the penal system for while it cannot be measured directly its presence was certainly felt by prison service personnel and prisoners alike.

In contrast, the concept of parole has tended to evoke a future-orientated quality concerned with a prisoner's suitability for conditional release back into the community (Hood and Shute 2002). Derived from the French chivalric tradition, parole was originally used as a term of art in times of war when an officer gave his 'parole d'honneur', or word of honour, not to escape from captivity, or to refrain from certain other actions to which his captors object (Hansard *HL Deb 12 June 1967 vol 283 c721*). In more recent times parole has acquired a more specific legal meaning and in their study of the fledgling parole system Morris and Beverly defined the modern parole system as '*a procedure whereby a man's sentence may be varied by administrative action*' (1975 p.2). While remission provided a reward for past deeds and resulted in a sentence being rendered null and void, parolees remained under

sentence and released on licence with the possibility of recall to prison for breach of their parole conditions. Hood and Shute put this in the following terms,

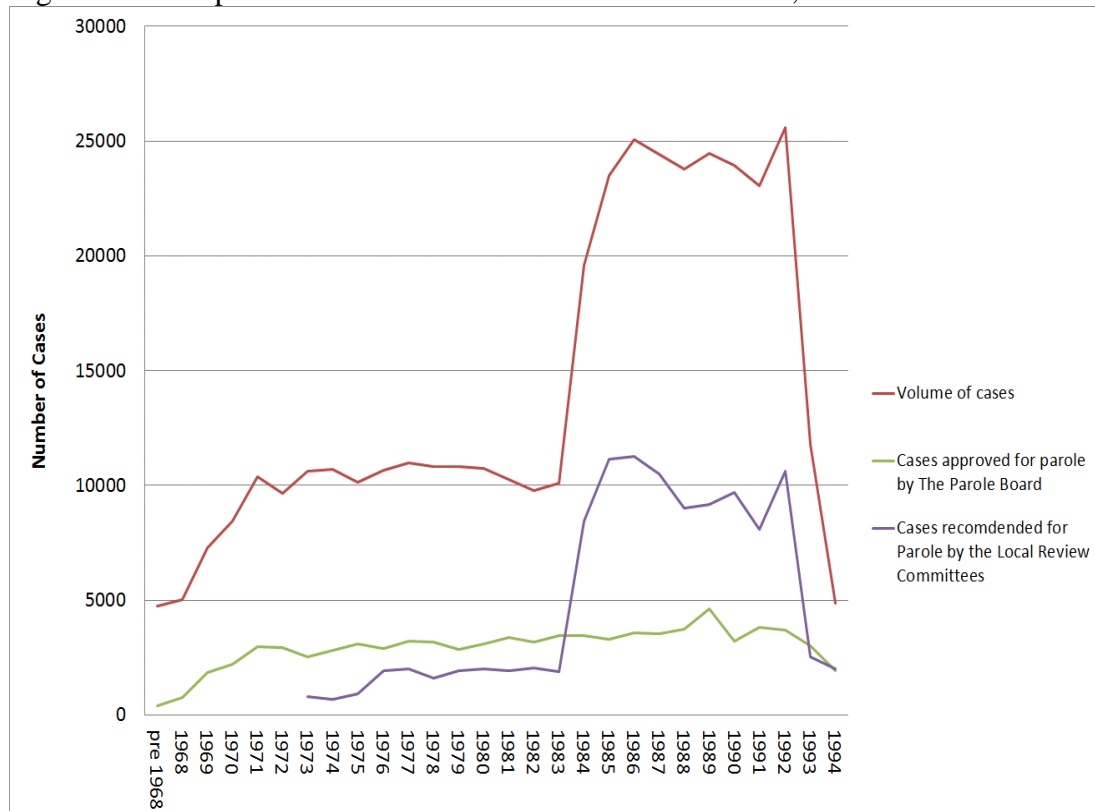
The concept of parole - by which we mean the discretionary release of prisoners from custody under some form of supervision before the expiration of their sentence - has a long, honourable, yet turbulent history within the English penal system. Parole has assumed a number of different forms and had a variety of justifications. But fundamentally it has always rested on the assumption that the court, when imposing a sentence of imprisonment, especially a long sentence of imprisonment, is not in a position to judge the precise period for which it is necessary to keep an offender in custody for the protection of the public. Parole, therefore, has always been linked to some degree of indeterminacy of sentence based on consequentialist criteria. As such, it has existed in actual or potential conflict with classical, desert-based approaches to the allocation of punishment (Hood and Shute 2002 p.835).

As a product of consequentialist logics it is perhaps unsurprising that parole has demonstrated such remarkable plasticity as a tool of public policy. Since the creation of the modern parole system in the Criminal Justice Act 1967 the operation of parole for determinate prisoners has progressed through a number of distinct operational stages as policy makers sought to adjust the risk appetite of the Parole Board and streamline decision-making for prisoners serving short sentences. Figure 9 reveals that for most of the 1970s the number of cases processed by the parole system, either by the Parole Board or locally based Local Review Committees, fluctuated at around 10,000 applications per year. During this time the number of cases approved for parole increased steadily from 2210 in 1970, a 28.3% success rate, to approximately 5000 in 1980, representing a success rate of over 50%. Thereafter the volume of cases considered for parole increased dramatically following Leon Brittan's decision in 1983 to reduce the minimum threshold for parole to six months. As a direct consequence of this decision to extend parole to the majority of short sentence prisoners the caseload of the parole system peaked in 1986 when 24,380 cases were considered and approximately 15,000 prisoners were granted parole, a success rate of over 60% that bore little resemblance to the risk-averse instincts of the early Parole Board.

Following this high-water mark, the parole system began to recede. Reform of remission arrangements in 1987 removed many short sentence offenders from the

scope of the parole system and this downtrend accelerated after 1992 when the Criminal Justice Act 1991 came into effect and introduced a radically altered system of parole based upon greater recognition of just deserts and risk management (Hood and Shute 1994).

Figure 9: The Operation of Parole for Determinate Sentences, 1968 - 1993

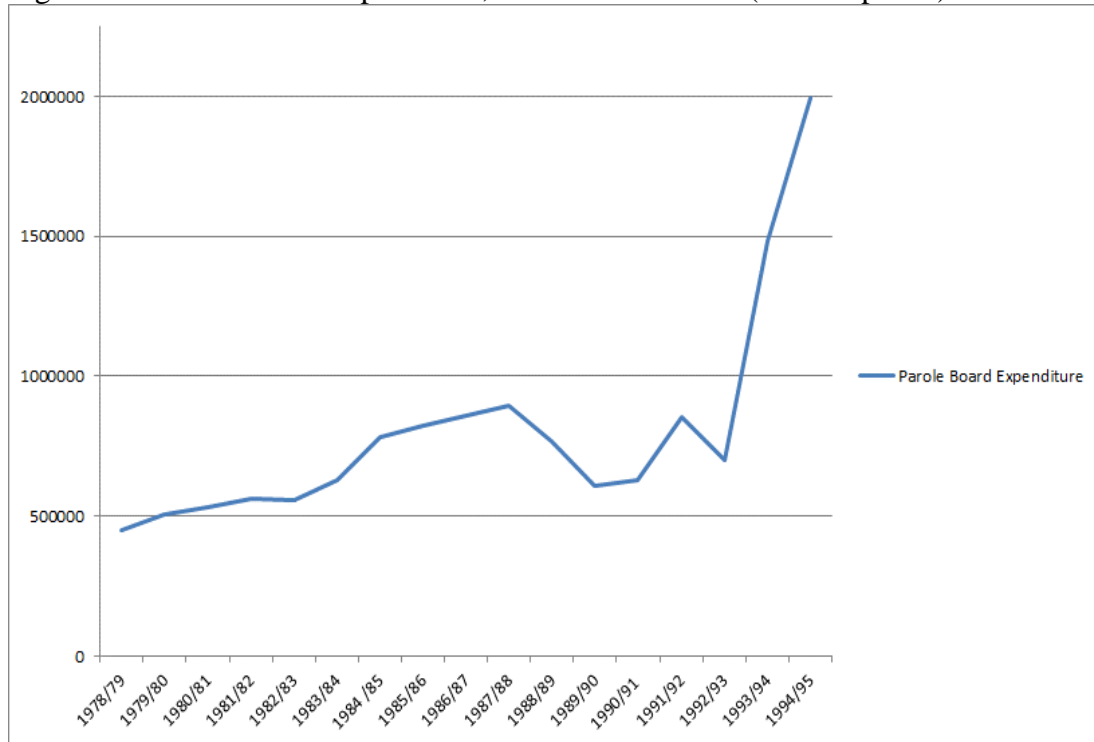


Source: HMSO Report of the Parole Board, 1968 - 1995

These policy changes had a significant impact upon the administration of the parole system. In 1970 the lay membership of the Parole Board stood at 27 supported by a full time Chair and a secretariat of six officials. By 1990 the membership of the Parole Board had grown to 63 with a secretariat of 9 full time officials. As Figure 10 reveals the expenditure of the Parole Board also grew steadily from 1978/79 before increasingly rapidly after 1992/93 as the government responded to the case of *Thynne, Wilson and Gunnell v United Kingdom*<sup>3</sup> by placing the review of discretionary life sentence prisoners on a judicial footing with greater regard for due process, provision of legal representation and a right to address the court.

<sup>3</sup> (1991) 13 E.H.R.R. 666

Figure 10: Parole Board Expenditure, 1978/79 – 1994/95 (at 2014 prices)



Source: HMSO Report of the Parole Board, 1978 - 1995

This general picture suggests that the policy and practice of early release did change significantly between 1960 - 1995. But what was going on behind these headline figures? In what follows I want to suggest that the existing literature has tended to focus on three significant dimensions of policy change within early release policy and practice.

### 1.3.2 *An uncertain inheritance*

As the aims and techniques of criminal justice evolved so too did the operation of early release. This has been the subject of considerable scholarly attention. Perhaps the first systematic treatment of the modern parole system in England and Wales can be found in West's (1972) publication *'The Future of Parole'* where he and other contributors drew attention to the rehabilitative roots of the modern parole system in England and Wales (West 1972 p.23). In his article *'The Development of Parole and the Role of Research in its Reform'* Shute traces the roots of the modern parole system from the 'ticket of leave system' for transportees to the penal colonies through to the debates that raged around the abolition of the death penalty and the growing influence of indeterminate sentencing in Great Britain and overseas Shute 2003 pp.377 – 387). He goes on to suggest that the system of parole introduced by the *Criminal Justice Act*

1967 was closely linked to prevailing interest in treatment, training and rehabilitation (2003 p.384). This was particularly apparent in the widespread belief that prisoners reached a 'recognisable peak' in their training where they were more likely to respond positively to 'early release' under supervision than continued incarceration. Reminiscent of Mick Ryan's (2003) critique of the rhetoric and reality of the 'rehabilitative ideal' Shute draws attention to the weak empirical basis of the 'recognisable peak' argument and suggests that more pragmatic considerations exerted a significant influence over the development of the modern parole system,

Why might policy-makers have been drawn to claims with so little empirical foundation? The most likely answer is that they offered a convenient way of providing a veneer of theoretical respectability to policies which were driven by other, more pragmatic concerns. One of these was the belief that parole might contribute to the maintenance of discipline in prisons. Even more significant, though was the thought that parole would provide a quick and relatively inexpensive solution to the pressing problem of prison overcrowding (2003 p.385).

In their unpublished article '*The Changing Face of Parole in England and Wales: A Story of Well-intentioned Reforms and Some Unintended Consequences*' Hood and Shute (2002) elaborated further on this theme. They argue that early release has demonstrated remarkable flexibility as a tool of public policy supporting such varied objectives as '*quietly releasing out the back door those who were neither in need of rehabilitation nor posed any significant risk to the public*', providing a bridge into the community for many repeat offenders, a '*reward for those who have been especially helpful to the authorities*', offering an incentive to inmates who behave well in prison and a 'safety-valve' when prisons have become overcrowded (Hood and Shute 2002 p.836). Moreover, it has '*kept in custody, for comparatively longer periods, not only those who apparently continue to pose a high risk to the public but also those whose crimes were notorious, even though they have apparently been rehabilitated or no longer pose any significant risk to the public*' (Hood and Shute 2002 p.836). The relative importance of these considerations shifted over time as policy-makers oscillated between a number of different consequentialist justifications for early release before the whole exercise of early release was challenged by retributive justifications for punishment that came to prominence in the late 1980s and 1990s

(Ashworth 1989). In this sense early release can be seen as inherently bound up with wider justifications for sentencing and punishment,

The weight accorded to these different considerations, and the resolution of conflicts between them, has been affected by changes in the structures and objectives of the sentencing and prison systems. It has also been affected by changing conceptions of the problem of criminality, by changing social and legal values, and by changing public sentiments (Hood and Shute 2002 p.836).

Interestingly, I have been unable to find more than a handful of studies that explore either the operation or policy thinking behind remission in detail (McConville 1981; Turner 1966a; West 1972). Unlike parole, remission has tended to operate under the radar of academic scrutiny attracting sporadic attention in times of crisis. Furthermore, there has been little or no sustained enquiry into the relationship between parole and remission, an idiosyncrasy of the British system that appears to have exerted a significant influence over the trajectory of early release in England and Wales (Home Office 1989c; Hunt 1972). More generally these accounts have tended towards the broad sociological sweep of early release rather than the empirical particulars of the policy-making process (Shute 2003). There are few, if any, narrative histories of early release policy and practice while attempts to assess the public policy implications of resource allocation, public administration or management of stakeholders with an interest in early release are limited (for a notable exception see Maguire 1992).

### *1.3.3 The growing influence of human rights and procedural justice*

The second and arguably most discussed dimension of change, concerns the quasi-legal status of early release decision-making (Hawkins 1973; Hood 1974a, 1974b; Padfield 2007). As I noted above early release has profound implications for the relationship between state and citizen and executive control of this process has attracted considerable scrutiny. Padfield *et al* (2012a) have examined the growth of quasi-judicial decision making and draw attention to *prima facie* concerns about transparency, due process and accountability in a number of areas of contemporary practice,

The allocation of criminal sanctions, traditionally referred to as sentencing, has generally been thought of as something for which judges

and magistrates in the criminal courts are responsible... But the 'system' for determining sanctions has, almost by stealth, been stretched: key elements of decision-making have been moved upstream and downstream of the courts, thereby falling largely outside judicial control. On the one hand, a significant number and proportion of criminal sanctions (mainly, but not exclusively, financial penalties) are today imposed out-of-court, administratively, by the police, the Crown Prosecution Service (CPS) and many other bodies. At the other end of the spectrum, decisions about whether and when to release the fast growing numbers of prisoners serving indeterminate custodial sentences – and later whether to recall some of them to prison - lie in the hands of the Parole Board (2012a p.956).

Early release has become a key locus for executive action and Padfield *et al* question the legitimacy of transferring major decisions about the liberty of individuals to a 'non-judicial' or 'non-court' body (Padfield *et al* 2012a p.957). The authors provide an excellent overview of the development of parole and the shift away from rehabilitation to the management of risk before turning to some of the more problematic aspects of the parole system (Padfield *et al* 2012a pp.968 -980). Chief among them is the problematic operation of indeterminate sentences and the impact of a series of negative judgements from the European Court of Human Rights (ECtHR) that have drawn attention to significant breaches of prisoners' human rights. What is interesting about the analysis of Padfield *et al* is the role afforded to the courts and the ECtHR as key drivers of policy change. Far from the Whitehall or Westminster models of policy change, legal decisions emerge as a key driver of reform, prompting the Parole Board to improve its procedures, 'to make them more 'court-like' and bring them more into line with the principles of natural justice and the European Convention on Human Rights (Nichol 2007 pp.1-19).

A comprehensive overview of the legal framework within which parole decisions are taken can also be found in '*Who to release? Parole, fairness and criminal justice*' (Padfield 2007). This collection of essays primarily deals with contemporary practice and issues in 'early release' but also offers some useful insights into the development of early release since the *Criminal Justice Act 1967*. For example, Sir Duncan Nichol, a former Chairman of the Parole Board draws attention to the increasing influence of human rights within early release decision-making (Nichol 2007 pp.1-19). While Professor Alison Liebling explores why conceptions of fairness' are so important to prisoners while others explore the emotive issue of recall to prison and a system of

aftercare and supervision based upon risk-assessment (Liebling 2007 pp.63-71). A useful comparative analysis of international policy and practice can also be found in *'Release from Prison: European Policy and Practice'* (Padfield *et al* 2012b) while a historical perspective on these issues can be found in Bottomley's *'Decisions in the Penal Process'* (1973a) and *'Dilemmas of Parole in a Penal Crisis'* (1984).

#### *1.3.4 The day-to-day administration of early release.*

As a direct result of these pressures the day-to-day administration of early release has been the subject of almost continual scrutiny from within the academy and penal reform lobby.

Chief amongst these contributions one finds the Longford Committee report *'Crime: A Challenge to Us All'* (Labour Party Study Group 1964a) a policy blueprint that was instrumental in championing the introduction of a system of parole eventually given legal effect by the *Criminal Justice Act 1967*. By the 1970s the initial optimism of the Longford Committee had given way to a new found scepticism about the reformatory value of the penal system. In 1975 the National Association for the Care and Re-settlement of Offenders (NACRO) published *'Parole: The Case for Change'* (Cavadino *et al* 1977) offering a powerful critique of a system said to be built upon on an unsubstantiated theory, unfair in its treatment of individual prisoners, offered few procedural safeguards such as a right to a hearing and placed huge strain upon prisoners and their families given the uncertain outcome of the discretionary system. A failing exacerbated by the Parole Board's longstanding refusal to provide reject reasons. In response NACRO called for a more judicial system along the lines outlined above by Hood (1974b). A similar assessment can be found in *'Prison Secrets'* (Cohen and Taylor 1976). Where NACRO favoured reform of the present system, Radical Alternatives to Prison (RAP) and the National Council for Civil Liberties (NCCL) went further in suggesting that parole was *'a perfect example of what happens when executive power becomes arbitrary in a closed setting like the prison'* and called for its *'total abolition'* (Cohen and Taylor p.88).

This was followed up by sustained attention in the 1980s as the prison population began to rise and policy-makers explored options for extending the scope and reach of early release. In 1980 NACRO published *'Prospects for Parole: A Review of the*



*Present System and Attitudes Towards It* (Mackay 1980) while the newly formed All Party Parliamentary Penal Affairs Group published *'Too Many Prisoners'* (1980) calling for automatic release of short sentence offenders. Dissatisfied by the results of an internal Home Office review of early release the Howard League established its own working group under the Chairmanship of Professor the Lord McGregor of Durris. The working groups report *'Freedom on Licence'* offers a far reaching review of the parole system from the parliamentary debates that shaped the *Criminal Justice Act 1967*, to the American experience and the contours of the existing parole debate (Howard League 1981). The report concluded with a series of policy recommendations for the reform of the parole system and called upon the government to take immediate steps to breathe new life into a system that could no longer be relied upon to safeguard the rights of prisoners,

We believe that the Parole Board has become a creature of the Executive and that its independence has been diluted in a way that was not intended by Parliament. As a result, the Board has become a defender of the system as it stands, rather than an explorer of the system as it could be (Howard League 1981 p.83).

This rich and varied literature continued into the 1990s with the deliberations of the Carlisle Committee and *Criminal Justice Act 1991* attracting comment from the Prison Reform Trust (1991), the Howard League of Penal Reform (1990), JUSTICE (1990) and many others. Such contributions have provided a wealth of evidence and insight for this study, both as secondary sources on the key developments in early release policy and practice, but also as fascinating primary sources of evidence that reveal something of the key fault lines in early release debate, prevailing vogues in criminal justice and shifting justifications for punishment. That said these sources are by their very nature piecemeal and partisan and provide few clues to the broader socio-economic shifts that structured and sustained such changes. Further research is therefore required to place such sources in their appropriate historical context.

#### **1.4 Research Questions and Contribution of this Thesis**

In this introductory Chapter I have set out the central concerns of this study and traced the historical development of criminal justice in England and Wales between 1960 - 1995. Far from suggesting a process of continued upheaval and radical departures my

review of the evidence has revealed a more nuanced picture of both continuity and change (see also Faulkner 1991). While many of the central tasks of criminal justice have endured the shocks associated with late twentieth century modernity there is good evidence to suggest that criminal justice has become an altogether more volatile public policy concern (Bottoms and Stevenson 1992; Newburn 2007b; Pratt 2007). Policy-makers have struggled to come to terms with the new realities of the high-crime society and have often been forced onto the back foot in dealing with the administrative implications of a more contested discourse of punishment (Garland 2001). Three dimensions of this shift were particularly pronounced, the politicisation of criminal justice, the punitive turn within punishment and the changing role of the Home Office within this complex eco-system.

While this wider context provides an important backdrop to the development of early release in England and Wales I have argue that unlike the reform of policing, crime control and sentencing, early release has been subject to comparatively little sustained attention, not least as a subject for detailed historical scrutiny. Instead the existing literature has tended to focus on a number of key areas of policy change, most notably the shifting normative basis for parole, the growing influence of human rights and procedural justice (Padfield 2007; Padfield *et al* 2012a) and reform of the everyday operation of early release (see Howard League 1981). Other elements of the literature remain underdeveloped. There has been little exploration of the historical development of early release, the key periods of reform, crisis and public policy debate. Nor has there been sustained analytical interest in the public policy implications of early release or how policy-makers have sought to shape this area of criminal justice administration. My primary research questions emerge from this review of the existing evidence and have been framed in order to contribute to our understanding of this subject matter in two ways; to construct a detailed narrative history of early release policy and practice in England and Wales and explain these changes. These concerns form my primary research questions: First, in what ways did the policy and practice of early release develop in England and Wales between 1960 - 1995? Second, how might we account for these changes?

My review of the evidence has also hinted at a number of breakout questions for secondary enquiry. In this Chapter I have explored three dimensions of change within

the criminal justice field; the politicisation of criminal justice, the administrative implications of a more punitive penal system and institutional change within the Home Office. In Chapter Two I will introduce a fourth element of change related to the broader re-alignment in the political economy of criminal justice. The detailed study of early release offers a useful opportunity to explore how these forces have operated in practice. From this I have derived my secondary research questions.

- a) In what ways did the policy-making process change between 1960 - 1995? What might this reveal about the changing roles of politics, practice and expert knowledge within public policy?
- b) What impact, if any, did changes in the moral justification for punishment play in the development of early release policy and practice?
- c) What do the archival records reveal about the changing culture, structure and objectives of the Home Office between 1960 – 1995? In what ways might this have influenced the trajectory of early release policy and practice?
- d) In what way did changes in the underlying political economy of criminal justice influence the aims and techniques of early release between 1960 - 1995?

In seeking to address these research questions my thesis has been organised around three substantive sections. In Section One I develop a theoretical framework and research design that will inform my initial orientation towards the data sources. In Chapter Two I examine a number of theoretical perspectives within the criminological literature and advance the case for an institutional analysis of early release that is well attuned to the various ways in which history, ideas and the unequal distribution of power shape the trajectory of public policy. In Chapter Three I detail my research design and methodology and outline how I have sought to acquire new and original knowledge of early release and address my research questions. Section Two forms the core of my empirical analysis. In Chapters Four to Six I begin to construct a contemporary history of early release policy and practice in England and Wales between 1960 - 1995. I develop three detailed empirical case studies of key moments in the recent history of early release policy and practice. My purpose here is to showcase the archival records and reveal some of the underlying dynamics that have defined early release as a public policy concern. Finally, in Section Three, I summarise the key findings of this study. Chapter Seven summarises the central findings of this study, reflects a number of themes in more detail and explores the relevance of this research for contemporary criminal justice policy and practice.

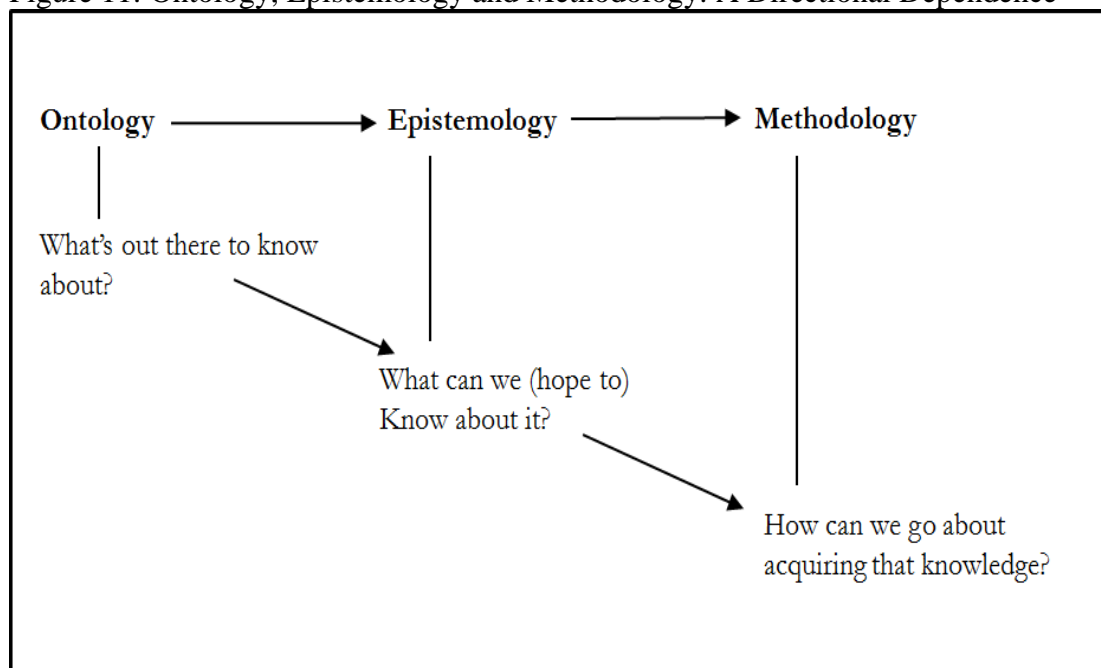
## 2. Developing a Theoretical Framework: Towards an Institutional Analysis of Early Release Policy and Practice

### 2.1 Introduction

In Chapter Two I develop a theoretical framework for the empirical exploration of my research questions. In so doing I review the various accounts of policy change within the criminological literature and advance the case for a systematic and historically grounded institutional analysis of early release policy in England and Wales.

Given the challenge of conceptualising both the ‘how’ and ‘why’ of policy change I have found the logic model developed by Hay (2002) in *Political Analysis: A Critical Introduction* and set out in Figure 11 below a helpful framework for thinking through my research questions.

Figure 11: Ontology, Epistemology and Methodology: A Directional Dependence



Source: Hay (2002 p.64)

Hay advocates an approach to political and policy analysis that is clear and transparent about the ontological as well as the epistemological and methodological dimensions of social science research (Hay 2002 p.64). This may seem axiomatic but as Hall has noted, ‘one of the curious features of contemporary debates is that they pay more attention to methodology than to issues of ontology’ (2003 p.373). A tendency, found

in both social science and historical scholarship, that has often obscured the central role of concepts such as structure and agency, power, materialism and idealism play in any comprehensive theoretical account of policy change. There are many ways of thinking about these issues, including critical realism, constructivism and phenomenology but the key point is that such choices must be justified by the researcher. Since these questions cannot be resolved empirically they must be considered *a priori* and addressed before turning to epistemological and methodological considerations, a ‘directional dependence’ that is captured in the logic model set out above (for further discussion see Hay 2001 p.63; Hall 2003 p.374).

This way of thinking about the relationship between theory and method provides a useful point of entry into a discussion of the various accounts of policy change in the criminal justice system. I begin with a survey of the existing criminological literature and identify a number of different vantage points from which to view policy change in the criminal justice sphere. I then argue that an institutional analysis of public policy is particularly well suited to my research questions and I seek to locate my theoretical approach within the broad perspective of historical institutionalism, a ‘theory of the middle range’ (Merton 1967) that seeks to understand how institutions structure and shape political behaviour and outcomes over time. Finally, I seek to summarise my approach and highlight the key assumptions, strengths and weaknesses associated with this theoretical framework.

## **2.2 Theorising Policy Change within the Criminal Justice System**

A way of seeing is a way of not seeing  
(Poggi 1965 p.284).

Before turning to the literature it is important to establish the scope of this study with a little more precision. The contemporary history of criminal justice has excited considerable attention within the literature. This has focused on such varied issues as the politics of crime control (Downes 1992; Downes and Morgan 2006; Garland 2001), penal policy (Hood 1974c; Young 1999; Zedner and Ashworth 2003) and an inter-disciplinary turn that has explored how the underlying conditions of our political economy influence the trajectory of crime policy (Cavadino and Dignan 2006b; Di Giorgi 2006; Reiner 2007).

I want to draw upon these insights but it is the interaction and opposition between the various pressures that have shaped the development of public policy that is of most interest here. By examining early release through a public policy lens I want to signify a broader focus on operational concerns, resource allocation and stakeholder management as well as the more widely discussed ideational and political dimensions of policy-making. In this more holistic sense public policy can be seen as, '*an assertion of the will, an attempt to exercise control, to shape the world*' (Moran *et al* 2006 p.3) and my interest is in how policy makers have sought to administer, modify and reform the operation of early release over time. Addressing the 1976 Cropwood Round-Table Conference '*Penal Policy-Making in England*', Michael Moriarty, then Assistant Under-Secretary of State at the Home Office, helpfully drew attention to three levers by which policy-makers have sought to exercise control and shape criminal justice,

...there are at least three dimensions of policy-making that occur to the administrator: changes in the legal framework; qualitative decisions about the way in which the penal system is run within the legal framework; and the securing of resources for maintaining the system (Moriarty 1977 p.129).

Traditionally, the development of public policy has been explained in somewhat binary terms by those taking an 'intentionalist' position which seeks to, '*explain political outcomes simply by referring to the intentions of the actors directly implicated*' (Hay 2002 p.110) and various forms of 'structuralism' that conceptualise, '*political effects, outcomes and events exclusively in terms of structural or contextual factors*' (Hay 2002 p.100). Frustration with the limitations of these perspectives has seen considerable attention paid to the structure / agency problem in the hope of integrating both perspectives into a more rounded account of social change. This focus can be seen in the social ontologies developed by Anthony Giddens in his work on structuration (1979; 1984), the critical realism of Roy Bhaskar (1975; 1989) and the strategic relational model pioneered by Bob Jessop (1990) and latterly by Colin Hay (Hay 2002; Hay and Jessop 1995).

None of these perspectives have entirely resolved the structure / agency debate. While subtle, underlying ontological assumptions about structure and agency as well as the related issues of power, materialism and idealism continue to do a great deal of the theoretical ‘heavy lifting’ within the various historical reviews of criminal justice between 1960 - 1995. As Poggi (1965) reminds us, the analytical choices we make inevitably illuminate some elements of the social world and obscure others. For while the everyday business of policy formation over a short time frame is often conducive to agent-centred accounts, it is impossible to make sense of the broad sweep of history over decades and centuries without some reference to the broader political economic shifts in England and Wales. In what follows I explore four areas of focus within the criminological literature that alight upon differing levels of critical analysis, namely; the role of individuals and elites, broader shifts in the social structure, the importance of political culture and a more recent institutional turn within the literature that is beginning to explore how institutions mediate between the various social, economic and individual forces that shape public and political debate about crime.

### *2.2.1 Individuals and governing elites*

The first and arguably most common analytical perspective within the literature has centred on the role of individuals and political elites as key engines of policy change.

In Chapter One I examined a number of agent centred approaches (Faulkner 2006, 2014; Ryan 2003; West 1972) but arguably the most influential example of an agent-centred outlook can be found in Lord Windlesham’s study, *‘Responses to Crime’* (1987, 1993, 1996, 2001). Across these four works Lord Windlesham traces the evolution of governmental responses to crime from the ‘gentler age’ of 1947 – 65 through to the reactive, piecemeal legislative proposals of the mid-to-late 1990s. The central thesis of *‘Responses to Crime’* holds that for much of the post-war period criminal justice was the preserve of a small yet influential group of policy makers that took, *‘an enlightened interest in questions of penal reform’* (1987 p.20). For better or worse this was not to last and the rather paternalistic approach to crime and disorder established by R.A. Butler and successive Home Secretaries was gradually eroded by the rise in recorded crime and growing public appetite, either real or perceived, for retribution and ‘just deserts’. In Windlesham’s diagnosis ‘Pandora’s Box’ has been

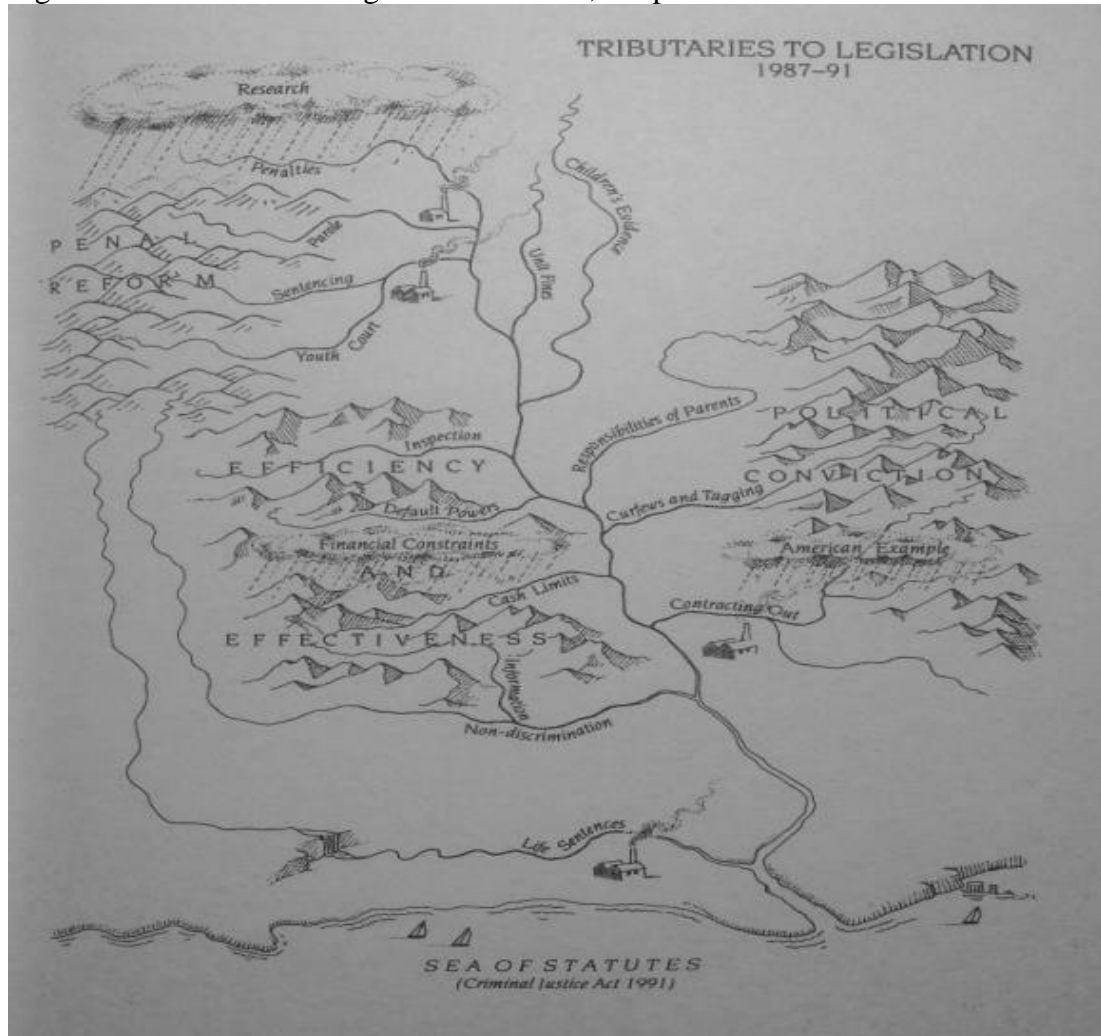
opened and criminal justice has been exposed to the winds of populism and the insecurities of the general public (1987 p.20).

The picture of contemporary criminal justice history that emerges from '*Responses to Crime*' is shot through with an intentionalist lexicon, from the meticulous scrutiny of the 'movers and shakers' within the criminal justice system and the power dynamics within the party political system, to the influence of academics and the personalities within the 'penal lobby'. This has a number of significant implications for how Windlesham conceptualises the development of penal policy and seeks to explain key moments of policy change. First, I would argue that Lord Windlesham demonstrates an underlying ontological preference for agency over structure, coupled with a relatively benign view of how political elites yield power that leads him to a rather pluralist view of policy making (see the discussion of R.A Butler and Roy Jenkins in Windlesham 1993 p.154). A theme that is also captured beautifully by the frontispiece map, set out at Figure 12 below, which can be found in the introduction to '*Penal Policy in the Making*' (Windlesham 1993).

The caricature is so interesting because it arguably captures the dominant imagery of policy development within much of the mainstream criminological literature; a pluralist eco-system where policy-makers balance the competing interests of economic constraints, political expediency and the pressures of academic research and penal reform. As Windlesham himself notes the journey from ideas to action can be a rather turbulent and haphazard affair but one is left with a rather benevolent view of power and 'elites' premised upon a Whiggish belief in progress (for a slightly different reading of this frontispiece map see Newburn 2011 p.503). The second implication of this theoretical approach is a predilection for explaining critical junctures in the historical evolution of criminal justice with reference to the intentions and personal attributes of key actors. Nowhere is this more apparent than in Lord Windlesham's reading of the events that followed the 1987 General Election and the concerted effort by the Thatcher government to exert some downward pressure on the prison population (Windlesham 1993 pp.209 - 254), a rather 'inconvenient truth' that has attracted considerable attention within the criminological literature (see Hay and Farrell 2010).



Figure 12: Tributaries to Legislation 1987-91, Responses to Crime Volume 2



Source: Windlesham (1992 foreword)

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Take for example the following,

There is an adage in the Home Office that after a General Election changes in ministerial personalities can be just as significant as changes between the parties in power. A minister who is reappointed, returning with enhanced reputation and authority, is in the optimum situation to get things done *if he knows what he wants to do* (emphasis added) (Windlesham 1993 p.210).

This (rather chauvinistic) mode of reasoning leads Windlesham to offer a theory of policy change based upon the political skill of Douglas Hurd and his junior ministerial team, most notably John Patten, along with the catalysing effect of a broader strategic alignment in the interests of Ministers, senior civil servants, the judiciary and other

notable power brokers within the criminal justice system. This constellation of issues undoubtedly provides part of the answer for the government's response but it fails to account for the wider socio-economic context in which such decisions were taken. The detail and richness of Windlesham's depiction of criminal justice policy is to be commended and provides an invaluable secondary source of information for this study but it also highlights many of the limitations of intentionalist accounts. While commending the comprehensiveness of Windlesham's study, Loader and Sparks (2004) ultimately find it unsatisfactory for providing a rather,

... internal, Westminster-centric treatment of political events and processes with scant reference to either the economic, social and cultural contexts within which they are played out, or to the criminological and political ideas that relevant actors implicitly or expressly mobilise and tussle over. One is left in little doubt that the liberal, elitist paradigm for governing crime has collapsed, but with few sociological clues as to why (Loader and Sparks 2004 p.11).

### 2.2.2 'Big picture' criminology

While agent-centred studies are well calibrated to the detail of everyday policy-making these causal dynamics often melt away when policy change is located within a broader historical perspective. Why, for example, did the trends outlined in Chapter 1 gain such purchase in England and Wales? Why did these changes emerge so forcefully in the 1970s and 1980s? It is impossible to answer these questions without some reference to broader social, political and economic structures and the shifts associated with the latter half of the twentieth century.

A comprehensive overview of the relationship between crime and the underlying structure of the liberal democratic state can be found in Reiner's (2007) *'Political Economy, Crime and Criminal Justice'*. As Reiner notes, careful analysis of the causal links between crime, criminal justice and the underlying configuration of the political economy has a long and distinguished history within criminology (Reiner 2007 pp.345-355). An analytical 'golden thread' that can be seen in the contributions of such varied thinkers as Merton (1938), Bonger (1916), Rusche and Kirchheimer (1939) and the various critical criminologists who grew in influence through the 1970s (for example Lea and Young 1984). In recent years however, such perspectives have fallen out of favour, in large part because political economy has come to signify an approach

that is either conceptually distinct from economics or synonymous with it (Reiner 2007 p.342). This reductionism is to be regretted since a broader conception of political economy that attends to the intersection between ‘civil society’, ‘the state’, ‘the economy’ and ‘the polity’ is an essential component of a fully social theory of crime and criminal justice that recognises the, *‘dialectical complexity of mediations and interactions between macro-structures and individual actions’* (Reiner 2007 p.373).

Arguably, the most keenly discussed aspect of this dialectic has been the link between crime, punishment and the underlying structure of the economy. To take but a few examples, Wacquant (2005, 2009b) has analysed how the breakdown of the post-war ‘Fordist-Keynesian’ settlement gave rise to mass incarceration and the ‘ghettoisation’ of young black men in many parts of the United States. In a UK context De Giorgi (2006) has traced the evolving role of punishment within a state apparatus which exists to preserve hegemonic class relations (De Giorgi 2006 p.4). For De Giorgi the shift from a ‘Fordist’ to a ‘post-Fordist’ system of capitalist production is critical to understanding the profound changes within the criminal justice outlined in Chapter 1. While the former represented a political economic system based upon a stable labour market, low unemployment and welfare policies premised upon social inclusion, the latter system is defined by significant ontological uncertainty, fragmentation and social exclusion. This has seen the management of unemployment and ‘social marginality’ move from the welfare and healthcare systems to the criminal justice arena triggering the reinvention of punishment from a tool of discipline to manage workforce scarcity to a regime based upon exclusion and risk-management better able to manage surplus (De Giorgi 2006 p.67 – 73). Elsewhere, Farrall and Hay (2010) have noted how the shift from Keynesianism to neoliberal thinking worked its way through a number of ‘cognate fields of social policy’, most notably economic policy, education, housing and social welfare in ways that created time-lag and spill-over effects within the criminal justice arena. For example, neoliberal reforms of education policy intended to raise standards and encourage greater competition had the unintended consequence of increasing the use of exclusions by Head Teachers which in time placed greater pressure upon the youth justice system (Farrell and Hay 2010 pp.561 - 562).

More recently, there has also been something of a revival in academic interest in the political dimensions of political economy. A research agenda that arguably reflects the emergence of neo-liberalism and neo-conservatism as the dominant modes of governance in many advanced Western democracies since the end of the Cold War. To take but a few examples, in *'Crime in an Insecure World'* Ericson (2007) explored the ways in which neo-liberal political cultures respond to and reproduce a climate of uncertainty through the introduction of 'counter-laws' that undermine legal safeguards and create new surveillance technologies. In *'Governing through Crime'* Simon (2007) documents how crime became the 'axis' around which a new civil and political order was created in the United States. Similarly, Loader (2006) has examined the influence of 'liberal elitism' in shaping governmental attitudes towards crime in post-war Britain (2006 p.561). Informed by extensive interviews with senior policy-makers, Loader argues that for much of the post-war period, criminal justice policy was the preserve of a small metropolitan elite of 'platonic guardians' bound together by 'liberal elitism,' a governmentality characterised by '*a set of express and implied values and beliefs about the proper conduct of government towards crime*' (Loader 2006 p.562). As a mode of governance 'liberal elitism' was only possible within a socio-political context where the general public were more deferential of government, crime was less common and society demonstrated higher levels of equality and social solidarity. As the political-economic conditions of British society began to change so the political settlement marked by liberal elitism began to break down.

Many of these strands within the literature are brought together in Garland's (2001) seminal study, *'The Culture of Control'*. While recognising the varying social, institutional and cultural determinants of criminal justice, Garland focuses upon the broad organising principles that structure the ways in which contemporary societies think and act around criminal justice. In so doing, Garland offers a '*history of the present*' that documents the decline of the 'rehabilitative ideal' and a post-war political settlement that pursued inclusionary and welfarist-orientated penal policies (2001 p.1). The rehabilitative mentality has not disappeared entirely, but since the 1970s it has given way to '*the legitimacy of an explicitly retributive discourse*' built around the centrality of the victim and protection of the public (2001 p.9). Garland goes on to argue that the facticity of high crime societies, combined with the withering of state sovereignty has created the conditions for a bifurcated criminal justice policy that

oscillates between an expressive ‘criminology of the other’ and a ‘criminology of everyday life’ that seeks to control crime through the application of managerialist techniques (2001 p.185).

Seeking an explanation for this phenomena, Garland stresses the importance of the economic, social, cultural and political changes associated with the transition to late twentieth century modernity. The key point being that policy-makers have struggled to come to terms with profound shifts in the dynamics of capitalist production, the restructuring of the family and household changes in the social ecology of the city and suburb, the rise of electronic mass media and the ‘*democratization of social and cultural life*’ (2001 p.78). This has seen successive generations of policy makers gravitate towards a suite of punitive and exclusionary policy initiatives which O’Malley (1998) has characterised as a fusion of neo-liberal and neo-conservative ideologies. Over time this policy response has fuelled the public’s appetite for ‘tough’ crime measures and a race to the bottom as the political parties have converged around a law and order agenda characterised by penal populism. As Newburn has argued, ‘*recent trends in liberal democracies such as America, Britain, and elsewhere suggest that there is something of an elective affinity between neoliberal economic and social policies and populist punitiveness and cognate adaptations in the penal sphere* (2007 p.461).

The ‘*Culture of Control*’ has rightly emerged as ‘*arguably the most important and influential book in Western criminology in the past ten years*’ (Newburn 2007a p.330) and provides a key point of departure for this study. This influence will be seen in later chapters, but as with all accounts of policy change it is not without its limitations. A number of authors have commented upon the tendency within the ‘*Culture of Control*’ to paint with broad brush strokes and construct a picture of historical change that leaves little or no room for the variability and contingency that characterise national responses to crime across both time and space. For example, Nelken (2009) has argued that in common with several other accounts of the ‘punitive turn’ the ‘*Culture of Control*’ suffers from a mistaken ethnocentrism that assumes that the ways in which we think about and respond to crime are universally shared. As a result, Garland fails to account for the very different penal trajectories of non-Anglo-Saxon countries, ‘*what some observers see as an essential aspect of late modernity others see as*

*ethnocentric projection – an Anglo-American tendency to assume that what others do in foreign places and foreign languages is less important, and that they too are bound to come into line eventually*’ (2009 p.294). Similarly, Sparks and Loader (2004) have criticised the ‘*Culture of Control*’ for failing to adequately account for the pre-1970s world of crime control and the stresses, disagreements and conflict that marked the development of penal policy at this time. In this sense the ‘*late 1970s become the ground zero for a newly contested field of crime control*’ and a canvas on which to project post-1970s ailments (2004 p.14).

These analytical blind spots can arguably be traced back to the underlying ontological assumptions at the heart of Garland’s project and an associated preference for an ‘*analytical rather than archival*’ methodology (Garland 2001 p.2) that will be discussed in more detail in Chapter Three. By alighting upon a level of analysis that illuminates the socio-economic shifts associated with late modernity the ‘*Culture of Control*’ offers a compelling account of change within the criminal justice sphere but this by its very nature obscures the capacity of individuals, communities and institutions to resist or accelerate the various pathways along which criminal justice policy may travel.

### *2.2.3 Contingency, variability and political culture*

One of the most productive routes for restoring a sense of contingency and variability (but not necessarily agency) to our understanding of criminal justice has been to focus on the role ‘political cultures’ play in shaping public policy.

In their ground-breaking study ‘*Penal Systems: A Comparative Approach*’ Cavadino and Dignan (2006b) conducted a wide-ranging comparative analysis of global penal systems. Far from confirming a ubiquitous trend towards penal convergence across the globe, their analysis demonstrates a more complex picture of similarity and difference, both in national incarceration rates and public discourses around crime more generally. Cavadino and Dignan advance a ‘radical pluralist’ theory of society characterised by the interaction of material conditions, ideological and cultural factors (2006b pp.12-14). While these forces interact differently within each liberal democratic state broad similarities can be discerned between ‘families’ at the political economic level and this leads the authors to a typology of Western penal systems that

draws heavily upon Esping-Anderson's (1990) formulation of neoliberal, corporatist and social democratic welfare states. Neoliberal states like the United States and Great Britain exhibit the highest imprisonment rates and demonstrate a greater propensity towards punitive criminal justice policies. As one moves along the spectrum from the corporatist states of France and Germany to the social democratic polities of Scandinavia, one finds markedly less use of imprisonment and evidence of greater faith in the re-integrative potential of criminal justice. The great achievement of Cavadino and Dignan's study is to evidence a relationship between political culture and responses to crime not just across jurisdictions but arguably over time as these polities developed.

More recently, a number of researchers have used these comparative tools to undertake more detailed qualitative analysis of the criminal justice systems of various liberal democratic states. For example, in his study, *'When Children Kill Children'*, Green (2008) examines the tragic child-upon-child murders of James Bulger in England and Silje Redergard in Norway. Green documents how the murder of James Bulger provoked an expressive and retributivist response in Britain that has become synonymous with the concepts of 'penal populism' and 'penal punitiveness'. In contrast, the Norwegian response was defined by compassion and restraint, there was no outpouring of anger from the victim's parents, a team of experts worked alongside the families to re-integrate the offenders into the community and politicians did not seek political gain from the situation. In seeking to explain these differences in approach Green argues that crime rates and punishment trends fluctuate independently of one another in large part because of the mediating role of political culture. This is defined as, *'a pattern of cognitive, affective, and evaluational orientations towards political objectives among the members of a group'* (Green 2008 p.37). Building upon Lijpharts (1984, 1999) analysis of consensual and majoritarian democratic cultures, Green argues that the consensual democratic system found in Norway would, *'appear to retain structural and cultural features that retard, counteract or delay the adverse effects associated with late modernity'* (Green 2008 p.14).

Similarly, in *'The Politics of Imprisonment'* Barker (2009) documents how variations in the democratic traditions of the US federal states have a strong bearing upon the developmental trajectory of criminal justice policy and the treatment of offenders over

time. Barker suggests that as a discipline criminology has lacked the methodological tools to account for the move from “politics to policy” and sets out to demonstrate how the democratic process has influenced the penal culture of California, Washington and New York (2009 p.33). At the heart of Barker’s explanatory account are the concepts of ‘political structure’ and ‘collective agency’, while the former concerns the ‘rules of the game’ (North 1990) and ‘legitimate channels of action’ the latter relates to how people take action in the political arena, interact in the public sphere and engage with policy makers (2009 pp.25-46). These factors have exerted a significant impact over the democratic culture of US states. Where the centralised and elitist culture of New York state fosters an actuarial approach to the management of crime, the ‘polarized populism’ associated with Californian politics has generated strong political incentives towards expressive and retributivist crime control policies.

This analysis leads Barker to a number of conclusions with implications for the study of penal policy in both historical and comparative perspective. Chief among them, the catalysing potential of civil engagement, the relevance of ‘place’ as an important antidote to universalising claims about globalisation, the exceptional nature of racial politics in the USA and most significant of all perhaps for this study, the importance of institutional constraints and path dependencies (2009 pp.35-42). As Barker notes institutional structures have a powerful influence on the temper of criminal justice policy that is worthy of further study,

This study shows how contemporary American penal regimes were shaped by the legacies of past practices and institutions.... These findings suggest that certain kinds of institutional configurations were more likely to deepen demands for retribution as well as provide their legal and political expression, while others were more likely to bring about more conciliatory measures (2009 p.180).

Political culture therefore emerges as a powerful tool for exploring contingency and variability in liberal democratic responses to crime. It also offers one possible vantage point from which to examine the capillaries of power that connect individual events with wider structural factors. For example, in Green’s analysis of how political culture structures, shapes and constrains the scope of policy making through a series of ‘pre-rational’ and ‘normal political filters’ (2008 p.83). But despite these advances political culture remains an elusive concept. It can be difficult to conceptualise and subject to



detailed empirical scrutiny. Moreover, the analytical tools associated with political culture offer a rather limited account of the ‘spatial’ dimensions of policy development, by which I mean the uneven distribution of power within the policy-making process, the winners and losers of policy decisions and the administrative challenges that inevitably emerge once policy is translated into practice.

#### *2.2.4 The mediating role of political institutions*

Given the longstanding criminological interest in the State, punishment and the exercise of power it is perhaps unsurprising to find that there has been growing interest in institutions and institutional perspectives within the criminological literature. In the early twentieth century Rusche and Kirchheimer (1937) sought to locate the penal system within a broader institutional landscape defined by the labour market and economic pressures. While in his seminal work *‘Discipline and Punish: The Birth of the Prison’* Foucault (1977) argued that the invention and spread of the prison could only be understood with reference to changes in the wider care institutions of society.

More recently Karstedt (2012) has reviewed the influence of the ‘new institutionalism’ on contemporary criminological thinking. Karstedt argues that the ‘new institutionalism’ has entered the criminological consciousness via the pathways of the ‘old institutionalism’, as anomie theory, a renewed interest in the political economy of punishment and new concepts like collective efficacy and social capital (Karstedt 2012 p.340). This focus on institutional structures has permeated through many areas of criminological discourse. Messner and Rosenfeld (2007) have advanced an ‘institutional anomie theory’ to account for the causes of crime in the United States. Elsewhere, Zimring and Johnson (2006) have argued that the character of the criminal justice system depends to a considerable degree upon its institutional design and level of insulation from other pressures. While *‘less insulation’* is likely to make the system more receptive to populist demands for punishment the existence of a professional body of judges and a system that encourages *‘principle and individualised punishment decisions’* can provide the necessary degree of insulation to restrict popular impulses towards harsher punishment (2006 pp. 266-280).

There has also been growing interest in how institutions account for punishment trends between societies and over time. One of the most influential contributions to this

debate has been Lacey's (2008) *'The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies'*. Lacey seeks to locate the experiences of Great Britain and the USA within a broader international context and cautions against reading the drift towards 'penal populism' as an inevitable corollary of global forces that will eventually engulf all liberal democratic systems. The relationship between political economy and punishment does not operate in simple input – output terms, instead, socio-economic forces are mediated through a range of economic, political and social institutions (2008 pp.55-62). It is through this mediating process and the ensuing impact of 'institutional stabilisation' and path dependence that commonalities and discontinuities occur within national penal systems. Once these arrangements begin to crystallise they create powerful institutional incentives for particular political choices over others.

The concept of institutional advantage is central to Lacey's analysis and draws heavily upon the 'varieties of capitalism' approach pioneered by Hall and Soskice (2001). This analysis suggests that capitalist economies can be distinguished according to their organisational capabilities: co-ordinated market economies (CMEs) like Germany, Japan and Sweden *'depend more heavily on non-market relationships to coordinate activity'* (2001 p.7). In contrast, liberal market economies (LMEs) commonly found in the English speaking world *'coordinate their activities primarily via hierarchies and competitive market arrangements'* (2001 p.8). In reality all western economies exhibit features of both the LME and CME models of social organisation but as a heuristic device Lacey finds that the LME/CME distinction maps extremely well onto Cavadino and Dignan's (2006b) analysis of penal systems outlined above. Since CMEs are premised upon inclusionary, long-term patterns of relationship building, Lacey reasons that such systems are more likely *'other things being equal, to generate incentives for the relevant decision-makers to opt for a relatively inclusionary criminal justice system'* (2007 p.58) and are *'structurally less likely to opt for degradation or exclusionary stigmatisation in punishment'* (2007 p.58). By contrast, LMEs are institutionally responsive to the demands of innovation and flexibility with the implication that *'under conditions of surplus unskilled labour (conditions which liberal market economies are also more likely to produce), the cost of harsh, exclusionary criminal justice system are less than they would be in a co-ordinated market economy'* (2007 p.59).

*'The Prisoners' Dilemma'* emerges as a key text in advancing our understanding of how liberal democratic states respond to the problem of crime. It opens up new possibilities for thinking about how institutional settings incentivise policy-makers to favour some political choices about criminal justice policy while inhibiting others. Indeed, the identification of institutions as a key factor in the long-term development of criminal justice policy in both the work of Barker (2009) and Lacey (2008) has exerted a significant influence on the development of my research. But it must also be acknowledged that recent interest in institutions remains largely theoretical and has not been subject to detailed empirical study (Lacey 2013). For these reasons *The Prisoner's Dilemma* can be seen as a call to arms for further research and does not in and of itself provide an 'off the shelf' methodological template from which to conduct an institutional analysis of early release. It is therefore necessary to engage with the political science literature associated with the 'new institutionalism' to develop the key building blocks of my theoretical approach.

To recap, I have examined four different ways of thinking about the development of criminal justice policy and practice in England and Wales. Each perspective is based upon a number of ontological assumptions about the nature of power, structure and agency, ideas and materialism that can both illuminate and obscure our understanding of the political world. I noted that agent-centred views are particularly common within the criminological literature but often yield, *a form of analysis which tends to be highly descriptive. It is rich in on detail; low on explanation*' (Hay 2002 p.110). In practice it is impossible to make sense of medium to long-term shifts within criminal justice without some account of the wider structural changes associated with late twentieth century modernity. Finally, I examined the emerging research into institutions and found that this offers a promising, albeit underdeveloped viewpoint from which to develop a 'theory of the middle range' (Merton 1967 p.39) that is sensitive to empirical particulars and well suited to the explanation of a limited aspect of social life (Bryman 2007 p.6).

### **2.3 The 'New Institutionalism'**

Without denying the importance of both the social context of politics and the motives of individual actors... institutional analysis posits a more

independent role for political institutions. The state is not only affected by society but also affects it. Political democracy depends not only on economic and social conditions but also on the design of political institutions (March and Olsen 1984 p.738).

David Downes once described criminology as a '*rendezvous subject*' (cited in Garland and Sparks 2000 p.7). Historically this intellectual cross pollination was fuelled by the disciplines of sociology, psychology, law and philosophy (Young 2003 p.97). But in recent years a strong inter-disciplinary research agenda has gathered pace seeking to traverse the traditional criminological interest in deviancy, policing and the legitimacy of punishment with a political science literature attuned to the political process, policy formulation and the application of power. In his review of police reform Savage (2007) drew upon a range of analytical tools from political science to account for the historical shifts in policing over time. This includes contemporary accounts of new public management, policy networks and the creative role of policy entrepreneurs. In their work on political culture and policy transfer Newburn and Sparks (2004) concluded that the *politico-cultural environment to which ideas, practices and policies travel has a very significant impact on the eventual shape and destiny of the 'import'; or even if there is any import at all*' (2004 p.10). An observation that lead the authors to consider the import of a 'Varieties of Capitalism' approach (Hall and Soskice 2001) and Kingdon's (1984, 2010) work on policy formulation and agenda setting.

Likewise, I have outlined how the work of authors like Lacey (2008) and Barker (2009) have opened up new vistas from which to examine the development of penal policy and how it has changed over time. The '*Prisoners' Dilemma*' took the first formative steps in laying some of the theoretical groundwork for this approach but it is necessary to engage with the political science literature in more detail to develop a theoretical framework capable of guiding my empirical exploration of early release policy and practice. In what follows I want to review the existing literature on institutional analysis and the view of policy change adopted by this study before seeking to locate my approach within the tradition of 'historical institutionalism'.

### *2.3.1 Rediscovering political institutions*

So what are political institutions and why do they matter? In one sense scholarly interest in institutions is longstanding. Their presence within the political landscape

has long been recognised within the traditions of public law and political analysis but this tended towards a rather static, monolithic view of institutional structures (Lowndes 2010 p.60). In their now classic article '*Rediscovering Institutions: The Organisational Basis of Politics*', March and Olsen (1984) explicitly sought to transcend the traditional political science concern for, '*concrete political institutions, such as the legislature, executive, bureaucracy, judiciary, and the electoral system*' in order to build a richer understanding of how politics 'really works' in institutional spaces (March and Olsen 1984 p.6). The key point being that institutions were not simply bricks and mortar, constitutional constructs or transaction points for calculating individuals but complex networks of rules, norms and behaviours that operate independently from individual actors and broader structural pressures,

An institution is a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances' (March and Olsen 2008 p.1).

This has stimulated a very different research agenda from the 'old institutionalism'. Where once political scientists focused on the formal constitutional responsibilities of institutions like the Ministry of Defence or Home Office the 'new institutionalism' has shifted the focus of enquiry towards, for example, the less well understood decision-making, budgetary and procurement procedures that define the day-to-day business of government (Lowndes 2010 p.67).

This definitional plasticity is both a strength and weakness of institutional analysis. On the one hand it has stimulated a diverse and sophisticated body of research. Skocpol (1979) has documented how social revolutions in France, Russia and China were strongly influenced by the institutional resilience of the military and administrative apparatus of the state. In his study of unionization in Western Europe Rothstein illustrated how the structure of unemployment insurance institutions played a critical role in the development of national union movements. While Immergut (1992) has explored how the development of national health insurance regimes in Western Europe was strongly influenced by the willingness of physicians groups to accommodate the views of reformers, attitudes she attributes to the porous nature of

the decision-making processes in France, Switzerland and Sweden. Yet some critics have expressed dissatisfaction with the rather nebulous quality of this definition. Rothstein (1996) has argued that if the concept of an institution '*means everything then it means nothing*' since it is impossible to distinguish institutional phenomena from other social facts (1996 p.145). John (1998) has cautioned against the dangers of including too many aspects of political life under one category and Peters calls for '*more rigour in conceptualisation and then measurement of the phenomena that are assumed to make up an institution*' (1996 p.215). Indeed, it must be said that my personal experience of institutional analysis in this study has taken me a long way from the broad varieties of capitalism approach adopted in '*The Prisoners' Dilemma*' (Lacey 2008).

In part this may reflect the fact that from its creation the 'New Institutionalism' was defined as much by what it was in opposition to as by what it stood for. The work of March and Olsen and many others grew out of a deep dissatisfaction with the dominant theoretical positions within American political science, most notably, behavioralism a rather a-theoretical perspective that sought to discern basic rules of political behaviour from the informal distributions of power, culture and routine (Hay 2002 p.10). This 'institutional turn' (Jessop 2000) has seen many political scientists reject many long-held assumptions about change in the political world. Chief amongst them, the tendency to view political outcomes as the result of rational 'equilibrium contracts' between self-interested individuals, a tacit belief in the idea of progress and the belief in efficient historical processes that provide unique solutions appropriate to that time limited context (March and Olsen 1984 p.735). I would argue that many of these underlying assumptions can be found in the accounts of criminal justice change outlined earlier (most notably Lord Windlesham's frontispiece map in Responses to Crime 1993) and it is worth quoting the multi-pronged criticism offered by March and Olsen at length,

Although the concept of institutionalism has never disappeared from theoretical political science, the basic vision that has characterized theories of politics since about 1950 is (a) contextual, inclined to see politics as an integral part of society, less inclined to differentiate the polity from the rest of society; (b) reductionist, inclined to see political phenomena as the aggregate consequences of individual behavior, less inclined to ascribe the outcomes of politics to organizational structures and rules of appropriate

behavior; (c) utilitarian, inclined to see action as the product of calculated self-interest, less inclined to see political actors as responding to obligations and duties; (d) functionalist, inclined to see history as an efficient mechanism for reaching uniquely appropriate equilibria, less concerned with the possibilities for maladaptation and non-uniqueness in historical development; and (e) instrumentalist, inclined to define decision making and the allocation of resources as the central concerns of political life, less attentive to the ways in which political life is organized around the development of meaning through symbols, rituals, and ceremonies (1984 p.735).

Unsurprisingly, the ‘new institutionalism’ has inspired a burgeoning literature that cannot be reviewed in detail here (for a useful overview of the literature see Peters 2005). To this end Hall and Taylor’s (1996) article ‘*Political Science and the Three New Institutionalisms*’ provides an invaluable roadmap for the inter-disciplinary traveller. Hall and Taylor argue that the ‘new institutionalism’ should not be interpreted as a ‘*unified body of thought*’ but seen rather as a ‘number of approaches that *developed in reaction to the behavioral perspectives that were influential during the 1960s and 1970s*’ (2006 p.936). Three broad schools of thought have developed within this movement each with differing ontological and epistemological assumptions; a rational choice institutionalism premised upon a largely objectivist ontology and epistemological positivism; a sociological institutionalism that is broadly constructivist and interpretivist in orientation and a historical institutionalism that draws upon both of these perspectives (see also Marsh and Stoker 2010 pp.184-210; Hay and Wincott 1998).

These underlying ontological and epistemological choices lead to very different perspectives on how institutions influence policy outcomes. Where rational choice institutionalism has tended to view politics as a series of ‘collective action dilemmas’ between rational actors with fixed preferences, sociological institutionalism posits a very broad definition of institutions as a series of ‘*symbol systems, cognitive scripts, and moral templates that provide the ‘frames of meaning’ guiding human action*’ (Hall and Taylor 1996 p.947). In contrast historical institutionalism has centred upon how political struggles are mediated over time by the institutional settings in which they take place. This is ultimately concerned with revealing how ‘*institutions, understood as sets of regularized practices with a rule-like quality, structure the behaviour of political and economic actors*’ (Hall 2009 p.2).

While there has been some effort to carve out a distinct historical institutionalist ontology (see the interesting debate between Hall and Taylor 1996; 1998 and Hay and Wincott 1998) it is sufficient to note here that historical institutionalism has been defined by a belief that, *'institutions... can shape and constrain political strategies in important ways, but they are themselves also the outcome (conscious or unintended) of deliberate political strategies of political conflict and of choice'* (Thelen and Steinmo 1992 p.10). In this sense historical institutionalism is best understood as an approach to policy analysis that loosely integrates a series of ontological, epistemological and methodological assumptions about the political world. As Steinmo would later put it,

Historical institutionalism is neither a particular theory nor a specific method. It is best understood as an approach to studying politics. This approach is distinguished from other social science approaches by its attention to real world empirical questions, its historical orientation and its attention to the ways in which institutions structure and shape political behaviour and outcomes (2008 p.118).

This dialectical approach to questions like structure and agency would appear to be particularly well suited to the aims of this research and provides a powerful guide for the systematic and historically grounded study of early release policy and practice between 1960 - 1995. Moreover, Hall and Taylor (2006) allude to four building blocks of the historical institutionalist approach that provide an initial orientation towards the data and a helpful vocabulary for thinking about policy change, namely; the relationship between institutions and individuals, the importance of history in shaping political outcomes, the distribution of political power and the role of ideas.

### *2.3.2 Institutions and individuals*

The first building block of historical institutionalism relates to how actors operate within institutional or organisational settings. Since its inception the new institutionalism has accommodated two distinct views of how individuals operate within political institutional settings (Lowndes 2010 p.72). First, the normative (sociological) institutionalism of authors like March and Olsen (1984) who claim political institutions influence actor's behaviour through a series of values, norms and 'constitutive rules and practices' that provide structures of meaning and prescribe



appropriate behaviour. Second, the rational choice institutionalism of economists such as Ostrom (1999) who have claimed that political institutions influence behaviour by altering the context in which individuals select strategies for the pursuit of their preferences. Historical institutionalism has tended to adopt an intermediary position between these perspectives employing both ‘cultural’ and ‘calculus’ approaches to explain political action (Hall and Taylor 2006 pp.950-955).

In this study I draw most heavily upon the normative strand within the literature to explore how the values, behaviour and attitudes of political actors are shaped by the institutional settings within which they operate. As Sanders (2006) has noted historical institutionalism starts from the premise that it is more enlightening to study human political interactions in the context of rule structures that are themselves human creations. This draws attention to a number of interesting issues. For while political institutions are often taken for granted or seen as bureaucratic impediments to be overcome, government would be almost impossible (and highly inefficient) without them. March and Olsen express this in the following terms,

Institutions simplify political life by ensuring that some things are taken as given. Institutions provide codes of appropriate behaviours, affective ties, and a belief in legitimate order. Rules and practices specify what is normal, what must be expected what can be relied upon, and what makes sense in the community; that is, what a normal, reasonable, and responsible (yet fallible) citizen, elected representative, administrator or judge, can be expected to do in various situations (2006 p.9).

In this sense institutions help to impose order upon uncertainty and translate an overabundance of external inputs into manageable information that can inform decision-making. Invariably, some political institutions perform these functions better than others, but the key point is that this utility comes at a cost. The basic ‘logic of action’ within institutional milieus is one of ‘rule following’ that is reinforced through a suite of behavioural norms and practices that reduce flexibility and variability amongst individuals (see Hay 2002 pp.103; March and Olsen 1989). Over time such structures can prove extremely resilient to change and exert a significant influence over the trajectory of public policy. It is important not to overstate this point. Institutions exist largely independently from individual action but they are reliant upon them, as Steinmo *et al* (1992) have noted institutions constrain and refract politics but

they are never the sole “cause” of political outcomes. For this reason, the authors argue that historical institutionalism is particularly well suited to ‘theories of the middle range’ that seek to make sense of both historical contingency and stability over time.

This also hints at some limitations of institutional analysis. By very definition institutional analysis implies a focus on how organisations structure and shape individual action. In part this reflects the emergence of the ‘new institutionalism’ as a criticism of behaviourism and recognition of how institutions constrained individual action. But it also reflects a series of underlying ontological assumptions about the relative ordering of structure and agency. Hay (2002) has drawn attention to the ‘structuralist tendencies’ of historical institutionalism and catalogued five ways in which institutions are seen to structure individual action:

- 1) The ‘density’ of the existing institutional fabric in any given context renders established practices, processes and tendencies difficult to reform and steer.
- 2) Institutions are normalising in that they tend to embody shared codes, rules and conventions, thereby imposing value systems that constrain behaviour.
- 3) Institutions define logics of appropriate behaviour to which actors conform in expectation of the likely sanctions for non-compliance.
- 4) Institutions embody sets of ideas about that which is possible, feasible, and desirable and the means, tools and techniques appropriate to realise policy goals.
- 5) Creation may be constrained by a reliance upon existing institutional templates (2002 p.105).

Applied in a rigid fashion there is a danger that historical institutionalism crowds out individual agency and leaves very little analytical space for the various ways in which individuals and coalitions of interest can influence the trajectory of public policy. Recognising this tendency means it can be mitigated to a degree by the adoption of a research strategy that is ‘saturated with agency’ to borrow a phrase from historian Christopher Clark (2014 p.xxix). Ultimately however there is no getting away from this structuralist tendency and that is not necessarily a bad thing. As Hall and Taylor observe, *‘institutionalists’ must remain structuralist at least in the sense that they seek to reveal how institutions shape social and political life. Otherwise, much of the analytical distinctiveness of institutionalism will be lost’* (1998 p.959).

### 2.3.3 History matters

The second main building block of historical institutionalism concerns the role of history in shaping policy outcomes. Arguably, historical institutionalism departs most markedly from other forms of political analysis in the emphasis it places on the temporal as well as the spatial elements of policy development. This calls for a sequential account of policy development '*as life is lived*' rather than a snapshot of those interactions at one point in time (Sanders 2006 p.39). As Paul Pierson argues in his book '*Politics in Time*' the study of politics in historical perspective can '*greatly enrich our understanding of complex social dynamics* (2004 p.1) and suggests that, '*there is often a strong case to be made for shifting from snapshots to moving pictures*' (2004 p.1).

'History matters' but this implies more than a simple linear, cause and effect model of historical development. Historical institutionalism posits a more sophisticated picture of how history shapes the policy-making process through the countervailing forces of 'path dependence' and 'timing and sequence'. In recent years these terms have proliferated in their use and are deployed in support of a variety of conclusions. As Pierson notes,

Social scientists generally invoke the notion of path dependence to support a few key claims: Specific patterns of timing and sequence matter; starting from similar conditions, a wide range of social outcomes may be possible; large consequences may result from relatively "small" or contingent events; particular courses of action, once introduced, can be virtually impossible to reverse; and consequently, political development is often punctuated by critical moments or junctures that shape the basic contours of social life. All these features stand in sharp contrast to prominent modes of argument and explanation in political science, which attribute "large" outcomes to "large" causes and emphasize the prevalence of unique, predictable political outcomes, the irrelevance of timing and sequence, and the capacity of rational actors to design and implement optimal solutions (given their resources and constraints) to the problems that confront them (2001 p.XXX).

Path dependence has been particularly susceptible to so-called 'concept stretching' (Sartori 1970). Used in a narrow sense it has come to mean little more than an appreciation of how events at an earlier point in time will influence the possible outcomes of a sequence of events occurring at a later point in time (Sewell 1996

p.262). But applied in a more expansive sense path dependence emerges as a, '*dynamic process involving positive feedback, which generates multiple possible outcomes depending on the particular sequence in which events unfold*' (Pierson 2004 p.20). At the core of this process is the role of positive reinforcement. As Margaret Levi notes positive feedback creates developmental trajectories that are hard to reverse once in motion (1997 p.28). Once institutions are created they become resilient to change and this 'stickiness' can close off some policy avenues while encouraging others.

This can be a significant impediment to 'root and branch' reform of political systems, even for those who command substantial financial and political capital. In his study '*Dismantling the Welfare State*' Pierson (1994) demonstrated how the systematic attempts by both the Thatcher and Reagan governments to 'roll back the frontiers of the welfare state' were both encouraged and frustrated by institutional structures. This was particularly apparent in relation to reform of public housing. In England and Wales, the relative fragmentation of the tenants' lobby coupled with the overall quality of the housing estate allowed the Thatcher government to pursue a far more effective policy of privatization than was possible in the United States where the unified nature of the US Social Security System made it far easier for critics to mobilise opposition amongst those who would be effected by the cuts (Pierson 1994 pp. 74-100).

Similarly, timing and sequence can have a big impact upon the overall trajectory of public policy. As noted above there has been a tendency within the social sciences to attribute 'large' historical effects to 'large' historical causes (Pierson 2001 p.XXX). In contrast scholars working within the historical institutionalist tradition have illustrated how seemingly minor decisions at the right point in time can generate substantial political outcomes at a later point in a causa sequence, an effect that is most pronounced when such decisions shift the resources available to political actors or restrict their access to key decision-making for a (for an excellent overview see Pierson 2000). However, it must also be noted that historical institutionalism has been far more effective in explaining 'institutional stability' than it has at making sense of seismic political change and critical junctures, a vulnerability that links back to the structuralist tendencies of the new intuitionism. As Steinmo *et al* (1992) have noted the common recourse to theoretical devices like 'punctuated equilibrium' to explain complex critical junctures ultimately sees institutional analysis abandoned for base forms of

structure and agency at precisely the point when history is at its most important and interesting,

The problem with this model [punctuated equilibrium] is that institutions explain everything until they explain nothing. Institutions are an independent variable and explain political outcomes in periods of stability, but when they break down, they become the dependent variable, whose shape is determined by the political conflicts that such institutional breakdown unleashes (1992 p.15).

For Pierson, a more profitable explanation of the both the relative stability and fluidity of historical events can be found in the integration of path dependence and ‘timing and sequence’. For while path dependence and positive reinforcement are often seen to have a stabilising influence on public policy, timing and sequence can introduce contingency and variation, most notably when ‘policy windows’ are opened by the regular operation of the electoral cycle or exceptional events (Kingdon 2003). This leads Pierson to argue that where self-reinforcing processes are at work political life is likely to be marked by the following characteristics:

1. Multiple equilibria. Under a set of initial conditions conducive to positive feedback range of outcomes is generally possible.
2. Contingency. Relatively small events, if occurring at the right moment, can have large and enduring consequences.
3. A critical role for timing and sequencing. In these path-dependent processes, when an event occurs may be crucial. Because early parts of a sequence matter much more than later parts, an event that happens “too late” may have no effect, although it might have been of great consequence if the timing had been different.
4. Inertia. Once such a process has been established, positive feedback will generally lead to a single equilibrium. This equilibrium will in turn be resistant to change (2004 p.43).

#### *2.3.4 The distribution of political power*

The third building block of historical institutionalism relates to the distribution of power within institutional structures. Unlike rational choice theory which has tended to conceptualise policy-making as a process of collective bargaining between broadly equal actors, historical institutionalism has been, ‘*especially attentive to the way in which institutions distribute power unevenly across social groups*’ (Hall and Taylor 1996 p.941).

As Hall and Taylor note, political institutions can influence the distribution of power in a number of ways. This might include the degree of access actors have to the decision-making process, the institutional tools available to outsiders agitating for change or the cumulative effect of policy pronouncements for the distribution of political and economic power over time. Hall describes this in the following terms,

Institutional factors play two fundamental roles in this model. On the one hand, the organization of policy-making affects the degree of power that any one set of actors has over the policy outcomes... On the other hand, organizational position also influences an actor's definition of his own interests, by establishing his institutional responsibilities and relationships to others. In this way, organizational factors affect both the degree of pressure an actor can bring to bear on policy and the likely direction of that pressure (Hall 1986 p.19).

This raises some fundamental questions about the nature of political power. The 'community power debate' has attracted heated discussion between those who view power in classical pluralist terms as control over decision-making (Dahl 1961), the highly influential work of Bachrach and Baratz (1962; 1970) who conceptualised power as the second-order ability to set the agenda for the decision-making process and scholars like Steven Lukes (1974; 1978) who have championed preference shaping as the 'third dimension' of political power. These concerns are largely outside the scope of this chapter but suffice it to say here that the ways in which we view power have a very real bearing on how we perceive the policy-making process (a more detailed discussion can be found in Hay 2002 pp.168-193). For example, I would argue that Lord Windlesham's focus on the 'first-face' of power in *Responses to Crime* (1987; 1993) leads him to a pluralist conception of criminal justice change that focuses on the political disputes that crystalized around key decision-making points.

It is probably right to say that historical institutionalism is rather more sympathetic to the second and third faces of power than other theoretical accounts. It requires us to go further in understanding how institutions distribute power, not just in relation to key decisions, but also to shape the political agenda and influence the preferences of actors working within these structures<sup>4</sup>. Moreover, historical institutionalism is

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<sup>4</sup> Although it should be noted here that authors like Colin Hay have been extremely critical of Luke's conception of the third dimension of power and the ability of the researcher to distinguish between the perceived and genuine interests of a political actors.

sensitive to the distribution of power between social groups and institutional settings. It is sensitive to the feedback loops generated by political choices which by their very nature alter the legal, financial and political balance of power between parties. This creates winners and losers which in turn has a significant effect on their access to decision-making structures, the types of arguments that are likely to be successful and the ability of groups to form coalitions of interest and exert institutional pressure (Weir 1992).

### 2.3.5 *The role of ideas*

The fourth and final building block of historical institutionalism I want to introduce concerns the role of ideas within public policy.

In recent years' considerable attention has been paid to the role ideas play in driving the complex interplay between institutional stability and renewal (Hay 2006). Much of this interest can be traced back to Hall's highly praised article '*Policy Paradigms, Social Learning, and the State*' (1993). Therein Hall draws attention to the ideational dimensions of public policy and advanced the view that policy-makers operate within 'policy paradigms' that provide an interpretative framework for the understanding and realisation of political aims. Two elements of this analysis are particularly noteworthy.

Hall offers a powerful conceptual model for accounting for both similarity and difference within states over time. For Hall policy change can occur at three levels of abstraction. 'First order' change refers to the often incremental refinement of policy on particular subject areas. While the ultimate goals of policy remain steady, their application evolves to reflect new experience and knowledge. 'Second order' change occurs where, '*the instruments of policy as well as their settings*' are adapted (Hall 1993 p.279). While the hierarchy of policy objectives remains, the basic techniques of policy are re-invented. 'Third order' change in comparison is a far rarer occurrence and is said to occur when there are, '*simultaneous changes in all three components of policy: the instrument settings, the instruments themselves, and the hierarchy of goals behind policy*' (1993 p.279). Drawing heavily upon Kuhn's (1962) '*The Structure of Scientific Revolutions*', Hall argues that while first and second order change are best understood as examples of 'business as usual' policy making, third order change

represents, a radical re-alignment in both the means and ends of policy development. To adopt Kuhn's terminology, this can be expressed as a 'paradigm shift.'

Moreover, Hall calls for a greater emphasis upon the role ideas play within policy development. Hall argues that policy-makers operate within 'policy paradigms' that provide an interpretative framework for the understanding and realisation of political aims;

Politicians, officials, the spokesman for social interests and policy experts all operate within the terms of political discourse that are current in the nation at a given time, and the terms of political discourse generally have a specific configuration that lends representative legitimacy to some social interests more than others, delineates the accepted boundaries of state action, associates contemporary political developments with particular interpretations of national history and defines the context on which issues will be understood (1993 p.289).

For much of the post-war period Keynesianism provided a settled interpretative framework for the identification and resolution of fiscal concerns. In the 1970s, however, cracks began to emerge in the Keynesian armour and monetarism emerged as a coherent and ideologically attractive alternative. This set in train a period of first and second order re-alignment in British economic policy but it was not until the election of the Conservative Party in 1979 that a radical re-formulation of the goals and techniques of economic policy occurred. The result was a 'paradigm shift' that saw monetarism emerge as the accepted economic paradigm amongst Treasury officials and financial regulators. Similar questions can plausibly be asked of criminal justice: Do criminal justice policy makers operate within a particular policy paradigm? Do the well documented changes associated with criminal justice policy since 1945 represent first, second or third order change? I return to these questions in Chapter Seven of this study.

## **2.4 Summary of Theoretical Approach**

In this Chapter I have sought to develop a theoretical framework to address my research questions and guide my exploration of the archival records. In so doing I have examined a number of analytical perspectives within the criminological literature, most notably the role of individuals and governing elites, shifts in the broader social



structure, political culture and the mediating role of political institutions. I went on to suggest that each of these analytical positions is built upon a number of underlying ontological assumptions about power, structure and agency, materialism and idealism that are better suited to differing levels of analysis and explanation. While broadly intentionalist accounts often yield a rich narrative history of everyday policy-making this often lacks explanatory rigour when history is viewed over a longer time frame. In contrast Garland's (2001) *The Culture of Control* emerged as a key point of departure for this study but it was noted that this broader focus on the social, economy and political determinants of crime invariably pays less attention to the contingency and variability that has so often characterised liberal democratic responses to crime.

Neither theoretical perspective was appropriate in this context. My research questions draw attention to the development of early release policy and practice in England and Wales from 1960 – 1995 and this seems particularly well suited to a 'theory of the middle range' that seeks to explain a limited aspect of social life and occupy a position, *'intermediate to general theories of social systems which are too remote from particular classes of social behaviour, organization and change to account for what is observed and to those detailed orderly descriptions of particulars that are not generalized at all'* (Merton 1967 p.39). My review of the political science literature revealed that the 'new institutionalism' has emerged as a particularly influential approach within this tradition and provides the analytical tools to move beyond a monolithic understanding of political institutions to understand how 'politics really works' in organisational settings.

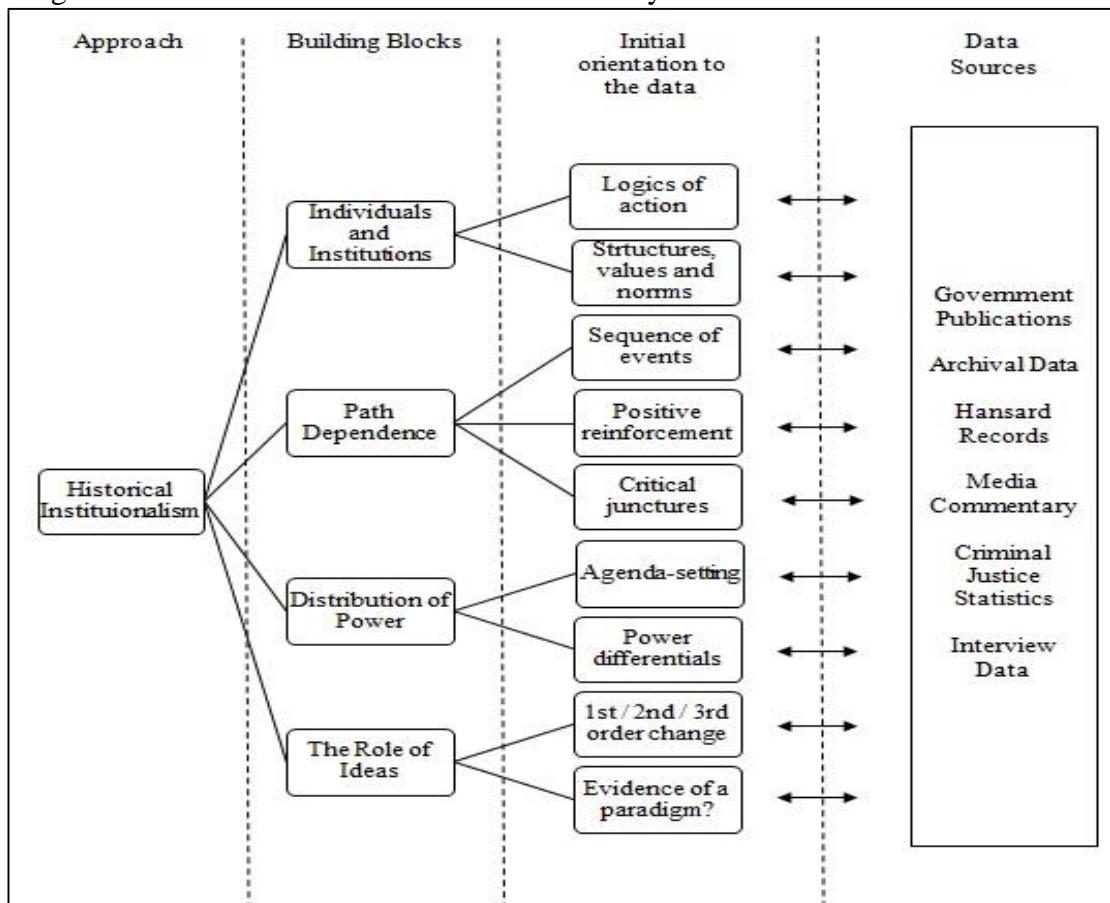
Given my interest in both the temporal and spatial elements of public policy development, I have sought to locate this analysis within the broad tradition of 'historical institutionalism' and sketch out the core 'building blocks' of the theoretical framework that has guided my empirical exploration of the data. I have advanced a view of policy change that suggests a dialectic relationship between structure and agency and is sympathetic to the second and third dimensions of political power. Moreover, I have posited a central role for ideas as a driver of policy change as well as a dynamic view of history and the interaction between timing and sequence in shaping the trajectory of policy development. In this sense historical institutionalism offers a theoretically rich deductive approach to political analysis that helps orientate

the researcher to complex political phenomena and account for both the ‘how’ and the ‘why’ of policy change. Hay describes this relationship between theory and practice well,

Yes, theory is about simplifying a complex external reality, but not as a means of modelling it, nor of drawing predicative inferences on the basis of observed realities. Rather theory is a guide to empirical exploration, a means of reflecting more or less abstractly upon complex processes of institutional evolution and transformation in order to highlight key periods or phases of change which warrant closer empirical scrutiny... In this way, institutionalists and constructivist political analysis proceeds by way of a dialogue between theory and evidence as the analyst, often painstakingly, pieces together a rich and theoretically informed historical narrative (2001 p.47).

In this context historical institutionalism offers a powerful guide to my empirical exploration of early release policy and practice and encourages a constructive dialogue between the theoretical position set out in this Chapter and the research design developed in Chapter Three. This conceptual model is set out below at Figure 13.

Figure 13: Initial Orientation towards the Primary Data



### **3. Research Design and Methodology**

#### **3.1 Introduction**

Having advanced the case for an institutional analysis of early release policy and practice I now turn to my research design and methodology. My aim in Chapter Three is to provide a systematic account of the steps I have taken to gain knowledge of the historical development of early release in England and Wales between 1960 - 1995.

As I outlined earlier the way we see and understand the political world has considerable implications for the most appropriate research design and methodology (Hall 2003 p.374; Hay 2001). Within the criminological literature there has been a tendency to focus on 'big picture' historical change (De Giorgi 2006; Young 1999) and, to borrow Garland's terminology, an associated preference for 'broad generalization' rather than 'empirical particulars' (2001 p.vii). In contrast, my literature review has revealed that there has been relatively little systematic historical study of key events within the contemporary history of criminal justice, not least in relation to early release where little or no detailed research has been done. This is to be regretted. The building blocks of historical institutionalism outlined in Chapter Two provide the analytical tools to develop a rich account of policy change in the evolution of criminal justice and why certain historical trajectories took hold and not others. But this approach to analysis will only ever be as good as the primary data it is based upon. This is why I have been attracted to the historical development of early release in England and Wales. It is why I have adopted a 'theory of the middle range' that is sensitive to empirical enquiry as well as the changing political economy of criminal justice and the capillaries of power that connect the micro, meso and macro levels of the social structure.

This research project calls for a rather different research design and methodology to those typically deployed within the social sciences. In what follows I want to provide an honest, open and reflective account of my research strategy as well as the obstacles, missteps and lessons I have learnt as a criminologist doing historical study. In particular I want to expand upon the idea of criminologist as historian and build the case for a practical and applied historical institutionalism that yields a detailed

narrative history of early release. I confront the inevitable tension between breadth and depth when undertaking historical research and outline the benefits of a qualitative case-study approach that focuses upon key episodes in the evolution of early release policy and practice. I then turn to the practical dimensions of my research methodology. Here I outline the key sources of evidence that have informed this study and my approach to data collection and analysis.

### **3.2 The Criminologist as Historian**

...every single political phenomenon lives in history, and requires historically grounded analysis for its explanation. Political scientists ignore historical context at their peril (Tilly 2006 p.433).

One of the central claims of this study is that the analysis of criminal justice in historical perspective can reveal an empirically rich account of how the liberal democratic state seeks to justify, and in turn, administer a system of criminal justice. But even if we accept this claim and the implications of Tilly's cautionary message, it can be difficult to translate this interest into a practical research agenda. How do we acquire knowledge of historical events? Perhaps more significantly, how do we make use of the historical datum once we have assembled it?

Historical institutionalism provides a 'way of seeing' the political world (Poggi 1965) and a guide to empirical enquiry but it does not provide a readymade framework or research design, *'for the generation of evidence that is suited both to a certain set of criteria and to the research question in which the investigator is interested'* (Bryman 2008 p.31). Unlike experimental, longitudinal and ethnographic approaches that offer extensive methodological guidance (Bryman 2008 p.62) the path from social scientist to historian is not so well signposted. In *'Logics of History'* Sewell argues that social scientists and historians have tended to talk past one another in this regard and calls for a more constructive dialogue between the disciplines (2006 pp.22-80). As Sewell acknowledges, this is easier said than done, for while social scientists have been pre-occupied with formal methodologies and generalizable claims, historians have tended to emphasise descriptive rigour with a less privileged position afforded to theory and methodology,

Theory has a strikingly less central place in history than in the social science disciplines. From the beginning of the systematic differentiation of disciplines in the late nineteenth century, historians and social scientists alike have contrasted the “ideographic” or “descriptive” research of historians – which attempts to capture the uniqueness and particularity of its object – with the “nomothetic” or “explanatory” research of social scientists – which aims to establish general laws or at least valid generalizations. Social science fields might be said to be defined by their theories and formal methodologies; history is more informally (but no less effectively) defined by its careful use of “primary” sources, its insistence on meticulously accurate chronology, and its mastery of narrative (2006 p.3).

From an early stage in this study I was cognisant of these methodological departures and the countervailing pressures they were exerting upon my research. It has focused my attention on the descriptive and explanatory dimensions of my research and the conflict between, *‘parsimony and predictive capacity (the power of explanation) on the one hand versus accuracy of assumptions... and the ability to reflect the complexity and indeterminacy of political processes on the other* (Hay 2002 p.36). Moreover, the relative lack of guidance and formal method for historical researchers ensured a particularly steep learning curve as I began to operationalise this study (Gunn and Faire 2012). The steps I have taken to navigate these challenges have exerted a significant influence over the look and feel of my research and it is worth pausing at this point to reflect in general terms on the travails of a criminologist doing history before jumping into a detailed overview of my research methodology.

### *3.2.1 Parsimony and complexity*

The first point to note is that my research questions call for both a description of the historical development of early release in England and Wales between 1960 - 1995 and a theoretically informed explanation for why these changes occurred. By advancing an institutional analysis of early release I have sought to position my research in the ‘middle range’ and achieve an empirically grounded narrative history of ‘early release’ that fills a significant gap in our knowledge while also arriving at a theoretically rich account of policy development and explanation for why certain developmental trajectories took hold and not others. In this sense my study seeks to straddle the disciplines of history, political science and criminology that typically occupy very different theoretical positions within the parsimony / complexity debate (Hay 2002; Sewell 2006).

As I noted in Chapter Two, many recent historical accounts of criminal justice have tended towards ‘grand theorising’ and the broad historical sweep of criminal justice that lends itself well to generalisation. Reflecting upon the influence of seminal texts like Young’s *‘The Exclusive Society’* (1999), Garland’s *‘The Culture of Control’* (2001) and Wacquant’s *‘Punishing the Poor’* (2009a) Farrall *et al* (2014) have argued that in giving preference to the ‘big picture’ of penal change the criminological literature has tended to *‘focus on macro-level analyses of the UK (and the USA) in such a way that important details are often overlooked and the subtle differences between administrations and countries are downplayed’* (2014 p.3). More persuasively perhaps, the authors argue that this picture *‘gives primacy to theoretical rather than empirical considerations to the extent that few claims are subjected to rigorous data analyses’* (2014 p.3).

The *‘Culture of Control’* (Garland 2001) offers a useful case-study in this regard, not least because Garland is so open about his methodological choices. From the outset Garland recognises the inherent tension between ‘broad generalisation’ and ‘empirical particulars’ when seeking to make sense of the social world. But while recognising the inevitable costs of abstraction, for example *‘excessive simplification’*, *‘false generalisation’* and a *‘neglect of variation’* Garland ultimately deems this a price worth paying in order to alight upon a level of analysis capable of yielding an explanatory account of the broad social structures that shape the causes of crime and our responses to it (2001p.viii), not just in Britain, but right across the globe. For this reason, Garland’s historical analysis gravitates towards a traditional social science concern for parsimony and generalizability rather than a historical research agenda that has tended towards complexity. Garland is explicit about this. Heavily influenced by Foucault’s genealogical method, Garland describes his approach as *‘analytical rather than archival’* (2001 p.2) and in seeking to offer a *‘history of the present’* (2001 p.1) attempts to distance the analysis offered in the *‘Culture of Control’*, from the *‘conventions of narrative history and above all from any expectation of a comprehensive history of the recent period’* (2001 p.2). These methodological choices go hand in hand with the ‘big picture’ criminology outlined in Chapter Two and offers further insight into the strengths and limitations of Garland’s analysis noted earlier.

Like Farrall *et al*, Loader and Sparks (2004) call for a more empirically grounded study of crime. Championing a ‘historical sociology’ of criminal justice Loader and Sparks call for a research output that offers a ‘*more quizzical historical sensibility that is attuned to the trajectories of competing practices, ideologies and ideas and the legacy particular signal events and conflicts bequeath us today*’ (2004 p.14). What would this look like in practice? For Loader and Sparks an effective historical sociology of crime would emphasise how relevant actors interpret the political and institutional settings they find themselves operating in, highlight the completing meanings in-use of relevant legal, criminological and political categories and survey the interconnections between crime related demands, rationalities and the wider terrain of political ideas – notably liberalism (2004 p.13). A truly authentic historical sociology of criminal justice calls for a more detailed account of historical events than many notable contributions to the criminological literature have been able to offer (Simon 2003; Young 1999, 2007; Wacquant 2009).

This call for a more quizzical historical sociology of criminal justice fits well alongside the theoretical framework I set out in Chapter Two of this thesis. My literature review has revealed the relative scarcity of research on the historical development of early release policy and practice in England and Wales and in this context an ‘analytical rather than archival’ research approach would simply not have been appropriate. Furthermore, this approach is entirely consistent with the historical institutionalism outlined in Chapter Two. Hay has suggested that the ‘new institutionalism’ has tended to yield detailed ‘*contextually specific assumptions*’ rather than ‘*generalisable and predictive theory*’ (Hay 2002 p.36). While Mahoney and Rueschmeyer have noted that the epistemological foundations of historical sociology ‘*fit comfortably*’ alongside the ontological building blocks of the historical institutionalist tradition (2003 p.6).

### 3.2.2 Theory and practice

With that in mind, the second key point to make as a criminologist doing historical study is that my preference for an archival rather than analytical history has required a research design that is arguably closer in spirit to that taken by historians than by social scientists. This has implications for the selection of historical events, the triangulation of the archival record and the time required to undertake high quality historical research. But above all else it has necessitated a central role for archival

research and the historians craft in the process of identifying and determining the significance of historical evidence (King 2012 p.14).

As Gunn and Faire note in their recent work *'Research Methods for History'* it remains the case that, *'in large swathes of social, cultural and political history... dissertations, theses and books are written with barely a nod towards methodology'* (2012 p.3). This tendency to confer a less central role to theory and formal methodology can be unsettling for many social scientists (Sewell 2006). Where the social sciences have dedicated considerable attention to reliability, replication and validity, both internal and external (Bryman 2008 p.30), historical research has tended to focus on chronology and mastery of narrative. As a result, the historian must hone a rather more informal, and applied research craft that is sensitive to 'social temporality' or what might be described as the timing, order and sequencing of events (Amenta 2009). In large part this skill must be assimilated through practice and experience but Sewell (2006) has argued that it is possible to identify a number of widely accepted, if unspoken, principles of the historiographical method that help students of history to filter relevant information:

- Events are fateful. They cannot be undone.
- Events are contingent. They depend upon the complex temporal sequence of which they are a part.
- A focus on the event. Historians often talk about 'turning points' and 'watershed moments'.
- Social temporality is extremely complex.
- Causal heterogeneity. The consequences of a given act are not intrinsic in the act but will depend on the nature of the social world within which an event takes place.
- Historical contextualisation. We cannot know what an act or an utterance means and what its consequences might be without knowing the semantics, technologies and logics that characterise the world in which such actions take place.
- Chronology. The precise placement of a happening or a fact in time (Sewell 2006 pp.6-12).

The level of detail and contextualisation associated with a grounded and applied historical institutionalism is resource intensive and time consuming. It favours depth over breadth and demands extensive archival research and the triangulation of the evidence to build a comprehensive chronology of events. As Amenta (2009) has



argued, the practicalities of historical research rule out many prospective research designs and demand a greater immersion in the historical records,

... acting more like historians makes historical sociology more time consuming and difficult. There are no shortcuts to mastering historiography or engaging in archival work. More significantly, these structures tend to force historical social scientist deeper into their cases and tend towards case study. That is to say, social scientists seeking deep historical knowledge will be pushed towards studies of developments in fewer countries or places within a country over briefer periods of time (2009 p.354).

The key point being that as a criminologist doing historical research it has been necessary to make difficult decisions about the relevant importance of parsimony and complexity and to navigate the competing claims of the historical and social scientific method. By positioning my research in the middle range I have sought to engage with a more quizzical historical institutionalism (Loader and Sparks 2004) that requires significant immersion in the historical sources while retaining a theoretically rich account of policy change. In turn, this has demanded a research design and methodology that reflects the more time consuming and resource intensive nature of historical research. It has required heavy engagement with the archival record and it has encouraged a 'snowballing' approach (Robson 2011) to data-collection and analysis that places a strong emphasis upon experience, instinct and real-time decision making in the archives. These features of my research design and methodology are discussed below in turn.

### **3.3 Research Design: A Case Study Approach**

#### *3.3.1 Why case studies?*

Given the time and resources available to me as a doctoral student it would have been almost impossible to survey every aspect of the historical development of early release in England and Wales between 1960 – 1995. Conversely, there was little to be gained from focusing so narrowly on one event that my analysis had little to say about shifts in both the aims and techniques of criminal justice 1960 – 1995 outlined in Chapter One. It has therefore been necessary to limit the historical scope of this study to reflect the constraints placed upon this project.

To achieve an appropriate balance between breadth and depth of analysis I have adopted a qualitative case study approach that has focused upon three critical junctures in the development of early release policy and practice between 1960 - 1995. Breaking the time period down in this way has helped me to place clear parameters around this study and achieve the level of immersion in the archival records that is necessary to reveal the complex linkages associated with historical institutionalism. Mahoney and Rueschemeyer put this elegantly,

By employing a small number of cases, comparative historical researchers can comfortably move back and forth between theory and history in many iterations of analysis as they formulate new concepts, discover novel explanations and refine pre-existing theoretical expectations in light of detailed case evidence (2003 p.13).

Moreover, the selection process itself has sharpened my focus on the ‘signal events’ and critical junctures associated with a grounded historical sociology and institutionalism (Loader and Sparks 2004 p.14). The selection of case studies has brought a welcome focus and ‘boundedness’ to this study (Swanson and Holton 2005 p.328), but it is not an approach without difficulties. In what follows I want to reflect upon the selection of my three case studies before turning to a discussion of ‘what they are cases of’.

### *3.3.2 Early release policy and practice case studies*

The first point to note is that this study will focus on the time period 1960 – 1995. As Pierson notes, *‘choices about the scope of time covered in a particular analysis have profound effects. They lead to substantial shifts in the kinds of theories we employ, the methods we use, the kinds of causal forces we are likely to see at work, and the even the outcomes of interest that we come to identify in the first place’* (2003 p.199). This is certainly the case here. By focusing on a period of just over three decades I have attempted to deliver a manageable project of research that speaks to some of the key shifts in criminal justice in post-war England and Wales.

There are several good reasons for a focus on the period 1960 - 1995. At a pragmatic level the thirty (now twenty) year rule means that few historical records for the post 1995 period have been released, or are likely to be released in the foreseeable future with the implication that the study of such events will surely occupy a future

generation of historians. By ending my study in 1995 I have been able to dedicate more time and resources to the scrutiny of policy change in the 1960s than would otherwise have been possible. This is significant because the 1960s have often been reduced to little more than a ‘golden age’ of penal policy or a blank canvas onto which post 1970s anxieties could be projected (Loader and Sparks 2004 p.14). As a result, there has been little discussion of the debates, disagreements and political configurations that marked the pre-1970s world of criminal justice, issues I have been keen to engage with in this study. Moreover, my literature review has revealed that following Michael Howard’s speech at the 1995 Conservative Party early release policy and practice was the subject of almost continued reform and discussion incorporating the Comprehensive Review of Parole in 2001, the Halliday Report and *Criminal Justice Act 2003* (Windlesham 2001 pp.1-28). Any attempt to integrate a detailed discussion of these events into this study would have necessitated a very different, far broader survey of the historical record than was possible, or indeed desirable, given the aims of this study.

Moreover, the pre-1995 focus provides an important, and often overlooked, historical context to the events that would follow in the mid-1990s and beyond. As Downes and Morgan (2007) have noted the mid-1990s was a key turning point in the emergence of a more populist penal policy. There has been significant criminological interest in signal events like the horrifying murder of Jamie Bulger which shook the country (Green 2008), Michael Howard’s notorious ‘Prison Works’ speech and the appointment of Tony Blair as Shadow Home Secretary which signalled the start of a ‘race to the bottom’ as the main political parties battled for control of the law and order agenda (Anderson and Mann 1997; Downes and Morgan 2007). There is no doubting the importance of these events but they did not happen in a historical vacuum. Contemporary policy-making depends to an important degree on past decisions and in this study I seek to locate these events in a longer temporal sequence.

The density of reform associated with early release policy and practice in England and Wales between 1960 - 1995, coupled with the relative lack of existing historical study means there are no shortage of events and policy debates that merit detailed research. The abolition of the death penalty in 1965 went hand-in-hand with the creation of a new regulatory framework for the detention of ‘lifers’ and prisoners serving long

determinate sentences. Less emotive, but of arguably greater consequence for the day-to-day operation of the criminal justice system, were the ‘wicked issues’ of how much time determinate sentence offenders should serve in prison and the practical administration of a system that resulted in the termination of prison sentences. Not to mention the provision of supervision and aftercare services to reintegrate offenders back into the community and prevent re-offending.

In selecting these case studies, I have sought to ensure balance across the period in question and a pragmatic focus on events that offer sufficient archival material to sustain an extended period of doctoral research. Within this framework I have also tried, where possible, to be guided by events on the ground and the watershed moments policy-makers themselves considered significant. From this three case studies have emerged that provide the substantive focus for this study. My first case study examines the period 1960 - 1968 and the events that led to the introduction of a modern system of parole in the *Criminal Justice Act 1967*, a period of policy development that is absolutely fundamental to an understanding of how early release developed in England and Wales in the decades that followed. My second case study encompasses the period 1975 - 1982 and the steps taken to extend a system of parole to short sentence offenders. This was a particularly turbulent period in the history of criminal justice, characterised by the gradual erosion of the rehabilitative ideal, a rising prison population and growing concern about the procedural weaknesses inherent in a system of executive release. My third and final case study explores the period from 1987 - 1991 and the decision to undertake a root and branch review of parole following the 1987 General Election. Here I focus on the proceedings of the Carlisle Committee and the radical overhaul of early release policy and practice enshrined in the *Criminal Justice Act 1991*. An extended timeline of key events is set out at Appendix 1 along with background information on the key individuals that feature in this study at Appendix 2. These appendices are intended as an aide memoir to guide the reader through the occasionally dense web of events and key individuals that feature in Chapters Four, Five and Six of this study.

### 3.3.3 What are they cases of?

By bounding the parameters of my research in this way it has been possible to achieve a greater degree of immersion in the archival records than would have been possible

with a broad review of the period. But just as importantly, these periods of time were selected for their potential to exemplify the changing aims and techniques of criminal justice in England Wales in the years following 1960. In this sense I adopt an approach Yin has characterised as an ‘exemplifying case study’ where, ‘*the objective is to capture the circumstances and conditions of an everyday or commonplace situation*’ (2003 p.41). This is why I have sought to focus on the operation of early release for determinate sentence offenders and the unexceptional ‘steady state’ administration of criminal justice in the shadow of the prison gates rather than the special cases of compassionate leave or the Royal Prerogative of Mercy. However, this still begs the question of what these case studies are indicative of and on what basis such claims are made, a question that brings us back full circle to the parsimony / complexity trade-off and the decision to position my research in the middle range between empirical particulars and ‘grand theory’.

As I have already noted above theories of the middle range are well suited to the explanation of a limited aspect of social life (Bryman 2007 p.6). My focus on a detailed narrative history of early release means that my analysis is unlikely to yield a general explanation of the ‘big picture’ shifts in criminal justice, either in the UK or internationally. Nor is my analysis likely to be directly applicable to other areas of public policy in the criminal justice arena, for example, criminal procedure, policing or drug policy. But it would be wrong to suppose that this focus has no wider applicability. Reflecting upon the question ‘what is this a case of?’ part of the answer must surely be that historical analysis, particularly comparative historical analysis, shines a light on present day attitudes and assumptions. It reminds us of the contingency that lurks beneath seemingly stable social structures. As Hobsbawm once noted, ‘*all history is contemporary history in fancy dress*’ (1997 p.228) and much of the contemporary interest in the history of criminal justice has been driven by dissatisfaction with the status quo, whether that be liberal reformers fiercely critical of penal populism and a rising prison population or conservative commentators exercised by the erosion of traditional values, the separation of powers and truth in sentencing.

Furthermore, I want to suggest that by their very nature the shifting ideas, arguments and assumptions that have been deployed to justify early release of prisoners reveal a great deal about wider justifications for punishment and sentencing behaviour. As

anyone who has debated the rights and wrongs of releasing high-profile offenders like Myra Hindley, the Lockerbie bomber Abdelbaset al-Megrahi or Oscar Pistorius will know the arguments for termination of a prison sentence go hand in hand with justifications for punishment. Early release therefore offers a powerful mirror through which we can view our claims and assumptions about custodial sentences and the morality of punishment. For this reason, early release offers a useful point of entry into a wider discussion of punishment, public policy and the administration of criminal justice. A theme I develop in more detail in my substantive empirical chapters.

### **3.4 Methodology**

With these three case studies in mind I now turn to an overview of my research methodology, understood here in simple terms as a '*technique for collecting data*' (Bryman 2008 p.31).

By advancing a systematic and historically grounded institutional analysis of early release my study has been heavily influenced by the rather informal and practically orientated focus of historical scholarship. As Gunn and Faire have noted, historical research places a strong focus on practice, immersion and real time decisions taken in the archive,

Historical training routinely includes an introduction to archives and sources... But it is rare to find any explicit discussion of what choices might be made in the archive, what strategies pursued or how different types of sources might be interpreted. *It is assumed that these skills will be absorbed by students or historians through a form of immersion, time and practice providing eventual mastery.* Despite burgeoning interest in the history of the archive over the last decade, there has been remarkably little discussion of the actual process of archival research, or what the historian and theorist Michael de Certeau termed the 'historiographical operation' by which the 'past', or its documentary traces, are turned into 'history' defined as a specific form of writing (emphasis added) (2012 p.5).

This has certainly been my experience and I have found de Certeau's notion of the 'historiographical operation' extremely helpful in framing my research design. In what follows I want to reflect on the steps I have taken to translate the many and various documentary traces uncovered by this study into a history of early release policy and practice in England and Wales between 1960 – 1995. It is important to note in advance

that this should not be understood in a simple linear or sequential fashion. Rather, the approach taken here can be characterised as a process of immersion as I have moved back and forth between the empirical data and theory through an iterative process of data analysis (Creswell 1998 p.142).

### *3.4.1 Data sources*

In this study I have drawn upon a wide range of primary and secondary sources. At a basic level this triangulation of the data has helped me to build an overarching chronology of early release as well as the more precise sequencing of the complex, often fast moving political events that characterise my case studies. Moreover, these varied sources of evidence have informed a process of detailed contextualisation that is central to the historical institutionalism outlined above.

Archival Records: The principal sources of data used by this study were archival. These records have been drawn from a number of archives in England and Wales, most notably the National Archives at Kew which has proved a hugely productive source of information. In the course of this study I have reviewed several hundred files and tens of thousands of pages of documentation. Within this broad sample I have captured information from the 90 most informative records and digitised approximately 2000 pages of documentation. An overview of the key file series at the National Archives that have informed this study is set out in Table 1 below.

To support detailed contextualisation of historical events I have also drawn widely upon the political papers available at the Churchill Archive, University of Cambridge, the British Library and the London School of Economics archives. For party political records I have made use of the Conservative Party Archive housed at the Bodleian Library, University of Oxford as well as party manifestos and conference reports for the major political parties that are now available online. Unfortunately, the historical roots of the Labour Party within the trade union and cooperative movements mean that no equivalent centrally managed archival collection of policy papers and other correspondence currently exists and it has been necessary to identify these historical traces from a range of disparate sources.

Table 1: National Archives, Key File Series

<b>File Series</b>	<b>Department</b>	<b>Original Series Number</b>
BV3	Parole Board	/
CAB 128 CAB 129	Cabinet Office: Cabinet Minutes Cabinet Office: Memoranda	CM and CC file series
CAB 134	Cabinet Office: Home and Social Affairs Committee	/
CAB 165	Cabinet Office: Legislation Committee	/
HO 223	Home Office: Establishments	ESG (Establishments, General Matters)
HO 263	Home Office: May Committee	/
HO 291	Home Office: Criminal	CRI and CCS Symbol file series
HO 303	Home Office: Publicity and Public Relations	PTY Symbol file series
HO 317	Home Office: Private Office Papers	/
HO 318	Committee on the Prison Disciplinary System: Report and Papers	/
HO 330	Home Office: Probation	PBN Symbol Series
HO 336	Prison Commission and Home Office Prison Department	PCOM
HO 383	Home Office: After-care	AFC Symbol file series
HO 391	Home Office: Prison Department	PDG Symbol file series
HO 495	Home Office: Criminal Policy	CP series
CM 46/13	National Audit Office	FPE 16/29 PART 2
PCOM 9	Prison Commission and Home Office, Prison Department:	/
PCOM 14	Prison Commission and Home Office Prison Department:	/
PREM	Records of the Prime Minister's Office	/
T-Series	Treasury	/

Below I discuss the practicalities of conducting archival research but at this point it is important to acknowledge that the ‘official’ records housed within these archives have invariably influenced the character of this study. As Sanders has noted, historical institutionalism can be used to undertake ‘top down’ studies of ruling elites or ‘bottom up’ portrayals of everyday people and social movements (2006 p.44). It is undoubtedly the case that the evidence collected by this study has generated a picture of early release as seen from the perspectives of the establishment, of senior officials, politicians, practitioners and thinkers rather than the general public, activists or



prisoners themselves who were more likely to be critical of the system. That is somewhat unavoidable in a study of this nature but it does not entirely preclude a consideration of social movements. For example, in Chapter Six I discuss the importance of judicial review and prisoner protest as important sites of conflict where the two worlds of civic activism and the governing elite have collided, leading on occasions to reform and policy change.

Freedom of Information: One further limitation associated with the archival records is that access to public records in the United Kingdom is subject to the ‘thirty-year rule’. Section 5(1) of the *Public Records Act* (1958) states that, ‘*Public records... shall not be available for public inspection until they have been in existence for [thirty] years or such other period...as the Lord Chancellor may... for the time being prescribe as respects any particular class of public records*’. More recently this clause has been amended by the *Constitutional Reform and Governance Act 2010* to the effect that the UK Government is now migrating to a ‘twenty-year rule’ whereby there will be two document releases per year until 2022 when the National Archives will receive the files from 2001 and 2002.

The implication being that at the time of writing (Summer 2015) records up to and including 1986 had been transferred to the National Archives and made available to the general public. As a result, government records were not available for a significant portion of the time period considered by this study, most notably, in relation to my third case study that covers the period 1987 - 1991. To overcome this difficulty, I have made significant use of the *Freedom of Information Act 2000* and a detailed overview of my experience of using freedom of information (FOI) requests as a research tool, the practicalities of engaging with public bodies and framing information requests is set out at Appendix 3. Suffice it to say here that in the course of this study I have submitted a total of ten FOI requests to the Home Office, Ministry of Justice and Parole Board on topics as diverse as sentencing practice, internal Home Office reviews of parole and the ‘integrated resource and policy planning documents’ prepared for Ministers each spring in advance of the annual Public Expenditure Survey (PES). In total this has yielded 689 pages of documentation, much of which was reviewed when exercising the statutory right to view files in person at the Ministry of Justice. As a result, it has been possible to fill in some of the gaps in the archival record through the

use of targeted FOI requests along with the careful use of Section 16 of the Act which place a duty on all public bodies to, *'provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it'*. The *Freedom of Information Act 2000* offers a powerful research tool that has yielded some invaluable insights into the development of early release policy and practice, but FOI is no substitute for the systematic review of archival records. Without an informed sense of what is and is not included in the FOI response it has been difficult to triangulate the historical evidence with the same degree of rigour, the implication being that these 'documentary traces' have been harder to decipher and are inevitably prone to confirmation bias. For my final case study, I have by necessity relied more upon secondary sources and insights from my interviews, the implications of which are discussed below.

Secondary Sources: Alongside these primary sources of data I have also made extensive use of secondary sources to ground my research still further. I have drawn heavily upon a series of Government publications including Command Papers (Green and White), statistical bulletins and Annual Reports that often provide a range of qualitative and quantitative evidence pertaining to financial accounts, workforce numbers and key indices of change within the prison estate. These publications provide invaluable insight into long-term operational trends within the criminal justice system but they are also subject to regular changes in formatting, counting conventions and presentation that can make long-term comparative analysis a difficult and exasperating task.

In tandem with government publications, I have also made significant use of parliamentary resources. These include the Hansard Record on Parliamentary debates, written answers and Parliamentary Select Committee Reports, including witness statements, memorandums and briefings often published as supplementary annexes. Using the Hansard Millbank website<sup>5</sup> I have also been able to consolidate the fragmented Hansard records relating to the *Criminal Justice Act 1967*, *Criminal Justice Act 1982* and *Criminal Justice Act 1991* into a single, integrated and fully searchable documentary record, a process that has allowed for more effective analysis

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<sup>5</sup> <http://hansard.millbanksystems.com>

and amendment tracking as these Bills have passed through both Houses of Parliament.

Where possible these official sources have been complemented by a range of supporting materials that add colour and context to this picture. For example, I have drawn upon the insights contained in a range of political diaries, memoirs, autobiographies and the various pamphlets, briefings and events produced by penal reform organisations like the Howard League of Penal Reform, Prison Reform Trust and NACRO. Perhaps the most useful secondary resource used by this study has been media reporting, including both the written press and television. In common with the archival record, making use of historical media content is subject to varying levels of access and availability. At the time of writing *The Times*, *Guardian / Observer*, *Daily Mirror* and *Daily Express* now offer fully searchable, digitised catalogues for the entire period of this study. After 1983 the lion's share of newspaper reports can also be searched for and accessed using LexusNexus but this content can only be exported as unformatted text and gives little indication of how such stories were originally displayed or their prominence on the page vis-à-vis other news stories. Regrettably digitised newspaper reports for the *Sun* newspaper and *Daily Mail* were not available for the years prior to 1984 and it was necessary to undertake manual searches using the index cards and microfilms at the Collindale newspaper archive prior to its closure in November 2013 and subsequent relocation to the British Library at Kings Cross St Pancras, London.

Interviews: Finally, as the data-collection phase of this study drew to a close I was able to conduct a number of in-depth exploratory interviews with individuals who have worked within the criminal justice system. It is important to note that these interviews were not intended as a foundational source of evidence for this study. They were too small in number to yield anything approaching a representative sample, while many of the events were simply too long ago to expect detailed recollections from interview participants. Rather, the purpose was primarily to bring colour and insight to the archival record from those who experienced these events first hand. More generally, the interviews allowed me to address some of the gaps in my knowledge, particularly in relation to my third case study, as well as restore a human dimension

and sense of agency to a picture that can become overly structuralist when viewed through the lens of historical institutionalism.

Accordingly, I sought to interview a range of individuals who by virtue of their professional background have occupied different vantage points within the criminal justice system. Most notably, representatives of the Judiciary, Probation and Aftercare services, Prison Service and Home Office as well as Politicians with an interest in home affairs. Most interviewees were identified in the course of my research either by reviewing the Annual Reports of organisations like the Parole Board or through the professional contacts of my supervisors and other interviewees. Given the likely age of many of these individuals, making contact was handled with care, an issue that became particularly salient when seeking suitable judicial figures for interview. The high average age of senior presiding judges has meant that many potential interviewees were already of advancing years at the time of the events in question with the implication that many had either passed away in the intervening years or were unable to contribute due to poor health or failing memory. Accordingly, all suitable candidates were approached in writing, typically using the contact details available in Who's Who, providing an overview of my research, likely interview questions and a guarantee of anonymity. Interviews were then conducted at a time and place of the interviewees' preference. An overview of the interviews I have conducted along with the date the interview took place, detail on occupational background and whether the interview was transcribed is set out at Table 2.

Because of the exploratory focus of these interviews they were conducted in a largely unstructured format. As interviewer I would prepare an aide-mémoire with a number of general topics for discussion, but unlike semi-structured interview scripts these tended to differ significantly from interviewee-to-interviewee according to their professional background, age and known interests. However, in the course of the interviews it quickly became apparent that the following broad topic areas were regularly discussed:

- The changing aims and justifications for early release.
- Professional experience of early release policy and practice. Reflections on the Parole Board where applicable.
- The strengths and weaknesses of 'early release'.

- The working culture of the Home Office and associated agencies.
- The influence of key stakeholders. Most notably, the Treasury, Prime Minister's Office, the Police and Parole Board.
- Working relationship with the senior Judiciary, Lord Chief Justice, Lord Chancellors Department and Magistrates Association.

Table 2: Interview Schedule and Background Information

Ref	Date	Sector	Position (Held or at Retirement)	Transcript
A	3 December 2013	Academic	<ul style="list-style-type: none"> <li>• Professor of Criminology</li> <li>• Member of the Parole Board for England and Wales</li> </ul>	No
B	14 January 2014	Civil Servant	<ul style="list-style-type: none"> <li>• Home Office Civil Servant</li> </ul>	Yes
C	22 April 2014	Charity	<ul style="list-style-type: none"> <li>• Penal Reformer</li> <li>• Member of the Parole Board for England and Wales</li> </ul>	Yes
D	28 May 2014	Politician	<ul style="list-style-type: none"> <li>• Conservative Backbench MP</li> </ul>	Yes
E	15 September 2014	Probation Service	<ul style="list-style-type: none"> <li>• Chief Probation Officer</li> <li>• Member of the Parole Board for England and Wales</li> </ul>	Yes
F	29 September 2014	Judiciary	<ul style="list-style-type: none"> <li>• Circuit Court Judge and Deputy High Court Judge</li> <li>• Member of the Parole Board for England and Wales</li> </ul>	Yes
G	2 December 2014	Civil Servant	<ul style="list-style-type: none"> <li>• Home Office Civil Servant</li> </ul>	No
H	20 January 2015	Prison Service	<ul style="list-style-type: none"> <li>• Prison Governor</li> </ul>	Yes

All interviews were conducted in a flexible, conversational style and recorded where possible. Transcribing was outsourced to a specialist transcription service, quality assured and shared with the interviewee once completed for approval. On two occasions the setting within which the interview took place meant that a recording was not appropriate. In these instances, I have relied upon detailed notes that were typed up shortly after the interview had taken place.

### 3.4.2 Data collection

Scrutinising and making sense of these rich and varied data sources has been a significant undertaking. In this section I want to outline the steps I have taken to identify relevant materials, extract useful content from the voluminous and largely tangential archival record and capture this evidence in such a way that was conducive

to more-in-depth analysis. The lion's share of my research was conducted in the archives and this is my primary focus here unless otherwise stated.

Interrogating the evidence: In the formative stages of this study my data collection was primarily guided by a number of targeted key word searches using archival search databases such as the National Archives Discovery Catalogue and Cambridge University Janus portal. These were initially framed around basic search strings like "parole", "remission" or the "prison population". Over time this developed in sophistication as my understanding of the three case study areas increased. As a result, my search parameters gradually broadened out to include key events like the "Criminal Justice Bill 1967" or "public expenditure survey" as well as prominent figures and potholders like "Permanent Secretary AND Sir Philip Allen". Thereafter I developed what may be described as a 'snowballing methodology' where I would follow up on citations, file references and cited events to identify new records and publications for further exploration.

This snowballing methodology was resource intensive and yielded rather mixed results. On the one hand it provided an invaluable orientation to the historical records and allowed me to quickly build up a broad picture of the historical development of early release policy and practice. But in practice keyword searches often proved to be of limited utility. The descriptions given to archival records are often very functional and give little indication of the materials contained therein. Likewise, the keywords assigned to online search catalogues by archival staff are by their nature limited and overly reductive. It also became clear that when used to identify newspaper reports the keyword searches outlined above tended to introduce a bias in favour of broadsheet newspapers that were more likely to discuss abstract policy concepts and employ the terms of art used by policy-makers. In contrast tabloid newspapers were significantly less likely to use terms like parole or release on licence favouring instead to focus on the immediate human interest story. To take just one example, the search term 'remission' often generated a small number of hits within tabloid newspaper databases but when this was approached through the lens of a high profile human interest story, such as the murder of Anna Humphreys by David Evans, an offender recently released under the governments remission reforms, a sizeable number of reports, front page exclusives and opinion pieces began to emerge. Over time this necessitated a move

away from an overreliance on key word searches and the development of significant prior knowledge before tabloid records could be identified with confidence.

Recognising the limitations of keyword searches I gradually shifted my focus towards the resource intensive but ultimately more effective manual exploration of the archival records, a task made far simpler by recent improvements in the National Archives Discovery catalogue and digitisation project. In turn I was able to develop a stronger sense of how the archives were constructed along with an appreciation of the key decision-making points within the public policy process that were most likely to generate a rich and useful paper trail. Perhaps more intriguingly it has helped me build up a picture of the discussions and events that are most likely to be retained, destroyed or selectively minuted by government departments. Reflecting on this point in a fascinating 1994 lecture *'Archive Fever: A Freudian Impression'* Derrida (1996) described the archive as a powerful symbol of state authority and a profound example of collective *'remembering'* and *'forgetting'* (1996 p.77). Highlighting the *'violence of the archive'* Derrida reminds us that archives are not merely sites of memory and preservation but are also a place of forgetting and destruction (1996 p.7). As King puts it,

Put more plainly, every act of remembering and preserving is fixed to its shadow of loss and forgetting; ideas and experiences are written down in the first place so that they may be forgotten; documents are selected for inclusion into archives by acts of exclusion; the very preservation of documents in an archive *'exposes [them] to destruction'* (King 2012 p.18).

Far from a neutral and objective store of information the archive emerges as an active participant in the creation of *'official history'* and all the disputes over power, legitimacy and hegemony that come with it. Once aware of this and familiar with the basic logic of the archives I was able to develop a number of cognitive shortcuts that significantly increased the efficiency of my work. My research took a significant step forward when I began to focus on the records generated by key decision-making fora within the Home Office and associated agencies. Most notably, ministerial meetings, standing committees like the Crime Policy and Planning Committee and activities that required the active and regular involvement of the Permanent Secretary or the Deputy under Secretaries, for example, the annual Public Expenditure Survey (PES) exercises.

These papers have proved to be particularly valuable as they tend to provide a greater insight into the drivers behind government policy, the relative importance of various policy issues and how they connected to broader strategic thinking within the Home Office. Moreover, these records were also more likely to include background briefings, options appraisals and next steps that provided indispensable context and chronological detail on the issue of early release.

Data management and capture: Even within the most promising records only a small proportion of the documentation I have reviewed ultimately proved to be relevant, offered promising leads or profound insight. As a result, the real-time decisions I have taken within the archive to interrogate the records and distinguish between the useful and mundane must be recognised as a key methodological decision-making point in this study.

Far from the Hollywood imagery of archival research as a fast-moving voyage of discovery marked by hidden clues, recovery of lost documents and moments of revelation the everyday business of archival research is altogether less glamorous (King 2012). It is often a slow, gruelling process marked by the juxtaposition of dead-ends, false starts and occasional elation. The sheer volume of records can be intimidating, while boredom and the pressure of time often encourage rapid reviews of the files rather than forensic scrutiny. As King notes,

... the researchers own fear, boredom, inexperience, frustration and loneliness can shape decisions made in the archives, and the resulting contours of research. Nicholas Dirks recalls the moment of panic he has in going in the archives for the first time, having no idea 'how to control the chaos' of documents, 'both endless and banal' (2012 p.20).

Anyone who has conducted archival research will sympathise with Dirks' experience and I quickly discovered that my ability to calibrate the level of focus and cognitive investment in a file was absolutely critical to effective and sustainable archival research. This can be an unforgiving process. In the formative stages of this study I would often alternate between the two extremes of over-reading largely inconsequential records and rushing through promising files that later turned out to contain useful insights. Problem files, by which I mean records that were bulky, lacked



an organising chronology and tended towards miscellany rather than a clear policy focus, were a particular challenge in this regard since they were likely to consume time and energy better directed elsewhere, or worse still, encourage a cursory review of the records when a detailed review might have revealed profound insight.

Formal methods can support this process but it is no substitute for the more practical skills of instinct, experience and craft (Gunn and Faire 2012). The approach I adopted was largely pragmatic. If a record related directly to early release or provided important contextual information, for example, information pertaining to the prison population, government expenditure or key personnel it was captured for further analysis. I kept a log of all the files I reviewed along with a summary of key findings and whether the file was considered helpful or not. This has allowed me to build up a useful map of key resources over time. Where documents were considered significant the relevant pages were photographed using a smartphone making sure to include the file cover, name and reference number. I would then upload these images to a laptop computer and use an ‘optical character recognition’ software package called ABBYY FineReader to collate and convert these images into searchable, fully interactive PDF documents. Using this entirely new approach, made possible by advancements in smart phone technology, I have been able to develop a substantial library of fully digitised and searchable PDF documents that were subsequently uploaded to NVivo, a qualitative data analysis (QDA) software package in order to support management and coding of the available data sources.

Where possible this process of interrogation, sifting and capture was also adopted for non-archival sources. Government publications, Hansard records and relevant sections from memoirs, speeches and autobiographies were digitised and uploaded to NVivo to allow for wide-ranging coding of the datum. This was also true of party political archive material and the various publications from the ‘penal reform lobby’ including pamphlets, reports, and briefing papers. My interviews were also transcribed and converted into searchable PDF documents for upload to NVivo.

### *3.4.3 Data analysis*

This process continued until it was clear that my empirical exploration of the historical records was yielding ever diminishing returns in terms of new evidence or insight into

my case study areas. At this point my attention shifted towards in-depth analysis of the data. In this section I want to outline the steps I have taken to translate these sources of evidence into an account of early release policy and practice in England and Wales, 1960 – 1995 that addresses my research questions.

In many respects the iterative and immersive approach taken by this study means that data analysis was occurring at every stage of my research from the identification of data sources, to the initial sift in the archives and desk-based analyses once the datum had been organised and uploaded to NVivo. As Creswell has noted, data analysis does not come ready made ‘off-the-shelf’ but is custom built, revised and choreographed (1998 p.142; see also Miles and Huberman 1994) through an iterative process of immersion Creswell captures with the concept of the data analysis spiral,

To analyse qualitative data, the researcher engages in the process of moving in analytical circles rather than using a fixed linear approach. One enters with data of text... and exits with an account or a narrative (1998 p.142).

Once the available datum was captured, organised and uploaded to NVivo it was subject to a far more systematic form of analysis consistent with the tradition of qualitative content analysis, often referred to as thematic analysis. As Bryman notes this is, ‘*probably the most prevalent approach to the qualitative analysis of documents*’ (2008 p.529) and is particularly well suited to large data sets as it, ‘*comprises a searching-out of underlying themes in the materials being analysed...*’ (2008 p.529). While other forms of documentary analysis were available, most notably discourse analysis, semiotics and hermeneutics these approaches were simply too detailed and time-consuming to be viable in the context of a research project where I was reviewing thousands of pages of documentation.

Data coding: Recognising the descriptive and analytical components of my study I began by developing a two-tier coding framework. The first descriptive coding tier related to key events in the evolution of early release policy and practice. Here I used NVivo to code any datum that revealed chronological or contextual information about the evolution of early release prior to 1960, the period covered by my first case study (1960- 1967), the second case study (1975 – 1982), the third case study (1987-

1992) or thereafter. Over time I began to introduce more precise secondary coding categories as my understanding of these events increased. For example, the events surrounding the 1987 general election, the proceedings of the Carlisle Committee and the passage of the Criminal Justice Bill 1990/1991. Reflecting Amenta's advice that historically orientated social scientists should 'go native' as historians before returning to a sociological interest in generalization I focused heavily upon this process in the early stages of my study (2009 p.354). Using the data manipulation tools on NVivo I was able to draw together a range of data sources relating to a particular event and thereby achieve the necessary degree of triangulation to develop a detailed chronology of early release policy and practice.

Over time I was then able to introduce a second analytical coding tier concerned with thematic analysis and explanation. This process typically begins with a preliminary reading of the archival record and the application of foundational questions like '*of what general category is this item of data an instance*', '*what is the item of data about*' and '*what are people doing*' (Loftland and Loftland 1995). To this end I began by analysing a small number of records in considerable detail in order to derive an initial coding framework that was heavily influenced by the building blocks of historical institutionalism outlined earlier. This included:

- Balance of power
- Determinacy / indeterminacy in sentencing
- Financial pressures
- Home Office culture
- Prison population and operational pressures
- Public opinion
- Rationale for early release (control, risk, rehabilitation)
- Relationship between remission and parole

Over time I was able to refine and condense a number of additional coding categories to reflect a number of key issues emerging from the historical records. This led to the coding structure set out at Table 3 below and an example of this process is set out at Figure 14. This extract from the archival record is part of a briefing paper prepared by Michel Moriarty, then Head of the Crime Policy Planning Unit for Neil Cairncross, Deputy Under-Secretary of State and Chair of the Crime Policy Planning Committee (TNA: HO 495/25). The paper dated 15<sup>th</sup> May 1975 offers the Chair background information on an upcoming meeting of the Crime Policy and Planning Committee

that has been convened to discuss the extension of parole to short sentence. Using NVivo the briefing note has been analysed using the two-tier coding structure outline above for what it reveals about the chronology and context of early release as well as the key issues and meanings deployed by policy-makers engaged in the administration of early release.

Table 3: Primary and Secondary Coding Categories

<b>Primary Coding Categories</b>	<b>Secondary Coding Categories</b>
Administration of early release	Aftercare and supervision
	Parole – operation and reform
	Partly suspended sentences
	Remission – operation and reform
	Fusion of remission and parole
Home Office culture and structure	Home Office culture
	Home Office structure
	Procedural justice
	New Public Management
Judges and sentencing practice	Executive or quasi-judicial decision-making
	Engagement with the judiciary
	Sentencing practice
Justifications for punishment	Determinacy and indeterminacy
	Deterrence
	Just deserts
	Rehabilitative ideal
	Risk and containment
Operational factors	Control and Discipline
	Financial Considerations
	Fragmentation of the system
	Use of police cells
	Prison estate conditions
	Prison population
	Rising crime
Political considerations	Bifurcation
	Party politics
	Penal populism
	Public opinion
	Inter party politics
Voices within the criminal justice system	Inter-departmental engagement
	Penal lobby
	Police, Probation and Prison practitioners
	Parole Board
	Research, academics and Advisory Bodies

The colour coding reveals useful background information on the chronology of events that led to the extension of parole to short sentence offenders as well as reflections on

a range of issues including the relative merits of discretionary and automatic release, steps to reduce the prison population and the benefits of a quasi-legal system of executive release. This process of immersion and coding was important for a number of reasons. First, these thematic areas provided a useful point of departure as I attempted to broaden the reach of my research and undertake successive waves of data collection, sifting and analysis. Second, by engaging more systematically with the emerging patterns and themes within the archival records it was possible to add significant context to my narrative account of early release policy and practice. Third, this coding framework was essential to the ongoing comparative analysis of my case study areas. By bringing together my first order indexing of the data according to time and my second order thematic analysis it was possible to explore in a robust way how attitudes towards such issues as determinacy and indeterminacy, public opinion and the findings of academic research had changed between the periods in question.

Completing the historiographical operation: This process of data-coding and manipulation was an important step in navigating the historical records but as Bryman cautions, the qualitative researcher should not '*equate coding with analysis*' (2008 p.552). To complete the historiographic operation of translating documentary traces into a 'history' of early release it was necessary to engage in a further round of interpretation, immersion and writing. This was directed towards three principal tasks; to piece together a detailed chronology of early release, to explain these policy developments and finally, to reflect upon what this revealed about the broader development of criminal justice in England and Wales between 1960 - 1995.

At this point it was necessary to start bringing together the historical, political science and criminological elements of my study. From a very early stage in this study I began to piece together, detail and refine the chronology of events that marked each of my case studies. Where possible I sought to identify corroborating evidence that would allow for triangulation of the historical records and provide the necessary degree of confidence that my sequencing of events was correct. In turn, I began drafting narrative histories of the events in question in order to foster a process of 'learning by doing' (Dey 1993 p.6) that helped me to synthesise the key information, identify gaps in my knowledge that required further research and reflect upon whether the claims I was making were robust and supported by the historical record.

Figure 14: Illustrative Example of Thematic Analysis

**E.R.** (5)

Mr. Cairncross

OFFICIAL MEETING ON PAROLE, 15TH MAY

Unless you would prefer it otherwise it may be convenient to regard today's meeting as a meeting of the Planning Committee; nevertheless it may be best to confine it to a discussion of parole, and to leave over for a future occasion the minutes of the last meeting, matters arising therefrom, and any other business unless it is of definite urgency. One or two members (Mr. Hyde and Miss Cunliffe) will stay away on that understanding.

I suggested to Mr. Emerson that, if time allowed, he might put together a note listing the policy issues that arise from the present parole scheme. In case that does not materialise I offer the list below as my own amateur effort. Needless to say, this is well trampled ground and there are familiar arguments for the status quo on all points.

The present scheme is essentially selective, in the sense both that only a minority are given parole and that there is a process of weighing up their merits. Some of the proposals for changing the scheme would depart from the principle of selectivity and really mean starting from scratch and devising a different system of sentence and release management. However, within the framework of the present scheme there may be some room for manoeuvre, with the object of making greater use of parole to relieve the prison population, under the following headings

- (1) greater risk-taking by the Parole Board, in the sense of granting parole to <sup>some</sup> ~~those~~ who now are not judged suitable for it at all
- (2) earlier parole, in the sense of letting out nearer to the one-third date a higher proportion of those who are paroled. It is a criticism of the scheme that many of those granted parole are released only a few months or even weeks before the two-thirds point, and that supervision for these short periods is hardly meaningful
- (3) lowering the parole threshold so as to bring within the scheme prisoners serving sentences of 18 months or less (the effective present minimum)
- (4) building up post release facilities, such as hostels, so as to encourage the Board to take more risks. This point came up during the discussion with Lord Harris about probation hostels etc.

A second series of issues has to do with procedures, and includes:

- (1) should prisoners appear before the Board, state their case and hear the case against them? Should they have legal representation?
- (2) should those rejected be given reasons for the decision?
- (3) should there be a right of appeal?

**Case Study 2:  
Short Sentence  
Offenders**

**Executive or  
quasi-judicial deci-  
sion-making**

**Prison population**

**Risk and containment**

**Aftercare and  
supervision**

**Parole - operation  
and reform**

**Procedural justice**

Source: TNA: HO 495/25

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Once I had developed a comprehensive chronology of events I began to reflect upon my second tier coding in order to both contextualise my case study periods and identify the key drivers in the development of public policy. Reflecting the deductive approach to public policy analysis adopted by this study my approach was heavily influenced by the building blocks of historical institutionalism outlined above. It is important to note that my purpose here was not to develop a completely novel set of explanations for how public policy is developed and evolves over time, but to test, apply and refine a number of general theoretical propositions in light of the empirical data. Put another way, I have sought to arrive at a series of findings or conclusions that demonstrate how the central themes of historical institutionalism, namely; organisational rules and norms of appropriate conduct, path dependence, the unequal distribution of power and institutionalised ideas operated and played out within the context of early release policy and practice. I did this by reviewing my coding and seeking to identify patterns or key themes within the data sources and then relating them back to the building blocks of historical institutionalism. Was the fraught relationship between the Home Office and judiciary evidence of the unequal distribution of institutional power? Did the waxing and waning of support for indeterminate sentencing signify the powerful impact ideas play in the policy-making process? Again these findings were developed through a process of writing and discussion to test whether these claims were borne out by the available evidence.

The final stage of this process involved a period of comparative analysis to explore the similarities and differences between my case studies and by extension, what this might reveal about the changing aims and techniques of criminal justice. Once I had identified a number of key themes I began to explore how these differed between my three case studies. I went back to the underlying primary data sources to explore differences in language, the framing of issues, underlying assumptions and the justifications used to support various policy positions. I then used Hall's theory of social learning (1993) and the concepts of first, second and third order policy change outlined in Chapter Two to determine how pronounced the changes had been. This was important because I wanted to get beyond the common picture of change and transformation to offer a more sophisticated picture of similarity and difference within the evolution of criminal justice policy. For while it is true that the practical everyday tools of criminal justice administration are constantly changing it is often the case that

the overarching policy objectives and high level goals of public policy are far more stable. By coding the various sources of evidence both chronologically and thematically I was able to develop a robust picture of how early release policy and practice evolved in England and Wales between 1960 – 1995, a theme I return to in Chapter Seven of this study.

### **3.5 Summary of Methodological Approach**

In this Chapter I have offered an overview of the research design and methodology used by this study to gain knowledge of the historical development of early release in England and Wales between 1960 - 1995.

In seeking to position my research in the ‘middle range’ it has been necessary to balance the competing concerns of a criminological literature that has tended to focus on ‘grand theorising’ and the broad historical sweep of criminal justice change with a historiographical scholarship that is primarily orientated to detailed chronology and mastery of narrative (Sewell 2006). I began this Chapter by reflecting upon the challenges facing a criminologist doing historical research. Here I advanced the case for a quizzical and historically grounded institutional analysis of early release that eschews a ‘big picture’ view of policy change in favour of detailed contextualisation, an approach which arguably reconnects with a longstanding criminological interest in the historical development of the liberal democratic state and penal policy. For example, Sir Leon Radzinowicz’s (1961) *In Search of Criminology*’ and the five-volume *History of the English Criminal Law and Its Administration*’, the fifth volume of which was co-authored with Roger Hood (1986), a tradition that also encompasses Bailey’s (1981) *Policing and Punishment in Nineteenth Century Britain*’ and Scull’s (2015) more recent study *Madness in Civilization: A Cultural History of Insanity*’.

I went on to suggest that this approach to empirical enquiry favoured a research design based upon qualitative case studies that have allowed me to limit the scope of this research, focus on a number of ‘signal events’ in the development of early release and achieve a greater degree of immersion in the data sources than would have been possible with a broad review of the period. From this I identified three case studies that provide the substantive content of this study; the *Criminal Justice Act 1967*, the extension of parole to short sentence offenders and the root and branch reform of early



release that followed the 1987 General Election. I noted that these methodological choices made it difficult to derive generalizable claims from the historical records or extrapolate out to other areas of criminal justice policy but advanced the argument that it was nonetheless possible to use early release to explore wider changes in the administration and justification for punishment in post-war England and Wales.

Finally, I turned to my research methodology and to borrow Michel de Certeau's concept of the 'historiographical operation', the process by which the 'past', or its documentary traces, are turned into 'history' (de Certeau 1988; Gunn and Faire 2011 p.5). Here I reflected upon the challenges of archival research and the central role of a practical and applied research craft when undertaking historical research. This led me to an iterative and fluid process of immersion in the archival records as I began to move between data, analysis and theory. In seeking answers to my research questions my data analysis was based upon a process of thematic analysis or qualitative content analysis that is particularly common when analysing large volumes of documentary evidence. Reflecting the deductive theoretical framework outlined earlier the findings outlined in the proceeding case study chapters do not represent completely novel explanations of how public policy has developed and evolved over time but an attempt to test, refine and adapt the theoretical building blocks of historical institutionalism in light of the evidence.

## **4. An ‘Idea Whose Time Had Come’: The Establishment of a Modern System of Parole in England and Wales, 1960 - 1968**

### **4.1 Introduction**

This chapter is the first of three empirical case studies that will compare and contrast the public administration of early release policy in England and Wales between 1960 and 1995.

In this case study I trace the emergence of parole between 1960 - 1968. In so doing I draw upon the extensive process of historical research and analysis outlined in Chapter Three to document how the Home Office arrived at the complex system of parole that would be enshrined in law by the *Criminal Justice Act 1967*; a settlement that would exert a significant influence over the trajectory of early release policy and practice in the subsequent thirty years. Two aspects of the 1967 parole reforms demand explanation. First, why did parole break onto the political agenda and gather enough policy momentum to reach the statute book? Second, why was the regulatory architecture of the early release system established by the *Criminal Justice Act 1967* so administratively complicated? In particular, why did the Home Office choose to graft parole onto the existing system of remission for good conduct given the anomalies this would unleash within the penal system?

To address these questions this Chapter will be split into three sections. I begin with an examination of the long-term historical trends in early release administration and how this gave rise to a number of policy problems that were shaped by a wider socio-economic context marked by cultural change, political optimism and economic volatility. I then document the development of parole in the 1960s with particular reference to the various policy and political considerations that resulted in the establishment of a modern system of parole in the *Criminal Justice Act 1967*. Here I will argue that parole gave administrative expression to prevailing support for indeterminate sentences and the personalisation of punishment. Finally, I return to the two questions outlined above and draw upon the building blocks of historical institutionalism outlined earlier to summarise the key policy drivers that cohered within the Home Office to bring about this very British compromise.

## 4.2 The Context

It is one of the more reliable pieces of criminological knowledge that the vast majority of men and women sentenced to imprisonment can expect to be released before the end of their term of imprisonment. Across time and place there have been no shortage of administrative mechanisms to realise this objective (see Padfield *et al* 2012b) but it is striking just how quickly ‘parole’ - a framework that integrated discretionary release, liability for recall and active supervision while on licence - emerged as the favoured option for reform in England and Wales. Why should this be the case? When I first began to explore the historical origins of the modern system of early release in the 1960s I was struck by the tendency within the archival record (TNA: CAB 129/123/14; HO 383/219) and secondary literature (Home Office 1989c p.7) to describe parole as ‘an idea whose time had come’. The prevalence of this explanation was intriguing, not least because it is notable by its absence from later periods of reform considered in this study. At first sight this may appear to offer little more than teleological shorthand for a series of complex events that belie simple explanation. But on closer inspection it hints at a number of more tantalising possibilities. That policy-makers and practitioners viewed parole in pragmatic terms as the ‘right’ technocratic response to the challenges they were facing. Or perhaps it was the hard won prize of a conviction politics that saw parole as the natural extension of an unfolding project to rehabilitate and integrate offenders back into society.

To understand these claims, it is necessary to locate the emergence of parole within a wider social and historical context. In the first section of this Chapter I want to unpack the idea of parole as ‘an idea whose time had come’ and explore the wider social, political and economic backdrop against which these policy considerations took hold. I start with a brief history of ‘early release’ before turning to a wider consideration of the socio-economic trends that defined the administration of criminal justice in the early 1960s.

### 4.2.1 A brief history of early release

It is tempting to scour the historical records in search of the aetiological ‘smoking gun’ that signalled the arrival of a modern system of parole in England and Wales. In reality the historical antecedents of parole, remission and release on licence are far more

diffuse (Home Office 1989c pp.3-13; Radzinowicz and Hood 1986 pp.465-596). As far back as the seventeenth century the Privy Council had authorized the granting of reprieves and stays of execution to those convicted of serious crimes (Bottomley 1990 p.326). But it is arguably not until the advent of transportation and the power of the Crown to grant convicts of good character a 'ticket of leave' to travel freely within the colonies that a formalised administrative system of early release begins to take shape in England and Wales (McConville 1981).

As a manifestation of the prerogative of mercy the ticket of leave system was inexorably linked to a fledgling interest in the art of government and the maintenance of order in the penal colonies (Bottomley 1990). Captain Philip Gidley King, the third Governor of the New South Wales penal colony is said to have laid the foundations for the ticket of leave system when in 1801 he granted the first 'annual certificates' that allowed convicts to move freely and work within the New South Wales territory (Macintyre 1999 p.43). In part this was a pragmatic step to relieve pressure on scarce resources but it also reflected a growing awareness of the role hope and incentive played in maintaining social order in such remote corners of the Empire. Over time the ticket of leave system was codified and became a central feature of transportation, described by the Select Committee on Transportation 1837-8 in the following terms,

A convict, transported for seven years, obtains, at the end of four years; for fourteen years, at the end of six years; and for life, at the end of eight years, as a matter of course, unless his conduct has been very bad, a ticket of leave, which enables him, according to certain regulations, to work on his own account. This indulgence on the whole has a very useful effect, as it holds out hope to a convict if he behaves well, and is liable to be re-assumed in case of misconduct (Molesworth 1838: xvii).

Conditions in the penal colonies were often intolerable and many convicts suffered appalling hardship but as the Carlisle Committee noted in their 1989 review of parole, the ticket of leave framework did at least provide a template, '*for some of the most innovative and influential penal projects of the day*' (Home Office 1989c p.3). In the 1840s the moderniser Captain Alexander Maconochie was widely lauded for transforming the fortunes of the notorious Norfolk Island penal colony by introducing a marks system that placed greater trust in convicts and rewarded good behaviour with better conditions and eventual release (Bottomley 1990 p.323; Home Office 1989c

p.3). Equally significant was the work of Sir Walter Crofton, a future Director of the Irish Prison System, who developed ‘*a system of graded progression through a program of education and training*’ that would prove highly influential in the United States of America (Bottomley 1990 p.323).

Growing scepticism about the deterrent effect of transportation and its negative impact upon the fledgling colonies ultimately saw transportation fall into disuse in the mid-1850s and the practice was abolished altogether following the arrival of the Hougoumont at the port of Fremantle, Western Australia on the 9 January 1868 (McConville 1989 p.381). With the abolition of transportation, the punishment of criminals could no longer be outsourced to the new world and in the late 1850s the government embarked upon a major prison building programme alongside the introduction of a new sentence of penal servitude blending elements of imprisonment and hard labour (McConville 1989). By this time the underlying rationale for the ticket of leave system was firmly established within British penal practice (Shute 2003 p.379) and the idea was imported into the new regime with those sentenced to penal servitude becoming eligible for release on licence at the discretion of prison authorities (McConville 1989 p.403). A system that was eventually placed on a more structured footing in 1863 following a critical report of the Royal Commission on ‘*Transportation and Penal Servitude*’ (1863) who recommended the establishment of a formalised version of the ‘marks system’ first pioneered in Western Australia (see Radzinowicz and Hood p.501; Shute 2003 p.379).

Two points about the regulatory structure established by the *Penal Servitude Act 1853* are worthy of note in the present context. First, while the *Penal Servitude Act* established a system of release on licence subject to recall, there was no accompanying provision for the active supervision of convicts while on release. This fact was not well understood by the general public and provoked fierce criticism following an outbreak of lawlessness and garroting (robbery by strangulation) in 1863 that was attributed to a group of dangerous convicts recently released on licence (Hood 2002 p.5; Radzinowicz and Hood 1985 p.524). Second, penal servitude sat uneasily alongside a system of locally administered justice (Home Office 1989c p.4). While minor offences were typically served in local prisons, serious offenders sentenced to penal servitude were classed as ‘convicts’ and managed centrally by the Home Office

(Home Office 1989c p.4). This dichotomy introduced a number of ‘anomalies’ into British penal administration. While males serving sentences of penal servitude were eligible for release on licence of up to one quarter of their sentence, no equivalent arrangements existed for those serving normal sentences of imprisonment. In practical terms this meant that while some of the most serious offenders could look forward to some degree of early release, ordinary prisoners, who had by definition been convicted of more minor offences, were expected to serve their sentence in its entirety (Home Office 1989c p.4).

This state of affairs was heavily criticised by the 1895 Gladstone Committee who recommended that eligibility for early release should be extended to ordinary prisoners (HMSO 1985 para.44). The Government accepted this recommendation but rather than place all prisoners on the same legal footing *The Prison Act 1898* reinforced this dual system of punishment and introduced a distinct system of what became known as ‘remission’ for local prisoners. The Act empowered the Home Secretary to introduce Prison Rules setting out the treatment of those in custody and in 1907 the rules were settled to the effect that a prisoner could, by special industry and good conduct, earn remission of up to one-sixth of their sentence (FOI: HO 291/2138). The impact for local prisoners was significant but at an administrative level the twin-track approach merely compounded the variable treatment of ‘convicts’ and ‘prisoners’. In particular, differences in the quantum of early release that could be earned by various categories of offender remained for much of the early 20<sup>th</sup> Century, a situation finally brought to an end in August 1940 when a pressing need for accommodation to house those detained under wartime regulations forced the Home Secretary to increase early release for prisoners and male convicts to one-third of their sentence (Home Office 1989c p.4), a policy position subsequently codified in the Prison Rules of 1949. While control and discipline were central features of the pre-war early release system they were not the only considerations. As Sir Lionel Fox, a former Chairman of the Prison Commission noted, early release and management of the prison population were closely linked and the government alighted upon a threshold of one third remission time, ‘*primarily as a measure to reduce the prison population*’ (Fox 1952 p.165). So it would remain until 1987 when it was extended by another Home Secretary, Douglas Hurd, seeking to manage a spiralling prison population (see Chapter Six).

Moreover, aftercare arrangements differed markedly for prisoners and convicts. While convicts continued to be released on licence under police supervision and remained at risk of recall for the remainder of their sentence, local prisoners who earned remission time were released unconditionally with no continuing liability for recall excepting the residual obligation that, *'adults released after a sentence of a year or more who had had at least two previous custodial sentences or a sentence of corrective training were required to supply their addresses to the Central After-Care Association so that these could be passed to the relevant police stations'* (Home Office 1989c p.5). Of equal significance was the fact that remission was automatic. Owing to the difficulty prison officers faced in undertaking real time assessments of prisoner conduct the marks system had fallen into disuse and was gradually replaced by a presumption in favour of release (an excellent account of which can be found in TNA: HO 263/148). So much so that by the time Penal Servitude was abolished in 1949, remission had evolved from a discretionary privilege to an automatic right, with the implication being that all prisoners regardless of the seriousness of their crime, risk to the public or response to rehabilitation were released unconditionally at the two-thirds point of their sentence (Home Office 1989c p.5).

While somewhat stylised this short history provides an important backdrop to the deliberations that took place in the early 1960s. Many of the themes that will be explored in this study, from the confused normative basis for early release, the interaction of parole and remission and the operational tension between early release as a right and a privilege were already firmly established within British penal policy and practice. It is also clear that many of the administrative components of an integrated early release system had been tried and tested with prison populations and many of the limitations of the system were known to prison authorities. Administrators were aware of the logistical difficulty (and perceived unfairness) of placing discretion in the hands of prison authorities. The merits of unconditional release vis-à-vis release on licence with liability for recall had attracted public debate as had the failure to provide adequate aftercare and supervision arrangements. This is critical to understanding the debates that surrounded the introduction of a modern system of parole in 1967. The events of the 1960s were not *sui generis* but an attempt to adapt long-standing questions about how to justify and administer a system of early release to the particular concerns of the period.

But more than this, I would also argue that this picture draws attention to one further, often neglected feature of the penal landscape in the early 1960s. Namely, that with the abolition of penal servitude and the associated provision for release on licence, the Prison Department was left with an early release toolbox for adults that was entirely unfit for purpose at a time when the effective rehabilitation of prisoners back into the community was a central policy objective of the penal system. The system of remission based upon automatic and unconditional release with no continuing liability for recall was about as far away from the spirit of the ‘rehabilitative ideal’ as it is possible to imagine and contrasted particularly unfavourably to the borstal system, widely regarded as the ‘jewel in the crown’ of British penal policy (Faulkner 2014 p.26; Hood 1965), which provided for a comprehensive system of supervision for borstal trainees while on licence. One gets a sense of this ‘policy problem’ from my interview with a former Chief Probation Officer who had been invited to reflect upon the formative stages of his career in the 1960s,

But, I mean throughout the service I think this [parole] was seen as a really good useful, positive development. Because what we had before then was approved school after care, borstal after care and that’s another word you don’t hear any more, isn’t it, Borstal.

The young offender institutions. Borstal aftercare and then something called voluntary aftercare, right. Not taken up very much actually.

...

And it, was seen as a good thing but prisoners wouldn’t take it up, well you can understand it. It’s such an admission of inadequacy to say I’m being voluntarily helped by a probation officer. But here, that [parole] legitimised the whole process in a sense because they were released on parole and all prisoners would take advantage of that because you know it got them out. So it was very ... but we in probation took it ... I mean I think it’s fair to say that most probation officers would put those cases ... they put them as a top priority (Interview E: 15 September 2014).

We know from the archival record that the Home Office was keen to address these deficiencies and learn lessons from the borstal system which continued to exert a strong, albeit faltering, influence over penal policy in England and Wales (TNA: PCOM 9/665; PCOM 9/2248). Moreover, the Prison Commission was merged into the Prison Department in 1963 bringing a great deal of institutional memory into the



Home Office (Faulkner 2014; Windlesham 1993 p79) on the operation of both borstal and convict licences as well as the experiences of many senior officials who had served their apprenticeships in the Prison Commission and would go on to be closely involved in the creation of the modern parole system (for example Sir Philip Allen and Norman Storr who would reach the ranks of Permanent Secretary and Assistant Secretary respectively). The key point being that the reforming project ushered in by the Gladstone Committee (HMSO 1895) and the entirely justifiable decision to abolish penal servitude served to highlight the variable treatment of prisoners and convicts as well as adults and adolescents who were subject to the more developed licence arrangements of the Borstal system. In turn these concerns would interact with a number of other administrative concerns and prompt a problem solving process infused with the prevailing values and concerns of the 1960s. It is to this issue I now turn.

#### *4.2.2 The operational context*

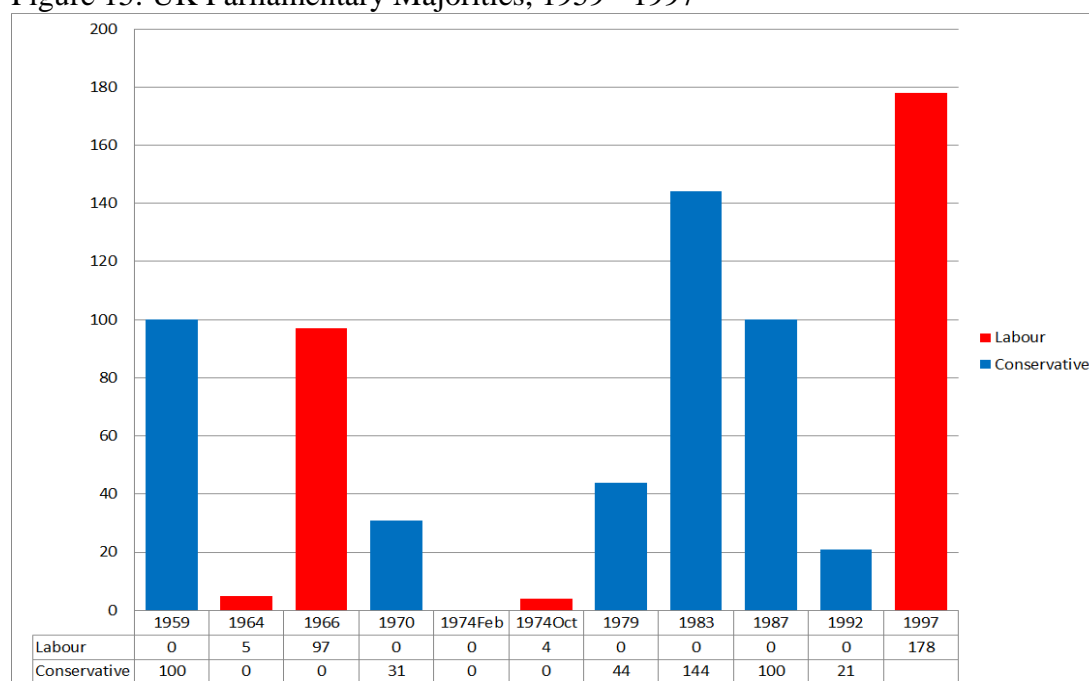
Much has been written about the socio-economic and cultural forces that re-shaped Britain in the 1960s. This is largely outside the scope of this study. Instead I want to reflect upon a handful of developments that help to make sense of the policy debates that surrounded the emergence of parole in the 1960s. These dynamics can be seen at both a political, economic and administrative level.

At the 1964 general election the Labour Party returned to power after thirteen years of Conservative rule. At one time the government of Harold Macmillan had enjoyed high levels of public approval but by the early 1960s the government was struggling to come to terms with a deteriorating economic situation, Britain's place in a changing world and the fallout from the 1963 Profumo affair that had rocked the political establishment and challenged the hierarchical nature of British society (Dutton 1997 pp.68-74). In contrast the Labour Party enjoyed considerable success in positioning itself as the party of renewal, a narrative that resonated with the prevailing optimism of the times, the growing affluence of the British middle classes and a post-War desire to build a better future (Labour Party 1964b; Seale 1995 p.230). This worldview came to infuse a number of public policy areas including criminal justice. As Morris has noted,

The public mood was again one of expectation, not so much for ‘reform’ in the traditional sense, but of new and exciting innovation. The Robbins Committee on Higher Education, which was to oversee the greatest period of university expansion that the country had ever known, had been appointed early in 1961. In the United States John F. Kennedy had been elected the youngest ever President and was seen as a symbol of hope and progress by young people in the West.... In various subtle ways the Labour Party under Wilson’s leadership capitalized on many of these hopes and emotions and presented the possibility of a society in which the quality of life would continue to be enriched for everyone, this time by the conscious exploitation of the new technologies that were emerging in what was to become known as the ‘post-industrial society’ (1989 p.110).

In reality there was considerable policy convergence between the two main political parties and Dutton has argued that, *‘Labour probably won in 1964 on the successful projection of an image rather than an alternative set of policies’* (Dutton 1997 p.75). Despite a 3.5% swing to the Labour Party the first past the post electoral system yielded a slender parliamentary majority of just five and it was immediately evident that the government of Harold Wilson would have to return to the polls sooner rather than later to build a credible political mandate (see Figure 15).

Figure 15: UK Parliamentary Majorities, 1959 - 1997



Source: Dod (2000)

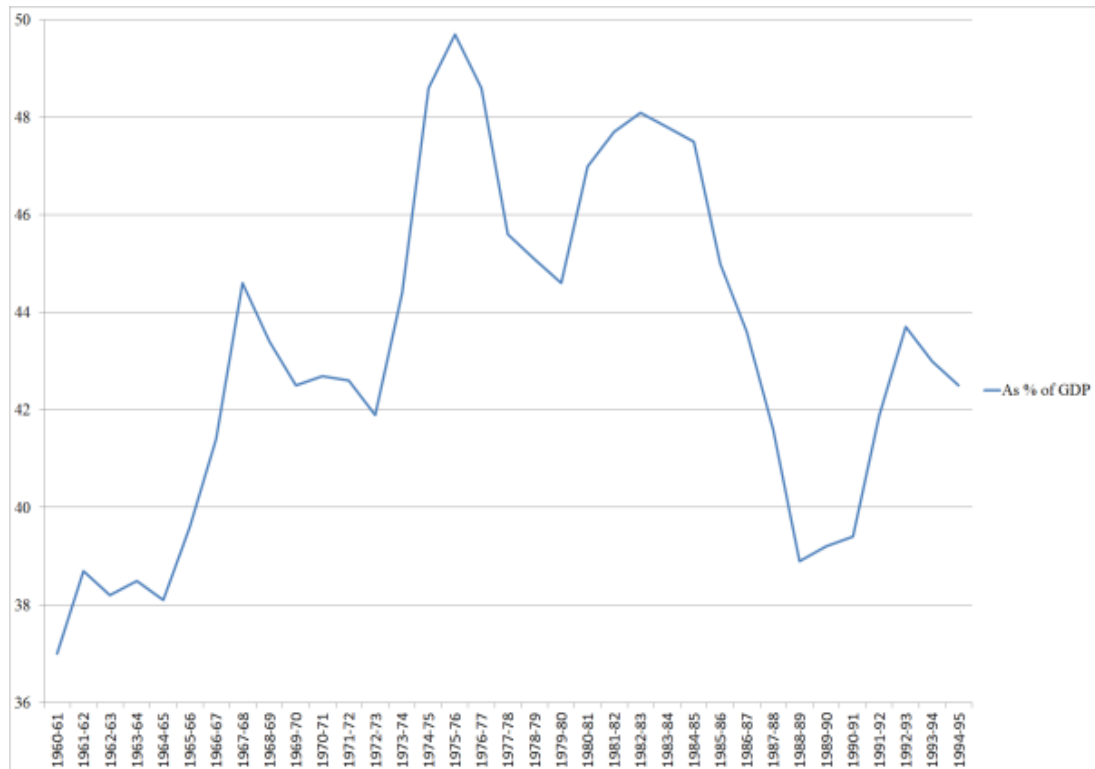
Parliamentary realpolitik therefore had a significant impact upon the trajectory of public policy between 1964 - 1966. Unable to rely upon a significant parliamentary majority the Labour government was modest in its aims and limited in its impact.

While there were some successes in relation to pensions and housing (McKie and Cook 1972 p.42) the rhetoric did not always match the reality leading Robert James to describe the first Wilson government as a, '*cautious, conservative, tentative government, deeply suspicious of truly radical departures*' (1972 p.81).

When the Wilson government did flex its muscles it was often to help 'pump prime' a stuttering economy. In part this reflected the economic paradox of post-war Britain. The 1960s were a time of prosperity that transformed the fortunes of many middle class families who had 'never had it so good', but it was also the case that the rising affluence and consumerism of British society took place against a backdrop of relative economic decline (Marsh *et al* 1999 p.43). Labour inherited a sizeable trade deficit from the Conservatives and the annual average GDP growth rate in Britain fluctuated around 3% between 1950 – 73, far below the economic performance achieved in France (5.1%), Japan (9.7%) and Germany (6.0%) over a comparable period (Marsh *et al* 1999 p.45). Successive post-war governments struggled to close this gap without overheating the economy and risking the devaluation of sterling.

At its core was a fundamental dilemma; attempts to accelerate growth resulted in higher imports, a balance of payments deficit and a crisis of confidence in sterling which necessitated 'stop-go' periods of austerity (Dutton 1997 p.78). For example, in July 1961 the Chancellor of the Exchequer Selwyn Lloyd introduced a series of deflationary measures intended to cool down the British economy including tax increases, cuts to public expenditure and a public sector pay pause. This was compounded in 1963 when Charles De Gaulle vetoed Britain's membership of the EEC and undermined the governments' attempts to grow a trade surplus (Marsh *et al* 1999 p.106). This had a cooling effect upon budgets across Whitehall. As Figure 16 below reveals government expenditure as a percentage of GDP went through cyclical periods of growth and contraction which saw expenditure peak and trough throughout the 1960s, 1970s and 1980s.

Figure 16: Government Spending as a % of Gross Domestic Product (GDP), 1960/61 – 1994/95



Source: Office for Budget Responsibility (2015)

This may seem rather removed from the everyday concerns of prisoners and penal administrators but in actual fact it had a huge impact upon Departmental planning throughout this period examined in this study (a theme we return to in more detail in Chapter Six). As one senior Home Office official, Michael Moriarty, noted in *'Penal Policy-Making in England'* (1976) the stop-go nature of government spending had a big impact upon the relationship between the Treasury and the Home Office as well as the expenditure decisions taken within the Department. Given the long lead-in times typically associated with building works and refurbishments, capital expenditure was particularly vulnerable to austerity measures and often scaled back during periods of fiscal retrenchment. In contrast, revenue costs were bound up with wages, redundancy and recruitment, issues that were politically sensitive and very difficult to cut back in the short-term,

Within the budget for Home Office services, there are decisions regarding the allocation of resources between capital and current expenditure; between buildings, equipment of various kinds and staff (and, within staff, between grades or functions); and among the different services. Two particular characteristics of this kind of policy-making are the speed at which the decisions often have to be taken, and the limited room for

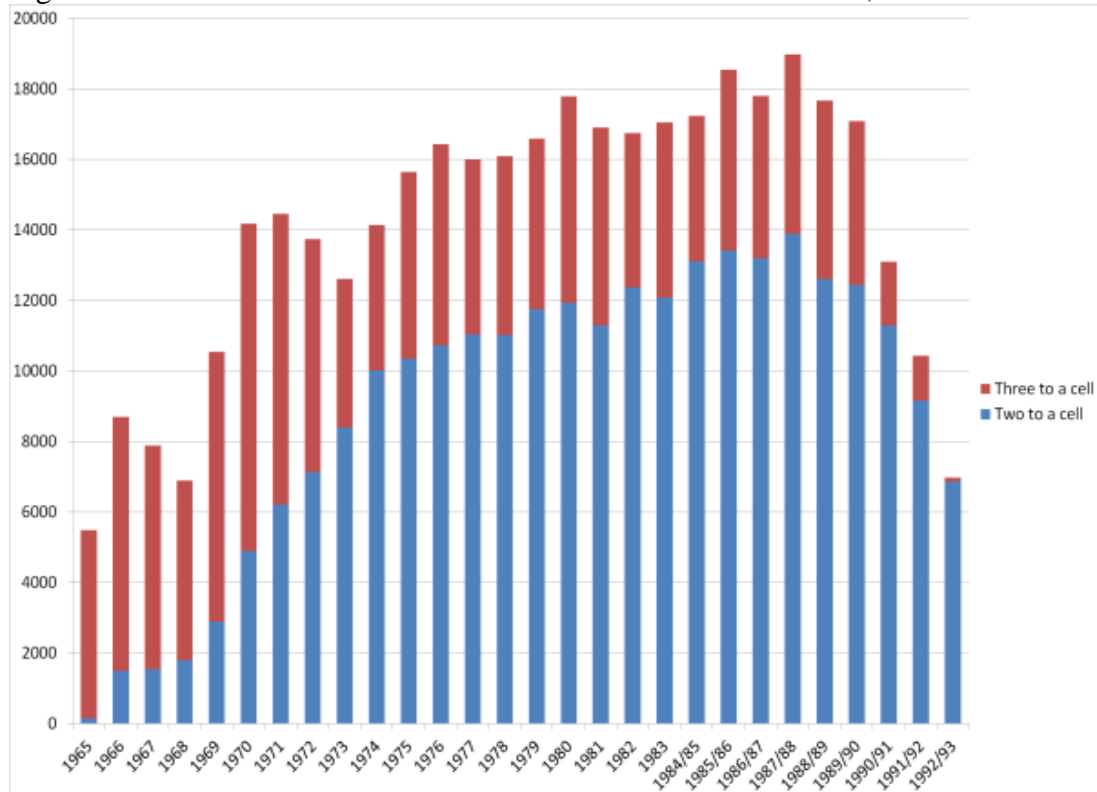
manoeuvre. The basic time-scale is the annual preparation of estimates and the annual public expenditure survey (PES) in which public expenditure needs are forecast for the ensuing five-year period. In orderly times these procedures should afford adequate scope for the underlying policy issues to be worked through. In practice, the economic problems of recent years have frequently required the downward revision of estimates and forecasts at short notice. Room for manoeuvre is limited by the manpower-intensive character of penal services and indeed all Home Office services: what is seen as an overriding need to maintain existing staff levels, and where possible to make good deficiencies and leave some margin for growth to meet demand, means that suddenly-demanded cuts tend to fall largely on capital spending programmes and other non-staff items (Moriarty 1976 p.130).

As a result, penal administrators were stymied in terms of the quantum of resources, both capital and revenue that would be made available to the Home Office, as well as the consistency of future expenditure commitments needed to make long term strategic decisions about the administration of the penal system. Moreover, this was occurring at a time when rising crime rates and sentencing practices were already putting increasing strain on the prison estate. Recorded crime had risen from 478,394 in 1945 to 1,133,882 in 1965, an increase of 137% in just 20 years for the reasons outlined in Chapter One. There was also evidence to suggest that sentencing practices were hardening in light of a perceived crime wave driven, in part, by the growing affluence of the middle classes, the proliferation of marketable goods like cars and inter-generational shifts in youth culture (Morris 1989 pp.93-103). From 1955 onwards the number of offenders sentenced to immediate custody grew from a low of approximately 22,000 in 1950 to 40,000 in 1961. Thereafter the use of immediate custody reduced for a number of years before increasingly significantly from 1965 onwards (see Figure 3).

This had a direct impact on the operation of the penal system. During the 1960s the prison population increased from a yearly average of 27,099 in 1960 to 39,028 in 1970, a rise of 44% in just under a decade (see Figure 4). Mirroring the sentencing behaviour of the courts this general trend was punctuated by periods of retrenchment and expansion. Between 1962-1964 and 1967-1968 the prison population decreased before rising significantly in the late 1960s and early 1970s leading to a 'prison population boom' that had a significant impact upon the final shape of the *Criminal Justice Act 1967* (Morgan 1983). As the prison population increased prison governors were forced

to make greater use of cell sharing. In 1965, a total of 5337 prisoners were held in three-man cells with a further 148 accommodated two to a cell. By 1970 this figure had increased dramatically with 9288 held three to a cell and 4886 in two man cells (see Figure 17).

Figure 17: Number of Prisoners held Either Two or Three to a Cell, 1965 – 1991



Source: Home Office Report on the Work of the Prison Department, 1965-1987. Home Office Report on the Work of the Prison Service, 1988 – 1991. HMPS Report on the work of the Prison Service, 1992 – 1996.

No equivalent to Her Majesty's Chief Inspector of Prisons existed prior to 1981 making independent assessment of conditions in the prison estates difficult. However, one gets a strong sense from media and other reports that conditions in the prison estate were not conducive to the lofty goals espoused in the Prison Rules. Sir Lionel Fox famously described Britain's ageing Victorian prisons as '*monuments in stone to the ideas of a century ago*' (cited in LSE Archive and Special Collections: Morris T/6) and a dire picture of these penal artefacts was offered by the Prison Commissioners in a surprisingly candid commentary from their Report for the Year 1962,

Despite some increase in accommodation provided by the opening or development of new establishments, overcrowding has persisted in the local prisons and its attendant evils, so often described in previous reports, have again hampered efforts to establish a longer working week and

modern training techniques. The staff, happily not now so thin on the ground as in recent years, has, as always, coped valiantly and cheerfully with the recurrent problems, and morale has remained high. The halcyon days between the wars, when no cell contained more than one prisoner, seem unreal now to those who remember them, but as the extensive building programme now in progress gathers pace there is hope they might one day return (Home Office 1962 p.12).

What does this picture suggest? In sum, the 1960s were a period of optimism and belief in the capacity of the state and the ‘white heat of technology’ to build prosperity and the common wealth. In practice the ambitions of the incoming Labour government were curbed by a limited parliamentary majority and a turbulent socio-economic context (James 1972). Ongoing fiscal uncertainty meant that the resources available to the Home Office were uncertain and delimited the range of options available to penal administrators in seeking to manage a penal system that was, in theory at least, tasked with the rehabilitation of offenders and their integration back into the community (Moriarty 1977). As recorded crime began to increase and sentencing practices hardened this placed considerable strain upon the criminal justice system and prison overcrowding began to increase as the decade progressed.

### **4.3 Preparing the Ground**

#### *4.3.1 The emergence of parole within British penal policy, 1962 – 1964*

Within this operational context it is reasonable to conclude that Home Office policy makers were predisposed to any policy innovations that were likely to encourage the rehabilitation of offenders, facilitate the integration of prisoners back into the community and in time help reduce the prison population.

Echoing Sir Walter Crofton’s earlier calls for a graduated system of education and training much of the early penal policy debate in the 1960s crystalized around the need for a clearer pathway from the sentence of the court to a period of intensive treatment while in custody and, in time, effective aftercare to support the integration of offenders back into the community once released (TNA: HO 383-219; PCOM 9/665). In their Report ‘*The After-Care and Supervision of Discharged Prisoners*’ (Home Office 1958) the Advisory Council on the Treatment of Offenders advocated compulsory after-care and supervision for long-term prisoners citing the belief that such offenders

had a special need for ‘guidance and help on release’ not only to assist the individuals concerned but also to reduce the risk of further harm to the general public. This logic was widely accepted and provision for compulsory after-care was included in the *Criminal Justice Act 1961* but never activated owing to a lack of resources. Instead the focus of attention shifted back to voluntary aftercare arrangements and the Advisory Council for the Treatment of Offenders report ‘*The Organisation of After-Care*’ (Home Office 1963c) broke new ground in calling for the reorganisation of probation and aftercare services in England and Wales (Newburn 2003a p.133).

As a consequence of this unfulfilled promise the issue of aftercare remained stubbornly on the political agenda. Moreover, the growing use of parole in America, Canada and Australia had not gone unnoticed by British policy-makers keen to keep pace with their neighbours in the march to modernity. On the 28th October 1963 the Chairman of the Howard League of Penal Reform, Kenneth Younger wrote to the Home Secretary Henry Brooke to draw his attention to demeaning prison conditions and call upon the Home Office to embrace ‘*an “open door” policy in the penal field. By this we mean the release on licence and under supervision of prisoners serving 12 months or over at a time which might be determined by the penal authorities but might, in suitable cases, be quite early*’ (as cited in LSE Archive and Special Collections: Morris T/6). A short while later the *Murder (Abolition of Death Penalty) Act 1965* helped to focus attention on the treatment of prisoners serving long-term determinate sentences and mandatory life sentences. During the passage of the Bill Lord Dilhorne and Lord Parker, the sitting Lord Chief Justice, moved an amendment to the Bill seeking to grant the Home Secretary new powers to release prisoners serving long determinate sentences once they had spent five years in custody (Hansard: HL Deb 05 August 1965 vol269 cc405-25). While these amendments never made it to the statute book the government did commit to a review of long-term determinate sentence prisoners with a view to returning to Parliament with proposals in the not too distant future.

Each of these concerns must be considered contributory factors in the development of parole but what is particularly striking about the archival record is the extent to which these considerations were located within a wider narrative bound up with prevailing justifications for punishment, particularly the therapeutic methods associated with the



rehabilitative ideal. Since the late nineteenth century the arc of penal policy had been towards the rehabilitation and treatment of the offender. This was reflected in the highly influential Gladstone Committee Report on Prisons and the ground breaking statement that,

We think that the system should be made more elastic, more capable of being adapted to the special cases of individual prisoners; that prison discipline and treatment should be more effectually designed to maintain, stimulate or awaken the higher susceptibilities of prisoners to develop their moral instincts, to train them in orderly and industrial [sic] habits, and whenever possible to turn them out of prison better men and women, both physically and morally, than when they came in... It may be true that some criminals are irreclaimable... but... the great majority of prisoners are ordinary men and women amenable, more or less, to all those influences which affect persons outside (HMSO 1895, para. 25).

Over time this rehabilitative focus had become increasingly modernist in its orientation and infused with the prevailing belief that science and technology could improve the delivery of state interventions (see for example Radzinowicz 1999; Home Office 1959). Perhaps the leading exponent of this view was the sociologist and legislator, Baroness Barbara Wootton. In the nineteenth Clarke Hall lecture, '*Contemporary Trends in Crime and its Treatment*,' Baroness Wootton (1959) set out the case for a 'forward looking' approach to punishment in the following terms, '*the treatment of offenders thus enters the category of human actions which are at least potentially rational and scientific. By careful observation of past experience, empirical generalisations can be formulated which become themselves the basis for more successful future action. By the normal processes of science, in short, a definite body of knowledge can be built up* (1959 p.19).

Parole was attractive within this context because it gave administrative expression to high level normative ideals that favoured indeterminate sentences and the personalisation of punishment. Put another way one can see this as a mutually reinforcing methodology that linked high level policy goals to administrative action; inmates differed in their response to 'treatment' and this necessitated individualized doses of incarceration. This personalisation of punishment required that a degree of indeterminacy was built into custodial sentences to allow for the earlier release of suitable candidates and extended periods of detention for those requiring more

intensive ‘support’. What is more, an expertly administered system of release on licence, premised upon rigorous selection, had the potential to reinforce the reformatory value of prison and guard against executive abuse of absolute indeterminacy.

One can trace the development of this logic through a series of highly influential commentaries on crime and punishment in the early 1960s. In a radio broadcast on the 15 February 1962, and subsequently published by *The Listener* under the title ‘*Indeterminate Prison Sentences*,’ Rupert Cross, then a Lecturer in Law at Oxford University, called for reform of prison sentences along the following lines; ‘*I want to suggest that every sentence of imprisonment for more than six months should be indeterminate. My suggestion is that...the Prison Commissioners (or some body of persons acting on their behalf) should have power to release the prisoner after a much shorter period if they consider the case to be a suitable one for an early release*’ (1962 p.289). Cross explicitly noted that the, ‘*individualization of punishment is the current demand*’ (1962 p.289) and questioned the ability of the sentencing judge to adequately predict a prisoner’s response to rehabilitation while in prison. Surely it was better, Cross argued, that the executive with access to real time information on a prisoner’s progress and prospects on release should be able to vary the sentence accordingly?

Nigel Walker, then a Reader in Criminology at Oxford, expanded further upon this theme in a broadcast on the 28 June 1962. A lifelong supporter of indeterminate sentencing Walker was particularly critical of a sentencing regime he perceived as making it, ‘*as difficult as possible for methods of disposal to be reviewed and corrected in the light of the offenders reactions to his treatment*’ (Walker 1962 p.1100). In its place Walker endorsed the creation of a ‘Supervision and Custody Board’ with the power to grant, ‘*earlier release under supervision to those who seem ready for it*’ (1962 p.1100). Finally, in his article ‘*Alternatives to Determinate Sentences*’ Eryl Hall Williams, then a Reader in Criminology at the LSE, traced the emergence of indeterminacy in British penal policy and reflected upon the sentencing reforms advocated by Walker and Cross (1964). Of particular note, Hall Williams questioned the practicability of the schemes outlined above and cast doubt on the track record of the Home Office in identifying the ‘right moment’ for release. Accordingly, Hall Williams favoured a rather more modest package of reform based upon the

creation of a Sentence Review Board able to review and amend the original sentence of the court as new information came to light;

Under the system proposed, it would be open to the Home Secretary to apply to the Sentence Review Board for the review of the sentence of anyone detained in custody before two-thirds of the sentence had expired. The Review Board would be able to alter the sentence so as to permit earlier release. This might obviate the necessity to change the two-thirds rule [remission]. But the appropriateness of the rule should certainly be reviewed in any general reorganisation (1964 p.60).

In each of these contributions one can detect a clear nervousness about the introduction of ‘absolute indeterminacy’ into British law and a desire to establish a flexible system of punishment consistent with the principles of individual liberty and the rule of law. Commentators differed on how best to achieve these objectives but it is clear that by 1964 support for a limited system of indeterminate sentencing was gaining traction within penological circles. However, it was not until the publication of the Longford Report in 1964 that these various policy prescriptions begin to coalesce into a workable programme of reform with political impetus (Labour Party 1964a).

The study group was established in December 1963 under the Chairmanship of Lord Longford while the Labour Party was still in opposition. The Study Group was one of several policy reviews intended to prepare the party for government and enjoyed a broad terms of reference, *‘to advise the Labour Party on the recent increase in recorded crime, the present treatment of offenders, and the new measures, penal or social, required both to assist in the prevention of crime and to improve and modernise our penal practices’* (Labour Party 1964a p.1). The Committee’s final report, *‘Crime: A Challenge to Us All’* published on the 15 July 1964, was wide ranging and made sixty-six recommendations on issues as varied as the re-organisation of the Home Office, the demolition of Victorian prisons and transfer of responsibility for juvenile offenders to the Family Courts (Labour Party 1964a). Critically in this context it also advocated the introduction of a system of parole for prisoners serving determinate sentences.

The personal papers of the late Professor Terry Morris, now held at the London School of Economics, offer a fascinating insight into the development of parole within the

Longford Committee's deliberations (LSE Archive and Special Collections: Morris T/6; T/7). My research has revealed that parole emerged relatively late in the Committee's proceedings. In March 1964 Dr Morris (as he then was) circulated a memorandum entitled '*Ten Points*' to the study group calling, amongst other things, for the introduction of parole as part of '*the progressive introduction of the indeterminate sentence, and the ultimate abolition of the determinate sentence*' (LSE Archive and Special Collections: Morris T/6). This was discussed at a meeting of the Committee on the 10th March 1964 prompting a wide-ranging debate on the political merits of indeterminate sentencing. It was agreed that Lord Gardiner would prepare a positioning piece on parole for further discussion by the Committee and a note entitled '*A Parole System*' was drafted later that same month (LSE Archive and Special Collections: Morris T/6: RD.733/March 1964). Lord Gardiner was enthusiastic in his support for the introduction of a parole system, arguing that parole would help to expedite the safe release of prisoners once they had seen the error of their ways, '*there are men kept in prison after they have learned their lesson and have been taught a trade and when the cost to the community of continuing to keep them in prison is no longer justified by any useful purpose*' (LSE Archive and Special Collections: Morris T/6: RD.733/March 1964). For completeness this note can be found in full at Appendix 4.

The language and rationale articulated by Lord Gardiner in his note '*A Parole System*' was adopted almost wholesale in the final report. In '*Crime: A Challenge to Us All*' the Longford Committee argued that, '*[p]rison, in short, should always be the last resort*' (Labour Party Study Group 1964a p.47) and since its use should be consistent with the aims of rehabilitation, '*we doubt the value of keeping men in prison after they have learned their lesson; at this point the cost of continuing to keep them in prison is no longer justified*' (Labour Party Study Group 1964a p.43). Accordingly, the Committee encouraged a future Labour government to establish a Parole Board with the power to release suitable prisoners on licence before the end of their prison sentence;

Parliament has provided that borstal sentences shall not be for more than two years but that the Prison Department may release any Borstal trainee after he has served at least a quarter of this period. We recommend that the Home Secretary should appoint a Parole Board with two or more

representatives of the judiciary upon it with similar powers in relation to any sentence of imprisonment (Labour Party Study Group 1964a p. 43).

The Report is significant for a number of reasons. First, one can see the emergence of what has often been described as the ‘recognisable peak’ argument (Shute 2003; Hood and Shute 2002), a rhetorical device deployed by policy makers throughout the passage of the Criminal Justice Bill 1966/1967 to justify a parole system premised upon individualised treatment. Second, many members of the Longford Committee would go on to hold senior positions within the Wilson Government following Labour’s victory at the 1964 General Election. Lord Longford served as the Lord Privy Seal, a position that enjoyed Cabinet rank. Gerald Gardiner was appointed Lord Chancellor in 1964; Sir Frederick Elwyn Jones would serve as Attorney General and latterly Lord Chancellor, while Alice Bacon joined the Home Office as Minister of State and sat on the Labour Party National Executive (Windlesham 1989 p.106). Third and altogether less tangible, I would argue that part of the success of ‘*Crime: A Challenge to Us All*’ is that it offered a compelling narrative that linked the development of parole to the rather Fabian social democratic values of the post-war Labour Party set out earlier in this chapter. This ‘coupling’ (Kingdon 2003 p.20) with the incoming Labour governments political agenda goes a long way to explaining the Reports legacy as both a high quality public policy statement and a sophisticated attempt to operationalise the values of the rehabilitative ideal.

This is not to downplay the importance of financial considerations and the likely impact of parole on the prison population. Concern over a growing and extremely costly prison population were important considerations in the decision to introduce a system of parole in England and Wales (Morris and Beverley 1975 p.159; Shute 2003 p.385), rather, the point being made here is that these factors were understood and located within a wider narrative that emphasised the value of indeterminate sentences and the personalisation of punishment, a theme I return to in my concluding remarks.

#### *4.3.2 The parole system begins to take shape*

On the 1<sup>st</sup> July 1965 the Cabinet of the new Labour Government met to agree the legislative programme for the 1965/66 parliamentary session (TNA: CAB 134/2001). Amongst the beneficiaries of this planning meeting was Sir Frank Soskice. The Home

Secretary was authorised to introduce a Criminal Justice Bill in the next parliamentary session giving legal effect to various initiatives inherited from the outgoing Conservative government (TNA: CAB 134/2001). This was quickly supplemented by a number of Labour initiatives developed while in opposition. Cabinet Office records indicate that on the 2 August 1965 Soskice wrote to the Cabinet Home Affairs Committee seeking approval to augment the Bill with measures to abolish preventative detention and introduce a system of parole for medium to long-term adult prisoners (TNA: CAB 134/1997; CAB 134/2001). The Home Secretary's memorandum explained his intentions in the following terms with more than a sprinkling of Longford Committee vernacular thrown in for good measure,

*Experience has shown that many long term prisoners reach a peak in their training, at which they are likely to respond to generous treatment, but may go downhill if kept in prison for the full term of the sentence. I propose, therefore, to institute a parole system permitting early release, subject to conditions and to liability to recall to prison, for selected medium and long-term prisoners. Apart from the benefit to the public which should ensue from enabling these prisoners to lead a more useful life while on parole, the system should also result in some saving of money, prison staff and space* (Emphasis added) (TNA: CAB 134/1997).

The paper trail emerging from the Home Affairs Committee provides a rich and fascinating insight into the chronology of policy development at this time. My research has revealed that the Home Office had originally intended to introduce a rather modest Criminal Justice Bill in the 1965/66 parliamentary session without the publication of a White Paper (TNA: CAB 134/2001; CAB 134-1997). Parole was to be the centrepiece of this Bill but a decision on the introduction of parole was deferred until September 1965 while the Home Office consulted the Scottish Department and Lord Chief Justice. When the issue returned to the Home Affairs Committee on the 22 September 1965 Soskice was able to update the Committee and strengthen his case by confirming that his consultation with the formative Royal Commission on the Penal System and senior judiciary had been encouraging (TNA: CAB 134/2001). Furthermore, a national conference with Prison Governors in August 1965 had indicated strong support for the initiative as a useful tool of discipline and control, *'every Governor I have consulted has emphasised that if he could hold out to prisoners in his charge the hope of an earlier release on parole, subject to licence, towards improved behaviour and in conducting his prison'* (TNA: CAB 134/2001). However,

there was also an acknowledgement of the progressive benefits of parole as a way to incentivise a process of penance and rehabilitation for some prisoners, *'it would also, very greatly strengthen his hand in influencing them. It would in the view of prison governors, lead to a large number of prisoners abandoning a life of crime on their release under licence and returning permanently to society as useful citizens'* (TNA: CAB 134/2001).

The Home Affairs Committee duly granted policy approval for the introduction of a system of release on licence but by November 1965 it was clear that the Criminal Justice Bill had lost its place within the Parliamentary timetable and would be held over to a future session (TNA: CAB 134/1997). The political and economic context was simply not conducive to the wide-ranging legislative programme Labour had intended to implement while in opposition and criminal justice reform was a significant casualty of wider power dynamics. The Wilson government commanded a wafer thin majority in the Commons and this precarious position sapped Labour's reforming zeal, stifled ambition and necessitated prioritisation. In particular, the early years of the Wilson government were dominated by efforts to avert the devaluation of sterling (Pimlott 1992). As the diaries of Crossman and others reveal this single issue consumed more of the governments' time and political capital than any other issues (Crossman 1975). Bogged down in the Commons and exposed on a variety of economic flanks, criminal justice reform was low down the list of government priorities.

As the prospects of a Criminal Justice Bill dimmed the Home Office changed tack and sought permission first from the Cabinet Home Affairs Sub-Committee in November 1965 (TNA: CAB 134/1997) and then from Cabinet on the 2 December 1965 to publish a White Paper entitled the Adult Offender (TNA: CAB 128/39/83). In the minutes from Cabinet it was noted that,

The Home Secretary said that the Government might be liable to incur criticism from liberal opinion if they did not soon make a distinctive contribution to the reform of the penal system; and, since there was no immediate prospect of introducing a Criminal Justice Bill, it was proposed that a White Paper on the Adult Offender should be published as a counterpart to the White Paper on young offenders which had been published in August. The new White Paper should set the government's

main proposals for legislation against the background of current thinking and action on penal problems. The central feature of these proposals was the introduction of a system of parole which would enable long-term prisoners whom there seemed to be some prospect of reclaiming to return to society after they had served a third of their sentences, but subject to recall to prison for a further third if they misbehaved (TNA: CAB 128/39/83).

As a result of this legislative hiatus it appears that the Home Office was able to draw breath and consolidate its plans for penal reform. The breadth and depth of rules, protocols and stakeholders that had to be traversed during this period provides a powerful illustration of both the ‘density’ of the institutional fabric and uneven distributions of power that so often define political action (Hay 2002 p.106). Two examples stand out from the records. First, Treasury papers reveal that in the rush to publish *‘The Adult Offender’* (Home Office 1965b) the Home Office fell afoul of Harold Wilson’s decree that the Treasury should be consulted on all White and Green papers before seeking full Cabinet approval for publication (TNA: T 227/2292), a measure no doubt introduced in response to the government’s continuing efforts to control inflation and exert fiscal discipline. It seems the Home Office had failed to follow this procedure correctly resulting in a rather bad-tempered exchange of correspondence with the Treasury that culminated in formal discussions between the Home Secretary and Niall McDermot, Financial Secretary to the Treasury (TNA: T 227/2292). As one Treasury Official noted in his briefing to Ministers on 17<sup>th</sup> November 1965,

We have considered that the proposals for release on licence should eventually produce some saving in the prison expenditure although there will be some offsetting additional expenditure on probation and aftercare... Elsewhere in the draft White Paper there are some proposals involving expenditure which have yet to be approved by the Treasury, under the normal procedure, as laid down by the Prime Minister the Treasury should have been consulted before the paper was circulated to a Cabinet Committee. I have mentioned this aspect to the Cabinet Office... (TNA: T 227/2292).

To defuse a potential row with the Treasury, Soskice wrote to the Financial Secretary on 29th November 1965 seeking clearance for the measures outlined in the White Paper (TNA: T 227/2292). The proposals for parole were approved on the grounds that they were likely to save the public purse in the medium to long term but elsewhere



there were some subtle yet revealing changes to the White Paper. Most notably a commitment that, *'their [prisoners] conditions in confinement must be as humane and tolerable as we can possibly make them'* was watered down to read *'their conditions in confinement must be humane and tolerable'* so as to protect the Treasury from any liability to deliver against an unqualified commitment to improve accommodation standards (TNA: T 227/2292). Evidence, if it were needed, of how complex inter-departmental negotiations can impact upon both the substance and tenor of criminal justice policy.

Second, the historical records indicate that far from being a homogenous Department that spoke with one voice the Home Office, at least at the level of middle-management, was a forum for intra-division discussion, dispute and horse-trading<sup>6</sup>. For example, the Probation and Aftercare Department was decidedly mixed in its reflections on the Adult Offender White Paper (TNA: HO 383/219). Officials were critical of the additional burden the parole system might place on the Probation Service, no doubt aware that aftercare accounted for a tiny fraction of Home Office expenditure. Equally, the functional responsibilities within the Probation and Aftercare department arguably meant that officials were more attuned to the risks associated with transitioning offenders back into the community than their colleagues in the Prison Department. A note dated 10 November 1965 reveals that the Probation and Aftercare Department was particularly concerned by the paradoxical implications of grafting parole onto the existing system of remission,

If supervision is regarded as a means of rehabilitation rather than as a modified punishment, the proposals seem to produce some rather odd results. If I understand the example in paragraph J correctly it means that the man released on licence after two years (who is by definition the least risk) would have two years' supervision; the man who leaves after three years (presumably at greater risk) would have only one year's supervision and the man who was never released on license because he is a bad risk would have no supervision at all. I cannot think that this is really intended or can be justified, but it does seem that any introduction of licence ought to be coupled with a review of statutory after-care (TNA: HO 383/219).

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<sup>6</sup> Although the evidence does suggest that this heterogeneity was flattened out when issues were escalated to the Senior Civil Service and advice was given to Ministers

The fusion of parole onto the existing system of remission stands out as one of the defining features of early release in England and Wales. I have found few contemporaneous accounts of this issue within the archival record or academic literature (arguably the best discussion of this issue can be found in Turner 1966a) and the possible reasons for this are discussed in greater detail in the conclusion to this chapter.

The White Paper received full Cabinet approval on the 2<sup>nd</sup> December 1965 (TRA: CAB 128/39/83) and was published as the '*The Adult Offender*' later that same month (Home Office 1965b). The centre piece of the government's plan was a commitment to introduce a system of parole for adult offenders,

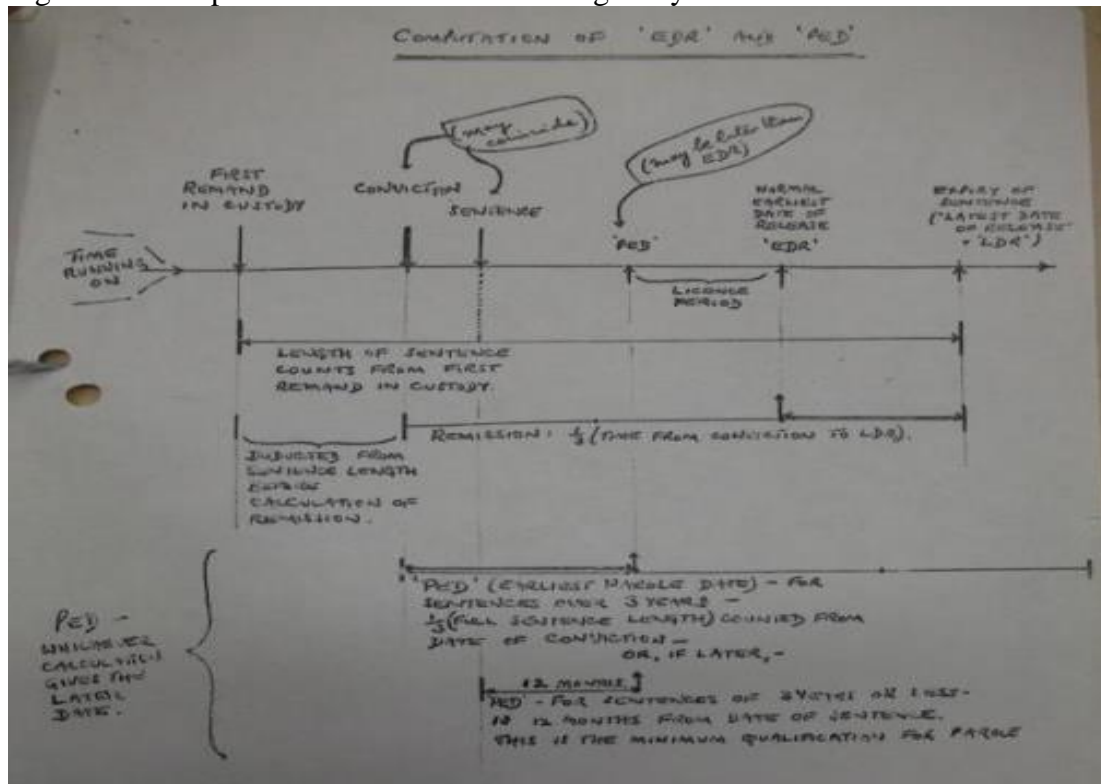
At present a prisoner is released after completing two-thirds of his sentence unless he misconducts himself in prison. What is proposed is that a prisoner's date of release should be largely dependent upon his response to training and his likely behaviour on release. A considerable number of long-term prisoners reach a recognisable peak in their training at which they may respond to generous treatment, but after which, if kept in prison, they may go downhill. To give such prisoners the opportunity of supervised freedom at the right moment may be decisive in securing their return to decent citizenship (Home Office 1965b p.4).

The Home Office described '*The Adult Offender*' as a publication '*for the purposes of discussion*' (1965b p.3) and while the proposals for parole were generally well received the White Paper attracted some criticism for a conspicuous lack of detail. For example, the Magistrates Association submitted a response to the Home Office in March 1966 suggesting that while they were broadly supportive of a system of parole, '*our chief criticism of the White Paper is that it is too vague*' (TNA: PCOM 9/665) and called upon the government to provide more detail of how the scheme would work in practice. This probably reveals more about the culture and character of the Home Office at this time than it does about the stage of policy development for while some elements of the proposal were open for discussion, in reality, the administrative framework for a system of parole was almost fully formed by December 1965 (see TNA: PCOM 9/665; PCOM 9/2248; HO 383/219). We know this because in the months leading up to the publication of '*The Adult Offender*', Brian Cubbon, then Head of C1 Division in the Criminal Department, wrote to the Prison Department on the 10<sup>th</sup> September 1965 setting out a number of exploratory questions about the practical workings of the parole

system that the Home Secretary would need clarity on in advance of any parliamentary statement (TNA: PCOM 9/665). This included the categories of offender who would be eligible for parole, the point within a sentence when parole would take place, the likely numbers on release and the anticipated quota of probation staff required to administer the system.

In a detailed response dated 1 October 1965, Norman Storr, an Assistant Secretary, set out the present state of thinking within the Prison Department (TNA: PCOM 9/665). This paper trail is significant because it is one of the earliest surviving records I have found that describes the proposed system in detail, but also because it is extremely close in form and substance to the proposals that were eventually included in the draft Criminal Justice Bill published in December 1966. First, Mr Storr confirmed that all prisoners serving determinate sentences would be eligible for parole after serving 12 months or one third of their sentence, whichever was the longer. An early attempt to map the prisoner journey from the PED (parole eligibility dates) to EDR (earliest date of release) and LDR (latest day of release) is set out at Figure 18 below.

Figure 18: Computation of Parole Release Eligibility



Source: TNA: HO 391/433

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Second, civil servants were keen to impress upon the Home Secretary that eligibility for parole would not be synonymous with release. In other words, parole would not be automatic and all release decisions would be at the discretion of the Home Secretary, *‘selection for parole, as contrasted with eligibility, will be on the positive qualification of a prisoner and this qualification will be acquired by his own conduct and attitude during the custodial part of his imprisonment. The criterion for selection will be the likelihood of his not resorting to further crime if released on parole’* (TNA: PCOM 9/665). More than any other issue the discretionary nature of parole was seen as central to retaining the support of the courts and general public who it was assumed would not look favourably upon the automatic release of thousands of prisoners each year. Third, prisoners would be released on licence under the supervision of a probation officer. Fourth, while on licence prisoners would be at risk of recall for the remainder of the sentence subject to remission. Fifth, while it was impossible to give precise statistics the Home Office Research Unit estimated that roughly that 3,000 and 3,500 prisoners would immediately qualify for consideration with a further 400 receiving a positive release recommendation (TNA: PCOM 9/665).

To all intents and purposes this memorandum set out the fundamental planks of the parole system that would subsequently be introduced by the Criminal Justice Act 1967. Like many liberalising measures from this era parole is commonly associated with the progressive reforms of Roy Jenkins (Allen 2004 p.78; Williams 1972), here we have clear evidence that its origins lay firmly in the much maligned Home Office of Frank Soskice and his Permanent Secretary Sir Charles Cunningham (Allen 2004 p.78) enthusiastically supported it must be said by members of the Longford Committee like Alice Bacon and Lord Longford who were by now in key government positions. Indeed, given the detail expressed in these records, it is almost certain that the proposed scheme had been in gestation far longer, perhaps in preparation for a likely Labour government or as part of the policy development process within the Home Office. In relation to the later the Home Office Research Unit had already made several scoping studies of the factors related to reconviction along with an unpublished study entitled, *‘First and Second Prison Sentences with special reference to parole’* (TNA: HO 291/727).

#### 4.3.3 Jenkins arrival at the Home Office

This analysis of the archival records strongly suggests that by the end of 1965 the legislative foundations of a modern system of parole were firmly established in England and Wales (TNA: PCOM 9/665). The political, economic and ideological case for a system of parole had been made out and the Home Office had largely negotiated the dense institutional fabric of rules, interest groups, checks and balances that define the development of public policy (TNA: CAB 134/2001; HO 383/219; PCOM 9/665; PCOM 9/2248). With the publication of *'The Adult Offender'* the locus of activity shifted from the internal machinations of the Home Office and Cabinet to the presentation and reception of these ideas outside of Whitehall.

As is so often the case political forces entirely unconnected to the criminal justice system would have a significant impact upon the trajectory of penal policy. Shortly after the publication of the White Paper the Prime Minister Harold Wilson announced a Cabinet re-shuffle in preparation for a likely summer election. Soskice, who was suffering from ill-health, was appointed Lord Privy Seal and recommended for a peerage (the government's parliamentary majority was too precarious to risk a by-election in the short term). In turn, Roy Jenkins who had recently turned down the role of Secretary of State in the Department of Education and Science was appointed Home Secretary in recognition of, *'his administrative ability and courage in one of the most difficult departments (Aviation)'* (Pimlott 1992 p.191).

This appointment resulted in a series of personnel changes in the senior echelons of the Home Office and a concerted effort to transform the working culture within the Department. Led by the 'formidable' Permanent Secretary Sir Charles Cunningham (Jenkins 1991 p.182), the Home Office of the 1960s was a highly centralised and hierarchical organisation. Jenkins would later describe a Home Office culture based upon, *'the most centralised system of submissions to the Secretary of State which can ever have been seen in Whitehall'* (1991 p.182). While in *'The Home Office: Perspectives on Policy and Administration'* former Home Secretary Jim Callaghan offered a similar assessment of a Department characterised by high staff turnover at the top of the Prison Department where the Director General rarely stayed in post for more than 3 years and a byzantine distribution of responsibility within the tripartite system of the Home Secretary, the Lord Chancellor and the Law Officers (Callaghan

1982 pp.12-16). Furthermore, Callaghan remarked with some bewilderment upon the autonomous workings of each division within the Home Office at this time;

It is obvious that, at the practical working level, the linkages between the different aspects of Home Office work are not very strong... Policy issues do not sweep across whole areas of the Home Office in a single tide. On the contrary, each part has its own expertise and, more often than not, its own legal code. Whilst there may be an abstract similarity between certain Home Office problems, this often disappears in the management of the problems themselves (Callaghan 1982 p.14).

Jenkins was determined to break this culture. In his memoir '*A Life at the Centre*' he describes a strained and turbulent relationship with Sir Charles which came to a head in late January 1966 (1991 p.181). In what is described as one of the most difficult and defining meetings of his career, Jenkins met with Sir Charles on the 10<sup>th</sup> January and insisted upon wholesale reform of the Department intended to foster a more collegiate atmosphere and external facing approach. Following an extended power battle between the two most senior figures in the Department these changes were reluctantly implemented by Sir Charles. The legacy of this battle of wills can be seen in the revised guidance to civil servants on briefing the Home Secretary set out at Appendices 5A and 5B (TRA: HO 303/97). While the original guidance instructed civil servants to provide a recommended option without access to the file, the revised guidance encouraged officials to provide more expansive options appraisals along with the background papers. I have no doubt that these two iterations of the briefing guidance were placed together on the archival record for posterity and illustrate how Roy Jenkins was beginning to stamp his authority on the Home Office.

As a result, a pre-agreed extension to Sir Charles's tenure as Permanent Secretary was withdrawn and following his retirement Sir Charles was replaced by Sir Philip Allen (later Lord Allen of Abbeydale) in the summer of 1966. A career civil servant Phillip Allen had joined the Home Office in 1934 rising to the rank of Deputy Chairman of the Prison Commission for England and Wales in 1952. Allen subsequently joined the Treasury as a Second Secretary from 1963-66 before returning to the Home Office as a Permanent Under-Secretary in 1966. Seen as part of a 'new breed' of more politically astute civil servants this change of leadership helped to unlock a period of unparalleled productivity within the Department (The Telegraph, 29 November 2007). Reflecting

on his return to the Home Office several years later Lord Allen suggests that, '*morale in the Home Office had sunk quite low in Frank Soskice's time*' (Allen 2004 p.63), a state of affairs that quickly gave way to a period of unprecedented excitement and creativity within the Home Office,

On a personal note though, I think that one of the most exhilarating times I ever spent was my first month back in the Home Office from the Treasury in 1966. We had a series of meetings with the Home Secretary, Mr Jenkins, to come to decisions on various propositions for inclusion in the Criminal Justice Bill which was being prepared for introduction that autumn. Among other things, we discussed aspects of the proposed new parole system, and introducing suspended sentences and majority verdicts of juries; and it was fascinating to see how, under the leadership of the Home Secretary, the various experts - prisons, police, criminal department specialists, lawyers and the rest - chipped in with their own thoughts and their own experience. I think that Mr Jenkins would agree that although he was in full charge of the pattern of the Bill, what finally emerged on particular issues was not the policy laid down in detail by any one individual, but was rather the result of an interchange of views and experience between people with differing professional interests in the same problem (Allen 2004 p.29).

A further transfusion of political capital came when the Labour government was re-elected with a significantly increased political majority at the 1966 general election (see Figure 15). When asked by James Margach of the *Sunday Times* what he intended to achieve as Home Secretary now that Labour had been returned to office Jenkins replied '*I would like to turn back this mounting crime wave. I would like to take some major steps forward in the reform of our penal system. And I would like also to see at any rate two or three liberal measures on the statute book*' (cited in Conservative Party Archive: LCC 1/2/7). This set the tone for what followed. As I have noted the administrative framework for parole changed remarkably little during this time but it is clear that with Jenkins's arrival at the Home Office the Criminal Justice Bill was re-invented as a far more ambitious and tightly defined package of reform. The records from this era are inevitably partial and it is all too easy for the archival researcher to misconstrue an isolated discussion or dispute as evidence of something bigger. But it does appear that a great deal of time and resource was spent throughout 1966 shoring up the Bill's reforming credentials to better reflect the Home Secretary's ambitions (see TNA: CAB 129/159/19; HO 291/1246; PCOM 9/2261).

It is at this point that the Home Office brought forward plans to introduce suspended sentences, streamline court proceedings with the introduction of majority verdicts and regulate the possession of shotguns (TNA: CAB 134/2956). Similarly, my research indicates that officials continued to ruminate over the one outstanding issue in relation to parole; the ‘wicked problem’ of who should be responsible for governance of the system, the Home Secretary or an independent Parole Board (TNA: HO 383/219). In a memorandum to the Secretary of State and Minister of State Lord Stonham on 20 June 1966 (TNA: HO 384/99) senior officials set out their formal advice for governance of the system, *‘based on a continuous process of assessment within the prison machine and that S. of S. should have the final responsibility for selecting prisoners for release’* (TNA: HO 384/99). The Home Secretary was invited to resist the creation of an independent parole board on the grounds that; the Home Secretary already enjoyed considerable discretion to determine whether a sentence was served in an open or closed prison and whether a prisoner would be transferred to a hostel accommodation towards the end of his or her sentence; that a parole board would weaken the Home Secretary’s accountability to Parliament and an overly judicial body would bring unnecessary formality to proceedings. Finally, it was noted that the comparable Preventive Detention Advisory Board had proved entirely unsuccessful in assessing preventive detainees’ prospects on release (TNA: HO 384/99).

It can be argued that the discussion of an independent Parole Board was symptomatic of a Home Office culture that was unwilling to relinquish power and control. Moreover, some elements of the case put up to the Home Secretary do not stand up to scrutiny. If the Preventative Detention Advisory Board had proved so unable to adequately judge the right moment to release adults serving extended sentences of preventive detention and officials’ anticipated similar difficulties with an independent Parole Board, it is not entirely clear why the Home Office machine would fare any better. Not least because the Advisory Council on the Treatment of Offenders had been extremely critical of the entire exercise of discretionary selection in their Report on Preventive Detention,

It thus seems true to say that the Boards are unable to differentiate a good risk from a bad one. This was confirmed to us by the Chairman of the Board who told us “we can never form a reliable opinion about a prisoner’s prospects on release, and fortified though we are by almost exhaustive



information, our decision at the end is basically a hunch, and often a majority hunch at that (Home Office 1963b p.37).

The most likely explanation is that the desire to keep selection of parole ‘in house’ reflected the centralising tendencies of a Home Office and a desire to resist any fragmentation of power that might frustrate the Department’s policy objectives in the long-term. For example, on the 31st January 1967 Jenkins instructed his officials to explore ways to further reduce the prison population, including options for further iteration of the proposed parole scheme (TNA: HO 291/1246). In a memorandum to the Home Secretary it was noted that the impact of the parole system on the prison population was highly contingent upon the discretion bestowed upon parole decision-makers and any moves to create an independent Parole Board may frustrate the Home Secretary’s efforts to reduce the prison population, *‘everything turns on the way in which the discretion is exercised, (and if we were to have an independent parole board deciding who should be licensed, you would largely lose control of the way in which the power is used)’* (TNA: HO 291/1246). At an even more fundamental level it is probably true to say that if the Home Office had taken the findings of the Advisory Council at face value the very foundations of a system of parole premised upon meticulous selection of suitable candidates would have been left in serious jeopardy. Not for the first time perhaps the emerging evidence didn’t fit the politics and the Home Office pushed on undeterred by this inconvenient truth.

On 3<sup>rd</sup> August Jenkins wrote to the Prime Minister setting out his proposals for a Criminal Justice Bill in the next Parliamentary session (TNA: PREM 13/999). This was considered by the Cabinet on the 4<sup>th</sup> August 1966 (TNA: CAB 129/24) where it was noted that the proposal for parole (without the establishment of a Parole Board) had previously been approved by the Cabinet and the Home Office now wanted to supplement the Bill with a package of measures intended to reduce the prison population, most notably the introduction of suspended sentences, plans to tackle drunkenness and limitations on the use of remand (TNA: CAB 128/41). This was followed by further discussion at the Home Affairs Committee (H-Committee) on the 5th August 1966 along with final clearance from the ‘Legislation Committee’ (known as ‘L Committee’) on Tuesday 22 November (TNA: CAB 134/2956).

As Harold Wilson once said ‘a week is a long time in politics’ and between his appearance at ‘H Committee’ and ‘L Committee’ the authority of Roy Jenkins as Home Secretary was severely tested by a series of events that arguably served to highlight the ideological distance that had opened up between the Labour government (as well as the liberal wing of the Conservative frontbench) and the more conservative instincts of the general public. On Friday 12<sup>th</sup> August, three policemen were shot dead in Shepherds Bush by gunmen Harry Roberts and his two accomplices who fled the scene prompting a nation-wide manhunt. The pictures shocked a nation (see Figure 19 below) and led to an immediate backlash against a Labour Government that had recently abolished the death penalty and use of corporal punishment in prisons. A growing sense of crisis was compounded at the annual meeting of the Police Federation on the 20 October 1966 where it was reported that 300 policemen staged a walkout out during the Home Secretary’s speech citing no confidence in the government (The Times October 1966).

Figure 19: Newspaper Cuttings from 1966



Source: From top, Daily Express 13 August 1966, Daily Mirror 28 December 1966c, Daily Mirror 23 December 1966b

Two days after this walkout the inexperienced Home Secretary was plunged into a fresh crisis. This time however the focus was not on the safety of the police but security arrangements within Britain's jails. On the 22 October the infamous Cambridge spy George Blake escaped from Wormwood Scrubs prison where he was serving 42 years in prison for multiple offences related to spying for the Soviet Union. The audacity of the escape, coupled with the propaganda coup for the Soviet Union proved inflammatory (a detailed account of these events can be found in Hermiston, 2013). The stream of front page headlines set out at Figure 19 would almost certainly have tested the government's political resolve. The Crossman diaries give an interesting insight into Jenkins' state of mind at this time and a less than supportive relationship with the Prime Minister Harold Wilson, *'during our private talk Roy Jenkins rang up in a great stew about George Blake. When Harold put down the receiver he turned to me and said, that will do our Home Secretary a great deal of good. He was getting too complacent and he needs taking down a peg'* (1977 p.87).

In response to mounting media attention Jenkins announced on the 24th October that an inquiry would be set up to examine prison security under the chairmanship of Lord Mountbatten (HC Deb 24 October 1966 vol 734 c649). Setting out the terms of reference for the inquiry in the Commons, Jenkins came under considerable pressure from all sides of the House and would later reflect in his memoirs that, *'...the statement did not go at all well. The atmosphere was wrong before I came to the inquiry announcement, glacial on the opposition benches, uneasy on the Labour side, and Mountbatten appeared as more a gimmick than a coup'* (Jenkins 1991 p.202). The Conservative opposition seized on the statement as an opportunity to embarrass the government and re-affirm their credentials as the natural party of law and order. Following *'scenes of uproar in the commons'* (The Daily Mirror 25 October 1966a) Edward Heath held an impromptu meeting of his Shadow Cabinet before submitting a motion of censure against Jenkins on that grounds that, *'this House deplores the refusal of the Secretary of State for the Home Department to set up a specific inquiry to report as a matter of urgency on the escape of George Blake from Wormwood Scrubs Prison'* (HC Deb 31 October 1966 vol 735 c115).

The Motion was heard on Monday 31<sup>st</sup> October 1966 and is widely considered to be one of the finest moments of Jenkins' parliamentary career. As Crossman noted contemporaneously,

Then we went back to hear Roy Jenkins wind up with a tremendous annihilating attack which completely destroyed the Opposition. Before he got up he sat there next to me rubbing his hands and looking as nervous as hell but the moment he started one realized that he'd prepared that speech with tremendous care. He demolished Quentin's case and demonstrated that no special precautions had been taken by Henry Brooke [background on Quentin Hogg and Henry Brooke can be found at Appendix 1]. The demolition job was so total that when the vote came many of the Tories just weren't there. It was a tremendous reversal achieved by sheer debating skill-the first really good evening the Party has had since we came back from the recess. *It did a lot to change the atmosphere* (emphasis added) (1977 p.100).

The issue of prison security would return to the front pages of the media in December 1966. Just weeks before the publication of the Mountbatten Report the 'Mad Axeman' Frank Mitchell, described by some newspapers as '*Britain's most violent convict*', escaped from Dartmoor prison with the assistance of the Kray Twins (The Windsor Star 14 December 1966). The escape served to reinforce public fears of organised crime in England and Wales and many in the media drew comparisons with the Great Train Robbery and Ronnie Biggs' subsequent escape from HMP Wandsworth in July 1965, but for the time being Jenkins had pulled off a political coup that bolstered the authority of the Home Secretary at a time when he was about to marshal a significant Criminal Justice Bill through Parliament.

These events are significant from a historical perspective because they indicate just how contingent and sensitive to external forces the trajectory of criminal justice policy can be. Roy Jenkins was rocked by the Shepherds Bush murders and the escape of George Blake. He could easily have lost control of the situation and his job given the lukewarm support of Harold Wilson who was increasingly suspicious of his young rival. Instead a solid Parliamentary performance was able to change the mood music, at least within Parliament, and cement Jenkins' reputation for competence in times of crisis. This series of events had little if anything to do with the political merits of parole or the provisions contained in the Criminal Justice Bill 1966/1967 and yet these events and the government's response to them would arguably hold more sway over the

fortunes of the Bill than any of the points of finer detail. A case in point of why Harold MacMillan is said to have feared ‘events, dear boy, events’ above all else.

#### **4.4 The Criminal Justice Act 1967**

##### *4.4.1 The Bill*

Having explored the development of parole and located this within a wider political context I want to turn finally to the Criminal Justice Bill 1966/1967. Rather than walk through each stage of the legislative process in detail I want to pick out some of the key features of the Bill as it passed through Parliament in order to illustrate why it should be considered such an important milestone in the development of early release and penal policy.

Buoyed by his handling of the Blake affair, Jenkins used a BBC party political broadcast that aired on the 1<sup>st</sup> December 1966 to set out his plans for criminal justice reform. A package of measures the Home Secretary lauded as the most significant reform of the system since the Second World War,

At first sight this may appear to be a random mixture of a Bill including proposals on such diverse subjects as juries, parole for prisoners, and the control of shotguns. But in fact it has running through it a single clear thread of purpose. The aim is to strengthen the hand of those engaged directly in the war against crime. All the main reforms included in this Bill contribute to that objective. They will make more effective the various agencies concerned in combating crime - the police, the criminal courts, and the Prison Service (cited in Lester 1967 p.252).

The Criminal Justice Bill 1966/1967 received its Second Reading on the 12 December 1966. Commending the Bill to the House the Home Secretary presented a rather different vision of the Bill to his public broadcast. Gone was the rhetorical appeal to war and combat readiness, replaced instead with the altogether more restrained language of modernity and consensus, ‘*my object has been to construct a Bill which would be consistently liberal and rational in its approach to the difficult and emotional questions of crime and punishment*’ (HC Deb 12 December 1966 vol738 c52). Parole was presented alongside suspended sentences and various other penal provisions as a suite of reforms that ‘*revolve around the single theme, that of keeping out of prison those who need not be there*’ (HC Deb 12 December 1966 vol738 c1502).

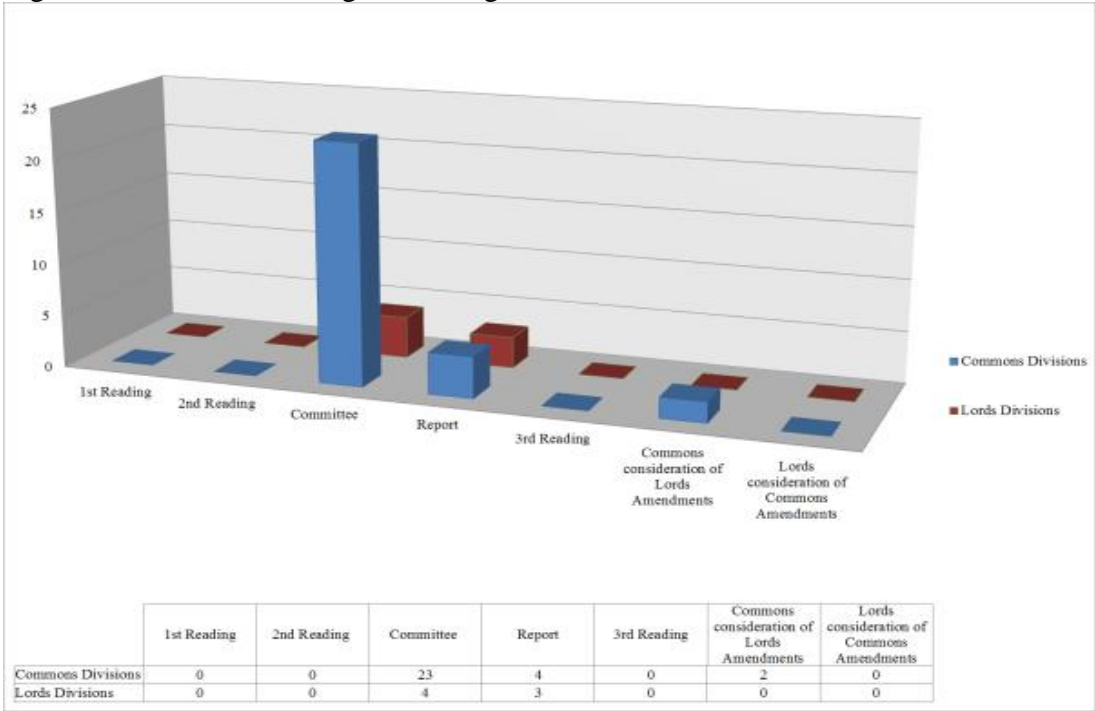
To a modern eye it is striking how strong the cross-party support for parole was. After all, this was a measure that would strengthen the power of the executive to release many serious offenders after just one third of their sentence. Yes, there was debate about the administrative workings of the system; particularly the quasi-legal status of parole and the relative merits of an independent Parole Board, but the Hansard records are notable for the absence of any genuinely dyed-in-the-wool opposition to discretionary release on licence. This was particularly true of the Conservative front bench led by Quentin Hogg, the then shadow home affairs spokesman. The Conservative Party had advocated the introduction of parole in their study '*Crime Knows No Boundaries*' (1966) and briefing the Shadow Cabinet at the Leader's consultative committee on 30th November 1966, Hogg reflected on the Bill in the following terms,

There can be no question of a party attitude on the majority of these proposals. They are essentially matters on which experts differ, and individuals will not be dragooned into a common line. Personally I support the great majority of the changes, for what they are worth (as to which a certain degree of agnosticism is permissible). I am against entrusting the new Parole system to the Secretary of State, and would prefer a Parole Board on the Canadian model...

Speaking generally the Bill itself is a potpourri of ideas (none, I think, original) which have been current for a long time (Churchill/HLSM 2/42/2/16).

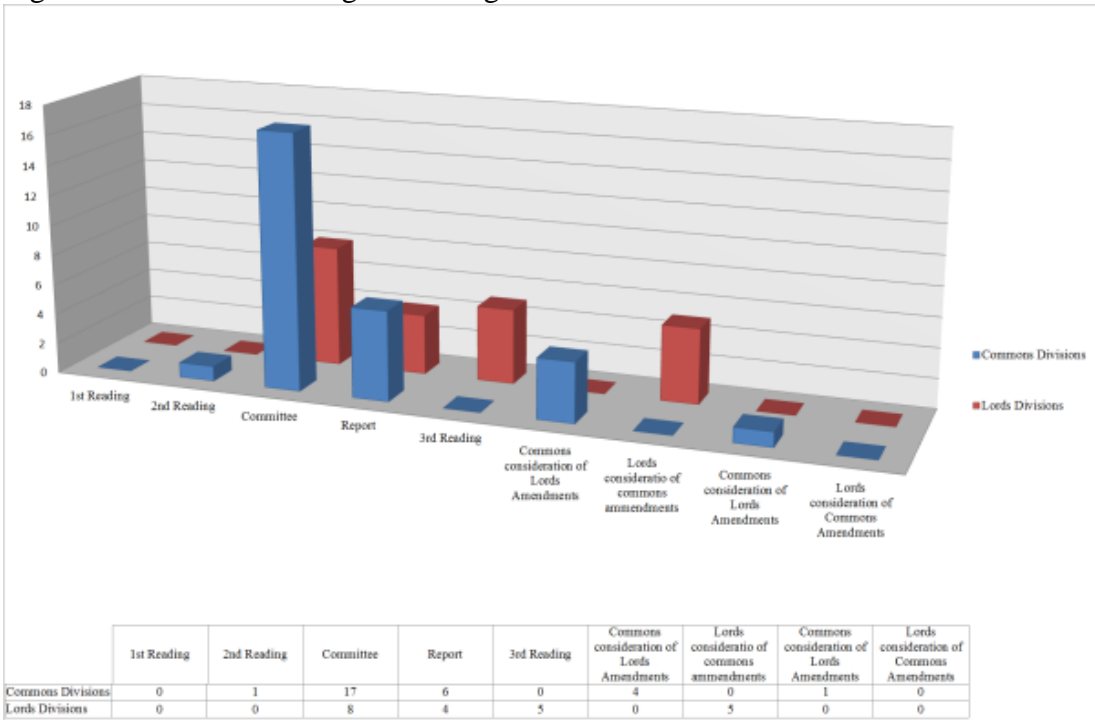
Hogg was by no means exceptional in his belief that crime should not be matter for political grandstanding. Downes and Morgan (2007) have traced the emergence of crime as a party political issue and the records do support the conclusion that penal policy in the late sixties was relatively insulated from political point scoring (Churchill/HLSM 2/42/2/16; Churchill/HLSM 2/42/4/33). For example, if we take the number of divisions during the passage of the Bill as a proxy the evidence does suggest that Parliament has become more adversarial over time. Figures 20 and 21 below set out the number of divisions at each stage of the legislative process for the *Criminal Justice Act 1967* and *Criminal Justice Act 1991* respectively.

Figure 20: Divisions during the Passage of the Criminal Justice Act 1967



Source: Hansard Millbank <http://hansard.millbanksystems.com/>

Figure 21: Divisions during the Passage of the Criminal Justice Act 1991



Source: Hansard Millbank <http://hansard.millbanksystems.com/>

While no generalizable conclusions can be drawn from this comparison it does at least suggest that in 1967 politicians were far less likely to push points of contention to a division. The government was defeated on four occasions during the passage of the Criminal Justice Bill 1966/1967 on the issues of suspended sentences, remand and

shotgun licences but these issues were somewhat incidental to the substantive clauses of the Bill. This comparison also indicates that divisions were less likely to occur at the politically damaging Second Reading or Report stages and that the House of Lords was far less assertive in its disagreements with the Commons than present legislators.

Moving beyond the somewhat inexact metric of parliamentary divisions there is also some evidence to suggest that the government was responsive to the rather less quantifiable influence of expert opinion and appeal to authority. Indeed, the debates over the desirability of an independent Parole Board offer a useful counterfactual to the tendency to view Parliament as a simple rubber stamp of executive action (Rosenblatt and Korris 2008). As originally introduced in the Commons, section 22 of the Bill left the decision of whether to release a prisoner on licence wholly to the discretion of the Home Secretary. Home Office officials, particularly those likely to be involved in the ongoing administration of the parole system, were wedded to an internalised decision-making structure but it is clear that Ministers and the ‘Bill Team’ charged with the safe passage of the legislation were less willing to expend significant political capital in defence of this arrangement. The minutes from the Legislation Committee reveal that the Home Office were prepared to concede ground on this point and it was agreed in advance of the marshalling of the Bill for its 2<sup>nd</sup> Reading that *‘government spokesmen would not commit themselves firmly against it and if the case for a board was strongly argued when the Bill was under discussion in Parliament, policy could be reconsidered’* (TNA: CAB 134/2956). Perhaps foreseeing the value of outsourcing one of the more hazardous jobs in the Home Office in-tray or expediting the passage of the Bill through Parliament.

As anticipated, the point was strongly argued in Parliament. At Second Reading Quentin Hogg set out the opposition’s preference for an independent parole board, arguing that a strong judicial presence was critical to securing buy-in from the courts and ensuring that questions of liberty never became a matter within the day-to-day responsibilities of a Government Minister (Hansard: HC Deb 12 December 1966 vol 738 c76). When the Bill reached Committee, Sir John Hobson, a former Attorney General, moved a number of amendments designed to curtail executive control over the system by establishing an independent Parole Board (Hansard Standing Committee A 7 March 1967 c704). The issue was considered at length in Committee and rather



unusually for a Secretary of State, Roy Jenkins attended all Committee proceedings in person rather than delegate this responsibility to his junior Ministerial team. While the Home Secretary was unable to accept the opposition's proposals he was prepared to bring forward his own plans for a system of parole incorporating an independent Parole Board, *'the Government are disposed to consider a scheme on the lines I have put forward and would endeavour to put down Amendments in this direction if they appealed to the Committee at the Report stage'* (Hansard Standing Committee A 7 March 1967 c743). The Home Office honoured this promise at Report with a series of amendments intended to establish a 'Prison Licensing Board' a rather municipal name that was eventually changed to the Parole Board by the House of Lords.

This suggests that the government were willing to cede ground on points of substance where the case was made forcefully. One of the defining features of the Criminal Justice Bill was the extent to which debate was dominated by lawyers and legal argument. As Lord Brooke, the Leader of the Opposition in the Lords noted,

I make no criticism, but the Bill seems to me to have been examined in another place predominantly from the point of view of lawyers. Indeed, the noble Lord, Lord Stonham, said that the Standing Committee was packed with legal luminaries. I trust, we shall have the full benefit of that in your Lordships' House, too, but I hope that we shall also look at it carefully and understandingly from the standpoint of magistrates, of the Probation Service and of other interests vitally concerned, to whom it is of very special importance. This is not a lawyers' Bill only; it is just as much a layman's Bill. You cannot be sure of getting justice by leaving it entirely to lawyers (HL Deb 10 May 1967 vol282 c1448).

More research is needed to determine the impact of this legal hegemony. The abundance of lawyers within Parliament is well documented (see House of Commons Library 2010 pp.5-6) but comparatively little research has explored the impact of this on both the style and substance of parliamentary debate (Howarth 2013 pp.41-63). We know that very few lay parliamentarians took much interest in the Criminal Justice Bill and when they did legislators were often highly deferential to legal professionals. It is plausible that the legal character of the debate, coupled with the number of prestigious lawyers on the Conservative benches, offered the opposition a different route from which to scrutinise the Bill and influence its direction.

It would however be wrong to overstate this argument and misconstrue the absence of contemporary penal populism for an apolitical approach to penal policy. Reflecting upon both the archival record and Hansard it is clear that a very different political equilibrium held sway that provided different rewards and opportunity costs to politicians of the day. For example, whether the debate was framed in partisan terms or not made little material difference to Labour's post 1966 majority and ability to force through their proposals. The government still controlled the parliamentary timetable (a weapon used to good effect during the passage of the Bill) and enjoyed a substantial majority in the Commons Standing Committee set-up to scrutinise the Bill. Sheer weight of numbers was a decisive factor and of the twenty-three divisions called for in Committee the government enjoyed a hundred per cent success rate. The situation was somewhat more fluid and complex in the House of Lords where party discipline tended to be weaker. The Conservatives were by far the largest single party in the Lords and could often rely upon cross bench hereditary peers to vote with them on key issues. On the issue of criminal justice, the picture was a little more nuanced with alliances forming on a case-by-case basis meaning that the Government had to rely upon support from Liberal, Conservative and Crossbench peers to resist the opposition's amendment.

The final point I want to make brings us back full circle to the contributions of Cross (1962; 1966), Walker (1962) and Hall Williams (1964) and the logic model that linked the high-level normative goals of the 'rehabilitative ideal' with the administrative application of these goals through the parole system. Time and time again the Hansard record reveals that early release was justified on the grounds that it introduced a desirable level of indeterminacy into the penal system to allow for the effective personalisation of punishment. Perhaps the most eloquent expression of this viewpoint was offered by Viscount Amory, a former Conservative Chancellor of the Exchequer and Chairman of the short-lived Royal Commission on the Penal System,

I now come to the joint questions of greater flexibility in sentencing and release on licence. It seems to me that if we take seriously that the object of treatment should be to turn the offender into a law-abiding and responsible citizen, then we must accept three conclusions. The first is that the treatment should be progressive - that is to say, graduated steps leading progressively back to full liberty - secondly, that the form of treatment must be tailored to the needs of the individual; and, thirdly, that these

considerations will often involve modification of the original sentence in the light of the response of the individual to the treatment he has had. Therefore, one concludes that there must be a possibility of a greater element of indeterminacy in the original sentence. In that regard, some form of release or partial release under licence is highly desirable (HL Deb 10 May 1967 vol 282 c1489).

This passage beautifully captures the ‘golden thread’ of penal thought that linked Robert Cross’s early support for indeterminacy with the proposals of the Longford Committee, the Adult Offender White Paper and the debates within Parliament. While policy-makers differed on the ‘first order’ design of the parole system and the ‘second order’ instruments of policy there was almost universal consensus on the third order’ hierarchy of goals to be pursued by the penal system (Hall 1993 p.278). In this sense the *Criminal Justice Act 1967* can be considered an archetypal product of the rehabilitative paradigm that dominated penal policy in the 1960s.

#### 4.4.2 *Postscript*

The *Criminal Justice Act 1967* was given Royal Assent in July 1967 and Lord Hunt was appointed Chairman of the Parole Board in October 1967. The appointment of Lord Hunt was highly symbolic, as one former Prison Governor put it to me, ‘*I mean Hunt’s appointment spoke volumes and this is the man who climbed Everest, who took risks. You know, he wasn’t a bureaucrat and it was seen ... and that was the dying time of Borstal, a belief in the prisoner’s rehabilitation*’ (Interview H: 20 January 2015). The Board was originally comprised of 17 staff and the first tranche of prisoner releases took place on 1 April 1968 when a total of 350 prisoners were recommended for release by the Parole Board (HMSO 1968d). As outlined earlier in Figure 9, the number of prisoners released by the Parole Board grew steadily in the late 1960s before plateauing for much of the 1970s.

Establishing an effective system of parole did not prove to be an easy task. The system had been premised upon expert assessment of prisoners and the provision of high quality paperwork that would enable the Board to operate a sophisticated system of discretionary release. In reality, administrative mismanagement and historic under-investment in prisoner case notes meant that prison records were often of poor quality, incomplete and delivered late to the Parole Board. Reflecting on his time at the Parole Board some years later Lord Hunt was scathing about the state of affairs he discovered

at the Home Office on his appointment in 1967, *'within a matter of months of the board being set up, we found a pretty scandalous state of affairs in the Home Office. We found a great pile of dossiers relating to forgotten men in the room of the then under-secretary. It was two High Court judges... who cleared the backlog'* (HL Deb 03 July 1991 vol 530 c1030).

This state of affairs was further compounded by the failure of the various criminal justice agencies to communicate with one another, perhaps reflecting the 'siloed' nature of the criminal justice system at this time, if indeed it is possible to describe these arrangements as a 'system' at all (Interview H: 20 January 2015). As one civil servant noted in September 1967,

If the secretariat is to be formed from within the Home Office, it would be administratively convenient if it could form part of the Probation and After-Care Department, but this may be politically unacceptable. Debates in both Houses on the Criminal Justice Bill suggest that the Prison Department would probably be unacceptable in some quarters. But wherever the staff is attached, I would hope that the secretariat could be located in the same building as the Probation and After-Care Department. We already face the daunting prospect of having the Criminal, Prison, and Probation and After-Care Departments and the Research Unit located in four separate buildings, and unless we can have ready and constant contact with the Board secretariat I fear that the scheme may well prove inoperable (TNA: PCOM 9/2261).

It was perhaps inevitable then that the fledgling parole system soon began to court controversy. On 12 August 1968 Sydney Williams made front page news after shooting his wife and her new partner at their home in Four Ashes Staffordshire before committing suicide (see Figure 22). Williams was amongst the first prisoners to be released on licence and it later emerged that neither the Parole Board nor the police had been informed of the repeated threats Williams had made against his wife or her partner while on licence. Given the damage caused by such adverse media publicity the new Home Secretary James Callaghan ordered an immediate review of the nascent parole system and issued revised guidance on the importance of data sharing between all criminal justice agencies (Daily Mirror: 12 August 1968).

Figure 22: Daily Mirror, Monday 12 August 1968



Source: Daily Mirror 12 August 1968

Paradoxically it is these early failures that reveal something of the positive influence of parole and why it has proved such an enduring feature of the penological landscape. The quality of prison documentation improved significantly following the introduction of parole as prison authorities were forced to take prisoner's aftercare arrangements seriously. Yes, the architecture of the parole system was complex and unwieldy but it also helped to insulate the fledgling system from criticism once the inevitable trickle of negative stories began with the case of Sydney Williams. As one notable penal reformer put it to me this ornate decision-making structure was arguably a small price to pay for the reformatory value of the new parole system and its sustainability in the medium to long-term (Interview C: 22 April 2014),

I think there was a genuine rehabilitative streak in the notion of parole, both in the Crime: A Challenge to Us All type discussions prior to its introduction, but also in the design of it in the first place. There was a notion that prisoners could be rehabilitated and redeemed that was running through it that was genuine among those who designed it, and they were balancing it against the possibility of a backlash, the possibility of criticism but also the possibility that things could go drastically wrong. Hence it was so cautious and timid at the beginning but nevertheless I think

it was a genuine rehabilitative notion that was reflected in the peak argument.

So although despite the flaws in the peak argument as such the belief that people could change is a positive and a humane belief, and I think that was behind it.

*TG: So something about checks and balances so that if it did go wrong they had plausible deniability...*

Yes...

As a result, parole enjoyed a degree of cross-party support that was absent from other reforms enshrined in the *Criminal Justice Act 1967*. While the mandatory suspended sentence was quickly abolished by the Conservative Party when they were elected in 1970 the parole system was expanded. The *Criminal Justice Act 1972* empowered Local Review Committees (LRCs) to release certain categories of offender pre-agreed by the Parole Board, a move that reflected the growing public and political confidence in the system of parole first introduced in 1967.

## **4.5 Conclusion**

At the outset of this Chapter I posed two questions for further discussion. First, why did parole break onto the policy agenda in England and Wales and gather enough momentum to reach the statute book? Second, why was the regulatory architecture of the early release system established by the *Criminal Justice Act 1967* so administratively complicated? In particular, why did the Home Office choose to graft parole onto the existing system of remission for good conduct? In my conclusion to this chapter I want to return to these questions and reflect upon three inter-locking themes that emerge strongly from the available data sources and provide an essential backdrop to the case studies that follow.

### *4.5.1 Parole: a victory for principle or pragmatism?*

The establishment of a modern system of parole in England and Wales has stimulated lively debate within the literature. In their conclusion to ‘*On Licence*’ Morris and Beverley (1975) placed parole alongside the suspended sentence and limitations on the sentencing powers of magistrates as ‘*a piece of penal machinery designed to do little more than reduce the prison population and to negate the necessity for a large*

*and expensive programme of prison building*' (1975 p.159). More recently, Shute (2003) has suggested that the continued deployment of the empirically dubious 'recognisable peak argument' can be understood as '*a convenient way of providing a veneer of theoretical respectability to policies which were driven by other, more pragmatic concerns... that parole would provide a quick and relatively inexpensive solution to the pressing problem of prison overcrowding*' (2003 p.385). In contrast Morgan (1983) has rejected the prison population thesis, a view she considers overly simplistic for a number of reasons, most notably that policy statements like the Longford Report (1964a) '*Crime: A Challenge to Us All*' suggest that parole did have a basis in principle as well as pragmatism; that the first formulations of a parole system pre-date the prison overcrowding crisis of 1966 / 1967 and the fact that the parole eligibility guidelines outlined in the *Criminal Justice Act 1967* related to only a small percentage of the prison population.

On this issue my analysis largely confirms Morgan's interpretation of the aetiology of parole. Part of the enduring interest of these events is the challenge of unpicking the rather 'nebulous consensus' (Tata 1990) that characterised the parole debate; the different views and agendas of those engaged in the policy-making process and the somewhat blurred lines between the underlying objectives of parole and its presentation to the public. Nonetheless there are good reasons to conclude that parole was rooted in principle and inexorably bound up with the evolution of 'penal welfarism', a policy framework premised upon rehabilitative interventions rather than negative, retributive punishments (Garland 2001 pp.23-52). The likely impact upon the prison population and reductions in expenditure were undoubtedly important considerations and grew in significance when Jenkins was appointed Home Secretary in 1966 and the prison population began to rise at a concerning rate (TNA: HO 291/1246). But I would argue that these were secondary justifications that helped the parole reforms maintain momentum once they broke onto the political agenda, they were not, in and of themselves, primary considerations.

This inheritance can be seen at several stages of the parole debate. As I noted earlier the debate that grew up around parole in the 1960s should not be considered *sui generis* but the latest contribution to a longstanding discourse about the appropriate aims and techniques of penal administration. Since the 1895 Gladstone Report the arc of penal

policy had been towards the rehabilitation and integration of offenders back into the community. It took time for this logic to build momentum and work its way into the institutional fabric of the criminal justice system to the extent that it provided a relatively stable set of rules, values and norms of appropriate conduct for policy-makers and administrators. Indeed, the 'rough edges' between Victorian notions of punishment and 'modern' forms of penal-welfarism were particularly noticeable with regards to early release arrangements. With the abolition of capital punishment, penal servitude, and the associated provision for the release of convicts on licence prison authorities were left with a very limited early release toolkit based upon the unconditional release of offenders at the two-thirds point of the sentence with no continuing liability for recall, or supervision while in the community. A deficiency that was all the more marked given the provision for young people through the Borstal system, widely regarded at this time as the 'jewel in the crown' of the British penal system

This was a far cry from the Gladstonian vision of effective rehabilitation of the offender back into society and over time aftercare and readiness for release became increasingly important areas of policy focus as prison authorities paid due regard to Sir Alex Paterson's famous dictum that *'you cannot train a man for freedom under conditions of captivity'* (Home Office 1965 p.1). I want to suggest that the dissonance between prevailing penological support for indeterminacy and the personalisation of punishment and a remission framework that offered little more than automatic unconditional release created a policy problem that unlocked a period of significant creativity inside the Home Office and external stakeholders with an interest in penal matters. Indeed, this focus of enquiry can be traced through the contributions of the Advisory Council on the Treatment of Offenders (1958), the academic discussions of Rupert Cross (1962) and Nigel Walker (1962) as well as the more overtly political contributions of the Longford Committee (1964a). In turn this problem-solving process was interpreted through the lens of 'liberal elitism' a governmentality Loader (2006) has described as a set of express and implied values about the proper conduct of government towards crime based upon a civilising project, the use of expert knowledge and the careful management of public opinion. As Merlyn Turner noted contemporaneously *'the Home Secretary's plans, outlined in the White Paper on the Adult Offender, could be interpreted as the dividing line between*



*outdated conceptions of after-care and the more progressive ideas of parole*' (1966 p.1). In this sense the reconfiguration of criminal justice associated with the unfolding modernising project of penal welfarism should be seen as an essential precursor to the emergence of parole in England and Wales and the measures contained within the *Criminal Justice Act 1967*.

Moreover, my analysis of the available data does suggest that much of the debate around the establishment of a modern system of parole fails to account adequately for the different stress and nuance placed upon the scheme under the tenures of Frank Soskice, Roy Jenkins and perhaps just as significantly their Permanent Secretaries Sir Charles Cunningham and Sir Philip Allen. The archival record described earlier reveals very clearly that the administrative framework for a system of parole was well developed by 1966 (TNA: CAB 134/2001; HO 383/219; PCOM 9/665; PCOM 9/2248) and owed a considerable intellectual debt to the Longford Committee recommendations first articulated by Lord Gardiner in his note '*A Parole System*' (LSE Archive and Special Collections: Morris T/6). The decision to limit parole eligibility to offenders serving sentences of 18 months or over was a conscious decision to curtail the scope of the system and focus on a small number of medium and long-term serious offenders who were seen to be within the prison environment long enough to allow for an effective programme of rehabilitation (TNA: HO 383/420; HO 391/432). It is also revealing that when the formative Criminal Justice Bill was held over to another Parliamentary session Soskice sought to impress the importance of the reforms upon his cabinet colleagues by appealing not to pragmatic considerations like discipline, reductions in the prison population or public expenditure but to higher principle and the need to satisfy liberal opinion and make a '*distinctive contribution to the reform of the penal system*' (TNA: CAB 128/39/83).

With the appointment of Roy Jenkins as Home Secretary the public presentation of parole began to shift (TNA: HO 291/1246). Parole was still linked to modernization of the penal system but from January 1966 as the Home Office began to respond to the prison population boom the reforming credentials of the Criminal Justice Bill were strengthened and the parole scheme was integrated into a wider package of reform including the suspended sentence and limitations on the sentencing powers of the magistrates' courts that were orientated towards an overarching policy objective, *'that*

*of keeping out of prison those who need not be there*' (Hansard: HC Deb 12 December 1966 vol 738 c1502). No doubt this reflected the significant increase in the prison population between 1965 and 1967 but so far as parole is concerned this shift was as much a matter of presentation as substance. While recognising the significant decision to establish an independent parole board during the passage of the Criminal Justice Bill, it is also the case that the fundamental administrative planks of the scheme first developed under Soskice remained intact. We may therefore conclude that while matters of principle help to explain the emergence of parole onto the political agenda, more pragmatic concerns came to the fore as the scheme was integrated into a wider package of penal reform and the emphasis shifted under Roy Jenkins to inter-departmental negotiation, Parliamentary scrutiny and the public presentation of the Bill.

#### *4.5.2 A very British compromise: The fusion of parole and remission*

Furthermore, I would argue that much of the discussion of parole serves to divert attention from the continued existence of remission. This was by no means inevitable. If reductions in the prison population were the primary driver of penal reform then the obvious option would have been to extend remission to say 50% of a prison sentence, an option that was considered on a number of separate occasions between 1960 - 1995. Remission was inexpensive to administer, did not require a complex decision-making framework and could be easily amended by statutory instrument. Conversely, if the reform agenda was purely driven by principle it would have been entirely understandable if the Home Office had taken the opportunity to abolish the outmoded system of remission altogether and replace it with a straightforward system of parole as was common in many other western jurisdictions at this time. Indeed, there were some calls for this from commentators like Turner (1966a) and it was known that the judiciary was hostile to any extension of automatic release.

It is surely revealing that the Home Office settled on neither of these options and elected instead for a compromise third way solution. Remission received remarkably little sustained attention within the Home Office, Parliament or the subsequent literature. In part this reflected the fact that few observers (or prisoners) really understood the distinction between parole and remission (see for example Bottomley's unpublished study of the operation of parole at Hull Prison). But it also suggests that

pragmatic considerations like control, discipline and reductions in the prison population were exerting an influence over the policy-agenda, most notably within the Prison Division, but were dealt with away from the spotlight created by the new parole system. By retaining a system of remission and the safety valve offered by the Prison Rules should the prison population reach crisis point the Home Office remained true to an important rule of statecraft; not to surrender powers that may prove difficult to reacquire at a later point in time. So long as remission was supported by Prison Governors (TNA: (TNA: CAB 134/2001), provided an effective tool of prison discipline and quietly expedited the early release of many thousands of prisoners every year there was very little interest in opening this up to critical scrutiny.

As a result, the Home Office and the various divisions with a stake in the parole system either ignored or closed down discussion of the paradoxes that would be unleashed by grafting parole onto the existing system of remission (some discussion can be found in TNA: HO 383/219). Chief amongst them being the anomaly that high risk offenders rejected by the Parole Board would subsequently be released unconditionally without any continuing liability for recall or supervision by a Probation Officer that was considered essential for public protection. This anomaly was subject to particular scrutiny in the House of Lords during the passage of the Bill and laid bare the inability or the unwillingness of the Home Office to resolve this fundamental contradiction,

LORD HAMILTON OF DALZELL

Before we leave this clause, I wonder whether the noble Lord would be good enough to explain the purpose of subsection (5)(b), which I find rather difficult to understand. It says in effect that the licence of an ordinary prisoner will run from the date of his release to the end of two-thirds of the sentence. I understand that it is the intention to release the soonest the man with the best chance of success outside. He will be released after one-third of his sentence, and he will then have supervision and help for the whole of the second third. The man with the least chance of success will be released later and will have less supervision, until the man who is thought to have so little chance of success that he will not be released until the end of the normal two-thirds of his sentence will get no supervision at all.

Is it really the intention that the more help a man needs the less help he will get?

...

LORD STONHAM

It is a difficult point, and, frankly, I do not see at the moment any way of meeting it. But certainly I will look at it, and I will get in touch with the noble Lord between now and Report stage in case he wants to raise the matter again (Hansard: HL Deb 12 June 1976 vol 283 c 761).

It may be that the Home Office were unprepared or did not wish to respond in the House with an appropriate explanation for this administrative lacuna. More likely is that the grafting of parole onto remission was seen as a necessary compromise solution. By retaining remission, the progressive, modern system of parole was unencumbered to focus on the important work of rehabilitation safe in the knowledge that remission would continue to keep the system ticking over in the shadow of the prison gates.

*4.5.3 Law's Empire*

Finally, my analysis suggests that a delicate balance of power between the Home Office, other Whitehall Departments and the various actors with a stake in the criminal justice system had a profound impact upon the trajectory of penal policy at this time. The Home Office undoubtedly enjoyed a privileged position within the criminal justice system but this power was not absolute. The Department had to navigate the various interests and expectations of those actors with a stake in the reform package, it was reliant upon a wide range of delivery agents to administer the parole system and perhaps most importantly of all it needed to maintain the support of those who could frustrate the Departments' policy objectives.

This unequal distribution of power was based upon a complex web of 'soft' influence, inter-personal relationships and formal institutional structures. Above all else my research suggests that the final shape of the parole scheme was defined by the relationship between the Home Office and the judiciary. This dynamic had both political and ideational dimensions. From an early stage in the policy-making process it was recognised that a vote of no confidence from the senior judiciary would spell disaster for the new fledgling parole system and more likely than not lead to a change in sentence practice designed to frustrate the goals of the parole scheme. But just as importantly there is good evidence to suggest that civil servants and other significant decision-makers, well versed in the work of A.V. Dicey and the constitutional

separation of powers, had also internalised the idea of judicial independence and instinctively deferred to the courts across a wide spectrum of sentencing issues. This dynamic emerges strongly from the archival record (TNA: CAB 134/2001; HO 291/727; see also Hansard: HC Deb 12 December 1966 vol 738 c70). Speaking to *The Observer* on 4<sup>th</sup> December 1966 Louis Blom-Cooper, then a member of the Home Secretary's Advisory Council on the Penal System offered his assessment of the proposed parole scheme, an analysis that is as prescient today as it was then,

The proposed release system also suffers from two major defects:

It places far too much trust in the co-operation of the courts. If judges, expressing what they feel to be a public reaction to crime, simply step up the length of sentences, the whole project of early release will be jeopardised in one blow.

Ever since the White Paper announced these proposals there have been signs that some judges - particularly at Quarter Sessions - have reacted in precisely this way. Thus the 'parole' system is at the mercy of judicial sentencing - is not a happy augury.

Secondly, the decision whether a prisoner has responded to treatment will be made by Home Office officials, based on prison governor's reports (and in turn, upon the say-so of prison officers). Nothing could be more calculated to upset the therapeutic relationship of prison officers and prisoner than for the former to have a conclusive say in the latter's liberty (Churchill/HLSM 2/17/22).

Blom-Cooper's diagnosis was noted by Conservative Home Office and reveals just how important a policy consideration the anticipated response of the judiciary was. Put simply, the delicate balance of institutional power closed down many possible avenues of reform while favouring others. It meant that a scheme based upon the automatic release of prisoners, such as an expanded system of remission, was considered an unacceptable extension of executive action and interference with the sentencing discretion of the courts. It ensured that the final system was premised upon a complex process of discretionary release which, given the scale of the prison population in England and Wales, required a two-stage decision-making process incorporating an initial sift by prison based Local Review Committees (LRCs) and a more robust decision by the central Parole Board. Finally, in echoes of the Victorian marks system, it meant that parole was positioned strongly as a privilege and not a

right, despite the well-known difficulties the authorities had in administering a discretionary system of incentives and punishment.

Each of these compromises would become a source of ongoing conflict and frustration for the Home Office, the judiciary and the various practitioners charged with the day-to-day delivery of the parole system. But in an important sense they were necessary trade-offs within a liberal democratic system of government where more was at stake than just the administrative expediency of early release. As Loughlin (2003) has noted, the separation of powers, rule of law and political pre-commitment are inherently bound up with the legitimacy and ongoing governability of the liberal democratic state. In this sense, compromises in the delivery of early release were generated by the rough edges of a liberal democratic governmentality and the benefits the executive, legislature and judiciary accrued from such a relationship.

## **5. The politics of inertia: The extension of early release to short sentence offenders**

### **5.1 Introduction**

This chapter is the second of three empirical case studies that explore the public administration of early release policy in England and Wales, 1960 - 1995. Here I focus on the period 1975-1982 and the steps taken to extend a system of early release to short-sentence offenders.

In the previous chapter my analysis of the evidence led me to argue that the modern system of parole introduced by the *Criminal Justice Act 1967* gave administrative expression to prevailing support for indeterminate sentencing and the personalisation of punishment to the unique circumstances of the offender. Pragmatic considerations like reducing an expensive prison population did play a role in the decision to graft parole onto the existing system of remission but this was often balanced against the need to maintain the support of the judiciary and establish a robust governance architecture designed to provide the Home Office with a defence of ‘plausible deniability’ should individual parole decisions attract negative publicity. In this case study we pick up the story in the early 1970s as the Home Office began to explore options for extending the scale, scope and reach of the parole system. While Chapter Four focused on the steps taken to justify, and in turn administer an effective system of early release, here I focus on a period of policy inertia, failure and the various ways in which institutional pressures fractured and impeded the development of a consistent strategic approach to the administration of early release policy and practice.

Following a similar format, Chapter Five will be split into three sections. I begin by reflecting on the operational context within which the evolution of early release policy and practice must be located. I then explore the steps taken to extend the reach of the parole system as part of the “Jenkins initiative” before setting out a detailed history of the ever more complex policy debates that surrounded the efforts to extend early release to short sentence offenders. Here I will draw upon previously unreleased records from the Home Office that reveal just how conflicted policy-makers were in their efforts to steward a criminal justice system increasingly outside of their control.

Finally, I conclude this case study by reflecting upon what these events reveal about the changing aims and techniques of criminal justice at this time.

## 5.2 The Context

In the first section of this chapter I want to set the scene for the events that follow and locate the policy debates that surrounded early release for short sentence offenders within a wider socio-economic context. This is not to suggest a simple cause and effect relationship between context and political outcomes. On the contrary, the picture offered here is of a dynamic and fast moving chain of events as policy-makers struggled to keep the criminal justice system functioning within circumstances that were not always of their own choosing.

With that in mind, I explore these issues as policy-makers would have seen them through the lens of the Public Expenditure Survey, an annual series of decisions taken between the Chief Secretary to the Treasury and the principal secretaries of state to *'fix the amount of money made available for each programme and sub-programme for each of the following three financial years'* (Faulkner 1990 para 8). In particular I focus on one aspect of these delicate negotiations, namely, the Treasury's decision in 1973 to disinvest from a significant prison building programme once it became clear that the Home Office prison forecasts had significantly over-estimated the likely growth in the prison population. A decision, I will argue, that had a defining impact upon the development of criminal justice policy in the 1970s and beyond.

As with all narrative histories there is a danger that the author suggests coherence where there was none. This is certainly not my intention, at its heart this review of the broader socio-economic context is about the messy and contingent decisions taken by policy-makers seeking to steer the criminal justice through a succession of 'lesser of two evil' scenarios.

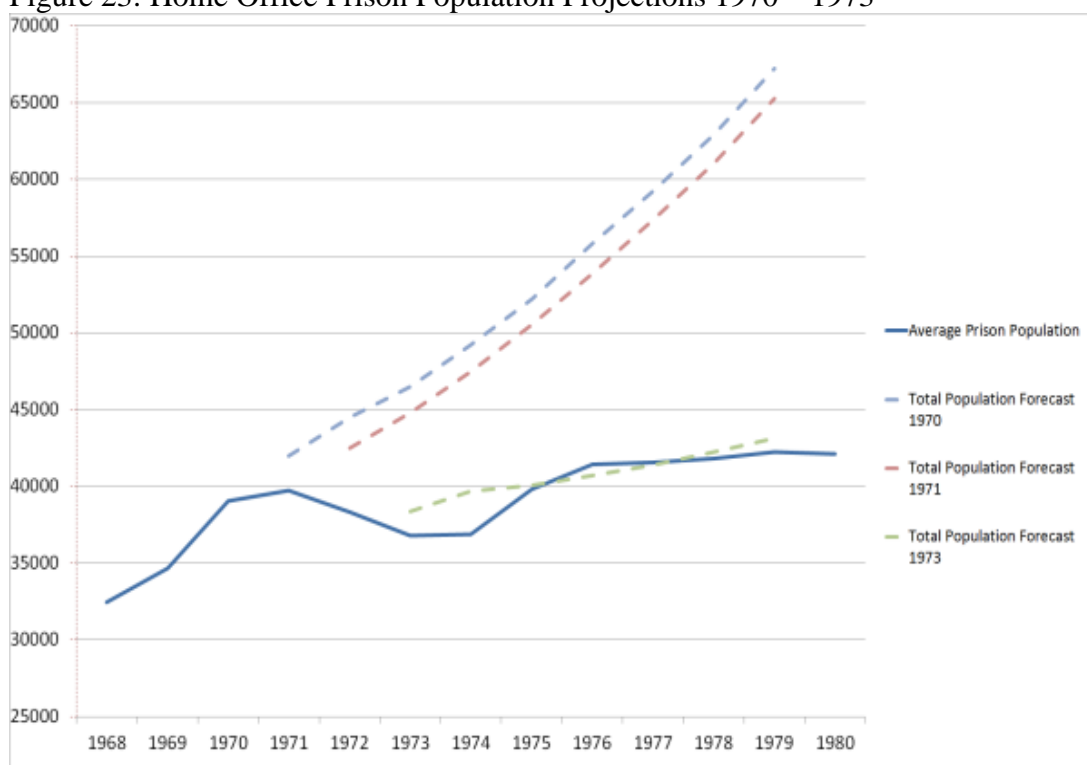
### 5.2.1 *The long shadow of disinvestment*

On the 26 November 1971 the Director General of the Prison Service William Robert Cox wrote to the Secretary of State Reginald Maudling, the Permanent Secretary Sir Philip Allen and Minister of State Mark Carlisle (TNA: PCOM 14/18). A serious problem was developing within the Home Office. On the basis of calculations from



Statistical Department, the Home Office had released a series of troubling prison population forecasts suggesting the average prison population would rise to over 60,000 in England and Wales by 1980 (see TNA: PCOM 14/18, HO 291/1509). The forecasts, set out at Figure 23 below, were significant for a number of reasons. Putting to one side the implications of such a steep rise in the prison population for Home Office planners the figures had been cited by the Home Secretary in Parliament and perhaps of most significance they were relied upon during the Departments' Public Expenditure Survey (PES) negotiations with the Treasury. Projections that had helped the Home Office to secure approximately £1.5bn (2012 prices) in additional capital expenditure to undertake a prison building programme intended to add 3,000 places a year and bring the CNA of the prison estate up to 57,500 by 1979 (TNA: PCOM 14/18).

Figure 23: Home Office Prison Population Projections 1970 – 1973



Source: TNA: PCOM 14/18

The credibility of the forecast data was now being seriously questioned. The figures bore little resemblance to the Prison Departments annual outturn data and there were ominous signs that this variance had affected the Treasury's '*attitude to our proposals for new schemes, in particular their willingness to give early approval to standard design briefs for new establishments*' (TNA: PCOM 14/18). Mr Cox invited the Home

Secretary and the Permanent Secretary, who as accounting officer was ultimately responsible to Parliament for Departmental expenditure, to reflect upon the presentational implications of rowing back on previous statements. While the figures were concerning, Mr Cox advised against a knee-jerk response given the long-term certainty of rising crime rates,

It is difficult for us to put forward these estimates with complete confidence in the face of the stability of the figures over the last 15 months, and the Treasury may well challenge them. If the plateau continues into 1972 we may have to conclude that there has been some basic change that we have not so far identified. But it is wrong to make too much of short term fluctuations in considering long term trends. Unless and until there is much better evidence of a slowing down in the growth of criminality (which is the most important single factor) we think it right to assume that the prison population will continue to increase as it has done with some interruptions since the end of the war (TNA: PCOM 14/18).

As a result of this exchange the Home Office slightly downgraded their population forecasts and agreed to look again at the statistical assumptions underlying their prison population projects. But so internalised was the assumption of rising crime rates by this time there seemed little reason to deviate too radically from the statistical forecasts when it was anticipated that recorded crime rates would continue to rise in the medium to long-term.

### *5.2.2 Sentencing*

This ‘wait and see’ approach bought the Home Office some time but over the course of the following year it became increasingly apparent that the Home Office methodology was flawed, a problem compounded by an unexpected reduction in the use of immediate custody by the courts (TNA: PCOM 14/18).

The early 1970s are interesting because they challenge the assumption of a simple, mechanistic relationship between rising crime rates, sentencing practice and the prison population. The archival record reveals that despite rising crime rates fewer defendants standing trial for indictable offences were being found guilty by the courts (TNA: PCOM 14/18; Home Office 1973b p.2). It is also clear that the use of immediate custody by Magistrates and the Crown Courts had dropped by an order of magnitude entirely unpredicted by Home Office statisticians (Home Office 1973b p.2). As Figure

3 reveals, approximately 60,000 offenders were sentenced to immediate custody in 1970. By 1974 this had dropped to little over 50,000 a fall of 17% in only 4 years. Allied to this, average sentence lengths remained fairly stable and fluctuated around 12 to 13 months in the early 1970s before dropping year on year to little over 10 months in 1982 (Home Office 1975a; 1980a; 1985a), trends that helped drive the prison population down from a post-war high of 39,708 in 1970 to 36,774 by 1973 (see Figure 4).

In 1973 a revised methodology better attuned to demographic change and the differential treatment of various offence classes revealed the scale of the problem (TNA: HO 291/1509). As Figure 23 indicates the predicted prison population in 1979 was revised down from the 1970 figure of 67,200 to the 1973 figure of 43,120. On the 26th June 1973 the new Permanent Secretary Sir Arthur Peterson wrote to the Home Secretary Robert Carr confirming that the forecasts relied upon in the annual PES negotiations grossly overestimated the likely growth in the prison population (TNA: HO 291/1509). While noting the positive implications of current sentencing practice (a position relied upon heavily in external communications) it was clear that, *'the change in the projections will however put us in a difficult position with the Treasury in asking for resources for the building programme and for the prison service generally'* (TNA: HO 291/1509). Carr's response gives some sense of what was at stake,

I am nervous of using these new forecasts as a basis for discussion with the Treasury until we have had the chance to consider what they mean in terms of future policy. Unless we have a very clear idea of where we are going on penal policy the Treasury will simply leap on these figures in order to cut our expenditure. Once this happened it could take years to re-establish a proper capital programme again. We must have new prisons, even if the number of prisoners falls and we must also have some establishments of a different kind - e.g. hostels, etc. (TNA: HO 291/1509).

The Home Secretary was right to be cautious. The downward trend in sentencing practice did indeed prove short-lived and the use of immediate custody rebounded strongly from 1974 onwards. In 1973 a little over 30,000 persons aged 17 and over were sentenced to immediate custody, a figure that had risen to 55,000 by 1983 (Home Office 1975a; 1985a), an upward trend that meant that by 1985 England and Wales

were sentencing more young males to immediate custody and for longer periods in custody than almost every other country in Western Europe. As it transpired the revised 1973 projections proved a fairly reliable guide to the future growth of the prison population but by this stage the damage was done. On the 15 August 1973 Home Office officials wrote to the Treasury confirming that, *'it no longer seems likely that the prison population will increase over the next 5 years at anything like the rate we had previously feared would be the case'* (TNA: HO 291/150).

### 5.2.3 Financial considerations

A meeting between the Home Secretary and the Chief Secretary to the Treasury, Patrick Jenkin was hastily arranged for the 8<sup>th</sup> October 1973. There was only one item on the agenda; reductions in Home Office expenditure (TNA: HO 291/1509; T 353/104).

These revelations were hugely embarrassing for the Home Office but these statistical errors may not have proved decisive were it not for the structural weaknesses of the British economy in the early 1970s. Timing, it seems, really is everything. But for the wider global economic insecurity or even the short-lived change in sentencing practice the trajectory of criminal justice policy may have been very different. Instead these issues came to light at a time of considerable economic turbulence in England and Wales. As Sandbrook (2010) has recently noted the slow breakdown of the Bretton-Woods settlement, compounded by geo-political tensions and the 1973 'Oil Crisis' created a global economic shock that hit Britain particularly hard (2010 pp.10-12). The 1970s were a time of unprecedented cultural and social flux but economically it was also *'something of a reckoning for a country and a consensus that had been living on borrowed time'* (2010 p.12). Britain experienced power cuts, a three-day week and, on five separate occasions between 1970 and 1974, the Heath government was driven to declare a state of emergency. Inflation was once again rising to dangerous levels and in 1972 the Treasury introduced a suite of deflationary measures to control government expenditure (Sandbrook 2010).

As we saw earlier the criminal justice system was particularly vulnerable to short-term disinvestment and long-term underinvestment. The democratic dividend of investing in the prison estate had always been marginal and proved to be a low priority as

difficult decisions were made on how best to prioritise finite public funding between the competing interests of health, education, welfare and defence. The Treasury was therefore predisposed to seek significant savings from the Home Office and as I noted in Chapter Four the axe tended to fall on capital expenditure during periods of retrenchment (Moriarty 1977). Within this context the revised figures were an open invitation for the Treasury to renegotiate the PES settlement and the Home Secretary was advised by his officials that, *'the Chief Secretary will have been briefed to seek large reductions in the prison building programme as a consequence of the new and much lower population forecasts that have been accepted as a basis for planning since the Official 1973 PES Report was submitted'* (TNA: HO 291/1509). In response the Home Secretary was encouraged to adopt a strategy of damage limitation drawing attention to the work that has already been done, the high lead in costs associated with pre-construction planning and the cost effectiveness of a modest prison building programme with a stronger focus on refurbishment and renewal of Britain's ageing prison estate (TNA: HO 291/1509).

As anticipated the Chief Secretary began this high stakes inter-departmental meeting by confirming *'he was looking for reductions in forward estimates of expenditure in order to reconstitute the contingency reserve. In the Home Office expenditure there were two areas of potential reduction, namely police manpower and prison buildings'* (TNA: T 353/104). Given the political sensitivity of cuts to police manpower the Chief Secretary indicated he was looking for reductions to the prison building programme in the region of £0.5bn (2012 prices) over the next 3 years. In response the Home Secretary, *'stressed his belief that it would be disastrous so to cut prison building as to appear to destroy the prison building programme. He welcomed a reduction in the prison population, which he regarded as in part at least the result of a policy of placing greater emphasis on non-custodial treatment, but there was a great need to take advantage of the situation to reduce overcrowding and replace antiquated prisons'* (TNA: T 353/104). As the meeting progressed it became clear that the savings the Home Office were prepared to countenance were far lower than those the Treasury were now seeking and the meeting ended in stalemate. It was therefore agreed that further discussion at Ministerial level should be deferred while officials worked through the figures and calculated the likely savings at various levels of capital expenditure (TNA: T 353/104).

#### *5.2.4 The prison population*

There was, however a mood of inevitability about these discussions and in late 1973 the Treasury abandoned the prison building programme once it became clear that the prison population forecasts were unduly pessimistic (see HMSO 1976c paras.65-72). The impact of these negotiations cannot be overstated. The prison building programme was halved from a projected 17,000 additional places over a 5-year period to approximately 8,700 over the same period, a move that saw flagship projects mothballed in Lincolnshire, Surrey, East and West Riding, Berkshire, Kent and Cambridgeshire (TNA: HO 291/1509). As Carr had feared it would take years for this level of investment to be re-established and it was not until after the 1987 General Election that a prison building programme of comparable ambition was finally implemented.

This disinvestment arguably cast a long shadow over penal policy in the 1970s. The Home Office was heavily criticised by the Public Accounts Committee (PAC) in their 1975-76 Report (HMSO 1976c paras 65-72) while internally policy-makers were forced to radically alter their plans for administration of the penal system (see also National Audit Office 1985 paras 3-6). Moreover, when the prison population did begin to rise the prison estate was ill equipped to cater for the increased through flow of prisoners into the prison estate. Following rapid rises in the prison population between 1974 and 1976, the prison population rose steadily from 39,820 in 1975 to 46,000 in 1984/85, a modest rise when placed in a longer historical perspective, but it still represented a 15% increase in little under a decade, placing further pressure upon a penal estate that was already struggling (see Figure 4). Underlying this general trend were some interesting seasonal variations. In 1980 the prison population fell to a low of 35,825 following industrial action by the Prison Officers Association (POA), a level that had not been seen on average in England and Wales since 1968. As industrial action came to an end the prison population began to rebound and fluctuated around the 43,000 mark for the first half of the 1980s before accelerating after 1985 as the Thatcher and Major governments began to embrace a more muscular form of penal populism (Bottoms 1995; Downes and Morgan 2007).

These years on year increases in the average prison population placed huge pressure on a prison estate that had seen little real terms growth as a result of the challenging PES negotiations outline above (see Figure 4). As the gap to the CNA grew, the prison service was forced to rely upon cell sharing to make up the shortfall. Prison overcrowding hit a peak in 1980 with 17,787 prisoners accommodated two or three to a cell, leading to serious industrial unrest, the publication of the 'May Report' (Home Office 1979b) and the POA strike of 1980. Throughout the 1980s more than 15,000 prisoners were housed two or three to a cell, a practice that only began to fall into disuse in the 1990s. It should be noted that prison authorities did reduce the number of prisoners held three to a cell from 9,288 in 1971 to 4128 in 1984/85 but this was largely attributable to the refurbishment of larger Victorian prison cells and provided a small modicum of improvement within a system that was still overly familiar with cell sharing and prison overcrowding. The situation in local prisons was particularly acute and continued to deteriorate well into the 1980s as the remand population doubled from 5,100 in 1976 to 10,081 in 1986. In 1981 the newly established Chief Inspector of Prisons for England and Wales spoke candidly about the unfolding humanitarian crisis within local prisons,

Our examination of six locals, which held 5,674 prisoners in accommodation intended for 3,548, brought home with great force the appalling conditions in which the inmates of these prisons are required to live, and the inadequacy of even the most basic facilities to cope with so many people. We are not just concerned at seeing two or three prisoners crammed into one cell, although that is unhealthy enough, but also with the dilution of the regime, the rapidly diminishing possibility of access to recreational, educational and other facilities and the inevitable preoccupation with the basic routines of bathing, feeding, exercise and slopping out, all because of the weight of numbers (HM Inspector of Prisons 1982 p.11).

### **5.3 What to do About Short Sentence Prisoners?**

As the prison population began to rise in 1974 the Home Office, by its own admission, became 'preoccupied' with measures intended to discourage the use of immediate custody, shorten prison sentences and extend the use of the parole system (see Home Office 1976c p.6). This gathered pace when Roy Jenkins returned to the Home Office in March 1974 and immediately vowed to take decisive steps to reduce prison overcrowding (The Guardian, 22 May 1974). This was easier said than done. Years of

economic stagnation starting with the 1973 Oil Crisis meant that little additional investment came on stream in the 1970s. The Home Office could no longer build their way out of trouble and the squeeze on Departmental budgets had prevented the Home Office from recruiting the additional probation officers needed to oversee greater use of non-custodial sentences like probation (TNA: HO 495/18). The Home Office therefore turned to early release in the hope of affecting substantive reductions in the prison population at relatively low cost.

### 5.3.1 The 'Jenkins initiative'

By 1975 parole had been in operation for almost a decade and during that time the Parole Board had demonstrated that it was possible to release prisoners on licence without seriously jeopardising public safety. The difficulty was that growing confidence in the system was not translating into a high volume of parole releases. The Parole Board had proved to be an extremely conservative body and parole remained the exception rather than the rule for most prisoners (Maguire 1992; West 1972). As detailed in Figure 9 the number of prisoners released on licence by the Parole Board remained remarkably stable in the first ten years of operation; in 1970 a total of 2,210 prisoners were released on licence by the Parole Board, a figure that increased gradually to 3,106 in 1975. Similarly, the number of releases made by Local Review Committees (LRCs) under the delegated powers contained in s35 of the Criminal Justice Act 1972 barely increased from 813 in 1973 to 923 in 1975.

As the parole system became a more familiar feature of the criminal justice landscape so too did the calls for expansion and progressive reform. As far back as October 1971 the Conservative Party had argued in their pamphlet *'Crisis in Crime and Punishment'* that, *'the parole system, due largely to the fine work of Lord Hunt and his colleagues on the Parole Board, has proved an outstanding success and there are good reasons for its extension'* (1971 p.12). A special issue of the British Journal of Criminology in January 1973 was devoted to the policy and practice of parole featuring contributions from Hawkins (1973) advocating an alternative parole procedure, Bottomley's (1973) study of parole decision-making in a long-term closed prison and Nuttall's (1973) analysis of Parole Board decision-making. This was followed in 1977 with a NACRO publication *'Parole: The Case for Change'* (Cavadino *et al* 1977). The pamphlet drew attention to the procedural failings of the parole system and called for a revised system



of early release that placed parole on a quasi-judicial footing with automatic release for all short term prisoners,

For all prisoners serving sentences of up to and including three (or four) years, release on parole should be automatic after, say, one-third of the sentence (subject to any extra time imposed for offences against prison discipline) with supervision up to the end of the sentence. For those sentenced to over three (or four) years imprisonment, the courts should have at their discretion the power to order that the prisoner should not be released before the end of his sentence (minus a period of, say, one-sixth remission) without the approval of the Parole Board (Cavadino *et al* 1977 p.125).

Similar views were gaining traction within the Home Office. As a result of detailed archival research it is now possible to trace this process of policy formation with greater precision than ever before (FOI: HO 291/2138; TNA: HO 495/18, HO 495/4). On the 15th May 1975, the Head of the Crime Policy Planning Unit Michael Moriarty wrote to Neil Cairncross, Deputy Under-Secretary of State and Chair of the Criminal Policy Planning Committee providing background information on the parole system for an upcoming strategy meeting (TRA: HO 495/25). This briefing note is set out in full at Appendix 6. Moriarty expressed his view that, *'within the framework of the present scheme there may be some room for manoeuvre, with the object of making greater use of parole'*, a conclusion that led him to encourage senior Home Office decision-makers to consider the merits of relaxing the risk appetite of the Parole Board and extend parole eligibility to new categories of prisoner (TRA: HO 495/25). Revealingly, Moriarty paid due regard to the procedural limitations of the parole system and the academic literature, most notably the concerns raised by Dr Roger Hood in his 1974 NACRO address *'Tolerance and the Tariff'* (Hood 1974a) and further developed in a Cambridge University Cropwood Roundtable paper entitled *'Some Fundamental Dilemmas of the English Parole System and a Suggestion for Reform'* (Hood 1974b p.1). But there is a strong sense that while the Home Office were cognisant of these criticisms they were a secondary concern when compared with the primary challenge of relieving pressure on the penal estate (TRA: HO 495/25).

Cairncross chaired a special meeting of the Criminal Policy Planning Committee on Thursday 15 May 1975 and this was followed by a Ministerial Presentation to Lord Harris, then Minister of State at the Home Office with responsibility for prisons on the

2<sup>nd</sup> July 1975 (TNA: HO 495/25). On Friday 4th July the Home Secretary Roy Jenkins convened a meeting with Lord Harris, the Permanent Secretary Sir Arthur Peterson and senior ranking Home Office officials to discuss ‘penal policy’ in greater detail (TNA: HO 303/98). Opening the meeting the Home Secretary set out his stall and *‘stressed that the meeting should concentrate on measures which might be expected to provide some relief to the prison population’* and went on to suggest that, *‘the main emphasis should be on measures concerning bail and parole’* (TNA: HO 303/98). Following a wide-ranging discussion of parole procedure, governance and the desirability of providing ‘reject reasons’ to unsuccessful parole applicants the Home Secretary directed his officials to work up detailed propositions for the expansion of the parole system. This was to include measures to extend parole to prisoners previously deemed too risky and revised guidance creating a presumption in favour of parole at the halfway point of a sentence unless there were exceptional reasons for refusal. Interestingly, the records also reveal that senior Home Office decision-makers doubted the Parole Board’s ability to drive these changes forward by their own volition. The Permanent Secretary drew attention to the rather conservative nature of the Parole Board; particularly the Chairman Sir Louis Petch, a former Second Permanent Secretary at HM Treasury, and suggested that the Home Office should take a lead on this issue with the upcoming NACRO Annual Conference identified as an opportune moment to make a public statement of intent (TNA: HO 303/98).

Thereafter, events moved quickly as the Home Office sought to negotiate the dense web of criminal justice stakeholders and secure buy-in to the government’s reform proposals. The Home Secretary met with the Lord Chief Justice on 15 July 1975 in order to brief Lord Widgery on the growing pressure on the penal system and secure his approval for a series of measures intended to stimulate the increased use of parole (TRA: HO 495/25). The records suggest that the Lord Chief Justice expressed no objection to the measures but took exception to any suggestion that the sentences of the court were too long (TRA: HO 495/25). The very next day the Home Secretary met the Chairman and Vice-Chairman of the Parole Board to discuss his plans for the parole system. While the Home Secretary acknowledged the Chairman’s concern about the risks of a higher parole rate, the Home Secretary was steadfast in his belief that the case for change was now irresistible,

The Home Secretary said that the major problem which he faced at the present time is that of the recent upsurge in the prison population. The total prison population on 30th June was 40,577 which exceeded the previous highest population in June 1971. Even outside the present time of financial stringency it would not be possible to ease the impact of these numbers quickly; the present situation made it almost impossible to do so. The difference, however, between a tolerable and an intolerable situation in prison was a margin of a few thousand prisoners, and any improvements that could be made would be of great importance, parole, he said had worked well and he hoped that the ideas which he wished to suggest in the parole area would be seriously considered by the Board (FOI: BV3/47).

Following this meeting Sir Arthur Peterson wrote formally to Sir Louis Petch on the 24 July 1975 summarising the actions agreed with the Home Secretary and confirming his Departments' intention to expand the operation of the parole system (FOI: BV3/47). The Parole Board was directed to take all necessary steps to grant parole earlier to prisoners who already received it, extend parole eligibility to categories of prisoner historically denied release on licence and make greater use of the s35 arrangements in the *Criminal Justice Act 1972* to delegate decision making to the prison based LRCs. In his reply on the 30 July 1975 Sir Louis Petch confirmed that subject to a few drafting amendments the General Purpose Committee of the Parole Board were agreeable to the Home Secretary's reform package (FOI: BV3/47).

This exchange of correspondence bought to a close a period of intensive negotiation between the various actors with an interest in early release. On the 31<sup>st</sup> July 1975 the Home Secretary gave a highly influential speech to the NACRO Annual Conference stating that, '*the prison population now stands at over 40,500... It has never been higher. If it should rise to, say, 42,000 conditions in the system would approach the intolerable and drastic action to relieve the position will be inescapable. We are perilously close to that position now*' (as cited in Zander 1988 p.285). Urgent action was needed and the Home Office was now in a position to act. In response to an 'inspired parliamentary question<sup>7</sup>' from Ernest Perry MP a statement was made in Parliament on 4 August confirming the Home Secretary's intention to make greater use of parole,

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<sup>7</sup> A pre-agreed question asked by an MP at the behest of the government

It is now over seven years since the principles of parole were explained in Parliament during Debates on what became the Criminal Justice Act 1967. The main criteria then laid down, which have been amplified in the independent Parole Board's annual reports have stood up well, and many thousands of prisoners have been parolees without appreciable increase in risk to the public.

I am fully persuaded, however, that the use of parole can properly and safely be extended. I have therefore consulted the Parole Board and agreed with them new guidelines within which these basic principles can be interpreted to achieve this end without loss of public confidence in the scheme.

There are two ways in which progress can be made; one is the granting of parole earlier to the kind of prisoners who already receive it. The other is to grant parole to more of the 60% of prisoners who are eligible but who do not receive it' (Hansard HC Deb 04 August 1975 vol 897 c25W).

Following this statement, the Parole Board issued new guidance to LRCs and began to operationalise its new policy directions. The legacy of the Jenkins initiative is rather mixed. On the one hand the proposals were received to near universal support in the media (see Figure 24) and resulted in a modest improvement in the parole rate. In 1975 a total of 9,455 determinate sentence prisoners were considered for parole review, of which 4,029 were released by either the LRCs or Parole Board. This represented a release rate of approximately 43% (HMSO 1975b). By 1977 the release rate had crept up to 50.4% with 1,200 additional prisoners released on licence annually, a figure that remained fairly stable until 1983 and the extension of parole to short sentence offenders (HMSO 1977). But it must also be noted that the Jenkins initiative also represented the, '*first significant attempt by a Minister to influence or control the overall policy of the Board*' (Maguire 1992 p.183). While such measures were warmly welcomed at the time, the Jenkins initiative established a 'policy-setting precedent' that had the unintended effect of normalising Home Office intervention in the work of the Parole Board, a precedent that was relied upon by Leon Brittan a number of years later with an altogether more negative reception (Maguire 1992 p.183).

Ultimately, the gradual relaxation of parole delivered the marginal gains Roy Jenkins was seeking and helped to ward off the worst excesses of prison overcrowding. But it was very much a temporary fix that paled in comparison to the projected rises in the prison population over the coming years. Throughout these deliberations the elephant

in the room had been short sentence offenders. The parole system introduced by the 1967 Act was explicitly designed to deal with medium to long-term offenders and eligibility had been limited to those serving sentences of 18 months or longer for the reasons set out in the conclusion to Chapter Four. In practice this meant that the vast majority of prisoners fell outside of the scope of the parole system. The average sentence length in 1977 was 12.1 months with 77% of the adult male population serving sentences of up to and including 18 months (Home Office 1978a). When taken in conjunction with growing penological support for shorter sentencing the Home Office was under pressure to think about how early release could be extended to short term offenders.

Figure 24: Media Reception to the Extension of Parole



Source: Daily Mail 5 August 1975 and Daily Express 5 August 1975

Indeed, it appears that all options were on the table. In November 1975 Merlyn Rees came close to approving a scheme of 50% remission and it was reported in the media that the Home Office had given serious thought to a prison amnesty as part of the Queen's Silver Jubilee celebrations scheduled for 1977 (Daily Mail 16 November 1976; TNA: HO 495/8). There is also evidence to suggest that the Home Office was

looking beyond England and Wales for inspiration. On 31 March 1976 Minister of State Lord Harris and Parliamentary under Secretary Dr Edith Summerskill met with senior officials to discuss '*Parole and Probation Matters*' (TNA: HO 330/335). Dr Summerskill noted that that, '*the Human Rights Sub-Committee of the Parliamentary Labour Party were likely to propose that parole should be abolished altogether, and be replaced by straight 50% remission of all sentences, as was done in Northern Ireland*' (TNA: HO 330/335), a view rejected by Lord Harris who felt such a scheme would be unacceptable to judicial and public opinion in England and Wales.

In the following section I explore how the complex policy debates that surrounded the extension of early release to short sentence offenders unfolded between 1977 - 1983. I start by exploring the emergence of the partly suspended sentence before turning to the various options for reform under consideration in the Home Office after 1977. Finally, I examine the recommendations of the Home Office '*Review of Parole in England and Wales*' (Home Office 1981d) and the political fallout from the 1982 Conservative Party Conference and judicial opposition to the government's parole reforms.

### *5.3.2 The emergence of partly suspended sentences*

Not all policy change emerges within Whitehall or Westminster. So it was with the sudden and rather unexpected arrival of the partly suspended sentence. While the Home Office was busy exploring forms of executive release there is some evidence to suggest that the senior judiciary were driving a quiet revolution in sentencing practice and a new jurisprudence premised upon short sentences.

As the rehabilitative ideal began to unravel and successive research findings cast doubt upon the value of borstal training (Mannheim and Wilkins 1955) and probation (Folkard *et al* 1976) many criminal justice practitioners staged a partial retreat from the reformatory potential of prison to a less demanding faith in individual deterrence, the 'clang of the prison gates' and a more modest rehabilitative belief premised upon the opportunities to work constructively with prisoners during the first few months of their sentence. On the 15 October 1976 the Lord Chancellor Lord Elwyn-Jones delivered an impassioned speech at the Annual General Meeting of the Magistrates' Association calling upon the magistracy to make greater use of shorter sentences

(TRA: HO 495/4). The Lord Chancellor argued that the vast expense of incarceration, coupled with the bleak conditions within many local prisons prevented any meaningful reformatory activity with prisoners. In the absence of any generalised rehabilitative effect it was the Lord Chancellor's belief that the first few weeks of a custodial sentence were most likely to influence an individual's propensity to re-offend and a short sentence was therefore more than sufficient to satisfy the deterrent and reformatory effects of the criminal law,

Imprisonment is a costly way of dealing with offenders. It now costs well over £3,000 to keep one man in prison for twelve months. At present we are clearly in a situation where we cannot as a nation find more money and more staff for more prisoners, or even for better prisons. In present circumstances our only hope of improvements in the prisons is by getting the population down so there is less over-crowding and less pressure on staff. A more sparing use of imprisonment, through shorter sentences, could be one way of achieving this (TRA: HO 495/4).

In many ways this was an inversion of the 'recognisable peak' argument that had proved so influential in the parole deliberations of the Longford Committee (of which Lord Elwyn-Jones was a member) and the Adult Offender White Paper discussed in Chapter Four. In both instances faith in the benefits of prison remained but where many policy-makers in the 1960s believed this effect was increased by sustained exposure to prison (up to a recognisable peak) their successors argued for the opposite. The benefits from custody were most apparent in the first few weeks of a prison sentence and reduced thereafter as offenders became institutionalised and exposed to the detrimental effects of prolonged incarceration. This mind-set quickly began to influence sentencing practice. As Justice May would subsequently reflect in his address to the 8<sup>th</sup> Annual Overnight Conference of the Parole Board at Cumberland Lodge on 22 September 1977, *'the courts are increasingly taking the view that the maximum impact that prison has in that type of offender who has no record of violence occurs within the first six months of the sentence... As a consequence of this view sentences that a year ago would have been in the 12 to 18 month range are now in the range of from six to twelve months'* (FOI: BV3/52).

In this context it required only a small leap of imagination for policy-makers to see a short sentence of imprisonment as a credible alternative to both immediate custody

and the increasingly discredited fully suspended sentence (Bottoms 1979, 1980; Thomas 1982). Writing in *The Magistrate*, Professor Antony Allott (1976) offered one of the first cogent proposals for a framework of partial suspension. Reflecting on Lord Elwyn-Jones' call for shorter prison sentences Allott advanced a '*radical scheme for the partial implementation of the Lord Chancellor's suggestion*' based upon the requirement, '*that a sentence will not be suspended, but the offender will be required to serve immediately fourteen days of the said term or terms*' (1977 p.27). This idea was further refined and given the official stamp of approval by the Advisory Council on the Penal System (ACPS) in their 1977 Report '*Sentences of Imprisonment*' (1978 pp.118-123). The ACPS indicated that consideration had been given to partly suspended sentences as early as 1976 but the Council had not recommended legislation due to uncertainty over how it would impact upon the prison population (1978 p.119). The Report was critical of individual deterrence as a justification for short-sentences and expressed reservations about the Courts seeking to use the power of partial suspension as an alternative to non-custodial sentences. However, the Council did conclude that if used in the right circumstances the penological foundations of the partly suspended sentence were sound and may prove a useful addition to the sentencing tool-kit of the courts,

To sum up, we view the partially suspended sentence as a legitimate means of exploiting one of the few reliable pieces of criminological knowledge - that many offenders sent to prison for the first time do not subsequently reoffend. We see it not as a means of administering a "short, sharp shock", nor as a substitute for a wholly suspended sentence, but as especially applicable to serious first offenders or first-time prisoners who are bound to have to serve some time in prison, but who may well be effectively deterred by eventually serving only a small part of even the minimum sentence appropriate to the offence. This, in our view, must be its principal role (1978 p.123).

As is so often the case the proceedings of an advisory body were overtaken by political events. On the 28 June 1977 a backbench Conservative MP Patrick Mayhew (a practising barrister and future Attorney General) moved an amendment to the Criminal Law Bill with the aim of empowering the Courts to partly suspend a prison sentence (Hansard: Standing Committee E, 28 June 1977 c655). Mayhew's rationale for the new sentencing power was revealing. Gone was the post-war faith in indeterminate sentences and a 'recognisable peak' in a prisoners' rehabilitation, replaced instead



with a stripped back belief in the individual deterrent effect of prison as a ‘short, sharp shock’ that had been explicitly rejected by the Advisory Council on the Penal System,

... it is the first few weeks that really bite and that really have a deterrent effect. If the memory of those first weeks is not dulled by acclimatising to life in prison – one does acclimatise to it fairly quickly – it will probably live forever and the prison sentence will have achieved for the offender its maximum deterrent effect, which is what we are hoping for (Hansard: Standing Committee E, 28 June 1977 c656).

The Government indicated in Commons Committee that it was sympathetic in principle to this argument and Home Office Minister of State Brynmor John MP promised to bring forward more detailed proposals for the introduction of a partly suspended sentence on Report (Hansard: Standing Committee E, 28 June 1977 cc657-658). Efforts were made in both Houses to allow courts to impose a supervision order on offenders serving sentences of partial suspension but this was resisted by the government on the grounds that supervision was expensive and would place too great a burden on the resources of the probation service. The government’s proposals were eventually accepted without division and added to the statute book on 29 July 1977. Section 47 of the *Criminal Law Act 1977* stated that where a court passes, ‘*a sentence of imprisonment for a term of not less than six months and not more than two years it may order that, after he has served part of the sentence in prison, the remainder of it shall be held in suspense*<sup>8</sup>’. In this sense partial suspension can be considered a species of early release. It differed from parole to the extent that it was achieved by judicial rather than executive action and did not entail ongoing supervision under licence but the ultimate effect was the same; release of a prisoner before the end of his or her determinate sentence with liability for recall.

One of the most intriguing features of the partly suspended sentence story was just how quickly the idea was abandoned by the Government. There is some evidence to suggest that the Home Office was divided on the introduction of the measure. Several years later during the passage of the *Criminal Justice Act 1982* Lord Harris of Greenwich (a Minister of State at the Home Office during the passage of the *Criminal Law Act 1977*) revealed that a breakdown of communication within the senior ranks of the Department

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<sup>8</sup> <http://www.legislation.gov.uk/ukpga/1977/45/contents>

had lead the government to erroneously place the partly suspended sentence on the statute book in 1977. Upon realising this error, a decision had been taken at the highest levels to row back and block any activation of the power,

I have to tell the House that it is very rare for there to be failures of communication within the Home Office but, on this occasion, there was such a failure, for which Ministers must accept responsibility. I certainly accept my measure of responsibility; but, once we were apprised of what we had got ourselves into, we decided to extricate ourselves from it with the maximum speed, because, although I do not like and I do not think it appropriate to give details of official advice which was received nor to attempt to use the advice which was tendered to one particular Administration in a debate such as this, I must make it absolutely clear that the view we took was not taken in the teeth of determined opposition from our officials' (Hansard HL Deb 07 June 1982 vol 431 c104).

This indecision reflected Home Office concern that the courts were likely to misuse the partly suspended sentence as an alternative to non-custodial sanctions with the result that activation of s47 may well increase rather than reduce the prison population. A position the Home Office confirmed several years later in their 1981 publication '*A Review of Parole in England and Wales*' when they noted that the clause '*has not been activated because of fears that the new sentence would be used to give a 'taste of imprisonment' in cases where at present the courts would impose a fully suspended sentence or non-custodial sentence... there can be no certainty that implementing section 47 would achieve any reduction in numbers in custody and would not confer any advantage in the treatment of individual offenders* (1981d p.14).

### *5.3.3 On the horns of a dilemma: the question of short term prisoners*

The prospects for partial suspension were dealt a further blow with the election of the Conservatives in May 1979. Having held the shadow home affairs portfolio for a number of years William Whitelaw was confirmed as Home Secretary and the archival record reveals that from the earliest days of his tenure the Home Office moved to implement a two-pronged strategy in relation to penal policy (TNA; HO 495/21; HO 495/2; FOI: HO 495/21; FOI: January 2013). On the one hand the Home Office sought to build a constructive dialogue with the judiciary in order to coax the courts towards greater use of non-custodial sentences (see TNA; HO 495/21). On the other, officials began to explore options for extending early release to the vast majority of prisoners

serving short-term prison sentences. Prompted by a critical report of the Parliamentary Expenditure Committee (House of Commons 1978 p.XXXIII) the Home Office had established a wide-ranging review of parole in England and Wales and this provided the perfect vehicle for Whitelaw to consider reform of the release arrangements for short sentence offenders (TNA: HO 495/4; HO495/18; HO 291/25). The two prongs of this strategy are discussed below in turn.

Sentencing practice falls largely outside the scope of this thesis but it is impossible to understand the events that follow without an adequate account of the constitutional position of the judiciary and changing sentencing practice. The constitutional separation of powers between the executive and judiciary emerges as a key driver in the development of criminal justice policy. Not only in relation to how the institutional balance of power structured the options available to policy-makers but in how civil servants, no doubt well versed in the work of A.V. Dicey, had internalised a certain view of judicial independence and deferred to the courts across a wide range of sentencing questions. This was particularly apparent when it came to activating the partly suspended sentence clauses within the *Criminal Law Act 1977*. Used as originally intended by the Advisory Council, partly suspended sentences could have helped catalyse the shift from long term determinate sentences towards shorter custodial sentences and in so doing help manage the prison population. But used incorrectly partial suspension would have the opposite effect, encouraging the courts to give non-serious offenders a taste of prison when historically they would have been dealt with in the community thereby increasing the prison population. In such a fragmented system policy-makers simply could not anticipate the response of the courts with any degree of confidence (Advisory Council on the Penal System 1978; Home Office 1981d).

The Home Office were all too aware of this predicament and considerable efforts were made to build bridges with the judiciary in order to exert some semblance of ‘soft influence’ over sentencing behaviour (FOI: HO 495/21). For example, Bob Morris, a former Assistant Under Secretary of State in the Home Office, recalls attempts in the very early 1980s to broach these issues with the judiciary, *‘I remember the Permanent Under-Secretary with Mr Whitelaw’s permission conducting some initiatives which took the form of discrete dinners at gentlemen’s clubs. The judiciary was then*

*manifestly apprehensive about such approaches. It thought that the Home Office had only one agenda, which was to reduce the size of the prison population. That suspicion never disappeared entirely*’ (CCBH 2010 p.18). The Home Office worked hard to mitigate this suspicion. The following extract from a submission by Permanent Secretary Sir Brian Cubbon to the Home Secretary on the topic of early release for short term prison sentences offers a unique insight into the delicate tightrope the Home Office was walking in seeking to curb the prison population while also retaining the confidence of the judiciary (FOI: HO 495/21). As Sir Brian was acutely aware the government’s best laid plans would stand and fall according to the co-operation of the judiciary.

I think we need to link this whole exercise (including the question of implementing section 47) with the approach to the Lord Chancellor and then to the Judges about sentencing practice and the prison population. We cannot go it alone. The courts can nullify the intended effect of any of the legislative schemes which have been canvassed, or conversely make them unnecessary if the main object is to reduce the prison population. We need to see if we can establish a dialogue with the judiciary in order to form a view of how best to move forward on the joint problem of sentencing practice and sentencing powers. Putting it very crudely, we need to establish which of three scenarios is the most likely:

- (a) the courts, with encouragement following our initiative with the Lord Chancellor, go a long way towards solving the overcrowding problem by a sustained change in sentencing practice;
- (b) the courts and the executive pull together in the same direction, either by a combination in changes in sentencing practice and new schemes for early release on the lines of Flag A [bullet point (a) above], or at least the courts do not nullify the effect of such a scheme;
- (c) the executive and the legislature unilaterally make changes which are then offset by sentencing practice (FOI: HO 495/21).

Initially there were reasons for cautious optimism that Cubbon’s scenario ‘c’ could be avoided. A concerted effort was made to promote the use of non-custodial sentences and in the months following his appointment as Lord Chief Justice in April 1980, Lord Lane issued a series of practice directions in the cases of *R v Bibi*<sup>9</sup> and *R v Ian Albert Upton*<sup>10</sup> stating that, ‘*the time has come to appreciate that non-violent petty offenders*

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<sup>9</sup> (1980) 1 W.L.R. 1193

<sup>10</sup> (1980) 2 Cr. App. R. (S.) 132

*should not be allowed to take up what has become valuable space in prison*’ (Upton p.133). Judgements that helped to temper the use of immediate custody, at least in the short term, and contributed to a fairly stable prison population in the first half of the 1980s.

In parallel to the steps taken to exert a modicum of influence over sentencing practice the Home Office began exploring options for extending a system of early release to short sentence offenders (TNA: HO 495/4; HO495/18; HO 291/25). Greater use of non-custodial sentences remained the aspiration for many penal reformers but given past experiences there was little sense in relying upon this outcome (Faulkner 2014 pp.99-108; TNA: HO 495/18). In any event there was limited funding available to recruit the number of probation officers needed to scale-up the use of non-custodial sentences to the levels required to make a significant dent in the prison population (TNA: 495/18). The government needed a contingency option and this came in the form of early release for short-term prisoners.

In 1978 the Parliamentary Expenditure Committee had examined options for the *‘reduction of pressure on the prison system’* and concluded in their Fifteenth Report that, *‘an independent inquiry should be instituted into the whole parole system though we have no views as to the form it should take other than that it should not be limited to an internal review by officials’* (House of Commons 1978 p.XXXIII). Following this recommendation an internal review of the parole system (by Home Office officials) was established with a remit to consider options for extending parole to those serving short prison sentences (Home Office 1981d). As I noted above prisoners serving less than 18 months made up the overwhelming majority of the prison population but were liable to serve a longer proportion of their sentence than longer term prisoners. The extension of a system of early release to this category of offender had the potential to remove thousands of prisoners from the system at a stroke (a gift that would keep on giving on an annual basis) while at the same time correct a perceived injustice that short-term prisoners had been excluded from the benefits of early release. The so-called ‘equity’ argument (FOI: January 2013).

The parole review unlocked a huge amount of creative thinking within the Home Office and it must be said amongst the various organisations with an interest in penal

reform. It is difficult to do justice to the paper trail that grew up around the vexed question of early release for short-term prisoners, the sheer breadth and depth of the records makes synthesis of the available data difficult, as does the relative weight to confer on contradictory accounts. But in summarising the archival records I would argue that it is possible to identify at least four major candidates for reform, each with their supporters, detractors, strengths and weaknesses. In what follows I want to sketch out the strengths and weaknesses of four options for reform and indicate how different interest groups within the criminal justice system, academia and penal lobby lined up behind their preferred option. First I will look at remission before turning to the model of release on licence pioneered in Northern Ireland, automatic parole for short term offenders and the partly suspended sentence.

Remission: The first option available to the Home Office was to amend the Prison Rules and increase remission from one third to one half for all categories of prisoner. An increase in remission time was attractive for a number of reasons; it could be implemented swiftly by statutory instrument, it made no additional demands upon the prison or probation service and did not rely upon the cumbersome machinery of the parole system. Records indicate that the influential Prison and Borstal Governors' Branch of the Society of Civil and Public Servants had consistently advocated remission as an effective tool of prison control and a mechanism for reducing the prison population (Prison and Borstal Governors' Branch of the Society of Civil and Public Servants 1977, 1978; TNA: HO 495/21). A view that also found favour in Justice May's *'Report of the Committee of Inquiry into the United Kingdom Prison Services'* which recommended that, *'executive intervention through remission schemes and parole should be kept under consideration'* (Home Office 1979b: 27).

Given the simplicity of the reforms and the powerful alliance of interests in support of extending remission time it is easy to see why it remained high on the political agenda throughout the period in question, that it had not been implemented can be attributed to two serious shortcomings. First, Whitelaw strongly objected to the fact that reform of remission did not allow the Home Office to discriminate between certain categories of offender (HO495/23). Remission applied equally to all prisoners regardless of the gravity of their offence and this was fundamentally at odds with the Thatcher

government's commitment to bear down heavily on violent offenders. As one official in the Crime Policy Planning Unit noted,

If the prison system broke down it would be government's responsibility to take whatever measures were considered appropriate to deal with the emergency. However, at present the Home Secretary is extremely reluctant to contemplate the only kind of measures which would be possible (e.g. an increase in remission) because they would have to be indiscriminate, they could have unwelcome side effects on the administration of criminal justice as a whole, and they could only be a temporary palliative (TNA: HO 495/23).

Second, and perhaps more decisively, further increases to remission time were fiercely opposed by the judiciary on the grounds that it represented an unacceptable level of interference with the sentence of the court. As the following note from Anthony Brennan, dated 1st May 1979, illustrates there was a clear and present danger that the courts would actively undermine the intended effects of remission by increasing the average sentence tariff.

I had an interesting telephone call from the Lord Chief Justice arising from the exchange in the House yesterday on S of S's "May" statement.

He said that he had been concerned (going on the Press reports) about the apparent preoccupation with the idea of increased remission. He thought that there was a considerable danger of the judges and magistrates simply reacting by increasing sentences: this, he said, had happened in Canada. He wondered if the Home Office had given thought to an alternative approach. This would be to provide that every prisoner should automatically be paroled after a third of his sentence *unless the judge had ordered, in his particular case, that he should serve the full term less normal remission*. Of course, there would be much work to do on the detail of such an approach but he felt sure that it would be more acceptable to the Judges. I elicited that the LCJ was talking of a change that might replace the existing parole scheme - not just one for prisoners to whom that scheme does not apply (emphasis added) (TNA: HO 495/21).

The Northern Ireland model: The second option was to adopt a system of release analogous to that introduced with some success in Northern Ireland. The long standing political and sectarian tensions in Northern Ireland coupled with the administrative difficulties of dealing with 'political prisoners' meant that the system of parole introduced by the *Criminal Justice Act 1967* was never extended to Northern Ireland (TNA: HO 495/21). Instead the authorities pioneered a system of release on licence

that bore many of the hallmarks of remission but with one significant difference, prisoners remained on licence for the remainder of their sentence.

Under the scheme introduced by the *'Treatment of Offenders (Northern Ireland) Order 1976'* all prisoners, excluding lifers and those serving determinate sentences of under one month, became eligible for release after they had served 50% of their sentence (House of Commons 1978 p.326; TNA: HO 495/21). Like remission in England and Wales release was automatic and subject to forfeiture for bad behaviour, but where the Northern Ireland scheme differed was in relation to the prisoners continuing liability for recall. In England and Wales remission time meant a prisoner was released unconditionally with no continuing liability for recall. In contrast, prisoners in Northern Ireland serving a sentence of more than 12 months were liable to recall for bad behaviour and could be ordered by the courts to serve the remainder of their sentence in custody as well as any additional prison terms for crimes committed while on release (House of Commons 1978 p.326; TNA: HO 495/21).

There were good reasons to extend the Northern Ireland model to England and Wales. The scheme offered many of the advantages of remission but with the additional benefit that it provided a degree of control over offenders for the remainder of their sentence along with a clear mechanism for further sanction should they offend while on release (TNA: HO 495/21). Furthermore, the Northern Ireland model did not require an elaborate administrative architecture and offered a clear, appreciable impact on the prison population that was missing from more discretionary systems. For this reason, the model attracted considerable support within the higher echelons of the Home Office and a powerful champion in the shape of Permanent Secretary Sir Brian Cubbon who had first-hand experience of the system from his time as Permanent Secretary in the Northern Ireland Office between 1976 - 1979. In the minutes of a meeting with the Home Secretary on 28 January 1980 it was recorded that,

Sir Brian Cubbon said that many of the changes which had been urged would in fact increase rather than reduce the complexity of the parole scheme. In his view parole was probably not the right solution for the short sentence prisoner. On the other hand, the partial suspension of sentences, on the lines of Section 47 of the Criminal Law Act 1977, could have unforeseeable implications on sentencing practice. One possibility might be to examine further the adoption of the system in Northern Ireland of



conditional remission, which enabled a prisoner to be released on conditions, after serving half his sentence. It might be feasible to combine both mandatory and discretionary elements in such a procedure, and in this way avoid the problems which had arisen following the introduction of suspended sentences (TNA: HO 495/21).

Unfortunately, it was difficult to predict with any degree of confidence how the judiciary would respond to a scheme of automatic release and unlike the simple remission change it was likely that the adoption of the Northern Ireland model would require the enactment of primary legislation to empower the Home Secretary to add conditions to a prisoner's remission time. For these reasons the Northern Ireland model of release on licence had proved difficult to transport across the Irish Sea.

Parole: With remission held in suspense as a reform of last resort and the Northern Ireland model seen as a compromise solution the third option under consideration by the Home Office and alluded to by the Lord Chief Justice Lord Lane, was the possibility of reducing the minimum threshold for parole. Under the parole system introduced by the *Criminal Justice Act 1967* prisoners only became eligible for parole once they had served twelve months or two thirds of their sentence, whichever was the longer. Because most prisoners could expect the final third of their sentence to be remitted, in practice, only prisoners serving sentences of over 18 months reached the threshold for parole eligibility.

As a result, parole applied to only a small minority of the prison population. While this made sense within a system premised upon the rehabilitative merits of a 'recognisable peak' it was anathema to policy-makers motivated by consequentialist concerns such as correcting the inconsistent treatment of short and long term prisons, bolstering the deterrent effect of the criminal law and accelerating the release of prisoners from the prison estate. Officials estimated that automatic parole for prisoners satisfying pre-defined criteria might reduce the prison population by more than 7,000 and help to address historically high re-offending rates (Home Office 1981d). Unlike the crude tool of remission, parole was premised upon more sophisticated risk assessment and Home Office research had demonstrated that parolees were (marginally) less likely to offend in the first two years following release (Nuttall *et al*

1977). Equally parolees benefited from the supervision of a probation officer, a feature of the system that was almost universally welcomed.

The difficulty was devising a system that would operate effectively at scale, given the inevitable increase in caseload for the Home Office, Parole Board and Probation Service. The portents were not encouraging. In a briefing to Home Office officials charged with developing a system of early release for short sentence offenders it was noted that, *as part of the background flavour, you should know that S of S regards the elaborate bureaucracy of the parole scheme as burdensome although he appreciates its utility (especially with the life prisoners) ...* (TNA: HO 495/21). As outlined above, the Home Office embarked upon an internal review of parole in early 1979 and began to grapple with these issues (FOI: HO 495/21; FOI: January 2013; TNA: HO 495/21; HO 495/2). The final report will be considered in more detail below but in the interim it is important to note that a number of organisations sought to influence Home Office thinking by offering their own programmes of reform.

The Parole Board was particularly vocal in the debates that raged over short-term offenders. Far from a passive player in the reform process, the Parole Board used its resources, expertise and access to influence Home Office thinking and to steer the debate. In 1979 a Parole Board study group was established under the chairmanship of Sue Baring (then Chairman of Hampshire Probation and Aftercare Committee). The bulk of the study group's time was invested in the question of parole board decision-making but the records in relation to parole for short sentence offenders are particularly noteworthy (FOI: BV3/26; BV3/30/2; BV3/35). At an early point in their proceedings a decision was taken to reject the case for automatic parole of short term offenders on the grounds that, *'it was thought that this would probably overload the Probation Service and would inevitably include a large number of prisoners who had little intention of co-operating with the Probation Service* (FOI: BV3/30/2). In its place the study group endorsed a scheme that retained a discretionary system of parole by delegating the cases of prisoners serving less than four years to prison-based LRCs using the powers contained in the Criminal Justice Bill 1971/1972,

#### SUMMARY OF THE NEW PROPOSED TWO-TIER SYSTEM

31(a) The LRC to deal with all cases where the sentence is 4 years or less plus those cases where the maximum expected available period of parole is not more than 3 months.

(b) The Parole Board to deal with all cases where the sentence is greater than 4 years except for those cases where the maximum expected available period of parole is not more than 3 months, plus the Home Office referrals (FOI: BV3/30/2).

It is difficult to verify the study group's concerns about placing undue stress on the Probation Service with any degree of confidence. While this was undoubtedly a consideration it is surely the case that in seeking to preserve a brand based upon discretionary release the study group was also seeking to protect both the Parole Board and the LRCs gatekeeping role within that system. At the level of administrative expediency, the scheme had much to commend it, the Home Secretary already possessed the powers to bring about these changes and over time the LRCs had taken on a greater proportion of Home Office decision-making. But at the level of principle the Parole Board was very much a lone voice. Penal reformers had made much of the running in calling for the extension of parole of short term prisoners but unlike the Parole Board there was almost universal support for a system of automatic release. For example, the Howard League had called upon the Home Secretary to institute an independent review of parole on at least two occasions during the 1970s (Howard League 1992 p.vii). Disappointed by the Home Office's "half-hearted response" with the internal review of parole the Howard League established their own review in March 1980 (1981 p.vii). Chaired by Lord McGregor of Durris the working group published a highly influential report '*Freedom on Licence*' in 1981 calling for creation of a system of automatic release on licence for prisoners serving less than three years,

The scheme which we favour would operate as follows: All prisoners sentenced to periods of less than three years would automatically be eligible for release on licence after serving one third of their sentences. Prisoners sentenced to periods between three and seven years would also be eligible for automatic release but, in these cases, the court would be able, if it so wished and subject to appeal, to stipulate a minimum period which would have to be served before parole could be granted. In such a situation, the prisoner's case would be reviewed at the time stipulated by the court, and release would be at the discretion of the Parole Board. Prisoners sentenced to periods in excess of, say, seven years, would be subject to parole review at one-third of the sentence, as now (1981 p.86).

Similar calls came from NACRO (Mackay 1980) and from within the academy (Hood 1974a; 1974b; Morris 1980). Whether predicated upon discretionary or automatic release, the extension of parole to short term prisoners attracted considerable support from those working within the criminal justice system. While there were clear concerns over the logistical and financial implications of extending parole to such a large class of prisoners this appeared to be a secondary consideration to the wider benefits of reducing the prison population and release on licence under the supervision of a probation officer. The question was whether similar advantages could be achieved without further manipulation of prison sentences by executive action.

Partly Suspended Sentences: The fourth and final contender for early release of short term prisoners was the partly suspended sentence. As I noted earlier the Home Office declined to activate s47 of the *Criminal Law Act 1977* due to concerns about how the measure would be utilised by the courts but officials were not ready to give up on the principle behind partial suspension entirely (FOI: HO 495/21; TNA: HO 495/18; HO 495/21). From a technocratic perspective the failing of s47 was the discretion it bestowed upon the courts and the subsequent ambiguity about how it would be implemented in practice. To sidestep this difficulty Home Office officials began to develop plans for what might be described as a compulsory partly suspended sentence. Known colloquially within the Home Office as the ‘Bampton proposal’ after its author Stuart Bampton, a principal within H2 Division (Parole and Probation), the scheme augmented the partly suspended sentence template enacted in the *Criminal Law Act 1977* with the provision of supervision on release and a legislative presumption in favour of partial suspension that could only be reversed in exceptional circumstances (TNA: HO495/18; HO 495/21). Mr Bampton outlined his proposal in the following terms in an influential paper circulated on the 1 June 1979,

The proposal is that the courts be given responsibility for allowing short sentence prisoners to serve part of their sentence in the community as happens with longer sentence prisoners who receive parole. If the provision allowing for partially suspended sentences were to be amended such that all sentences between, say, 3 and 15 months *were required to be suspended for the middle third*; and if during this suspended third the prisoner were to be on parole licence with the normal liability to recall, an almost immediate and dramatic effect would occur - providing sentence lengths were not increased. *It should be possible to prevent this at least in part if the courts were given power to refuse parole for the middle third of*

*sentence in exceptional cases with a proviso that reasons would need to be given.*

The proposal has much in common with Dr Hood's ideas for automatic parole but there are significant differences particularly in presentation. Thus automatic parole to prejudice the time people spend in prisons, or to ease the pressure on the prisons, would not be regarded kindly by public opinion. If, however, it is presented as a move to remove the anomaly that parole eligibility does not apply to all, it may attract much less criticism. The main difference, however, is that whereas automatic parole will be seen as the Executive undermining court sentences, partially suspended sentences will remain within the responsibility of the courts - even though their discretion will be greatly circumscribed and either method will derive from the Executive and Parliament (my emphasis) (TNA: HO 495/18).

The second paragraph is particularly revealing. One of the great attractions of the partly suspended sentence was that it could be presented as an addition to the sentencing toolkit of the courts rather than as a questionable act of executive control. In almost every other regard the practical import of the compulsory partly suspended sentence was identical to that of automatic parole. The Bampton proposal attracted a considerable degree of attention within the Home Office and while it was criticised by some as overly ornate many others saw it as an ingenious solution to the myriad of problems thrown up by the extension of early release to short sentences offenders (FOI: January 2013; TNA: HO 495/18; HO 495/18). Perhaps of most significance it quickly emerged as the option of choice within the Crime Policy Planning Unit and was regularly championed by the Unit as the policy-making process unfolded (TNA: HO 495/18; HO 495/18).

The Home Office agonised over the extension of early release to short sentence offenders. At different times each of these approaches could be considered in the ascendancy before being fatally wounded and returning to the policy drawing board. As Figure 25 illustrates the Home Office undertook countless options appraisals to weigh the pros and cons and quantify the likely impact upon the prison population (TNA: HO 495/21). Such analyses can help inform the policy-making process and focus the issues but they are not substitute for leadership, conviction and 'small p politics'.

Figure 25: Home Office Options Appraisal of Early Release for Short Term Prisoners.

EARLY RELEASE FOR SHORT SENTENCE PRISONERS			
Scheme	Advantages	Disadvantages	Effect on prison population
A Half remission for those serving sentences of two years imprisonment or less	Simple. Introduction by amendment to Prison Rules	Resource constraints obvious motive. Possibility of a compensatory increase in sentence lengths	Steady state reduction of about 2,700
B As at A but excluding those with four or more previous convictions	More likely to maintain confidence in system than A	Would need legislation. Would exclude many prisoners who were not necessarily serious criminals	Steady state reduction of about 500
C As at A but excluding those convicted of offences of violence	As at B but at less cost in terms of reducing effect on prison population	Would need legislation. Would call into question current basis of sentencing "tariff" based on length of sentence as indicator of seriousness	Steady state reduction of about 2,300
D Flexible remission	Could be manipulated to have a guaranteed effect on the prison population	Would introduce unacceptable degree of caprice and uncertainty into the system. Would be furthest removed in its effect from what the court decided in each individual case <del>which need legislation</del>	Would vary according to reduction desired by the executive
E Partially suspended sentence of imprisonment	Can be introduced by bringing into effect section 47 of the Criminal Law Act 1977. Gives additional powers to the courts, not the executive	Serious risk of increasing proportionate use of imprisonment and prison population. Will put more pressure on local prisons, already most seriously overcrowded prison establishments	Impossible to predict. Ranges from a reduction in daily average population of about 3,800 to an increase of about 8,000
F Automatic parole after $\frac{1}{2}$ sentence for all serving sentences of between 6 months and 3 years	Relatively easy to administer. Some saving on existing parole arrangements. Extends idea of parole to shorter sentences without damaging existing arrangements for those serving longer sentences	Courts likely to react by increasing sentence lengths. Would need legislation. Would need additional resources for probation service	Could be a reduction of about 6,500 but only if sentencing practice remains unchanged

Source: TNA: HO 495/21

In this sense the policy-making process was of a very different character to the debates that surrounded the introduction of parole in the 1960s and the ease with which such considerations were located within a broader narrative associated with the rehabilitative ideal and the personalisation of punishment. This made an already difficult policy issue even harder to resolve. Without a clear sense of direction, the Department was seeking to address various, often mutually conflicting objectives through one package of reform. Setting out the measures of success for any system of early release for short sentence offenders William Boham suggested that to be viable any particular scheme had to satisfy a number of policy objectives:

- a) To minimise anomalies between different sentences so that some offenders are not released disproportionately sooner than others in proximate sentencing bands.
- b) To negotiate satisfactorily the effects (direct or indirect) which its adoption would have on the main parole scheme.
- c) To allow for likely compensating behaviour by sentencers, - e.g. to restore the original effect of their sentencing powers.
- d) To be capable of - carrying the Scots since it would be difficult to operate two substantially different systems in Great Britain (TNA: HO 495/21).

This difficulty also reflected the continued challenge of maintaining the support of the judiciary and predicting their likely response in a variety of scenarios. For example, on the 15 May 1980 Sir Brian Cubbon led a 'Penal Policy Stock Taking Meeting' with senior officials to plot a course through the policy minefield (TNA: 495/21). Officials '*explained the difficulties which had arisen in devising a scheme to enable short sentence prisoners to be paroled*' (TNA: HO 495/21; see also FOI: January 2013) and noted the challenge of taking the judiciary with them and in an extraordinary statement indicated that the Home Office was pursuing a high risk strategy of actively seeking to increase the differential between the sentence of the court and their time actually served in prison in order to retain support for the parole system,

It was also recognised that all schemes for the earlier release of prisoners might be frustrated by adjustments in sentencing practice. Nevertheless, a statutory scheme for the conditional release of short sentence prisoners would be an equitable complement to the parole scheme *and would fit in with a long-term strategy (which helped with judicial and public opinion) of widening the gap between the term of imprisonment pronounced in court and the term actually served*. This would require assistance from the

judges, who would need to have the implications made clear to them, and whose views would need to be taken into account. It was recognised that not all the judges shared the apparently enlightened view of the Lord Chief Justice; and it was also pointed out that such a policy might still lead the judges to an increasing resort to sentences of imprisonment. Sir Brian Cubbon said that a paper should be prepared in the course of June which would put a straightforward scheme to Ministers with the necessary explanation of what was involved. The proposal should be brought to Sir Brian Cubbon and discussed with Mr Brittan before it was put to the Home Secretary (emphasis added) (FOI: January 2013).

If true, this long-term strategy of widening the differential between the sentence of the court and the time actually spent in prison stood in stark contrast to the growing demands for ‘truth in sentencing’ that emerged in the mid-1980s and will be explored in greater detail in Chapter Six.

#### *5.3.4 Home Office Review of Parole in England and Wales 1981.*

Each of these options remained on the table while the review of parole ran its course. After three years the Home Office ‘*Review of Parole in England and Wales*’ was finally published in May 1981 and immediately courted controversy (Home Office 1981d). A rather unambitious and conservative document, the ‘*Review of Parole*’ offered a gentle critique of the parole system and acknowledged some longstanding issues of due process but ultimately shied away from radical departures (Howard League 1981; Parliamentary All-Party Penal Affairs Group 1981).

The biggest talking point was in relation to the extension of parole to short-term offenders. The Review acknowledged the difficulties of extending a discretionary release to short sentence offenders but argued nonetheless that, ‘*the attractions of extending the central idea of parole — release under supervision — to a greater proportion of the prison population are substantial*’ (1981d p.16). In reaching this conclusion the Home Office working group had considered a number of options and alighted upon a rather vague proposal to establish a system of release on licence for short sentence prisoners,

One approach would be to recognise the impracticability of assessing short-term prisoners while in custody, and to make the element of supervision instead an integral part of the sentence as passed by the court. In very broad outline, this might mean that the middle third of a short sentence would be held in suspense and the offender would be placed on



release under the supervision of a probation officer for that period. Remission of the final third of the sentence could continue to operate as at present, with any loss lengthening the time spent in custody rather than shortening the period of suspension. The arrangements for supervision might be broadly similar to those for suspended sentence supervision orders. Offenders would be obliged to observe certain conditions, for example to maintain contact with the supervising officer, and if an offender were reconvicted while under supervision the court could reactivate the unexpired part of the period of suspension (1981d p.14).

The media presented this as automatic parole, others a hybrid of remission and parole but in reality it was best described as a system of early release on licence based upon the 'Bamptton scheme' of compulsory partly suspended sentences (FOI: HO 495/21). The evidence for this comes a little later in the Report when the authors note that, '*the new approach outlined above offers a rethinking of section 47, using a similar framework to extend the concept of parole to those at present ineligible*' (1981d p.14). A distinction also noted contemporaneously by Bottomley (The Times 21 August 1981) and latterly in James Dignan's excellent short history of partly suspended sentences (1984). In essence the Home Office were recommending a partly suspended sentence with the addition of a probation order to provide for supervision during the period of suspension. Critically, the '*Review of Parole*' was stronger than previous policy statements on the question of whether the new system should be mandatory. The Review discussed the merits of compulsory suspension and judicial discretion concluding that a legislative presumption in favour of suspension, unless there were compelling reason not to do so, was favoured because of the significant impact this would have on the prison population (1981d p.15).

This was a defining moment in the history of early release for short sentence offenders (an interesting summary of which can be found in Prison Reform Trust 1987). Until this point the genesis of Home Office thinking from Anthony Brennan's note summarising his discussions with the Lord Chief Justice had been that the courts would retain sentencing discretion (FOI: HO 495/21). The symbolic importance of this presumption was huge and the departure of the Home Office from this understanding cannot be overstated. For the executive it was a guarantor that the scheme would have the desired effect upon implementation. For the judiciary it crossed the Rubicon into executive interference with the constitutional function of the courts. Why was the Home Office prepared to take such a risk? Reductions in the

prison population loomed large over this discussion but it was not the only consideration. The records suggest that the Home Office was also motivated by a well-intentioned desire to ensure that short sentence offender's prisoners were treated in a fair and equitable manner by the courts who may otherwise apply sentences of immediate custody, fully suspended sentences and partial suspension in an inconsistent manner across England and Wales (FOI: HO 495/21). Allied to this one can also detect a clear desire to ensure that the majority of short sentence offenders received some degree of supervision when on release, a feature of the parole scheme that had been widely celebrated (FOI: HO 495/21). Altogether less clear are the manoeuvrings of the Lord Chief Justice and the assurances, if any, he offered to the Home Office. There is some evidence to suggest that the Lord Chief Justice was rather more sympathetic to these measures than his fellow Lord Justices of Appeal and the Home Office may have been confident that Lord Lane could bring the judiciary with him in support of these measures (FOI: HO 495/21). Whatever the unique constellation of reasons for this decision, there is no doubt that it represented a significant tactical gamble on the part of the Home Office.

#### *5.3.5 The politics of inertia*

A story is told that when asked about his time as Home Secretary, Herbert Morrison MP responded with a warning that *'the corridors of the Home Office are paved with dynamite'* (as cited by Callaghan 1982 p.12). Whitelaw was about to experience this volatility first hand. Despite his efforts to wean the country off its growing addiction to custody a series of events would ultimately consign Whitelaw's plans to the penological dustbin and shackle the power of one of the most powerful members of the Cabinet (for example Figure 26).

Indeed, these events are all the more interesting for the fact that they happened despite Whitelaw's qualities as a leader and manager, not because of them. We know this because Whitelaw was almost universally regarded as an excellent Secretary of State. A glimpse of this is seen in the political diaries of Chris Mullin MP who noted in one entry, *'to the Oxford and Cambridge Club in Pall Mall to deliver yet another book talk... Among those present, Sir Brian Cubbon, a former permanent secretary at the Home Office. Who, I inquired, was the most impressive minister he had served?*

*Without hesitation, he nominated Willie Whitelaw as both the most effective and the most affable' (Mullin 2010 para Thursday, 18 March).*

Figure 26: Caricature of Home Secretary Whitelaw in New Society



Source: Morris 1980 p.283

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The senior judiciary were the first to turn against the government's plans for release on licence for short sentence prisoners (Maguire 1992 p.185). The nub of the issue was the level of discretion afforded to the courts at the sentencing stage. To ensure the new measure had a significant impact upon the prison population the Home Office were insistent that there should be a presumption in favour of release. For the courts the creation of a presumption in favour of partial suspension was seen as unacceptable fetter on the sentence discretion of the courts and the judiciary promptly withdrew its support (Dignan 1984). After a period of correspondence, the Lord Chief Justice wrote formally to the Home Secretary on the 9<sup>th</sup> October 1981 setting out the judiciary's opposition to the early release reforms presented in the Home Office '*Review of Parole in England and Wales*' (FOI: May 2013). A copy of that letter was released to this study under the *Freedom of Information Act* and given its historical significance is set

out in full at Appendix 7. In that letter Lord Lane informed the Home Secretary that he had consulted with the Lord Justices of Appeal who were now unanimous in their belief that the removal of '*any element of discretion*' from the sentencing decision represented an unjustifiable '*usurpation of the function of the judge*' that could not be supported (FOI: May 2013). The Lord Chief Justice encouraged the Home Secretary to look instead at amending the *Criminal Justice Act 1967* in order to reduce the parole threshold to six months (FOI: May 2013). Further insight into the deliberations of the Lord Justices of Appeal can be found in a special edition of BBC Panorama aired on 22 February 1982. Pressed by Tom Mangold on the judges' veto, Lord Justice Lawton offered the following account of those discussions,

The Lord Chief Justice asked all the Lord Justices who deal with criminal appeals to have a talk with him in his room and he then told us what the Home Secretary's suggestion was. We were told by the Lord Chief Justice that the Home Office were not in favour of giving any discretion to the trial judge. We felt that this was wrong both in practice and we thought too that the public would resent it because so many of these recidivist burglars will be in circulation again within a very short time of being sent to prison (BBC Panorama 1982 'The Sentence of the Court', Broadcast 22 Feb. 1982).

Days after receiving this rebuff from the Lord Chief Justice, Whitelaw suffered a further setback at the Conservative Party conference. The summer of 1981 had seen riots in cities across England, many of which were attributed to racial tensions and inner city deprivation (Newburn 2015). Consequently, Whitelaw was under significant pressure from the right wing of his Party to toughen up the government's law and order credentials at precisely the point at which the Home Office was seeking to promote the use of non-custodial sentences and remove thousands of short term offenders from prison, hardly the stuff of dreams for the 'hang-em and flog-em brigade' of the Conservative Party. From the outset of the debate the atmosphere was hostile. Edwina Currie famously brandished a pair of handcuffs at Whitelaw during an impassioned debate (Figure 27) which saw the law and order motion defeated by a 'substantial majority' for the first time in decades (Conservative Party 1981).

Figure 27: Video Recordings from the 1981 Conservative Party Conference.  
(See attached CD)

The media fallout from the conference was immediate (see Figure 28 above) and gives a clear sense that Whitelaw was left on borrowed time as Home Secretary. But in the short-term a reshuffle was simply not an option. The Guardian would later report that *‘an incensed Willie Whitelaw informed the Prime Minister that if she ever publicly supported critics of his policy again he would resign* (The Guardian 9 October 1985), a move that would have been deeply damaging to the Thatcher government given Whitelaw’s standing as Deputy Prime Minister, personal support for Margaret Thatcher and perceived strategic importance as the bridge to the ‘one nation’ elements of the Conservative Party who were still deeply sceptical of Thatcher’s premiership (Hay and Farrell 2010).

Figure 28: Media Response to the 1981 Conservative Party Conference



Source: Daily Express 14 October 1981

With the Home Office fighting to contain the situation on two fronts the Government were forced into a politically embarrassing climb down. On 27 November 1981 Patrick Mayhew MP, now Minister of State, informed the House of Commons that the government had decided not to proceed with the proposal for automatic release on licence set out in the *‘Review of Parole in England and Wales’* and would instead activate s47 of the *Criminal Law Act 1977*, a policy shift the indefatigable Lord Longford dubbed *‘Whitelaw Mark 1 and Whitelaw Mark 2’* (Hansard: 24 November 1981 column 716). Explaining the government’s change of course Mayhew rejected the claim that the proposals had been torpedoed by the judiciary, claiming instead that following a consultation with key stakeholders the government had concluded that the

plans for automatic release on licence set out in the Home Office Review of Parole were, '*likely to counteract the very welcome downward trend in sentence lengths*' (The Guardian 27 November 1981). In this sense Mayhew was rehearsing a pre-agreed Home Office 'line to take' setting out how Ministers should explain this *volte farce* to the general public,

The last Review said that the Planning Unit had been engaged in the preparation of a scheme for possible legislation on early release for short sentence prisoners. Such a scheme was developed in some detail and discussed by senior management in July; but the more closely the possible options were explored, the less desirable they became. The final assessment was that the scheme (and viable variants) would have no predictable impact on the prison population, that it might vitiate the effect of calls for shorter sentences, and that it could not in any event be implemented for 12 months because of the administrative complexities. The Home Secretary wrote to the Lord Chief Justice in September enclosing a summary of the Planning Unit's work, and the Lord Chief Justice's reply made it clear that he would not endorse legislation before his recent judgements on sentencing had had time to make an effect. It was therefore decided that plans for an early release scheme should be put on one side, at least for the time being. This decision has been reflected in subsequent Ministerial statements which have been to the effect that although some form of direct intervention cannot ultimately be ruled out the Court of Appeal's initiative must be given a chance (TNA: HO 495/23).

Left with few options the Home Office activated the partly suspended sentence provisions of the *Criminal Law Act 1977* on 29 March 1982 with virtually no agreement on the likely effect on the prison population. After more than two years of intense policy discussion the Home Office had expended a great deal of political capital with little to show for its efforts. Henceforth the Home Secretary would have to manage an altogether more precarious relationship with Conservative backbenchers emboldened by the 1982 Conservative Party Conference. Perhaps more significantly some media outlets reported that Lord Lane had become so disillusioned with political initiatives to reform the penal system that he limited contact with the Home Office to all but the most unavoidable 'official business' (The Guardian 10 November 1990; see also Windlesham 1993 p.184). As we will see the relations between the Home Office and senior judiciary did begin to thaw following the 1987 General Election but the damage was done and for much of the decade it was all but impossible for senior decision-makers to establish an integrated strategy for management of the criminal justice system (Faulkner 2014 p.113).

## 5.4 The Criminal Justice Act 1982

As so many had done before, the Home Office sought to wipe the slate clean with a new Criminal Justice Act. In drawing this Chapter to a close I want to focus on two elements of the *Criminal Justice Act 1982* that provides an important segue into the reforms of parole set out in Chapter Six. First, the arguments and strategies employed by legislators during the passage of the Bill. Second, the immediate aftermath of the Bill and the circumstances that led partial suspension to misfire as a viable tool of penal reform.

### 5.4.1 The Bill

The Criminal Justice Bill was presented to Parliament on the 20 January 1982. Commending the Bill to the House on Second Reading Whitelaw indicated that the government was fulfilling a manifesto commitment, *'to provide the courts with more flexible and effective powers for dealing with the diversity of offenders who come before him'* (Hansard: HC Deb 20 January 1982 vol 16 c294). He went on to defend the constitutional independence of the courts to determine the appropriate quantum of punishment in individual cases but recognised *'the stresses that can occur within the prison system'* required a more robust response from the Home Office (Hansard: HC Deb 20 January 1982 vol 16 c294). Under sustained questioning from the Chair of the Parliamentary All Party Penal Affairs Group (PAPPAG) Robert Kilroy-Silk, Whitelaw accepted a degree of *mea culpa* for the period of political inertia outlined above but insisted it was right that the Home Office had responded to the views of the judiciary and other criminal justice stakeholders;

I did what I believe is right in a democratic system; I consulted widely all those concerned. The result of the consultations led me to believe that in the current climate of shorter sentences this would be the case. This is what those who impose the sentences, both judges and magistrates, believe. I have every reason to trust their judgment and I have done so. If it is to be said that I should not trust their judgment that would be a great mistake. I believe they will show that this power will work to the best advantage.

In this country our whole approach to sentencing has been based on the principle that within the framework set by statute it is for judges and magistrates to impose the sentences they deem appropriate in each

particular case. I pay tribute to the way in which our under-provisioned prison system has coped with the pressures that result (Hansard HC Deb 20 January 1982 vol 16 cc299).

Accordingly, the Home Office would seek to equip the courts with a varied sentencing toolkit while also insuring the Prison Service had the necessary powers to cope with unexpected shocks to the prison estate. In this sense the Criminal Justice Bill 1981/1982 was a significant piece of legislation. Largely remembered for the heated debates that surrounded the free votes on capital punishment, the 1982 Act introduced three less recognised reforms to the early release architecture of England and Wales. First, section 30 of the Act significantly curtailed the circumstances in which a partly suspended sentence could be used by the courts. Second, section 32 granted the Home Secretary emergency powers to release non-violent offenders up to 6 months before their remission date should the situation within the prison estate become critical. Finally, section 33 empowered the Home Secretary to alter the minimum eligibility period for parole. This final provision didn't feature in the original copy of the Bill. Interestingly, the reform that was to have the single biggest impact upon the prison population in the 1980s was only incorporated into the Bill following considerable pressure from the PAPPAG supported by a number of penal affairs groups outside of Parliament. As one senior penal reformer put it to me,

One interesting thing was the 1982 Criminal Justice Act as that passed through Parliament, largely because of the amendments with all party support from the All Party Penal Affairs Group. There were quite a lot of amendments which were accepted by the Government, one of them was reducing the parole threshold from 12 months to 6 months minimum before you could be released. But there were a whole range of others, abolishing imprisonment for soliciting, for certain vagrancy offences, providing legal aid for bail applications to the Crown Court. I can't remember what they all were now but there were a whole range of amendments that were accepted by Government, largely with all party support, that Home Office and Government Ministers were happy to accept even at the same time as... Leon Brittan was throwing the book at prisoners in terms of parole eligibility for more serious offences, so there were elements to build on (Interview C: 22 April 2014).

As I noted earlier the principal failing of s42 of the *Criminal Law Act 1977* was the discretion it granted the courts to determine when a partly suspended sentence was appropriate. In response the Home Office used the Criminal Justice Bill to



simultaneously restrict the use of partial suspension where non-custodial remedies were available and maximise its use where short sentences of custody were deemed appropriate. Section 30(3) reduced the qualifying period for a partially suspended sentence from 6 months to 3 months while Section 30(4) of the Bill held that the court could not impose a partly suspended sentence where a fully suspended sentence would be appropriate or the offender had no prior history of imprisonment.

Throughout a heated Committee session Patrick Mayhew was pressed on media reports that he had admitted in private that the government plans were a ‘gamble’ just as likely to increase the prison population as to bring about reductions (Hansard: Standing Committee A cc.383-412). Similarly, the sudden emergence of ‘Whitelaw Mark 2’ was the subject of considerable speculation amongst legislators with many citing the influence of the senior judiciary, Whitelaw’s experiences at the Conservative Party Conference and Mayhew’s own attachment to a measure he had personally introduced in 1977 were identified as the smoking gun behind the government’s policy reversal. Under intense questioning from Labour Home Affairs Spokeswoman Dr Edith Summerskill and Robert Kilroy Silk, Mayhew conceded that while the proposals were a calculated risk the rationale for partial suspension was sound and a persuasive case for their introduction had been made out. Moreover, the government had acted entirely properly in taking account of judicial criticism of the Home Office ‘*Review of Parole*’ (Hansard: Standing Committee A cc.383-412).

The Bill was also subject to considerable criticism within the Lords, as Peers probed the likely effect on the prison population in greater depth. Outlining the case for the government, Under Secretary of State Lord Elton attempted to shift the debate onto safer ground by stressing the government’s commitment to judicial autonomy and a mixed portfolio of sentencing tools to support the courts,

The implementation of the partly suspended sentence is consistent with the principle that it is for judges and magistrates to impose the sentences they deem appropriate in each particular case. The new power will strengthen the courts in their avowed policy of reducing sentence lengths where possible— but at their own discretion. The comments we received on the proposal for a scheme of automatic release of short sentence prisoners on supervision after one-third of their sentence which we canvassed in the Review of Parole last year convinced us that the approach

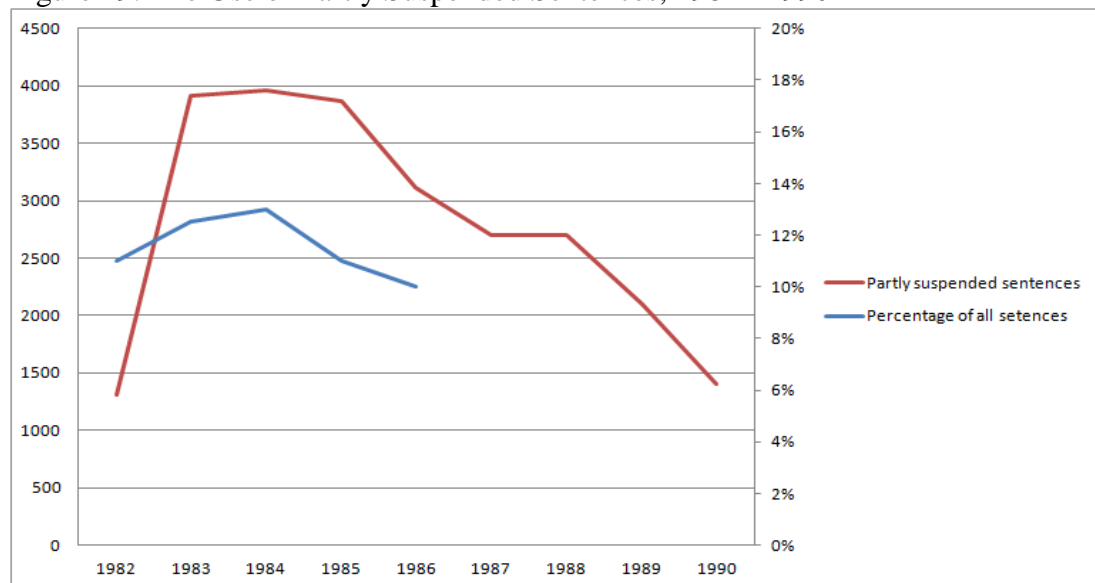
we have taken is the proper one. Automatic reduction would have confronted the courts with a dilemma where the full period of custody could only have been achieved, where necessary, by increasing the initial sentence. Partial suspension leaves the determination of sentence to the court (Hansard HL Deb 07 June 1982 vol 431 c8).

As it transpired the partly suspended sentence clauses within the Bill enjoyed a relatively comfortable passage through Parliament as more controversial clauses of the Bill relating to life sentence prisoners and capital punishment bore the brunt of parliamentary scrutiny. The *Criminal Justice Act 1982* received Royal Assent in October 1982 and the provisions relating to partial suspension came into effect on 31 January 1983 with the passing of a statutory instrument named the '*Eligibility for Release on Licence Order 1983*'.

#### 5.4.2 Postscript

For all the posturing, both inside and outside Parliament, the partly suspended sentence provisions contained in the *Criminal Justice Act 1982* had little or no discernible impact upon sentencing behaviour and when viewed in historical perspective can be seen as largely ineffectual. After an initial jump, the use of partial suspension plateaued at just over 12% of all sentences between 1982 and 1985. Thereafter the use of partly suspended sentences fell into terminal decline so that by 1990 only 1400 such sentences were handed down by courts across the whole of England and Wales (see Figure 29 below).

Figure 29: The Use of Partly Suspended Sentences, 1982 - 1990



Source: Various, Home Office Criminal Justice Statistics England and Wales, 1982 - 1990

By any measure this was an extraordinarily poor return given the five years of intensive policy development within the Home Office and the significant political capital invested by William Whitelaw and his junior ministerial team, a failure made all the more desperate when placed in the wider context of a prison system that had lurched from crisis to crisis.

The principal reason for this trend was that by 1984 the partly suspended sentence had been comprehensively overtaken by events. Ironically it was the clauses relating to the minimum qualifying period for parole championed with such vigour by the PAPPAG and their partners in the penal lobby that radically altered the early release landscape. Leon Brittan was appointed Home Secretary in July 1983 and used his debut speech at Party Conference to signal a change of direction in criminal justice policy (Conservative Party 1983 pp.1-22). Brittan had enjoyed a rapid ascent within the Conservative Party and as the youngest Home Secretary since Sir Winston Churchill was understandably keen to repay the faith of the Prime Minister and avoid the torrid reception William Whitelaw had received at the infamous 1981 Party Conference. Brittan therefore played to the galleries with a pledge that serious offenders would be required to serve longer periods of imprisonment and would accordingly be denied parole until much later in their sentence (Conservative Party 1983 pp.1-22). In turn, the tougher treatment of serious offenders would require shorter sentences for petty criminals,

It is also right that those who pose no such risk either do not go there in the first place or are released when they have suffered the first short, sharp shock of custody. It is for this reason that first, I intend to reduce from one year to six months the minimum qualifying period of custody before a prisoner can be considered eligible for parole. This will reduce our prison population substantially. Those released will be the least serious criminals. Their removal will ensure that there is room for the men of violence who must be imprisoned, often for substantial periods, if the public is to be properly protected (Conservative Party 1983 p.21).

The restriction of parole for serious offenders provoked a storm of criticism. Many academics saw the reforms as motivated by political expediency rather than principle or empirical research (see McCabe 1985) and one member of the Parole Board Dr Candy, a Consultant Psychiatrist at St John's Hospital in Aylesbury resigned from the

Board in protest (as cited in Shute 2003 p.403). Behind closed doors the Parole Board lobbied hard for the abolition of the restrictive policy (HMSO 1992) and legal proceedings were brought against the Home Office in the case of *Re Findlay*<sup>11</sup>, a case discussed in more detail below.

The negative reception to the restrictive policy appears to have distracted attention from the administrative implications of extending parole to short sentence offenders. For all the talk of half remission, automatic parole and compulsory partial suspension it was the existing system of discretionary parole with a beefed up role for prison based LRCs that finally succeeded in removing a large number of short term prisoners from the prison estate. As a technocratic exercise it is difficult not to applaud the Home Office solution which exhibited more than a passing resemblance to the proposals of the Parole Board study group Chaired by Sue Baring outlined above. The parole system was a well-established feature of the penological landscape and it was the retention of the discretionary element of parole that ensured early release for short term prisoners was palatable to the judiciary at least in the short-term (Maguire 1992 p.185). Equally the operational limitations of a discretionary system were traversed by exploiting the delegated powers contained in the *Criminal Justice Act 1972* to push decision making down to prison based LRCs who could deal with a significantly higher volume of cases than the central Parole Board. This wasn't automatic release but it was as close as it was possible to get to such a system while retaining the underlying philosophy of parole as a discretionary privilege to be earned rather than a right to be accorded automatically.

The new system came into force in July 1984 and the impact was immediate. As a result of the lowering of the parole eligibility threshold the number of prisoners released on parole ballooned from 5,366 in 1984 to 14,769 in 1987, an increase of 175% in three years (see Figure 9). As a result, a significant number of short term prisoners were removed from the prison estate but it is difficult to judge whether this simply accelerated the revolving door of minor offenders back into the justice system. What is clear is that the extension of parole to short term prisoners did result in the LRCs granting parole to higher risk offenders, parole revocations increased

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<sup>11</sup> Re Findlay [1985] AC 318

significantly from 1984 onwards and peaked in 1991 when over 1300 prisoners were recalled to prison. The extension of parole did act as a break on a rising prison population and in that limited sense can be seen as a more successful reform than the partly suspended sentence.

During the passage of the *Criminal Law Act 1977* the Labour MP Edward Lyons had criticised the proposal for partly suspended sentences and predicted its abolition in the not too distant future.

The clause is a recipe for putting more people in prisons and for giving longer prison sentences. ... It seems crazy to introduce legislation of this sort which will produce longer sentences and put more people in prison. I was the only one to say so in Committee, but apparently what I said had no effect. I shall therefore repeat my prophesy. *There will be a Criminal Justice Bill within the next few years in which the Government will be seeking to strike out this new clause* (emphasis added) (Hansard: HC Deb 13 July 1977 vol 935 c489).

These words proved prophetic. By the late 1980s partial suspension made little sense as increasing numbers of short-term prisoners came to enjoy release on parole. Perhaps more fatal was that it proved entirely incompatible with an emergent just deserts penal philosophy that sought to reconnect the sentence of the court with the gravity of the offence. On the recommendation of the Carlisle Committee, the partly suspended sentence was eventually abolished in the *Criminal Justice Act 1991*.

## **5.5 Conclusion**

In this Chapter I have examined the increasingly complex policy deliberations that accompanied the Home Office's attempts to extend a system of early release to short sentence offenders. In so doing I have described a period of seven years defined by political inertia, pragmatism and, on occasions, policy failure as penal administrators sought to manage an increasingly challenging criminal justice system in circumstances that were not always of their own choosing. How do we account for these events? What do they reveal about the administration of criminal justice more generally between 1975 - 1982? In my conclusion to this case study I want to reflect briefly upon three themes that emerge particularly strongly from the archival records.

### 5.5.1 Administrative realpolitik

If the establishment of a modern system of parole in England and Wales was grounded in principle, less than a decade later the picture was very different. The archival records show very clearly that the extension of parole to short sentence offenders was driven almost exclusively by consequentialist logics and administrative realpolitik.

Traces of this can be found in the voluminous archival record that built up around the question of early release for short sentence offenders. From a contemporary vantage point the records possess a rather detached quality concerned with increasingly narrow technocratic points of difference rather than substantive questions of a principle. One particularly frank official noted contemporaneously that the discussions lacked a clear guiding philosophy, *'[s]o far, the discussion is like a ship without a rudder since we seem to be in perpetual motion around the same arguments but without moving them to a conclusion. This is probably because the consideration of parole for short-term prisoners has become intertwined with the recurrent need to consider contingency planning should the prison population reach "bust"'* (TNA: HO 495/21). A claim that appears to be corroborated by the Crime Policy Planning Unit and their honest appraisal that, *'[s]uch considerations draw attention, of course, to the fact there is no strictly penological rationale for the scheme: the reason why it appealed to the Home Office (viz fewer people in prison) would be irrelevant to the courts once they had decided imprisonment was appropriate at all'* (TNA: HO 495/18).

In part, this can be traced back to the economic turbulence of the early 1970s and the 1973 decision of the HM Treasury to withdraw funding from the ill-fated prison building programme, a decision that would severely limit the operating space for Home Office policy-makers to influence sentencing practice or the command the necessary revenue and capital resources to respond adequately to a rising prison population. But it also suggests a crisis of confidence in both the aims and techniques of criminal justice as 'penal welfarism' increasingly failed to provide a reliable guide to administrative action or a compelling narrative for the justification of such policy decisions. Successive generations of Home Office officials (and Ministers) had internalised the rehabilitative ideals of penal policy, taught them to others and refined this policy framework to meet the changing needs of the criminal justice system. One of the central claims of this study is that over time this had crystallised into a stable

and institutionalised Home Office worldview that provided a shared understanding of crime and punishment and a professional intuition that provided the intellectual tools to diagnose and resolve many day to day policy issues. As the rehabilitative ideal broke down so did its prescriptive and normative value.

This general picture suggests that policy-makers were struggling to apply a long-standing penal orthodoxy that was increasingly at odds with operational realities, professional experience and the emerging evidence base. This saw many criminal justice practitioners fall back on less demanding consequentialist logics such as the deterrent effect of prison and the ‘clang of the prison gates’, a view that was particularly prominent within the judiciary who had always been more cautious in their support for the rehabilitative ideal (Interview F: 29 September 2014). This created a momentum towards short sentences and the development of the partly suspended sentence that came at the expense of punishment in the community and long determinate sentences. In this sense penal policy in the 1970s was shaped by the unravelling of penal welfarism.

#### *5.5.2 From plurality to action*

Furthermore, my research reveals subtle variations in how such policy issues were framed and approached within the various divisions of the Home Office (TNA: HO 495/18; HO 495/18; FOI: January 2013). The tendency to view government Departments as homogenous institutions has often seen the Home Office equated to the personality of the Home Secretary or imbued with a corporate identity that speaks with one voice and acts with common purpose (Lowndes 2010). Moreover, there has been relatively little focus on how the Home Office copes with plurality and translates a multiplicity of views, options and agendas into a singular course of action (traces of this can be found in Faulkner 2006; 2014; Royal Institute of Public Administration 1982; Windlesham 1993). For those taking a broadly intentionalist position, Ministerial decisions emerge as the defining point in the process while those with a more structuralist orientation have tended to emphasise the importance of wider socio-economic forces in structuring and sustaining such decision-making processes.

My research offers a rather different perspective on these issues and goes some way towards revealing how the organisational basis of the Home Office and other

institutions has influenced the trajectory of early release policy and practice. It challenges the image of a homogenous Home Office identity and goes some way towards revealing the complex web of negotiations, trade-offs and conflicts that defined the day-to-day relationships between the rather autonomous divisions that made up the Home Office. Furthermore, it calls into question a sequential or linear view of policy-making as options are gradually distilled down for consideration and decision by Ministers. It suggests instead an altogether messier, contingent and dynamic view of how plurality is resolved and policy decisions are taken. Take for instance the debates that surrounded the extension of early release to short sentence offenders, there was no settled Home Office view on this question. At different times a range of options for reform were seen to be in the ascendancy before being rejected, reformulated or overtaken by external events. In part this was because the various divisions with a stake in early release saw the world very differently according to their functional responsibilities, objectives and the messages received from the unique constellation of practitioners and stakeholders associated with that team. Consider, for example, the following views on the ‘Bampton scheme’ of compulsory partial suspension developed within the Probation and Aftercare Department “H2 Division” (a complete Home Office ‘organogram’ for 1977 can be found at Appendix 8),

Criminal Policy Department: Crime Policy Planning Unit “C1 Division”:

‘C1 suggests that if it is felt that the courts should have full discretion about parole for short sentences, it would be better to implement section 47 of the Criminal Law Act 1977 with additional provision for supervision during the suspended part of the sentence, than to introduce a completely new provision’ (TNA: HO 495/18).

Chief Scientist Department: Home Office Research Unit:

‘I cannot say that I am particularly sympathetic to this scheme, however ingenious, for tinkering with a parole system which I should like to see abolished, provided there is substituted for it a commission independent of the Home Office (but accountable to Parliament) for the review of prisoners sentenced to long terms. As a criminologist, I have never understood the penological justification for the system (although I understand the sociological and political ‘justification’ only too well). Scientifically, such empirical evidence as there is about the benefits of supervision on parole has never struck me as particularly convincing. In short I think we are attempting to tackle an admittedly complex problem from the wrong end and that we do well to have regard to continental experience in this matter’ (FOI: January 2013).



Prison Department: Operational Administration “P3 Division”:

A variant of automatic parole would be a scheme suggested by P3 combining enhanced remission with supervision. Such an alternative scheme which would have a similar effect to the one proposed but would, it is maintained, give rise to fewer administrative problems. The method would be to increase remission for good conduct and industry under Prison Rule 5 to two-thirds (retaining the present proviso that the actual term should not be reduced by remission to less than 31 days) with a liability to supervision and recall for the first half of the period remitted. The licensing provisions could be based on those in section 20 and Part I of Schedule 3 of the Criminal Justice Act 1961. This would be similar to automatic parole, apart from the terminology. Remission has come to be regarded as a right, whereas parole is a privilege (TNA: HO 495/18).

I want to argue that the organisational basis of the Home Office had a significant and largely overlooked impact upon the trajectory of criminal justice policy. Over time it cemented an institutional hierarchy of power which ensured that powerful Divisions like the Police Department were able to use their considerable financial, political and human resources to shape the political agenda and advance their interests. But more subtly these different views had an important framing effect on how issues were interpreted and the most appropriate administrative levers for the resolution of such problems. It is surely no coincidence that the Prison Department favoured an extended system of remission given the low administrative burden presented by the scheme and the perceived value of remission as a tool of control while the Probation and Aftercare Department worked tirelessly for a system that incorporated active supervision while on release.

It also hints at one final possibility; that the decision of which Division to assign a task, project or problem to was just as significant as the deliberations and recommendations that followed. In some instances, this was a conscious decision to exploit such differences and allocate tasks to the teams most likely to provide the desired response. But more generally such decisions were shaped by a series of unwritten rules, assumptions and norms of appropriate conduct that informed how the allocation of tasks amongst the various divisions of the Home Office was to be undertaken. Norms of appropriate conduct that may well have closed down some likely avenues of reform while favouring others. For example, the Crime Policy Planning Unit was introduced to coordinate the policy-making process across the

Home Office and bring a more strategic approach to such deliberations. Unfortunately, it has not been possible to explore this change in the machinery of government within the scope of this study and further research is needed on how such cross cutting teams influenced the development of penal policy.

### *5.5.3 A restricted operating space*

Finally, the records suggest that the period covered by this case study saw an intensification of the oppositional forces outlined in Chapter Four. Once again the unfolding dialectical relationship between the Home Office and the judiciary stands out as the defining driver of early release policy and practice. But it was not the only force at work. In Chapter Five I have touched upon a number of relationships that served to limit and constrain the operating space available to the Home Office.

At the beginning of this Chapter I examined the importance of the Public Expenditure Survey and the legacy of the 1973 HM Treasury decision to withdraw from a significant prison building programme once it became clear that the Home Office figures greatly overestimated the likely growth in the prison population. In turn the reduction of funding for both the prison service and probation and aftercare personnel had a significant impact upon morale and the operational readiness of various criminal justice agencies to deliver more resource intensive penal interventions, for example, non-custodial sentences or an effective programme of training and rehabilitation. Operational issues that led in time to the establishment of the May Committee enquiry into Prison Services, industrial action and the eventual negotiation of the Fresh Start agreement. I went on to examine the so-called ‘Jenkins initiative’ and the concern expressed by senior officials that the Parole Board lacked the necessary dynamism to extend the scope of parole without intervention by the Home Secretary.

Later on I examined the ruminations of the Parole Board working group convened under the Chairmanship of Sue Baring who had recommended an extension of the discretionary parole system and greater delegated powers for the prison based LRCs, a scheme that was close in form to the scheme finally adopted by Leon Brittan when the *Criminal Justice Act 1982* was activated and eligibility for parole reduced to 6 months. Finally, in the party political sphere I examined the increasingly strained relationship between the Home Secretary, back-bench members of parliament and the

Conservative party rank and file. In the absence of an effective opposition from the Labour Party, internal party politics took on added significance. The defeat of the law and order motion at the 1981 Conservative Party Conference was a huge personal blow to Whitelaw and arguably became a symbolic event within the Conservative Party consciousness that required careful handling. The riots of 1981 were largely attributed to poor race relations and inner city deprivation, issues largely outside the Home Office area of responsibility and yet they would come to have a significant influence upon the political capital of the Home Secretary and his ability to drive through his reform of early release policy and practice.

## **6. Early Release at a Crossroads: The Carlisle Committee and Criminal Justice Act, 1987- 1992**

### **6.1 Introduction**

In this third and final case study I explore the evolution of early release policy and practice between 1987 and 1992, a transitional period sometimes described as an ‘Indian summer’ for liberal criminal justice policy (Windlesham 1993 p.28).

This Chapter builds upon earlier findings. In my first case study I traced the emergence of the modern system of parole given legal effect by the *Criminal Justice Act 1967* and suggested that discretionary release on licence gave administrative expression to prevailing penological support for indeterminate sentencing and the personalisation of punishment. In Chapter Five I explored the delicate institutional balance of power that shaped the mixed fortunes of partly suspended sentences and William Whitelaw’s failed attempts to introduce a system of automatic parole for short sentence offenders. Here I argued that the stop-start reform of early release procedures was symptomatic of a process of ‘political inertia’ and a failure to adapt public policy to the shifting realities of a dynamic criminal justice system. Both case studies demonstrated how institutional forces impact upon criminal justice policy and mediate between policy actors and the wider structural context within which they operate. In particular, I sought to illustrate how institutional forces have guided, structured and tempered the development of early release policy since its modern incarnation in the 1960s.

However, it would be wrong to conclude that institutions only exert a dampening effect on policy-making. In this Chapter the focus of enquiry shifts to consider the sometimes creative, catalysing effects of institutions and the hard won battles to both improve the operational health of the criminal justice system and rationalise the system of early release with the Carlisle Committee Report ‘*The Parole System in England and Wales*’ (Home Office 1989c). I begin by sketching out the wider strategic context within which Home Office decision-making was taken, in order to illustrate the scale of the challenge facing the criminal justice system on the eve of the 1987 General Election. I then construct a detailed chronology of ‘early release’ reform, starting with the piecemeal modification of remission arrangements in April 1987 and culminating

in the radical overhaul of ‘early release’ in Part Two of the *Criminal Justice Act 1991*. Finally, I reflect upon these significant developments in early release policy and unpack what this series of events tells us about the administration of criminal justice in England and Wales in the late 1980s and early 1990s.

## **6.2 The Context**

On the 11 March 1987 then Home Secretary Douglas Hurd and his Minister of State Lord Caithness met with the Director General of the Prison Service, Chris Train at Queen Anne’s Gate, the Whitehall headquarters for many Home Office staff after 1977, to discuss the deteriorating conditions within the prison system (The Guardian 12 March 1987a). Records of the meeting are incomplete but there is some evidence to suggest that Hurd closed the meeting by instructing his most senior officials to begin contingency planning for the release of 6,000 prisoners under the emergency powers provided for in the *Criminal Justice Act 1981* (The Guardian 12 March 1987a; Zander 1989 p.292).

If true, this marked a significant departure from the long-standing Home Office ‘open door’ approach to management of the prison estate (Zander 1989 p.297). Not least as shortly after his appointment as Home Secretary Hurd had delivered a keynote speech to the Prison Governors Conference re-affirming his Departments commitment to accommodating those sentenced to custody by the courts;

There is a school of thought which would place the emphasis entirely on containing the level of demand. This is unrealistic. The prison system must respond to the demands placed on it by the courts. It is true that Parliament has provided, for use in an emergency, a power of executive release applying to prisoners who are in the last six months of their sentence. But my predecessors have made clear that its use would be confined to extreme emergencies, losses of accommodation caused by fire, riot or the like. I stand by that position (The Churchill Archives Centre: Churchill/KNNK 2/3/1/42).

Why were Ministers beginning to countenance such a departure from Home Office orthodoxy? The penal system had long been defined by a discourse of crisis and calls of impending chaos were nothing new. In 1975 Roy Jenkins had proclaimed that if the prison population should reach 42,000 ‘*conditions in the system would reach the intolerable*’ (The Guardian 24 July 1975) and yet, in the years that followed, the

system had proved remarkably resilient in pulling back from the brink of catastrophe despite a far higher average prison population. What made the situation in 1987 qualitatively different from previous periods was the coalescence of a deteriorating operational context and an obstructive political inheritance that limited the options available to the Home Office in extracting themselves from this situation. There was simply nowhere left to go. I will go on to argue that these events can be seen as part of a cyclical process of reform and renewal that created the space for policy-makers to pursue a more strategic approach to the administration of the criminal justice system. But in March 1987 Home Office decision-makers faced a ‘perfect storm’ and few available channels to circumnavigate the operational turbulence they were experiencing. Four elements of this political calculus emerge most strongly from the historical records and are discussed below in turn.

#### *6.2.1 The effects of a rising prison population*

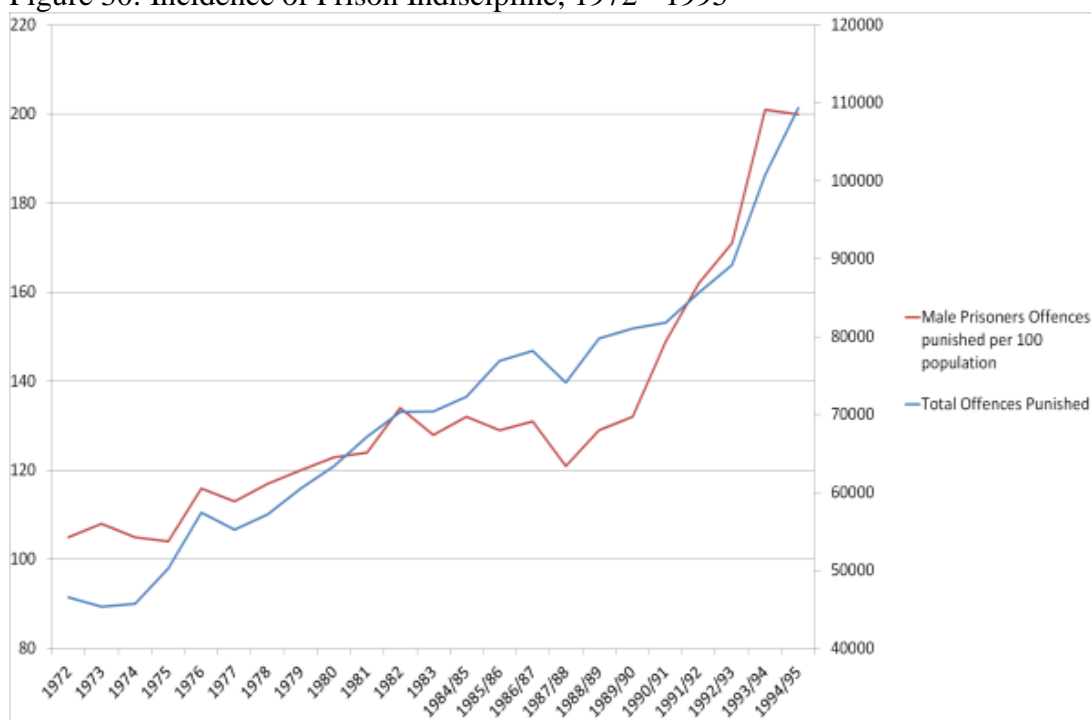
The tangled problems of our prisons took up ever more of my time at the Home Office. Several times we seemed on the edge of catastrophe (Hurd 2004 p.344).

First and foremost, the Home Office had to contend with a prison population that had reached a post-war high of 51,000 by early 1987 (see Figure 4). While the headline figure was itself symbolically damaging for Home Office planners who had, by their own admission, been ‘preoccupied’ with reducing the prison population (Home Office 1976c) it was the logistical implications of accommodating so many prisoners that really began to tell (Windlesham 1993 p.140). Despite the Thatcher government’s commitment to a comprehensive prison building programme the average population had grown 7,500 prisoners higher than the CNA of the prison estate (Figure 4). Contrary to Leon Brittan’s pledge to end cell sharing by 1990 the number of prisoners sleeping either two or three to a cell had actually increased to an unprecedented 18,983 (Figure 17). When taken as a whole, an ageing prison estate, staff shortages and the continued necessity of ‘slopping-out’ meant that many prisoners were confined to crowded, unsanitary cells with little opportunity for constructive activity. In his Annual Report for 1986 HM Chief Inspector of Prisons Judge Stephen Tumim noted that, *‘the physical conditions in which many prisoners had to live continued, therefore, in many cases, to border on the intolerable... Overcrowding, coupled with the lack of*

*in-cell sanitation and the sharing of limited and inadequate facilities on the landings, represented much human misery* (HM Inspector of Prisons 1987 p.8).

As conditions deteriorated prison indiscipline, a useful barometer of operational health, increased markedly. In the summer of 1986, many penal establishments throughout England and Wales experienced significant disruptions. Northeye Prison was partly destroyed, Bristol Prison was severely damaged and at Erlestoke Youth Custody Centre, thirty-four young offenders escaped after destroying their living quarters. According to Home Office estimates the damage to the prison estate would eventually cost the taxpayer more than £13.5m at 2012 prices (Home Office 1987b p.1). More generally, as Figure 30 demonstrates, there were 78,214 recorded acts of indiscipline in 1986/87 including 20 rooftop protests and 17 episodes of hostage taking (Home Office 1989b p.127).

Figure 30: Incidence of Prison Indiscipline, 1972 - 1995



Source: Home Office 1990d

This should not be dismissed lightly. During the course of one interview a former Home Office official described the 1986 ‘summer of discontent’ and the events at HMP Northeye, in particular, as the ‘worst moment’ of Hurd’s tenure at the Home Office (Interview B: 13 January 2014). Prison administrators feared widespread prison disturbances more than any other issue and this was not a remote threat. Local

intelligence was indicating that further rioting was a real possibility should there be an extended period of hot weather in the summer of 1987 (The Guardian, 13 July 1987b).

#### *6.2.2 The application of organised pressure*

The second major consideration for the Home Office was the institutional pressure applied with increasing force by organised interest groups within the criminal justice system. While the situation was dire it was not inevitable that such conditions would translate into policy change. Few votes were lost by enforcing tough penal regimes. Prisoners were largely alienated from the political process and unable to apply more than fleeting democratic influence. A strong humanitarian impulse did guide many politicians and officials but this exerted a rather nebulous influence over the trajectory of penal policy (Loader 2006). Public policy change is most commonly created through the consistent application of organised pressure by those with power and influence (Hacker and Pierson 2010) and in 1987 it was bodies like the Prison Officers Association (POA), National Association of Probation Officers (NAPO) and the Police Service that were shouting loudest.

In April 1986 the Prison Officers Association (POA) voted 13,106 to 3,100 in favour of industrial action to protest against substandard pay and conditions. This resulted in significant disruption and the eventual negotiation of the 'Fresh Start Agreement' intended to address long standing weaknesses in the structure and organisation of the Prison Service. Pressure groups like NACRO, the Howard League of Penal Reform and PAPPAG continued to lobby the Home Secretary with the latter publishing a much discussed pamphlet, *'The Rising Prison Population'* in 1986 condemning the gross disparity between the stated goals and operational realities of the penal system,

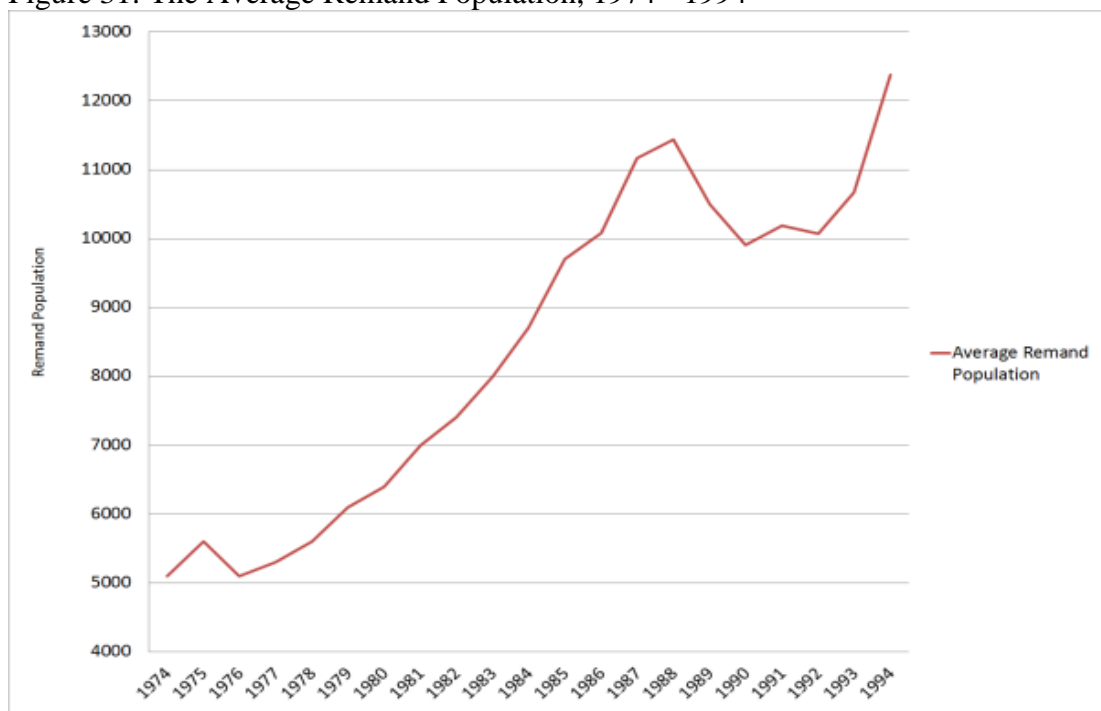
Such conditions make a mockery of the prison system's stated aim of preparing prisoners to lead a good and useful life, fail to meet the most elementary standards of human decency, violate internationally agreed standards for the treatment of prisoners, create tensions and serious hardship for both prisoners and prison staff, and increase the risk of disorder in prisons (1986 p.2).

Pressure also came from less obvious corners of the criminal justice system. The Police Service, as represented by the Police Federation and Association of Chief Police Officers (ACPO), had long used their influence to criticise executive release and make



the case for ‘fair’ sentences that kept criminals of the streets for an extended period of time (for example *The Guardian* 17 November 1988a). This position began to soften as year on year increases in the remand population awaiting trial peaked at 11,162 in 1987 and began to spill over into police cells (see Figure 31). In early 1987 the Metropolitan Police Commissioner, Sir Kenneth Newman wrote to Douglas Hurd warning the Home Office that holding prisoners in police cells was diverting significant police resources from front line activity and represented an unacceptable drain on police capability (*The Guardian* 13 July 1987b).

Figure 31: The Average Remand Population, 1974 - 1994



Source: Home Office Report on the Work of the Prison Department, 1965-1987. Home Office Report on the Work of the Prison Service, 1988 – 1991. HMPS Report on the work of the Prison Service, 1992 – 1996.

The relative independence of crime rates and the prison population has been well documented (Cavadino and Dignan 2006a p.447) but here, for a fleeting moment in time, the use of police-cells created a feedback loop within the criminal justice system that was most unwelcome to the senior ranks of the police service whose influence within political circles was unrivalled. As one Home Office official put it to me,

You know the police mattered hugely. If you lose the police you lose everything, and the police are absolutely crucial. You know you had the IRA campaign going on, you’ve just had the miners’ strike, under public disorder you’ve got terrorism you’ve got the crime rate going up, I mean you know in terms of big politics, winning elections or losing elections the

police are streets ahead of it... the police really matter (Interview B: 13 January 2014).

The cumulative and converging nature of this organisational pressure should not be under-estimated. Jointly and severally these various interest groups enjoyed direct (and regular) access to the senior echelons of the Home Office as well as commanding the institutional firepower to disrupt the everyday business of the criminal justice system. While their agendas were very different the constant reinforcement of a discourse of operational fatigue must surely have been internalised by Home Office decision-makers and weighed heavily in the Department's options appraisals.

### *6.2.3 The Judiciary and Sentencing Practice*

The third major element in the decision-making equation was the need to manage judicial opinion and respond to hardening trends in sentencing behaviour. As I noted in Chapters Four and Five, the story of early release is bound up with the unfolding dialectical balance of power between the executive and judiciary, a relationship that could both impede and catalyse policy change. Where the various interested parties outlined above enjoyed varying degrees of influence within the Home Office, judicial power was hard-wired into the British constitutional system and the day-to-day operation of the criminal justice system.

In the early 1980s the outlook had been reasonably positive. Concerted effort by William Whitelaw and the Lord Chief Justice had drawn attention to the problem of prison overcrowding and the need to keep the prison population in check. On his appointment as Lord Chief Justice in April 1980, Lord Lane issued a series of practice direction in the cases *Upton* and *Bibi* directing the courts to treat immediate custody as a sentence of last resort. Later, in *Aramah*<sup>12</sup> Lord Lane issued the first in a series of guideline judgements intended to set down, '*general parameters for dealing with several variations of a certain type of offence, considering the main aggravating and mitigating factors and suggesting an appropriate starting point or range of sentences*' (Ashworth 2010 p.36). These judgements did alter sentencing behaviour, at least in the short term and played a contributory role in the Lord Chief Justice's decision to withdraw his support for the proposed system of automatic release on licence

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<sup>12</sup> (1985) 4 Cr App R (S) 407

contained in the Home Office Review of Parole in England and Wales (TRA: HO 495/23). Average sentence lengths for those aged seventeen and over fell from 13.2 months in 1975 to 10.3 months in 1982, while the Magistrates' Courts, often portrayed as particularly retributive responded by gradually reducing the number of males aged 21 and over that were sentenced to immediate custody<sup>13</sup> throughout the 1980s. This alliance proved short-lived and both sentence lengths and use of immediate custody began to rebound after 1984. A large part of the increase was attributed to the increasing remand population and Crown Court disposals in 'triable either way' cases resulting in longer sentences of imprisonment (Home Office 1987b). But not all the blame can be laid at the doors of the judiciary. Many commentators have highlighted the tough law and order narrative emerging from the Home Office following Brittan's arrival at the Home Office (Zander 1989) as well as perceived public support for more punitive sentencing, as tacit approval for stronger sentences (Roberts *et al* 2003). Not for the first time perhaps change in one corner of the criminal justice eco-system would bring about new and unanticipated policy outcomes elsewhere.

Hardening sentencing trends were compounded by an increasingly fractured working relationship between the Home Office, the Lord Chancellor's Office and senior judiciary. If coordinated effort between the Home Office and Lord Chief Justice had brought some relief to the prison population in 1982 by 1987, the opposite was true. As Faulkner has noted,

Direct communication between the judiciary, especially the higher judiciary, and the Home Office was however difficult, particularly if the Home Office appeared to be asking for more leniency in sentencing in order to relieve prison overcrowding; to complain about apparent inconsistency; or to propose, or draw attention to, research on sentencing which might challenge assumptions on matters such as the deterrent effect of a severe sentence.... Reasons for the difficulty were partly the risk of appearing to challenge the judiciary's constitutional independence and partly the political risk to the Government of seeming 'soft' on crime (Faulkner 2006 p.113).

The implications of this fracture will be explored through this case study but at the very least we can conclude that by 1987 it was becoming increasingly difficult for the

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<sup>13</sup> Although this must be balanced against the increasing numbers sentenced to immediate custody by the Crown Court, typically for longer periods.

Home Office to exert any soft influence over sentencing practice or the use of non-custodial measures with any degree of confidence. The answer would have to be found within the Home Office's sphere of influence and historically this had meant turning to executive release and the creation of additional prison capacity.

#### 6.2.4 *A difficult inheritance*

Unfortunately for Hurd and his advisors this particular path had been well travelled by the Home Office. By the late 1980s early release had emerged as a key battleground between the executive, judiciary and the various interest groups with a stake in the criminal justice system. The problem could be traced back to July 1983 when Home Secretary Leon Brittan used his maiden speech at the Conservative Party Conference to signal a change of direction in the government's approach to law and order.

As I noted earlier, Leon Brittan's move to introduce a bifurcated system of parole for serious and minor offenders served to destabilise the already delicate regulatory balance of early release policy and practice. In private the Parole Board expressed serious misgivings with the 'restrictive policy' (FOI: BV3-38) while the Home Office was drawn into protracted judicial review proceedings challenging the Home Secretary's decision to unilaterally revise the policy directions issued to the Parole Board without consultation of relevant stakeholders in the criminal justice system. The dispute finally reached the House of Lords in the case of *Re Findlay*<sup>14</sup> and while the Law Lords eventually found in favour of the Home Secretary the damage had arguably already been done, prisoner morale was poor and judicial discontent was mounting (The Guardian 6 February 1984; The Times 21 February 1984). The sheer scale of early release made possible by 'section 33' cases coupled with an incendiary Home Office circular that advised LRCs that there should be a presumption in favour of parole for short sentence offenders provoked a storm of criticism from the judiciary and previously unseen records released under the *Freedom of Information Act* reveal that,

In the autumn of 1985 the Lord Chief Justice drew to the attention of the Home Secretary the mounting concern among members of the judiciary, and in particular among circuit judges (as evidenced at the Judicial

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<sup>14</sup> Re Findlay [1985] AC 318

Seminar at Roehampton in September), about the effect of the reduction in the minimum qualifying for parole (MQP) from 12 to 6 months under section 33 of the Criminal Justice Act 1982. It was against that background that the Home Secretary decided in December 1985 that a Working Group should be established, under the chairmanship of Mr S G Norris, Director of Operational Policy, Home Office Prison Department, with the following terms of reference:

"To explore further the concerns that have been expressed by the judiciary about the operation of section 33 of the Criminal Justice Act 1982; and, against that background and taking into account the independent role of the Parole Board and Local Review Committees, to look for ways in which that aspect of the parole scheme might be improved" (FOI: HO 291/ 2081).

The judiciary was represented on the Working Group by Sir Maurice Drake, a High Court Judge and former Vice Chairman of the Parole Board. At a meeting of the Working Group on Thursday 24 April 1986, Mr Justice Drake set out the concerns of the judiciary (FOI: HO 291/2081). He questioned whether it was possible to adequately assess the risk of short term prisoners and took aim at the Home Office guidance that there should be a 'presumption in favour' of parole for eligible s33 prisoners (FOI: HO 291/2081). This presumption, ingenious as it was in shifting the focus of intervention from the 'Bampton proposal' restrictions on sentencing discretion to the deliberations of the Home Office administered LRCs, was perceived as an unacceptable erosion of the sentencing function of the courts 'by the back door' and Drake expressed his fear that many judges were now actively working to undermine the parole system (FOI: HO 291/2081). In the minutes to one meeting it is noted that, *'he [Mr Justice Drake] said that at a recent meeting which he had with the Lord Chief Justice, the LCJ had told him that there were now very clear indications that judges were increasing sentences to take account of the parole situation'* (FOI: HO 291/2081), a trend, it should be noted, that appeared to contradict established case law. As the Carlisle Committee would later note the Court of Appeal had made it clear in a long series of judgements from *R v Maguire and Enos*<sup>15</sup> to *R v Oules and Oules*<sup>16</sup> that, *'judges should pass what they consider the right sentence for the offence and not concern themselves either with when the offender is likely to be released or with whether he will then receive any supervision'* (Home Office 1988 p.61).

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<sup>15</sup> (1957) 40 Cr App R.92

<sup>16</sup> (1986) 8 Cr App 12 (S) 124

This difficult inheritance had profound implications for Hurd. As Shute has noted, parole had historically operated as a '*safety valve*' when pressure on the prison population became particularly grave (2003 p.836). The problem for the Home Office in 1987 was that the parole system had reached its load-bearing capacity; its administrative coherence was unravelling and the judiciary had lost confidence in the system, particularly the s33 procedures (FOI: HO 291/ 2081). On the other hand, the bifurcation of parole - particularly the restrictive policy for serious offenders - had proved highly popular with the right-wing of the Conservative Party and any moves to further 'liberalise' early release arrangements were likely to draw negative criticism from within the party and tabloid media. Where Roy Jenkins, William Whitelaw and Leon Brittan could turn to parole to mitigate the worst effects of the prison population this option was simply unavailable to Douglas Hurd. As one senior penal reformer put it to me,

The thing of course that hit headlines was the tougher end, it was Leon Brittan's restrictions on the over 5-years, and certain categories... minimum 20 year terms for certain categories of life. What I think, I think the thing which really sowed the seeds and created the momentum for what became the Carlisle changes was actually the reduction in the threshold, because that produced a situation which the custodial term was the same for sentences of a range of different lengths, which caused concern amongst sentencers. It also produced concern amongst some academics who were regular commentators. But it was more the sense on the part of sentencers who were obviously reinforced then by some of the academic writing that as they saw it the sentences were being undermined by this change. So I think that created a momentum which helped the Carlisle reforms to become accepted (Interview C: 22 April 2014).

It is against this fluid and rather turbulent operational backdrop that reform of early release in the late 1980s must be understood. The Home Office was exposed on several flanks seeking to manage the 'bottom-up' operational pressures of industrial unrest, prison indiscipline and a challenging legal-administrative inheritance with the 'top-down forces of financial restraint, growing judicial criticism and delicate inter-Departmental negotiations with Number 10 and other Whitehall Departments.

### **6.3 The Long Road to Legislation**

In this section I want to illustrate how the Home Office sought to navigate through this policy minefield and sketch out a systematic and historically grounded analysis of

early release reform starting with the extension of remission arrangements, the Carlisle Committee review of parole and culminating with the provisions of the *Criminal Justice Act 1991*. In so doing I illustrate how the increasingly restricted options for reform of the criminal justice in the late 1980s led Home Office policy-makers to look afresh at systemic change of the administration of early release in England and Wales.

### *6.3.1 Introduction of 50% Remission*

The Home Office never did exercise the emergency powers of executive release contained in the *Criminal Justice Act 1982*. The plans were leaked to *The Guardian* journalist Aileen Ballantyne who ran a front page exclusive on the 12 March 1987 entitled '*Crowding may free 6,000 prisoners*' (The Guardian 12 March 1987a). The story was politically embarrassing for the Conservative Party and it was reported that the Prime Minister intervened personally to veto the plans and shore-up the government's hard earned law and order credentials in the run up to the 1987 General Election (Zander 1989 p.292).

The Conservative Party won a decisive victory at the General Election on 11 June 1987 and preparations for a prison amnesty were quietly mothballed. Hurd convened a series of meetings in June and July 1987 to scope out an alternative approach (Hurd 1993 p.347), where past Home Secretaries had turned to parole it was remission that now emerged as the most promising lever at the disposal of the Home Office. While the operation of parole could only be altered through primary legislation remission was entirely in the gift of the Home Secretary and could be quickly expedited by statutory instrument. Equally, remission required no formal assessment of inmates and placed no additional resource pressures on either the prison or probation service. In administrative terms the measure was resource neutral and was likely to result in significant reductions in the prison population. The attraction is easy to understand but like Whitelaw before him, Hurd was well aware of the indiscriminate nature of remission and the deficiencies of a system that was both automatic and offered no continuing liability for recall once released. As he would later recall in his memoirs,

By July 1987 the total of prisoners in England and Wales was 51,029, of whom 68 were in police cells. There was no particular rhyme or reason for this summer surge; it bore no relation to the figures of recorded crime, which were rising less fast than they had been. On 2 July I held a long and

crucial policy meeting at the Home Office. 'Devise outline plan, including some 50% remission. *Could be politically lethal*' (emphasis added) (Hurd 1993 p.347).

On the 16<sup>th</sup> July 1987 Douglas Hurd addressed the House of Commons and announced a 'five-point plan' intended to take immediate and decisive action to address the deteriorating conditions within the penal system (The Times 17 July 1987). First, an army camp in Rollestone, Wiltshire would be converted into a temporary prison providing space for an additional 360 inmates. Second, in discussion with the Treasury there would be a substantial expansion and acceleration of the prison building programme. Third, with immediate effect Hurd was establishing a new Prison Building Board within the Home Office to streamline the prison building programme and '*exploit to the full private sector techniques in bringing new prisons on stream*' (The Times 17 July 1987). Fourth, the Government would honour the Conservative Party manifesto commitment to, '*institute a thorough review of the workings of the parole system*' (Conservative Party 1987 p.57). Finally, pending the outcome of the parole review, the period of remission which could be earned by those serving sentences of up to 12 months was increased from a third to one half (The Times 17 July 1987).

This final measure provoked considerable unrest amongst Conservative backbenchers and resulted in a tense meeting between the Parliamentary Party, Douglas Hurd and his Minister of State John Patten (Interview B: 13 January 2014). In a circular to Conservative MPs dated 20 July 1987, Hurd expanded further on these measures, conceding that while his plans might cause backbenchers '*short-term discomfort*' (The Churchill Archives Centre: Churchill/ILLD 2/14/10) it was hoped that in the long run these measures would ensure that the prison system was not a lightning rod for political opposition through the lifetime of the new parliament. The rationale for introducing remission is particularly interesting and worth quoting at length,

This will achieve two ends. First while the Review is being conducted it will reduce the anomalies caused by the interaction of remission and parole - especially in relation to the lower minimum qualifying period for parole introduced by Leon Brittan. These anomalies have been subject to growing criticism from the judiciary. Second, it will provide the prison system with some relief from the present levels of overcrowding and enable the important new 'Fresh Start' working practices to be implemented with very significant gains for prison regimes and value for money. The change in



remission will affect only less serious offenders. The great majority of these are guilty of offences against property and less than a fifth are guilty of any use of violence. Indeed, the 'violent offenders' in this category will overwhelmingly be of the pub brawl or Saturday night fight type. The prison population will be reduced by some 3,500 and the maximum reduction in effective sentence length for any one offender will be two months, in most cases it will be much less (The Churchill Archives Centre: Churchill/ILLD 2/14/10).

The changes to remission took effect on the 16 July 1987<sup>17</sup> and provoked heated discussion. Roy Hattersley, Labour spokesman on home affairs, welcomed the announcement but cautioned the government for a short-term approach to prison administration. The tabloid press was particularly critical as reflected in the headlines outlined below at Figure 32.

Figure 32: Media Response to Hurd's Introduction of 50% Remission



Source (from top to bottom): Daily Mail 17 July 1987a, Daily Mail 14 August 1987b, The Daily Express 18 July 1987

<sup>17</sup> Prison (Amendment) Rules S.I 1987 No 1256

The reform of remission arrangements had an immediate effect on the prison population. 3,500 prisoners were released early from prison in August 1987 and the prison population fell by over 6 per cent in little over 2 months, a reversal matched only in scale by the Prison Officers Strike of 1980 (Home Office 1988a; 1989a). The changes to remission brought only temporary relief for the government but this was sufficient to draw the sting from the prison estate during the much feared warm summer months of 1987. In this very narrow sense the policy was a success, but in mortgaging the future the Home Office was storing up problems the Carlisle Committee would be tasked with resolving.

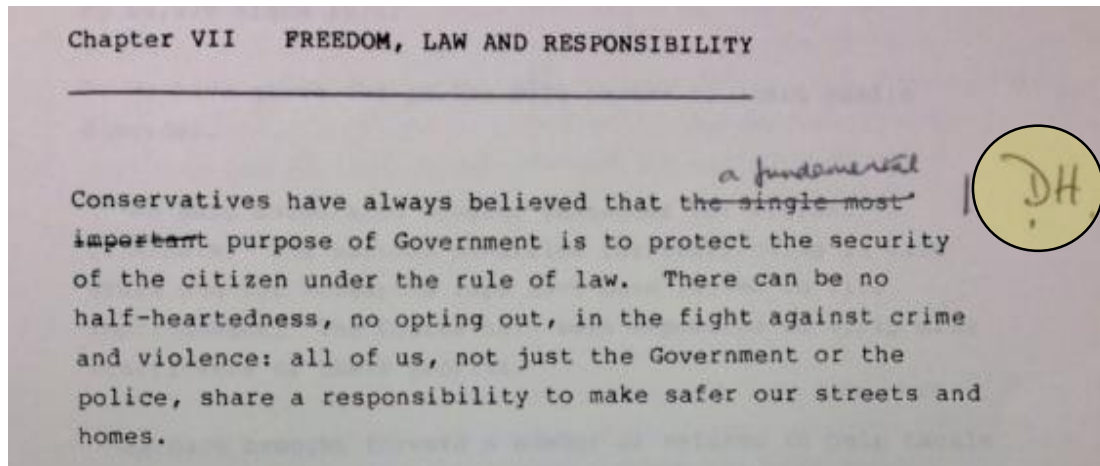
### *6.3.2 Establishing the Carlisle Review of Parole*

The Home Office began preparatory work for a review of parole in June 1987, somewhat before the Home Secretary's announcement to the Commons on 16 July. The initial scoping work was triggered by the Conservative Party Manifesto, *'The Next Moves Forward'* and a commitment to institute a thorough review of the parole system (1987 p.57). The origins of this commitment are difficult to trace. Planning for the 1987 General Election began in July 1986 when the Prime Minister established a Strategy Group, dubbed the 'A-Team' with responsibility for providing the overarching political narrative that would define the Conservative Party re-election campaign (Thatcher 1993 p.565). Sitting underneath the Strategy Group were eleven party policy groups chaired by Cabinet Ministers with broad terms of reference to engage the Parliamentary Party and develop the Party 'War Book' for the upcoming election campaign (Thatcher 1993 p.565).

The party policy working group on law and order was chaired by Douglas Hurd with support from his special adviser Edward Bickham. Records of the policy group are incomplete and it is difficult to identify the author of the parole review commitment with any confidence. However, records from the Conservative Party Archive at the Bodleian Library do reveal that the commitment was included because of a *'concern among the judiciary about the effect of parole on prisoners with short sentences; dissatisfaction in some quarters about the disparity between the time served in prison and the sentence handed down by the court... and the effect of any changes on the prison population'* (Conservative Party Archive: CRD 4/30/7/26). Furthermore, we can reasonably conclude from the following passage of text from an early draft of the

manifesto (Figure 33) and the reference to 'DH' that Douglas Hurd was probably involved in the drafting of the law and order proposals in some capacity and would have taken ownership of the decision to introduce a review of the parole system.

Figure 33: Extract from file '1987 General Election: Manifesto planning notes and briefs'



Source: Oxford, Bodleian Library, Conservative Party Archive: CRD 4/30/7/26

Records indicate that Lord Lane and his deputy Lord Justice Tasker Watkins were consulted on the plans prior to the General Election and by 19<sup>th</sup> June Mark Carlisle (as he then was) had been identified as the preferred chair of the committee (FOI: HO 291/2138). The Home Office also wrote to the Lord Chancellor's Department on the 24<sup>th</sup> June 1987 seeking views on judicial membership of the committee. Understandably, given the events outlined in Chapter Five, judicial representation on the Review Committee provoked considerable unease within the Home Office with one senior official expressing concern about the judiciary's likely attitude towards the Review and early release for short sentence offenders,

In some ways I am not sure that it would be an advantage for the High Court Judge on the review to have had Board experience. On the whole they do not see the same range of cases as other members; and recent High Court Judges (Drake, McCullough, Popplewell) would approach the review with pretty closed minds about the merits of parole for short sentenced prisoners. Judicial opposition to section 33 is obviously a major issue for the review; but I am not convinced that membership should contain a leading antagonist (which Drake J, for instance, certainly is) (FOI: HO 291/2138).

Despite such reservations events were moving quickly. The Home Secretary and David Faulkner met with Mark Carlisle on 21<sup>st</sup> July 1987 to finalise the terms of reference, membership and an indicative timeline for the review (FOI: HO 291/2138). The Lord Chief Justice, Lord Chancellor and Number 10 were consulted and advice was put to the Home Secretary on the suggested arrangements for the committee (FOI: HO 291/2138). The final membership and terms of reference for the Working Group are set out at Appendix 9 and were made public following Hurd's public announcement of his 'five-point plan' and the review of parole outlined earlier (Home Office 1989c).

### *6.3.3 Proceedings and Report of the Carlisle Committee*

The Carlisle Committee convened for the first time in September 1987 and would go on to meet on twenty-two occasions before submitting its final report to the Home Office in October 1988 (Home Office 1989c p.1). Fact finding visits were made to a number of prisons and probation services as well as overseas trips to Canada and both federal and state correctional facilities in the USA. Written and verbal submissions were received from a variety of audiences including NACRO, the Howard League of Penal Reform and JUSTICE (Home Office 1989c p.1).

On the face of it, the very act of establishing an independent review of parole was unusual. Independent commissions were generally seen as a rather un-Thatcherite way of doing public policy and evoked memories of a 'gentler age' of policy making where Royal Commissions and Advisory Councils were common (Windlesham 1993 p.45). The Thatcher government may have favoured decisive leadership and streamlined decision-making but it was not above the use of independent reviews where they were politically expedient. For a short while the Carlisle Committee was able to remove the complex issue of parole from the political agenda and allow for a detailed, independent review of the issues that the various stakeholders within the criminal justice system could buy into. Good news for the Home Office but as one *Guardian* editorial noted contemporaneously the legacy of previous decisions coupled with the density of interest groups and agendas that intersected on the question of early release made the Committee's task extremely complex,

That is not to say that there may not be a route out of the current mess that will avoid offending the conflicting interests of the judiciary, the Conservative Party, the popular press, the European Commission on Human Rights, the prison officers and - not least - the prisoners themselves. Merely to say that you would not, by choice, start from here. But that's the task that Mr Carlisle has been given. A tougher one in the law and order field it would be hard to imagine (Guardian 22 July 1987).

Regrettably, a number of FOI requests to the Home Office, Parole Board and Ministry of Justice suggest that the records from the Review Committees proceedings have been destroyed and no personal papers appear to remain. The available evidence is therefore limited and largely based upon secondary accounts from members of the committee. Triangulation of the available data are therefore difficult. Sir Oliver Popplewell has suggested that Lord Carlisle, *'chaired the committee with 'consummate skills, bringing together disparate views from experts in their field, who expressed their views forcibly and with conviction'*, while proceedings were held in a constructive and collegiate spirit, *'I cannot remember being on a committee which expressed such sensible or formidable arguments with such little rancour and with a flexibility which enabled members to change their minds after heavy argument on many subjects'* (Popplewell 2003 p.250). This air of conviviality is confirmed by other members of the Review Committee (Interview A: 3 December 2013) but my research has revealed that there were nonetheless some very significant differences of opinion between members of the working group. As one such figure put it to me, there was a clear split between those members of the group that wanted to see a stronger emphasis upon punishment and the more liberally minded members of the Review Committee who supported a progressive system of parole to prepare offenders for life on release;

I mean the key thing about the group was that it was split almost down the middle between softies and toughies. I mean that was the key dynamic in the long run, and this was pretty clear ... the toughies were...Popplewell, Russell West, but Peter Wright and to some extent Mark Carlisle were sort of toughies (Interview B: 13 January 2014).

This schism became a defining feature of the working group's proceedings and the final content of the Report. The basis for a compromise position appears to have rested on the 'softies' conceding that prisoners serve half of their sentence in prison in return for support for stronger procedural safeguards and a concerted effort to reduce both the use of immediate custody and sentence lengths. One also gets a sense of the

growing influence of a 'just deserts' penal philosophy that located the normative power of punishment in retribution and accentuated the importance of legal reasoning at the point of sentence to quantify the harm done and provide a proportionate quantum of punishment. This focus on proportionality and the sentencing decision came through strongly in the following discussion of the Carlisle Committee;

I mean the deal really was that quite early on they formed – the Liberals formed a sort of faction to block too early a move to being tougher, but... because Roger Hood had theoretical difficulties about early release and problems with the process stuff, and was well plugged into this American thinking about sentencing, he at the end of the day was prepared to countenance a shorter period of early release, and therefore more... the great phrase 'more truth in sentencing', so long as you bore down on sentences to compensate for the fact that you're changing the currency, and secondly so long as you got a decent sort of due process enhancement into how it worked, and that was where the deal lay really. So the toughies got their... instead of getting out at a third you didn't get out until half-way. The Liberals got out that it would be a better process and you wouldn't just sort of... it wouldn't be 50% of the sentence it was just you'd take all that into account. You know, they were happy that way because the judges weren't against due process, judges tend to run in favour of due process. So that was sort of-that was where the deal lay (Interview B: 13 January 2014).

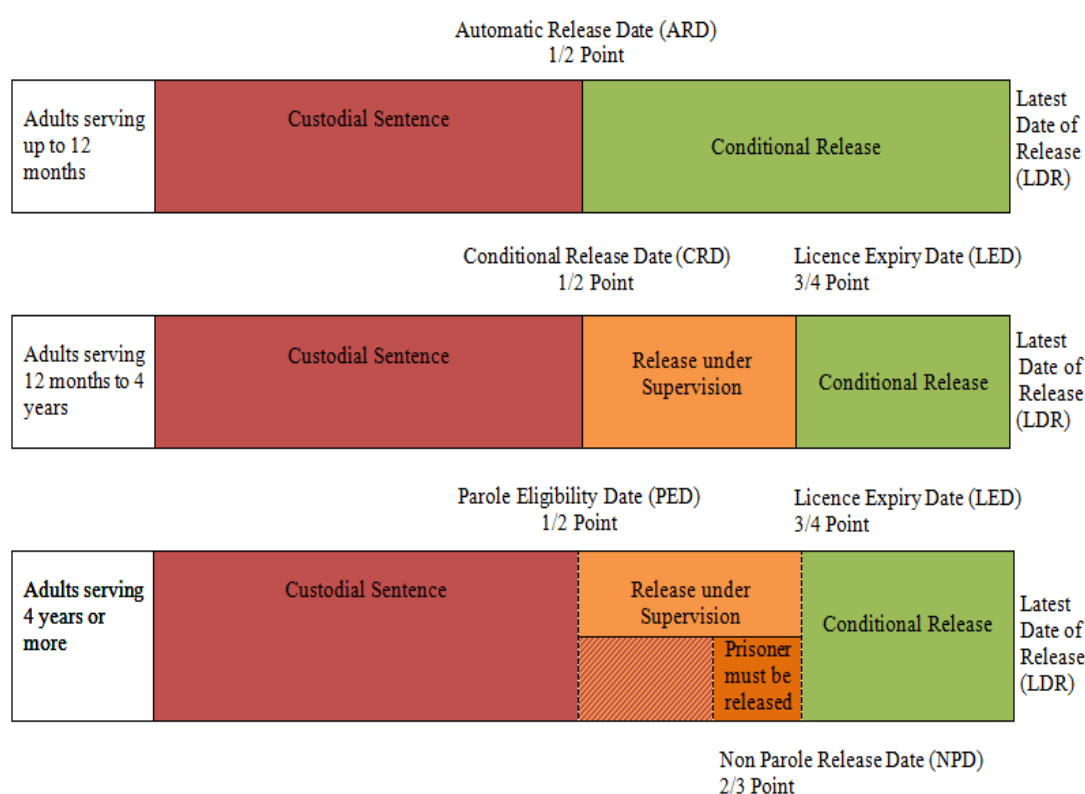
Reading '*The Parole System in England and Wales*' (Home Office 1989c) afresh one is struck by the quality of analysis and the conscious desire to articulate a simplified system of early release that would prove acceptable to a broad constituency. The Report sets out in considerable detail the historical evolution of parole, the operation of early release in other jurisdictions and the recommendations of a range of bodies with an interest in the criminal justice system. It is clear also from the Report that the Committee took seriously the views of the many organisations calling for the abolition of parole. Most notably several senior judges, the National Association of Probation Officers, the Prison Reform Trust, the Royal College of Psychiatrists, the National Council for Civil Liberties and academics like Professor Terry Morris who had played such an important role in placing parole on the political agenda as a member of the Longford Committee (Home Office 1989c p.42).

While the Committee did not agree with the calls for the total abolition of parole it did identify six major weaknesses with the existing system of early release (incorporating

parole, remission and partly suspended sentences). First, the Committee noted that the extension of parole to short term offenders had done more to undermine the integrity of parole than any other reform. While well intentioned the practical implications were extremely damaging since, *'it is wrong in principle and, in any event, unworkable in practice, to try to operate a selective parole system for short sentence prisoners'* (Home Office 1989c p.48). Second, the Committee accepted the arguments made by figures such as Sir Maurice Drake on the Home Office working group when they concluded that *'the judges are right to object to the way in which the present system undermines proportionality by eroding, and in some cases removing entirely, the distinction between the amounts of time which offenders spend in custody under sentences of differing lengths'* (Home Office 1989c p.48). Third, the Report suggested it was *'flawed in principle and harmful in practice'* (Home Office 1989c p.49) to restrict parole to serious offenders. Fourth, the Committee were critical of the administrative delays in the provision of information and decision-making. Fifth, the Carlisle Committee noted excessive secrecy of the present system. Sixth and perhaps of greatest import, the Committee drew attention to the role 50% remission and short term parole had played in creating, *'an unacceptable disparity between what sentences say and what they mean'* (Home Office 1989c p.49).

When taken as a whole the Carlisle Committee were strongly of the view that root and branch reform was needed to simplify the operation of early release in England and Wales and restore meaning to the sentence of the court. The best available evidence indicated that it was impossible to operate a discretionary system of early release for short-term prisoners and in the view of the Committee the *'simplest and most defensible'* way to operate a system of early release that blended elements of automatic and discretionary selection was on the basis of sentence length (Home Office 1989c p.65). As set out in Figure 34 below, the Committee recommended that adult offenders serving sentences of up to twelve months should be released automatically at the half-way point in their sentence subject to any sanctions for poor behaviour. Offenders serving twelve months to four years would be released on licence at the halfway point in their sentence and subject to supervision until the two-thirds point of their sentence at which time they would be released at risk of recall for bad behaviour.

Figure 34: Carlisle Committee Recommendations



Source: Home Office 1987c

In a significant departure from the existing system, discretionary parole would only operate in relation to prisoners serving sentences of over four years (Home Office 1989c paras.269-280). Prisoners would become eligible for parole at the halfway stage in their sentence at which point their cases would be considered by the Parole Board who would determine when to release a prisoner on licence under the supervision of a probation officer. Reflecting strong penological support for aftercare supervision and mindful of the previous anomalous position of high risk offenders denied parole only to be released unconditionally at a later date with no supervisory support, the Carlisle committee recommended that all prisoners be released on licence at the three-quarters point of their sentence to allow some modicum of statutory supervision (Home Office 1989c paras.293-299). A step designed to ease the transition of long term prisoners back in to the community.

This revised operational structure had a number of administrative implications for the operation of early release in England and Wales. It necessitated the abolition of partly suspended sentences, already falling into disuse, because they were simply incompatible with a proposed structure based upon sentence length (Home Office



1989c paras.93-500). Given the significantly reduced workload of the Parole Board it also left no role for the prison based LRCs that had historically provided the initial sift of eligible prisoners and proved so valuable when the Home Office abandoned the idea of compulsory partial suspension in favour of a system of discretionary parole for short sentence offenders (Home Office 1989c para.317). Finally, it necessitated the abolition of remission, at least in the sense it had traditionally operated, since all prisoners would remain 'at risk' of recall until the end of their sentence with more than a passing resemblance to the system of release on licence that operated in Northern Ireland (Home Office 1989c para.299). The Committee also recommended a radical overhaul of the governance of the parole system. Rejecting the tripartite structure of the Home Office, Local Review Committees and Parole Board, the Committee recommended that the Home Office should cease to be responsible for individual parole decisions with the Parole Board assuming executive powers in relation to prisoners serving determinate sentences. While the Home Secretary would retain ultimate responsibility to Parliament, particularly in relation to 'lifers,' the Board would become a more autonomous body requiring an enhanced secretariat and Chairmanship function (Home Office 1989c pp.64-73).

Undoubtedly the biggest point of controversy in the report was the requirement that offenders serve one half of their sentence in prison and remain at risk of recall for the remainder of their sentence. Many had welcomed the creation of the Carlisle Committee as a once in generation opportunity to ease pressure on the prison estate but any such hope faded on publication of the Report. Far from bringing about a reduction in the prison population there was a very real risk that the changes recommended by the Carlisle Committee would actually increase the numbers in prison should it not be accompanied by an associated reduction in the use of immediate custody by the courts (FOI: May 2013; The Guardian 26 November 1988b). This presented a number of problems for Home Office strategists. Limiting the scope of the review had helped secure judicial support for the review but in practice it meant the Carlisle Committee could not predict the impact of their recommendations with any degree of confidence. Its success would stand and fall on the extent to which the courts could be persuaded to make better use of non-custodial measures.

As a result, the initial response to the Carlisle Committee report was lukewarm. Despite the enhanced procedural safeguards secured by the ‘softies’ on the committee (Interview B: 13 January 2014), Vivien Stern, Director of NACRO lamented the Committee’s failure to push for radical reform, *‘thousands of short-term prisoners who are now safely released on parole after one-third of their sentence will remain longer in prison’* (The Guardian 26 November 1988b). Barry Sheerman MP, then Labour home affairs spokesman, called upon the Home Secretary to go further by allowing automatic parole for those serving up to four years after one-third of the sentence (The Guardian 26 November 1988). While Harry Fletcher, Assistant General Secretary of the National Association of Probation Officers, called for the total abolition of the parole system in favour of a system of shorter determinate sentences (The Guardian 26 November 1988b). At least initially the Committee’s recommendations in relation to sentencing were also given short shrift by the judiciary, as Sir Oliver Popplewell would later write in his memoirs,

We were not asked to express any view about sentencing. It was not within our terms of reference. The views that were expressed were done without any observations being sought from the Lord Chief Justice or other judges or without any evidence other than anecdotal evidence being put before the committee. Sensibly, the judges took no notice of this part of the report (2003 p.254).

Within the Home Office the portents for the Carlisle Report also appeared gloomy. *The Independent* reported in January 1989 that the Home Office was minded to shelve the committee’s recommendations, *‘...according to Home Office sources, although ministers are still discussing the plan, they have found many of the reforms politically unacceptable’* (The Independent 24 January 1989a). This concern appeared to rest upon a dual fear that sentencing reform would undermine the party’s tough law and order credentials and attract criticism from the senior ranks of the judiciary who continued jealously to guard the court’s sentencing discretion. In reality the policy considerations were more complex. Records released to this study under the *Freedom of Information Act* reveal that following the publication of the Carlisle Committee Report an internal Home Office working group was established, initially under the direction of William Bohan, Assistant Under Secretary of State, before handing over to Graham Angel who would rise to the same rank in the Criminal Department (FOI: May 2013). The terms of reference for the Working Group were cast broadly to

examine the Carlisle Committee's recommendations with particular reference to their administrative and resource implications. Of particular interest in this context the project team was guided by a number of assumptions that reveal a great deal about how the aims and techniques of punishment in England and Wales were evolving at this time:

1. In accordance with the spirit of the Carlisle Report, we have assumed that the objectives of change in the parole system should include the following:
  - a. bringing about greater parsimony in the use and length of custodial sentences for all but serious, violent crimes;
  - b. restoring greater proportionality between nominal sentence and time served in custody;
  - c. making conditional release at least relatively more effective in helping prisoners re-enter society and avoid recidivism;
  - d. making the parole process simpler and fairer, and seen to be such, by prisoners and the public (FOI: May 2013).

The realisation of these objectives was complicated by two significant administrative challenges. The first related to the dividing line between the automatic system of conditional release for short sentence offenders and the discretionary system of parole for serious long-term prisoners. The Carlisle Committee had suggested a threshold of four years and below for automatic release but this was politically sensitive. The government was committed to a tough, bifurcated penal policy and any reforms that were likely to result in the automatic release of violent or sexual offenders was seen to be politically risky given the real or perceived attitudes of the parliamentary party and wider electorate. On the other hand, any steps to shift prisoners from an automatic to a discretionary system of parole would have a clear and immediate impact upon the prison population with the available data suggesting an increase to the prison population in the region of 4,000 if the government elected to place prisoners serving four years and above within the discretionary strand of the new parole system.

The second issue was whether the proposals would be acceptable to the judiciary and in time lead to a step change in sentencing practice. As the Carlisle Committee had noted the requirement that offenders spend a longer period of their sentence in prison with continued liability for recall once released was likely to result in a significant increase in the prison population if it was not accompanied by an overall reduction in

the use of immediate custody by the courts. No doubt fearing a repeat of the judicial veto that scuppered Whitelaw's plans for a compulsory partly suspended sentence the Home Office agonised over the judicial response to the Carlisle Report. The archival records reveal that in May 1989, *'Mr Faulkner wrote to Lord Justice Tasker Watkins in May gently inviting comment but has received no reply'* (FOI: May 2013). Meanwhile Statistical Department were asked to interrogate the emerging forecasts to quantify how changes in sentencing lengths and the number of prisoners recalled to prison would affect the prison population. The permutations set out at Figure 35 suggest that in the absence of significant off-setting reductions in sentence lengths by the courts the prison population was likely to rise by several thousand.

Figure 35: Home Office Impact Assessment of the Carlisle Committee Recommendations upon the Prison Population

Estimated effects on prison population		
1. Eligibility for early release and parole at 50% of sentence: effect of changes in the point at which early release becomes discretionary.		
Sentence length	Percentage of offenders in restrictive parole policy	Prison population
3 years	57%	- 100
3+ years	57%	- 400
4 years (Working Party)	71%	- 500
4+ years (Carlisle)	72%	- 900
5 years	78%	-1000
5+ years	84%	-1400
2. Proportion returned to prison for breach of licence or re-offending before end of sentence.		
10%	+ 900	
20%	+ 1900	
30%	+ 2800	
3. Examples of net effect of 1 and 2.		
(i) Parole eligibility at 4+ years (Carlisle)	10% recall	-
	20% recall	+1000
	30% recall	+1900
(ii) Parole eligibility at 4 years (Working Party)	10% recall	+ 400
	20% recall	+1400
	30% recall	+2300
(iii) Parole eligibility at 3+ years	10% recall	+ 500
	20% recall	+1500
	30% recall	+2400
4. Off-setting reductions in sentence lengths.		
5% reduction in all sentence lengths		-2200
10% reduction in all sentence lengths		-4300
10% reduction in sentence lengths up to 4 years		-3500

Source: FOI: May 2013

These deliberations were given added urgency by events outside of the Home Office. On the 6 July 1989 David Evans a known sex offender was found guilty of the murder of Anna Humphries. This followed a string of serious offences and bureaucratic failures in relation to his aftercare and risk management arrangements. In July 1978 Evans had been jailed for five years at Birmingham Crown Court for the attempted rape and the assault of two women. Evans was released by the Parole Board in July 1980 upon satisfying the panel that he was no longer a risk to the public but went on to commit a further rape four months after his release on licence. Thereafter Evans was sentenced to ten years' imprisonment with the sentencing judge Mr Justice Drake, who would later sit on the Home Office review of s33 cases noting that, '*you are an extremely dangerous young man, particularly to young women. My duty is to protect the public from you*' (quoted in The Guardian 6 July 1989). An application for parole was rejected in 1985 but Evans was subsequently released on 13 May 1988 in accordance with remission procedures. Since remission of sentence amounted to unconditional release without supervision Evans was under no obligation to report to a probation officer or make the police aware of his whereabouts. Six months later, he kidnapped and killed Anna Humphries.

The murder of Anna Humphries exposed the deficiencies of the existing early release system and allowed the general public to peer behind the administrative veil of remission to an extent that had rarely occurred in post war England and Wales. The fallout in the media was considerable with the story making front page news in the media with many commentators noting that the murder of Humphries could have been avoided if the Carlisle recommendations were in effect and Evans had been subjected to supervision, a requirement to make himself known to local police officers and a liability to recall should his behaviour on release prove unsatisfactory (The Independent 17 July 1989b; The Times 6 July 1989a). Lord Carlisle also entered the debate arguing that, '*if our proposals were implemented even those like David Evans, who did not get parole, would nevertheless be under a period of supervision once released. That would add to the safety and security of society*' (The Times 6 July 1989b).

These events helped galvanise support for the Carlisle proposals. The archival records reveal that in the summer of 1989 Lord Justice Tasker Watkins convened an exceptional conference of judges to discuss the Carlisle Committee proposals and despite Home Office nervousness the conference, '*declared enthusiastic support for the key Carlisle recommendations*' (FOI: May 2013). Likewise, the Home Office working group briefed Ministers recommending the implementation of the Carlisle recommendations, subject to a number of revisions to the scope of discretionary release and the Home Secretary's ability to veto the decisions of the Parole Board in the interests of public safety (FOI: May 2013).

#### *6.3.4 Preparing the Ground: Post Election Planning*

Following Ministerial approval planning began for provision of a revised early release system in a Criminal Justice Act planed for the 1991/92 parliamentary session. However, it is impossible to make sense of the final shape of these reforms without an adequate understanding of the wider debates that marked the development of the Bill. Elsewhere both Lord Windlesham (1993) and Faulkner (2006; 2014) have described the strategic planning that preceded the Bill in considerable detail. Rather than rehearse those accounts here I want to identify a few key issues that help to make sense of the underlying policy narrative that would frame the Criminal Justice Bill 1990/1991 and the provisions relating to both sentencing and early release.

I have already documented the immediate steps taken by the Home Secretary to address the deteriorating situation in the prison estate on his return to the Home Office. In parallel, Ministers, their political advisers and senior civil servants embarked upon a significant post-election planning process with a view to developing a long-term strategic vision for the criminal justice system. Matching the provision of places (geographically and by security category) to the through-flow of prisoners into the penal system was the pre-eminent 'wicked issue' for Home Office planners. Sentencing trends had hardened since the mid-1980s with the result that courts in England and Wales were sentencing more people to immediate custody and for longer periods of time than anywhere else in Europe. A succession of Public Expenditure Surveys had resulted in real-time growth within the Home Office budget and a significant Prison Building Programme but with increasingly sophisticated population

forecasts indicating further growth in the prison population there was an appetite to take stock and re-appraise the government's objectives in relation to criminal justice.

In the week following the 1987 General Election senior Home Office officials met at the Ship Hotel Brighton under the Chairmanship of David Faulkner (Windlesham 1993 p.213). Accompanied by Hurd's top advisor Edward Bickham, the purpose of the meeting was to reflect on existing policy objectives and identify a number of flagship policy initiatives that would be taken forward in the next Parliament. This was followed by a strategic planning day at Leeds Castle on 28 September 1987 where Ministers were asked to agree the Departmental priorities that would guide the Home Office during the next review period. My FOI requests indicate that the records from this meeting are no longer held by the Home Office or Ministry of Justice but contemporaneous accounts indicate that the meeting was attended by the top tier of the Home Office. Douglas Hurd, in the Chair, was joined by his Ministerial Team of John Patten, the Earl of Caithness, Timothy Renton and Douglas Hogg. The Permanent Under Secretary to the Home Office Sir Brian Cubbon was joined by his six deputy Under Secretaries; David Faulkner (Criminal Policy and Planning), Chris Train (Prison Service), John Chilcott (Police) James Nursaw (Legal Adviser), Michael Moriarty (Principal Establishments Officer) and Mary Tuck (Research and Planning) (for more detail see Windlesham 1993 p.215).

The meeting covered the entire gamut of Home Office activity but in relation to the prison system Ministers were asked to reflect upon the government's position in respect of sentencing and punishment. The choice was a stark one. A strong 'law and order' narrative had brought considerable success for the Conservative Party but this political windfall had come at an administrative cost. Despite significant investment in a prison building programme, the number of offenders sentenced to immediate custody continued to outstrip the provision of new places. With the prison population projected to reach 63,000 by the mid-1990s and no evidence that costly prison sentences offered greater deterrent or rehabilitative value than other forms of sentence, Ministers were invited to weigh the competing demands of political expediency and administrative utility,

The most important strategic question was whether to leave sentencing to the courts, to give political support to severe sentencing as an expression of moral authority or political leadership (there was not much confidence in its deterrent or rehabilitative effect), and to build whatever new prisons were needed to cope with the resulting population. This would have been the easy option. The alternative was to continue and intensify the efforts to control the prison population, and therefore to try and place some limitations on sentencing; and simultaneously to pursue other policies to reduce crime and to deal more effectively with those who committed it (Faulkner 2006 p.114).

Officials offered no advice on the choice between them, *'regarding it as an essentially political decision'* (Faulkner 2010 p.6). After considerable discussion Ministers decided to, *'exert some downward pressure on the rise in the prison population'* and agreed to make a concerted effort to promote the use of non-custodial sentences as part of a wider 'just deserts' penal philosophy (Faulkner 2010 p.6). Six overarching priorities emerged from the Leeds Castle discussions:

1. Prevent and reduce crime.
2. *Establish a more coherent and principled basis for sentencing and parole.*
3. Avoid the unnecessary use of imprisonment and stabilise the prison population.
4. Develop schemes of supervision in the community which would effectively reduce offending.
5. Give greater consideration to victims.
6. Make the system more efficient, effective and accountable (my emphasis) (Faulkner 2010 p.6).

The planning meeting at Leeds Castle has been lauded as a high watermark of progressive penal policy-making; both for the collaborative manner in which Ministers worked with their senior officials and the decision to row back from ever more punitive policies (Windlesham 1993 p.215). But as Windlesham notes, considerable preparatory work had already been done to build the case for a more strategic approach to management of the criminal justice system. The Leeds Castle event was not the beginning of that process but it did help to build a collective vision and *'soon came to be recognised as a milestone in the development of policies that had been consciously designed as part of a system of criminal justice, rather than a random collection of timeline proposals for change'* (Windlesham 1993 p.215). With the emergence of a clear and broadly accepted roadmap for reform of the criminal justice system the



Home Office embarked upon a concerted schedule of activity to secure buy-in for the new approach. Particular attention was paid to potentially hostile audiences within the Conservative Parliamentary Party, the Judiciary and the Probation Service<sup>18</sup>. Most notably John Patten took personal responsibility for a ‘hearts and minds’ campaign in the House of Commons where he met with over 150 Conservative Backbench MPs over the course of the year to secure buy in for the government’s proposals (Windlesham 1993 p.215).

A Green Paper, ‘*Punishment, Custody and the Community*’ was published in July 1988 seeking views on a range of policy issues including the use of imprisonment, electronic tagging and a holding statement on reform of the parole system while the matter was considered by the Carlisle Committee. The Green Paper was followed by an ‘*unprecedented and never repeated*’ conference at Ditchley Park in September 1989 (Windlesham 1993 p.242); a joint planning meeting that brought together senior criminal justice representatives in England and Wales. This included the Lord Chancellor, Lord Mackay of Clashfern; the Attorney-General, Sir Patrick Mayhew; the Home Office Minister, Mr John Patten; the Metropolitan Police Commissioner, Sir Peter Imbert and two chief constables; the Lord Chief Justice, Lord Lane; the senior Lord Justice of Appeal, Sir Tasker Watkins; and the Director-General of Prisons, Mr Chris Train. Setting out the government’s position John Patten indicated that the Home Office wanted to pursue two aims in relation to sentencing:

One is to establish firmly those principles of sufficiency and proportionality of response. The other is to reinforce the links between offenders and society and emphasise the importance of social responsibility. Our objective is better justice, with greater consistency and emphasis on the offender in society... ‘We have tried to interfere as little as possible with the independence and the discretion of sentencers. We are not proposing mandatory sentencing guidelines or a sentencing commission...We prefer sentencers to be free to consider all relevant circumstances: but we do believe that their discretion should be properly limited so that it does not frustrate policy principles’ (Faulkner 2010 p.5).

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<sup>18</sup> The suggested changes were particularly bittersweet for the Probation Service. Firstly, in terms of the additional numbers who would be subject to punishment in the community. Secondly because the service would have to adopt a far more punitive ethos if the re-branded non-custodial punishments were to be taken seriously by the judiciary and Conservative Party faithful.

The Ditchley Park conference secured broad approval for the objectives outlined in *'Punishment, Custody and the Community'* and began the slow process of healing the wounds of a working relationship that had been fractured in part by the events that led to Whitelaw's volte face on automatic parole for short-term offenders. There is also a sense that the Ditchley Park conference signalled the arrival of a more self-confident justification for sentencing reform and early release blending elements of just deserts and risk assessment (see Feeley and Simon 1992 for an early account of the actuarial logic of the 'new penology'). This narrative would play an increasingly important role in framing the early release reforms recommended by the Carlisle Committee just months earlier. Not for the first time the rationale for early release was evolving to reflect wider societal attitudes towards sentencing and punishment. As the locus for sentencing decisions shifted from the forward-looking science of penology advocated by Baroness Wootton to a backward-looking emphasis upon the gravity of the offence a similar reconfiguration occurred within early release thinking. At a policy level the emergence of a 'just deserts' penal philosophy left little space for indeterminacy or the 'recognisable peak' arguments that had exerted so much influence in the 1960s, instead, the 'Home Office took seriously the need to restore meaning to sentences and respect the 'punitive element' of the sentence handed down by the courts. Likewise, at an administrative level the Carlisle framework was entirely compatible with the emerging bifurcation of punishment for serious offenders and petty criminals, as well as an increasingly actuarial approach to aftercare and supervision premised upon public protection and effective risk management (Hood and Shute 1994; Shute 2003).

Douglas Hurd left the Home Office shortly after the Ditchley Park conference and was replaced by David Waddington. Despite the more punitive instincts of his successor the policy framework developed during Hurd's time at the Home Office was too advanced for a fundamental re-think and the Government's White Paper, *'Crime, Justice and Protecting the Public'* was published in February 1990. Reflecting Hurd's desire to avoid a patchwork of initiatives authored by the 10 or 12 divisions in the criminal, police and prison departments both the Green and White papers were drafted by Jean Goose, Head of the Criminal Department (CCBH 2010 p.6) and this consistency of authorship can be seen throughout the White Paper. As a statement of public policy *'Crime, Justice and Protecting the Public'* is notable for its clarity of vision and a strong 'just deserts' penal philosophy that proposed a *'coherent legislative*

*framework for sentencing with the severity of the punishment matching the seriousness of the crime and a sharper distinction in the way the courts deal with violent and non-violent crimes'* (Home Office 1990a p.i). In relation to early release the White Paper welcomed the Carlisle recommendations and committed the government to implementing the lion-share of the review committee's recommendations. Following the conclusions of the internal working group led by Graham Angel the Home Office concluded that a system of early release could be made to work alongside a just deserts sentencing methodology but *contra* the Carlisle Committee the government felt that in the interests of public protection the discretionary strand of early release should apply to offenders serving sentences of four years and over (1990a: 28 - 34). Moreover, the government was unable to accept the Carlisle Committee view on the governance arrangements for the new system or the case for augmenting the Parole Board with additional executive powers (Home Office 1990a p.31). Mirroring the situation in 1967 the Home Office erred on the side of caution and confirmed that the Home Secretary would retain the final say on the cases of serious offenders.

From a contemporary vantage point these stepping stones towards a more strategic vision for the criminal justice system are fascinating. It is striking that when confronted with the competing claims of an explicitly populist law and order posture or a concerted effort to exert some downward pressure on the prison population Ministers elected to pursue a more nuanced package of reforms and place greater emphasis upon the use of non-custodial sentences. Given similar evidence it is not at all clear that Ministers today would alight upon a similar balance. Nor was this a simple presentational exercise. Significant political capital was invested by Ministers like Minister of State John Patten to secure the support of backbench Conservative Party MPs and translate this overarching strategic vision into tangible policy propositions. Moreover, these events demonstrate a rather more collegiate approach to management of the criminal justice system than was typical of the Home Office for much of the post war period. While it is easy to overplay the importance of the conferences at Leeds Castle and Ditchley Park they do appear to symbolise, albeit for a fleeting moment in time, a genuine attempt to break free from the shackles of penal pragmatism, address longstanding structural issues within the penal system and build support for a more strategic approach to administration of the criminal justice system. As one senior penal reformer put it to me;

Hurd had liberal views anyway, but they were reinforced... it was key that they were reinforced by key officials who were in senior positions at the time; David Faulkner was a notable one, he wasn't the only one, who took them away for away days and presented facts but also presented possibilities for change, options for change. And Patten was key as well because he did most of the work on actually getting the Act through Parliament, leading the detailed working committee himself. But also a lot of the high profile work, going on the news and arguing for a reduced use of custody. So it was a combination really of the fact that you did have Ministers... once the momentum had started with Hurd – I know the White Paper didn't come out until later, but the work on what became the 1991 Act was really done largely under Hurd and Patten, and then Patten was a continuing Junior Minister throughout the changes of Home Secretary (Interview C: 22 April 2014).

There were undoubtedly grounds for cautious optimism but the delicate handling of the judiciary reveals just how precarious the Home Office position remained after the 1987 General Election. Even policy windows have their limitations. By resisting calls to introduce a Sentencing Council or extend the successful steps taken to limit the use of custody for young offenders in the *Criminal Justice Act 1988* the Home Office paid a high price for judicial approval. Whether unwilling or unable, the failure of senior policy-makers to challenge judicial autonomy in sentencing at the Ditchley Park conference ensured that the government's flagship criminal justice policy was once again hostage to fortune and dependent upon soft influence of the judiciary to achieve their policy aims. Pre-commitment emerges time and time again as an essential ingredient of long-term policy change, without it the Home Office were left dangerously exposed as the winds of change began to shift after the 1992 General Election.

In sum, the Carlisle Committee review of parole in England and Wales should be viewed as one component of a wider strategic review of criminal justice administration which began following the 1987 General Election. This attempt to develop a longer-term strategic approach to management of the criminal justice system can be traced through the discussions at Leeds Castle, the Green Paper '*Punishment, Custody and the Community*' and the Ditchley Park conference that brought together the various agencies in the criminal justice agencies. This process of policy development culminated with the measures set out in the White Paper '*Crime, Justice and*

*Protecting the Public*', premised upon a strong 'just deserts' sentencing philosophy. The White Paper had a significant bearing upon the final shape of the early release reforms, while still bound up with rehabilitative notions of punishment there are clear signs that early release was increasingly seen as a problematic obstacle to greater 'truth in sentencing'. This general hardening of attitudes towards punishment continued with David Waddington's appointment as Home Secretary in October 1989 and preparation for a new Criminal Justice Act in the 1991/92 Parliamentary session.

## **6.4 The Criminal Justice Act 1991**

### *6.4.1 The Bill*

Turning to the Criminal Justice Bill 1990/1991 I want to focus on a few key events and debates that illustrate the application of power, the tactics and strategies employed by politicians to further their interests and influence the legislative process. As I noted in Chapter Four the legislative process should not be too readily dismissed as a source of evidence. The records I have examined in this study reveal a great deal about the areas of consensus, divergence and the issues that are and are not on the political agenda at any given time.

Second Reading: The Criminal Justice Bill 1990/1991 received its Second Reading on the 20 November 1990. Commending the Bill to the House David Waddington noted that it was an '*important reforming measure which sets out to increase society's confidence in the criminal justice and penal system and its effectiveness in dealing with offenders*' (HC Deb 20 November 1990 vol 181 c138). On the matter of early release, contained in Part II of the Act, Waddington went on to argue that radical reform of parole and remission was needed to restore meaning to the sentence of the court and build public confidence in the criminal justice system. In his words, '*release at the one third point of sentence, which can occur if a person gets maximum parole and maximum remission, lead to an unacceptable erosion of the value of the sentence passed by the court. That is bad for respect for the criminal justice system*' (Hansard: HC Deb 20 November 1990 vol 181 c140).

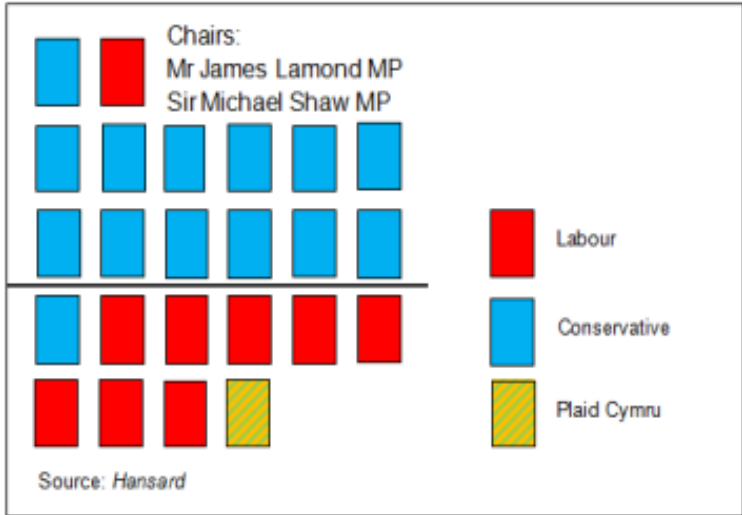
The Second Reading debate is interesting for a number of reasons. First, it is arguable that events outside the Chamber had a more decisive impact upon long-term the trajectory of criminal justice policy than the debates raging within it. While the Second Reading debate unfolded the Conservative Party was engaged in a leadership ballot prompted by Michael Heseltine's resignation from the Cabinet. During the Second Reading debate word reached the House that Margaret Thatcher had lost the confidence of the Party and her position as Prime Minister had become untenable. The events that followed have been well documented and put in train a series of events that would eventually filter through to the criminal justice system (Watkins 1992). Margaret Thatcher resigned as party leader on the 23<sup>rd</sup> November and John Major was eventually confirmed as Prime Minister on 28th November 1990 following a divisive leadership contest. In the ensuing Cabinet re-shuffle David Waddington was elevated to the House of Lords and Kenneth Baker was appointed Home Secretary. This fundamentally altered the balance of power at Cabinet level and as Farrell and Hay (2010) have noted it was the Major Government that would become synonymous with the tough law and order policies that are so often identified with the Thatcher years.

Second, in a move intended to signal a more assertive Home Affairs posture the Labour Party took the rather unusual step of tabling a 'reasoned amendment' seeking to prevent a second reading for the Criminal Justice Bill and frustrate the government's criminal justice reform package in its entirety. Responding to the second reading debate Shadow Home Affairs Spokesman Roy Hattersley emphasised the Labour Party's support for the Carlisle Committee recommendations but expressed his fear that the requirement that all prisoners serve half their sentence in jail may result in a net increase to the prison population if it were not accompanied by tangible decrease in the use of custodial sentences. This, it was submitted, could only be guaranteed through the creation of a Sentencing Council with the authority to direct sentencing behaviour. Since the Bill did not provide confidence on such matters as crime prevention, remand prisoners or concrete steps to manage the '*unacceptably high prison population*' (HC Deb 20 November 1990 vol 181 c151) in England and Wales it could not be supported by the opposition.

In pushing for a division on the Bill the Labour frontbench would have been well aware that they had virtually no prospect of success given the relative strength of the

parties in the Commons. So it proved. The government held the division comfortably by 350 votes to 190 but this adversarial reception helped set the tone for a Bill that would be subject to considerable disagreement as it progressed through Parliament. As I have set out previously there is some evidence to suggest that the UK Parliament has become more combative over time on matters of criminal justice and my analysis of the Hansard records indicates that Home Office Ministers in 1991 could expect a far more hostile reception than their predecessors working on the *Criminal Justice Act 1967* and *Criminal Justice Act 1991* (see Figures 20 and 21). Nowhere was this more apparent than when the Bill was referred to Commons Committee for detailed scrutiny. In total 17 divisions were called on the Bill, all of which were won by the government. This was hardly surprising. As Figure 36 indicates the Conservative Party enjoyed a healthy majority on the Standing Committee and used this to good effect.

Figure 36: Composition of the Commons Select Committee, Criminal Justice Bill 1990/1991



Source: Hansard Millbank, <http://hansard.millbanksystems.com/>

Government control of the legislative process meant that the time allocated to the scrutiny of the Bill was limited and Ministers also benefited from the resources and know-how of an extensive 'bill team' of civil servants led by Robert Fulton. Two Ministers of State (John Patten and Angela Rumbold) were also assigned to shore up the Home Office position on the Standing Committee. Faced with such an imbalance of power the opposition and the non-parliamentary bodies that supported them were forced to think more creatively in seeking to influence the passage of the Bill. To take but one example, the Hansard record suggests that the opposition enjoyed some success by drawing upon legal authority to advance their case. Considerable

discussion was given over to the judgement of the European Court of Human Rights (ECtHR) in the case of *Thynne, Wilson and Gunnell v United Kingdom*<sup>19</sup> published just weeks before the introduction of the Bill. The petition was bought by a number of prisoners who claimed that the operation of parole for those serving discretionary life sentences infringed their rights under the European Convention of Human Rights (ECHR). Most notably their Article 5 right that, ‘*everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*’

Granting the appeal, the ECtHR held that the UK was in breach of its obligations since, ‘*neither the Parole Board nor judicial review proceedings—no other remedy of a judicial character being available to the three applicants—satisfy the requirements of Article 5(4)*’ (ECHR para.80). The Court therefore directed the UK Government to introduce a suite of measures intended to move the review of discretionary life sentence prisoners onto a judicial footing with greater regard for due process, provision of legal representation and a right to address the court. The judgement created an impetus towards reform the Home Office was unable to check. At this time the ECHR had no direct legal effect in British law but the United Kingdom did have a general duty to comply with the Convention. The case of *Thynne, Wilson and Gunnell* also served to give legal articulation to the long-recognised procedural shortcomings of the parole system. By focusing on legal authority and universal values like due process, the opposition was able to secure a concession from the Government to give further consideration to this issue. This pressure ultimately proved irresistible, when the Bill reached the House of Lords the government moved to introduce a more explicitly quasi-legal system for dealing with indeterminate life sentences that would provide the template for further reform in 2003.

It is important not to overstate these achievements. The Labour party pushed repeatedly at Second Reading, in Committee and on Report for the introduction of a Sentencing Council and release on parole at the one third point of a sentence. Strong party discipline in the Commons ensured that each and every one of these attempts

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<sup>19</sup> (1991) 13 E.H.R.R. 666



was defeated. Equally, the Government was able to flex its muscles on report tabling an amendment that would empower the Home Secretary to alter the threshold between the automatic and discretionary elements of the early release system by statutory instrument. This represented a departure from the Carlisle recommendations and reflected Conservative concern that the Home Secretary should have some flexibility to respond to events on the ground and ensure serious offenders were not eligible for automatic release on licence without more detailed review by the Parole Board. The relative ease with which government Whips were able to negotiate the Bill through the Commons obscured the lack of support for the package as a whole. As Robert Fulton leader of the Bill Team later noted, the '*sentencing philosophy went very much against the grain of a lot of instincts of people on the Conservative Back Benches*' (CCBH 2010 p.61) and support for the Act quickly evaporated in subsequent years.

House of Lords Second Reading: The Criminal Justice Bill reached the Lords on the 12 March 1991. Introducing the Bill, Earl Ferrers repeated the policy position John Patten had first articulated to the senior judiciary at the Ditchley Park conference in 1988;

The main purposes of the Bill are to reform sentencing practice—the way in which a sentence is determined—and the way in which sentences are actually carried out. The sentence in an individual case is, of course, a matter for the magistrate or the judge concerned. It is not a matter for Parliament. It is, after all, only the sentencer who will know all the facts of the case. What we seek is consistency of approach in sentencing, not uniformity. We have, therefore, resisted the temptations of those who would like to see detailed and rigid sentencing rules imposed upon the courts, which would require particular offences to be sentenced within only a very narrow range of options (HL Deb 12 March 1991 vol 527 c73).

This was followed by a re-statement of the principles first articulated in the '*Crime, Justice and Protecting the Public*' White Paper (1991a). The Bill took as its foundational principle the retributive intuition that punishment should be determined by the seriousness of the offence. Reflecting the general suspicion of the reformatory power of prison Earl Ferrers noted that '*it has long been recognised that imprisonment frequently does more harm than good*' (Hansard HL Deb 12 March 1991 vol 527 c74) and indicated that the government was committed to making better use of punishment in the community. In operational terms this balance would be struck through the

continued bifurcation of punishment; serious offenders could expect to receive long custodial sentences while ‘petty offenders’, particularly those who perpetrate property offences would be dealt with through non-custodial measures.

The root and branch reform of early release, recommended by the Carlisle Committee, was intended to give expression to this policy framework by restoring credibility to the sentence of the court and streamlining the work of the Parole Board. In relation to determinate sentences, Peers from all sides of the House were broadly supportive of the proposed approach (HL Deb 12 March 1991 vol 527 cc73-172). Opposition spokesman Lord Richard welcomed the government’s introduction of the Carlisle reforms but repeated Roy Hattersley’s lament that the requirement that offenders serve 50% of their sentence could result in a substantial rise in the prison population without the creation of a sentencing council (HL Deb 12 March 1991 vol 527 c80). Lord Windlesham, a former Chairman of the Parole Board, praised the Bill but expressed concern that the central just deserts philosophy of the White Paper had been diluted over time, ‘*each Home Secretary—there have been two so far in succession to my right honourable friend Mr. Hurd, who was the original architect of this legislation—seems to have felt a compulsion to add his own imprint of toughness to the Bill, presumably for presentational reasons*’ (Hansard HL Deb 12 March 1991 vol 527 c94).

Aside from the discussion of parole the Hansard record is also noteworthy for the discussion of remission and partly suspended sentences that made up the remainder of the government’s existing early release armoury. The consideration of partly suspended sentences reveals a great deal about how far penal ‘orthodoxy’ had travelled since the parliamentary debates on the *Criminal Law Act 1977*. While some, like Lord Monson and sitting Law Lord, Lord Ackner, remained wedded to the notion of a ‘short sharp shock’ and a broad toolkit of sentencing disposals (Hansard HL Deb 12 March 1991 vol 527 c124), many more were in agreement with the Carlisle Committee and considered the operation of partly suspended sentences as incompatible with the new early release system introduced by Part II of the Act. As we noted in our second case study the choice of locating the power of release in the hands of judges rather than the executive was symbolically powerful even if the practical differences between a partly suspended sentence and automatic short-term parole were negligible. By 1991 that symbolism had all but drained away and partly suspended sentences were seen as an

anomaly that represented only 5% of court disposals in criminal cases. The notion of a ‘short sharp shock’ was anathema to the government’s policy of reserving prison for the most serious offenders while the 50% of sentence requirement had been introduced with the explicit purpose of restoring meaning to sentences. There was simply no room for the partly suspended sentence in the post 1991 release architecture.

What was true of partly suspended sentences was also true of remission. As Lord Hunt, the first Chair of the Parole Board noted the fusion of parole and remission had created a distinctly British system of ‘early release’ that created a number of operational anomalies that were exposed by the brutal murder of Anna Humphries and subsequent conviction of David Evans (Hansard HL Deb 12 March 1991 vol 527 c105). Lord Hunt went on to note that this hybrid approach had exerted a negative influence on the operation of early release and the continued existence of remission could no longer be justified,

I am particularly glad that remission time is to go. It was always excessively long for the needs of prison discipline and it constituted too large a reduction of the intended sentence of the court. It is quite interesting to recall that its retention in 1967 was the reason why— the matter arose when we were discussing the criminal justice legislation in 1967— parole eligibility had to be fitted in during the middle third of a sentence and could be awarded after only one-third of a sentence had been served. It was quite unlike any other conditions obtaining in other countries which my colleagues and I on the then Parole Board visited in order to discuss early conditional release systems. That fact did not endear parole to a number of people, including the judges, in the early days, and it has been alleged that it may have led to some lengthening of prison sentences (Hansard HL Deb 12 March 1991 vol 527 c 105).

House of Lords Report and ‘Ping Pong’: Following Lords Committee there was little discussion of early release for determinate sentences as attention turned to the highly emotive topic of mandatory life sentences for murder. The remainder of the Bill is therefore largely outside the scope of this paper but it is worth reflecting briefly on these debates because it was against this backdrop that the government eventually relented on the introduction of an explicitly quasi-judicial approach to the release of prisoners serving discretionary life sentences. An approach that, when combined with greater use of automatic release for short sentence offenders, would come to define

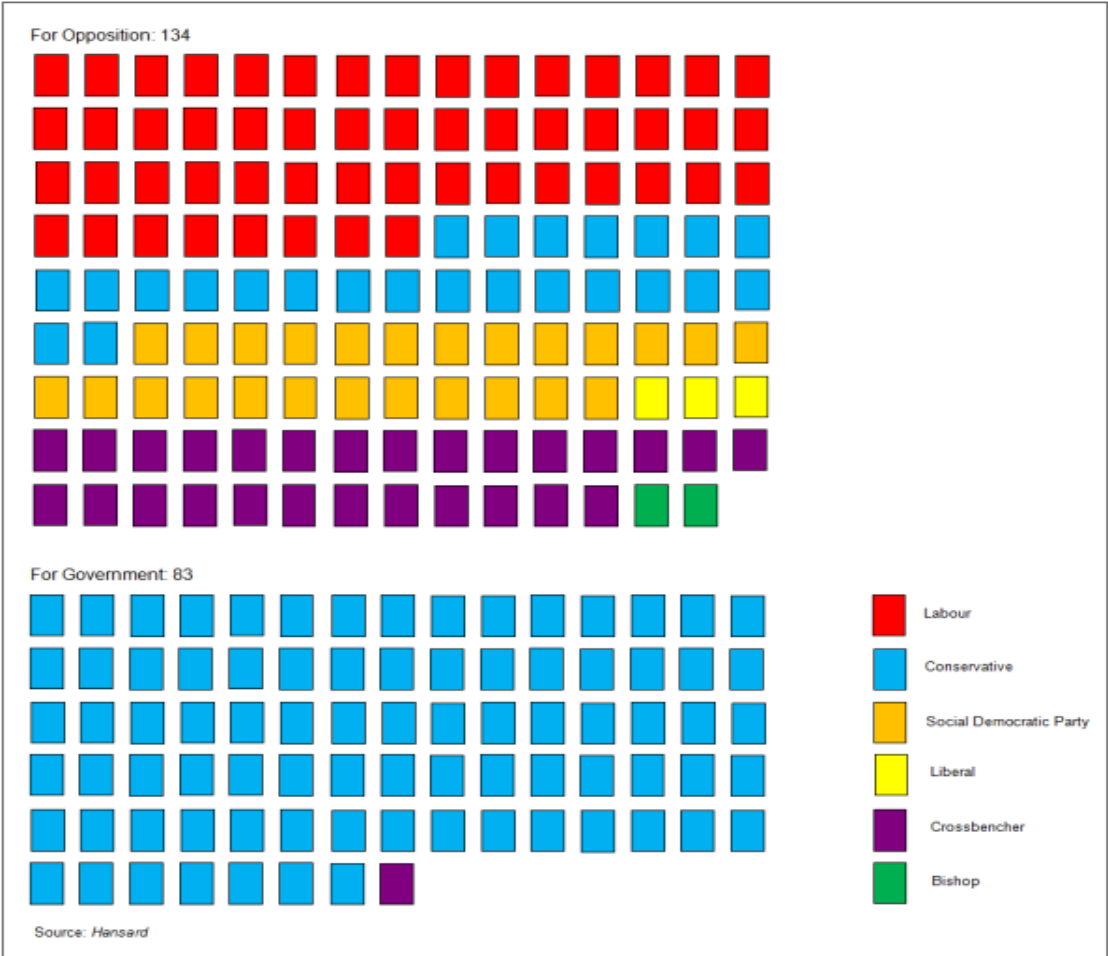
the work of the parole system in the years that followed (Interview F 29 September 2014).

With the passage of the Bill through the House of Lords a concerted effort was made to amend the criminal law and abolish the obligation on the courts to impose a mandatory life sentence for murder. The mandatory life sentence dated back to the abolition of the death penalty in the *Murder (Abolition of Death Penalty) Act 1965* and remained an extremely contentious issue both within Parliament and wider public discourse about crime and punishment. In 1989 the House of Lords Select Committee Murder and Life Imprisonment chaired by Lord Nathan had recommended that the mandatory life sentence be abolished in favour of a system of discretionary life sentences that empowered the courts to fix the tariff prisoners could expect to serve according to the particular circumstances of the case (House of Lords 1989). This was supported by a broad coalition of Peers, including the acting Lord Chief Justice Lord Lane, and senior judges both past and present. Most notably this support crossed party lines and the government was defeated on several occasions in the Lords. Figure 37 sets out the party political breakdown of a Lords vote on one particularly significant vote on mandatory life sentences.

The result was a battle of wills between the government with a powerbase in the Commons that wanted to safeguard the mandatory life sentence to mark the ‘uniquely heinous nature’ of murder and a cross party alliance in the Lords motivated by a desire to empower the sentencing judge to alter the sentence length in light of the unique facts of the case. As the Bill entered its final phase known colloquially as ‘ping pong’ a pattern emerged whereby the Lords would amend the Bill in order to abolish the mandatory life sentence only for the Commons to reverse this decision. This continued for over a month before the Lords finally gave way and accepted that mandatory life sentences would remain on the statute book. This was a highly damaging episode for the government. Lord Waddington’s authority as Leader of the House and Lord Privy Seal was severely weakened and relations between the Commons and Lords were strained. *The Independent* reported that ‘*Peers inflicted one of the heaviest defeats on the Government in living memory last night when they voted to abolish the automatic life sentence for murder*’ (The Independent 19 April 1991) while *The Times* emphasised the tactical errors made by the government in handling the Lords, ‘*the four*

*defeats within an hour showed up the inexperience of Lord Waddington, leader of the Lords, and the new chief whip, Lord Hesketh, in handling Tory peers tactfully... Many senior peers were astonished that Lord Waddington insisted on pushing the four amendments to the vote in full knowledge that he would be defeated on each occasion (The Times 5 July 1991).*

Figure 37: House of Lords Division on Life Sentences, Criminal Justice Bill Lords Consideration 3 July 1991



Source: Hansard Millbank, <http://hansard.millbanksystems.com/>

Faced with organised and effective opposition to the Bill in the Lords the Government was forced to bring forward a number of concessions that might otherwise have been avoided. Chief amongst them was a series of government amendments on Lords Report that established a judicial arm of the Parole Board to deal with prisoners serving discretionary life sentences. As Lord Waddington noted the government had wanted further time to consider the ruling of the ECtHR but given the pressure exerted in the Lords it had decided to accelerate the timetable for reform,

While, as I indicated in Committee, we should have preferred to take more time to consider the full implications of the judgment of the European Court of Human Rights, we have decided that it would be right to respond to the views expressed in your Lordships' House by introducing amendments to the Bill during its later stages to deal with that point...

Clearly, the European Court of Human Rights judgment requires cases involving discretionary life sentence prisoners to be considered by a body having the status of a court. That body should have the power, once the initial term set by the trial judge has passed, to order the prisoner's release if it is safe to do so. Clearly, the body should operate in a judicial manner, giving the prisoner the opportunity to appear before it and to be legally represented. However, the Government wish to offer alternative proposals on some of the more detailed points. We believe, for instance, that it may be preferable for the tribunal function to be carried out by the Parole Board, operating under a special procedure in the cases concerned rather than that a completely new tribunal should be set up. The relevant panel of the Parole Board would, however, be constituted under the chairmanship of a judicial member of the board... (Hansard HL Deb 20 May 1991 vol 529 c60).

This change was significant for a number of reasons. With the extension of automatic parole to prisoners serving short custodial sentences the Parole Board was released to focus on the more resource intensive cases of prisoners serving long sentences for serious offences. This becomes increasingly significant in the years following the election of New Labour. As the number of prisoners serving discretionary life sentences for public protection increased the judicial procedures introduced by the *Criminal Justice Act 1991* would become a central feature of the Parole Board's work (Padfield *et al* 2012a p.955).

Yet, it is arguable that this would not have happened if it were not for the coalescing of a number of institutional factors. Yes, the government enjoyed the lion share of institutional power in the legislative process and used this to good effect but it was not limitless. The evolution of parole decision-making for prisoners serving discretionary life sentences highlights all too clearly how an effective appeal to authority (in this instance the ECtHR), veto power (concerted Lords opposition to mandatory sentences) and the privileged position accorded to judges and 'authoritative voices' created the space for compromise and unforeseen policy outcomes. In this sense the content of the *Criminal Justice Act 1991* was not solely the result of individual action, nor can it be attributed solely to larger social-economic trends. Institutions play an important

mediating role in the policy process and nowhere has this been truer than in the dense institutional fabric of the parliamentary process.

#### 6.4.2 *Postscript*

The Criminal Justice Act received Royal Assent on 25 July 1991. The new system came in force on the 1 October 1992 and applied prospectively to all offenders sentenced to determinate sentences after that date. During this transition the last vestiges of the *Criminal Justice Act 1967* framework that had been extended, modified and adapted to meet the changing needs of the penal system passed into the history books. Gone was the focus on indeterminacy and the personalisation of punishment in the 1967 Act. Gone was the 1970s confidence in the reformatory potential of a ‘short sharp shock’ or the enhanced individual deterrent effect of the partly suspended sentence. The system of 50% remission introduced by Hurd as a measure of last resort in 1987 was also abolished as were the prison based LRCs that had carried so much of the administrative burden once the judiciary had made it clear they would not support a system of compulsory partial suspension. In its place the *Criminal Justice Act 1991* introduced a stripped back, rather functional system of early release premised upon proportionality in sentencing, active risk assessment and robust supervision when prisoners were released on licence.

But this did not definitively settle the issue of early release for a generation as many had hoped. Faulkner has described the populist backlash against the 1991 Act as, ‘*probably the most sudden and the most radical which has ever taken place in this area of public policy*’ (quoted in Gibson *et al* 1994 p.84) and the abolition of early release quickly emerged as a cause célèbre within this new populist discourse (for a detailed history of events see Windlesham 2001 pp.1-53). At the 1995 Conservative Party Conference the Home Secretary Michael Howard announced his intention to introduce a system of mandatory sentences and abolish the early release framework first recommended by the Carlisle Committee. Once again the theme of truth in sentencing featured heavily, ‘*it’s time to get honesty back into sentencing. Time to back the courts. And time to send a powerful message to the criminal. No more automatic release. No more release regardless of behaviour. And no more half-time sentences for full time crimes*’ (cited in Windlesham 2001 p.3). The speech was heavily criticised by the Lord Chief Justice Lord Taylor (The Times 13 October 1995)

and latterly by the Penal Affairs Consortium (1996) amongst others who offered a powerful critique of mandatory sentences. But despite such concerns the move was seen as electorally popular and the policy was worked up in further detail by Home Office officials. In early 1996 the Home Office published *'Protecting the Public: The Government's Strategy on Crime in England and Wales'* a 'controversial' White Paper (Shute 2003 p.429) that called for the total abolition of the early release framework contained in Part II of the *Criminal Justice Act 1991*,

The Government believes that the sentence passed by the court should mean what it says. Accordingly the Government proposes that the present early release arrangements should be abolished (although the Parole Board will continue to consider cases involving the release on licence of life sentence prisoners). Instead, prisoners will have to earn early release by co-operation and positive good behaviour. No part of this will be granted as of right – it will have to be earned. Behaviour will be continuously assessed throughout the sentence (1996 p.44).

The White Paper was followed by the legislative proposals contained in the *'Crime (Sentences) Bill'*. The Bill received its Second Reading on the 4 November 1996 and the subsequent passage of the legislation through Parliament reveals something of the emerging contours of a new law and order landscape. Opposition to the Bill in the Commons was muted. As Newburn (2007) has noted, New Labour were at pains to safeguard a tough law and order image and, *'during the passage of the bill, the then Labour shadow home secretary, Jack Straw, had been careful not to appear to be especially hostile to the bill'* (Newburn 2007b p.439). In contrast, a concerted effort was made in the House of Lords by a cross-party alliance of former Home Office ministers, senior judges and the then Chairman of the Parole Board Lord Belstead to water down the proposals for mandatory sentences and restore a measure of sentencing discretion to the courts (Windlesham 2001 pp.1-53). Under growing pressure to conclude the passage of the Bill before the commencement of the General Election campaign the amendments made to the Bill in the Lords were reluctantly accepted by the Home Secretary in return for acquiescence to the government's proposals for a scaled back system of early release. A system that, if enacted, would require prisoners serving three years or more to earn the right to apply to the Parole Board for release on licence, once they had served five sixths of their sentence.



Despite fierce opposition to the circumvention of usual procedures the offer was accepted and the Bill was passed on 19<sup>th</sup> March 1997 just days before Prorogation and the conclusion of Parliamentary business. In the ensuing general election, the Labour Party were returned to power on a landslide victory but any hope that New Labour would repudiate *The Crime (Sentences) Act* was short lived. Jack Straw committed the government to introduce the mandatory sentences powers incorporated in the Act but, in a significant departure from Conservative policy, Straw confirmed that the government would not activate the powers relating to early release, favouring instead a system of ‘honesty in sentencing’ that required the sentencing judge to explain what the sentence would mean in practice (Windlesham 2001 pp.1-53). As a result, the system of parole established by the *Criminal Justice Act 1991* received an unlikely reprieve. The *Crime and Disorder Act 1998* amended recall arrangements for short sentence offenders and in 2001 the Home Office announced a Comprehensive Review of Parole that made over one hundred recommendations for reform (HMPS 2001). This was followed by the Halliday Report, ‘*Making Punishments Work* (Home Office 2001) and the *Criminal Justice Act 2003* that introduced a significant package of reform for early release in England and Wales. By this time the average prison population in England and Wales had risen to 73,038, a rise of 62% in little over a decade.

## **6.5 Conclusion**

Of all the events described in this study the documentary traces associated with Chapter Six are amongst the most difficult to decipher. In part, this reflects the inevitable limitations of the data; these events are still of relatively recent origin and it will be for a future generation of historians to excavate the full archival record once it has been released. But more than this, the difficulty of the ‘historiographical operation’ (Certeau 1988; Gunn and Faire 2012 p.5) is surely suggestive of the uncertain and dynamic character of criminal justice policy at this time. There is little doubt that the pre-eminence of penal welfarism had come to an end, but making sense of the more contested world of criminal justice that replaced it is an altogether more difficult task. This is what makes the events described here so interesting. In the conclusion to this Chapter I explore three key themes emerging from the data sources before turning to my closing remarks in Chapter Seven of this study.

### 6.5.1 *The backlash gathers pace*

From a contemporary perspective, the proceedings of the Carlisle Committee and the analysis found in the final report '*The Parole System in England and Wales*' (Home Office 1989c) offer a fascinating insight into a period of policy development that was very much a product of the times. For the most part there is clear continuity with the aims and techniques of early release outlined in earlier chapters, but it is also apparent that by the late 1980s there was growing frustration with the operation of parole and a willingness to contemplate radical departures.

The Home Office were instrumental in setting the tone. The terms of reference were drafted in such a way to prevent a wide-ranging review of penal policy (Interview B; 14 January 2014), Home Office officials provided a strong secretariat to the Committee and the members of the Review Committee were carefully selected to help steer a course between a timid review that failed to deal with the issues decisively or went too far in proposing radical departures that would be unviable or politically objectionable to Ministers (TNA: HO 291/2138). Officials were at pains to, '*guard against having too many people on the committee who have fixed views from the outset about the merits or de-merits of the present system*' (TNA: HO 291/2138) while the Parole Board argued the case for individuals they considered to have the '*most neutral attitude towards the parole scheme*' (TNA: HO 291/2138). From its inception the Committee was geared towards the 'art of the possible' and this inevitably promoted a degree of continuity with the past. The Carlisle Committee took seriously the liberal and humanitarian critiques of imprisonment and advanced the case for a humane, effective penal policy that encouraged a greater emphasis on crime prevention, non-custodial measures and constructive steps to prepare inmates for their eventual release when a custodial sentence was unavoidable,

Our approach can be summarised in two principles, neither of them radical nor revolutionary, indeed they go with the grain of many Court of Appeal judgements over the years: first, the courts should send to prison only those whose offending makes any other course unacceptable; second, those who are sent to prison should not stay there any longer than is strictly necessary (Home Office 1989c p.56).

Moreover, the Carlisle Committee was quick to re-assert the sentencing discretion of the courts, the value of discretionary release for serious offenders and the benefits of

supervision while on release to prepare prisoners for their eventual integration back into the community. For this reason, the Carlisle Committee can be located firmly within the liberal-elitist tradition of penal reform discussed earlier (Loader 2006; Ryan 2003). But what makes the Carlisle Committee qualitatively different from previous exercises such as the Home Office '*Review of Parole in England and Wales*' in 1981 is how these liberal concerns were juxtaposed against a 'truth in sentencing' argument which suggests the penal zeitgeist was beginning to turn away from early release for the first time.

In this study I have traced the evolution of early release through a series of reforms intended to extend the scope of executive release and increase the quantum of early release that could be received by prisoners. These reforms were principally justified on instrumental grounds; initially as a way of giving administrative expression to indeterminate sentencing and the personalisation of punishment (Cross 1962, 1966; Walker 1962) and latterly in pragmatic terms as a way of achieving significant reductions in the prison population (Home Office 1976c). This dynamic began to change in the mid-1980s. While heavily criticised at the time, I want to suggest that Leon Brittan's decision radically to curtail parole eligibility for serious offenders helped to establish a counter-narrative that saw those in positions of authority really challenge the instrumental benefits of early release for the first time. In simple terms this narrative rejected consequentialist justifications for imprisonment in favour of a retributive view of punishment as intrinsically valuable in marking out the unique seriousness of the offence. When viewed in this way, early release starts to become problematic, both as a means of watering down the punitive element of the sentence imposed by the courts (the populist argument) and in undermining the complex assessment of harm and proportionality at the point of sentence (the just deserts argument). As Ashworth noted contemporaneously, the later view was particularly influential in driving a significant backlash against parole in many jurisdictions,

The spread of "just deserts" has been associated with the decline of parole and moves towards "real time" sentencing, developments which may be regarded as natural concomitants of an approach whereby the proportionate sentence is calculated at the outset, not to be subverted by decisions taken at later stages which alter the effective sentence length (Ashworth 1989 p.351).

I would argue that the oppositional tension between the consequentialist and retributivist justifications for punishment defined the work of the Carlisle Committee and subsequent period of policy-development culminating in the *Criminal Justice Act 1991*. It can be seen in the division between the ‘softies’ and the ‘toughies’ on the Carlisle Committee (Interview B: 13 January 2014) and it can be seen in the final Report where the Committee noted that, ‘*we are satisfied that one of the main defects of the present system is that things too often do not mean what they say. We believe that there is a strong case for restoring some meaning to the full sentence imposed by the court*’ (Home Office 1989c p.61). It is also evident in the deliberations of the Home Office working group who wrestled with the political implications of the Carlisle Report and the dividing line between the automatic and discretionary elements of the new system (FOI: HO 291/ 2081). Truth in sentencing was the new demand and as a Criminal Law Review editorial noted at the time, ‘*the Committee falls into the pattern of recent committee reports in Canada and Australia... in trying to assimilate the “bark” and the “bite” of custodial sentences, thereby increasing “truth in sentencing”*’ (Editorial 1987 p.653). The Carlisle Committee is historically significant because it accepted much of the force of the critique of consequentialism, albeit in a way that was heavily critical of populist punitive justifications for punishment (Home Office 1989c p.64), and recommended a significant rolling back of early release in England and Wales.

Developing this theme still further the debates outlined above also suggest that the backlash against parole ebbed and flowed between the populist and just deserts elements of the consequentialist critique outlined above. There is little doubt that the restrictive policy introduced by Leon Brittan was driven by a populist desire to mark the punitive element of the sentence and embrace a more muscular law and order platform after the perceived liberalism of the Whitelaw years (McCabe 1985; Windlesham 1989; Shute 2003 pp.400-407). Over time this gave way to a ‘just deserts’ rationale for punishment that exerted a significant influence over the Carlisle Committee and Home Office White Paper ‘*Crime, Justice and Protecting the Public*’ (Home Office 1990a) before also being superseded by a far stronger populist position in the mid-1990s that came to see early release as a secretive and undemocratic attempt by officials and liberal reformers to frustrate a (perceived) public demand for tough and expressive prison sentences (Pratt 2007). This line of argument is apparent in the

debates that accompanied the *Criminal Justice Act 1991* in a way that simply wasn't the case in the parliamentary debates considered earlier in this study. Take for instance the view of controversial Conservative MP Terry Dicks MP,

Some of the things that I am about to say will not please the bleeding hearts, the do-gooders or the officials at the Home Office who seem to have a great influence - perhaps too great an influence - on the criminal justice legislation....

The Bill mentions early release time. Why on earth should we have early release time? A sentence should be a sentence. If people do not behave in prison, we should add time on for bad behaviour, not take time off for good behaviour. There should be no question about it; if they are in prison, they are there to be punished, and that should be the beginning, the middle and the end of it (Hansard: HC Deb 20 November 1990 vol 181 c214).

At the time this view was dismissed out of hand as typical of the '*soft underbelly of the Tory party on these issues*' (Hansard: HC Deb 20 November 1990 vol 181 c219), but within a matter of years this position would be virtually indistinguishable from official government policy on early release as the populist backlash against the *Criminal Justice Act 1991* gathered pace in the mid-1990s.

#### 6.5.2 *Human rights and procedural justice*

In this study I have emphasised the important role ideas play in the development of public policy, both as a guide to action and a focal point to facilitate collective decision-making. But that should not come at the cost of an adequate discussion of the context within which such decisions were taken.

In 1975 Hall Williams published a highly influential article, '*Natural justice and parole*' arguing that since parole proceedings were of an administrative rather than judicial nature and intended by the legislature as a privilege rather than a right there was no compelling argument for applying the strictest requirements of natural justice to parole decision-making. This argument was often relied upon by the Parole Board in resisting calls for the introduction of legal representation and reject reasons but as the human rights movement grew in influence and society became less deferential to those in positions of authority (Nevitte 1996; Uslander 2002) it became increasingly difficult to justify this position. The demands of human rights and procedural justice

were moving up the political agenda and the 1980s saw a steady stream of judicial review applications from prisoners and public interest lawyers seeking to challenge the longstanding administrative assumptions that underpinned the parole system. To take but a few examples, in *Payne v Lord Harris of Greenwich*<sup>20</sup> the Court of Appeal considered whether a prisoner had a right to hear the reasons why the Parole Board's had decided to reject an application for parole, in *Weeks v United Kingdom*<sup>21</sup> the ECtHR examined the recall arrangements for parolees whose parole licences have been revoked and in the landmark case of *Thyne, Wilson and Gunnell*<sup>22</sup> the ECtHR directed the UK Government to introduce a suite of measures intended to move the review of discretionary life sentences onto a judicial footing with greater regard for due process, provision of legal representation and a right to address the court. Many of these judgements ultimately found in favour of the Home Office but over time this growing body of case law gave credibility to those calling for greater recognition of individual human rights and stronger safeguards against state infringement of individual liberties (Elliott 2007). As one prominent penal reformer put it to me, the demands of human rights and procedural justice loomed large over the Carlisle Committees deliberations,

But the things that really produced the changes in the parole system were court cases, some of them domestic courts but others European court cases. The fact that the Carlisle reforms were accepted, cleared out of the parole system a lot of cases of people who from that point on were released automatically, meant that it was possible resource-wise to implement the changes that were required by domestic and European judicial decision. So if you look at the system now you've got determinate sentenced prisoners being released automatically at a fixed point, and then you've got the Parole Board largely looking at indeterminate and life sentence cases in terms of the initial release decision (Interview C: 22 April 2014).

This re-casting of the balance between administrative expediency and human rights took place at a time when the administration of early release was already being tested like never before. As a result of the repeated interventions of policy-makers the scale, scope and reach of the early release system had been extended far beyond anything anticipated by policy-makers in 1967. In 1968, a total of 4347 applications for parole

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<sup>20</sup> [1981] 1 WLR 754

<sup>21</sup> (1988) 10 E.H.R.R. 293

<sup>22</sup> (1991) 13 E.H.R.R. 666

were considered in England and Wales, a figure that grew to 23,136 in 1988, a staggering rise of 432% in just two decades (see Figure 9). No reliable datum is available on either the number of personnel employed by prison based LRCs, the central Home Office Parole Unit or the real term costs of administering the parole scheme in its totality but we do know that the lay membership of the Parole Board for England and Wales grew from 17 appointments in 1968 to a total of 68 in 1988 (HMSO 1969d; 1989a). In parallel, Parole Board expenditure rose from £451,174 in 1978 to £895,205 by 1988 (at 2012 prices).

When taken as a whole the longstanding administrative assumptions that had made the delivery of a discretionary system of parole possible in 1967 were simply no longer feasible. As the Carlisle Committee noted, *'we are satisfied that it is wrong in principle and, in any event, unworkable in practice, to try to operate a selective parole system for short sentence prisoners...* (Home Office 1989c p.48) a view that reflected the principled arguments outlined above but also took into account the fact that it was simply not possible to assemble the necessary documentation to take robust release decisions for the vast majority of short sentence offenders, *'[t]oo often we saw LRCs reaching decisions on the basis of inadequate information because key documents, most commonly police reports, had not arrived'* (Home Office 1989c p.48). This realism is also apparent in the considerations of the Home Office working group tasked with translating the Carlisle Committee recommendations into workable legislative proposals. Yes, the politics and presentational implications of reform loomed large over the policy-making process but at all times this had to be balanced against the likely impact of such proposals on the prison population and the prioritisation of finite resources amongst the various agencies of the criminal justice system that would ultimately have to deliver the new early release framework (FOI: HO 291/ 2081).

In this sense the evolution of parole has a great deal in common with the historical trajectory of remission as it developed and matured into a settled administrative framework. In both cases what began as purely discretionary system, positioned as a 'privilege not a right' evolved into a largely automatic system as prison authorities struggled to deal with an increasing volume of cases in a fair, consistent and equitable manner that did not antagonise a volatile prison population (Liebling 2007; TNA: HO 263/148). It also serves as an important reminder that not all policy change emerges

from within Westminster or Whitehall. Much of the momentum for the Carlisle Committee reforms was driven by the courts, both domestic and European, civil society organisations and the effective use of judicial review to re-balance the relationship between state and citizen (Padfield 2007; Padfield *et al* 2012a).

### 6.5.3 Reform and renewal

For these reasons the events described here should not be viewed in isolation but located within a wider historical cycle of reform and renewal. In the years following the *Criminal Justice Act 1967* the compromise system of early release fusing remission and parole had demonstrated remarkable elasticity as a tool of public policy, it had adapted to the changing needs of the criminal justice system and accommodated an almost continued process of reform as the objectives of penal policy evolved (Tata 1990). But this elasticity had its limits and by 1987 the operation of early release in England and Wales had been stretched to breaking point. The options for further piecemeal reform were increasingly limited and as discontent with the operation of early release grew, so too did the case for root and branch reform.

This policy problem helped to place early release on the policy agenda but it is arguably the proximity of these events to the 1987 General Election that proved decisive. In his seminal work *'Agendas, Alternatives, and Public Policies'* Jonathan Kingdon has demonstrated how 'policy windows' can unlock periods of energy and creativity in the policy process (2002 pp.165-196). Commonly associated with unforeseen events, the renewal of democratic government or the re-alignment of legislative power, policy windows bring strategic objectives into focus and create the conditions for problem solving activity. With this in mind the 1987 General Election can be interpreted as a policy window where wide-ranging reform of early release policy and practice became achievable. The Conservatives were returned to power on the 11 June 1987 with a healthy majority of 100 MPs and a strong mandate to implement their law and order commitments, including a review of parole in England and Wales. An extended period of hegemony had also strengthened the Conservative Party position in the House of Lords where they commanded 531 Peers to a Labour grouping of 117. Refreshed and re-energised by a strong Conservative performance in the General Election, Hurd returned to Queen Anne's Gate as a considerably more experienced Home Secretary with a strong command of his Departmental brief and



the political appetite to undertake the wide-ranging strategic review of penal policy outline above (Hurd 2003; Interview B: 14 January 2014).

When taken as a whole the mounting incoherence of early release coupled with the policy window created by the 1987 General Election and Hurd's growing self-confidence as Home Secretary helped to create the political momentum for wide-ranging reform of early release. But it was absolutely essential that this agenda was sustained by a favourable context. There were any number of occasions when reform of early release could have fallen off the political agenda, most notably following the lukewarm reception to the Carlisle Report (The Independent 1989a), but unlike the events outlined in Chapter Six the key power brokers within the criminal justice system helped to reinforce the case for reform rather than frustrate it.

Hampered by the continuing practice of cell-sharing the police were more aware than ever of pressures in other parts of the criminal justice eco-system. The strategic review of criminal justice following the 1987 General Election had done much to build a collective vision for management of the criminal justice system amongst senior Home Office officials and Ministers (Faulkner 2006; Windlesham 1993). It was also hugely significant that the senior judiciary, so critical of the operation of s33 cases, came out in support of the Carlisle Committee proposals that went along way to returning meaning to the sentence of the courts (FOI: May 2013). Despite her punitive instincts, the Prime Minister gave Hurd significant discretion to manage the Home Office as he saw fit (Hurd 2003 p.341), while the tragic murder of Anna Humphreys helped to galvanise media and public opinion and reinforce the arguments for why the status quo was no longer tenable. Put simply, these various interest groups had more to gain from reform of early release than they did with sticking with an increasingly dysfunctional status quo, a strategic calculation that arguably helped tip the balance in favour of accepting the Carlisle Committee proposals and the measures given legal effect by the *Criminal Justice Act 1991*.

## 7. Discussion

### 7.1 Introduction

In the introduction to this thesis I posed two primary research questions that have guided my research: First, in what ways did the policy and practice of early release develop in England and Wales between 1960 - 1995? Second, how might we account for these changes? In seeking to address these questions and a number of breakout questions for secondary enquiry, I have advanced the case for a systematic and historically grounded analysis of public policy. As I argued in Chapter Two, the evolution of criminal justice as a public policy concern has attracted considerable interest within the literature but this has tended to focus on the role of individuals and elites as key agents of policy change (Ryan 2003; Windlesham 1993) or the influence of 'big picture' socio-economic shifts associated with late twentieth-century modernity (Garland 2001; Young 1999; 2009b). Comparatively little attention has been paid to the role of political institutions and in this study I have drawn upon the building blocks of historical institutionalism outlined earlier to guide my data analysis and make sense of the important, but often overlooked, influence of institutions on policy outcomes.

This research focus has shaped my methodological choices. As a criminologist undertaking historical study, a theme discussed in Chapter Three, I have sought to position my research in the 'middle range' and achieve an empirically grounded archival history of early release that fills a significant gap in our knowledge while also arriving at a theoretically rich account of policy change. Drawing upon extensive archival research, a methodological approach that is extremely rare in contemporary criminology, I have considered three critical junctures in the evolution of early release policy and practice; the introduction of a modern system of parole in the *Criminal Justice Act 1967*; the complex policy-debates that surrounded the extension of a system of parole to short sentence offenders in the early 1980s; and the steps taken to rationalise the operation of parole by the Carlisle Committee and *Criminal Justice Act 1991*. These detailed historical case studies have revealed a complex picture of both continuity and change (Faulkner 1991).

In Chapter Seven I want to return to my primary research questions, particularly the second more analytical line of enquiry and summarise the major findings of my research. I reflect upon the key dynamics that have influenced the historical trajectory of early release policy and practice in England and Wales between 1960 - 1995 before turning to a brief epilogue setting out the benefits of a quizzical and historically grounded institutionalism that examines public policy ‘as life is lived’ rather than taking a snapshot of those interactions at one point in time (Sanders 2006 p.39).

## **7.2 The Evolution of Early Release Policy and Practice**

So how do we account for the historical development of early release policy and practice described in this study? In answering this question, I want to focus on four themes that I think emerge most strongly from my analysis; a dynamic picture of policy change, the mediating role of the Home Office at the intersection between policy and politics, the uneven distribution of power amongst the various agencies with a stake in the criminal justice system and the legacy of path dependent policy choices.

### *7.2.1 Towards a dynamic understanding of policy change*

This study offers a view of public policy development that is somewhat at odds with the dominant imagery within much of the mainstream criminological literature; namely, a pluralist eco-system where policy-makers seek to balance the competing interests of economic constraints, political expediency, the pressures of academic research and penal reform (Faulkner 2006; Walker and Giller 1977; Windlesham 1993). Building upon the new institutionalist critique of policy-making offered by March and Olsen (1984; 1989) and set out in Chapter Two, I have sought to understand the policy-making process as it is, rather than how it ought to be. This has revealed an altogether more complex, messy and contingent view of policy-making than for example, Lord Windlesham’s frontispiece map set out at Figure 12 (an excellent account of policy-making in the ‘real world’ can be found in Hallsworth *et al* 2011). In particular I believe the administration of early release policy and practice in England and Wales between 1960 - 1995 was defined, amongst other things, by the following key characteristics:

Early release in perspective: In Chapter One I set out the case for detailed research of early release policy and practice, a form of executive action that presents a series of administrative challenges with serious implications for the liberty of the individual. There is however a danger that the selective use of archival records to detail this particular history of events introduces a sampling bias that overstates the prominence of early release within overall government decision-making. For the avoidance of doubt my review of the archival records, particularly the records pertaining to the Prime Minister, Cabinet and the various sub-committees on Home Affairs, reveal that apart from a short period of scrutiny in the 1960s early release barely featured as a policy issues at the top-tier of government. This is not to dismiss the importance of early release as a public policy concern but to place such issues in their appropriate context. The relative standing of early release, like penal policy more generally helps to explain why these issues were so sensitive to upstream policy choices and the shifting objectives of the Home Office who were by and large free to manage these issues with little intervention from collective Cabinet decision-making structures.

The law of unintended consequences: Allied to the above, my analysis has demonstrated just how often the trajectory of early release policy and practice was interrupted, not by the conscious choices of policy-makers but as a consequence of entirely unrelated political decisions. These externalities can be seen throughout the events described in this study. I have noted how the modernising project associated with penal welfarism led to the abolition of penal servitude with unanticipated implications for the release and aftercare arrangements of prisoners serving long determinate sentences. Harold Wilson's decision to reshuffle his Cabinet in advance of a possible 1966 General Election resulted in Roy Jenkins' appointment as Home Secretary, a move that started to challenge the hierarchical culture of the Home Office and unlocked a period of unprecedented creativity that saw the Criminal Justice Act 1967 re-imagined as a far more ambitious piece of legislation. While in Chapter Five I noted how the global economic insecurity of the early 1970s shaped the Treasury's attitude towards the PES negotiations with Whitehall Departments and made it more likely than might otherwise have been the case, that the errors in the Home Office's prison population projections would be used as the basis for disinvestment from the flagship prison building programme.

Contingency: In the course of this study I have been struck by just how contingent many episodes in the historical development of early release policy and practice have been. There was nothing certain or pre-determined about many of the events described here and it is easy to see how things could have worked out very differently. How would the *Criminal Justice Act 1967* have looked if Roy Jenkins had taken the job as Secretary of State for Education or lost the confidence of the Prime Minister over his handling of the Shepherds Bush murders and the escape of George Blake? How would the administration of criminal justice in the 1970s have differed if Robert Carr had convinced the Treasury to maintain its commitment to the prison building programme? Would the populist backlash against the *Criminal Justice Act 1991* been at all different if Margaret Thatcher had not lost the leadership of the party during the passage of the Bill? We will never know the answer to these questions but they offer a useful caution against an overly deterministic interpretation of criminal justice change and a reminder of why there has been such significant variability in political responses to crime across time and space despite broadly similar exposure to the socio-economic forces of late twentieth century modernity.

Compromise: Policy-makers struggled to keep the criminal justice system functioning within circumstances that were not always of their own choosing. Decision-makers rarely had absolute discretion to make the choices they would have liked; many inherited unwanted commitments from their predecessors and were regularly forced to take policy choices in a succession of ‘lesser of two evils’ type scenarios. Douglas Hurd’s room for manoeuvre on early release was significantly limited by the choices of previous Home Secretary’s. While popular within the Conservative Party, the bifurcation of parole introduced by Leon Brittan served to undermine the administrative coherence of early release in England and Wales. The restriction of parole for serious offenders embroiled the Home Office in protracted judicial review proceedings culminating in the House of Lords decision in *Re Findlay*<sup>23</sup>, while the extension of parole eligibility to short sentence offenders in s33 cases was universally derided by the judiciary and led to the establishment of an internal Home Office working group chaired by Sydney Norris that would prove to be

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<sup>23</sup> *Re Findlay* [1985] AC 318

an important precursor to the Carlisle Committee (FOI: HO 291/ 2081). An inheritance that may help to explain why the Home Office elected to revise the Prison Rules and move to a system of 50% remission, an option that had been consistently mooted and rejected by the Home Office since the mid-1970s.

Imperfect knowledge: Finally, it is remarkable how often policy-makers were forced to make decisions on the basis of imperfect knowledge and struggled to predict the likely consequences of their choices with any degree of confidence (see also Jessop 1990; Hay 2001 pp.126-134). This was particularly true when it came to anticipating how policies would ‘travel’ as they were interpreted and implemented by a succession of delivery agents within the criminal justice system. Home Office officials worried about the creation of an independent Parole Board because they feared it would frustrate the Department’s policy objectives in the medium to long term (TNA: HO 384/99), an anxiety that remained well into the 1970s when on advice from officials Roy Jenkins took steps to ‘pre-commit’ a conservative and risk averse Parole Board by announcing his plans to extend the scale and reach of the parole system in response to a dangerously high prison population (TNA: HO 303/98). The Home Office repeatedly struggled to understand the intentions of the judiciary, understandably so given that the judicial branch of government also represented a diverse and heterogeneous constellation of institutions comprising the Magistrates Association, Lord Chief Justice and the idiosyncratic position of the Lord Chancellor and the Lord Chancellor’s Department that grew in size and complexity during the period in question. This made it exceptionally difficult to predict how the judiciary would make use of new sentencing powers like the partly suspended sentence or react to the extension of early release to short sentence offenders as Whitelaw discovered to his cost in 1981 (FOI: May 2013).

### *7.2.2 The mediating role of the Home Office*

Furthermore, it is impossible to understand the events described in this study without some account of the mediating role of the Home Office at the intersection between policy and politics. As I noted in Chapter Five there has been a tendency to view central government Departments as homogenous institutions and this has often seen the Home Office equated with the personality of the Home Secretary or imbued with a corporate identity that speaks and moves with common purpose (a discussion of this

tendency can be found in Lowndes 2010 pp.67-71). Moreover, there has been relatively little focus on how the Home Office copes with plurality and translates a multiplicity of views, options and agendas into a singular course of action.

This study goes some way towards moving beyond the rather static, monolithic view of the Home Office and revealing how criminal justice policy-making ‘really works’ in organisational settings. My analysis confirms many of the insights from previous accounts of criminal justice policy-making. Ryan was surely right in his description of post-war criminal justice administration as the preserve of a, *‘small coterie of somewhat self-satisfied, well connected [white?] middle class, mostly male, metropolitan reformers, academics and a few sympathetic judges, sharing authority with powerful civil servants and ministers in pursuit of their own private agendas. These people were the ones who really counted when it came to making penal policy...’* (2003 p.40). Similarly, Loader’s discussion of *‘liberal elitism’*, a complex worldview premised upon civilising values, the use of expert knowledge and the careful management of public opinion offers a powerful insight into the governmentality that framed the proper conduct of government towards crime in post-War England and Wales. More generally the archival records paint a clear picture of a department grappling with the appropriate balance between citizen and state, an unusually eclectic portfolio of policy interests and an administrative culture rooted in case management rather than large public expenditure transfers that were typical of large Whitehall spending departments (Faulkner 1991). A tradition that was increasingly at odds with the managerialist techniques associated with ‘new public management’ (Sparks 2001; Zedner 2004) and the actuarial logics of the ‘new penology’ (Feeley and Simon 1992) that came to exert a significant influence over the assessment of risk by the Parole Board and probation services following enactment of the *Criminal Justice Act 1991*.

But this study also hints at a number of further possibilities. Each of the case studies set out in this study shine a light on how the organisational basis of the Home Office shaped the everyday experience of Ministers and officials as well as their approach to policy-making. At a very practical level I noted in Chapter Four that the geographical spread of the Probation and After-Care Department, the Criminal Department, Prison Department, the Home Office Research Unit and Parole Board secretariat across four

separate buildings almost rendered the operation of the fledgling parole system unworkable and required new forms of collaboration between the various agencies with a stake in the early release system (TNA: PCOM 9/2261). More deeply embedded was the uneven distribution of power within the various directorates of the Home Office. Historical institutionalism requires the researcher to go beyond the first face of power and the authority to make decisions to better understand the more demanding ways in which those with power influence the decision-making agenda and shape the preferences of others. In this regard the Home Office has always been a rather asymmetric department and there is good evidence to suggest that the Police dominated in terms of power and prestige while the Probation and Aftercare Department was able to command only fleeting influence over the policy agenda (Interview B: 14 January 2014). This asymmetry helped to close down certain policy options and make others more likely. For example, the steps taken to protect police investment in the 1973 Public Expenditure Survey contributed to the eventual disinvestment from the flagship prison building programme and historic underinvestment in the Probation Service. These choices about resource allocation cast a long shadow over the administration of criminal justice throughout the decade, at a time when the Probation Service lacked the necessary personnel to cope with a significant increase in non-custodial disposals by the courts and the prison estate struggled to cope with significant further increases in the average prison population. In this context it is little surprise that reform of early release emerged as such an important tool in the administration of the penal system when so few other levers of control were available.

More subtly my analysis reveals that within the broad institutional worldview we may describe as 'liberal elitism' there were subtle variations of light and shade (Loader 2006). I have argued that there were important differences in how the various Home Office divisions with a stake in the early release system saw the world according to their functional responsibilities, policy objectives and the real time feedback they were receiving from the unique constellation of professional relationships that built up around each team. These subtle differences in worldview had an important framing effect on how issues were interpreted within the Home Office and the most appropriate administrative levers for the resolution of such problems. It is surely no coincidence that the Prison Department favoured an extended system of remission given the low



administrative burden presented by the scheme and the perceived value of remission as a tool of control while the Probation and Aftercare Department worked tirelessly for a system that incorporated active supervision while on release. It also hints at one final possibility; that the decision of which Division to assign a task, project or problem to was just as significant as the deliberations and recommendations that followed. In some instances, this appears to have been a conscious decision by senior decision-makers to exploit such differences and allocate tasks to the teams most likely to illicit the desired response. But more generally such decisions were shaped by a series of unwritten rules, assumptions and norms of appropriate conduct that informed how the allocation of tasks amongst the various divisions of the Home Office was to be undertaken.

When taken as a whole my research suggests that these norms of appropriate conduct coupled with the precedents set by previous budget allocations and the informal pecking order amongst Home Office divisions exerted a significant but largely undiscussed influence over criminal justice policy in England and Wales. More research is therefore required to scrutinise these complex interactions, the influence of cross cutting teams like the Crime Policy Planning Unit and better understand how the organisational basis of the Home Office has influenced the historical development of criminal justice policy in England and Wales.

### *7.2.3 An uneven distribution of power*

The Home Office may have occupied a privileged position within the criminal justice system but this power was not absolute. The events described in this study reveal that the Home Office was reliant upon a complex chain of delivery agents to administer the parole system. In developing new policy positions Ministers and their officials were often forced to navigate a dense network of interest groups perceived to have a stake in the criminal justice system and invested considerable departmental resources to help ‘win the argument’ with those who could frustrate their policy objectives (Interview D: 28 May 2014). As Home Secretary Douglas Hurd noted in the 1987 edition of ‘*The House magazine*’ a weekly journal of the Houses of Parliament,

Of the diverse responsibilities which a Home Secretary has to bear, it is questions of law and order that inevitably weigh most heavily with him. It

is ironic perhaps that despite high expectations — and I don't for a moment complain about that - I have my hands on very few levers of control. In fact, just about the only bit of the system that I am totally responsible for is the running of our prisons. Needless to say, I don't have control over the numbers that come into them (Hurd 1987 p.14).

Hurd's comments, made as they were at the height of the late 1980s prison boom, betray more than a hint of 'plausible deniability' and it is important not to overstate this point. The unequal distribution of power does not lead inevitably to inaction and inertia. The strategic review of criminal justice following the 1987 General Election demonstrates that where clear policy objectives had been identified the Home Office did have access to a great many levers of control such as legislation, patronage, policy directions and resource allocation that were more than sufficient to transform the criminal justice landscape (Faulkner 2006; 2014). Rather the point being made here is that in practice the development of early release policy and practice was continually impeded, refracted and sometimes catalysed by the unequal and constantly shifting distribution of power within the criminal justice system. It can be seen in the PES negotiations between the Home Office and the Treasury that established the resource envelope, both revenue and capital, available to the criminal justice system. It can be seen in the relationship between the Home Secretary and the Prime Minister and the reception of government policy within the wider political party, Parliament and the various civil society organisations with an interest in penal reform.

But just as significantly, this process continued as the focus turned from policy to practice and is apparent from the Home Office relationship with the various delivery agents with a stake in criminal justice administration, whether represented jointly by the Police Federation, Prison Officers Association (POA) and National Association of Probation Officers (NAPO) or severally by senior Prison Governors and Chief Constables. As Faulkner noted in his address to the BREDAs Conference in October 1990, this added a further degree of complexity to criminal justice as a public policy concern,

So our system is complicated. It is not well designed for systematic planning, or indeed for efficient day to day operation at national or local level. Planning and co-ordination have to take place along three separate dimensions - within central government; between central government and the locally provided services and so far as possible the judiciary; and

between the services themselves, again including the judiciary so far as possible (Faulkner 1990 para.7).

More than any other I have argued that the relationship between the Home Office and the judiciary had a defining influence on the evolution of early release policy and practice. This dynamic had both political and ideational dimensions; it can be seen in the often tense discussions between the Home Office and the Lord Chief Justice, but there is good evidence to suggest that civil servants and other significant decision-makers, well versed in the work of A.V. Dicey and the constitutional separation of powers, had also internalised the idea of judicial independence and instinctively deferred to the courts across a wide spectrum of sentencing issues. This influence can be seen in the compromise decision to graft a modern system of parole onto remission in the *Criminal Justice Act 1967*, the withdrawal of judicial confidence following the publication of the Home Office (1981d) '*Review of Parole in England and Wales*' and the internal review of s33 cases of parole for short sentence prisoners that emerged as an important contributory factor in the Conservative manifesto commitment to establish a review of the parole system and the Carlisle Committee proceedings outlined in Chapter Six.

Each of these compromises would become a source of ongoing conflict and frustration for the Home Office, the judiciary and the various practitioners charged with the day-to-day delivery of the parole system. But in an important sense they were inevitable trade-offs within a liberal democratic system of government where more was at stake than just the administrative expediency of early release. Over time the Home Office enjoyed both successes and failures in managing these delicate relationships and this had a significant impact upon the realisation of policy objectives in the medium-to long-term.

#### *7.2.4 The legacy of path dependent choices*

It has become somewhat axiomatic to claim history matters in the study of public policy (Tilly 2006) but the legacy of such historic policy choices is writ large throughout this study. As I noted in Chapter Two, relatively minor choices at one point in time can have major implications at a later point in a temporal sequence. This is especially likely when policy choices introduce positive feedback, a process that

incentives further moves in the same direction and increases the costs of changing direction (Pierson 2001). As Margaret Levi has noted, positive feedback creates developmental trajectories that are hard to reverse once in motion (1997 p.28), with the implication that once institutional norms and rules of appropriate conduct have become established they become resilient to change and this 'stickiness' can close off some policy avenues while encouraging others.

There is strong evidence to suggest that the development of early release policy and practice in England and Wales has been shaped by path dependency. One such example stands out above all others, the decision to graft the new system of parole onto the existing remission arrangements in the *Criminal Justice Act 1967*. This was a big decision with big consequences, the legacy of which could still be felt well into the 1990s with the gradual transition to the Carlisle Committee framework enshrined in the *Criminal Justice Act 1991*. As I noted in Chapter Four this compromise option was by no means inevitable. If reductions in the prison population were the primary driver of penal reform, then the obvious option would have been to extend remission to say 50% of a prison sentence as would occur be proposed on a number of separate occasions. Remission was inexpensive to administer, did not require a complex decision-making framework and could be amended easily by statutory instrument. Conversely, if the reform agenda was purely driven by principle it would have been entirely understandable if the Home Office had taken the opportunity to abolish the outmoded system of remission altogether and replace it with a straightforward system of parole as was common in many other western jurisdictions at this time.

The key point being that once the decision had been taken to adopt a hybrid rather than a pure system of either parole or remission this began to exert a path dependent impact upon the trajectory of early release policy and practice in England and Wales. For eligible prisoners and their families, it created a legitimate expectation that their cases would be considered for parole at the one third point of their sentence; the prison service invested heavily in a new rank of Assistant Prison Governors who were responsible for overseeing the aftercare arrangements of all prisoners and the complex computation of early release dates (Interview H: 20 January 2015). Moreover, a whole new administrative apparatus was created to deliver the new system, appointments to the Parole Board were highly prestigious, Local Review Committees were established

in facilities across England and Wales and a new parole secretariat was established within the Home Office. The system was supported by the Treasury as a way of reducing the financial costs associated with the penal system while the penal lobby comprised of organisations like the Howard League of Penal Reform, NACRO and latterly the Prison Reform Trust were all broadly supportive of a system of early release, particularly as a way of offering hope to those within the prison system and a vehicle for reducing the prison population. For all these reasons it would have taken considerable political will to unwind this complex infrastructure, especially as early release proved its value as an indispensable tool of prison population management in the late 1970s. Despite the self-evident limitations of this system the process of positive reinforcement incentivised the Home Office to work within this framework and heavily discount alternatives that would have required a radical departure from this settlement.

What did this mean in practice? By dividing the time available on release between the automatic system of remission and the discretionary system of parole the Home Office had secured judicial and practitioner support for the new system but over time this arguably made administration and reform far more difficult. The interaction between the two systems meant that computation of early release dates was extremely complicated and created anomalies like the example of a high risk offender refused release on parole only to be released unconditionally under remission arrangements. It also meant that many of the reforms outlined above related only to one section of the prison sentence and over time this encouraged prison authorities to focus on ‘net widening’ exercises like the Jenkins initiative or the increasingly technocratic efforts to extend a system of parole to short sentence offenders. But more than this, it was the division of the automatic and discretionary elements of the system into two separate legal regimes that generated so many of the tensions outlined above.

Somewhat counterintuitively I think remission is the key to understanding the peculiar evolution of parole in England and Wales. Remission enjoyed high levels of support amongst Prison Governors who saw it as an invaluable disciplinary tool and it offered a simple, cost effective method to quickly expedite the release of large volumes of prisoners from the prison estate. But this came at a cost since remission applied automatically to all prisoners regardless of the seriousness of their offence and

contained no provision for aftercare even when it was known that a prison was likely to be a threat to public safety without effective supervision and liability for recall. This trade-off appears to have resulted in a form of decision-making paralysis; the Home Office were unwilling to abolish remission but at the same time they repeatedly shied away from further reform and expansion until 1987 when all other options for reform had been exhausted. As a result, the focus of attention was continually shifted from remission, the elephant in the room, to the altogether more malleable system of parole. As conditions in the prison system became more acute and modest additional capital investment came on stream from the Treasury the Home Office turned with increasing regularity to the parole system to help control the prison population. As we have seen this typically involved efforts to water down the discretionary element of parole and introduce a degree of coercion that would guarantee significant reductions in the prison population. This can be seen in the 'Bampton proposal' for compulsory partially suspended sentences and later on the guidance to LRCs stating that there should be a presumption in favour of release when dealing with s33 cases of short sentence offenders. Viewed in isolation these proposals did not represent a fatal interference with the sentencing power of the courts, but because they operated in addition to remission arrangements that automatically shortened all sentences by a third, even modest attempts to place parole on a more automatic footing were problematic and perceived as unjustifiable executive action by the judiciary.

Over time this created something of a vicious circle that contributed to a deteriorating relationship between the Home Office and senior judiciary. It exacerbated the concerns of the judiciary who were increasingly sceptical of executive interference with the sentencing function of the courts and it limited the ability of the Home Office to exert some semblance of soft influence over sentencing practice and alert a somewhat distant and remote judicial class to the deteriorating conditions within the prison estate. The key point being that many of the difficulties and frustrations experienced by policy-makers in the 1980s can be traced back to the legislative decisions made in the run up to the *Criminal Justice Act 1967*. A settlement that created strong path dependencies that only began to unravel as consequentialist justifications for punishment fell out of fashion and the 1987 General Election created a policy window where genuine root and branch reform became possible.

### **7.3 Epilogue: The Merits of Historical Study**

I believe these findings reinforce the case for a quizzical and historically grounded institutionalism that examines public policy ‘as life is lived’ rather than taking a snapshot of those interactions at one point in time (Pierson 2004; Sanders 2006 p.39). Making sense of this complex picture of continuity and change requires detailed contextualisation of public policy debates and a sensitivity to the historical antecedents that shaped such choices (Tilly 2006). In turn, this research agenda is particularly well suited to comparative historical analysis and archival research that encourages greater immersion in the primary data sources (Amenta 2009 p.354). This is not to downplay the importance of ‘big picture’ accounts of criminal justice change but rather to suggest that such approaches can be usefully complimented by research in the ‘middle range’ (Merton 1967) and inter-disciplinary approaches like historical institutionalism that offer a bridge between empirical particulars and criminological theory.

By placing early release in broad historical perspective this study has revealed some of the stepping stones that led from the confident and optimistic penal welfarism of the 1960s to the altogether more contested politics of law and order that emerged in the mid-1990s. These shifts did not occur in a vacuum but as a result of both the conscious and unintended choices of successive generations of policy-makers. I have documented how the oscillation between consequentialist and retributive justifications for punishment drove the transformation of early release from a tool of indeterminacy and the personalisation of punishment to a pragmatic policy lever intended to strengthen the deterrent effect of the criminal law and manage the prison population. In time the shift towards retributive justifications for punishment saw the emergence of a ‘truth in sentencing’ critique of consequentialism that was highly sceptical of early release for undermining the complex assessment of harm and proportionality at the point of sentence and an altogether more populist argument that criticised early release for watering down the punitive element of the sentence imposed by the courts.

As I noted in Chapter One penal administrators operating in 1960 would have recognised many of the central concerns of criminal justice in contemporary England and Wales and it is revealing just how frequently the same dilemmas, trade-offs and mistakes re-emerge within the evolution of early release policy and practice. For this reason, historical analysis offers a fascinating insight into what Rock has described as

the ‘chronocentrism’, or ‘*belief that we live in “new times” ... that demand new concepts, ideas, understandings*’ that is implicit in so much policy development and analysis (2005 p.473). To take but one example, on the 3<sup>rd</sup> October 2013, the then Justice Secretary Chris Grayling signalled his intention to overhaul the system of early release in England and Wales,

It’s outrageous that offenders who commit some truly horrific crimes in this country are automatically released from prison halfway through their custodial sentence, regardless of their behaviour, attitude and engagement in their own rehabilitation. This Government is on the side of people who play by the rules and want to get on. We need to teach criminals a lesson; you will be punished for your crime and you must earn your release, it is not an automatic right (MOJ Website 4 October 2013).

In so doing the Secretary of State entered a longstanding inter-generational dialogue about the administration of the penal system and the termination of prison sentences. A dialogue that goes back at least as far as Captain Alexander Maconochie’s decision in the mid-nineteenth century to introduce a ‘marks system’ at the notorious Norfolk Island penal colony and encompasses the introduction of a modern system of parole in the *Criminal Justice Act 1967*, Whitelaw’s volte face on compulsory release on licence for short sentence offenders, Leon Brittan’s restrictive policy and Michael Howard’s controversial steps to realise greater ‘truth in sentencing by introducing a system of mandatory sentences. The politics of early release have always vied with the claims of ‘administrative wisdom’ but it is clear that since the mid-1990s the relationship between these two normative drivers of public policy has become altogether more contested with implications for the ‘humanity, fairness and effectiveness of the criminal justice system (Garland 2001; Lacey 2007). It is striking that thirty years before Grayling’s statement the May Committee Inquiry into the United Kingdom Prison Services had reflected on exactly the same question and arrived at a very different conclusion,

From time to time it has been proposed that remission should be positively earned rather than awarded automatically subject to the proviso that it can be forfeited for bad behaviour. Such a system was used in Britain during the last century and formally abandoned only in 1940. Under this scheme, prison officers awarded ‘marks’ to inmates who had behaved well and, on the basis of the number of marks acquired, an inmate could accelerate his progress through the system and gain additional privileges. Unfortunately,



officers very rapidly fell into the habit of awarding full marks to almost every inmate, preferring to rely on disciplinary procedures when dealing with recalcitrant inmates; the scheme was, therefore, effectively abandoned long before its formal abandonment in 1940. It is interesting to note that Sir Lionel Fox, a former chairman of the Prison Commission in describing the reasoning behind the decision to abolish the 'marks' system said, "it appeared to the Commissioners that a system of this traditional pattern was open to two objections in principle in so far as the privileges had a value as elements of training, the sooner the prisoner was able to profit by them the better: and in so far as they were useful as aids to discipline, a prisoner might be more affected by the loss of something he was actually enjoying than by deferment of the hope of enjoying it" (TNA: HO 263/148).

The more things change it seems, the more they stay the same.

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## Appendix 1: Early Release Key Event Timeline, 1960 – 1995

July 1964	Publication of the Longford Report, ' <i>Crime a Challenge to Us All</i> '.
October 1964	General Election. The Labour Party form new government.
August 1965	During the passage of the Murder (Abolition of Death Penalty) Act 1965, the government make a commitment to review the legal position of prisoners serving long determinate sentences.
December 1965	The Home Office publish ' <i>The Adult Offender</i> ' setting out proposals for the introduction of a system of parole in England and Wales
March 1966	General Election. The Labour Party are returned to power.
October 1966	George Blake escapes from HMP Wormwood Scrubs. Roy Jenkins announces review of prison security by Lord Mountbatten.
July 1967	The Criminal Justice Act 1967 receives Royal Assent.
April 1968	The first tranche of 350 prisoners are released on parole.
June 1970	General Election. The Conservative Party form new government
October 1972	The Criminal Justice Act 1972 receives Royal Assent. The Act empowers Local Review Committee's (LRC) to release certain categories of offender pre-agreed by the Parole Board.
February 1974	General Election. The Labour Party forms a minority government.
October 1974	General Election. The Labour Party form new government.
August 1975	Roy Jenkins makes Parliamentary statement announcing plans to extend the scope of the parole system to more categories of prisoner.
October 1976	The Lord Chancellor Lord Elwyn-Jones addresses the Annual General Meeting of the Magistrates Association and calls upon the courts to make greater use of shorter sentences.
July 1977	The Criminal Law Act 1977 receives Royal Assent. The Act introduces a new power to partly suspend determinate sentences.
May 1979	General Election. The Conservative Party form new government.
1980	Lord Chief Justice issues a series of practice judgements in <i>Bibi</i> and <i>Upton</i> calling upon the courts to make less use of custody.
May 1981	The Home Office publish ' <i>A Review of Parole in England and Wales 1981</i> ' calling for the introduction of a scheme of release on licence for short sentence offenders.
October 1981	The Lord Chief Justice Lord Lane writes to the Home Secretary setting out judicial opposition to the proposed system of release on licence for short sentence offenders.
October 1981	The Law and Order motion is defeated at the Conservative Party conference.
March 1982	The Home Office activate the partly suspended sentence provisions of The Criminal Law Act 1977.
October 1982	The Criminal Justice Act 1982 receives Royal Assent. The Act contains provisions relating to partly suspended sentences, emergency release and minimum eligibility for parole.

June 1983	General Election. The Conservative Party are returned to power.
October 1983	Leon Brittan addresses the Conservative Party conference and announces plans to limit parole eligibility for serious offenders.
July 1984	The threshold for parole eligibility is reduced from 12 months to 6 months.
November 1985	In the case of <i>Re Findlay</i> the House of Lords find that the Home Secretary had acted lawfully in issuing revised policy directions to the Parole Board restricting parole eligibility for serious offenders.
December 1985	Home Office establish a working group to review the operation of “s33 cases” of parole for short sentence offenders.
June 1987	General Election. The Conservative Party are returned to power.
July 1987	Douglas Hurd addressed the House of Commons and introduces a system of 50% remission and a review of parole in England & Wales.
September 1987	The Carlisle Committee is established and meets for the first time.
November 1988	The Carlisle Committee publish, <i>‘The Parole System in England and Wales’</i> . The Report recommends sweeping changes to the operation of early release in England and Wales.
September 1989	The Home Office convene a conference of senior decision-makers at Ditchley Park to agree a long term strategy for administration of the criminal justice system.
February 1990	The Home Office publish <i>‘Crime, Justice and protecting the Public’</i> . This includes a commitment to implement the recommendations of the Carlisle Committee.
April 1990	Riots at HMP Strangeways. Lord Woolf is asked to Chair an enquiry into disturbances at prisons across England and Wales.
November 1990	Thatcher resigns as party leader. In the ensuing Conservative Party leadership contest John Major becomes Prime Minister.
July 1991	The Criminal Justice Act 1991 receives Royal Assent.
April 1992	General Election. Conservative Party returned to power.
October 1995	Michael Howard addresses the Conservative Party conference and announces plans to abolish automatic early release.
March 1996	The Home Office publish <i>‘Protecting the Public: The Government’s Strategy on Crime in England and Wales’</i> outlining plans for the total abolition of early release.
March 1997	Proposals for mandatory sentences are watered down by the House of Lords. The <i>Crime (Sentences) Act 1997</i> gains Royal Assent.
May 1997	General Election. The Labour Party form new government.
July 1997	The new Home Secretary Jack Straw commits to the introduction of mandatory sentences but confirms that the government will not abolish early release for prisoners serving determinate sentences.

## Appendix 2: Biography of Key Actors

Sir Phillip Allen (Lord Allen of Abbeydale)	Joined the Home Office in 1934 and served in the War Cabinet 1943-44, Dep. Sec to the Ministry of Housing and Local Government 1955-60. Dep. Sec, Home Office 1960-62, Second Secretary, HM Treasury 1963-66 and Permanent Under-Secretary of State, Home Office 1966-72
Graham Angel	Under-Secretary, Criminal Department, Home Office, and Receiver of the Met Police, 1992-96.
William Bohan	Home Office: Asst Principal, 1952; Principal, 1958; Sec., Cttee on Immigration Appeals, 1966-67; Asst Sec., 1967. Chm., European Cttee on Crime Problems, 1987-89
Anthony Brennan	Principal Private Sec. to Home Sec., 1963, Assistant Under Secretary of State, Criminal Department, 1971-75, Immigration Department, 1975-77; Deputy Under-Secretary. of State, Home Office, 1977-82, Deputy Secretary, Northern Ireland Office, 1982-87
Leon Brittan (Lord Brittan of Spennithorne)	Minister of State, Home Office, 1979-81; Chief Secretary to the Treasury, 1981-83; Sec. of State for Home Department, 1983-85; Secretary of State for Trade and Industry, 1985-86.
Henry Brooke (Lord Brooke of Cumnor)	Conservative MP Hampstead, 1950-66, Chief Secretary to the Treasury and Paymaster-General, 1961-62; Home Secretary, 1962-64
Neil Cairncross	Home Office, 1948; a Private Sec. to the Prime Minister, 1955-58, Dep. Sec., Cabinet Office, 1970-72, Deputy Under-Secretary of State, Home Office, 1972-80
Mark Carlisle (Lord Carlisle of Bucklow)	Parliamentary Under-Secretary of State, Home Office, 1970-72; Minister of State, Home Office, 1972-74; Sec. of State for Education and Science, 1979-81. Chairman: Home Affairs Committee, 1983-87; Parole Review Committee, 1987-8
Victor Collins (Lord Stonham)	Joint Parliamentary Under-Secretary of State, Home Office, 1964-67, Minister of State, 1967-69
Sir Brian Cubbon	Home Office, 1951; Cabinet Office, 1961-63, 1971-75; Private Sec. to Home Sec., 1968-69; Permanent Under-Sec. of State, N.Ireland Office, 1976-79. Permanent Under-Sec. of State, Home Office, 1979-88
Sir Charles Cunningham	Entered Scottish Office, 1929. Private Sec. to Sec. of State for Scotland, 1935-39; Asst Sec., Scottish Home Dept, 1939-41; Principal Asst Sec., 1941-42; Dep. Sec., 1942-47; Sec., 1948-57; Permanent Under-Sec. of State, Home Office, 1957-66
Sir Maurice Drake	A Judge of the High Court of Justice, Queen's Bench Division, 1978-95 Vice-Chairman., Parole Board, England and Wales, 1985-86
Sir Frederick Elwyn-Jones (Lord Elwyn-Jones)	Attorney General, 1964-70, Lord High Chancellor of Great Britain, 1974-79, Labour West Ham South, 1950-74



David Faulkner	Private Sec. to Home Sec., 1969–70, Assistant Under-Sec. of State, 1976; Under Sec., Cabinet Office, 1978–80; Home Office; Assistant Under-Sec. of State, Dep. Under-Sec. of State, 1982; Head of Criminal and Res. and Statistical Departments, 1982–90; Principal Establishment Officer, 1990–92
Sir Lionel Fox	Chairman of Prison Commission for England and Wales, 1942–60, Visiting Fellow Institute of Criminology, Cambridge 1960–61
Robert Fulton	Home Office, 1973–2003: Private Sec. to Perm. Sec., 1977–78; Radio Regulatory Dept, 1978–83; Police Dept, 1984–88; Prison and Criminal Policy Depts, 1988–91; Dir of Prison Service Industries, 1991–96
Gerald Gardiner (Lord Gardiner)	Called to the Bar, 1925; KC 1948, Lord High Chancellor of Great Britain, 1964–70
John Harris (Lord Harris of Greenwich)	Special Assistant to Rt Hon. Roy Jenkins as Home Secretary, 1965–Nov. 1967, and as Chancellor, Nov. 1967–1970, Minister of State, Home Office, 1974–79, Chairman Parole Board for England and Wales, 1979–82
Quentin Hogg (Lord Hailsham of St Marylebone)	Leader of the House of Lords, 1960–63. Sec. of State for Education and Science, April-Oct. 1964; Lord High Chancellor of GB, 1970–74 and 1979–87
John Hunt (Lord Hunt of Fawley)	Leader British Expedition to Mount Everest, 1952–53. Chairman: Parole Board for England and Wales, 1967–74
Douglas Hurd (Lord Hurd of Westwell)	Minister of State, Home Office, 1983–84; Secretary of State for Northern Ireland, 1984–85, for Home Department, 1985–89; Sec. of State for Foreign and Commonwealth Affairs, 1989–95.
Roy Jenkins (Lord Jenkins of Hillhead)	Minister of Aviation, 1964–65; Home Secretary, 1965–67, 1974–76; Chancellor of the Exchequer, 1967–70; President of the European Commission, 1977–81
Robert Kilroy-Silk	Labour MP Ormskirk, Feb. 1974–1983; Knowsley N, 1983–86. Member Home Affairs Select Committee, 1979–84; Chairman: Party All-Party Penal Affairs Group, 1979–86,
Geoffrey Lane (Lord Lane)	A Judge of the High Court of Justice, Queen’s Bench Div., 1966–74; a Lord Justice of Appeal, 1974–79; a Lord of Appeal in Ordinary, 1979–80, Lord Chief Justice of England, 1980–92
Francis Longford / Pakenham (Lord Longford)	Personal assistant to Sir William Beveridge, 1941–44, Lord Privy Seal, 1964–65; Secretary of State for the Colonies, 1965–66; Leader of the House of Lords, 1964–68
Sir Patrick Mayhew (Lord Mayhew of Twysden)	Minister of State, Home Office, 1981–83; Solicitor General, 1983–87; Attorney General, 1987–92; Secretary of State for Northern Ireland, 1992–97
Michael Moriarty	Home Office Private Sec. to Parliamentary Under-Secretaries of State, 1957–59, Private Sec. to Home Sec., 1968; Head of Crime Policy Planning Unit, 1974–75; Assistant Under-Sec. of State, 1975–84
Sydney George Norris	Principal Private Sec. to Home Sec., 1973–74; Asst Sec., 1974; seconded to HM Treasury, 1979–81; Asst Under Sec of State, 1982; NI Office, Principal Estabt and Finance Officer, 1982–85; Dir of Operational Policy, Prison Dept, 1985–88; Police Dept, 1988–90; Principal Finance Officer, 1990–96

Hubert Parker (Lord Parker of Waddington)	Called to Bar, 1924, Judge of High Court of Justice, King's Bench Division, 1950–54; a Lord Justice of Appeal, 1954–58, Lord Chief Justice of England, 1958–71
John Patten (Lord Patten of Barnes)	Minister of State, Home Office, 1987–92; Secretary of State for Education, 1992–94.
Sir Louis Petch	Private Secretary to successive Chancellors of the Exchequer, 1953–56, Second Permanent Sec., Civil Service Dept, 1968–69, Chairman of the Parole Board Parole Board, 1974–79
Sir Arthur Peterson	Principal Private Secretary to Home Secretary, 1946–49, Asst Under-Sec. of State, Prison Dept, Home Office, 1963–64, Permanent Under-Sec. of State, Home Office, 1972–77
Sir Oliver Popplewell	Judge of the High Court of Justice, Queen's Bench Division, 1983–99, Vice-Chm., Parole Bd, 1986–87 (Mem., 1985–87); Mem., Parole Review Committee, 1987–88
Sir Frank Soskice (Lord Stow Hill)	Solicitor-General, 1945–51; Attorney-General, 1951; Home Sec, 1964–65; Lord Privy Seal, 1965–66
Vivien Stern (Baroness Stern)	Director NACRO, 1977–96, Secretary-General, Penal Reform International, 1989–2006
Norman Storr	Entered Indian Civil Service, 1930, Principal, Home Office, 1947; Principal, 1952, Establishment Officer, 1958, Assistant Under Secretary of State 1966-67
Christopher Train	Deputy Under Secretary of State, Home Office, and Director-General, Prison Service, 1983–91, Vis. Prof., Dept of Management Sci., Strathclyde Univ, 1992–95
Dennis Trevelyan	Entered Home Office, 1950; Treasury, 1953–54, Home Office: Asst Under-Sec. of State, Broadcasting Dept, 1976–77; Dep. Under-Sec. of State and Dir-Gen., Prison Service, 1978–83, Dep. Sec., Cabinet Office, 1983–89, Principal, Mansfield College, Oxford, 1989–96
Sir Tasker Watkins	Lord Justice of Appeal, 1980–93; Deputy Chief Justice of England, 1988–93
William Whitelaw (Lord Whitelaw)	Secretary of State for: N Ireland, 1972–73; Employment, 1973–74, Home Secretary, 1979–83; Lord President of the Council and Leader, H of L, 1983–88
Lord Widgery	High Court Judge, 1961–68; a Lord Justice of Appeal, 1968–71, Lord Chief Justice of England, 1971–80
Barbara Wootton (Baroness Wootton of Abinger)	Prof of Social Studies, University of London, 1948–52; Nuffield Research Fellow, Bedford College, 1952–57, Royal Commission on Penal System, 1964–66; Penal Adv. Council, 1966–79

## **Appendix 3: The Freedom of Information Act as a Social Science Research**

### **Tool: A Methodological Note**

1. In this methodological note I provide an overview of the steps I have taken to make use of the *Freedom of Information Act 2000*, the challenges I have faced in seeking to use freedom of information (FOI) requests as a research tool and some of the techniques that can be used to improve the quality of information requests and the usefulness of the records released by public authorities.
2. The *Freedom of Information Act 2000* provides public access to information held by public authorities. Since the right to access was introduced public use of the Act has increased steadily, in 2014 the major Departments of State received in excess of 31,000 requests for information and on average 51% of those requests were granted in full<sup>24</sup>. Despite this there has been little methodological discussion of FOI requests as a social science research tool or the practicalities of using the Act to gain access to sources of data that fall within the scope of the ‘twenty-year rule’ as amended by the *Constitutional Reform and Governance Act* (2010). In the course of this study I have submitted a total of ten FOI requests to the Home Office, Ministry of Justice and Parole Board on topics as diverse as sentencing practice, internal Home Office reviews of parole and the Integrated Resource and Policy Planning Documents prepared for Ministers each spring in advance of the annual Public Expenditure Survey. In total this has yielded 689 pages of documentation, much of which was reviewed when exercising the statutory right to view files in person at the Home Office and Ministry of Justice. An overview of the FOI requests made by this study, including the wording of each request can be found at the end of this Appendix.
3. Among the many issues faced by researchers seeking to use FOI to acquire government records is establishing which public body holds the data you are seeking. This can be particularly difficult for criminal justice researchers following the separation of the Home Office and creation of a new Ministry of

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<sup>24</sup> See the latest Ministry of Justice Freedom of Information statistical bulletin for more information: <https://www.gov.uk/government/statistics/freedom-of-information-statistics-january-to-march-2015>

Justice with responsibility for the Courts, youth justice, the Prison and Probation Services. Many records historically held by the Home Office have now been transferred to the MOJ but a significant number have been retained with a view to releasing these records directly to the National Archives. The National Archives adds a further layer of complexity to this picture. Many records on the cusp of the '30-year rule' or earmarked for transfer as public bodies transition to the '20-year rule' are marked on the National Archive discovery website as 'closed' or 'retained by the department' and it can be difficult to ascertain whether such files are in transit, at the National Archives for processing or in storage at the relevant Department of State. Establishing which public body, if any, holds the information you are seeking can therefore be an extremely time consuming process. In the earliest stages of this study I tended to approach each public body sequentially gradually ruling out possibilities and using this insight to inform the next iteration of my FOI requests. This can be a particularly time-consuming and inefficient process and it is recommended that where possible all such requests are made simultaneously to each public body. Not least because quick responses from one body can reveal useful insight and help prevent the researcher being bounced between the bureaucratic processes of large Departments of State, a common occupational hazard when using the Freedom of Information Act.

4. Arguably the biggest and most frustrating challenge facing researchers using FOI requests as a research tool is establishing what records are held by the public authority and articulating FOI requests in a form that is likely to be granted and yield meaningful information. On occasions the FOI process can be a relatively simple transaction if the researcher knows exactly which record or data set they are seeking. But this is often the exception rather than the rule. Often I had a general sense of the records I was seeking but lacked sufficient knowledge of the files held by the public authority to articulate this with the necessary precision for an FOI request to be granted. Addressing this knowledge deficit can be extremely frustrating. In my experience nearly all exploratory requests for information are rejected by public bodies on the basis of the Section 12 exemption that a request has placed an unreasonable demand on the resources of the public authority. Currently, the cost limit for complying with a request or

a linked series of requests from the same person or group is set at £600 for central government, Parliament and the armed forces and £450 for all other public authorities. Section 12 can be a real barrier to using FOI as a research tool, but in the course of this study I developed three techniques that were particularly useful in overcoming this obstacle, namely, high quality drafting of FOI requests, making full use of the s16 duty to provide advice and assistance and a willingness to view records in person at the relevant public body. These techniques are discussed below in turn.

5. In drafting FOI requests it is important to remember that public bodies will not do the research for you. I quickly discovered that ambiguous, poorly drafted or open-ended requests were nearly always declined under the s12 exemption or resulted in the provision of low quality, incidental material. It is therefore essential that FOI requests are well drafted. As the Research Information Network (RIN) noted in their summary report from a workshop convened to raise awareness among researchers of freedom of information legislation,

A recurring theme throughout the meeting was the importance of carefully framing requests for information in order to increase the chances of obtaining what is being sought from relevant public bodies. This presupposes a good degree of preparation of questions, if need be breaking them down in components that can more easily be addressed; a willingness to be patient is also useful. Such a methodical tactic also underlines the importance of good relationship between requesters and public bodies, so that requests can form part of a cooperative rather than confrontational or scattergun approach. It follows therefore that the key to successful FOI requests is often founded on experience in working the system and making use of the legislation  
(RIN 2009

<http://www.rin.ac.uk/system/files/attachments/Freedom-of-information-workshop-Sept-09.pdf>).

In many respects my approach to FOI requests went through a similar process of iteration and refinement as my use of the archives more generally. As my knowledge of the policy-making process increased so did my understanding of the events and decision-making fora most likely to generate a useful paper trail. Over time the specificity of my requests improved and I was able to reference the events, Ministers, senior officials and decision-making forum which most

closely related to the records I was seeking. Where possible the request should be time bound and provide as much supplementary information as possible to aid the request. For these reasons it is recommended that researchers do as much background investigation into the records they are seeking as possible, in this sense FOI requests should be considered a second phase research tool once all other avenues have been exhausted.

6. As noted by the RIN I also found it useful to treat the FOI process as a constructive dialogue rather than a purely transactional or adversarial relationship. The FOI process can be extremely resource intensive and time consuming for researchers and public bodies alike, particularly where there is a large gulf between the researcher's knowledge of the records they are seeking and the limited file descriptions available to the officials who manage the FOI process in many large Departments of State. In my experience a constructive dialogue with officials using the s16 duty to provide advice and assistance can help to short-cut the 'FOI tango' described above. In seeking further advice and guidance on the file index used by the public authority or recently reviewed files I was able to significantly improve the quality of the information requests I was making. For example, in one such exchange an official at the Ministry of Justice provided the following information to me in response to a s16 request for further assistance.,

Although we cannot answer your request at the moment, if you are able refine it so that we can deal with it under the cost limit, then we will take it forward. I should say, though, that we have considered how you might do this but without success. If you reduced the number of documents sought, this would not necessarily reduce the number of files that would need to be reviewed.

However, outside the scope the Act, and on a discretionary basis, I can advise that the old Home Office files are continually being reviewed. Files dated up to 1987 have been reviewed and either destroyed or retained. This is an ongoing process and the following files, identified as potentially relevant to your request, have been selected for transfer to the National Archive next year:

CP 79 0033/0050/002/ - DIVERSION OF OFFENDERS FROM  
CUSTODY: PAROLE FOR SHORT SENTENCE PRISONERS  
CRI 86 0313/0001/003/ - PAROLE POLICY

CRI 87 0313/0002/001/ - REVIEW OF PAROLE; COMPOSITION  
& TERMS OF REFERENCE  
CP 80 0012/0031/004 - EARLY RELEASE FOR SHORT  
SENTENCE PRISONERS.

As a result of this information I was able to request a copy of the file index used by the Department to provide this information and make a series of far better informed FOI requests. It is worth remembering that while the officials administering the FOI system often have a far better knowledge of the records that are held, researchers often have a far better understanding of the subject matter and the records that are most likely to be of interest. An effective dialogue using s16 can help to bridge these perspectives and improve both the quality and the effectiveness of the FOI process.

7. Most public authorities will allow members of the public to specify whether they want materials made available electronically, in hard copy or viewed in person at the relevant public authority. Few users of the Act elect to view records in person and I heard many anecdotes from civil servants reflecting on how little used the FOI viewing rooms had been since the Act came into effect. This is to be regretted. For researchers seeking to undertake detailed historical analysis of FOI records the option to view records in person can be extremely effective. On several occasions my FOI requests revealed that whole file series on the issue of early release were held by both the Home Office and MOJ awaiting transit to the National Archives, a process that could have taken many months or years depending on the size of the administrative backlog within the Department. Only a small proportion of these files could be made available electronically or in hard copy within the parameters of the s12 cost exemption so by electing to view the records in person I was able to spend several days viewing the records in detail. This was invaluable to this study, it gave me the freedom to sift through the files and digitise the content I considered most relevant, it allowed me to build up a picture of the records held by the Department and internalise what Derrida has described as the ‘violence of the archive’ and it provided a hugely rich source of follow-up file references, memorandum codes and events from which to undertake further FOI requests and archival research. For this reason, all

historical researchers should exploit the opportunity to view FOI records in person where this option is available.

8. The Freedom of Information Act 2000 offers a powerful and often underused research tool for those undertaking detailed historical study of public policy. There has been very little sustained methodological discussion of the Act and many researchers are therefore left to 'reinvent the wheel' with little understanding of the entirely avoidable mistakes that are commonly made by the uninitiated or the wealth of best practice that has been developed over time by other researchers. There is little doubt that FOI requests can be a resource intensive and timely exercise. Increasingly so as the FOI teams within many public authorities are stretched and lack the resources to process the growing number of requests that are made each year. Nonetheless, well placed FOI requests when used in conjunction with effective use of the s16 duty to provide advice and assistance can provide invaluable supplementary information for researchers seeking to peer behind the veil of the 30 / 20 year rule and better understand recent developments in the evolution of criminal justice. Time will tell what effect the recently announced Cabinet Office Commission on Freedom of Information<sup>25</sup> will have on the operation of the Act but there is a clear case for a more constructive dialogue amongst researchers about the benefits of a right to access and how this could be simplified for all parties with a stake in the system.

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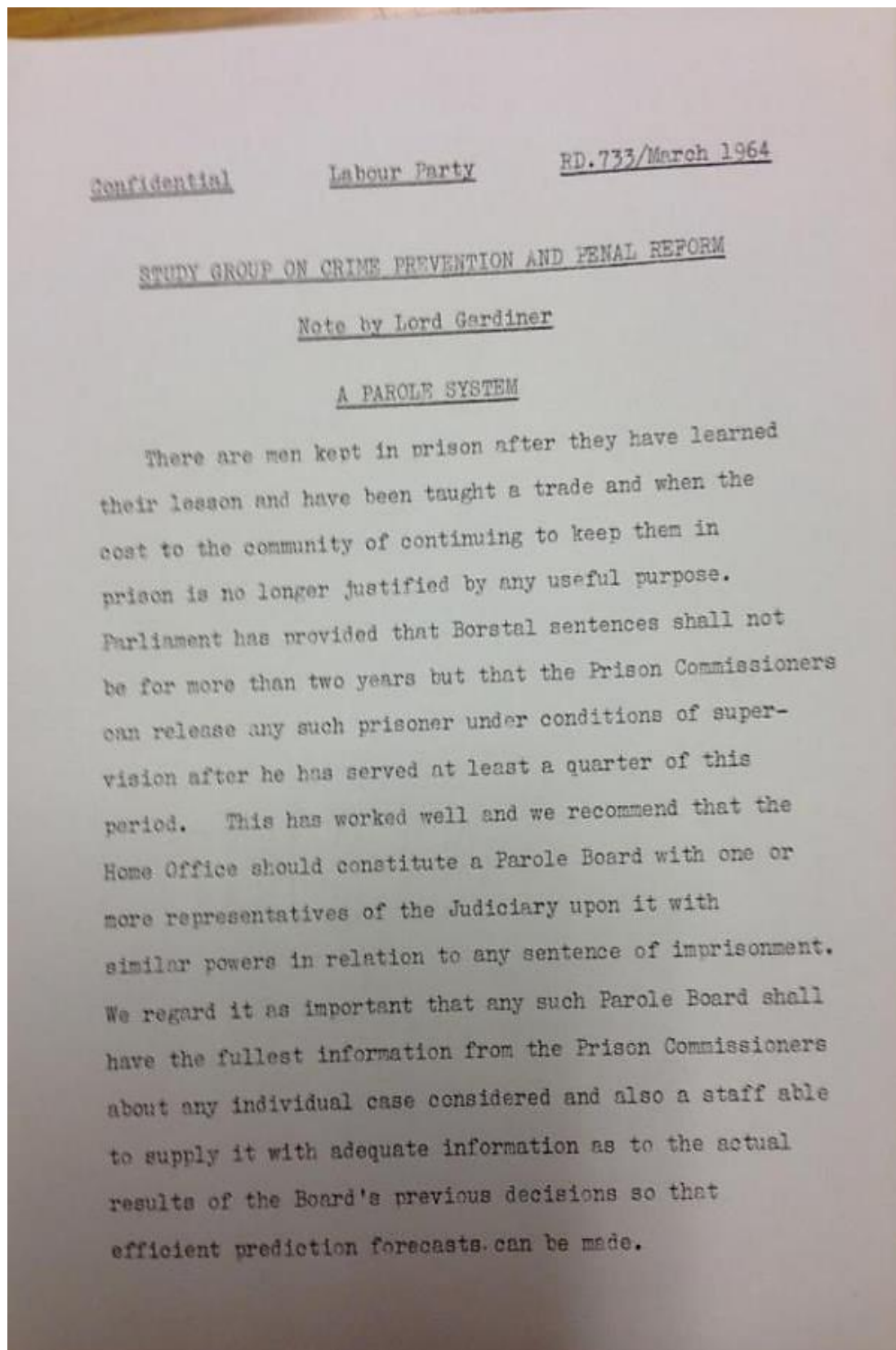
<sup>25</sup> <https://www.gov.uk/government/speeches/freedom-of-information-new-commission>



<b>Request Date</b>	<b>Public Body</b>	<b>Nature of Request</b>
30 July 2012	Home Office	<ol style="list-style-type: none"> <li>1. Advice given to Home Office ministers during the passage of the Criminal Law Act 1977 on the inclusion of s47 (prison sentence partly served and partly suspended).</li> <li>2. Any Home Office correspondence, files or advice to ministers relating to the decision not to activate the s47 power of partly suspended sentences. Please limit this to a timeframe of Aug1977 to Dec 1981.</li> <li>3. Documentation relating to the establishment, research, drafting or publication of the Home Office 'A Review of Parole in England and Wales' in May 1981.</li> <li>4. Correspondence between the Home Office and the offices of the Lord Chief Justice or the Lord Chancellor in 1981/82 relating to the government's proposal to extend parole eligibility to prisoners serving determinate sentences of less than 18 months.</li> <li>5. Documentation held by the Home Office which relates to the Home Secretary's decision to activate s47 (prison sentence partly served and partly suspended) of the Criminal Law Act on the 29th March 1982</li> <li>6. Advice given to Home Office ministers during the passage of the Criminal Justice Act 1982 on the inclusion of s30 (Prison sentence partly served and partly suspended).</li> <li>7. Advice given to Home Office ministers during the passage of the Criminal Justice Act 1991 on the inclusion of s5 (Suspended and extended sentences of imprisonment) which removed the power to impose partly suspended sentences).</li> </ol>
07 August 2012	Ministry of Justice	
11 September 2012	Ministry of Justice	<ol style="list-style-type: none"> <li>1. Any correspondence, internal memos or briefings to ministers (1985-1990) that relate to the exercise of the Secretary of State's power of 'early release' for non-violent offenders under s32 of the Criminal Justice Act 1982.</li> <li>2. Minutes, briefings and other correspondence relating to a meeting between Douglas Hurd (Home Secretary), Lord Caithness (Minister of State) and Chris Train (Director General of the Prison Service) on 12 March 1987 to discuss prison overcrowding.</li> <li>3. Any correspondence, internal memos or briefings to ministers that relate to changes to the Prison Rules in July 1987 to increase prisoner remission for good behaviour from one third to one half of sentence length.</li> <li>4. Documentation relating to the terms of reference for the review committee established by the Secretary of State on 16 July 1987 and chaired by Mark Carlisle, to 'examine the operation of the parole scheme in England and Wales' and its relationship with the current arrangements for remission, remand and partly and fully suspended sentences.</li> <li>5. Correspondence between the Home Office and the Review Committee (and / or Mark Carlisle) following the publication of 'The Parole System in England and Wales' in November 1988.</li> </ol>

12 December 2012	Ministry of Justice	<ol style="list-style-type: none"> <li>1. CP 79 0033/0050/002/ - DIVERSION OF OFFENDERS FROM CUSTODY: PAROLE FOR SHORT SENTENCE PRISONERS</li> <li>2. CRI 86 0313/0001/003/ - PAROLE POLICY</li> <li>3. CRI 87 0313/0002/001/ - REVIEW OF PAROLE ;COMPOSITION &amp; TERMS OF REFERENCE</li> <li>4. CP 80 0012/0031/004 - EARLY RELEASE FOR SHORT SENTENCE PRISONERS.</li> <li>5. Request the file names and date ranges for the “60 paper files that are listed as held by the Department and which might hold information relevant to the request” you mention on page 2 of your letter.</li> </ol>
23 July 2013	Ministry of Justice	<ol style="list-style-type: none"> <li>1. Whether the Department holds any records of evidence (written or oral transcripts) submitted to the Review Committee of the ‘System of Parole in England and Wales’ November 1988, Cm 532. Otherwise known as the ‘Carlisle Committee’.</li> <li>2. If yes, please provide a list of any files held by the Department which might hold information relevant to this request. Where possible please include the file name, reference number and record date range.</li> </ol>
05 Nov 2013	Parole Board	
10 Nov 2013	Home Office	
03 April 2014	Home Office	<ol style="list-style-type: none"> <li>1. Final drafts of the “Integrated Resource and Policy Planning Documents” prepared for Ministers each spring in advance of the annual Public Expenditure Survey. Where possible I am seeking records relating to the period, 1980 – 1990.</li> <li>2. Any discussion papers, transcripts or other correspondence relating to the Home Office planning day held at Leeds Castle on the 28 September 1987 and Chaired by the Home Secretary Douglas Hurd.</li> <li>3. A discussion paper entitled ‘Managing the Criminal Justice System,’ authored by the then Permanent Secretary Sir Clive Whitmore and delivered at the ‘Ditchley Park Conference’ in September 1989. A seminar attended by Home Office Ministers, senior Civil Servants and senior members of the Judiciary including the Lord Chief Justice.</li> </ol>
12 October 2014	Home Office	<ol style="list-style-type: none"> <li>1. Parole for short sentence prisoners: note by the Planning Unit, November 1979; diversion of offenders from custody. Date: 1979 Jan 01 - 1979 Dec 31 Reference: HO 495/18 (Former reference in its original department CP 79 33/50/2).</li> <li>2. Penal policy: reducing pressure on the prison system; early release for short term prisoners. Date: 1980 Jan 01 - 1980 Dec 31. Reference HO 495/21 (Former reference in its original department CP 80 12/31/4).</li> </ol>
29 October 2014	Ministry of Justice	

**Appendix 4: Lord Gardiner's note 'A Parole System' to the Study Group on Crime Prevention and Penal Reform, March 1964**



Source: LSE Archive and Special Collections: Morris T/6,

## Appendix 5A: Guidance to civil servants on briefing the Home Secretary, 1965

### Submissions to Ministers

4 Submissions to the Secretary of State should normally go first to the junior Minister responsible for the subject. Where, because of urgency or for some special reason, a submission is made direct to the Secretary of State, a copy should be sent to the junior Minister concerned.

5 Copies should be sent to Miss Bacon and Lord Stonham of all submissions which they would not otherwise receive under the arrangement in the preceding paragraph.

6 Heads of Divisions are reminded that it should be the general practice to put matters to Ministers in self-contained submissions that can be understood apart from the file. This is in order to reduce to the minimum the amount of material which they are required to read, and the need for brevity should be constantly remembered.

7 Paragraphs 4-6 above supersede Home Office (HD) Notices 17/1957 of 10th December 1957, and 24/1964 of 26th October 1964.

### Documents for Meetings of Cabinet and Cabinet Committees

8 Home Office (HD) Notice 23/1963 of 25th November 1963 still applies, with the single modification that four, instead of three, copies of submissions and attachments (if any) should be forwarded (see paragraph 4 of that notice).

C. C. C.

Source: TNA: HO 303/97

## Appendix 5B: Revised guidance for civil servants on briefing the Home Secretary, 1966

### London Offices only

### Home Office (H.D.) Notice 2/1966

#### SUBMISSION OF CASES TO MINISTERS FOR DECISION

1 The current departmental practice of submitting questions of importance for decision by Ministers in the form of self-contained documents should be discontinued and cases should be put forward on the files.

2 It would be helpful to the Home Secretary and to his Ministerial colleagues, and useful to the Department, if, in cases of the kind which are at present the subject of a self-contained submission, there were in the file a document which sums up the facts, the considerations which arise and the possible courses of action. The case for choosing one course in preference to others should be briefly discussed in the minutes on the file.

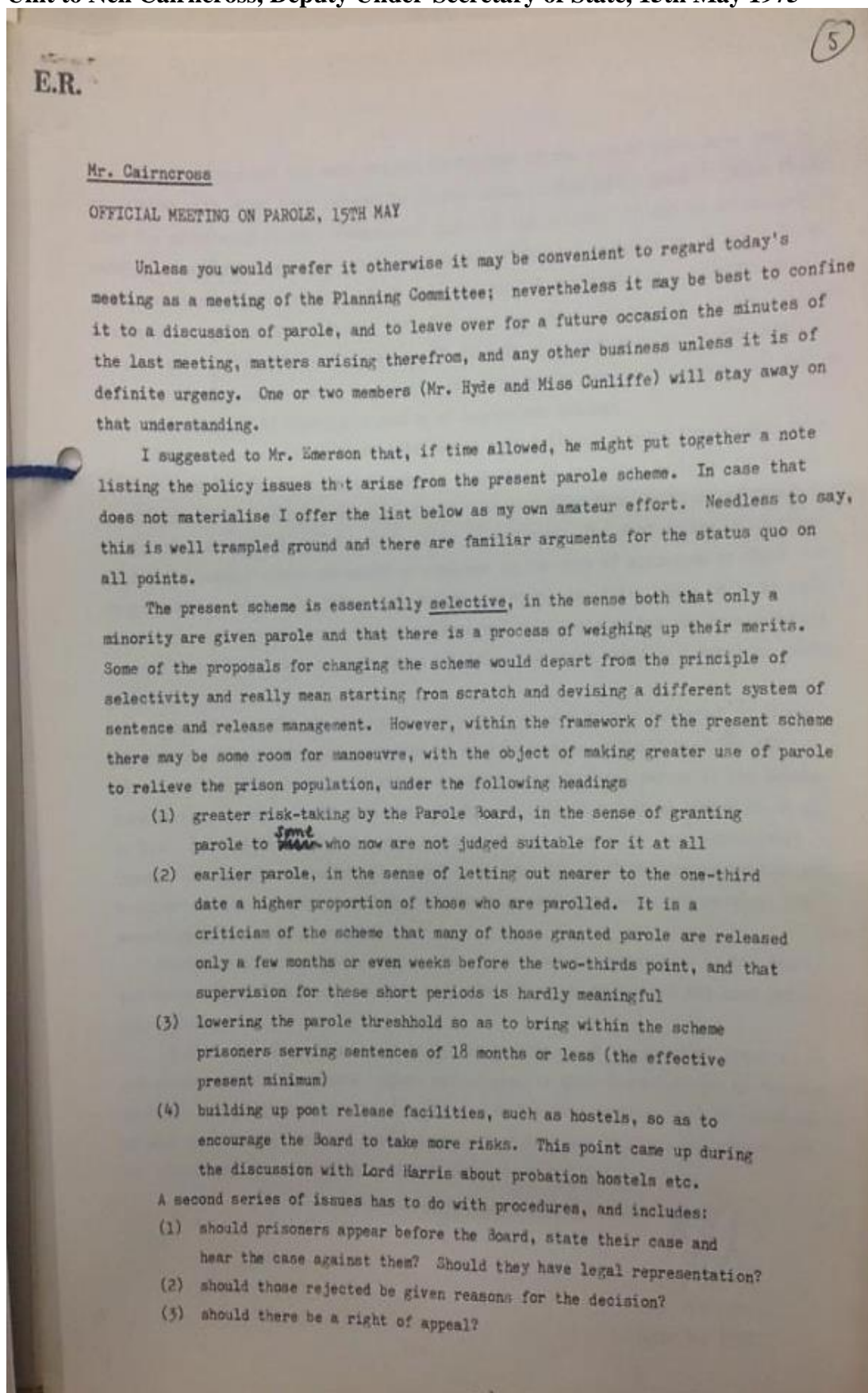
3 Files on their way to the Secretary of State should, as now, normally go first to the junior Minister responsible for the subject. Where, because of urgency or for some special reason, the file is sent direct to the Secretary of State, a copy of any summary prepared in accordance with paragraph 2 above should be sent to the junior Minister concerned, with a note explaining that the file has gone direct to the Secretary of State.

4 Copies should be sent to the Minister of State and the Parliamentary Under Secretaries of State of all summaries which they would not otherwise receive under the arrangement in paragraph 3.

Source: TNA: HO 303/97

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**Appendix 6: Letter from Michael Moriarty, Head of the Crime Policy Planning Unit to Neil Cairncross, Deputy Under-Secretary of State, 15th May 1975**





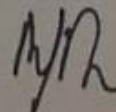
Thirdly there are the more radical criticisms of the scheme which have come to be associated with Roger Hood (though he is not alone in expressing them). These begin from the admittedly rickety theoretical basis of the scheme. It can be criticised for resting on assumptions about prison treatment, prisoners' response to it and a "peak" time, which many are sceptical about and some would deny altogether. Secondly the criteria for parole are confused. How far does the Board take account of the original offence and considerations of deterrence? Do some offenders receive "double debit"? Thirdly, in some cases parole is granted not because the prognosis is good but because it is the only way of ensuring a period of supervised release.

Considerations such as these have caused some critics to argue that parole is a form of resentencing by a non-accountable body that is no better equipped to decide length of sentence than the original court, and that therefore length of sentence should, as far as possible, be decided at the time of sentence. The Hood scheme would give "automatic parole" after one-third of sentence in the case of sentences of three (or four) years or less. For those with longer sentences than this, there would be parole at the one-third point unless the court reserved this decision for the Parole Board; but the Board would work to more fixed criteria, and there would be a hearing, reasons given etc.

Presumably at today's meeting we can expect no more than a rehearsal of these issues and, if possible, the emergence of some collective official view <sup>at</sup> the advantages and disadvantages of either a radical or a tactical review of the scheme. Lord Harris, we know, would like the case for and against a radical review to be put to him; but may be the meeting with him should also go over the less fundamental issues. As regards mechanics, it seemed to me that the short submission that we put together for the discussion with him of diversion went down well, and we might try something of the sort on parole.

There are also dark hints that he has views about the procedures of the Board, and membership, which he may wish to air. The Probation Department may know about this already.

Finally, Mr. Cowperthwaite periodically reminds us of the Scottish interest in any tinkering with the parole scheme, and is clearly anxious that we may go too far down the road without consulting the Scots. He has been in touch with Mr. Stotesbury as well as with me. We must obviously keep that interest in mind, and demonstrate in the minutes of the meeting that we have done so.



M.J. MORIARTY

15th May 1975

Appendix 7: Letter from the Lord Chief Justice to Home Secretary, 9 October 1981

10  
ROYAL COURTS OF JUSTICE,  
LONDON, WC2A 2LL  
9th October 1981.

My dear Home Secretary,

With further reference to our discussion the other day and my letter to you on the subject, I have now had the opportunity of a long discussion with the Lords Justices who sit on criminal matters in the Court of Appeal.

The preponderance of opinion was rather similar to the Roehampton opinion namely that your split system of comprising one third of a sentence in custody was not a good idea. The Lords Justices thought that judges would probably do their best to honour their obligations without deliberately upping sentences but the view was that once any element of discretion is removed from the system and once the reduction becomes imposed without anyone ever having considered the merit of the case, it is very difficult either for a judge or for a member of the public to see how justice can be said to have been done in any particular case. It becomes obviously a direct usurpation of the function of the judge. This plainly is going to cause you difficulty with the electorate just as it may cause you difficulty with the judges.

I should add that my idea of an amnesty was equally unpopular.

The system which eventually the Lords Justices were agreed would be the best was one which has been canvassed previously, if my recollection is correct, in a number of reports and articles, namely that the threshold for parole/ should be reduced to six months. This would require an amendment to Section 60, sub-section 1 of the Criminal Justice Act 1967 and to the Local Review Committee Regulation.

Quite apart from the obvious expediency of reducing the prison population in this way, there is another more palatable reason for doing it and that is the present un-fairness of the threshold of 18 months, which is emphasised when two people sentenced at the same time to different sentences may be released on the same day. If the threshold is reduced from 18 months to 6 months, it would make obviously a significant reduction in the prison population. As I understood it, without having the statistics in front of me, something like 45% of the sentenced prison population have 18 months or less to serve.

The principle objection made to this scheme is always the difficulty of processing the case. The parole scheme is based on the proposition that 12 months in prison is required to make a proper assessment of any candidate. I see no reason for interfering with the present system of paroling offenders serving more than 18 months. Where however, the sentence is less than 18 months, i.e. twelve months or less after remission, the kind of decision required is a much simpler one and could be made with a very much less elaborate procedure. The Advisory Council on the Penal System in its Report on Young Adult Offenders recommended an Advisory Body of the Governor or Deputy Governor together with three others (a Probation Officer, a member of the Board of Visitors and another). The shorter the sentence, the less need there would be of all the additional members besides the Governor.

The adoption of this method would remove the main objection to your first idea of split terms because it would be interposing a degree of discretion, although not so great a degree as the full parole system, between the sentence imposed by the Court and the discharge of the prisoner before the term imposed by the Court had been fully served.

This system will also have the advantage of making it possible for us here to continue to try to educate Courts to pass lower sentences on non-custodial sentences altogether, whereas the split system would really render that effort a waste of time, as I see it.

Forgive me again for troubling you but all of us here are anxious to provide such information and assistance to you as we can, because we realise how difficult the decision is which you have to make and how important it is it should be right and then speedily put into action.

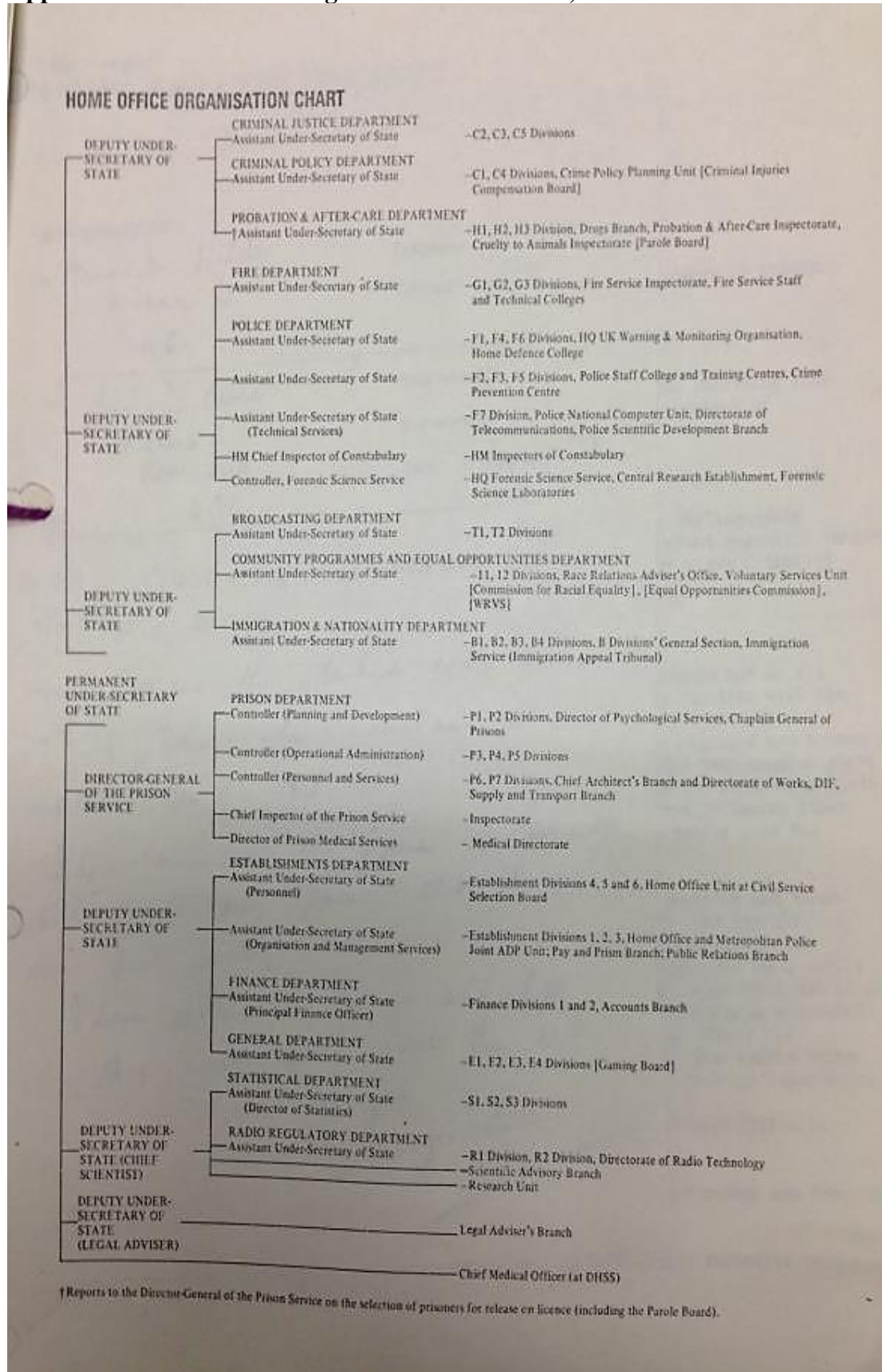
*Yours sincerely,*

*Geoffrey Hill*

The Right Honourable William Whitelaw, MC, DL, MP.,  
Secretary of State for Home Affairs,  
Home Office,  
Queen Ann's Gate,  
LONDON, SW1.



## Appendix 8: Home Office Organisational Structure, 1977



Source: TNA: HO 223/127

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## **Appendix 9: Carlisle Review Committee Membership and Terms of Reference**

### Membership

The Rt Hon the Lord Carlisle of Bucklow QC	Chair
Mr David Atkinson,	Retired Prison Governor
Mr Navnit Dholakia JP	Member of Lewes Board of Visitors and an officer of the Commission for Racial Equality
Mr Nicholas Hinton CBE	Director General, Save the Children Fund
Dr Roger Hood	Director of the Oxford Centre for Criminological Research
Mr Martin Laing	Chairman, John Laing PLC
The Hon Mr Justice Popplewell	High Court Judge
Mrs Jenny Roberts	Chief Probation Officer of Hereford & Worcester
His Honour Judge Sir David West-Russell	President of Industrial Tribunals and a circuit judge
Mr Peter Wright CBE	Chief Constable of South Yorkshire
Mr W R Fittall	Secretary
Ms J M Langdale	Assistant Secretary

### Terms of Reference

To examine the operation of the parole scheme in England and Wales, its relationship with the current arrangements for remission, time spent in custody on remand, and partly and fully suspended sentences and their effect on the time which offenders sentenced to imprisonment spend in custody after sentence; and to make recommendations on –

(a) whether a parole scheme should be retained as a feature of the penal system;

and, if so,

(b) its objectives

(c) any changes which should be made in law or practice affecting either eligibility  
or criteria;

or, alternatively,

(d) any different scheme which might be introduced to provide for release before expiry of sentence, either generally or for particular categories of prisoners;

and, in any case,

(e) the possibility of prisoners released before expiry of sentence being required to perform work of value to the community, having regard to the relative cost and effectiveness of custodial and non-custodial disposals;

having regard to the need for –

- i. fairness and consistency in the treatment of prisoners;
- ii. a clear understanding of the relationship between determination of the original sentence by judicial decision and the proper limits of executive discretion in giving effect to it;
- iii. public and judicial confidence in any new arrangements that might be proposed;
- iv. the resource implications of any changes proposed.

Source: Home Office 1989c