

A VERITABLE REVOLUTION: THE COURT OF CRIMINAL APPEAL
IN ENGLISH CRIMINAL HISTORY

1908-1958

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ABSTRACT

In a historic speech to the House of Commons on April 17, 1907, British Attorney General, John Lawson Walton, proposed the formation of what was to be the first court of criminal appeal in English history. Such a court had been debated, but ultimately rejected, by successive governments for over half a century. In each debate, members of the judiciary declared that a court for appeals in criminal cases held the potential of destroying the world-respected English judicial system. The 1907 debates were no less contentious, but the newly elected Liberal government saw social reform, including judicial reform, as their highest priority. After much compromise and some of the most overwrought speeches in the history of Parliament, the Court of Criminal Appeal was created in August 1907 and began hearing cases in May 1908. *A Veritable Revolution* is a social history of the Court's first fifty years.

There is no doubt, that John Walton and the other founders of the Court of Criminal Appeal intended it to provide protection from the miscarriage of justice for English citizens convicted of criminal offenses. The Court was certainly hard won and worthy of abundant praise, but its organization would prove problematic and, at times, horribly detrimental for over fifty years. From its inception, the Court was under the

complete control of the highest-ranking permanent member of the English judiciary, the Lord Chief Justice. Therefore, the quality of the Court and the practical application of its principals were intertwined with the character of a single individual. If the Lord Chief Justice understood and accepted the ideology on which the Court was founded, the Court of Criminal Appeal was indeed the tremendous asset to English justice of which Walton spoke in 1907. But if the Lord Chief Justice, for whatever reason, believed that an English citizen convicted of a crime had no rights, then the Court of Criminal Appeal was turned on its head and did not prevent, but in fact helped create miscarriages of justice so profound that it would take another fifty years to correct them.

APPROVAL PAGE

The faculty listed below, appointed by the Dean of the College of Arts and Sciences and the Dean of the Conservatory of Music and Dance have examined a thesis titled *A Veritable Revolution: The Court of Criminal Appeal in English Criminal History 1908-1958*, presented by Cecile Arden Phillips, candidate for the Master of Arts degree, and certify that in their opinion it is worthy of acceptance.

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ACKNOWLEDGEMENTS

I am sincerely grateful to Dr. Lynda Payne for all the help she has given me so I might better understand the British belief that justice for all its citizens is not constrained by the passage of time. This sense of justice is something of which she as a Briton is surely proud and I, and so many others, are profoundly envious. Although *A Veritable Revolution* often highlights miscarriages in British justice, it must be remembered that those miscarriages of justice are still visible because, no matter how long ago they occurred, they were considered wholly unacceptable and were not allowed to rest until they were put right.

CHAPTER 1

A CLEAR AND TEMPERATE SPEECH

[The Court of Criminal Appeal] yields to none in the order of its importance. It affects immediately and possibly for all time the administration of justice in that sphere of its operations in which it touches the defense of personal security, which is the absolute condition of individual happiness and welfare on the part of every member of the community throughout all classes of our population.

—Attorney General, Sir John Lawson Walton, 17 April 1907

On August 20, 1911, Rose Render's body was discovered lying at the foot of the stairs in front of 1 Upper Yardley Street, off Wilmington Square, London. The woman who occupied the lower level of the building had, moments before, heard a woman scream, "Don't Charlie, don't!" and then groan. She woke her husband and together they heard another groan from the street. By the time the couple reached their door, Rose's body was alone and lifeless. Another person who happened along set the time at 2:15 in the morning. He testified at trial that there was blood on Rose's dress, on the steps, and on the pavement. He went on to say, "I thought she was dead. We got a constable."¹

Rose Render was stabbed at least eight times. Divisional Surgeon of Police, Thomas Kobe, conducted the post-mortem. At trial he described what he found:

A puncture wound about an inch long, two and a half inches deep, and passing downwards to the pelvic bone on the left side and touching it was probably the first inflicted. The fatal wound was one below the clavicle; it entered the chest wall, penetrated the left lung and opened the sac covering the heart, entering the pulmonary artery. There was a wound between the seventh and eighth ribs, which penetrated the liver; there were four wounds on the right arm and two below the right shoulder. There was also a wound on the inside of the left hand extending to the bone.²

Charles Ellsom, Rose Render's live-in boyfriend, was arrested and charged with her murder. Although he denied all knowledge of the crime, Ellsom was tried, convicted,

¹ *Old Bailey Proceedings Online* (www.oldbaileyonline.org, 3 June 2010), September 1911, trial of Charles Ellsom (t19110905-75).

² *Ibid.*

and sentenced to death on September 5, 1911. Had he committed this crime three years earlier the only appeal allowed on his conviction or sentence would have been to the British Home Secretary. And one cannot imagine given the brutality of Rose Render's murder that Ellsom would have been shown any mercy. But Charles Ellsom was a most fortunate murderer.

Ellsom's good luck began with the passing of the *Criminal Appeal Act* in August 1907. This act mandated the creation of the first Court of Criminal Appeal in England's long history. Today, it is difficult to imagine the Court of Appeal—Criminal Division (as it is now called) being anything but a welcome addition to Britain's system of justice. However, the beginning of this court was anything but universally welcomed. Debate raged over the court in Parliament and in the leading newspapers of the day. Dire consequences were predicted if such a court was formed—with a complete breakdown of the criminal justice system feared by many. While others, most notably, Home Secretary, Herbert Gladstone, was astounded that such a court did not already exist. He declared Britain to be the “only civilized country” that did not allow appeals in criminal cases.³ It was therefore, not at all surprising that an editorial in *The Times* on July 30, 1907, summed up the general atmosphere surrounding the birth of the Court of Criminal Appeal by proclaiming it “a veritable revolution in criminal procedure.”

This last, successful push to form a court of appeal for criminal cases was a direct result of the 1906 landslide victory for the Liberal Party. Prime Minister, Henry Campbell-Bannerman, produced the first “coherent Liberal administration”⁴ since the era

³*Hansard Parliamentary Debates*, vol. 175 (1907), col. 186.

⁴Ewen A. Cameron, “‘Maistly Scotch’: Campbell-Bannerman and Liberal Leadership.” *Journal of Liberal History* 54, (Spring 2007). http://www.liberalhistory.org.uk/uploads/54_Spring_2007.pdf (accessed October 3, 2011).

of Prime Minister William Gladstone and “constitutional reform was at the heart of his political outlook.”⁵ Education, land reform, and Irish Home Rule, were all priorities for Campbell-Bannerman’s government. But equally important was court reform. For a generation, civil litigants (largely middle and upper classes) had enjoyed the right of appeal. It was now time to give the criminal litigant (largely from the lower classes) the same opportunity of appeal. Putting “liberty upon an equality with property,”⁶ was the goal.

Heading this fight in the House of Commons was Attorney-General John Lawson Walton. Walton had been a member of the House of Commons for sixteen years and Attorney General for just a year when he rose in the House of Commons to introduce the Criminal Appeal Bill calling for the Court’s formation. In this short speech, made under the “ten-minutes rule,”⁷ were all the reasons that Walton believed made it imperative that a court finally be formed to hear appeals in criminal cases. He covered all the elements that had dominated the “sixty year” debate surrounding such a court. Though no reason spoke more to the urgent need for such a court than when Walton, after praising England’s judiciary for achieving an unsurpassed reputation despite a flawed system, stated emphatically: “But justice has blundered. Innocent men have been convicted.”⁸

The innocent men most on Walton’s mind at the time were Adolf Beck and George Edalji. In an age before the advent of fingerprinting, Adolf Beck was the victim of one of the most extensive mistaken identity cases in history. He was an utterly

⁵ Ibid.

⁶ John Lawson Walton, Speech to the House of Commons, 17 April 1907, *Hansard Parliamentary Debates*, Commons, vol. 172, col. 1008-11.

⁷ *Hansard*, vol. 174 (1907), col. 282.

⁸ Walton, *Hansard*, vol. 172 (1907), col. 1008-11.

innocent man mistaken for a career fraudster named William Augustus Wyatt⁹—better known by his alias, John Smith. Smith had been convicted of robbing women of small amounts of jewelry with a ruse that he was an aristocrat and wanted the women to become his mistresses. Apparently, after serving a term in prison, Smith in 1894 went back to this same scenario to defraud more women. It was not until December 1895 that one of his latest victims, Otilie Meissonier, identified Smith. He was arrested, tried, convicted and sentenced to “seven years’ penal servitude.”¹⁰

The great tragedy here was that Otilie Meissonier did not identify John Smith at all, but instead identified Adolf Beck as the man who had robbed her. Again and again Beck petitioned the Home Office pleading that he was not Smith.¹¹ Finally, it was discovered that in Smith’s prison file a doctor noted that he was circumcised. The Home Office ordered Beck examined and discovered that he was not circumcised. Amazingly, all that this information got Beck was a new number and letter on his prison uniform that no longer indicated he had a previous conviction.¹² In 1901, after having served “his” time, Beck was released.

If ended there, Mr. Beck’s story was quite horrific enough. But fate was not finished with Adolf Beck. In 1904 he was again arrested, tried and convicted for Smith’s crimes. Luckily, this time the trial judge, Mr. Justice Grantham, had serious misgivings and ordered a hold on sentencing until an investigation could be completed. And mercifully, the real John Smith was arrested in the meantime for crimes that were committed when Mr. Beck was in prison. The Committee of Inquiry in Mr. Beck’s case,

⁹ This too could have been an alias. “Smith” is the name most often cited.

¹⁰ *Committee of Inquiry into the Case of Adolf Beck: Report from the Committee*, Cmd. 2315, 1904, vi.

¹¹ *Ibid.*, vii.

¹² *Ibid.*

formed in September 1904, surely summed up the feelings of most Briton's when they wrote:

The fact that an innocent man could be not once only, but twice convicted, and that an application to the Home Office upon the first of such convictions could lead to no redress, naturally, [creates] grave misgivings in the public mind as to the nature and working of our system of criminal justice.¹³

The other man on Attorney General Walton's mind in April of 1907 was George Edalji. If Beck's innocence was ultimately proven by virtue of his foreskin, then Edalji's was proven by his myopic eyes. Or at least that is what Sherlock Holmes' creator Sir Arthur Conan Doyle concluded when first he saw George Edalji reading a newspaper in the lobby of a hotel.¹⁴

George Edalji was an Anglo-Indian solicitor who lived with his parents and sister in Great Wyrley, an agricultural community near the city of Birmingham. For several months farm animals across the community had died after someone made "a thin slice across their bellies." In each instance, the animal was left to bleed to death. The community was, of course, horrified and frenzied calls were made for the police to find the culprit. During this same period several anonymous letters were received by the police and even Edalji's family, all claiming that George Edalji was the one committing the crimes. He was arrested on August 18, 1903, and charged with "feloniously wounding a horse."¹⁵ His trial the following October resulted in his conviction and a sentence coincidentally the same as Adolf Beck's, seven years' penal servitude. After three years of campaigning largely by members of his immediate family, Edalji was

¹³ Ibid.

¹⁴ "The Case of Mr. George Edalji: Special Investigation by Sir A. Conan Doyle," *Daily Telegraph* (London), January 11, 1907.

¹⁵ *Papers relating to the Case of George Edalji*, Cmd. 3503, 3.

released from prison without “comment or pardon.”¹⁶ He then set about trying to clear his name.

There are two stories as to how Arthur Conan Doyle heard about Edalji. In his book, *Conan Doyle and the Parson’s Son*, Gordon Weaver stated that Edalji, after having read the Sherlock Holmes novels in prison, contacted Conan Doyle.¹⁷ However, in his 1924 autobiography, *Memories and Adventures*, Conan Doyle took full credit for his involvement by claiming to have happened onto the Edalji story while reading an “obscure paper called the ‘Umpire,’ in late 1906.”¹⁸ Conan Doyle held that it was his incensed rage at what was to his “experienced” mind a blatant miscarriage of justice that prompted him to contact Edalji. Regardless of how Conan Doyle became involved, once he was involved the case became nothing less than a cause célèbre throughout the world.

The question of the role played by the national press in such cases was not lost on John Walton when he was describing the need for a criminal appeal court in his April speech to Parliament:

An enterprising Press has rushed in where jurists have feared to tread, and retrial by newspaper threatens to take the place which ought to be occupied by the process of rehearing before a judicial tribunal.¹⁹

Had Walton gone on to cite specific instances he would have certainly listed Conan Doyle’s campaign in the *Daily Telegraph* (London) to exonerate George Edalji. Not that Walton thought less of Edalji’s claim of innocence or that Conan Doyle was wrong in his defense of Edalji. What was relevant here was that Edalji’s case was often

¹⁶ Arthur Conan Doyle, *The True Crime Files of Sir Arthur Conan Doyle . . . Rediscovered by Stephen Hines* (New York: Berkley Prime Crime, 2001), 18.

¹⁷ Gordon Weaver, *Conan Doyle and the Parson’s Son: The George Edalji Case* (Cambridge: Vanguard Press, 2006), 230.

¹⁸ Arthur Conan Doyle, *Memories and Adventures* (New York: Little, Brown, and Company, 1924), 210.

¹⁹ Walton, *Hansard*, vol. 172 (1907), col. 1008-11.

cited alongside Beck's as an egregious miscarriage of justice and as such it was one of the reasons the Court was created. Certainly, the Edalji campaign did help form the court, just not for the same reasons that Conan Doyle had for championing the case.

Looked at closely, Edalji's case, to the British government in 1907 was not one of a grievous miscarriage of justice that could have been prevented by a criminal appeal court. It was instead a grievous political embarrassment that threatened to become an international scandal. Whether Edalji was innocent became almost a side issue. The media of the time latched onto the idea that "Sherlock Holmes" was on the case and the image was simply irresistible. Conan Doyle did force the government's hand, but not because he had uncovered a grave miscarriage of justice. It was, instead, because he had created a public furor that the government had to quell.

Conan Doyle was at the height of his world popularity in 1907. The Sherlock Holmes stories had secured his literary legacy and the tainting of that legacy through his involvement in mysticism and particularly the Cottingley Fairies debacle was still thirteen years away.²⁰ After an initial investigation into the case, Conan Doyle published a lengthy two-part article in the *Daily Telegraph* that read like one of his more brilliant short stories. Edalji was the innocent young protagonist, "very shy and nervous" and as "blind as the proverbial bat," from long suffering with "myopia of eight diopters."²¹

The similarities in Conan Doyle's structure of the Edalji case and his Sherlock Holmes stories were unmistakable. In Sherlock Holmes the police were always bungling buffoons and politicians were more often devious and corrupt. True to form, the villains

²⁰ Daniel Stashower, *Teller of Tales: the Life of Arthur Conan Doyle* (New York: Henry Holt & Co., 1999), 348-363.

²¹ *Daily Express* (London), 11 January 1907.

in Conan Doyle's "literary rehabilitation"²² of Edalji were members of the Great Wyrley police force, particularly the Chief Constable of Staffordshire, Captain George Anson. According to Conan Doyle, Anson's racism "filtered down" to his subordinates and they then targeted Edalji because of his mixed race. Conan Doyle admonished Anson that he had "no right to yield to such feelings." A man in Anson's position was "too powerful, others are too weak, and the consequences are too terrible."²³

Conan Doyle was a clever man. He insisted that the article be published without copyright so it could be disseminated with ease.²⁴ The *Daily Telegraph* published "The Case of Mr. George Edalji: Special Investigation by Sir A. Conan Doyle" on January 11 and 12, 1907. After the articles were published, the national press exploded with letters and commentary. As Conan Doyle wrote in his autobiography: "England soon rang with the wrongs of George Edalji."²⁵

What is important to remember here is that Britain's national press was not a neutral observer. The *Daily Telegraph* and *The Times* were both politically conservative newspapers.²⁶ Besides increasing their circulation ten-fold by printing an article by Sir Arthur Conan Doyle, the *Daily Telegraph* relished attacking the Liberal government currently in power. Further evidence of this was that when the Adolph Beck and George Edalji cases actually occurred and could have been more easily corrected, the government in power was Conservative. Rarely was that ever mentioned in the Conservative press. Put another way, it was the Liberal Home Secretary Herbert Gladstone who was roundly attacked even though it was a Conservative Home Secretary, Aretas Akers-Douglas, who

²² "Brief Comment on Foreign Topics," *New York Times*, February 10, 1907.

²³ *Daily Express* (London), 12 January 1907.

²⁴ Weaver, *Conan Doyle*, 234.

²⁵ Conan Doyle, *Memories*, 210.

²⁶ Political and Economic Planning, *Report on the British Press* (London: 1938), 114-115.

was in charge when these cases occurred and by right should have carried most of the blame.

Up to this time, the Home Office had stated repeatedly that the Edalji case was closed. However, the “clamour and organized agitation,”²⁷ chipped away at the government’s resolve until Home Secretary Gladstone agreed to meet with Conan Doyle on January 15, 1907. It was never known exactly what Gladstone said to Conan Doyle, but upon leaving the Home Office, Conan Doyle announced to “waiting reporters” that he was certain the matter would be corrected.²⁸ Conan Doyle was to be disappointed, because the Home Office still refused to order an official inquiry.

Then on February 2, 1907, *The New York Times* reprinted the *Daily Telegraph* article across seven columns of its newspaper. In a brief promotional item on the front page the editors made it clear exactly why the article was important. And it was not because of Edalji:

The Times begins this morning and will complete tomorrow morning the extraordinary “Case of George Edalji,” which is the work of Sir A. Conan Doyle, best known as the creator of “Sherlock Holmes” and as the author of the most interesting series of detective stories in English literature. “Sherlock Holmes” is a character in English literature who is quite sure of taking an honored place in that great portrait gallery. The Sherlock Holmes stories constitute a great literary achievement beyond the range of most novelists, in extent and sometimes in intensity.²⁹

Had *The New York Times* and other newspapers across the world simply reprinted the article and it then quickly faded from their pages the British government might have been able to weather the controversy. But the article ignited a debate about British justice in the world press that was surely intolerable to the government. A few weeks later, with

²⁷ Editorial, *Times* (London), 22 April 1907.

²⁸ Weaver, *Conan Doyle*, 245.

²⁹ “Truth Stranger Than Fiction,” *The New York Times*, February 2, 1907.

the story still ricocheting around the world, Home Secretary Gladstone appointed Sir Arthur Wilson to head a three-man panel to investigate and report on the case of George Edalji. Although the Edalji Report was delivered to Parliament, it was nothing like the important document requested and delivered in the Beck case.

In his speech to parliament in 1907, John Walton acknowledged the involvement of a Royal Committee in the bill he proposed by pointing out their finding that the “resources of the Home Office were neither adequate nor satisfactory,” to handle the functions of a court of criminal appeal. The Committee Walton was referring to was not concerned with George Edalji. It was the *Report of the Committee of Inquiry into the Case of Mr. Adolf Beck*.

The Beck Committee was appointed by Royal Warrant in June 1904 and was chaired by the second (behind the LCJ) highest permanent member of the judiciary, the Master of the Rolls, Richard Henn Collins. The Committee’s report was delivered to the then Home Secretary, Akers Douglas, and presented to both houses of Parliament the following September.³⁰ Unlike Edalji, Beck had already been granted a free pardon. The Beck Committee was not set up to decide if a miscarriage of justice had occurred but how it had occurred and, most importantly, how it could be prevented from occurring again.

As Walton made clear in his speech, the points most relevant to the formation of a criminal appeal court in the Beck Committee Report were the findings involving the Home Office. The Committee concluded that the Home Office was negligent when it failed to recognize in 1898 a case “so grave as to call for interference.” They commented that had the Home Office looked at the case with “a fresh eye,” they would have been able to recognize Beck’s two trials for what they were.

³⁰ *Case of Adolf Beck*. Cmd. 2315. 1904, iv.

A “fresh eye” in criminal cases seemed to be the very definition of a court of criminal appeal, but the Report went on to recommend strengthening the Court of Crown Cases Reserved (CCR) in lieu of a court of appeal. But the CCR was designed to allow an appeal only when the trial judge recommended one and then only on a point of law. John Walton obviously thought this was far from adequate. He politely commended the CCR in his speech to Parliament for their “economic and excellent machinery,” but he also announced that the jurisdiction of the CCR under his Bill would be transferred to the new Court of Criminal Appeal.

The most significant item in the long Beck Report was a memorandum prepared specifically for the Committee by the Home Office. The memorandum began with some startling statistics. The Home Office (circa 1903) received approximately 4000 petitions from prisoners each year, with another 1000 received from solicitors, family, and friends of prisoners. It then stated that after completing the tremendous administrative task of sifting through the thousands of petitions the Home Office must set about dealing with those petitions that clearly warranted further consideration. But before continuing to detail Home Office petition procedures, one particular point was underscored:

It has to be borne in mind that the Home Office is not a Court of Appeal, and that it is useless to attempt to re-try at the Home Office, on paper, cases already heard in open court before a jury.³¹

This point was of such particular importance that at the end of the memorandum, it was made again: “In dealing with all cases the principle is constantly kept in view that the Home Office . . . is not a court of appeal.” The Home Office also insisted in this memo that it was a “matter of cardinal importance,” that the cooperative relationship the

³¹ Ibid., Appendix: “Note as to the Practice of the Home Office in Dealing with Criminal Petitions,” 331.

Home Office had with England's judiciary must be maintained at all cost. The Home Office was not trying to deny that mistakes were made in the Beck case. They were instead, trying to explain the complicated relationship the Home Office had with trial judges. Without a court of criminal appeal, the Home Office depended on the country's judges to help them in their investigations. If the Home Office was to too often or too keenly question the decisions of trial judges, it might irreparably damage their ability to thoroughly review petitions seeking the Royal Prerogative of Mercy. The Home Office assured the Committee that this aspect of their duties was already "one of great difficulty and delicacy."

In essence, the Home Office in 1903 said exactly what Walton would say four years later. To truly prevent another Beck case, Britain needed a court of appeal for criminal cases, an entity with the authority and means to investigate a questionable case and where judges in open court, not politicians and career bureaucrats in secret, would decide if justice had been done.

In comparison to the Beck Report, the Edalji Report was of vastly less importance. It consisted of six pages and one appendix (the Home Office memorandum). It was delivered to Home Secretary Gladstone on April 23, 1907. Nowhere in the Report is a court of criminal appeal discussed. It was suggested that Edalji should not have been convicted on the charges and should be granted a pardon thus allowing him to regain his license to practice law. Yet the report also stated that Edalji had, more than likely, sent some of the malicious letters accusing others of the mutilations (thereby deflecting suspicion from himself) that were received by the police. The Committee concluded that Edalji was, thereby, at least partially responsible for what had befallen him and they

recommended that he not be awarded compensation.³² Edalji got his pardon and his career back, but never received compensation for the three years he spent in prison.

Needless to say, Conan Doyle was livid:

The sad fact is that officialdom in England stands solid together, and that when you are forced to attack it you need not expect justice What confronts you is a determination to admit nothing which inculpates another official, and as to the idea of punishing another official for offences which have caused misery to helpless victims, it never comes within their horizon.³³

The Edalji Report did make one significant contribution to the formation of a court of appeal. The Report was one of the first instances that labeled the standard practice of not transcribing trials from lower courts as counterproductive to any investigation of whether justice had been served:

In dealing with [the case] we, as well as those who have previously had to consider it, have had our difficulty greatly increased by the absence of any sufficient record of the actual proceeds at the trial.³⁴

The Edalji committee was forced to use newspaper reports of Edalji's trial in lieu of a transcript.

A trial of any kind conducted today without a complete, verbatim, transcript would be unthinkable. Yet that was exactly the situation in England before the formation of the Court of Criminal Appeal. The creation of an appeal court meant that every criminal trial in Britain would have to be recorded in shorthand notes for certainly the new court could not be expected to rely on newspapers for trial coverage. How to pay for these shorthand notes was an oft repeated concern of the members of Parliament opposed to John Walton's Bill.

³² *Case of George Edalji*, Cmd. 3503, 6.

³³ Conan Doyle, *Memories*, 213.

³⁴ *Case of George Edalji*, 3.

The debate on shorthand notes and all the other aspects of the Criminal Appeal Bill began on May 8, 1907, with a motion that the “Bill be now read a second time.” In the first two speeches alone, the Bill was called irresponsible, cumbrous, dilatory, peremptory, alarming, destructive, one-sided, tremendously expensive, absolutely unworkable, mischievous, and American.

Most of these comments came from the first speech by John Rawlinson. Rawlinson was a Conservative MP from Cambridge University and his speech was in aid of an amendment to the original motion that would leave out the word “now” and add the words “upon this day six months.”³⁵ Clavell Salter (Hants, Basingstoke) seconded Rawlinson’s motion with another long and rather overwrought speech on the utter disaster that would befall Britain if the Criminal Appeal Bill was made law. He concluded by saying that the new system proposed would “deprive our Criminal Courts of their principal glory in the deep sense of care, caution, and responsibility”³⁶ that they possessed at present.

Rawlinson and Salter were consummate Parliamentary politicians and predicting utter doom if the opposition was to have its way was surely not surprising. As the Attorney General and many others had noted, the right to appeal in criminal cases had already been debated for a “generation.”³⁷ Certainly, if Rawlinson’s motion to table the Bill for six months was accepted it would have been intolerable to Walton and his supporters.

Undoubtedly, the argument that a court of criminal appeal was, as Rawlinson put it, “absolutely and intrinsically an innovation” to a system of justice that had been

³⁵ *Hansard*, vol. 174 (1907), col. 282-94.

³⁶ *Ibid.*

³⁷ Walton, *Hansard*, vol. 172 (1907), col. 1008-11.

successful for centuries was legitimate. And certainly there would be an increase in governmental spending associated with a new court. But where the opposition lost credibility was in their overriding theme that justice was for one class only. Again and again, the opposition used the image of ignorant, poor, lower class, prisoners being undeserving of the right to appeal. The question of expense for many appeared to be far less a fiscal concern than a social one. So much so that the portion of John Walton's speech in which he made it clear that the new court would be available to all layers of society must have caused particular concern for some:

This is not a rich man's Bill. . . . An official is appointed whose duty it will be to obtain the materials which it is necessary to place before the Court for the consideration of the petition of every appellant; and if professional assistance be required a solicitor and counsel will be appointed to argue his case.³⁸

In fact, the arguments that some Conservative members of Parliament made opposing this Bill were far more than just a another Edwardian debate on class. The numerous social programs of the Liberal governments of Campbell-Bannerman and then after his death in 1908, Herbert Asquith, seemed to threaten the very existence of the so-called "ruling class". As Frances Donaldson noted in 1962:

[The Liberals] had, both by their victory [in 1906] and by the measures they introduced, inspired political anger not exceeded in this century. Theirs was the first of the modern Governments of the Left and it laid the basis for the Welfare State. The leaders were drawn far more than was usual from the middle classes and the intelligentsia, less from the aristocratic ruling class, and they were determined to improve the conditions of the poorer peoples.³⁹

Fortunately, the Criminal Appeal Bill was not tabled for six months. Former Conservative Prime Minister, A. J. Balfour, rose to point out that the debate on a "Bill proposing such a great change in the criminal jurisprudence of the country" should not be

³⁸ Walton, *Hansard*, vol. 172 (1907), col. 1008-11.

³⁹ Frances Donaldson, *The Marconi Scandal* (New York: Harcourt, Brace & World, Inc., 1962), 14.

held with so few back benchers present and at such an hour. It was nearly a quarter-past eight in the evening and Balfour reminded the House that there was still other business to discuss. He proposed the debate on the Criminal Appeal Bill be adjourned until “Monday next.” John Walton then rose to say he had no objections to Balfour’s proposal, but that he hoped that when the debate resumed it would not be “prolonged.” One cannot help but think the threat of a “six-months” delay was still troubling the Attorney General.

On May 31 the debate was resumed. This time Walton’s greatest ally in the Commons, Home Secretary, Herbert Gladstone, was present. The irony of so many of the opposition speeches was that sooner or later the claim was made that a criminal appeal court was not needed because the Home Office was perfectly capable of handling any potential miscarriages of justice. In reality, as the Home Office memorandum prepared for the Beck Committee made clear, they were, in fact, desperately seeking help.

Gladstone’s speech unambiguously asserted that the old argument that the Home Office was sufficient for appeals in criminal cases would not work this time. After the “something like thirty” criminal appeal bills that came before being killed by the “weight of technical and legal objection,” he pleaded with the House to not cause this Bill to suffer the same fate.

Gladstone then assured the House that the Court of Criminal Appeal would not as “many supposed” take the place of the Home Office. He then detailed the plentiful advantages an appeal court would have over the Home Office alone in dealing with questions in criminal cases. A court would have the power to quash a conviction and

they could hear both sides of the case. A court's decision was final and that finality allowed the reasons for the decision to be made public. Moreover, a court could hear fresh evidence and cross-examine witnesses—a power that the Home Office, as an office of the government, could not hold.

The emotion in the Home Secretary's speech was obvious. He was particularly bitter about the criticism, "censure and abuse" he and his department suffered because the Home Office must conduct investigations in secret. It was, he explained, in the interest of the prisoner that all inquiries were made with confidentiality assured to everyone willing to speak to the Home Office. But Gladstone then stressed that the "Home Secretary is, in my experience, constantly and repeatedly blamed in the Press and in Parliament because, forsooth, he is holding what is called a 'secret' inquiry."

Again toward the end of his speech Gladstone tried to relate the complete consternation he felt when so roundly attacked for his decisions:

. . . imagine the position of the Home Secretary, who may be cross-examined on the floor of this House by anyone who chooses to get up, wholly ignorant of the facts, and put every sort of difficult and delicate question, the answer to which would involve the disclosure of confidential information which it is practically impossible to give. The Home Secretary may have come to an absolutely right and sound decision, but, in spite of that he is exposed to the attacks and the questions of half a dozen individuals, with one purpose or another. . . . I say very deliberately to this House that the general position of the Home Secretary in criminal cases is now almost unbearable.⁴⁰

The Home Secretary then tried to negate some of the forgoing emotion in his speech with a rather offhand closing comment that "after all the Home Secretary is paid to be shot at."⁴¹ There was little doubt, however, that this particular Home Secretary was

⁴⁰ *Hansard*, vol. 175 (1907), col. 192-93.

⁴¹ *Ibid.*

tired of being shot at. After John Walton, discussed legal aspects of the Bill, it was read a second time and scheduled to be debated by the whole House.

Just a year before, the Lords had heard a nearly identical criminal appeal bill proposed by Lord Loreburn, Robert Threshie Reid, the Lord Chancellor in the Campbell-Bannerman Liberal government. Although John Walton introduced the 1907 Bill in the Commons and with the help of Herbert Gladstone steered it through that House, it was Lord Loreburn who was principally credited with the Court being formed at that particular moment in history.

Lord Loreburn was appointed Lord Chancellor in December 1905. As speaker of the House of Lords, Loreburn faced the formidable challenge of introducing the numerous Liberal reform measures to a House that was by 1905 dominated by Conservative hereditary peers. That he was so often successful and even admired by his rivals was attributed to his “dignity and pluck and the patent sincerity of his belief in the reforms which he advocated.”⁴² With the formation of the Court of Criminal Appeal he would need all the goodwill he had been building for two years.

The single noteworthy difference between the 1906 and 1907 Bills was that the 1906 Bill gave the Court of Criminal Appeal the right to order a new trial in cases where misdirection by the judge was discovered. The Lord Chancellor pointed out in 1907 that when he introduced his Bill in 1906 there was no such power and that indeed he opposed its inclusion because it “approaches the confines of torture to put a man on trial twice for

⁴² H.C.G. Matthew, Brian Harrison, ed., *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004), vol. 46, 409.

the same offence.”⁴³ The 1906 Bill passed in the House of Lords with the right to order a new trial added. The Bill was then sent to the Commons where it died.

Loreburn opened the 1907 debate by reminding the Lords that this Bill “corresponds in its main features with the Bill which received the approbation of this House and was passed through all its stages last year.” If he was hoping for a quick approval by the Lords he was disappointed. Lord Loreburn was indeed a powerful proponent of the Court, but he was challenged in both 1906 and in 1907 by a most formidable opponent to the Court’s formation: Lord Chief Justice Alverstone.

Since he was already the Lord Chief Justice and few envisioned the new court being headed by anyone else, Alverstone’s opinions about its formation were, of course, uniquely significant. Lord Alverstone’s role as head of the Court of Criminal Appeal will be more thoroughly discussed in the next chapter, but his part in the debates over the Court’s formation were prophetic glimpses into the way the new court would be run.

When looking at the debates between Loreburn and Alverstone it is important not to portray these two men as simply for and against the Court. That is unfair to both, but most especially to Alverstone. Again, in light of the ultimate success of the Court of Criminal Appeal, it is difficult to see how anyone could have advocated it not be formed. Certainly Alverstone, as a former conservative politician, was in theory part of the political opposition. It was clear he also held genuine concerns about a court of criminal appeal’s efficacy in the world-revered English system of justice.

Alverstone began his speech on the 1906 Bill by saying that he was not opposed to a court of criminal appeal “within certain limits.” Certainly on points of law he had no objection. It was, however, his firm belief that allowing appeals on questions of fact

⁴³ *Hansard*, vol. 179 (1907), col. 1471-84.

would “undermine altogether the responsibility of juries.”⁴⁴ He argued, quite effectively, that the Beck case, so often used as an impetus for a court of criminal appeal, would not have been altered by an appeal based on fact. The miscarriage of justice that Beck suffered arose from a point of law—the misdirection of the trial judge. Finally, Alverstone insisted that if appeals were allowed on questions of fact then a new trial must be ordered so those questions could be addressed by a jury.⁴⁵

Alverstone succeeded in attaching an amendment to the 1906 Bill that gave the court the power to order a new trial. This amendment guaranteed that the Bill would not pass the Commons. It would be naïve to think that killing this Liberal-sponsored measure was not on the minds of Conservative members of the House of Lords. But it is also unfair to think that Alverstone and the others who sponsored the amendment did so merely to defeat the Bill. At least in Alverstone’s case it was evident in his speeches that he was attempting to protect the jury system. As it turned out, an appeal on fact was not heard by the Court of Criminal Appeal until 1931.

The Bill-defeating power to order a new trial was firmly on John Walton’s mind when he introduced the 1907 Criminal Appeal Bill. In his April speech to the Commons, Walton was emphatic on the question of a new trial:

There will be no new trial. The scandals to justice, which must very often occur on the retrial of a criminal cause, will not happen in consequence of the provisions of this measure, and the accused person will be spared an ordeal which is consequent upon no misconduct on his part.⁴⁶

This one aspect of the Bill would remain a highly contested point. The 1911 Ellsom case (details of which began this chapter) would leave the Court begging for the

⁴⁴ *Hansard*, vol. 157 (1906), col. 1076-98.

⁴⁵ *Ibid.*

⁴⁶ Walton, *Hansard*, vol. 172 (1907), col. 1008-11.

power to order a new trial. Lord Alverstone in his 1914 autobiography, perhaps mindful of the Ellsom case, referred to the Court's inability to order a new trial after a misdirection of the trial judge as a "blot" that he was sure would soon be amended.⁴⁷ In fact it would be 1964 before the Court was given limited powers in this respect.

On August 16, 1907, Loreburn succeeded in piloting the new Bill through the Lords with only minor amendments (no power to order a new trial) and returned it to the Commons. Four days later the Commons agreed to the amendments and on August 28 the Criminal Appeal Bill received the Royal Assent and the *Criminal Appeal Act 1907* became law. And, at last, England had a Court of Criminal Appeal.

The Court was, from its inception, located in the prestigious Royal Courts of Justice in London. The building, a monolith of Victorian Gothic architecture, was opened by Queen Victoria in 1882 and housed all the High Courts of England and Wales. The Court was operated on a daily basis by its own Registrar taken from the ranks of the Masters of the Supreme Court and appointed by the Lord Chief Justice. The senior Master of the Supreme Court was the first Registrar.⁴⁸

It was amazing how calmly the Court was received when it started hearing cases the following May. After such a tremendous hue and cry over its formation, the Court experienced a mostly loving honeymoon with Britain's public and press. Although, the day after the court began hearing cases, *The Times* did publish a long editorial that was seemingly designed to once again stoke the fires of controversy.

⁴⁷ Viscount Alverstone, *Recollections of Bar and Bench* (London: Edward Arnold, 1915), 271.

⁴⁸ A. C. Forster Boulton, *Criminal Appeals Under the Criminal Appeal Act of 1907* (London: Butterworth & Co., 1908) 4-5.

The editorial began with the statement, “We deprecate the premature assumption of gross evils as the consequence of the new measure.”⁴⁹ They then proceeded to comment on aspects of the Act that appeared to be nothing but those gross evils. The editors of *The Times* were concerned that the new rules governing the court would encourage appeals: “The prisoner will learn from [the rules] that from the moment he lodges his appeal he will be, if not a favourite of justice, at all events the subject of exceptional treatment.”

The editorial was chiefly worried that section 14 of the Act “enumerated a pretty long list of privileges belonging to the appellant.” For instance, the appellant would be kept apart from other prisoners; he would be allowed to attend appeal hearings “which will be a pleasant variation of the monotony of a long-timed sentence, an excellent opportunity for an appellant to give publicity to some grievance, real or imaginary.” He would be allowed to wear his own clothes in court and prison garb of a different color while in prison. He would also be allowed to see his legal advisors alone and given writing materials for the “purpose of communicating with his friends.” If he was poor, “as generally he will be,” there would be legal assistance provided that was “better than that which he had at trial.” And, he would be allowed to sleep on a mattress. With all these luxuries, was there any doubt, *The Times* wondered, that all prisoners would not rush to appeal.⁵⁰

Certainly, *The Times* could have been just expressing their Tory cynicism with the Liberal victory that was the Court of Criminal Appeal. But more than likely they were giving voice to a fear that many in Britain shared at the time of the Court’s formation.

⁴⁹ Editorial, *Times* (London), 16 May 1908.

⁵⁰ *Ibid.*

One of the key elements in the Victorian and Edwardian understanding of criminology and penology was the idea of “uniformity.” The nationalization of Britain’s prisons during Benjamin Disraeli’s 1874 government was not only a means to spare localities from the burden of maintaining their own prisons. Nationalization allowed the government to make the punishment of criminals a uniform experience and thereby a greater success. As Seán McConville explained in his article, “The Victorian Prison,”:

The punishment had to be of such a character that it could be made uniform, and uniformity made sense only if one adopted a general view of prisoners’ capacities for choice and actions.⁵¹

The Victorian understanding of criminal behavior and the mind of the criminal was still very much in place in 1907. The image of convicted felons, by virtue of appealing their convictions, being given lavish freedoms challenged many English beliefs in what was necessary for crime control and their own safety.

Although, even *The Times* calmed down as the Court proved to work in just the manner John Walton had predicted. By February 1909, in a leading article, the newspaper was commenting that, because shorthand notes were now taken at every trial, there was “more care as to the reception or rejection of evidence” and “greater pains” were being taken in the lower courts with summing-up and directions to the jury so that it would assist jurors “without usurping their functions.” Yet, here again the Court not having the power to order a new trial was labeled a “disadvantage.”⁵²

The question of giving the young Court the power to order a new trial reached a crisis point in September 1911 with the case of Charles Ellsom. Ellsom was tried for the

⁵¹ “The Victorian Prison: England 1865-1965,” *The Oxford History of the Prison*, Norval Morris and David J. Rothman, ed. (Oxford: Oxford University Press, 1995), 145.

⁵² Editorial, *Times* (London), 2 February 1909.

murder of his girlfriend, Rose Render, in London on September 5, 1911.⁵³ As previously noted, it was a savage murder and there was little doubt Ellsom was guilty and would hang. But the trial judge, Mr. Justice Avory, made a mistake.

The most damning evidence at Ellsom's trial came from John Fletcher. Fletcher claimed to be an unemployed cook, but was more likely a pimp operating out of his one-room flat on Hampstead Road. Fletcher testified that he was with Ellsom and even loaned him a shilling to buy a large chef's knife some time before the murder. He also claimed that on the night of the murder Ellsom appeared at his flat "eyes glaring" and "sweating" and confessed that he had "killed [Rosie] stone dead." Fletcher stated under oath that "[Ellsom then] produced a knife from his right hand trousers pocket and said "this is what I done it with." The knife was wet with blood. Later that night Fletcher tried to get Ellsom to admit it was all just a joke, but Ellsom again pulled out the knife. This time Fletcher saw not only blood on it but fat as well. To that discovery Ellsom commented, "that's from somewhere near her heart." Fletcher then admitted that it was he who threw the knife down a "gully."⁵⁴

The testimony was certainly enough to hang Ellsom. Still, Fletcher was of such a "disreputable" character that his trial testimony was treated by the judge as "requiring corroboration." In his summing up, Justice Avory relied heavily on Fletcher's testimony at trial being essentially the same as what he gave the police on the day of the murder. Prosecution counsel, Archibald Bodkin, tried to correct the situation by pointing out that in fact the police statement did not match the testimony in the way the judge claimed. Mr. Justice Avory, nonetheless, went ahead and sent the case to the jury by saying that

⁵³ *Old Bailey Proceedings*, September 1911, Charles Ellsom (t19110905-75).

⁵⁴ *Ibid.*

“what he had told the jury was correct, namely that the statement had been open to the inspection of prisoner’s counsel.”⁵⁵ It had not.

At Ellsom’s appeal before Lord Chief Justice Alverstone, Mr. Justice Charles Darling, and Mr. Justice Hamilton, on September 28, 1911, counsel for the defense, A. S. Comyns Carr, pointed out the discrepancies in the testimony and the police statement. Apparently all the most salacious points of Fletcher’s trial testimony appeared first in his police statement either completely different or altered in some way. Had the statement been made available to the defense Fletcher would have been cross-examined on those points and might have admitted they were lies. At least the discrepancies might have provided doubt in the minds of the jurymen as to the veracity of Fletcher’s testimony.

Archibald Bodkin with Travers Humphreys for the Crown tried to argue that even without the police statement there was ample corroboration of Fletcher’s testimony from the two prostitutes in his flat. They had heard some of the conversation on the night of the murder. The Court rejected that argument and quashed the conviction on the ground of misdirection by Justice Avory.

The Court’s decision was not delivered by Lord Chief Justice Alverstone who headed the panel but was instead left to Justice Charles Darling. In announcing the decision, Justice Darling began by saying that the Ellsom case was not only a case of “great gravity” it was also of “exceptional importance because it is the first capital case in which the Court finds it necessary to set aside a conviction.” He elaborated that by their judgment, the Court was not expressing the “slightest opinion” as to whether the appellant was guilty but that with this case:

⁵⁵ Ibid.

We desire to repeat and emphasise what the Lord Chief Justice has said on several occasions, that it appears to us after some years' experience of the working of this Act, to be [a] matter of great regret that we have no power to order a new trial. . . . We hope that what we are now saying will be considered by those who have power to amend the law in this respect.⁵⁶

Justice Darling concluded the judgment of the Court by saying that although they must allow the appeal and discharge the appellant, “we wish to repeat our regret that we have not power to order a new trial.”⁵⁷

Two days later, *The Times* was ready with their condemnation, not of the Court this time, but of the problem the Court had encountered: “The emphatic regret expressed by the Court at its inability to order a new trial in such a case will, we apprehend, be shared by all.”⁵⁸ All the implications that the Court was not needed had vanished. It was clear that by 1911, the Court of Criminal Appeal was being embraced and was worthy of a vehement defense: “It is clearly not in the public interest that a defect in judicial procedure [no new trial] should enable [a murderer] to escape the just punishment of his crime.” *The Times*, which had previously bemoaned the creation of the Court, now wholeheartedly defended it:

The Court of Criminal Appeal was certainly not established for the purpose of providing judicial loopholes of escape for men who ought to be convicted and if any such loopholes are found by experience to exist it is the duty of the Legislature to close them as soon as may be.⁵⁹

It was in another editorial in *The Times* on April 22, 1907, that John Walton's introduction of the Bill to form the Court was called a “clear and temperate speech.”⁶⁰ Walton was fervently opposed to the Court having the power to order a new trial.

⁵⁶ *Criminal Appeal Report*, CR App R 11, 4.

⁵⁷ *Ibid.*

⁵⁸ Editorial, *Times* (London), 30 September 1911.

⁵⁹ *Ibid.*

⁶⁰ Editorial, *Times* (London), 22 April 1907.

Whether the Ellsom case would have changed that opinion cannot be known because John Walton died on January 18, 1908, at the age of fifty-six, four months before the Court of Criminal Appeal began hearing cases.

The *New York Times* reported that Walton returned from a seaside holiday in the best of health just a few days before his death and had sent invitations to his friends for a dinner party he was hosting that Saturday night. Then, on Friday morning, he was “seized by a chill” that developed rapidly into pneumonia and he died the next morning.⁶¹

The great irony in the obituaries written about Walton was that nowhere do they mention his involvement in the formation of the Court of Criminal Appeal. The *Times* said that as a lawyer he had taken a “leading part in a good many famous legal controversies.”⁶² They listed several cases that would have, no doubt, been important matters of recent history in 1908, although they are all but forgotten today. The Court of Criminal Appeal should certainly be seen as a lasting part of John Lawson Walton’s legacy.

Although he did not see the Court’s first session, John Walton did see the Criminal Appeal Bill he introduced become an Act of Parliament. He also saw the Court formed and the appeal judges appointed. One can only hope Walton had some sense of the important part he played in this historic leap forward for English justice.

⁶¹ “British Minister Stricken,” *New York Times*, January 19, 1908.

⁶² *Ibid.*

CHAPTER 2

THE LORD CHIEF JUSTICE'S COURT

But even supposing we were to add three new Judges, who would constitute a Court sitting all the year round, the expenditure would only amount to £15,000 a year, and that is nothing to be considered in comparison with so important a reform in the administration of the criminal law.

—Lord Loreburn, 22 May 1906

A key component of the opposition to the Court of Criminal Appeal was cost. In his short speech of 17 April 1907 John Walton laid out the structure of the court, seven existing High Court judges chosen and led by the Lord Chief Justice. He specifically said that the judges would “undertake the duties of [the Court of Criminal Appeal] in addition to the functions which they now discharge.”¹ Walton was emphasizing that there would be no new expense incurred for the appointment of judges for this court. The *Criminal Appeal Act 1907*, passed the following summer, reduced to three the minimum number of judges required to convene a session of the court.² The stipulation that they be existing High Court judges, remained. And with the passing of the Act, it became law that the judges for the new court would indeed be chosen and ruled by the highest-ranking judge in Britain, the Lord Chief Justice. As it turned out, structuring the Court in this manner and giving it so completely to the Lord Chief Justice impeded its progress for over fifty years.

One can readily grasp what Attorney General Walton and Lord Chancellor Loreburn were doing by stipulating the Court be formed in this manner. As well as avoiding the cost of hiring new judges, the legitimacy of the Court, particularly to the

¹ Walton, *Hansard*, vol. 172 (1907), col. 1008-11.

² Boulton, *Criminal Appeals Under the Criminal Appeal Act of 1907*, 1.

English public, was surely enhanced by placing the Lord Chief Justice (LCJ) in charge. There were, however, two serious problems with this structure.

First, from 1908 to 1946, with only one brief exception, the LCJ and consequently the head of the Court of Criminal Appeal was chosen not from the judiciary, but was instead a political appointment with the presiding Attorney General given first refusal. Shimon Shetreet, in his book, *Judges On Trial*, pointed out that, “the quality of the judges in any system largely depends upon the method of their appointment and the standards applied by the appointing authorities in the process of the selection of judges.”³ This seemed like nothing so much as common sense. So choosing, not just an ordinary judge, but the highest ranking judge in the nation based on political influence, held a genuine potential for disaster.

Notwithstanding, choosing the Lord Chief Justice from the realm of politics was a tradition dating back centuries. In a country that so openly cherished tradition it was unlikely that the method for selecting the LCJ would be changed simply because he was given a new court to govern. Still, the result was that until 1946 the highest criminal court in Britain was to be controlled by a politician who had no prior experience on the bench and in some cases should never have left the realm of politics.

The more egregious problem with the structure of the new court was that in essence there was only one judge who would consistently sit on the panel of justices in criminal appeals, the LCJ. The other judges were rotated in and out of the court per their schedules and at the LCJ’s direction. As explained in a 1964 *Journal of Public Law* article entitled, “Criminal Appeals in England: the Court that Isn’t,”:

³ Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland Publishing Co., 1976), 46.

Not only is there a leadership principle built into the court by statute, but the infrequency of any man's participation with the Chief Justice and the short time available for consideration of cases lead to what appears to be review by one man, who has been provided with some assistance It is most unlikely that a judge who seldom hears criminal appeals and has therefore, only a general acquaintance with what the court is doing will feel free to oppose suggestions of a Chief Justice who regularly attends to these questions.⁴

What is more, the LCJ remained a trial judge himself, hearing important cases in the High Court. So from the beginning, inherent in the Court's structure was the highly objectionable possibility that a defendant in a criminal case could be tried and convicted in a court presided over by the LCJ and then appeal that decision to the Court of Criminal Appeal where it would be heard by judges who in effect worked for the LCJ.

As Rosemary Pattenden pointed out in her book, *English Criminal Appeals*, High Court judges (including the LCJ) were even permitted to appear on the appeal panel of cases that they themselves had tried. Pattenden stated that in practice this rarely happened but that the decision in the 1951 case, *R. v. Lovegrove*, made it clear that, although undesirable, it was indeed allowed.⁵ Fortunately, there was never an instance in which the LCJ actually sat on the appeal of a case he had tried,⁶ but the mere possibility was troubling.

Certainly, the Court of Criminal Appeal, so exceedingly praised in chapter one of *A Veritable Revolution*, will not now be seen as an evil empire buffeted by the whims of a questionable leader. It does, however, mean that in order to understand the Court and its place in English criminal history it is essential to understand the structure of the Court and the character of the men who served as Lord Chief Justice during its prolonged

⁴ Gerald L. Kock, "Criminal Appeals in England: The Court That Isn't," *Journal of Public Law*, vol. 13 (1964), 95.

⁵ Rosemary Pattenden, *English Criminal Appeals: 1844-1994* (Oxford: Clarendon Press, 1996), 36.

⁶ Rayner Goddard attempted to do so in a 1951 burglary case in Leeds. After defense counsel, John Parris, strenuously objected, Goddard removed himself from the appeal panel.

formative period. In order to elucidate this point, this chapter examines in detail the lives of Lord Chief Justices Alverstone, Reading, Trevethin, Hewart, and Caldecote, and the capital cases they presided over as High Court judges and as the heads of the Court of Criminal Appeal.

Richard Webster, the 1st Viscount Alverstone, had been Lord Chief Justice for seven years when the Court of Criminal Appeal was formed. Webster was a successful barrister whose quick rise in his profession was due less to his “advocacy or [his] knowledge of law,” than to his “industry and mastery of the facts.”⁷ He was a conservative member of Parliament from the Isle of Wight when Prime Minister, Lord Salisbury, made him Attorney General in 1885. He then lost and regained the post of Attorney General over the next ten years as the Conservative and Liberal parties switched power. In May 1900, Webster became Baron Alverstone for a brief stint as Master of the Rolls before being appointed LCJ upon the death of Charles Russell in October 1900.⁸

Lord Alverstone became a much-admired member of the judiciary and was given credit for playing an “important part in the success” of the Court of Criminal Appeal.⁹ Yet his initial opinions and reservations about the Court never changed. In his autobiography, *Recollections of Bar and Bench*, published shortly before his death in 1915, Alverstone continued his argument that appeals should not be allowed based on fact: “I was, and still am, strongly opposed to the idea that there should be an appeal on the facts from the verdict of a jury to a Court constituted by Judges only.”¹⁰ Alverstone then wrote that the right to appeal on fact was “dropped” and that the Statute was limited

⁷ *Dictionary of National Biography*, vol. 57, 897.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Alverstone, *Bar and Bench*, 270.

to “points of law.” This was a telling half-truth. The *Criminal Appeal Act 1907* actually gave a convicted criminal the right to apply to the Court of Criminal Appeal for “leave to appeal” on any grounds, fact, law or a mixture of both.¹¹ Apparently, leave to appeal on such grounds was so remote as to be nonexistent in Justice Alverstone’s court.

Nevertheless, it would be in one of the most spectacular capital cases of the twentieth century that the problems inherent with the Court’s formation first surfaced. The case was that of Hawley Harvey Crippen who in 1910 was on trial for the murder of his wife, Cora. Lord Alverstone was the trial judge.

Crippen was a Michigan born homeopathic doctor who lived a seemingly quiet life at 39 Hilldrop Crescent in North London with Cora, his American wife of eighteen years. On the night of January 31, 1910, the Crippens held a small dinner party. The party broke up at around 1:30 the following morning. Cora, who reportedly was in fine spirits, stood at the front door of her home and bade her guests goodnight as they climbed into a cab. She then turned, went back into her house, and disappeared.¹² Using the name Belle Elmore, Cora had for years held hope of becoming a star of the music-hall stage. She had little success, but she did have a large group of, as it turned out, highly inquisitive friends through her membership in the Music Hall Ladies Guild. When Belle went missing the ladies of the Guild raised the alarm.¹³

Dr. Crippen initially claimed that his wife had been unexpectedly called back to America to deal with a family emergency. When questions about that scenario became too insistent, he claimed that while in America, Cora died suddenly of pneumonia and her

¹¹ R. E. Ross, *The Court of Criminal Appeal* (London: Butterworth & Co., 1911), 22.

¹² David Smith, *Supper with the Crippens* (London: Orion, 2005), 96.

¹³ *Ibid.*

body was cremated.¹⁴ Neither story was believed, and the police were called. After a brief interview by the soon-to-be-famous, Inspector Walter Dew of Scotland Yard, Crippen fled the country with his young mistress, Ethel Le Neve. This naturally made the police even more suspicious and they started digging up the basement of Hilldrop Crescent. There they found a human torso immediately believed to be that of Cora “Belle” Crippen.

What then ensued was an international manhunt, helped by one of the first uses of the new Marconi telegraph system. It culminated with Crippen’s arrest for the murder of his wife as he disembarked an ocean liner in New York. He was hurriedly brought back to London to stand trial at the Central Criminal Court, the revered “Old Bailey”¹⁵ before Lord Chief Justice Alverstone.

Stated simply the Crippen case might seem like little more than another Edwardian murder mystery, albeit a particularly grisly one. Nothing could be further from the truth. The sensationalism that surrounded this case was palpable. When Crippen was finally brought to trial charged with poisoning and dismembering his wife, it was only natural that the highest-ranking judge in the country would take the case. Although, by 1910 the highest-ranking judge in the country was also the head of the Court of Criminal Appeal. After he was found guilty and sentenced to death, Crippen’s only recourse was to appeal to a court headed by the man who had just delivered to him a sentence of death.

¹⁴ Ibid., 112.

¹⁵ The Old Bailey, so named because it is located on Old Bailey Street, is the building that houses England’s Central Criminal Courts in London. This courthouse is one of the most famous symbols of criminal justice in Britain.

Whether Crippen was indeed guilty of murder or any one of the myriad “disappearance” theories that surrounded his wife were closer to the truth, the certainty was that he did not get an impartial appeal. Immediately post-trial, Alverstone sent his trial notes to the Home Secretary in anticipation of an appeal. In those notes he stated that he could “conceive no ground which should prevent the death sentence being carried into effect.”¹⁶ It was highly unlikely that Alverstone did not express those same opinions to his fellow High Court judges. Even before the notes were gathered, one actually needed only to read the preamble to the death sentence Alverstone delivered to Crippen to understand that an appeal would be futile:

Hawley Harvey Crippen, you have been convicted, upon evidence, which could leave no doubt on the minds of any reasonable man, that you cruelly poisoned your wife, that you concealed your crime, you mutilated her body, and disposed piece-meal of her remains On the ghastly and wicked nature of the crime I will not dwell. I only tell you that you must entertain no expectation or hope that you will escape the consequence of your crime, and I implore you to make your peace with Almighty God.¹⁷

Crippen was then sentenced to be “hanged by the neck until you are dead” and after his appeal was quickly rejected, he was executed at Pentonville Prison in London on November 23, 1910.

There is no evidence that Lord Chief Justice Alverstone was a vindictive man who summarily dismissed the court he had opposed in 1906. One suspects that he did not set out to deny Hawley Harvey Crippen his legal right to a fair appeal. More importantly, Alverstone did not cost Crippen his life. There was little chance, given the evidence presented at his trial, that Crippen’s conviction would have been overturned. But by

¹⁶ Katherine Watson, *Dr. Crippen* (Kew: The National Archives, 2007), 85. Quoting National Archives document: HO 144/1718/195492.

¹⁷ Filson Young, *Trial of Hawley Harvey Crippen (Glasgow and Edinburgh, William Hodge, & Co., 1919)*, 183.

reducing Crippen's appeal to little more than a formality, Alverstone not only denied Crippen a full measure of justice, he negated the purpose and value of the young Court of Criminal Appeal. It is with Alverstone that we first see the Court not as the independent safeguard against the miscarriage of justice that Loreburn and Walton and so many others had intended, but instead as an extension of the personal and judicial philosophy of the Lord Chief Justice himself. By mid-twentieth century, the Court of Criminal Appeal as the special domain of the Lord Chief Justice would not only damage the image of the Court, it would contribute to some of the most notorious miscarriages of justice in English history.

Three years after the Crippen trial, in October 1913, Lord Alverstone resigned his position as Lord Chief Justice of England. According to Attorney General Sir Rufus Isaacs who visited Alverstone shortly after his resignation, Alverstone was "close to death, feeble and frail."¹⁸ Isaacs' visit to Lord Alverstone was not merely a courtesy call on an ill friend—Rufus Isaacs had just been named by Prime Minister Herbert Asquith as Alverstone's replacement. The post of Lord Chief Justice was by long tradition the proscriptive right of the Attorney General so the appointment of Isaacs as LCJ should not have been a problem. This was, however, no ordinary transition.

The one point consistently made in every account of Lord Alverstone's resignation was that it could not have come at a more inopportune time. For the previous year and a half Herbert Asquith's government had been embroiled in what became known as the Marconi scandal. And at the center of the Marconi scandal was Attorney General Rufus Isaacs.

¹⁸ Denis Judd, *Lord Reading: Rufus Isaacs First Marquess of Reading, Lord Chief Justice and Viceroy of India 1860-1935* (London: Weidenfeld and Nicolson, Ltd., 1982), 110.

On July 18, 1913, when rumors about Alverstone's ill health were circulating, *The Daily Express* voiced grave concerns that the role of Lord Chief Justice would be forever tainted if Rufus Isaacs was given the job. Under the headline "Not the Right Man," they reproached Asquith for even considering appointing Isaacs to the post, calling it no less than a "brazen effrontery almost beyond belief."¹⁹ They accused Isaacs, if he were to accept, of potentially "imperiling an office of which he must hold the honour very dear," and of covering himself with an "odium which he would wisely dread."²⁰ The article claimed that the role of LCJ more than any other required someone completely above even a hint of scandal, "on this impeccability depends the health of justice itself."²¹

By the autumn of 1913, Isaacs, along with Chancellor of the Exchequer, David Lloyd George, former Treasury Secretary, Lord Alexander Murray, and Postmaster-General, Herbert Samuel, had survived heated accusations of fraud, corruption, and stock manipulation in the Commons and in some of the nation's press. After months of testimony, a Select Committee of the House of Commons, set up to investigate the scandal, concluded in April 1913 that no one involved had intentionally deceived the government. That conclusion, but especially Asquith's steadfast support of his cabinet ministers had begun to calm the political turmoil. With the question of Alverstone's replacement everything was churned up once again.

What became the Marconi scandal initially had far more to do with the contentious Liberal vs. Conservative atmosphere of the House of Commons than any genuine suspicion of wrongdoing. Herbert Samuel, in March of 1912, signed a contract with the English Marconi Company to build and operate six telegraph stations, one in

¹⁹ *Daily Express* (London), 18 July 1919.

²⁰ *Ibid.*

²¹ *Ibid.*

England, and the others throughout the British Empire. Of course, being a Liberal initiative, this was challenged in the Commons by Conservative members. Conservative MPs were upset that the terms given Marconi were too generous and other companies were not adequately considered.²² If this had been the only challenge, Samuel would have been able (as he eventually did) to prove that his reasoning was sound and that the choice of the Marconi Company was sound. However, the debate on the merits of Marconi's telegraphic expertise quickly became secondary to accusations that certain members of the government had profited at the nation's expense.

The managing director of the English Marconi Company at the time was Godfrey Isaacs, older brother of Rufus Isaacs. On April 9, 1912, after a successful trip to New York, Godfrey had lunch with his brother the Attorney-General and another brother, Harry, at the Savoy. During this lunch Godfrey offered to sell both brothers shares in the American Marconi Company. Rufus purportedly questioned his brother about the connection between the American and English Marconi companies. Godfrey assured him the anticipated success of the American company was not at all dependent on the English company securing a contract with the British government. Rufus still refused to buy any of the shares and Godfrey had to be content with selling 56,000 shares to his brother Harry.²³

Had things ended there, the future Lord Chief Justice could have remained relatively unscathed. But Rufus Isaacs had second thoughts. With the success of the American shares looking to this former stock broker as a potential boon, Rufus Isaacs purchased 10,000 shares just a week later—not from his brother Godfrey but from his

²² *Hansard*, vol. 42, col. 667-750.

²³ Donaldson, *Marconi Scandal*, 45-60.

brother Harry. The Attorney General then sold 1000 shares to each of his closest friends: David Lloyd George, and Alexander Murray.

It is difficult to look at this transaction today and see anything except high-level insider trading. Even Asquith who publicly supported his ministers, in private commented that “our colleagues could not have done a more foolish thing.”²⁴ In her book, *The Marconi Scandal*, Frances Donaldson claimed “benighted innocence” for the three ministers in 1912. She pointed out that they all used their real names and never tried to disguise their purchase of the stock. Donaldson goes on to say that they were all busy men who likely gave what they were doing little thought.²⁵

Perhaps, but surely their minds were focused on nothing else during the first debate on the Marconi contract on October 11, 1912. Yet both Isaacs and Lloyd George steadfastly denied any connection to the English Marconi Company without mentioning their connection to the American company. This resulted in Rufus Isaacs spending the better part of the next year trying to explain away that omission.

One suspects another aspect of the episode created a level of historical sympathy for Rufus Isaacs, his family and Postmaster-General, Herbert Samuel that compensated for some of Isaacs’ poor judgment. They were all Jewish and at the time being targeted by a scurrilous anti-Semitic campaign by Hilaire Belloc and Cecil Chesterton in the pages of their literary journal *The Eye-Witness*.²⁶ In a “highly offensive”²⁷ article by Chesterton on August 8, 1912, Samuels and the entire Isaacs family (father, uncle, and brothers)

²⁴ Montgomery H. Hyde, *Lord Reading: the Life of Rufus Isaacs, First Marquess of Reading* (New York: Farrar, Straus and Giroux, 1967), 129.

²⁵ Donaldson, 53.

²⁶ *The Eye-Witness* was founded by Belloc and then edited by Cecil Chesterton until his death in 1916. Chesterton’s brother the famed writer G. K. Chesterton then ran the journal.

²⁷ Donaldson, 25.

were attacked and accused of cheating the British public. Then in their 29 August issue *The Eye-Witness* printed a letter purportedly from a reader that concluded: “It is inconceivable that two Hebrews unable to refute such accusations should continue to occupy positions hitherto supposed to be filled by honourable English gentlemen.”²⁸

Legal action was immediately considered but Herbert Samuel reasoned and Isaacs agreed that, among other things, “it would not be a good thing for the Jewish community for the first two Jews who have ever entered a British Cabinet to be enmeshed in an affair of this kind.”²⁹

There was no wonder then that Lord Alverstone, who was a close friend of Isaacs’, postponed his resignation for weeks in an effort to see the Marconi affair die down.³⁰ By October 1913, however, ill health forced him to make it official. When Alverstone did finally resign both Herbert Asquith and Rufus Isaacs were forced into positions that had little to do with what was best for the role of Lord Chief Justice. Although he did hesitate, Asquith could not refuse the position to his Attorney General without negating the support he had shown Isaacs throughout the Marconi affair. Likewise, Isaacs could not refuse the position that was from long tradition rightfully his without appearing guilty and leaving public life. So, Sir Rufus Isaacs was made Lord Reading and on October 22, 1913, before an enthusiastic crowd of well-wishers he swore that he would:

²⁸ Ibid.

²⁹ Hyde, *Lord Reading*, 130-131. Letter from Samuel to Rufus Isaacs.

The worst anti-Semitic attack against Rufus Isaacs was yet to come. After being appointed LCJ, Rudyard Kipling wrote the poem “Gehazi.” The poem was described by Denis Judd as one of “vitriolic hatred” directed at the new LCJ simply because he was Jewish.

³⁰ “Lord Chief Justice: Position of Sir Rufus Isaacs,” *Daily Express* (London), 1 October 1913.

. . . well and truly serve our Sovereign Lord King George V in the office of Lord Chief Justice, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will. So help me God.³¹

The problem was that Lord Reading never wanted to be the chief justice.

Furthermore, he leapt at the first opportunity to leave, at least temporarily, the courtroom behind. That opportunity was World War I and eventually an ambassadorship to the United States (while technically remaining the LCJ). Unfortunately, before he left the office completely in 1921, he did little to strengthen the prestige of the Court of Criminal Appeal.

Of his cases, two were particularly noteworthy. The first was the murder appeal in *Rex v. Beard*. Beard was a man convicted of smothering a young girl to death while attempting to rape her. The man was drunk at the time of the rape and Lord Reading concluded that he was “too drunk to form the intention of [murder]” and thereby reduced the conviction from murder to manslaughter.³² What was interesting about this case was that the Crown, dissatisfied with Reading’s decision appealed to the House of Lords. Here the Lord Chancellor, Lord Birkenhead, reversed Reading’s decision and reinstated the murder conviction. Reading, also a member of the House of Lords, left this unchallenged. He merely commented that he “agreed with his noble and learned friend on the Woolsack and [had] nothing to add.”³³ It showed an utter lack of interest in judicial precedence. Reading was in essence arguing what would one day be called diminished responsibility.³⁴ His lack of response to the Lord Chancellor was a missed opportunity to debate this legal issue.

³¹ “The New Lord Chief Justice: Swearing in Ceremony,” *Times* (London), 22 October 1913.

³² Hyde, *Lord Reading*, 173.

³³ *Ibid.*, 174.

³⁴ *Ibid.*

The other case was the trial for treason of the Irish patriot, Sir Roger Casement, in 1916. The myriad complexities of the Casement trial are beyond the scope of this thesis. Suffice it to say, the trial during wartime of a knight of the realm and a former member of the British Consular Service in the Congo was an important trial indeed. Lord Reading was the trial judge. Casement's defense was that he did not break the ancient law of treason that specifically stated that to commit treason one had to "[adhere] to the King's enemies inside his realm."³⁵ Casement's counsel held that because his client was not in the King's realm at the time, but in Germany, that his acts were not treason.

In his summation to the jury, Lord Reading left little option except to convict. It was Reading's opinion that Casement if seeking to start a civil war in Ireland was indeed committing a treasonous act. Casement was found guilty and sentenced to death. Casement's appeal, like Crippen's, was a foregone conclusion. It was dismissed by Justice Charles Darling—and on August 3, 1916, Roger Casement was hanged at Pentonville prison.

Justice Darling is a name that often appears in the early history of the Court of Criminal Appeal. He seems to have been the utility man on the High Court. For instance, Alverstone, who did not like delivering opinions in court, as in the Ellsom case, had Darling do so. Justice Darling would also prove invaluable to Lord Reading, for his presence in the High Court allowed Reading to be the LCJ without actually being the LCJ.

Shortly after the war began Lord Reading virtually abandoned the duties of LCJ (without resigning) to concentrate on the war effort and Justice Darling as his deputy took over. Reading's efforts for Asquith and then Lloyd George in the First World War were

³⁵ Ibid., 169.

certainly lauded. In his *War Memoirs*, Lloyd George called him his “invaluable aide.”³⁶

Likewise, as a High Commissioner and Ambassador to the United States, Reading was a particular favorite of President Wilson and his confidante, Colonel Edward House. House often credited Reading for helping to bring the U.S. into the war.³⁷ It was also a fact, however, that Reading spent less time presiding over the Court of Criminal Appeal or indeed any court than any other LCJ in history.³⁸ Why he did not resign when becoming a wartime ambassador was at the time puzzling. Of course, he certainly did not want to lose what might be a valuable position when the war was over. Another, more salient reason, however, finally came to light in 1921 when Reading did finally resign.

Reading was at heart a good and honorable man. Yet he was also the clearest example of the perils of choosing a politician over a member of the judiciary to become LCJ. Lord Birkenhead accurately summed up Reading’s career on the bench in 1924:

In that high office he displayed many admirable qualities . . . but he did not, perhaps, realize upon the Bench the high expectation of his judicial qualities which his skill in arguing legal points had seemed to justify. [Had] events allowed him to end his career in the placid atmosphere of the Law Courts, he would have become a great Lord Chief Justice. But the constant interruptions and preoccupations of his judicial career, produced partly by the war, but partly, I think, by his own impatience of a sedentary judicial career, denied the opportunity of creating a lasting judicial reputation.³⁹

By 1921 Lord Reading had decided to jettison his judicial career completely and return to the excitement of international diplomacy. When rumors began that he would soon be made Viceroy to India, the *Daily Express*, this time under the headline, “The Right Man,” and without even a whiff of “Marconi” praised Reading most profusely: “his gifts fit him

³⁶ Hyde, *Lord Reading*, 176.

³⁷ *Dictionary of National Biography*, vol. 29, 407.

³⁸ Hewart, *Not Without Prejudice*, 36.

³⁹ Hyde, *Lord Reading*, 174.

admirably for one of the most vital appointments made by any Government . . . if he goes to India he will take the confidence of the people at home.”⁴⁰ On January 10, 1913, Reading accepted the position of Viceroy to India and on March 9 he resigned as LCJ.

The choosing of Reading’s replacement became an almost comical example of how this vital judicial role was used as a political football. The Attorney General at the time was Gordon Hewart. Hewart wanted the role of LCJ and many expected he would be immediately appointed. Although, David Lloyd George, by then Prime Minister, could not afford to let the pugnacious Hewart leave his troubled administration at that time. So Lloyd George concocted and Hewart finally capitulated to a plan by which seventy-seven-year-old Justice A. T. Lawrence would be created LCJ, but only after supplying Lloyd George with an undated letter of resignation.

Justice Darling for all his usefulness to the government was pointedly passed over. Perhaps he tried too hard. It was reported that he sent a letter to Lloyd George saying he would take the office for even as little as “ten minutes.”⁴¹

These political machinations were roundly attacked. Lord Chancellor Birkenhead in a letter to Lloyd George branded it “illegal”⁴² and argued passionately that it would make the Lord Chief Justice “a transient figure subject to removal at the will of the Government and the creature of political exigency.”⁴³ Birkenhead insisted that the Attorney General be immediately appointed LCJ on Reading’s resignation. Lloyd George, on the other hand, was a consummate political schemer and he enlisted Lord Reading, a consummate political opportunist, to plead with Hewart. Reading told Hewart that no matter how much he hoped

⁴⁰ *Daily Express* (London), 6 January 1921.

⁴¹ *Dictionary of National Biography*, vol. 5, 148.

⁴² *Ibid.*, vol. 26, 906.

⁴³ Shetreet, 70.

to be named Viceroy, if Hewart would not agree to the plan, then Lloyd George would appoint someone else just to keep Hewart in the cabinet.⁴⁴ Hewart both admired and respected Reading and the idea that Reading would be denied the Viceroyship because of him troubled Hewart greatly. Of course, Lloyd George knew it would.

Hewart was also concerned that it would appear as if he had been passed over for the chief justice job. He tried to get Lloyd George to agree to officially offer him the job so he could then publicly turn it down. Although Hewart believed he had Lloyd George's agreement to this, Lloyd George went ahead and put his original plan in place.

Despite all the intrigue, the whole affair was short lived. In the Spring of 1922 when the Lloyd George government began to collapse, Justice Lawrence, now Lord Trevethin, Lord Chief Justice of England, was left to learn of his own resignation from *The Times* on March 3, 1922. Perhaps Lord Trevethin took some solace in *The Times* commending him for displaying a "strength of character and an independence of judgment [during his] brief Lord Chief Justiceship."⁴⁵ Gordon Hewart was then made Baron Hewart of Bury and became the new LCJ.⁴⁶

Members of the judiciary were, of course, deeply upset. In protest many of them refused to attend the farewell celebration for Reading although it was also said that they refused to do so because becoming a Viceroy after being Lord Chief Justice was a demotion and there was no need to celebrate.⁴⁷

The scheme caused a few fleeting questions in the House of Commons—the most interesting of which revealed that Lord Trevethin's pension would be increased from £3500

⁴⁴ Judd, 193.

⁴⁵ "The Lord Chief Justice: Retirement of Lord Trevethin," *Times* (London), 3 March 1922.

⁴⁶ *Dictionary of National Biography*, vol. 26, 906.

⁴⁷ Hewart, *Not Without Prejudice*, 36.

to £4000 a year by virtue of his stint as the Chief Justice.⁴⁸ Trevethin was reportedly so deaf by the time of his “resignation” as LCJ that he could not hear cases in the House of Lords as was his right. He retired to the country where fourteen years later while fishing in the Wye he slipped and fell into the water and died of a heart attack. He was ninety-three at the time.⁴⁹

There was no doubt that Gordon Hewart wanted to be the Lord Chief Justice. His biographer stated clearly it was the “post [he] coveted most,” because it would allow him to devote the rest of his life to law.⁵⁰ Prime Minister, David Lloyd George, was obviously taken with Hewart’s political savvy. He told Hewart that his “qualities would enable him to reach the highest position in the political world,” and during their years together Lloyd George offered Hewart both the Irish and Home Secretary positions. Instead, Hewart clung to the role of attorney general because of the presumptive right the attorney general had to become LCJ.⁵¹ Hewart should have listened to Lloyd George and remained in politics.

Lord Justice Patrick Devlin described Hewart as simply “the worst chief justice ever.”⁵² Cyril Harvey, QC, said in 1958, that, “there have been some dreadfully bad judges [but] none worse than Lord Hewart.”⁵³ Hewart was reportedly “boorish and rude to counsel” in court. He was also utterly dismissive and on one occasion nearly libelously insulting to the Lord Chancellor and the members of his office.⁵⁴ He engaged in a long series of nasty, public feuds with the government, particularly in the nineteen-twenties and early thirties. In

⁴⁸ *Hansard*, vol. 151 (1922), col. 1808w.

⁴⁹ *Dictionary of National Biography*, vol. 32, 792.

⁵⁰ Robert Jackson, *The Chief: The Biography of Gordon Hewart, Lord Chief Justice of England, 1922-1940* (London: Harrap, 1959), 126.

⁵¹ *Dictionary of National Biography*, vol. 32, 792.

⁵² Patrick Devlin, *Easing the Passing: The Trial of Dr. John Bodkin Adams* (London: Bodley Head, 1985), 92.

⁵³ Shetreet, 46.

⁵⁴ *Dictionary of National Biography*, vol. 26, 906.

fact, his influence on other justices was highly detrimental. In 1929, it prompted Sir Claud Schuster, permanent secretary to the Lord Chancellor, to comment:

. . . in recent years, the weight of prejudice against the State in the minds of many members of the Court of Appeal and Judges of the High Court has been such as seriously to affect the Administration of Justice.⁵⁵

There was also documented evidence that Gordon Hewart markedly abused the power given to the LCJ to assign cases to other judges. When Herbert Asquith was appointed to the bench, Hewart was incensed. He claimed that he had not been “shown sufficient respect” during consultation on the appointment. Therefore, he assigned the newly minted Lord Justice Asquith the most “notorious criminal cases” that the Old Bailey had at the time. It was a blatant effort to cause the inexperienced Asquith to make a mistake and damage his reputation.⁵⁶

Ultimately, no flaw of Hewart’s was more detrimental to English justice in both the High Court and the Court of Criminal Appeal, than his utter inability to transition from advocate to judge. In his scrupulously researched book, *Judges on Trial*, Shimon Shetreet wrote:

To be fit for the seat of judgment, a man should be of even temper and good manners, and be worthy of being trusted to display courtesy to persons appearing in court, be they barristers, litigants, witness or jurors Particular attention should be paid to the danger of a barrister remaining an advocate even when he goes to the bench; the ability to see only one point of view, however helpful to an advocate, is not a judicial quality.⁵⁷

It was clear that Lord Hewart possessed neither an even temper or good manners. Yet his failure to stop advocating for one side over the other was notorious. In *The Advocates Devil*, C. P. Harvey quoted a “leading silk” as saying:

⁵⁵ Ibid.

⁵⁶ Shetreet, 41.

⁵⁷ Ibid., 6.

Lord Chief Justice Hewart remained the perpetual advocate. The opening of a case had only to last for five minutes before one could feel—and sometimes actually see—which side he had taken. Thereafter, the other side had no chance.⁵⁸

Sometimes, Lord Hewart did not even need those five minutes, because he had already made up his mind before the trial began. Such a trial was that of Edith Thompson and Frederick Bywaters in the Court of Criminal Appeal on December 21, 1922. The case of Thompson and Bywaters, like Crippen twelve years before, was a titillating, headline-grabbing sensation, its every development watched by an anxious public and, apparently, the Lord Chief Justice.

It all began at midnight on October 4, 1922, when Percy Thompson and his wife Edith were returning to their home in Ilford from a late night at the theater. As they walked along the deserted Belgrave Road toward their house on Kensington Gardens a man approached from behind and, after pushing Edith off the sidewalk, stabbed Percy Thompson repeatedly before running away. The final stab wound severed Thompson's carotid artery and he died a few moments later.⁵⁹

There was a witness in a nearby house that testified he heard a woman scream "Oh don't, oh don't, in a most piteous manner,"⁶⁰ around midnight. There were, additionally, several people returning late from the theater like the Thompsons to whom Edith frantically approached for help getting a doctor for her husband. Everyone testified that Edith was inconsolable and near hysterics. The police were called, the body was taken away and Mrs. Thompson taken the few remaining yards to her home. The police sergeant that took her home testified that even then she did fully comprehend that her husband was dead.

⁵⁸ C. P. Harvey, *The Advocate's Devil* (London: Stevens, 1958), 32.

⁵⁹ Filson Young, ed., *Trial of Frederick Bywaters and Edith Thompson* (Glasgow: William Hodge and Co., 1923), 39. (Ilford Police Surgeon testimony)

⁶⁰ *Ibid.*, 19. (John Webber testimony)

Everyone that came in contact with Edith Thompson that night saw a woman profoundly distressed over the attack on her husband. No one said she was insincere or that they had the slightest suspicion that she was not a profoundly distraught woman. But Edith had lied that night, and lied repeatedly. She claimed she did not know what really happened. She began every narrative with her husband calling out or starting to fall. When Mrs. Pittard, one of the people she rushed to for help finding a doctor, asked her what happened she said, “Oh don’t ask me, I don’t know. Somebody flew past, and when I turned to speak to [Percy] blood was pouring out of his mouth.” Although, when she made her first official statement to the police at 11:00 am on the morning of the murder, there was no more mention of anyone else.⁶¹ The next day at the police station Edith gave yet another version of events:

My husband suddenly went into the roadway, I went after him, and he fell up against me, and called out “oo-er.” He was staggering, he was bleeding, and I thought that the blood was coming from his mouth. I cannot remember whether I saw anyone else there or not.⁶²

By this time, however, the police knew far more about the night Percy Thompson was murdered and they turned to asking Edith questions about a certain Freddie Bywaters. She responded that she indeed knew him and that he had been a friend of the family for many years and that he had lodged with her and her husband until August 1921. She also acknowledged that the letters the police had taken from her office were from Bywaters. It was only when she was leaving the police station and saw Bywaters in custody that she broke down completely, “Oh God; oh, God, what can I do? Why did he do it? I did not want him to do it.”⁶³ She then made an additional statement admitting that she had recognized Bywaters on that night as the man who stabbed her husband.

⁶¹ Ibid., 35. (Thompson’s statement entered into testimony by DI Richard Sellars)

⁶² Ibid., 36.

⁶³ Ibid., 37.

On October 5 Edith Thompson and Frederick Bywaters were jointly charged with the murder of Percy Thompson. Though long before their actual trial on December 6, they were tried in the English press. The scandal of a married woman having an affair with a younger man in her husband's house was all too tempting to ignore. When it was discovered that Bywaters had saved dozens of love letters Edith had sent him, even the usually staid *Times* could not resist detailing their more sordid content. *The Times* used snippets from the letters as paragraph headings, therefore, "The Tea Tasting Bitter" and "Enough for an Elephant" became sinister incitements to poison Percy Thompson weeks before the trial even began at the Old Bailey.⁶⁴

Yet as salacious as the love letters appeared to be, something else was at play in the case of Edith Thompson. Since the end of World War I, many Britons, particularly of Hewart's generation, had come to hate and even fear women like Edith Thompson, for Edith Thompson was a perfect example of what had become known as a "Modern Woman."

During World War I, the British government begged women to join the workforce to both further the war effort (such as working in a munitions factory) and replace the thousands of men who had left their jobs to join the military. The problem arose when these women, so desperately needed during the war, came to love the freedom of earning a living outside the home. This "modern" or "new" woman, emboldened by the independence she experienced during the war was after the war branded as un-British. Women were portrayed as a threat to the very core of the nation for refusing to meekly and hurriedly return to their pre-war roles as wives and "bearers of the race."⁶⁵

⁶⁴ "Ilford Murder Charge: Mrs. Thompson's Letters," *Times* (London) 25 October 1922.

⁶⁵ Virginia Nicholson, *Singled Out*, (Oxford: Oxford University Press, 2008) 127.

Thompson must have looked like the epitome of this “un-British” woman. She had no children even after a seven-year marriage. She held a responsible job as a bookkeeper and manager of a milliner’s shop for which she earned a higher salary than her husband did as a city clerk. She was even known to enjoy a night out with her girlfriends attending a West End theater and drinking port and lemon in a pub.⁶⁶ Whether Percy Thompson objected to his wife’s lifestyle is unclear. Suffice it to say, to many in society at the time, Edith Thompson was not only a potential murderer, she was a threat to English womanhood.

Had Thompson been a more traditional (pre-war) woman and had the English press been more restrained in their coverage of this case it is doubtful that even Bywaters would have been convicted of capital murder. In an early statement he claimed that he did not intend to kill Thompson but to fight him and perhaps frighten him into leaving his wife. This is not inconsistent with an impetuous young man in love with an unattainable woman. The whole scene might be more accurately explained as a heated argument that led to a fist-fight that got horribly out of control.

Instead of trying to save his own life, however, Bywaters spent the whole of his testimony at trial trying to convince the jury that Edith Thompson had nothing to do with the crime. Letter after letter was read to him as he tried to explain away its content. Bywaters claimed that the references to poison in the letters were not part of a plan to kill Percy, but Edith’s plan to kill herself if she could not get free. Bywaters also tried to convince the jury that the letters were more often nothing but Edith’s flights of fancy and romanticism—not genuine plans of any kind. It was all to no avail. On December 11, 1922, both defendants were found guilty of murder and sentenced to death. On December 21 in separate, but consecutive appearances, Lord Hewart heard their appeals.

⁶⁶ Kennedy, Helena, *Eve Was Framed—Women and British Justice* (London: Vintage, 1992), 255.

Edith Thompson's appeal was just the third capital case that Lord Hewart heard in the Court of Criminal Appeal since becoming LCJ the previous April. Though inexperience was not the issue in the appeals of Bywaters and Thompson. Evidence indicated that Hewart took his seat in the Court that day with his decision already made. Hewart's biographer, Robert Jackson, stated that, "in public as a judge and in private conversation Hewart always referred to [the Thompson case] as squalid and indecent."⁶⁷ Jackson highlighted Hewart's staunchly held opinion that two murderers were justly hanged and that he had "no patience with the hysterical public moves" (such as pleas to the Home Office) to save their lives.

Bywaters' appeal began with his attorney, Cecil Whiteley, again trying to first save Edith's life, by arguing that his client and Edith Thompson should not have been tried together because there was "no evidence at all that Mrs. Thompson did anything to aid and abet the actual commission of this crime."⁶⁸ To this Hewart responded: "speaking for myself, I am not prepared for a moment to admit that there was no evidence that Mrs. Thompson aided and abetted the actual commission of this crime."⁶⁹ The LCJ does not elaborate, but there was no such evidence presented at the trial to confirm Hewart's assertion.

It was clear from Bywaters' appeal that Lord Hewart was obsessed with the love letters. He early in the Bywaters' judgment acknowledged that there were only three surviving letters from Bywaters to Thompson. One would think that fact alone would have given the LCJ pause. Surely the utter one-sidedness of this infamous correspondence deserved comment. But beyond acknowledging it, the LCJ moved on. After quickly dismissing Bywaters' appeal Lord Hewart turned his attention to Edith Thompson.

⁶⁷ Jackson, 153.

⁶⁸ Young, *Bywaters and Thompson Trial*, 253.

⁶⁹ *Ibid.*

In the first paragraph of his judgment, Lord Hewart destroyed all hope of an impartial appeal in the case:

Before I come to deal with the argument that has been presented on behalf of the appellant by Sir Henry Curtis Bennett, it is necessary, as shortly as possible to review some of the facts of this essentially commonplace and unedifying case.⁷⁰

Again, before he addressed the grounds for appeal, Hewart referred to the love letters as clear evidence of a “most culpable intimacy [a] remarkable and deplorable correspondence, full of the most mischievous and perilous stuff.”⁷¹ Lord Hewart’s entire attitude to this case was heard in the phrase “culpable intimacy.” The letters were evidence to Hewart that Edith Thompson had shown a “passionate, and in the circumstances, wicked affection,” for Bywaters. It was that passion, that intimacy, that Hewart found criminal. Whether she had incited Bywaters to murder was secondary. Hewart dismissed Edith Thompson’s appeal and she and Bywaters were hanged on January 9, 1923.

Lord Hewart prided himself on being above the emotional uproar in this case. What he failed to do was to see through that uproar. Hewart said that he had no “patience” for the hysterics surrounding Edith Thompson. Those hysterics were exactly, and one might say the only, part of this case that Lord Hewart passed judgment upon.

Despite Hewart’s ever growing reputation for being an appalling judge, he did understand, at least intellectually, the importance of having a court of criminal appeal. In a speech to the Canadian Bar Association in 1927 Hewart explained:

What matters, and matters profoundly, is that everybody engaged in administering the criminal law [is] well aware that a Court of Criminal Appeal is in existence. The consequences of that diffused and abiding knowledge are quite incalculable.⁷²

⁷⁰ Ibid., 255.

⁷¹ Ibid.

⁷² Jackson , 147, 189.

English justice was better off with the Court in place. Even an LCJ who could not lay down his tendency to advocate and pre-judge the cases before him recognized that fact. Perhaps the most curious thing in Lord Hewart's long career as LCJ was that, besides recognizing the importance of the Court, he gave the Court the one precedence it had not had for twenty-three years: an appeal on fact.

An appeal on fact, along with the ordering of a new trial, were fiercely debated in both Houses of Parliament when the Court was being created. One could easily speculate that this question more than any other had prevented a court of criminal appeal from being formed until the relatively late date of 1907. In 1931 it looked as if, even though allowed by the *Criminal Appeal Act 1907*, that an appeal on fact would never be heard. This would, nevertheless, change in dramatic fashion when the case of Herbert William Wallace appeared before Lord Chief Justice Hewart and the Court of Criminal Appeal.

In January 1931 Herbert Wallace was a fifty-two year old agent for the Prudential Assurance Company living quietly with his wife of seventeen years in the Anfield area of Liverpool. On the evening of January 20 he left his wife, Julia, shortly after tea to meet a prospective client. When he returned home he found his wife on the floor of the parlor, her head lying in a massive pool of blood. She had been bludgeoned to death with such violence that her skull had burst.⁷³

The only thing that was ever certain in this case was that Julia Wallace was viciously murdered. The police suspected Herbert Wallace almost immediately, but their suspicions were confirmed absolutely once they discovered that the prospective client Wallace had gone to see on the night of the murder did not really exist. Wallace readily admitted that the phone message, taken for him by a friend at the City Café, to meet a Mr. Qualtrough must have

⁷³ Roger Wilkes, *Wallace—the Final Verdict* (London: Triad Panther, 1984), 47.

been a hoax. Although initially he thought the call was genuine, and several witnesses testified they did see Wallace in Sefton Park searching for the address he was given. Wallace was, nonetheless, arrested for his wife's murder on February 2, 1931.

Wallace's case, like Bywaters and Thompson before him, and indeed Harvey Hawley Crippen before that, was a lurid tale told in the pages of Britain's newspapers. Details of the murder and the subsequent trial quickly "spread the length and breadth of Merseyside."⁷⁴ In the *Liverpool Echo* the murder was called the "Naked Man Case" because it was reasoned that the only way Wallace could have murdered his wife without getting even a speck of blood on his clothes was to have committed the murder in the nude.⁷⁵ Such salacious coverage caused hundreds of people to line up in hope of grabbing a seat in the public gallery for Wallace's committal proceedings. The next day the *Liverpool Daily Post* reported verbatim the entire police case against Wallace.⁷⁶ One thing was certain, finding an impartial jury would be nigh on impossible.

In fact, finding a jury at all should never have been an issue. The police case against Wallace was far too thin to, under normal circumstances, ever go to trial. But Herbert Wallace was in many ways rather odd. He was quite tall (6'2") and painfully thin. In 1907 his left kidney had been removed and the other was failing and ill health gave him a decidedly gray pallor. He wore tiny gold-rimmed glasses that did little to disguise his large, protruding, "bug" eyes.

His personality, too, was peculiar. His Prudential clients thought him surly and impolite. He would often collect their insurance premiums without even a fleeting social comment. Apparently, he was incapable of strong emotion and his distant, seemingly

⁷⁴ Wilkes, 60.

⁷⁵ Ibid., 119.

⁷⁶ Ibid., 87.

indifferent, attitude to his wife's death immediately aroused suspicion in the Liverpool police officers investigating the case.

The medical examiner, John MacFall, commented that Wallace's behavior at the murder scene was decidedly "abnormal" and that Wallace was "too quiet, too collected," for someone whose wife had just been murdered. He testified that:

Whilst I was in the room examining the body and the blood, [Wallace] came in smoking a cigarette, and he leant over in front of the sideboard and flicked the ash into a bowl . . . it struck me at the time as being unnatural."⁷⁷

The Liverpool police became determined to find a case against this strange man whatever the cost. The police never fabricated evidence against Wallace, but they were quite aware that the evidence they had was weak. For example, one of the most intriguing documents in the Wallace case was a list made by Liverpool Detective-Inspector Herbert Gold. In a report written for his superiors, Gold made a pros and cons list of the most salient points in the Wallace case. Of the savagery of the murder: "Wallace, having struck one blow, would strike subsequent blows to ensure death [since] his wife could denounce him." But, a "homicidal maniac would [also] strike several blows." Wallace went to great lengths to find Mr. Qualtrough—thereby establishing an alibi. But perhaps he was just anxious to find new business. Finally, the deceased was insured for £20 and had £90 in savings that would go to Wallace upon her death, but then Wallace had no financial difficulties.⁷⁸ In other words, for every point against Wallace there was a reasonable explanation or a point in his favor. For every point that is except Wallace's looks and personality.

Wallace's trial began on April 22, 1931. Crowds started forming at dawn to secure a place in the public gallery of the Crown Court at St. George's Hall in Liverpool where the

⁷⁷ Jonathan Goodman, *The Killing of Julia Wallace*, (New York: Charles Scribner, 1969), 55.

⁷⁸ Wilkes, 98-99.

trial was held. Wallace was represented brilliantly by Roland Oliver, KC. Even the trial judge, Mr. Justice Wright, seemed in favor of an acquittal. Everyone was reasonably certain Wallace would be freed. Everyone except the jury.

The problem was that although not from Liverpool itself, the members of the Wallace jury had still been chosen from regions well within the circulation of all the Liverpool dailies. It was said that the jury was “simply not listening to the evidence.”⁷⁹ Roland Oliver understood why. On the second day of the trial he commented that he was certain that most if not all of the jury members had made up their minds before they ever entered the jury box.⁸⁰

On April 25 Herbert Wallace was found guilty of the murder of his wife, Julia. The verdict was reportedly so unexpected that “people in the court gasped with surprise.”⁸¹ Wallace, being sure of acquittal, had even gathered his coat and hat before the verdict was delivered, ready to exit the court. After the verdict, Justice Wright was visibly shaken and his voice was “hardly audible” as he pronounced the sentence of death.⁸²

Wallace’s appeal was fixed for May 18, 1931, in London. No one, however, held any hope it would save Wallace’s life for the appeal was to be heard by the Lord Chief Justice, Lord Hewart. Of the ten grounds for appeal, the first was the one on which the appeal would be decided:

The verdict was unreasonable and cannot be supported having regard to the evidence. The whole of the evidence was consistent with Wallace’s innocence and the prosecution never discharged the burden of proving that he and no-one else was guilty.⁸³

⁷⁹ Goodman, 244.

⁸⁰ Ibid.

⁸¹ “Condemned Man Freed by the Appeal Court,” *Daily Express* (London), 20 May 1931.

⁸² Goodman, 241-242.

⁸³ Ibid.

Roger Wilkes described the potential quashing of the verdict against Wallace as being “tantamount to asking the Appeal Court to rule [that] the Liverpool jury were fools.”⁸⁴ Before the appeal even began, Wallace’s solicitor, Hector Munro, wrote a letter to the Prudential expressing his grave doubts about the outcome. He thought that it was all but certain that the “Appeal Judges are likely to take the view that the jury are the judges under the English Law, and that a decision on the facts must finally be left to them.”⁸⁵ The Prudential had supported Wallace throughout the trial, even paying for much of his defense. Munro concluded his letter by encouraging them to waste no time in seeking an appointment with the Home Secretary who would be the only person left who could save Wallace’s life after the appeal failed.⁸⁶

Then, a very curious thing happened. Lord Hewart who had a reputation of being “one of the most vigorous and vociferous believers in the impeccability of the English jury system of this or any other century,”⁸⁷ ruled that the jury in the Wallace case was wrong. The Appeal judges concluded that the evidence showed that “[Wallace] had lived on terms of closest affection with his wife and had no conceivable motive for killing her.”⁸⁸ They also decided that the criticism of Wallace’s demeanor was unfair and that his defense team did not receive their proper share of help from the Liverpool police.⁸⁹

Lord Hewart delivered the Court’s decision to a packed but silent courtroom on the second day of the appeal. In a scene described by the *Daily Express* as “the most dramatic in

⁸⁴ Wilkes, 58.

⁸⁵ Goodman, 248.

⁸⁶ Ibid.

⁸⁷ Ibid., 251.

⁸⁸ *Criminal Appeal Reports*, 23 CR App R 32, 33.

⁸⁹ Ibid.

the history of the Criminal Appeal Court,”⁹⁰ Hewart concluded the Court’s decision by citing Section 4 of the *Criminal Appeal Act 1907*:

The Court of Criminal Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it cannot be supported having regard to the evidence.⁹¹

Hewart’s final words, “the result is that this appeal will be allowed and this conviction quashed,” were greeted by cheers in the courtroom and the Court of Criminal Appeal finally had a precedence for deciding an appeal on the basis of fact.

After spending a month in the condemned cell, Herbert Wallace, against all odds, was a free man. He returned home to Liverpool, but sadly, in less than two years, on February 26, 1933, he died of kidney failure at Clatterbridge Hospital.⁹² He was buried next to his wife, Julia, in Anfield Cemetery.

Despite all the negative aspects of Hewart’s record as a judge, including his inability to see the case of Thompson and Bywaters impartially, his decision in the Wallace appeal was a credit to English justice and it greatly strengthened the Court of Criminal Appeal. The Court was suddenly seen as a more independent body, a body that was genuinely fulfilling its mandate to protect citizens from miscarriages of justice.

In 1933 personal tragedy also struck Lord Hewart. Sara Hewart, Lord Hewart’s beloved wife of forty-one years died suddenly. It was reported that Lord Hewart was “prostrate with shock” over his wife’s death and was too ill to attend her funeral. She was buried in Manchester in the same grave as their son who had been killed at Gallipoli.⁹³

⁹⁰ *Daily Express* (London), 20 May 1931.

⁹¹ *Ibid.*

⁹² Goodman, 269-270.

⁹³ “Lord Chief Too Ill to Go to His Wife’s Funeral,” *Daily Express* (London), 7 November 1933.

Soon after his wife's death, rumors began that Lord Hewart would retire,⁹⁴ though he remained LCJ for seven more years. Unfortunately, he never ceased to be at public odds with whatever government was in power. Then in October of 1940, Prime Minister, Winston Churchill, apparently had enough of the combative Hewart and demanded his resignation via a telephone call.⁹⁵ His ignominious end was compared directly to that of Lord Trevethin.⁹⁶

Hewart was replaced by Thomas Inkslip who became Lord Caldecote. Caldecote was the last political appointment to the role of Lord Chief Justice. Thomas Inkslip, as Solicitor General, led the prosecution in the Bywaters/Thompson case and had appeared before Lord Hewart on many occasions. Yet Caldecote was a decidedly different sort of LCJ than his predecessor. Caldecote's most notable traits were his "calm judgment and steady capacity to weigh evidence and draw unemotional conclusions."⁹⁷

His most famous case as LCJ was the post-war appeal of William Joyce (the notorious "Lord Haw Haw") for treason on October 30-31, 1945. Caldecote upheld Joyce's conviction, but the case was of such complexity and had so greatly "aroused excitement and controversy in the country" that an additional appeal to the House of Lords was allowed. The House of Lords again upheld his conviction and Joyce was hanged on January 3, 1946, at Wandsworth Prison.⁹⁸

Caldecote suffered from continued poor health and shortly after the Joyce case ended he retired. A year later, he died at the age of seventy-one. Lord Caldecote had been LCJ for

⁹⁴ "Lord Chief Justice May Retire: Sir Thomas Inkslip Successor," *Daily Express* (London), 23 November 1933.

⁹⁵ *Dictionary of National Biography*, vol. 26, 907.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, v.29, 311-312.

⁹⁸ Peter Martland, *Lord Haw Haw: The English Voice of Nazi Germany* (Kew: The National Archives, 2003), 95.

William Joyce was found guilty of treason for pro-German broadcasts he made from Germany to Britain during the war. The nickname "Lord Haw Haw" came from the highly affected upper-class English accent he used during these broadcast.

just six years. He would be replaced by the first genuine (discounting poor Lord Trevethin) appointment to the post from the judiciary: Rayner Goddard. There would never again be a politician in the office of Lord Chief Justice. The Court would, in future, be spared a leader who had political favorite as his main (if not only) recommendation.

On the other hand, the more egregious element of selecting the head of the Court of Criminal Appeal remained. The Chief Justice would continue to be allowed to try cases in the lower courts that would then go to appeal by a panel of judges who were in effect under his control. The blatant possibility of a miscarriage of justice caused by this structure was still firmly in place when Rayner Goddard became Lord Chief Justice, head of the Court of Criminal Appeal of England and Wales in 1946. And a period in English history in which miscarriages of justice would run rampant was about to begin.

CHAPTER 3

THE REIGN OF LORD CHIEF JUSTICE GODDARD

Lord Goddard? You mean Lord God-damn!
—Winston Churchill

As complex as the men were who ran the Court of Criminal Appeal before 1946, none could match the complexity or sheer might of personality of Rayner Goddard. With a remarkably few exceptions, it is difficult to find unreservedly favorable commentary on Goddard's tenure as the head of the Court of Criminal Appeal. In nearly every popular account and many scholarly accounts as well, Rayner Goddard is portrayed as a colossal bully who did little more than wield his Victorian sensibilities to crush the lives of youthful offenders in post-war England. To many, he exemplified everything wrong with English justice after the war.

This image of Goddard extended well past his tenure as LCJ and even after his death. For example, just days after Goddard died at age 94 in May 1971, Bernard Levin in an opinion column in *The Times* branded Goddard's stint as LCJ a "calamity" and his influence on the judiciary as "unrelievedly malign."¹ In 1989, Terence Morris, in an astute and well-written overview of the period, characterized Goddard as an "irascible, reactionary old man" who was on his way to becoming an "enthusiastic misanthropist."² In addition, as late as 1995 during a debate in the Commons on a new Criminal Appeal Bill, a Bill that would usher in the most sweeping changes the British justice system had

¹ "Judgment on Lord Goddard," *Times* (London), June 8, 1971.

² Morris, Terence. *Crime & Criminal Justice Since 1945*, (Oxford: Basil Blackwell, Ltd.), 48.

seen in decades, an MP in essence called Goddard a scoundrel, a remark that went unchallenged.³

However, the most malicious story, yet the one that best sums up (if only in parody) the popular opinion of Goddard, came from barrister, John Parris, in 1991. Parris had appeared before Goddard on several occasions, most notably as defense counsel for Christopher Craig in the 1952 trial of Craig and Derek Bentley. It was Parris' contention that he was told by Goddard's chief clerk, Arthur Smith, that when Goddard would sentence a young offender to hang, as he did with Derek Bentley, he would derive such pleasure from doing so that he would ejaculate.⁴ There is no evidence, whatsoever, that Arthur Smith ever said such a thing. One has only to read Smith's autobiography of the fifty years he spent as Goddard's clerk to conclude that partaking in salacious gossip with defense counsel was not something Smith was likely to do.⁵ Notwithstanding, this story was often accepted as fact and repeated many times.

So, how did Rayner Goddard get such a horrendous reputation? He was the Lord Chief Justice and thereby the permanent head of the most powerful court in England and Wales from 1946 until his retirement in August 1958. These twelve years ranked as some of the most tumultuous in twentieth-century Britain. By 1953, for example, violent crime committed by juveniles had nearly quadrupled from pre-war figures. By one interpretation, the 1953 figures indicated "[some] 22,500 children under the age of 14 and 16,200 young persons between 14 and 17 were found guilty of indictable offenses in

³ *Hansard*, vol. 256 (1995), col. 23-114.

⁴ John Parris, *Scapegoat: the Inside Story of the Trial of Derek Bentley* (London: Duckworth, 1991), 49.

⁵ Arthur Smith, *Lord Goddard—My Years with the Lord Chief Justice* (London: Weidenfeld and Nicolson, 1959).

England and Wales.”⁶ Surely, a no-nonsense judge like Goddard should have been just what society needed to combat this problem.

Opinion was also widespread that Lord Caldecote’s frequent absences because of ill health had left the Court of Criminal Appeal and the judiciary as a whole in a shambles. Lower courts were purportedly running much too slowly and were delivering sentences that were far too lenient. Shortly after Goddard was appointed LCJ he received a letter from the Lord Chancellor, William Jowitt, decrying the “soft and wooly” attitude the judiciary had been showing criminals in recent years.⁷ Jowitt was also concerned with the juvenile offender and demanded that Goddard take drastic steps to end the terror inflicted upon society and its police by “gun toting” young criminals.

There was little fear that Goddard would be at all soft and wooly. He also had a judicial track record for being anything but lenient. In many ways, Goddard seemed the ideal man to head the judiciary during this troubled period of history. Yet history has largely forgotten any good qualities Goddard brought to his role as LCJ and replaced them with the scurrilous images detailed above.

It is the contention of chapter three of *A Veritable Revolution* that Goddard’s negative reputation was garnered from, more than anything else, two factors. First, his abysmal behavior as the trial judge in the 1952 murder case of Derek William Bentley left the historic view of him in tatters. The miscarriage of justice that Goddard caused during the trial, ultimately cost Bentley his life. But it did not die with him. Instead, this

⁶ Montgomery Hyde, ed. *Trial of Christopher Craig and Derek William Bentley*. (London: William Hodge and Company Ltd., 1954) 1.

⁷ Thomas Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford: Oxford University Press, 2000), 63.

singular injustice reverberated in British history for nearly fifty years, until another Lord Chief Justice, Thomas Bingham, finally set it right.

The second factor is what Bernard Levin called Goddard's "unrelievedly malign" influence on the English judiciary and particularly the Court of Criminal Appeal. Many Chief Justices had at times treated the Court as their private tribunal, but it was with Goddard that the Court of Criminal Appeal and the Lord Chief Justice seemingly become one. By both words and actions, Goddard demonstrated a desire to alter the very nature of the Court. To Goddard, the Court became little more than a confirming body to the decisions of the lower courts, assuming those decisions resulted in severe punishment for offenders. From the beginning, he made it clear to lower courts that harsh sentences would be upheld in the Court of Criminal Appeal, not quashed.⁸

Lord Alfred Denning, Master of the Rolls⁹ from 1962 to 1982, wrote in the foreword to Fenton Bresler's biography of Goddard that the Court of Criminal Appeal was "dominated" by LCJ Goddard:

He was so much in command that his colleagues on either side [in the Court of Criminal Appeal] did not venture to take much part in the discussion . . . [Goddard] would whisper, 'There's nothing in this is there?' Then, on getting their murmured assents, he would straightway give judgment. I have known him not to bother to ask them, but to take their assent for granted and deliver judgment forthwith.¹⁰

Denning was a friend of Goddard's. He began the foreword by saying Goddard was a "great" man. But Alfred Denning knew this was not the way the Court of Criminal Appeal should be run. He did not comment on any of the controversies surrounding

⁸ Eric Grimshaw, Glyn Jones, *Lord Goddard: His Career and Cases* (London: Allan Wingate, 1958), 10.

⁹ The Master of the Rolls was the head of the Civil Division of the English Court of Appeal and as such was the second most senior member of the judiciary.

¹⁰ Bresler, Fenton, *Lord Goddard: A Biography of Rayner Goddard Lord Chief Justice of England* (London: Harrap, 1977), vi-vii.

Goddard, but by choosing this specific anecdote Denning, at least inadvertently, gave weight to the comment that Goddard's influence on the judiciary was indeed malign.

One of the few balanced summations of Goddard's life appeared in the Oxford Dictionary of National Biography. After detailing the Bentley case, the conclusion was that Goddard, although a highly controversial figure, was more than anything, a product of his turbulent time.¹¹ One cannot help but think that a more accurate description would be that Goddard was a product of another time wholly ill-equipped to address what was a modern crisis.

The post-war crime wave was a real threat to society. Goddard and his fellow judges confronted a problem unparalleled in modern criminal history. The courts were being overrun by largely working-class offenders who had no regard for human life, their own or others, let alone the dictates of society. What was astonishing though was that Goddard apparently made no attempt to understand what was actually happening. Instead he held fast to a reductionist belief that harsh punishment was all that the problem needed.

Most of the young offenders who came before Goddard had come of age during the harrowing war years. For example, schools, such a large part of the infrastructure of youth, had often been bombed into oblivion. Even when a school did exist children who had spent their nights in bomb shelters and their mornings making their way through the rubble were not going to be stellar students if they managed to attend school at all.

The fear of being under attack must have played havoc with the minds of the young during this period. Coupled with the usual problems of adolescence, these children had spent years trying just to survive. Derek Bentley had been twice dug out from beneath his destroyed home. Moreover, his eldest sister, Joan, his aunt, and his grandmother had all been

¹¹ *Dictionary of National Biography*, vol. 22, 552.

killed in bomb attacks on south London.¹² And Derek Bentley was just one example. Surely, it was understandable that these children saw life not as a structured, law abiding, enterprise but instead as a sort of free-for-all adventure of endurance.

Then, when the war ended many people, particularly of Goddard's generation, thought life would return to a pre-war calm. But two factors besides a great body of alienated youth indicated that things were about to get far worse. One was that wartime rationing turned into post-war rationing which in turn strengthened the black market and the criminal element that controlled it. The second was that post-war Britain was besieged with guns. As David Yallop put it, "Thousands of Lugers, Colts, Webleys, Remingtons and dozens of other makes and types of guns came into Britain in the bottoms of kitbags."¹³ In a society in which even the police were unarmed, post-war youth became fascinated with guns. At his trial, Christopher Craig admitted to having a collection of 40-50 guns that he kept hidden beneath the floor boards in his attic.¹⁴

The Bentley case was the most famous example of an illicit gun wreaking havoc on post-war English society. It began on the night of November 2, 1952, when Derek Bentley and his friend, Christopher Craig, took a bus from their Norbury homes to Croydon in South London. After an aborted attempt to rob a butcher's shop they ended up at the gate of a warehouse on Tamworth Road belonging to Barlow and Parkers, a wholesale confectioner. After standing around acting suspiciously, pulling their hats down and stepping into the shadows when a car drove by, they scrambled over the gate. From the alley by the building, they then climbed a drainpipe to the roof. Although, unbeknown to either of the would-be burglars, a little girl, Pearl Ware, and her mother

¹² Iris Bentley, Penelope Denning, *Let Him Have Justice* (London: Sidgwick & Jackson, 1995), 95.

¹³ Yallop, 23.

¹⁴ Hyde, 123.

had been watching the two men from the window of their upper floor apartment directly across the road. Mrs. Ware told her husband who then hurried to a police call box and the police were on their way.¹⁵

What exactly happened on that roof will probably be debated forever. The barest facts are that Christopher Craig had a gun. When the police arrived he began shooting. After a gun fight of some duration, Croyden Police Constable, Sidney Miles, burst through a jammed door that led to the roof from the building. He was immediately shot by Craig just above his left eyebrow, and he died instantly.¹⁶

By all accounts Derek Bentley did not have a gun and never fired a shot. He emphatically did not kill anyone. Nonetheless, three police officers, Detective Constable Fairfax, Police Constable Harrison, and Police Constable McDonald testified that before Craig started shooting, Bentley shouted, “Let him have it, Chris.” They claimed that although it would be another fifteen minutes before PC Miles was killed, it was this encouragement that proved Bentley knew Craig had a gun. It was also alleged that this encouragement started the battle that resulted in PC Miles’ death. On November 17, 1952, both Bentley and Craig were committed to stand trial together for the murder of PC Miles under two doctrines of common law, constructive malice and joint criminal enterprise.¹⁷

The trial of Bentley and Craig was held before LCJ Goddard at the Old Bailey on December 9 and lasted three days. Both defendants were found guilty of murder, with

¹⁵ *R v. Derek William Bentley (Deceased)*, Case No: 97/7533/S1 (Supreme Court of Judicature Court of Appeal—Criminal Division 1998).

¹⁶ *Passim*.

¹⁷ *R v. Derek William Bentley (Deceased)*, Case No: 97/7533/S, 1998.

The doctrine of constructive malice states that “malice aforethought” (the mental decision to commit murder) is evident when a defendant commits murder in pursuit of another crime. It was abolished in 1957 with the passing of the Homicide Act.

Bentley receiving a recommendation from the jury for mercy. Goddard then delivered the only sentences allowed by law. Craig was sentenced to be held in prison “during Her Majesty’s Pleasure,”¹⁸ the wording used for an indefinite sentence that ended up being just over ten years. Bentley was sentenced to death. Bentley appealed his conviction on January 13, 1953, before Justices Reginald Croom-Johnson, Benjamin Ormerod, and Colin Pearson.¹⁹ That appeal was dismissed and he was hanged on January 28, 1953, at London’s Wandsworth Prison.

The utter nonsensical nature of sparing the shooter’s life but hanging his non-violent partner was lost on no one. During the trial, all sympathy lay with PC Sidney Miles and his family. Iris Bentley, in her account of her brother’s life, said that the crowds who attended the trial were like a “lynch mob” wanting someone (especially Christopher Craig) to pay for the murder.²⁰ But after the trial, when it was clear that only Bentley would pay with his life, the mood changed dramatically.

As Bentley’s execution date approached, whole segments of the British public became enraged with the idea that Bentley was set to hang for a murder that everyone agreed he did not commit. It would be the only time in British history that someone was executed for a murder when the actual murderer was allowed to live.²¹ The injustice of it, the disbelief that it could happen in Britain caused something in the British psyche to snap. A *Picture Post* article described the mood of the people as Bentley’s execution

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Iris Bentley, 105.

²¹ R. T. Paget, S. S. Silverman, *Hanged and Innocent?* (London: Victor Gollancz Ltd, 1953), 109.

approached as similar to what had “overtaken the country at the time of Dunkirk and at the time of the King’s death.”²²

After Derek was sentenced to die, Iris Bentley and her family, with thousands of supporters from all walks of life, began a desperate attempt to save his life. “Dad and I didn’t go to bed,” Iris wrote in her biography. “Mostly we just carried on, reading more letters, reading law books people had brought, Dad in his chair, me on the floor.”²³

Letters arrived in the “hundreds even thousands,” some containing money to help with the fight, so many that the Bentleys soon had a postman assigned to deliver just their mail.²⁴ The GPO installed a phone at no charge and “it never stopped ringing.”²⁵

“Suddenly,” Iris explained:

. . . the name Bentley was everywhere, on cars there were stickers saying ‘Bentley must not die’. Little old ladies sat under umbrellas at street corners collecting signatures. Even the cast of a Christmas show, Red Riding Hood on Ice, collected £200 to help. There were so many offers to help, so many kind people . . . they gave us faith in human nature.²⁶

People from across the country sought to help the Bentleys fight what was thought to be the clearest case of injustice. Londoners particularly demanded this injustice be stopped. David Yallop wrote that, “there were spontaneous demonstrations all over London.” The whole city was “on the verge of civil strife,” with “protesting

²² Ibid., 104.

The Battle of Dunkirk resulted in thousands of British soldiers being stranded on the beaches of Dunkerque, France. With the German Army fast advancing a frantic call went out across Britain for help rescuing the soldiers before they were killed or captured.

King George VI, the beloved monarch who stood stalwartly by his people during the war years, died in his sleep on 6 February 1952, at the age of 56 from lung cancer.

²³ Bentley, 136.

²⁴ Ibid., 129.

²⁵ Ibid., 137.

²⁶ Ibid., 129-130.

thousands [running] through the streets.”²⁷ But in the end, nothing could stop the scheduled execution.

Immediately after Derek Bentley’s death, and for the next forty-three years, the Bentley family and their supporters mounted a campaign to prove Bentley was innocent and wrongfully executed. That campaign ended on July 30, 1998, in the Court of Appeal—Criminal Division with the decision of Lord Chief Justice Thomas Bingham to quash Bentley’s conviction. When the Bingham decision was delivered it was hailed as proof that an innocent man had been hanged. In reality, it did no such thing.

As jarring as it now sounds, Derek Bentley was not innocent, nor did Lord Bingham declare him to be so. The miscarriage of justice in this case was not that Craig was sentenced to prison while Bentley was sentenced to death. The law in 1952 stated that no one under the age of eighteen could receive the death penalty. Under the law at the time, after a fair trial, it was perfectly legitimate for a jury to find Bentley guilty of murdering PC Miles and, again, the only sentence for a murder conviction for anyone over eighteen was death by hanging. Even denying Bentley a reprieve and letting him be hanged, although incredibly hardhearted and profoundly shortsighted, was not in itself a miscarriage of justice. Of course, the key phrase in the Bentley case was “fair trial.” That, he did not get from Lord Goddard.

Craig and Bentley were not charged with just any murder but the murder of a police officer in the line of duty. The killing of a policeman in Britain was considered a particularly heinous crime. As Reginald Paget proclaimed in his book, *Hanged But Innocent?*:

²⁷ David A. Yallop, *To Encourage the Others* (London: W. H. Allen, 1971), 253. Derek Bentley’s father was called out at 1:00am the morning Derek was hanged to try to calm the crowds who were breaking windows at the Home Office.

To Englishmen the killing of a policeman is perhaps the most serious of all crimes, and we are right so to regard it, for of all civilized people we in Britain have the least cause to fear our police. It is more than a symbol that our police go unarmed—it is a condition of our liberty and when men take advantage of our unarmed police they are threatening the whole of our liberties.²⁸

This awe for the police did not, apparently, extend to police salaries. In 1947, for example, the basic pay for a police officer working a forty-eight hour week was just five pounds. This was a pay rate lower than that of a dustman.²⁹

Death benefits were also abysmal. Sidney Miles' wife received just £2 6s per week from his death pension.³⁰ Her plight was thoroughly documented in the popular press (pretrial) and a voluntary fund was started on her behalf. This in turn caused Croydon MP Frederic Harris to open a debate on police widow's pensions in the Commons on November 11, 1952. Harris was trying to get the Home Secretary, David Maxwell Fyfe, to promise that some sort of increase in police death benefits could be arranged. After a detailed account of Mrs. Miles' finances, Harris declared it "deplorable" that she was being forced to depend on charity to survive. "It is just not good enough," Harris told the House, "to praise police officers who die while on duty."³¹

Unfortunately, Hugh Lucas-Tooth, Joint Under-Secretary of State for the Home Office, refused to promise anything. The exceedingly pragmatic Mr. Lucas-Tooth said there was little hope of implementing any change to the police pension structure set out in the *Police Pensions Act 1921*. He then gave a rather insensitive speech about what exactly constituted meritorious death on duty.³² To follow Mr. Lucas-Tooth's reasoning, one must conclude that had PC Miles burst through the stuck door onto the roof in

²⁸ Paget, Silverman, *Hanged and Innocent?* 95.

²⁹ Yallop, 26.

³⁰ *Ibid.*, 216.

³¹ *Hansard*, vol. 507 (1952), col. 905-14.

³² *Ibid.*

Croyden then fell to his death instead of being shot, his widow's financial situation would have been even more precarious. Anyone hearing this public haggle over funds would be understandably alarmed that the English police were indeed valued largely in words only.

Consequently, Derek Bentley found himself at the center of a super-charged atmosphere that pitted brave, selfless, horribly underpaid and overworked police officers against menacing and murdering young thugs. A police officer had been killed and at first everyone from members of the judiciary, the government, the media, and the average citizen seemed to coalesce behind one fact: someone had to pay for the crime. Again, in 1953 the law stated that a convicted murderer had to be at least eighteen to hang—Craig was sixteen and Bentley was nineteen.

Nevertheless, as stacked as the deck seemed to be against Derek Bentley, he still had, from a legal standpoint, an excellent chance of surviving the predicament. The prosecution had only the disputed words "Let him have it, Chris," to tie Bentley to the murder. It was true that he was on the roof with intent to rob the premises. He also had a knife and a "knuckleduster," but those were taken from him moments after he was arrested without (by all accounts) his having ever tried to use them. Derek Bentley's chance of surviving was over, however, when Lord Chief Justice Goddard chose to appear as trial judge.

Of course, Goddard would take this case. The trial of Bentley and Craig was yet another sensation in the media. It was being hailed (as so many trials were) the "trial of the century." As with Lord Alverstone and the Crippen case forty-two years before, the LCJ was fully entitled to take for himself as trial judge any case he wanted. The

perceived conflict of interest when the case went to appeal did not bother Goddard any more than it had apparently bothered Alverstone.

So what exactly did Rayner Goddard do during the trial of Bentley and Craig that resulted in Bentley's conviction being overturned forty-five years later? And more importantly, what did he do that caused another Lord Chief Justice to declare in open court that Goddard had indeed denied Bentley a "fair trial which is the birthright of every British citizen?"³³

There is no more lucid document about this trial or this case than the fifty-seven page judgment that Lord Bingham³⁴ delivered in Bentley's second appeal on July 30, 1998. Bingham's clear and concise analysis of the case at trial in 1952 and the countless controversies that had been swirling about the case for nearly five decades was nothing less than brilliant.

In the introduction to his judgment, Bingham listed the rules he and his fellow appeal judges followed in deciding the safety of a conviction from nearly half a century before. Lord Bingham stated that the Court would apply the statutory law of murder as it was in 1952, disregarding the abolition of constructive malice and the introduction of the defense of diminished responsibility that were part of the 1957 Homicide Act. As far as the "conduct of the trial and the direction of the jury," and the "safety of the conviction," the Court would use the rules laid down in the *Criminal Appeal Act 1968*. Lord Bingham explained:

Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of

³³ *R v. Derek William Bentley (Deceased)*, Case No: 97/7533/S, 1998.

³⁴ Lord Bingham heard this appeal with Lord Justice Paul Kennedy (at the time Vice President of the Queen's Bench Division), and Mr. Justice Lawrence Collins (now Lord Justice Collins). Lord Bingham delivered the judgment.

fairness, the approach indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time. This could cause difficulty in some cases but not, we conclude in this.³⁵

This statement declaring the use of a modern standard of fairness became known as the Bentley Doctrine and as Laurie Elks wrote, it was as “unexpected as it was welcome.”³⁶ The concern was that since misdirection by Lord Goddard was the first ground of appeal presented for Bentley in January 1953, the Court in 1998 would refuse to allow it to be made again. Bingham addressed this concern in his opening remarks by asserting that Goddard’s conduct during Bentley’s trial would indeed be considered in the second appeal.

One of the major controversies surrounding the Bentley case concerned the veracity of the testimony the three arresting police officers gave at the trial. Nearly every account of the case questions in some way the possibility that the three officers, who were in such diverse positions on the roof, all heard Bentley shout, “Let him have it, Chris,” just before the shooting began. The phrase is now infamous in British criminal history. It was debated for decades and the case against Bentley in 1952 depended completely on those few words. As then Crown Prosecutor, Christmas Humphries, said in his opening remarks:

[“Let him have it, Chris”] was a deliberate incitement to Craig to murder Sergeant Fairfax. It was spoken to a man whom he, Bentley, clearly knew had a gun. That shot began a gun fight in the course of which Miles was killed; that incitement, in the submission of the Prosecution, covered the whole of the shooting thereafter; even though at the time of the actual shot which killed P.C. Miles Bentley was in custody and under arrest.³⁷

³⁵ Ibid.

³⁶ Elks, *Righting Miscarriages of Justice?*, 133.

³⁷ Hyde, *Trial of Craig and Bentley*, 41.

The statement, if made, proved joint enterprise. Since everyone agreed that Bentley had in no way behaved aggressively toward the police on the roof of the warehouse, let alone shoot at them, it was the only way the prosecution could get a conviction. And as many would say, it was the only way that someone would be sentenced to hang for the murder of PC Miles. As it turned out, Mr. Humphries was to have his job of securing a conviction against Bentley made abundantly easy by the trial judge.

In Section I of the Bingham judgment, “The Case at Trial,” Lord Bingham and his fellow judges went over the whole of the police testimony and the case that was presented to the jury. They noted the numerous discrepancies in each officer’s account and concluded that those discrepancies were “more consistent with honesty than with an attempt to concoct a false account.”³⁸ For decades since the trial, and again at the second appeal, it was proposed that Detective Chief Inspector John Smith, the head of the police unit that responded to the roof top on the night of November 2, 1952, had “dishonestly orchestrated”³⁹ the police evidence. Bingham commented that the discrepancies in the testimony proved that if he did, “he made a poor job of it.”

As for the phrase, “Let him have it, Chris,” Lord Bingham was unequivocal. It was not important what anyone, especially Craig, thought Bentley had meant by the phrase. The crucial point was what Bentley actually meant by it. In evidence, Bentley denied ever having said the words. Even so, the jury in 1952 was still free to consider Bentley’s overall non-violent behavior on the rooftop as indicative of his true meaning if they believed he had actually shouted, “Let him have it, Chris.”

³⁸ *R v. Derek William Bentley (Deceased)*, Case No: 97/7533/S, 1998, Section I.

³⁹ *Ibid.*

In a long final speech for the defense in 1952 Bentley's barrister, Frank Cassels, QC, encouraged the jury to accept that if the words were said at all, it made no sense that they were an incitement for Craig to shoot at the police. It was, after all, a fact that during the whole time Bentley was on the roof he made no attempt to get away from the police. On at least two occasions, admitted by the police in their testimony, Bentley could have easily rejoined Craig, but he did not. He stayed obediently with the police officers even though Christopher Craig continued to fire his gun at them all.⁴⁰

Therefore, the second appeal judges concluded that the jury in 1952 did indeed have the information they needed to consider Bentley's case fairly. In other words, he was properly defended. But the real problem with the conduct of the trial can be heard in Lord Bingham's rejection of these initial counts of the appeal:

On the evidence presented to the court we conclude that a properly directed jury would have been entitled to convict [and] we should not regard the appellant's conviction as unsafe if the summing up had been fair and the directions in law adequate.⁴¹

Section II of the Bingham judgment, "The Summing Up to the Jury," proved that the miscarriage of justice that Bentley suffered lay directly in Goddard's hands. Lord Goddard's summing up to the jury was challenged by Edward Fitzgerald, QC, who represented Bentley in the second appeal, on several points. Though, none more damning than Goddard's failure to present two basic principles of English law to the jury: the standard of proof, and the burden of proof.

The standard of proof means that in order for the jury to convict a defendant, they must be sure of his guilt beyond any reasonable doubt. It is the judge's role in his summation to the jury to state this principle unambiguously. The judge must also make

⁴⁰ Hyde, *Trial of Craig and Bentley*, 186-187.

⁴¹ *R v. Derek William Bentley (Deceased)*, Section I.

certain the jury understands that the burden of proof is exclusively that of the prosecution. The jury must be told that the defendant does not have to prove anything and if there is any hesitation in their minds about the prosecution's case they must find in favor of the defendant.

During his summation to the jury at the trial of Christopher Craig and Derek Bentley, Goddard touched on these principles just twice. Although each time, he made further remarks that served only to negate their true meaning:

Now there are one or two preliminaries to which I call your attention, though it is hardly necessary. The first one is hardly necessary, because you know as well as I do that in all criminal cases it is for the Prosecution to prove their case and is said correctly that it is not for the prisoners to prove their innocence. In this case the Prosecution have given abundant evidence for a case calling for an answer, and although the prisoners do not have to prove their innocence, when once a case is established against them they can give evidence . . . then you have to take their evidence as part of the sum of the case. The effect of a prisoner's evidence may be to satisfy you that he is innocent, it may be it causes you to have such doubt that you feel the case is not proved, and it may, and very often does, have a third effect: it may strengthen the evidence for the Prosecution.⁴²

Goddard concluded his long summation with another confusing and contradictory attempt to explain the burden and standard of proof. Just before he sent the jury away to deliberate, Goddard made this statement:

It is dreadful to think that two lads, one, at any rate, coming, and I dare say the other, from decent homes, should with arms of this sort go out in these days to carry out unlawful enterprises like warehouse-breaking and finish by shooting policemen. You have a duty to the prisoners. You will remember, I know, and realize, I know that you owe a duty to the community, and if young people, but not so young—they are responsible in law—commit crimes of this sort, it is right, quite independent of any question of punishment, that they should be convicted, and if you find good ground for convicting them, it is your duty to do it if you are satisfied with the evidence for the prosecution.⁴³

⁴² Hyde, 196.

⁴³ Ibid., 205-206.

Bingham, citing decisions on proper summation to a jury from several cases prior to 1952, including two that Goddard himself had delivered, found that these statements were not just insufficient but had failed what was a “cardinal requirement of a properly conducted trial.” Bingham concluded:

By suggesting that the case had been ‘established’ . . . the jury in our view could well have been left with the impression that the case against the appellant was proved and that they should convict him unless he had satisfied them of his innocence . . . in our judgment this ground of appeal is made good.⁴⁴

This was enough to quash the conviction of Derek Bentley. But Bingham, Kennedy and Collins went on to address the overall prejudicial comments that Goddard made during his speech to the jury. Goddard spoke for forty-five minutes and in that time the only thing he said about Bentley’s defense was:

Bentley’s defense is: I didn’t know he had a gun, and I deny that I said ‘Let him have it Chris’. I never knew he was going to shoot, and I didn’t think he would.⁴⁵

Goddard continued by saying that against Bentley’s evidence (“which, of course, is the denial of a man in grievous peril”⁴⁶) there is the testimony of three police officers. Goddard reduced Bentley’s case to one of his word against the police. To Goddard, however, it was not enough to leave it at that, he had to make it abundantly clear what the jury members would be saying if they found Bentley not-guilty:

There is one thing I am sure I can say with the assent of all you twelve gentlemen, that the police officers that night, and those three officers in particular, showed the highest gallantry and resolution; they were conspicuously brave. Are you going to say they are conspicuous liars?⁴⁷

The word of the police officers against the word of Derek Bentley was not the whole case Mr. Cassels presented for his client. Not that Goddard was required to

⁴⁴ *R v. Derek William Bentley (Deceased)*, Section II (3).

⁴⁵ Hyde, 293.

⁴⁶ Ibid.

⁴⁷ Ibid.

reiterate everything said on behalf of the defendant. But at no time did Goddard allude to the submissiveness that Bentley showed the police. In one now notorious moment in the summation, Goddard tried to put on his own hand the knuckleduster that Bentley had with him on the roof. He commented on what a dreadful weapon it was and how it was easily capable of killing someone. He did not, however, remind the jury that the weapon had been taken from Bentley with no resistance just moments after the police arrived on the roof. Nor did he remind the jury that Bentley made no attempt, whatsoever, to use the weapon against the police officers.

The murder of PC Miles and the trial of Christopher Craig and Derek Bentley for that murder was accompanied by a constant media-fueled uproar. The entire country was anxious for a resolution. But just like the trial of Edith Thompson and Frederick Bywaters thirty years before, this trial needed a judge who could calm the furor surrounding the case so that justice could be done. Lord Hewart was not such a judge and neither was Lord Goddard.

Lord Bingham and his fellow judges rejected nearly the whole of Goddard's summation to the jury in the 1952 trial. Of Goddard's role in the trial they said:

[The circumstances surrounding the trial] made it more, not less, important that the jury should approach the issues in a dispassionate spirit if the defendants were to receive a fair trial. In our judgment, however, far from encouraging the jury to approach the case in a calm frame of mind, the trial judge's summing up [had] exactly the opposite effect. We cannot read these passages as other than a highly rhetorical and strongly-worded denunciation of both defendants and their defenses. The language used was not that of a judge but of an advocate. Such a direction by such a judge must in our view have driven the jury to conclude that they had little choice but to convict; at the lowest it may have done so. [The effect was to deprive him of the protection which jury trial should have afforded.⁴⁸

⁴⁸ *R v. Derek William Bentley (Deceased)*, Section II (3).

It was then that the judges declared that Goddard's summation to the jury in the trial of Derek Bentley had denied him the "fair trial which is the birthright of every British citizen."

Derek Bentley's first appeal was held on January 13, 1953. It was here that barrister Frank Cassels, in what was surely a courageous move, first made the argument that Lord Goddard did not properly present Bentley's case to the jury at his trial.

One can only imagine the pressure Cassels was under in going before the Court of Criminal Appeal to say that the Lord Chief Justice had made a grave error in his summation. But Cassels did exactly that. He argued that Goddard had presented the case almost solely from the prospective of the prosecution. He further argued that two sentences on Bentley's defense was not enough. He tried to reason with the appeal judges that had Lord Goddard presented the prosecution case with the same brevity as he did the defense then there would not have been a problem, but that was not what happened.

Cassels then told the Court that in his summation, Goddard ignored Bentley's version of events but presented in detail the version of events presented by the police.⁴⁹ To which, Justice Croom-Johnson, who headed the Court for this appeal, replied: "Of course he did."⁵⁰ Although Frank Cassels continued to fight tirelessly for his client, those four words, "of course he did," must have caused him profound distress.

The judges in this first appeal seemed to be mocking the case Cassels was putting before them. At one point Croom-Johnson assented slightly to one of Cassels' points only to then quickly warn him, "do not be lulled into a false sense of security" by that

⁴⁹ *Regina v. Derek William Bentley*, Court of Criminal Appeal, 13th January, 1953. Hyde, *Trial of Christopher Craig and Derek William Bentley*, Appendix I, 210-226.

⁵⁰ *Ibid.*, 217.

slight agreement. Croom-Johnson was also fond of referring to all that Cassels was saying as “every little point.” He wanted to know how Lord Goddard could be expected to present “every little point” to the jury. But Cassels was not saying that only minor bits of Bentley’s case had been omitted—he was arguing that the entire of Bentley’s case was all but overlooked by Goddard. Perhaps, Croom-Johnson was saying that the entire of Bentley’s case was nothing but a “little point.”

The whole appeal lasted something less than an hour.⁵¹ Justice Croom-Johnson then delivered the judgment for the Court:

In the opinion of the Court, the idea that there was a failure on the part of the Chief Justice to say anything short of what was required in putting that sort of case to the jury is entirely wrong.

Then, before he dismissed the appeal entirely, he called the case “nothing but an ordinary appeal in a murder trial . . . an ordinary appeal without foundation.” With this panel of appeal judges, one could well envision Goddard somewhere, if only in the judges’ minds, whispering, “there’s nothing in this is there?”

The abominable failure of the judges in Bentley’s first appeal did not go unnoticed by Lord Bingham in 1998. After listing some of Frank Cassels’ arguments, particularly the point that Bentley had been under arrest when PC Miles was shot, Lord Bingham wrote that in 1953 the “Court of Criminal Appeal failed to grapple with this ground of appeal, which should have succeeded.”⁵²

The key to Lord Bingham’s stance in this matter can be found in a 1999 lecture entitled, “Justice and Injustice.” In his lecture, Thomas Bingham said:

If, in a reasonable time, [a] wrongful conviction is corrected on appeal, the legal system may be said to be working. Appellate courts exist to remedy mishaps or

⁵¹ Yallop, *To Encourage the Others*, 224

⁵² *R v. Derek William Bentley (Deceased)*, Section II (3).

errors. But if a wrongful conviction is not corrected within a reasonable time on first appeal, then a gross injustice has been perpetrated.⁵³

Even more than the failure of Lord Goddard to conduct the trial of Derek Bentley fairly, the failure of the Court of Criminal Appeal to catch the error appeared to greatly trouble Lord Bingham. The second Bentley appeal was one of the most significant judgments in Lord Bingham's career. He ended it by saying:

It must be a matter of profound and continuing regret that this mistrial occurred and that the defects we have found were not recognized at the time.⁵⁴

Lord Bingham was genuinely a great man who demonstrated with the entire of his professional career his belief that the courts existed to serve the people. Although he had early in the Bentley decision announced that the appeal would be judged from a modern sense of fairness, he nonetheless made the point several times that even by the standards of 1953 Goddard's behavior was surely unfair. That the Court of Criminal Appeal, the predecessor of the court that he now headed, would miss such a blatant miscarriage of justice was surely heartbreaking.

The overriding question left to be answered after the Bingham judgment was: why had Goddard behaved the way he did during Bentley's trial? Lord Goddard was a man of abundant experience. He became a judge on April 6, 1932, when Lord Chief Justice, Gordon Hewart, appointed him to the King's Bench Division.⁵⁵ Before that he was a King's Counsel⁵⁶ from 1923 and a barrister since first being called to the bar at age

⁵³ Bingham, *The Business of Judging*, 271.

⁵⁴ *Ibid.*

⁵⁵ Bresler, *Lord Goddard*, 70.

⁵⁶ A promotion from ordinary barrister based on merit.

twenty-one in 1899.⁵⁷ It is impossible to think that Goddard simply made a series of errors at the Bentley trial.

Nor is there any evidence that Goddard even at the age of seventy-six (in 1952) was suffering from some form of senility. After all, he continued as LCJ for another five years and then remained an active member of the House of Lords until 1965.

The fact is that Goddard did what he did quite intentionally. The Lord Chief Justice, the most prominent member of the judiciary of England and Wales, deliberately set-out to guarantee the conviction of Derek Bentley. He did so by openly thwarting the rule of law secure in the knowledge that the Court of Criminal Appeal would do absolutely nothing. And he did so knowing full well that Bentley would be hanged. To Goddard hanging this one working-class teenager would be as Donald Thomas called it, “no end of a lesson” to juvenile offenders.⁵⁸

In their 1958 biography of Lord Goddard, Eric Grimshaw and Glyn Jones marked 1948 as the year in which Goddard became a “propagandist,” in fact the “principal propagandist for all those who felt that Britain was being too kind to her criminals.”⁵⁹ It was during his maiden speech to the House of Lords on April 28, 1948, that Goddard first gave public voice to his mantra that crushing punishment was the only correct response to criminal behavior. The debate was on the second reading of the Criminal Justice Bill and in that debate Goddard made several statements that would one day give clues as to what happened in the Bentley trial of 1952.

⁵⁷ *Dictionary of National Biography*, vol. 22, 548.

⁵⁸ Donald Thomas, *Villains' Paradise: A History of Britain's Underworld*, (New York: Pegasus Books), 195.

⁵⁹ Grimshaw, Jones, *Lord Goddard*, 93.

Goddard began by saying that he simply could not understand how, “criminal law [can be] a deterrent unless it is also punitive. The two things seemed to him to “follow one on the other.”⁶⁰ In aid of this belief and the use of corporal punishment, Goddard told the story from one of his own cases of a young farm-hand who was found guilty of attacking and robbing an elderly jeweler. Goddard sentenced the young man to “twelve strokes of the birch rod” and two months in prison. What Goddard was most proud of with this sentence was that the whipping and short prison term saved the farmer from losing “the services of a good farm hand over the harvest.”⁶¹

This was not the only time Goddard demonstrated his belief that justice for the working classes was in direct correlation to their usefulness to their middle and upper class employers. Just a year before, a young woman, Edna May Rees, appealed her sentence of eighteen months for larceny to the Court of Criminal Appeal only to have Goddard raise that sentence to four years. Goddard’s reason was that since Edna May was a domestic who stole from her employers she had caused “extreme difficulty” to “women in need of domestic help.” Goddard actually labeled Edna May a “public danger.”⁶²

In this first speech in the House of Lords, Goddard also expressed his utter shock that there was even a possibility that the death penalty might be abolished. He insisted that hanging must be retained because in his “humble opinion . . . there are many, many cases where the murderer should be destroyed.”⁶³ Goddard then used the details from two more of his cases, cases of particular horror, to back up his humble opinion.

⁶⁰ *Hansard*, vol. 155 (1948), col. 494-495.

⁶¹ *Ibid.*

⁶² “Sentence Increase—Four Years for Public Danger,” *Times* (London), 1 July 1947.

⁶³ *Hansard*, vol. 155 (1948), col. 494-495.

Grimshaw and Jones point out that Goddard's "should be destroyed" comment not only equated a human being to an animal but it showed Goddard abandoning his "deterrent" argument for an "eye for an eye doctrine."⁶⁴ Certainly, but the use of the word "destroyed" was chilling for another reason. It demonstrated Goddard's underlying mindset that certain human lives were expendable, less worthy of existence than others.

Goddard took this callous belief about human life and used it against Derek Bentley. It is crucial to the understanding of what happened to Bentley to note that Christopher Craig was from a middle-class family. His father, Niven Craig, was a distinguished army veteran of World War I and a member of the Home Guard in World War II. Derek Bentley, on the other hand, was from a working-class family, a family which had only in the post-war years managed to escape poverty.⁶⁵ This was something that Goddard would have deemed exceedingly important in his plan to make an example of someone in this case. One cannot help but conclude, that had the social classes been reversed in the Bentley and Craig trial no one would have hanged for the murder of PC Miles.

Notwithstanding, one might think that even if Goddard deliberately denied Bentley a fair trial, it was not his decision to let Bentley die. This was, at best, only partially true. Again, Goddard fixed the trial so Bentley would be convicted. He did so knowing that he had rendered the Court of Criminal Appeal so utterly impotent that they would not dare challenge a case in which he was the trial judge. Goddard knew, also, that without his concurrence with the jury's recommendation for mercy, no mercy would be shown Bentley.

When the jury attached a recommendation for mercy to their guilty verdict in Bentley's case they were trying to accomplish a specific purpose. The Royal Commission on

⁶⁴ Grimshaw, Jones, 100.

⁶⁵ William Bentley, Derek's father, finally achieved a level of financial security for his family when he began his own electrician business in his home.

Capital Punishment found that juries believed a recommendation for mercy would deflect the rigidity of the law that insisted anyone convicted of murder be sentenced to death. Although a jury was never asked for their reasons when issuing the recommendation, the Commission concluded that several reasons could “readily be inferred.” The most salient of these were “pitiable circumstances, youth, and absence of malicious intent or premeditation.”⁶⁶ Any one of these reasons would have prompted the Bentley jury to add the recommendation, even in the face of Goddard’s direction to convict.

The Commission further reported that they had received testimony declaring the Home Secretary, “always attaches weight to such a recommendation and would be very reluctant to disregard it if it were concurred in by the Judge.” In only six cases from 1900 to 1949 did the Home Secretary refuse a reprieve when the judge agreed with a jury’s recommendation for mercy.⁶⁷

The whole episode of the recommendation for mercy in the Bentley case demonstrated Goddard’s supreme hypocrisy. For years he implied that he was in agreement with the recommendation and that he was certain Bentley would be reprieved. Goddard’s clerk, Arthur Smith, wrote that:

The Chief himself thought all along that Bentley must be reprieved. Day after day he confidently awaited the news of the Home Secretary’s decision. And day after day passed, and the news still did not come.⁶⁸

Smith noted Goddard’s “profound distress” when Home Secretary David Maxwell Fyfe refused a reprieve and Bentley was hanged.

This was a lie. Goddard hid behind David Maxwell Fyfe and his refusal to grant the prerogative of mercy in the Bentley case for decades. Just weeks before he died,

⁶⁶ *Royal Commission on Capital Punishment*, Cmd. 8932, 9.

⁶⁷ *Ibid.*, 11.

⁶⁸ Smith, *Lord Goddard: My Years with the Lord Chief Justice*, 166.

Goddard gave an interview to David Yallop for his book on the Bentley case, *To Encourage the Others*. Goddard again expressed his profound sorrow over the hanging of Derek Bentley. Goddard then said that Maxwell Fyfe had at no time consulted him before refusing Bentley a reprieve. This led Yallop to comment:

[Goddard] felt sure that there would be [a reprieve] . . . perhaps if he had been less sure, and if he had known then that David Maxwell Fyfe would not consult him before announcing his decision, he would have attempted to exercise a greater degree of impartiality during the course of the trial. Undoubtedly the fact that he was completely convinced from the very outset of the case that Bentley would ultimately be reprieved had greatly influenced Lord Goddard. It had enabled him to treat the proceedings at the Old Bailey almost as a symbolic ritual.⁶⁹

In 1993, documents concerning the Bentley case held by the Home Office were released by the Public Records Office (now the National Archives). Found in those documents was correspondence between Goddard and Maxwell Fyfe dated December 12, 1952, and January 23, 1953. Goddard told Maxwell Fyfe emphatically that there were no “mitigating circumstances” that would warrant a reprieve for Bentley.⁷⁰ David Maxwell Fyfe would never have crossed Rayner Goddard by allowing Bentley’s execution to go forward if Goddard had not explicitly approved of him doing so.

Grimshaw and Jones wrote in 1958 that Goddard was nothing if not “unrepentant.”⁷¹ This was certainly true, for less than a year after the Bentley trial, Goddard tried it all again.

Michael Davies was a young working-class man who had been given a horribly unfair trial for the murder of another young man in a brawl on Clapham Common in July 1953. The case was, like Bentley’s, seen by some as evidence that Britain’s youth were out of control and needed to be punished. Davies’ trial was held at the Old Bailey before

⁶⁹ Yallop, 241-242.

⁷⁰ *Dictionary of National Biography*, vol. 22, 551.

⁷¹ Grimshaw, Jones, 100.

another Victorian member of the judiciary, Justice Malcolm Hilbury, and a jury from October 19 to 22, 1953.

The case of Michael Davies, just like the case of Derek Bentley, was orchestrated to secure a sentence of death and thereby send another warning to youthful offenders. For example, Justice Hilbury interrupted the proceedings 243 times—102 of these interruptions resulted in further harmful testimony to be given against Davies.⁷² Goddard had interrupted Bentley's trial "no less than 250 times"⁷³ with much the same result. Hilbury also twisted the rule of law by allowing testimony from highly questionable witnesses when that testimony was against Davies. His summation to the jury was also little more than a demand to convict.

Lord Goddard headed the panel of judges who found no fault with Mr. Justice Hilbury before they summarily dismissed the case in the Court of Criminal Appeal. A further appeal was allowed to the House of Lords, but on January 15, 1954, the Lords again upheld the conviction. Then the wait began to see if David Maxwell Fyfe would grant the Royal Prerogative of Mercy. But this time, after leaving Michael Davies in the condemned cell for ninety-two days, Maxwell Fyfe granted him a reprieve.⁷⁴

Years later, Michael Davies recalled that while he waited in the condemned cell at Wandsworth Prison to learn his fate, he often thought of Derek Bentley who had waited in the same cell. Davies was sure he would die. He reasoned that if they would hang Derek

⁷² Tony Parker, *The Plough Boy* (London: Arrow Books, 1965), 245.

⁷³ Bresler, 252.

⁷⁴ Maxwell Fyfe no doubt had his hands full during this period. It was just the previous March that John Christie was arrested for multiple murders and it became clear to nearly everyone that Timothy Evans (at whose murder trial Christie had been the principle witness) had been wrongfully hanged in 1950. It was a political nightmare for Maxwell Fyfe who had in a speech in the House of Commons said that a wrongful hanging was so impossible that it was in the "realm of fantasy."

Bentley who was only nineteen there was no hope that he could survive. Davies was twenty.⁷⁵

In what David Yallop described as a “truly pathetic” moment in his interview with Lord Goddard, he asked him about his public reputation as Lord Chief Justice. Goddard said, “It’s not an easy job, you know.”⁷⁶ It would be another twenty years before official documents proved Goddard’s role in Derek Bentley’s execution, and more than twenty-five years before Lord Bingham would quash the conviction Goddard had done so much to secure. Still, Yallop was astute enough to follow Goddard’s lament with this comment:

I wondered then, and still wonder, if it was made harder by having to live with the fact that, more than any other single person, he [Goddard] had placed the rope around Bentley’s neck.⁷⁷

Goddard’s reign as Lord Chief Justice was in so many ways a travesty. Under his control, the Court of Criminal Appeal became an actual participant in the miscarriages of justice it was designed to prevent. But at no time was Goddard’s utter mockery of justice more evident than when he sacrificed Derek Bentley’s life to prove a point.

In 1986, Lord Reginald Paget gave one of his final speeches in the House of Lords. Paget at the age of seventy-eight was by then an old soldier in the fight for the rights of those treated unjustly in England’s courts. It was on the eve of Derek Bentley’s execution in 1953 that Paget as an MP in the House of Commons was heard begging Maxwell Fyfe to let Bentley live:

I think the great condemnation which we made of the German people was that they stood aside and did nothing when dreadful things happened. We are a sovereign assembly. A three-quarter witted boy of 19 is to be hanged for a murder he did not

⁷⁵ Parker, 183.

⁷⁶ Yallop, 242.

⁷⁷ Ibid.

commit, and which was committed 15 minutes after he was arrested. Can we be made to keep silent when a thing as shocking as this is to happen?⁷⁸

It was something Paget surely never forgot. In 1986, in the House of Lords, Paget was talking about the Court when he said:

It is the court of the Lord Chief Justice. That, in my view, is bad. Power corrupts and there is no power more corrosive than that of a chief criminal judge. When revolution comes, he is the most hated instrument of the fallen tyranny.⁷⁹

Paget then compared the role of the LCJ to that of the Lord Chancellor. Lord Chancellors may start off with the same power-hungry arrogance of a LCJ, but the challenges they receive by other members of the House of Lords “cuts them down to size and they become quite human.” Paget concluded that a chief justice often becomes mad with power because he has “no bigger fleas to bite [him].”

Reginald Paget’s 1986 speech was concerned specifically with problems from another era in the history of the Court of Criminal Appeal. Nevertheless, one can well imagine that having been an eyewitness to the Bentley case there was no clearer example in his mind of a Lord Chief Justice corrupted by power to the point of tyranny than Rayner Goddard.

⁷⁸ *Hansard*, vol. 510 (1953), col. 845.

⁷⁹ *Ibid.*, vol. 473 (1986), col. 278-300.

EPILOGUE

THE BIRTH OF THE CCRC

Although the 1907 [Criminal Appeal] Act has been repeatedly amended, the scheme of the Act has not been fundamentally altered . . . this Court's central role [is] to ensure that justice has been done and to rectify injustice.

—Lord Chief Justice Woolf
Court of Appeal—Criminal Division
Second Hanratty Appeal, 10 May 2002

Raynor Goddard finally retired as Lord Chief Justice in 1958 at the age of eighty-one. It was said that he clung to the position of LCJ in hope of hand-picking his successor. If Goddard did approve of Prime Minister Harold Macmillan's choice of appeal judge, Hubert Lister Parker, as his replacement, that approval was assuredly short-lived. For Hubert Parker, more than anyone else, brought an official end to the Goddard era.

Lord Parker was often described as a “quiet, unassuming” man, an “admirable leader” who brought calm and a sense of inclusiveness to his role as LCJ. After the long divisive Goddard years, Parker was unabashedly called a “breath of fresh air as the leader of the judiciary.”¹

But even more significant, was Lord Parker immediate display of his keen understanding of the Court of Criminal Appeal's original mandate of providing protection for all English citizens, even those convicted of a crime, from the potential of injustice. For example, one of his first directives as LCJ was to end the practice of increasing sentences upon appeal. What was, under Goddard, a particularly vicious thwarting of the Court's purpose was removed. Lord Parker also worked to strengthen the legal aid program for indigent defendants. Unlike Goddard who deployed legal aid

¹ *Dictionary of National Biography*, vol.42, 685.

for all but a decidedly select few², Lord Parker described legal aid as “indispensable and [a] valuable social service” and actively sought to strengthen the program’s resources.³

Lord Parker was still LCJ in 1966 when he helped to bring about the Court’s most fundamental change. *The Criminal Appeal Act 1966* abolished the Court of Criminal Appeal and transferred its jurisdiction to the more established Court of Appeal, a court that had been hearing civil cases since 1873. That court was then split into two divisions, civil and criminal.

The Court of Criminal Appeal had existed for fifty-nine years. What finally brought it down was one of the flaws, inherent in its design and discussed in chapter two of *A Veritable Revolution*, namely, the Lord Chief Justice was the only permanent member of the Court.⁴ The constant rotation of judges with whom the LCJ made up the appeal panel was cited as the main reason the Court of Criminal Appeal had never achieved the status of the “real” Court of Appeal.⁵ Apparently, Parliament had finally concluded that a court essentially conducted by one man was not the level of justice that English citizens deserved.

The most challenging period in the history of the Court of Appeal—Criminal Division (Court of Appeal) occurred in the late 1980s and early 1990s. The convictions in a series of IRA terrorist bombing cases, perhaps the most famous being the Guildford Four and the Birmingham Six, were revealed to be some of the gravest miscarriages of justice in history.

² *Hansard*, vol. 175 (1952), col. 874-879.

Goddard argued in the above speech that providing counsel for some defendants was actually doing them an “unkindness.”

³ *Ibid.*

⁴ “Criminal Appeals in a New Court,” *Journal of Criminal Law*, vol. 31 (1967), 67.

⁵ *Ibid.*

Most of these cases were investigated and delivered to the courts by the now notorious West Midlands Serious Crime Squad. They were quashed when it was discovered that the Crime Squad was rife with corruption—something the defendants had asserted for years. Evidence showed that the Crime Squad routinely fabricated evidence, forged confessions, and tortured suspects.⁶

What was in many ways even more disturbing was that these cases, often referred to collectively as the Irish cases, were before the Court of Appeal and even the House of Lords on several occasions. The enormous breakdown in justice that they represented was not, however, discovered and the convictions were upheld each time.

The outrage at these wrongful convictions was nearly universal. The world press was again ablaze with stories of men and women who had been unjustly treated by an English court.⁷ Although, the strongest condemnation was reserved for the Court of Appeal. *The Independent* demanded that Lord Chief Justice Geoffrey Lane⁸, “the man who bears responsibility,” resign immediately. Whereas the *Economist* proclaimed:

Rarely has the reputation of English justice sunk so low . . . dishonest policemen launched the conspiracy . . . [but] lawyers, civil servants and politicians [acted] as unwitting but meticulous accomplices to the original conspiracy. The whole appeals procedure, not just a bunch of corrupt policemen, stands indicted.⁹

⁶ Ian Burrell, Jason Bennetto, “Police unit to blame for ‘dozens more injustices,’” *The Independent* (London) 1 November 1999.

The West Midlands Serious Crime Squad, the Irish cases and this entire period in British criminal history is a fascinating and complex story. It is only briefly outlined here.

⁷ The *New York Times* (perhaps because of the large Irish population in New York) was particularly critical of the way the cases had been handled. In an article entitled “Bill of Wrongs,” Anthony Lewis proclaimed Britain to be an “arbitrary society” because it “operates without the guiding light of a constitution.”

⁸ Upholding the convictions of the Birmingham Six was the one serious blot on Lord Lane’s otherwise superlative career as LCJ. When he died in 2005, Louis Blom-Cooper wrote in *The Guardian* that despite the mistakes he made in the Irish cases, Lane was still thought to be a “very great lord chief justice,” and that his “judicial record of impartiality was impeccable.” He was credited with tremendous leaps forward in modernizing the whole judicial system.

⁹ “A better last report,” *Economist* (London) 16 March 1991.

Paddy Hill, one of the Birmingham Six, summed up the feelings for many just moments after being freed by the Court of Appeal on March 14, 1991. He stood in front of the Royal Courts of Justice building and shouted back at the Court: “I don’t think them people in there have got the intelligence or the honesty to spell the word justice, never mind dispense it.”¹⁰

Yet again, something had gone catastrophically wrong with a court designed to protect citizens from injustice. The government of Prime Minister, John Major, was suddenly being pummeled with demands to do something to prevent such judicial wrongs from ever happening again. And in 1991, the government set about doing exactly that.

On the same day the Birmingham Six were given their freedom, Home Secretary, Kenneth Baker, in the House of Commons and Lord Chancellor James Mackay in the House of Lords announced the formation of a new Royal Commission on Criminal Justice headed by Walter Garrison, Viscount Runciman.¹¹

The Runciman Report was delivered to Parliament in July 1993. It was a carefully written, far-reaching analysis of the entire criminal justice system of England and Wales. The Commission studied and made recommendations on everything from the conduct of the police in any initial investigation through the entire appeal process. Although, the most important of all the Commission’s recommendations was for the creation of an independent organization with the sole purpose of protecting a defendant’s rights even after all appeals had been exhausted.

The arguments for and against the creation of the Criminal Cases Review Commission (CCRC) were surprisingly similar to the ones made nearly ninety years

¹⁰ David Pallister, “Irishmen freed as appeal is allowed after new evidence,” *The Guardian* (London) 15 March 1991.

¹¹ *Hansard*, vol. 187 (1991), col. 1109-26 (HC), vol. 527, col. 309-17 (HL).

earlier for the formation of the Court of Criminal Appeal. The Home Secretary was again at the center of the controversy.

While the Home Office had not acted as an ersatz appeal court since 1907, the *Criminal Appeal Act 1968* gave the Home Secretary the specific power to return any case “he thinks fit” to the Court of Appeal for a rehearing.¹² This resulted in the Home Office receiving hundreds of requests annually from defendants who had exhausted their appeals, but maintained they were victims of injustice. The Home Office was, however, seriously inadequate for this task.

The Runciman Committee found that even though a small unit called C3 in the Home Office was dedicated to investigating allegations of wrongful convictions, less than ten cases were returned to the Court of Appeal each year.¹³ They reasoned that this was because the Home Secretary in an effort to maintain a strict separation of the judicial and the executive branches of government, was hesitant to ever vigorously question the findings of a court, particularly a Crown court

It sounded as if the same problems documented in the memo the Home Office issued to the 1904 Royal Commission investigating the Adolf Beck case still plagued the Home Secretary. Apparently, the Home Secretary in 1991 was just as concerned that a too strident investigation into any suspected wrongful conviction case would upset the judiciary.

Therefore, the Runciman Committee recommended that the power to refer to the Court of Appeal any potential case of a miscarriage of justice should be given to a new

¹² Criminal Appeal Act 1968, Section 17 (1).

¹³ Elks, *Righting Miscarriages of Justice?*, 1.

body independent of the government and the courts. The sole purpose of this new organization would be to:

Consider allegations put to it that a miscarriage of justice may have occurred, to ensure that any further investigation called for is launched, to supervise that investigation if conducted by the police, and, where there are reasons for supposing that a miscarriage of justice might have occurred, to refer the case to the Court of Appeal.¹⁴

The Runciman Report was taken to heart by a government and a country sorely tired of having their system of justice called into question. Home Secretary, Michael Howard, called the creation of the CCRC “the most significant change to the structure of [the] criminal appeal system [in] thirty years.” The Criminal Appeal Act 1995 was passed into law on July 19, 1995, and the CCRC was born.

The CCRC inherited approximately 300 cases from the Home Office. In his book on the first ten years of the Commission, Laurie Elks noted that several of those initial 300 were “hoary old cases which the Home Office had deferred sine die as too difficult.”¹⁵

There were six¹⁶ historic cases (cases older than forty years) turned over to the CCRC. In all six, the defendants had been hanged. After the CCRC thoroughly investigated each case, they returned them all to the Court of Appeal as being cases where the convictions were seriously thought to be unsafe. Of the six, four were from the years when Goddard was Lord Chief Justice and thereby responsible for the English judiciary.

¹⁴ *Report of the Royal Commission on Criminal Justice*, Cmd. 2263, 1993, 217.

¹⁵ Elks, 5.

¹⁶ A seventh case, that of Ian Hay Gordon, convicted of murdering a judge’s daughter in 1950, was quashed in 2000. This case occurred in Belfast, Northern Ireland, and although it paralleled the other cases was in a different jurisdiction in both 1950 and 2000. One must then conclude that this was possibly a Goddard-free miscarriage of justice.

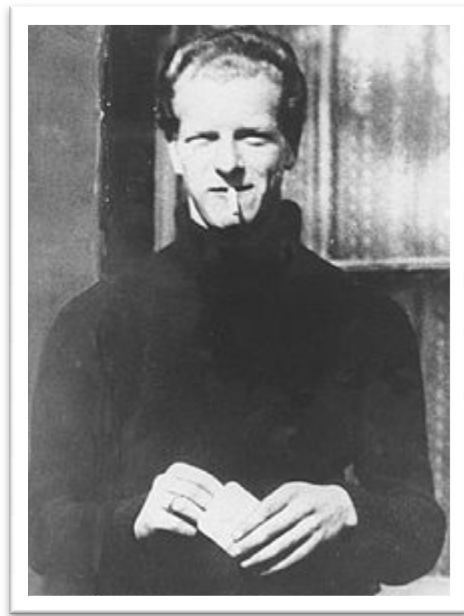
Of those four, three were found to be blatant miscarriages of justice and quashed by the Court of Appeal—Criminal Division.

One such case, of course, was that of Derek Bentley. It was passed from Home Secretary to Home Secretary for forty-five years. The CCRC investigated the case in the summer and early fall of their first year in operation and on November 16, 1997, they returned it to the Court of Appeal. The following summer, Lord Bingham made manifest the injustice done to Derek Bentley at his trial in 1952, and he quashed the conviction.

The CCRC is not perfect. It does not guarantee that everyone who feels they were mistreated by the courts will have their convictions quashed. What they do guarantee is that anyone who feels that they are a victim of a miscarriage of justice will, without fail, be heard. Few other countries have such a visible regard for the sanctity of justice.

In 1907, John Lawson Walton stood in the House of Commons and gave a clear and temperate speech purely in aid of extending justice to all. The Court of Criminal Appeal was a bold start that held high promise. No doubt, Walton would have been disappointed to see how the goals he envisioned for the Court were often subverted by the egos of the men who ran it. But the paramount lesson learned in any study of English criminal history is that no matter how difficult, no matter how seemingly impossible, and irrespective of all setbacks, English justice moves forward. The CCRC is clear evidence of that fact and John Walton would be proud.

APPENDIX



Derek William Bentley



Lord Chief Justice Rayner Goddard



Lord Chief Justice Thomas Bingham

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VITA

Cecile Arden Phillips was born on the 18th of July to the poet, Esta Elizabeth, and the artist, Cecil Arden. It was a Monday at 11:35 am. Some people say it was raining, while others insist it was only slightly overcast.

After a largely uneventful elementary and secondary education, Arden, for one semester, worked toward a degree in Theatre before switching to and eventually receiving a BA in Communications Studies from UMKC. This should not, however, be held against her, she made the switch when she was still quite young and foolish. Arden was married for ten very happy years to the physicist, Michael Dennis, who died suddenly of a heart attack while playing baseball in an August heat wave several summers ago.

Arden has written two novels: *Delaying the Inevitable* and *Ratio*. She has also written several short stories including “The Last Resurrection of Rory James,” “Harvey Dove,” “Flash Lads,” and “Clay in the Hands of the Potter.” *A Veritable Revolution* is her first full-scale work of non-fiction.