

Nineteenth-Century Criminal Justice: Uniquely Irish or Simply “not English”?

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This article examines the supposed uniqueness of the Irish criminal justice system in the nineteenth century. Although the English and Irish systems of criminal justice shared common roots, by the nineteenth century it was becoming apparent that there were differences in the way that law and justice were perceived and administered. The post-Famine years had a significant (and arguably negative) impact upon British perceptions of the Irish. This article examines both general perceptions of Ireland and Irishness, from the perspective of its relationship with England, and its position in the Empire. Outsiders' perceptions and attitudes indicated that Irish criminality and criminal justice were considered to be distinctive. However, a question arises as to whether Irish criminal justice were uniquely Irish or simply “not English”?

I - Introduction

How “Irish” was the criminal justice system of nineteenth-century Ireland? Much of the post-Famine commentary on Ireland painted a picture of an ungovernable country and an unruly people, immune to the imposition of order by legal rules and procedures.¹ Until the early twentieth century, no other part of the British Empire attracted as much negative commentary, with the legal system and the administration of justice in particular attracting strong criticism. This article addresses the question of how unique the Irish criminal justice system was – clearly it was distinguishable from the English system, but was there anything particularly “Irish” about it? The article first considers general perceptions of Ireland and Irishness in the nineteenth century, as well as perceptions of the Irish criminal justice system and Irish criminality. The article then considers how Ireland’s criminal justice system differed from England’s and asks whether the various differences, specifically relating to jury trials, could be said to be uniquely Irish or were more typical of common law systems around the Empire.

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¹ See *infra* notes 18-46. This is comparable to attitudes towards the English lower and middle classes during the eighteenth century, when a huge number of new capital offences were created in response to perceptions of deviance and in an attempt at social control. See D. Hay, P. Linebaugh, J. Rule, E.P. Thompson & C. Winslow, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1976).

II - The Irish Criminal Justice System in Context

Before examining the Irish system of justice in more detail, it is worth briefly summarising the wider legal, political and social contexts in which criminal justice was administered in nineteenth-century Ireland. From early in the century, the criminal justice system functioned under difficult circumstances. Almost every decade witnessed periods of political unrest and upheaval,² which were usually accompanied by increased criminal activity.³ Irish criminal justice was the subject of official scrutiny on a number of occasions in the nineteenth century. The years 1825,⁴ 1839,⁵ 1852⁶ and 1871⁷ saw the establishment of parliamentary committees to examine the state of either proclaimed districts or the country as a whole, focusing on problems with the administration of justice. Additionally, in 1873,⁸ 1874⁹ and 1881,¹⁰ committees were established with the

² These included the Catholic emancipation agitation of the 1820s (see F. O'Ferall, *Catholic Emancipation: Daniel O'Connell and the Birth of Irish Democracy 1820-30* (Dublin: Gill and Macmillan, 1985) and D.G. Boyce, *Nineteenth Century Ireland: The Search for Stability* (Dublin: Gill and Macmillan, 1990) at 57-86 [hereinafter Boyce]); the tithe agitation of the 1830s (see Boyce, *ibid.* at 62-64); the Young Irelanders' attempted uprising of the 1840s (see J.S. Donnelly Jr., "A Famine in Irish Politics" in W. Vaughan, ed., *A New History of Ireland; Volume V, Ireland Under the Union 1801-1870* (Oxford: Oxford University Press, 1989) at 364-71; A. Jackson, *Ireland, 1798-1998: Politics and War* (Oxford: Blackwell Publishers, 1999) at 55-57, R. Davis, *The Young Ireland Movement* (Dublin: Gill and Macmillan, 1987) and F.S.L. Lyons, *Ireland Since the Famine* (London: Weidenfeld and Nicolson, 1971) at 93-101 [hereinafter Lyons]); the rise of Fenianism in the 1860s (see Boyce, *ibid.* at 139-153); the Land agitation of the late 1870s and 1880s (on the reasons behind the land war, see W.E. Vaughan, *Landlords and Tenants in Mid-Victorian Ireland* (Oxford: Clarendon Press, 1994) at 208-216. See also Lyons, *ibid.* at 156-69, 182, 185-6); and the growing nationalist movements of the 1880s and 1890s.

³ The effect of these periods of unrest on the jury system in particular has been examined elsewhere: N. Howlin, "'The Terror of their Lives': Irish Jurors' Experiences" (2011) 29(3) *Law and History Review* 703 [hereinafter Howlin, "The Terror of their Lives"]; N. Howlin, "Controlling Jury Composition in Nineteenth-Century Ireland" (2009) 30(3) *The Journal of Legal History* 227 [hereinafter Howlin, "Controlling Jury Composition"].

⁴ *Report of the Select Committee Appointed to Inquire into the Disturbances in Ireland* H.C. 1825 (20) vii, 5

⁵ *Report from the Select Committee of the House of Lords Appointed to Enquire into the State of Ireland in Respect of Crime*, part 1, H.L. 1839 (486) xi, 1.

⁶ *Report from the Select Committee on Outrages (Ireland)*, H.C. 1852, (10) xiv, 438.

⁷ *Report of the Select Committee Appointed to Inquire into the State of Westmeath*, H.C. 1871 (147) xiii, 547.

⁸ *Report from the Select Committee Appointed to Inquire into the Working of the Irish Jury System*, H.C. 1873 (283) xv, 389.

⁹ *Report from the Select Committee on the Working of the Irish Jury System*, H.C. 1874 (244) ix, 557.

¹⁰ *Report of the Select Committee of House of Lords on Operation of Irish Jury Laws as Regards Trials by Jury in Criminal Cases*, H.L. 1881 (430) xi, 1. By contrast, the English jury system came under official scrutiny relatively rarely, and always within the context of impending legislative reforms: see *Report of the Select Committee on Law and Practice relating to Summoning, Attendance and Remuneration of Special and Common Juries*, H.C. 1867 (425) ix, 597, *Report of the Select Committee on Law and Practice Relating to Summoning, Attendance and Remuneration of Special and Common Juries* H.C. 1867-68 (401) xii, 677, 579, *Report of the*

Irish jury system as their primary focus. A consequence of the frequent use of parliamentary committees and special commissions to enquire into the state of Ireland was significant legislative reform of the justice system on a number of occasions during the century. In the 1830s Robert Peel, following his widespread reforms of the English criminal justice system, introduced significant reforms to the Irish system, including a reduction in the number of capital crimes,¹¹ a major overhaul of the jury system,¹² reform to prisons and punishment,¹³ changes to the organisation of the police¹⁴ and changes to the way in which criminal cases were defended,¹⁵ in addition to changes to the substantive criminal law.¹⁶ After the Famine, the early 1850s also saw significant reform of the courts and the justice system more generally.¹⁷ Many of the reforms introduced in the nineteenth century served to bring the Irish system of justice more in line with the English system, but as will be discussed further below other reforms were introduced in response to specifically Irish problems and situations.

III - Perceptions of Ireland and Irishness

When considering the “Irishness” of the Irish criminal justice system, one immediately encounters a definitional difficulty – what would have been understood as “Irishness” in the nineteenth century? Outsiders’ attitudes – particularly in Britain – could be diverse, and shifted in accordance with the changing political and economic landscape. Nineteenth-century rhetoric on social evolution distinguished between

Select Committee on Juries Bill, H.C. 1870 (306) vi, 61, and *Report of the Select Committee on Juries Bill*, H.C. 1872 (286) x, 563.

¹¹ *Capital Punishment (Abolition) Act 1835* (5 & 6 Wm IV, c. 8), the *Capital Punishment Abolition (Amendment) Act 1836* (6 & 7 Wm. IV, c. 4), the *Executions for Murder Act 1836* (6 & 7 Wm. IV, c. 30), the *Capital Punishment (Forgery) Abolition Act 1837* (7 Wm. IV & 1 Vic., c. 84) and the *Capital Punishment Abolition Act 1837* (7 Wm. IV & 1 Vic., c. 91).

¹² *Juries Ireland Act 1833* (3 & 4 Wm. IV, c. 91).

¹³ See for example the *Prisons (Ireland) Act 1836* (6 & 7 Wm. IV, c. 51) and the *Transportation (Amendment) Act 1837* (7 Wm. IV & 1 Vic., c. 36).

¹⁴ The *Constabulary (Ireland) Act 1836* (6 & 7 Wm. IV, c. 13), the *Constabulary (Amendment) (Ireland) Act 1836* (6 & 7 Wm. IV, c. 36), the *Dublin Police Act 1836* (6 & 7 Wm. IV, c. 29), the *Dublin Metropolitan Police Act 1837* (7 Wm. IV & 1 Vic., c. 25).

¹⁵ *Prisoners’ Counsel Act 1836* (6 & 7 Wm. IV., c. 114).

¹⁶ *The Burglary Act and Stealing (Amendment) Act 1837* (7 Wm. I & 1 Vic., c. 86), the *Robbery from the Person (Amendment) Act 1837* (7 Wm. I & 1 Vic., c. 87) and the *Offences Against the Person (Amendment) Act 1837* (7 Wm. I & 1 Vic., c. 85).

¹⁷ See for example the *Petty Sessions (Ireland) Act 1851* (14 & 15 Vic., c. 93), the *Supreme Court (Ireland) Act 1850* (13 & 14 Vic., c. 19), the *Common Law Courts (Ireland) Act 1851* (14 & 15 Vic., c. 17), and the *Constabulary (Ireland) Act 1851* (14 & 15 Vic., c. 85).

savagery and civilization,¹⁸ and such thinking was reflected in the discourse on Ireland. A number of historians have pieced together what they consider to be the dominant British attitudes towards Ireland and Irishness in the nineteenth century. Curtis, for example, writes that the unifying theme of British perceptions of Ireland in the nineteenth century was that the Irish were “alien in race and inferior in culture to the Anglo-Saxons.”¹⁹ They were the moral and physical opposites of the Saxons: “childish, emotionally unstable, ignorant, indolent, superstitious, primitive or semi-civilized, dirty, vengeful, and violent.”²⁰ Lebow, who explores British images of Ireland in the early nineteenth century, similarly describes commonly held views of “[c]hronic self-indulgence, indolence and laxity of purpose” as being the dominant features of the British image of the Irish.²¹ He notes that “[o]ther characteristics, such as the Irishmen’s proverbial dependence on alcohol, their woeful complacency and their abysmal ignorance and adherence to superstition” were frequently to be found in the newspapers, magazines and periodicals of the day.²² The popular image of the violent Irishman recurred in plays and novels,²³ and the Irish stereotype was “cunning but ignorant, cowardly but brazenly rash, religious and superstitious, indolent, complacent and addicted to both violence and alcohol”.²⁴ Lebow writes that British belief in Irish inferiority did not fundamentally change over time, and that this image of the Irishman was resistant to change.²⁵ He notes that the liberal view of Ireland which emphasised the moral and economic reform of the Irish gave way to more overtly biologically “racist” expressions in the post-Famine years.²⁶

However, Lengel argues that both Curtis and Lebow “profoundly underestimate the significance of the changing English perceptions of Ireland in the nineteenth

¹⁸ See generally N. Elias *et al*, *The Civilizing Process*, 2nd ed. (Oxford: Blackwell Publishing, 2000).

¹⁹ L.P. Curtis, Jr., *Anglo-Saxons and Celts: A Study of Anti-Irish Prejudice in Victorian England* (New York: New York University Press, 1968) at 5.

²⁰ *Ibid.* at 53.

²¹ R.N. Lebow, *White Britain and Black Ireland: The Influence of Stereotypes on Colonial Policy* (Philadelphia: Institute for the Study of Human Issues, 1976) at 40 [hereinafter Lebow].

²² *Ibid.* at 45.

²³ *Ibid.* at 44.

²⁴ *Ibid.* at 64.

²⁵ *Ibid.* at 73.

²⁶ *Ibid.*

century”.²⁷ In his view, popular perceptions of Ireland and the Irish were not static throughout the century, but changed over time. He points to the bitter disagreements between liberals and racialists over “the Irish question” in the post-Famine years: “[i]f their views were in fact fundamentally similar, Ireland would never have become the divisive issue in England that it became and remained for decades to come.”²⁸ Lengel further points out that while “[r]ace, gender and class are each discernable in English perceptions of the Irish ... one can be said to have been the element that determined the course of popular thought.”²⁹ Whether popular British views of Ireland evolved or were static, it is clear that “Irishness” was regarded as “otherness” in the nineteenth century, and that the unifying theme of British discourse on Ireland was the latter’s inferiority.

Ireland’s role within the Empire is also significant when seeking to ascertain exactly how Irishness was viewed.³⁰ Kitchen writes that by the mid-nineteenth century, the driving force behind British imperialism was “a curious mix of nationalism, Christian missionary zeal, the search for profit, and the career objectives of Britain’s civil and military officials.”³¹ He writes of the difficulty in constructing an imperial ideology which would make the Empire more palatable to the colonised:

[t]he ideology of Empire became that of a white, Protestant master race, whose right to rule resided in its respect for the rule of law, its superior moral vision, its devotion to duty, and its gentlemanly virtues. It was agreed that some tributary peoples shared at least some of these qualities and could thus be encouraged to develop their own identities within the Empire. Sometimes this attitude worked, as at home in the United Kingdom. Elsewhere, in Ireland or among the Boers of South Africa and the French in Canada, it failed miserably.³²

According to Said, imperial relationships are far more complex than a simple clash of opposites – interactions between the cultures of the ruling and subject peoples

²⁷ E. G. Lengel, *The Irish Through British Eyes: Perceptions of Ireland in the Famine Era* (Connecticut: Greenwood Press, 2002) at 4 [hereinafter Lengel].

²⁸ *Ibid.* at 4.

²⁹ *Ibid.* at 6.

³⁰ For a brief overview of the British Empire, see M. Kitchen, *The British Empire and Commonwealth, A Short History* (New York: Palgrave Macmillan, 1996).

³¹ *Ibid.* at 17.

³² *Ibid.* at 17-18.

are essential elements of the relationship.³³ Even so, the rulers will always attempt to deny this interaction and construct an image of the subjects as something immutably separate – as the “other.” In his view, the coloniser always attempts to create an absolute dichotomy between ruler and subject of superior versus inferior, strong versus weak, intelligent versus foolish, male versus female, and so on.³⁴

Although this appears to fit in with the British perceptions of the Irish outlined above, it has been argued that many of Said’s theories and assumptions may not be applicable to Ireland.³⁵ Ireland’s geographic proximity to the Imperial centre led to what Lebow describes as an “unusually high degree of mobility of persons, ideas and information”³⁶ between the two islands. He adds that the Anglo-Irish relationship is “probably unique in the annals of colonialism,” and Ireland and the Irish experience do not sit neatly within general theories of imperialism.³⁷ For example, there has long been recognition of the importance of the Empire in the construction of Protestant Irish identity.³⁸ However, Ridden observes that many Irish Catholics similarly saw the Empire in positive terms.³⁹ It should be remembered that both Catholic and Protestant colonisers from Ireland “played important roles in shaping British identity in the colonies.”⁴⁰ Similarly, Akenson points out that “despite their image of being democratic, rebellious and (among the nationalist majority in Ireland) anti-imperialist in general and anti-British Empire in particular, the Irish have actually been among the greatest supporters of the second British Empire and the Commonwealth.”⁴¹ He describes four categories of collaborators with the Empire: soldiers, administrators, clergy and ordinary settlers.⁴² The Irish made significant contributions to all of these groups

³³ E.W. Said, *Culture and Imperialism* (London: Chatto & Windus, 1993) at 127-8.

³⁴ *Ibid.*

³⁵ Lengel, *supra* note 27 at 7.

³⁶ Lebow, *supra* note 21 at 27.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ J. Ridden, “Britishness as an Imperial and Diasporic Identity: Irish Elite Perspectives, c. 1820-70s” in Peter Gray ed., *Victoria’s Ireland? Irishness and Britishness, 1837-1901* (Dublin: Four Courts Press, 2003) 88 at 88.

⁴⁰ *Ibid.*

⁴¹ D. H. Akenson, *The Irish Diaspora: A Primer* (Belfast: Institute of Irish Studies, Queen’s University Belfast, 1996) at 142.

⁴² *Ibid.* at 143.

during the rapid imperial expansion of the nineteenth and early twentieth centuries, clearly playing an ambiguous role within the Empire.

It ought to be noted that as with its relationship with Britain, Ireland's position within the Empire was not static during the nineteenth century. Before the Famine, Ireland was considered to be "an integral, though estranged, member of the British family of nations."⁴³ Again, Ireland's geographic location played a part in this. As a "sister island," Ireland had a much closer relationship with England than a colony such as India could ever have.⁴⁴ Lengel observes that:

[t]he full realization of Ireland's integration into the family was the goal of liberal legislation. This view of Ireland's place persisted until the famine forced theoreticians to face the fact that the civilizing mission there had failed. As in India after the Sepoy mutiny, the evident failure of the Whig-utilitarian model of empire did not cause most Englishmen to seriously question whether the empire as it stood should be retained or was morally justifiable. The guilt for the failure of the old ideals was laid at the door of the colonized rather than the colonizers, and the theories of empire were modified to accommodate the revelation of native perversity. In the process, Ireland was moved much more clearly into the role of a colony, while its status as a member of the British family was downplayed.⁴⁵

He adds that "it is clear that the English were much more willing to perceive the Irish as being of a type with non-European peoples after the famine than they had been before".⁴⁶

The shifting perceptions of Ireland and Irishness throughout the century can thus be viewed from both an Imperial and from a more local perspective. Either way, it is clear that the post-Famine years saw an alteration in the way that the Irish were viewed in Britain; this will be further explored in the next section.

⁴³ Lengel *supra* note 27 at 5.

⁴⁴ *Ibid.* at 6.

⁴⁵ *Ibid.* at 6.

⁴⁶ *Ibid.* at 7.

IV - Perceptions of Irish Criminality and Irish Criminal Justice

Popular British sentiment towards the Irish tended to be expressed in quite negative terms by the late 1840s. At the same time, the population of Irish-born people living in Britain rose sharply – it doubled between 1841 and 1861, and came to represent 3.5% of the total population.⁴⁷ The Irish in Britain tended to settle in port cities and northern industrial centres. As Swift notes, the Irish stood out because of their “poverty, nationality, race and religion”.⁴⁸ They “tended to be lumped together as ignorant, dirty and primitive Paddies or Biddies”⁴⁹ and poor Irish immigrants were both reviled and feared. Even before the Famine, commentators in Britain had viewed Irish immigration as “little short of a social disaster which, it was argued, exacerbated urban squalor, constituted a health hazard, and increased the burden on poor rates.”⁵⁰ Fitzpatrick writes that immigrant criminality was a “major theme of anti-Irish rhetoric”⁵¹ and the continued influx of Irish immigrants was viewed by many as a threat to law and order.

Fears and common beliefs in the innate criminality of the Irish were not entirely without foundation; O'Donnell notes that in the aftermath of the Great Famine, when Irish emigration was peaking, “the wandering Irish had an impact on the crime rates in their host communities, especially in England.”⁵² The Irish poor were the villains of Victorian society,⁵³ and were strongly represented in the courts and in prison populations. Economic, social, and religious factors influenced popular British perceptions of the Irish, and as Swift points out, “[p]olitical factors also fanned the

⁴⁷ R. Swift, “The Irish Outcast in the Victorian City: Problems and Perspectives” (1987) 25 (99) *Irish Historical Studies* 264 at 264. This figure did not include second-generation Irish who had been born in England, Scotland or Wales.

⁴⁸ *Ibid.* at 264.

⁴⁹ D. Fitzpatrick, *Irish Emigration 1801-1921* (Dublin: The Economic and Social History Society of Ireland, 1984) at 13.

⁵⁰ R. Swift, “Behaving Badly? Irish Migrants and Crime in the Victorian City” in J. Rowbotham & K. Stevenson, eds., *Criminal Conversations* (2005 Ohio State University Press) 102 at 107 [hereinafter Swift, “Behaving Badly”].

⁵¹ D. Fitzpatrick: “‘A peculiar tramping people’: the Irish in Britain, 1801-70” in W. Vaughan, ed., *A New History of Ireland; V, Ireland Under the Union 1801-1870* (Oxford: Oxford University Press, 1989) 623 at 647.

⁵² I. O'Donnell, “The Fall and Rise of Homicide in Ireland”, in S. Body-Gendrot & P. Spierenburg eds., *Violence in Europe: Historical and Contemporary Perspectives* (New York: Springer, 2008) 80 at 82.

⁵³ R. Swift, “Heroes or Villains? The Irish, Crime and Disorder in Victorian England” (1997) 29(3) *Albion: A Quarterly Journal Concerned with British Studies* 399 at 399.

flames of anti-Irish feeling, particularly between 1865 and 1868 when Fenian activities on the mainland brought a sense of fear of Irish nationalist violence to the host population.”⁵⁴

Such negative views of the criminality of the Irish in Britain naturally fed into British perceptions of the Irish in Ireland. This was at a time when the idea of the “dangerous classes”, lurking within the poorer working classes,⁵⁵ was taking hold. Ireland was viewed by many as a hotbed of criminality, with a violent, sectarian and clannish population. Newspaper reports from various parts of the realm suggest that there was a body of opinion which considered Ireland as presenting unique problems in this regard.⁵⁶ Such views have been questioned by Conley, however, who finds that the image of Ireland as being essentially a more violent country than England, is largely inaccurate.⁵⁷ In most years, she argues, the rate of homicides in Ireland was only two-thirds of that of England and Wales.⁵⁸ However, “[e]ven though the Irish committed fewer violent crimes per capita, Irish perceptions concerning violent behaviour differed from those of the English in significant ways.”⁵⁹ For example, there was in Ireland a general willingness to assume lack of lethal intent, with many violent homicides accepted as “melancholy accidents.”⁶⁰

A distinction could therefore be drawn between behaviour regarded as reprehensible or deviant, and that regarded as truly “criminal” in Ireland, which had a low rate of interpersonal violence and a seemingly high tolerance of personal violence and assault. Conley writes that most violent acts in late nineteenth-century Ireland were both expressive and recreational, as opposed to rational or goal-oriented.⁶¹ For example, it was rare for violence to be used as part of a robbery, but domestic violence

⁵⁴ *Ibid.* at 401-402. Swift notes that at the same time, Irish nationalists portrayed this association of the Irish with criminality as yet another element of British hostility against the Irish. *Ibid.* at 400.

⁵⁵ Swift, *Behaving Badly*, *supra* note 50 at 112-3.

⁵⁶ D. Taylor, “Beyond the Bounds of Respectable Society: the ‘Dangerous Classes’ in Victorian and Edwardian England” in J. Rowbotham & K. Stevenson eds., *Criminal Conversations, Victorian Crimes, Social Panic, and Moral Outrage* (Ohio: Ohio State University Press, 2005) at 5.

⁵⁷ C. Conley, *Melancholy Accidents: The Meaning of Violence in Post-Famine Ireland* (Lexington Books, New York, 1999) at 1 [hereinafter Conley, *Melancholy Accidents*].

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.* at 2-3.

and drunken brawls were common,⁶² and she estimates that over 42% of homicides were recreational in origin.⁶³ Faction fights and brawls, which could involve anywhere from two up to dozens of participants, filled a recreational void in rural Ireland. The lack of seriousness with which brawls were regarded was reflected in both the conviction rates and the sentencing for assaults and homicides arising from them:

[r]ecreational violence was not viewed as criminal precisely because it was a form of recreation. Malice was not a factor. While the fatal consequences of broken skulls might seem too apparent to overlook, for the participants they were simply an unfortunate byproduct. Bystanders were sometimes injured or killed, and the deaths and injuries had real consequences regardless of the lack of intention or malice. Nevertheless, if no serious harm was intended, any injury must have been accidental. This view was reinforced by a sense of fatalism.⁶⁴

The distinctions drawn between criminal and simply unfortunate or deviant behaviour was reflected in the criminal justice system. As will be discussed further below, difficulties were often experienced when trying to secure convictions in certain types of cases. The administrators of justice often found jury nullification to be a significant hurdle.

There was a common belief that the criminal justice system in Ireland was beset by unique difficulties, typified by a statement from an English newspaper in 1862: “[w]e take it there is no country in the world in which justice, both civil and criminal, is so fairly administered as in England. ... How is it that they manage these things differently in Ireland?”⁶⁵ One English newspaper reported in 1848 that “[t]he perversion of the jury-box in Ireland has been one of the many evils which have resulted from that misgovernment which separated the people into rival parties, embittered against each other by religious and political enmities.”⁶⁶ Further examples of this can be seen in English newspapers from the mid-nineteenth century:

⁶² *Ibid.* at 3-4.

⁶³ *Ibid.* at 18

⁶⁴ *Ibid.* at 41.

⁶⁵ *Manchester Times and Gazette* (22 August 1848).

⁶⁶ *Aberdeen Journal* (5 December 1838).

[t]here can be no doubt of the extent to which assassination and intimidation prevail in certain districts hereabouts. The people are absolutely so accustomed to it that they talk of it without any particular horror.⁶⁷

[a] large class of Irish crimes ... are nothing else than an embodiment of high treason ... Irish murders ... extend their influence far beyond the person of the victims. These influences are, in fact, levelled against the state – against the established system of social order.⁶⁸

...there is no doubt that one of the great causes of the lawlessness which exists in Ireland is owing to the sympathy of the tenant farmers and peasantry with assassins, or would-be assassins, which renders it difficult for the police to obtain any reliable information with regard to offenders, it appearing to be deemed a point of honour to protect them, and baffle the law.⁶⁹

The Government cannot expect to sustain the authority of the law in Ireland, where the established courts of justice are held in contempt. Trial by jury has been proved a solemn mockery.⁷⁰

According to Conley, the discrepancy between the level and aims of violence and the image in the British press “was probably equal parts paranoia and propaganda. The long and painful history of Anglo-Irish relationships made the British all too ready to accept the image of Irish barbarians and to fear a violent reaction to centuries of oppression.”⁷¹ Such rhetoric certainly contributed to the perception that there was a problem with the Irish criminal justice system, and that typically Irish approaches to issues of law and order, justice and fairness were inferior to and indeed, at odds with English or British attitudes.

V - Unique Aspects of the Irish Criminal Justice System

Vaughan points out that the general impression of disorder in Ireland “was increased by law enforcement arrangements in Ireland, which differed considerably from those in the rest of the United Kingdom.”⁷² In an effort to determine what was

⁶⁷ *Morning Chronicle* (17 April 1846). These were the words of a correspondent writing from Limerick during the Famine.

⁶⁸ Printed in *Aberdeen Journal* (5 December 1838) and *The Leeds Mercury* (23 June 1862).

⁶⁹ *The Era* (28 March 1869).

⁷⁰ *The Era* (24 September 1848).

⁷¹ Conley, *Melancholy Accidents supra* note 57 at 7.

⁷² See W.E. Vaughan, *Murder Trials in Ireland* (Dublin: Four Courts Press, 2009) at 139. Similarly, Bridgeman notes that by the end of British rule in Ireland, “the Irish system of criminal justice was very

notably “Irish” about the Irish criminal justice system, it is worth considering some of the ways in which it could be distinguished from the English system.

One unique feature of the Irish administration of justice related to local courts. These were originally administered by unpaid amateurs known as Justices of the Peace. McDowell notes that in England, Justices of the Peace were traditionally landed gentlemen. In Ireland, however, “where the landlord was often an absentee and where most of the landlords were protestants and the majority of the tenants were catholics and where agrarian questions were acute, there were obvious difficulties in making appointments to the bench.”⁷³ Bridgeman similarly cites the small size of the rural gentry in Ireland as leading to a reduced pool of possible Justices of the Peace.⁷⁴ This meant that a number of essentially unsuitable men were appointed to these posts,⁷⁵ and “one of the main concerns of government in attempting to suppress disorder was to improve the efficiency of the county magistrates.”⁷⁶ Reforms were introduced in the 1820s which required these amateur justices to sit jointly and act publicly at petty sessions. From the 1830s, the bench was criticised for its religious composition, and justices were accused of being politically biased.

An improvement in the administration of local justice was achieved through the introduction of paid, professional justices known as stipendiary magistrates. This was supplemented by and a professional police force.⁷⁷ The paid magistrates were to reside permanently in the district, and became known as Resident Magistrates.⁷⁸ They continued to operate alongside the unpaid magistrates, and inevitably tensions between the two branches characterised the mid-nineteenth century as the boundaries of their respective roles were not always clear. The unpaid magistrates became increasingly

different from that of England and Wales.” I. Bridgeman, “The Constabulary and the Criminal Justice System in Nineteenth-Century Ireland” in I. O’Donnell and F. McAuley, eds., *Criminal Justice History* (Dublin: Four Courts Press, 2003) 110 at 113 [hereinafter Bridgeman].

⁷³ R.B. McDowell, “The Irish Courts of Law, 1801-1914” (1957) 10(40) *Irish Historical Studies* 363 at 371 [hereinafter McDowell].

⁷⁴ Bridgeman, *supra* note 72 at 118.

⁷⁵ See McDowell, *supra* note 73 at 371.

⁷⁶ Bridgeman, *supra* note 72 at 118.

⁷⁷ See further *infra* note 62 and accompanying text.

⁷⁸ For further discussion of Resident Magistrates and their functions, see McDowell, *supra* note 73 at 373-45.

bitter and disillusioned as the professional magistrates superseded them in various areas. Agrarian disturbances in the first half of the century gave rise to a need for increased centralisation of law and order,⁷⁹ and an erosion of the magistrates' discretion over criminal justice policy.

This brings us to consider another unique aspect of the Irish justice system – the early existence of a centralised police force. Until 1856, there was no law relating to paid policemen for the whole of England, and it was not until 1829 that the London police were established as the first modern police force in England.⁸⁰ Much of this can be attributed to a “national prejudice against police.”⁸¹ Meanwhile, there had been an Irish police force in existence since the 1780s, when the *Dublin Police Act 1786*⁸² was passed.⁸³ The two Irish police forces in existence by the nineteenth century (the Royal Irish Constabulary and the Dublin Metropolitan Police) played an important role in the overall centralisation of justice in Ireland. Bridgeman notes that “[t]he police acted as gatherers of information on crime and criminal activities, and through the office of the county inspectors' clerk passed evidence, in the form of depositions and witness statements taken before magistrates, to headquarters in Dublin Castle.”⁸⁴

Another major distinction between the criminal justice systems of England and Ireland was that while for most of the nineteenth-century, English prosecutions tended to be brought by private individuals,⁸⁵ a system of public prosecution had emerged early in the century in Ireland. This was partially “as a response to the ... difficulties of

⁷⁹ Bridgeman, *supra* note 72 at 118.

⁸⁰ S. Palmer, “The Irish Police Experiment: the Beginnings of Modern Police in the British Isles, 1785-95” in I. O'Donnell and F. McAuley, eds., *Criminal Justice History* (Dublin: Four Courts Press, 2003) 96 at 99.

⁸¹ *Ibid.*

⁸² 26 Geo. III, c. 24 (Ir). An act for the better Execution of the Law within the City of Dublin, 1786.

⁸³ On the evolution of policing in eighteenth-century Ireland, see Kevin Boyle, “Police in Ireland Before the Union: I” (1972) 7 *Irish Jurist* (n.s.) 115 [hereinafter Boyle, “Police in Ireland: I”]; K. Boyle, “Police in Ireland Before the Union: II” (1973) 8 *Irish Jurist* (n.s.) 90; K. Boyle, “Police in Ireland Before the Union: III” (1973) 7 *Irish Jurist* (n.s.) 323. Boyle writes that the eighteenth century was ‘a watershed’, both in England and in Ireland, ‘in the evolution of modern means of social control.’ Boyle, “Police in Ireland: I,” *ibid.* at 117.

⁸⁴ Bridgeman, *supra* note 72 at 127.

⁸⁵ See J.H. Langbein, “The Origins of Public Prosecution and Common Law” (1973) 17 *American Journal of Legal History* 313.

enforcing English criminal law in Ireland.”⁸⁶ The system of private prosecutors had begun to break down in Ireland, as Bridgeman points out, as a result of the State’s inability to find prosecutors, witnesses and jurors who would convict in cases of agrarian crime.⁸⁷ The system of public prosecution was at first seen as an addition, rather than an alternative to the private system, but by the mid-nineteenth-century, the role of private prosecutors had been significantly diminished and all prosecutions came under the direct personal control and supervision of the Irish attorney general.⁸⁸ He appointed a crown solicitor for each county, who sent him instructions for opinion on each case sent forward by the magistrates for trial at the assizes.⁸⁹ Crown solicitors chose the crown counsel who acted for the Crown in each case and were, according to McEldowney, “the essential link” between the central administration and the local magistracy.⁹⁰ Prosecutions for almost all offences at assizes and quarter sessions were undertaken by the State.⁹¹

It is clear from these examples that the main way in which the Irish justice system differed from the English was the early and rapid move towards centralisation and professionalisation.⁹² The important role of amateurs within the English justice system was not mirrored in Ireland, because of the volatile situation around the country at times of unrest. As Conley notes, “the officials at Dublin Castle frequently found the locals less than cooperative and were often involved in a delicate balancing act between those who felt the government should do more to keep order and those who felt the government was tyrannical.”⁹³ Throughout the century, many people continued to view

⁸⁶ J. McEldowney, “Crown Prosecutions in Nineteenth-Century Ireland” in D. Hay & F. Snyder, eds., *Policing and Prosecution in Britain 1750-1850* (Oxford: Clarendon Press, 1989) 420 at 428 [hereinafter McEldowney].

⁸⁷ Bridgeman, *supra* note 72 at 114.

⁸⁸ For a comparative analysis, see W.H. Dodd, “The Preliminary Proceedings in Criminal Cases in England, Ireland, and Scotland, Compared” (1878) *Journal of the Statistical and Social Inquiry Society of Ireland* 201 [hereinafter Dodd]. See also W.N. Hancock, “The Cost of Adopting a Complete System of Public Prosecutions in England, as Illustrated by the Results of the Working of the Scotch and Irish Systems of Prosecution” (1878) *Journal of the Statistical and Social Inquiry Society of Ireland* 271. The only cases in Ireland where the attorney general could not prosecute were those concerning embezzlement in banks and other large establishments.

⁸⁹ Dodd, *ibid.* at 202.

⁹⁰ McEldowney, *supra* note 86 “Crown Prosecutions” at 437.

⁹¹ Bridgeman, *supra* note 72 at 115.

⁹² *Ibid.* at 140.

⁹³ Conley, *Melancholy Accidents*, *supra* note 57 at 134.

the legal system as an alien imposition, despite the fact that most judges and legislators were themselves Irish by the late nineteenth century.⁹⁴

Finnane has pointed out that the prison as a place of punishment was the subject of considerable debate in nineteenth-century Ireland, and that the country was the setting for Walter Crofton's important nineteenth-century prison innovations.⁹⁵ The use of "special" legislation during times of unrest was also a distinctive feature of the administration of justice in Ireland. In the 1850s and the 1880s, for example, legislation was passed when it was considered that the ordinary law was not enough to keep order in the countryside. Between 1866 and 1892, there were five different coercion Acts passed for Ireland.⁹⁶ The measures in these Acts included the imposition proclaiming districts and curfews, the removal of *habeas corpus* rights, the imposition of martial law, and provision for trial by special jury or trial by judge alone. Conley considers these to be "evidence of the very real limits on the power of the state in Ireland."⁹⁷

Finally, as noted elsewhere, differences in the social structure of both countries was also a contributing factor and impacted upon the administration of criminal justice.⁹⁸ Irish poverty was considered to be more extreme and the religious divides between the rulers and the ruled in Ireland had no counterpart in England. To compound matters, religious and political differences in some parts of Ireland were often accompanied by differences in language.⁹⁹ Thus in many respects the Irish criminal justice system operated in a way that was unique; or at least, in a way that was distinguishable from the English system.

⁹⁴ *Ibid.* at 5-6.

⁹⁵ M. Finnane, "Irish Crime without the Outrage: the Statistics of Criminal Justice in the Later Nineteenth Century" in N.M. Dawson, ed., *Reflections on Law and History* (Dublin: Four Courts Press, 2006) 203 at 204 [hereinafter Finnane, "Irish Crime without the Outrage"] at 209.

⁹⁶ These were the *Peace Preservation (Ireland) Act 1870* (33 & 34 Vic., c. 9), the *Protection of Life and Property in Certain Parts of Ireland Act 1871* (34 & 35 Vic., c. 25), the *Act for the Better Protection of Person and Property in Ireland 1881* (44 & 45 Vic., c. 4), the *Peace Preservation (Ireland) Act 1881* (44 & 45 Vic., c. 5), the *Act for the Prevention of Crime in Ireland, 1882* (45 & 46 Vic., c. 4) and the *Criminal Law and Procedure (Ireland) Act 1887* (51 & 52 Vic., c. 20).

⁹⁷ Conley, *Melancholy Accidents*, *supra* note 57 at 7.

⁹⁸ Howlin, "The Terror of their Lives," *supra* note 3 at 716-7.

⁹⁹ In 1871, there were 714, 313 persons in the country who could speak both English and Irish, while 103, 562 persons could not speak English. This had dropped to 64, 167 by 1881 (half of these were in Connaught), while the figure for those fluent in both languages had increased. Figures taken from the 1881 Census, Table xxxiv, available in T.E. Jordan, *The Census of Ireland 1821-1911, vols. 1-3* (New York: Edwin Mellen Press, 1998).

Alongside the differences in the machinery of the criminal justice systems of England and Ireland are statistics which appear to indicate that Ireland was overall a more violent society. However, the accuracy of such statistics is questionable¹⁰⁰ for numerous reasons: recorded crime represents only a fraction of all offences committed; definitions and categories of crime change over time, and it is difficult to distinguish changes in behaviour over time from changes in the efficiency of crime detection or prosecution, or changes in legal codes.¹⁰¹ Furthermore, Conley's analysis of violence in nineteenth-century Ireland, discussed above, indicates that while the Irish may have been more tolerant of casual violence, overall rates of violent crime were not dramatically different to those prevalent in England.

Nevertheless, the available statistics prove useful in painting a general picture of Irish criminality. As O'Donnell points out, "Ireland's status as a quarrelsome colony could not simply be ascribed to its endemic agrarian disturbances and periodic political upheavals, most of which resulted in little loss of life."¹⁰² Historians have drawn upon both judicial statistics and the constabulary's "outrage" returns,¹⁰³ with the latter indicating high levels of violence compared with other parts of the United Kingdom: the rate of homicides in Ireland was comparatively high when considered against recorded homicides in England and Wales in the mid-century.¹⁰⁴ Conviction rates in Ireland were low with the number of indictments far outweighing the number of convictions,¹⁰⁵ and both conviction and imprisonment rates were much lower in Ireland than in England.¹⁰⁶

¹⁰⁰ For example, see S.J. Connolly, "Unnatural Death in Four Nations: Contrasts and Comparisons" in *Kingdoms United? Great Britain and Ireland Since 1500: Integration and Diversity* (Dublin: Four Courts Press, 1999) 198 at 202 [hereinafter Connolly, "Unnatural Death"].

¹⁰¹ *Ibid.* See Howlin, "Controlling Jury Composition," *supra* note 3 at 231.

¹⁰² O'Donnell, "Homicide in Ireland," *supra* note 52 at 81.

¹⁰³ See for example D. Johnson, "Trial by Jury in Ireland 1860-1914" (1996) 17 *The Journal of Legal History* 270 [Hereinafter Johnson, "Trial by Jury"]. See also Finnane, "Irish Crimes without the Outrage," *supra* note 95 at 211-3.

¹⁰⁴ O'Donnell, "Homicide in Ireland," *supra* note 52 at 82.

¹⁰⁵ Connolly, "Unnatural Death," *supra* note 100 at 206. M. Finnane, "A Decline in Violence in Ireland? Crime, Policing and Social Relations 1860-1914" (1997) 1 *Crime, History and Society* 51, notes that the number of homicides in Ireland declined steadily from 1860 to 1914, but O'Donnell points out that the rates nevertheless remained higher than in Britain. O'Donnell, "Homicide in Ireland," *supra* note 52 at 81.

¹⁰⁶ See N. Woodward, "Transportation Convictions during the great Irish Famine" (2006) 37(1) *Journal of Interdisciplinary History* 59 at 65. The statistics presented to the Dublin Statistical Society by James Houghton in 1850 demonstrated that in the years 1842-1848, between 52% and 60% of those committed

A number of factors may be suggested as contributing to Ireland's low conviction rates, such as the local nature of many disputes, and close relationships between the accused, witnesses and jurors in rural Ireland.¹⁰⁷ There was also a perception at the time that convictions were more elusive for certain categories of crime. In 1848 the *Belfast News-Letter* reported that "[i]t is now an ascertained fact that in political cases, almost always, and in agrarian cases, not seldom, a verdict in accordance with the evidence cannot be counted upon in Ireland."¹⁰⁸ Difficulties associated with jury trials also added to the perception that there was an antipathy towards law and order. For certain types of cases, unbiased jurors could be difficult to obtain, especially in the later part of the century.¹⁰⁹ At times of unrest, outbreaks of political agitation saw violence and threats directed towards both jurors and witnesses.¹¹⁰ However, the impact of political agitation on serious crime should not be overestimated – Connolly points out that contrary to popular assumptions, agrarian homicide "accounted for only a small part of total Irish deaths by violence. During 1871-80, for example, only 68 out of 486 murders were classified as agrarian."¹¹¹

There are also various factors which may have contributed to the (arguably) relatively high crime rates overall. Major social upheaval, such as that caused by the Great Famine, inevitably impacted upon rates of criminality. James Moncrieff Wilson noted in 1857 that there had been an increase in all crime categories during the Famine, most notably crimes relating to property.¹¹² Furthermore, the rate of homicide per million in Ireland in the period from 1845 to 54 was 24, compared with 15.8 between

for trial in Dublin were convicted. J. Haughton, "Statistics of Crime" (1850) 2 *Journal of the Statistical and Social Inquiry Society of Ireland* 1.

¹⁰⁷ Johnson, "Trial by Jury," *supra* note 103 at 275.

¹⁰⁸ *Belfast News-Letter* (22 August 1848).

¹⁰⁹ See Howlin, "Controlling Jury Composition", *supra* note 3; Howlin, "The Terror of Their Lives", *supra* note 3; Johnson, "Trial By Jury," *supra* note 103; D.S. Johnson, "The Trials of Sam Gray: Monaghan Politics and Nineteenth Century Irish Criminal Procedure" (1985) 20 *Irish Jurist* 109; J. F. McEldowney, "Stand By for the Crown": An Historical Analysis" (1979) *Criminal Law Review* 272; J. F. McEldowney, "The Case of The Queen v McKenna and Jury Packing in Ireland" (1977) 12 *Irish Jurist* 339; J. D. Jackson, K. Quinn & T. O'Malley, "The Jury System in Contemporary Ireland: in the Shadow of a Troubled Past" (1999) 62 *Law and Contemporary Problems* 203.

¹¹⁰ This has been considered in greater detail in Howlin, "The Terror of Their Lives," *supra* note 3.

¹¹¹ Connolly, "Unnatural Death," *supra* note 100 at 207.

¹¹² J.M. Wilson, "Statistics of Crime in Ireland from 1842 to 1856," (1957) II *Journal of the Dublin Statistical Society* 91.

1895 and 1904.¹¹³ Another factor may have been the general attitude towards violent crime in Ireland – as noted, Irish society appears to have been more tolerant of violence compared with England or Wales.¹¹⁴ The reporting of many Irish crimes as “outrages” in the nineteenth-century also added to perceptions of Ireland as being an exceptionally violent country.

The Irish justice system was further undermined by parallel systems of “rough justice”; alternative means of settling disputes or inflicting retribution within the community. Resistance to the official legal system, which some associated with the conquest of Ireland, “created a space for the establishment of alternative legal concepts and structures that monitored and regulated the behaviour of rural communities.”¹¹⁵ Conley points out that in Ireland there were always alternatives to the courts, and that “[t]hrough the power of the secret societies had diminished considerably after the famine, the principle of community control could still operate.”¹¹⁶ Such community control came from boycotting, the Repeal Association, the Ribbon Association, arbitration courts, Land League Courts, National League Courts, United Irish League Courts and finally Dáil Courts. Some of these alternative courts systems even mimicked the official, British system of justice, with the calling of witnesses, the weighing of evidence by judges and juries, and the use of similar structures and similar language.¹¹⁷ Laird writes that “[l]aw in Ireland was not only a medium for the implementation of English rule; it was also a fundamental component of anti-colonial resistance, with the concept of an alternative system of control capable of supplanting a despised official law, functioning as one of the most sustained threats to colonial administrations.”¹¹⁸ By the 1880s, “sustained resistance to official law and its institutions was to become a central tactic in the battle of Irish Nationalism.”¹¹⁹

¹¹³ O'Donnell, “Homicide in Ireland,” *supra* note 52 at 81.

¹¹⁴ Johnson, “Trial by Jury,” *supra* note 103 at 278. O'Donnell notes that while there is little quantitative information available, the literature would also suggest that casual violence was common in eighteenth-century Ireland. O'Donnell, “Homicide in Ireland,” *supra* note 52 at 80-81.

¹¹⁵ Heather Laird, *Subversive Law in Ireland 1879-1920* (Dublin: Four Courts Press, 2005) at 13 [hereinafter Laird].

¹¹⁶ Conley, *Melancholy Accidents*, *supra* note 57 at 150.

¹¹⁷ Laird, *supra* note 115 at 25-27.

¹¹⁸ *Ibid.* at 13.

¹¹⁹ *Ibid.* at 16.

Whatever the reasons behind the high crime rate and low conviction rate, together they contributed to the general perception of a country with a high tolerance for criminal conduct, and a people indifferent to the mechanics of law and justice.

VI – Conclusions: How Unique was the Irish Approach to Justice?

Clearly there were problems with the system of criminal justice in Ireland, but the question here is whether these problems were uniquely “Irish”. Finnane suggests that there is much evidence to suggest that the criminal law and the criminal justice system in post-Famine Ireland were not entirely out of kilter with the rest of the United Kingdom, despite the various differences between the conditions prevailing in England and in Ireland.¹²⁰ Looking at the volume of arrests, prosecutions and punishments in Ireland, he argues that “agrarian unrest, even at its height, was never of major significance in the working of the criminal justice system.”¹²¹

It has been observed that when the British Empire was expanding, “law and administration were regarded as inseparable, a view which accounts for the early and vigorous attempts by the British to establish legal systems in their colonies.”¹²² Many difficulties associated with the Irish criminal justice system were mirrored in the colonies. For example, nationalist movements in different parts of the Empire necessitated law and order interventions which did not entirely alienate populations.¹²³ Another frequently-occurring problem was tension between existing legal cultures and the legal system imposed by the colonisers. Some of the difficulties experienced in Ireland were exacerbated by factors such as racial tensions and a lack of sufficient personnel, infrastructure and funding. For example, the jury system, often one of the first things to be established in colonial legal systems, often struggled, and had to be

¹²⁰ Finnane, “Irish Crime without the Outrage” *supra* note 95 at 204.

¹²¹ *Ibid.* at 207.

¹²² S. Fullerton Joireman, “Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy” (2001) 39(4) *The Journal of Modern African Studies* 571 at 577.

¹²³ For example, legislation passed in India to combat nationalist movements was based on similar measures enacted in Ireland. M. Silvestri, “‘The Sinn Fein of India’: Irish Nationalism and the Policing of Revolutionary Terrorism in Bengal” (2000) 39(4) *The Journal of British Studies* 454 at 477 [hereinafter Silvestri].

adjusted to suit the local climate.¹²⁴ All of this may be viewed as a facet of the wider difficulties associated with imposing British laws and legal institutions on diverse and far-flung societies.

The impact of the Irish diaspora on the development of colonial criminal justice systems also merits further investigation, though constraints of space prevent a detailed examination of such issues here. Many of those directly involved in the administration of justice around the Empire were Irish, or had experience of working in Ireland. For example, many ex-Royal Irish Constabulary (R.I.C.) officers found their way onto police forces in Canada¹²⁵ and Australia.¹²⁶ The Irish were also well-represented among the civil servants, lawyers, magistrates and other administrators who set out from the United Kingdom to the overseas territories in the nineteenth century.¹²⁷ Furthermore, some elements of the Irish criminal justice system were adopted as a blueprint in many territories. In fact, in the late nineteenth-century, many colonial administrators insisted that their police forces were trained by the R.I.C.¹²⁸ Most notably, the R.I.C. was regarded as an exemplar for colonial policing, and was used as a model for other forces such as the Indian police¹²⁹ (which was “the first and largest colonial police force to be shaped by the RIC”¹³⁰) Canada’s North-West Mounted Police,¹³¹ the Australian police¹³² and the Palestine Police Force.¹³³

¹²⁴ See further Howlin, “The Terror of Their Lives,” *supra* note 3 at 754-9.

¹²⁵ W. Jenkins, “Patrolmen and Peelers: Immigration, Urban Culture and ‘the Irish Police’ in Canada and the United States” (2002-2003) 28(2), 29(1) *The Canadian Journal of Irish Studies* 10 at 21. K. Fedorowich explores this theme further in “The Problems of Disbandment: The Royal Irish Constabulary and Imperial Migration 1919-29” (1996) 30(117) *Irish Historical Studies* 88.

¹²⁶ M. Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press Australia, 1994) at 9. See also 136-7.

¹²⁷ For example, see E. Richards, “Irish Life and Progress in Colonial South Australia” (1991) 27(107) *Irish Historical Studies* 216 at 232.

¹²⁸ G. Sinclair *At the End of the Line: Colonial Policing and the Imperial Endgame 1945-80* (Manchester: Manchester University Press, 2006) at 17 [hereinafter Sinclair].

¹²⁹ Silvestri, *supra* note 123 at 477.

¹³⁰ Sinclair, *supra* note 128 at 24.

¹³¹ See W. R. Morrison, *Showing the Flag: The Mounted Police and Canadian Sovereignty in the North, 1894-1925* (Vancouver: University of British Columbia Press, 1985) at 2. See Sinclair, *ibid.* at 36-51. Sinclair also notes that what emerged as the Canadian model of policing was a hybrid of the English and Irish models. *Ibid.* at 36.

¹³² Sturma is of the view that the nascent Australian police force of the nineteenth century had more in common with Irish than with British or American forces. M. Sturma, “Policing the Criminal Frontier in Mid-Nineteenth-Century Australia, Britain and America”, in M. Finnane ed., *Policing in Australia: Historical Perspectives* (New South Wales University Press, 1987) 15 at 28. Finnane notes that like the Irish constabulary, the Australian police were generally administered from the capitals of the colonies –

Despite the commonality of some of the issues identified above, there were aspects of the administration of criminal justice which were unique to Ireland. For example, the specific political and religious tensions which characterised Irish society and Irish criminal justice were not replicated in their entirety elsewhere. Although there were comparable pressures in other parts of the Empire, these usually had racial overtones specific to each colony, and the presence of immigrants from mixed backgrounds also influenced responses to such tensions. The religious and political make-up of Irish society was never entirely replicated in other parts of the Empire, although many Irish emigrants brought their belief-systems and prejudices with them. Some specific law enforcement arrangements, relating to the police, magistrates, courts, prisons and punishment also retained a uniquely Irish character.

While the Irish experience of criminal justice in the nineteenth-century may not have been entirely unique, the British reaction to it certainly was. Colonial criminal justice systems never attracted the same level of attention as the apparently irredeemable Irish system. Ideas about Irish criminality both at home and in Britain were firmly ingrained on the British consciousness, and formed a significant part of British discourse on Ireland. Throughout the century, "Ireland was consistently seen as presenting unique problems of crime and disorder."¹³⁴ The British despaired at the Irish justice system. But to what extent were the failures and limitations of the Irish justice system typically Irish? Was Ireland a more violent or subversive place than say Canada, India or Australia?

Two reasons are suggested for the strength of British negativity about the Irish criminal justice system. The first is Ireland's unique position within the Empire, and its close relationship with Britain, which meant that British involvement in the administration of justice was more pronounced than elsewhere. The Irish justice system

this was in contrast to police forces in England, America or Canada: M. Finnane, *Police and Government: Histories of Policing in Australia* (Melbourne: Oxford University Press Australia, 1994) at 9.

¹³³ Fedorowich, *supra* note 125 at 89. Sinclair notes that after the establishment of the Irish Free State, many former R.I.C. members emigrated to work in the Palestine Gendarmerie. Sinclair, *supra* note 128 at 16.

¹³⁴ Connolly, "Unnatural Death," *supra* note 100 at 201.

also came under more frequent and detailed scrutiny than other colonial systems, and was regularly the subject of parliamentary debate and consequent legislative reform. There are many examples of problems with the administration of justice which cropped up in Canada, New Zealand, Australia, India and the African territories, which never appear to have attracted quite the same level of vitriol as the problems in the Irish system. Second problems with the administration of justice formed part of the wider “Irish question” which dogged successive governments – the question of what was to be done with Ireland. This helps to further explain why so much attention was focused on the Irish criminal justice system’s shortcomings. As Lacey points out, “[t]he state of criminal justice – the scope and content of criminal law, the performance of criminal justice officials, public attitudes to crime, and the extent and intensity of the penal system – is often used as a broad index of how ‘civilised’, ‘progressive’, or indeed ‘truly democratic’ a country is.”¹³⁵ The perceived failures of the Irish criminal justice system were inextricably bound up with notions of Irish savagery, otherness and inferiority.

To conclude, the Irish system of criminal justice was certainly distinguishable from that of England, on a number of fronts: the early move towards professionalisation which characterised the evolution of the police, magistrates and prosecutors; differences in the way that law and order was perceived by the general population; unique political, religious and economic contexts in which criminal justice operated; the existence of parallel systems of informal justice; and low rates of conviction and imprisonment, to name a few. Conley notes that the British government

could rarely count on unquestioning support from any part of the common law system in Ireland. Juries simply refused to convict if they felt the action had been justified or that the issue should be settled outside the courts. Often the accused were released on recognizance when the Crown sensed there was no hope of a conviction.¹³⁶

However, despite these differences, it would be going too far to say that it was entirely “unique” within the wider common law world. There are parallels which can be drawn between Ireland and other parts of the British Empire, such as Australia and Canada, and

¹³⁵ N. Lacey, *The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008) at 3.

¹³⁶ Conley, *Melancholy Accidents*, *supra* note 57 at 6.

more notably India and the African territories. What was unique, or distinctive, however, was the British reaction to problems with Ireland's criminal justice system, for the reasons which have been outlined.