COMMENTARIES ON THE LAWS OF ENGLAND

BOOK IV OF PUBLIC WRONGS

WILLIAM BLACKSTONE

With an Introduction, Notes, and Textual Apparatus by Ruth Paley

OXFORD

THE OXFORD EDITION OF BLACKSTONE

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BOOK IV: OF PUBLIC WRONGS

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RUTH PALEY

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Editor's Introduction to Book IV

Book IV of the *Commentaries* deals with what Blackstone termed 'Public Wrongs', a term which his very first sentence defines as being synonymous with crime and misdemeanours. This in itself is something of a conceptual innovation. The terms 'crime' and 'criminal law' were of course widely used by lawyers and general public alike, but they were not part of the technical legal vocabulary, which preferred to recognize general categories such as felonies and misdemeanours and to concentrate on the procedural niceties of prosecution and choice of venue. Indeed, although the words 'crime' and 'criminal' are scattered throughout Giles Jacob's *New Law Dictionary* (1739), neither is defined. Nor did Jacob define the word 'prosecute' or 'prosecution'. To prosecute or to bring a prosecution in modern parlance is indicative of a process under criminal law; in the eighteenth century both words were often used in the sense of carrying forward a process and in connection with civil suits as well as with a criminal action. Prosecutions by indictment were brought in the name of the monarch, but the initiative to prosecute, decisions about just what to allege in the indictment (and hence to choose both the category of crime and the venue at which it could be tried), and payment of associated costs were matters for private individuals. Furthermore, prosecutions for non-felonious offences were regularly settled out of court for an agreed compensatory payment. Even felonies, including heinous offences such as murder, could be prosecuted at the suit of a private individual by means of 'appeal' (for which see further IV. 202–5).

The distinction between a criminal and civil action was thus not an easy one to make.[1] Prosecutions *qui tam* (whereby the prosecution was brought in the name of an individual as well as of the monarch) were particularly difficult to categorize. Giles Jacob listed them under civil actions but added that they 'may be rank'd under criminal actions'.[2] Blackstone mentions them in Book IV, but only in terms of a statutory limitation on the time within which a prosecution had to be commenced. For a slightly more detailed explanation, he refers his readers to his consideration of private (or civil) wrongs in Book III (Chapter 9). In neither account does he indicate the extraordinarily wide range of offences that could be prosecuted in this way. Nor does he indicate the suspicions of perjury that frequently attached to those who prosecuted such offences in expectation of a share of the reward.

Nevertheless, contemporaries clearly accepted that it was possible to differentiate between civil and criminal law, even if the distinction was ill-defined and the usage

[1] For more extensive discussion of these issues see G. R. Elton, 'Introduction: Crime and the Historian', in J. S. Cockburn (ed.), *Crime in England, 1550–1800* (1977), 1–14; D. Lieberman, 'Blackstone and the Categories of English Jurisprudence' in N. Landau (ed.), *Law, Crime and English Society, 1660–1830* (Cambridge, 2002), 139–61; J. M. Beattie, *Crime and the Courts in England 1660–1800* (Oxford, 1986), 457; N. Landau, 'Indictment for Fun and Profit', *Law and History Review*, 17 (1999), *passim.* Books cited were published in London unless otherwise noted.

[2] G. Jacob, *A New Law Dictionary* (1729), under Actions.

of terms so varied as to suggest that no firm boundary existed to distinguish what was specifically criminal law from the wider scope of English jurisprudence. The later seventeenth and eighteenth centuries saw something of an explosion in the availability of printed legal works, and, among these, books that concentrated on considerations of what the various authors considered to be the criminal law. They included influential treatises clearly aimed an audience of professional lawyers or would-be lawyers, such as the classic works by Coke, Hale, and Hawkins,[3] as well as guides for practitioners, such as Sir John Tremaine's *Placita Coronae or Pleas of the Crown* (1723) or the many editions of William Stubbs's *Crown Circuit Companion* (first published 1738). A wider audience was served by Giles Jacob's *The Modern Justice, containing the business of a justice of the peace in all its parts* (first published 1716), followed later in the century by the now largely forgotten manuals by Lord Dudley and Ward and Ralph Heathcote,[4] and the far more successful *Justice of the Peace and Parish Officer* by Richard Burn (first published 1755). Then too there were guides with a narrower focus, such as collections of penal statutes relating to non-Anglicans, customs and excise offences, or more general overviews of the penal statutes concerning the maintenance of law and order, by leading metropolitan magistrates.[5] Additionally some texts, such as Joshua Fitzsimmonds's *Free and Candid Disquisitions on the Nature and Execution of the Laws of England* (1751) and Henry Dagge's *Considerations on the Criminal Law* (1772), considered the criminal justice system in very general terms.

Book IV of the *Commentaries*, like its three predecessors, serves a very different purpose. Like them, it purports to be a general introductory text. For those who intended to pursue the study of the law as a profession, it offered a gateway to the more complex traditional works like Coke's *Institutes*, which were considered to provide the necessary foundations for legal practitioners. At the same time, Book IV provides the general introduction to the law that Blackstone considered necessary for young gentlemen who would not become professional lawyers, but would nevertheless be called upon to play their part in the working of the criminal justice system: men who needed to apply the law in practice, and thus to understand what did and did not amount to theft, the difference between murder and excusable homicide, and under what circumstances offenders were entitled to claim benefit of clergy; men who might even play a role as legislators.

The fourth book of the *Commentaries* had been long in the making before it was published in 1769.[6] Defending himself against criticisms of his treatment of the legal

[3] E. Coke, *Institutes of the Lawes of England* (1628–44); M. Hale, *Historia Placitorum Coronæ*, or *The History of the Pleas of the Crown* (first published 1694; Emlyn's edition, 1736); M. Hale, *The History of the Common Law of England* (1713); W. Hawkins, *A Treatise of Pleas of the Crown* (1716–21).

[4] J. Ward (Viscount Dudley and Ward), *The Law of a Justice of Peace and Parish Officer* (1769); R. Heathcote, *The Irenarch, or Justice of the Peace's Manual* (1774).

[5] J. Walthoe, *A Summary of the Penal Laws relating to Nonjurors, Papists, Popish Recusants and Nonconformists…* (1716); *A Collection of most of the Penal Laws relating the Customs and Excise* (1726); J. Fielding, *Extracts from such of the Penal Laws, as particularly relate to the Peace and Good Order of this Metropolis* (1761); W. Addington, *An Abridgment of the Penal Statutes…* (1775).

[6] Book IV was advertised as 'preparing for the press' in various newspapers in May 1768, and as 'in the press' in the following November: *Gazetteer*, 11 May 1768, *St James' Chronicle*, 24–26 November 1768. The full four-volume set was advertised in the *Public Advertiser* on 2 June 1769.

status of Dissent (Protestant Nonconformity to the established Church of England) in Chapter 4, Blackstone stated that parts of that chapter had been written some fifteen years earlier. This was clearly true: 'public wrongs' had figured as the final part in the private course of lectures that he had first given at Oxford in the 1753–4 academic year. The general plan of Book IV follows the schema of his lectures and of his subsequent *Analysis of the Laws of England* (Oxford, 1766–71). One of Blackstone's stated motivations for publication was the circulation of manuscript copies of notes taken by students attending his lectures; it is a tribute to the popularity of the lectures that this practice appears to have continued even after publication of the *Commentaries*. A copy of notes from Blackstone's lectures supposedly taken by Edward Williames Vaughan Salisbury survives in the Harvard Law School library, but Salisbury can hardly have attended Blackstone's lectures, since he himself did not matriculate until seven years after Blackstone's death in 1780.[7]

The originality of Book IV stems from the way in which it imposed a coherent structure on matters that had previously seemed arcane. Unlike conventional legal treatises, Blackstone considered the question of crime in a logical sequence, beginning with the nature of crimes, proceeding through the question of criminal responsibility and the various types of offence in ascending order of gravity, followed by the way in which a defendant was processed through the courts to ultimate conviction and punishment. This was a novel approach, one that was clearly born of the enlightenment emphasis on analysis and rationality. For this very reason it aroused some suspicion among his fellow lawyers, many of whom tended to regard the common law as an intricate system of forms that could not be reduced to any simplistic set of rules and principles.[8] It was a craft rather than a science, best learned by studying (and mastering) traditional practice-oriented, legal treatises, whose disorderly and rambling nature reflected the inherent complexity of the common law.

For all its originality in terms of structure, Book IV naturally does rely for much of its content on Coke, Hale, and Hawkins. Blackstone also made use of influential international texts of his own generation, some of which, such as Montesquieu's *Spirit of the Laws* and Beccaria's *On Crimes and Punishments*, we now regard as seminal, while others were and remain less well known, such as the *Grand Instructions for Framing a New Code of Laws for the Russian Empire* (1768). However, Book IV is far more wide-ranging than either a legal treatise or a philosophical discussion of the aims and purposes of a criminal justice system. Blackstone wrote as an educated man of his times, addressing an audience which shared a common cultural heritage. Accordingly he cited a wide range of classical texts, alongside historical and literary allusions with which he expected his readers to be more or less familiar. He did not, for example, think it necessary in Chapter 4 to explain Swift's allegory of Jack on a great horse eating custard, presumably taking it for granted that his readers would fully understand this reference to a lord mayor of London who made no effort to hide his Presbyterianism (IV. 35, note x).

[7] Harvard Law School Library, MS 4175; *Alumni Oxonienses, 1500–1714*, ed. J. Foster (1891–2), iv. 1245.

[8] M. Lobban, *The Common Law and English Jurisprudence* (Oxford, 1991), 47.

Although the full title of the *Commentaries* refers only to the laws of *England*, Book IV is full of allusions to the laws and customs of the ancient world as well as to the laws extant in other countries and to natural law. Blackstone made very clear his belief that the fallen nature of man meant that crime is an ever-present threat to the tranquillity of society; hence the laws that have evolved to deal with it address universal issues. Whether based on common law or Roman law traditions, whether devised by ancient or modern societies, systems of criminal justice all sprang from the same social needs. Thus it was possible for Blackstone to identify a common thread running from Cicero to Montesquieu.

This somewhat awkward marriage of tradition and reason is further underlined by Blackstone's treatment of English history. The more sweeping references derive from Blackstone's belief that in order to understand the then current state of the law it was necessary to understand its past. Accordingly, he was determined to trace the origins and development of institutions back to at least Anglo-Saxon times, if not before—a process ridiculed by Jeremy Bentham in his long unpublished *Comment on the Commentaries* as savouring of 'the pompous nothingness of half-learned pedants',[9] but one which fits with Blackstone's belief in the universality of sin and crime, as well as with the common trope of the Norman yoke, that appears explicitly in his final chapter:

> I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and risen to the perfection they now enjoy …[10]

Blackstone's 'rude outlines' divided English history into distinct phases, making explicit the historical framework that underpins the earlier chapters. The first phase was from the time of the ancient Britons to the Saxons, a period which, according to Blackstone, saw the original evolution of the common law 'which is doubtless of saxon parentage' (IV. 266). This was followed by the 'violent alteration of the English constitution' (IV. 268) attributable to the Norman conquest and the introduction of 'a scheme of servility' from which 'it has been the work of generations for our ancestors, to redeem themselves' (IV. 271). That redemption began not with Magna Carta but with the reign of Edward I, 'our English Justinian' (IV. 274), and continued under Henry VIII with the creation of a Protestant Church of England, 'the usurped power of the pope being now for ever routed and destroyed' (IV. 277), although other aspects of the royal prerogative meant that the final years of Henry VIII were 'times of the greatest despotism, that have been known in this island since the death of William the Norman' (IV. 280). Attempts to exploit the worst aspects of the prerogative and religious divisions led to the civil wars and execution of Charles I. The fifth phase began with the restoration of the monarchy in 1660, when a combination of the abolition of both the writ *de haeretico comburendo*, and military tenures, together

[9] *A Comment on the Commentaries* (Collected Works of Jeremy Bentham), ed. J. H. Burns and H. L. A. Hart (1977), 168.

[10] IV. 285.

with the passage of the Habeas Corpus Act amounted to nothing less than 'a second magna carta' (IV. 282–3). Strangely, Blackstone made only a passing mention of the executive's controversial uses of the law during the reign of Charles II, such as the *quo warranto* campaign to purge borough corporations in the aftermath of the dissolution of parliament in 1681, merely attributing the 'many very iniquitous proceedings, *contrary to all law*, in that reign' to 'the artifice of wicked politicians' (IV. 283). The last phase to be considered was that from the revolution of 1688 to Blackstone's own time—a period that he characterized as one of major progress towards the perfection of the laws. Both in Chapter 33 and elsewhere, Blackstone reveals a remarkably detailed knowledge of events of the later seventeenth century. He clearly assumes that his references to the career of the earl of Danby (IV. 171), the execution of Algernon Sidney (IV. 53), the Assassination plot (IV. 38), and even the relatively obscure condemnation of the non-jurors Cook and Snatt (IV. 81) would be readily understood by his contemporaries; even after the passage of nearly a century, memories of the political tumult that preceded the Hanoverian succession were clearly still common currency.

Despite the title of the final chapter, 'Of the Rise, Progress, and Gradual Improvements, of the Laws of England', Blackstone nevertheless sounded a note of caution. Some ten years before John Dunning made his famous motion in the Commons that 'the influence of the crown has increased, is increasing, and ought to be diminished',[11] Blackstone wrote that although the various reforms since the revolution had 'in appearance and nominally, reduced the strength of the executive power … the crown has, gradually and imperceptibly, gained almost as much in influence, as it has apparently lost in prerogative' (IV. 284). Elsewhere (IV. 183–4) he expressed unease about the expansion of summary offences, not only because of the tendency to erode jury trial but also because of the increased workload created thereby for lay magistrates and the consequent growing reluctance of gentlemen to take on the duties of a magistrate. A further diversion from a narrative structure that was designed to extol a vision of progressive improvement was Blackstone's diatribe against the game laws. In chapter 13 Blackstone had described the game laws, which dated largely from 1706,[12] and which restricted the right to hunt to substantial landholders, as of a 'questionable … nature' and as 'many and various, and not a little obscure and intricate' (IV. 114–15). He noted, with clear disgust, that the provisions of the game laws meant the property qualification that enabled an individual to kill a partridge was fifty times greater than that required to vote. He concluded that the only rational explanation why taking game should be regarded as a crime was 'that in low and indigent persons it promotes idleness' (IV. 115). He added a footnote to the fifth edition of 1773 about the 1770 statute that prescribed three months' imprisonment and heavy fines for anyone who killed game between sunset and an hour before sunrise, concluding somewhat incredulously that 'This statute hath now continued three sessions of parliament unrepealed' (IV. 315–16).

[11] *Parliamentary Register*, xvii. 453.

[12] 6 Anne c. 16, which Blackstone cites, following older collections of statutes, as 5 Ann. c. 14.

For Blackstone the game laws were a retrograde step, one that flew in the face of a basic common law principle whereby wild birds and animals (*ferae naturae*) could not be regarded as private property. In his final chapter Blackstone went far beyond mere description, making it clear that by separating the ownership of land from the ability to exercise rights over it, the game laws had erected a new kind of tyranny. After the Norman conquest the forest laws had vested all game in the crown; those laws were obsolete by Blackstone's time, but nevertheless,

> from this root has sprung a bastard slip, known by the name of the game law, now arrived to and wantoning in its highest vigour: both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons: but with this difference; that the forest laws established only one mighty hunter throughout the land, the game laws have raised a little Nimrod in every manor. And in one respect the antient law was much less unreasonable than the modern: for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but now … a freeholder of less than 100*l*. a year is forbidden to kill a partridge upon his own estate (IV. 268).

Blackstone was occasionally guilty of showing off the extent of his knowledge. He could not resist, for example, a discussion, arising from his own researches, of what he himself admitted was the obsolete criminal jurisdiction of the university of Oxford, where he had once served as judge of the chancellor's court (Chapter 19) or of the law of treason in Scotland (Chapter 29). In Chapter 19 he included a long digression on the origins of the term Star Chamber. In Chapter 23, 'Of the several modes of prosecution', he added an account of the virtually obsolete process of prosecution by appeal, prefacing his remarks with the statement that 'as it is very little in use … I shall treat of it very briefly' (IV. 202). His brief account nevertheless stretched to four pages and he added an extra paragraph in the fifth edition. Likewise in Chapter 27 he included an account of trial by ordeal and trial by purgation, both of which were long since abolished.

He was also sometimes guilty of manipulating his sources, adding citations that did not quite support the text. In Chapter 2 he cited Roman law as making allowances for drunken acts in order to contrast it to the law of England which 'will not suffer any man thus to privilege one crime by another' (IV. 17), but the source, Justinian's *Digest*, quite specifically refers to military law and to the fate of individuals who had attempted suicide whilst inebriated. Sometimes he is simply mistaken. The same chapter effectively plagiarized Hale's discussion of advancing a defence based on ignorance of the relevant law,[13] while adding as his own contribution a reference to Justinian which purportedly demonstrated that the maxim 'Ignorance of the law, which everybody is supposed to know, is no excuse' was common to both Roman and English law. But as Peter Brett pointed out half a century ago, Blackstone's references 'scarcely bear out the proposition which is allegedly based on them'. The English case *Brett v Rigden* (1568), originally cited by Hale, was not a criminal case at all. Sergeant Manwood had argued that when Giles Brett made his will and devised lands

[13] M. Hale, *Pleas of the Crown*, ed. S. Emlyn (1736), i. 42.

then in his possession, he should have known that the will would take effect at his death and that the devise would therefore include lands that he acquired between the date of the will and the date of his death. This contention did not relate to the principles of criminal law and was in any case rejected by the court. The citation to Roman law is similarly flawed, in that it is concerned with civil rather than criminal law.[14]

As Brett pointed out, there are many different scenarios in which ignorance of the law would have different meanings, and there is a dearth of authority to confirm that the maxim was genuinely applicable to every such scenario. Indeed, it seems likely that it was not until well after Blackstone's death that the judges began to accept and apply a strict definition of the maxim. After all, until 1793, statutes were held to take effect from the beginning of the parliamentary session in which they were passed. Promulgation was desultory.[15] It was perfectly possible therefore for an individual to commit a crime against a statute before that act of parliament had received the royal assent, let alone had been promulgated, or of which he was quite legitimately ignorant. In 1852 it was held that foreigners who acted as seconds in a duel, in a manner that would have been lawful and honourable in their own country, could not plead ignorance of English law.[16] Yet ignorance of English law does appear to have been a factor in the pardon awarded to John Wannberg in 1787.[17] Blackstone was very clear that drunkenness could not be used as a defence to a criminal charge, writing in Chapter 2 that 'our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour' (IV. 16); however, intoxication was clearly a factor in weighing up whether James Oakes had formed a felonious intent when he stole a bundle of calico in 1785, and it earned him a pardon.[18] These cases occurred after Blackstone's death, suggesting that the law cannot have been quite as clear during his lifetime as he suggested.

At other times he was selective about the full import of his sources, because the fine detail either detracted from or was irrelevant to his argument. A minor example occurs in Chapter 12 (IV. 103), where various medieval punishments for fraudulent traders are listed, in order to contrast them with the modern mode of punishment by fine. He therefore omits any reference to the existence of a medieval fine for brewers of bad beer, preferring instead to lay his emphasis on the use of the cucking stool. Another instance of selective inclusion relates to Blackstone's reference in Chapter 17 (IV. 158) to transportation for those convicted of larceny under the provisions of 4 Geo. I c. 11. What he did not mention was his doubts about whether that act was being properly interpreted. A year after Book IV was first published he wrote to the former attorney general, Sir Fletcher Norton, who had recently been elected as Speaker of the

[14] P. Brett, 'Mistake of Law as a Criminal Defence', *Melbourne University Law Review*, 5 (1965–7), 179. I am indebted to Simon Stern for bringing this article to my attention.

[15] J. Prest, 'The Promulgation of the Statutes', *Parliamentary History*, 17 (1998), 106–12; S. Devereux, 'The Promulgation of the Statutes in Late Hanoverian Britain', in D. Lemmings (ed.), *The British and their Laws* (Woodbridge, 2005), 80–101.

[16] *In the matter of Etienne Barronet and Edmond Allain, In the matter of Emanuel Barthelemy and Philip Eugene Morney* (1852) 1 El. & Bl. 2, 118 ER 337.

[17] The National Archives, Kew (hereafter TNA), HO 27/6/127, ff. 430–3.

[18] TNA, HO 47/3/39, ff. 126–33.

Commons. In that letter he questioned whether the terms of that act applied to women and those convicted of petty larceny and offered a draft declaratory clause which would have retrospective effect 'and obviate this doubt for the future'.[19]

The most blatant example of selective omission occurs in Blackstone's discussion of the case of William York, a ten-year-old convicted of murder in 1748. Blackstone makes it clear that the fear of 'propagating a notion that children might commit such atrocious crimes with impunity' led all the judges to agree that his crime deserved a death sentence (IV. 15). What he did not point out was that the judges were so disturbed by the prospect of putting a child to death that the sentence was repeatedly respited and that York was eventually pardoned on condition of entering the navy. Seen in context with Blackstone's other comments on the use of capital punishment, this appears to be a deliberate literary device intended to shock the reader at the thought that so young a child could be executed. In his very first chapter Blackstone had described the use of the death penalty as 'a wanton effusion of human blood' and questioned both its deterrent value and its moral basis:

> To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration. (IV. 7)

He also went out of his way in Chapter 14 to explain that an authorized officer who put an individual to death pursuant to a capital sentence was acting out 'of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it' (IV. 117).

Blackstone did not neglect the problems of preventing crime, agreeing with Beccaria that '*preventive* justice is upon every principle, of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice' (IV. 165). Chapter 18 consists of a pragmatic account of the existing provisions of the criminal law designed to prevent crime. One of these was the use of punishment, which (he stressed) should not be designed for expiation or revenge but for 'the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example' (IV. 165). Otherwise the only preventive measure Blackstone could offer was the power to take sureties for keeping the peace or good behaviour.

Nevertheless, Blackstone did have more ambitious ideas about crime prevention. Like many of his reform-minded contemporaries he believed that imprisonment could be used to teach habits of industry and thereby reform offenders. Between 1775 and 1776 he played a pivotal role in the process of drafting and lobbying that resulted in the Penitentiary Act of 1779.[20] Blackstone did not mention his own involvement in the passage of the act when he gave a brief account of it in the ninth edition, where somewhat surprisingly he placed these remarks in Chapter 28, which is concerned

[19] *The Letters of Sir William Blackstone*, ed. W. Prest (2006), 141–2.

[20] W. Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford, 2008), 297–301.

with benefit of clergy and the mitigation of punishments, rather than in Chapter 18, which focuses on the prevention of crime. The alteration is almost certainly Blackstone's own since Richard Burn, Blackstone's first editor, added clear signposts to his own changes to the text. Blackstone obviously had high hopes that the act would have a positive impact on reducing crime.

> In forming the plan of these penitentiary houses, the principal objects have been, by sobriety, cleanliness, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection, and to teach them both the principles and practice of every christian and moral duty. And if the whole of this plan be properly executed, and its defects be timely supplied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes. (IV. 350).

The Varia

Blackstone altered his text in successive editions for a variety of reasons. He corrected typographical errors and, when he became aware of them, his own errors or omissions. In Chapter 17, for example, he referred to the Waltham Black Act as having its origins from incidents in Epping Forest near Waltham in Essex, but in the fifth edition he corrected this to Waltham in Hampshire (IV. 329). He also habitually added extra citations, either to cases or to treatises. It seems likely that some changes are attributable to the compositor rather than to Blackstone himself. In Chapter 14 Blackstone correctly referred to Chapter 3 in Locke's *Essay on Civil Government* but this was changed to 5 in editions seven (1775) and eight (1778) before being corrected back to 3 in the posthumous ninth edition of 1783. The most likely explanation for the change is that during the print run the typeface became damaged and was replaced; a damaged '3' is easily misread as '5'. On occasion Blackstone took advantage of the opportunities offered by a new edition to expand on his original text. The simple statement in Chapter 28 that 'in general, all offences must be enquired into as well as tried in the county where the fact is committed' (IV. 197) was expanded in the fifth edition (1773) and in the seventh becomes a detailed account of all offences that could be tried in jurisdictions other than the one in which the alleged crime occurred (IV. 338–40).

Often he merely improved his literary style, choosing more suitable words—'hanging' instead of 'suspension', for example (IV. 143, 321). Constant attention to literary detail meant that he sometimes rephrased parts of the text for no other reason than to improve the rhythm of the phrasing. But he also made minute technical changes to the construction of his sentences: it is clearly more accurate to refer to 'any woman, being maid, widow, or wife' rather than 'any woman, maid, widow, or wife' (IV. 138, 319), although it would be difficult to misunderstand the sense of the original wording. Sometimes he changed his mind and reverted to the original: as when he wrote

that excuses ought not to be 'strained', changing this to 'restrained' in the seventh edition and then back to 'strained' in the ninth (IV. 125). Literary style was an integral part of the attraction of the *Commentaries* to readers. A long extract from Chapter 3 of Book III even appeared in a compilation of pieces designed both to edify readers and to illustrate 'elegant, correct and fine writing'.[21]

Blackstone's more substantial alterations reflected the need constantly to update his text. At its most basic this involved adding details of the continual accretions of statute law. In Chapter 21 of the seventh edition, for example, he added brief details of the 1773 statute that enabled warrants issued in England to be executed against offenders who had fled to Scotland, which was (as it still is) a different legal jurisdiction. However, given the vast range of the criminal law and the constant stream of new legislation it is scarcely surprising that Blackstone sometimes failed to keep up to date. In his discussion of the offence of pulling down turnpike gates in Chapter 11 he cited statutes of 1718 and 1732, apparently unaware that neither were in force at the time of writing. In the fifth edition he amended his reference to the 1732 statute, substituting instead a more recent statute of 1767. Yet by the time that edition appeared, the statute of 1767 had been superseded. Only in the ninth, posthumous edition did Richard Burn point out that the 1718 statute had expired in 1748, while the 1767 act was superseded by another of 1773 (IV. 95, 309).

Blackstone's text also reflected changes in the operation of the criminal justice system. The *Commentaries* were produced at a time of considerable evolution in the nature and conduct of criminal trials, particularly in the use of defence counsel. Accordingly, in the eighth edition Blackstone altered the statement in Chapter 27 that the judges 'seldom' refused the assistance of counsel to defendants to read that they 'never' refused such assistance (IV. 229–30, 345–6). The effect of wider world events on the criminal justice system in England was revealed by the omission of a few words in the discussion of punishments in the ninth edition of Chapter 29. Previous editions had referred to transportation to the American colonies; in a silent acknowledgement of Britain's loss of those colonies, the ninth edition, published after the conclusion of the American rebellion, merely mentioned transportation without reference to a destination (IV. 243, 352).

Another significant change in the operation of the criminal justice system was the way the courts treated the testimony of the victims in cases of the alleged rape of young girls (neither Blackstone nor the courts seem to have considered the possibility of the rape of boys). The original text followed Hale, who advocated admitting the testimony of a child even if that child were too young to understand the nature of an oath. The rationale was that 'the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand ... . And indeed it is now settled, that infants of any age are to be heard' (IV. 142). In the fifth edition, Blackstone made minor changes in wording, turning the absolute statement 'it is now settled' into the

[21] [Anon.], *The Beauties of English Prose* (1772), i. p. vi.

more qualified 'it seems now to be settled'. A substantive change occurred, however, in the ninth edition. Blackstone continued to refer to Hale's opinion that a child's evidence could be heard unsworn, but in the light of a recent (1779) ruling by the twelve judges added that practice was now quite the opposite as 'it is now settled, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected' (IV. 319–20). As the ruling occurred during Blackstone's lifetime and the alteration is not flagged as one introduced by Burn, we may be reasonably confident that it was penned by Blackstone himself.

Later in the same chapter Blackstone considered (male) homosexual acts, accepting the then conventional theology that extrapolated from the fate of Sodom and Gomorrah to conclude that they were against 'the express law of God' (IV. 143). In his original text he made it clear that homosexual acts were more often prosecuted as attempted sexual assaults than as actual sexual assaults 'on account of the difficulty of proof' (IV. 144). The implication was that the sex in such cases was non-consensual. It is therefore interesting that the ninth edition includes a reference to consensual homosexual acts. In such cases, Blackstone noted, both parties could be prosecuted, one for intent to commit, the other with intent to suffer 'the commission of the abominable crime' (IV. 320).

In stark contrast to this kind of piecemeal alteration, Chapters 4 and 17 underwent wholesale authorial revision, though for very different reasons. Chapter 17 concerns offences against private property. A haphazard accumulation of statutory changes made this a messy subject and resulted in a text that became increasingly convoluted and difficult to follow. The author's changes add virtually nothing to the content. Instead, almost like a miniature version of the imposition of structure on the law that made the *Commentaries* so readable, Blackstone re-arranged his original text, removing many of the references to statutes to footnotes, in order to construct a more coherent and accessible version for his readers.

The alterations to Chapter 4—'Of Offences against God and Religion'—are of a very different order. Blackstone was a convinced Anglican and references throughout this volume reveal the depth of his loathing for the Roman Catholic church. He variously described the power of the pope as 'arbitrary' (IV. 30) or 'usurped' (IV. 277), and in yet another reference to the 'Norman yoke' blamed the conquest for increasing the influence of the pope by virtue of the appointment of 'prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in rivetting the chains of a free-born people' (IV. 69). In Chapter 4 he made it clear that the various laws that prevented Roman Catholics from taking their full part in English society were entirely justified and that there could be no toleration for Catholics as long as their principles extended

> to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of reliques and images; nay even their transubstantiation. But while they acknowlege a foreign power, superior to the

> sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects. (IV. 36)

He then went on to list the various anti-Catholic statutes that were still in force, even though these statutes had been passed in the sixteenth and seventeenth centuries when Protestant fears of 'popery' were at their height and, apart from the ban on holding public office, went largely unenforced in Blackstone's England. His reference in the ninth edition to the 'Papists' Act' of 1778 underlined the identification of Catholicism as a potential source of rebellion, by stressing that the relaxation of penalties made by that act applied only to such Catholics as were willing to take steps to demonstrate their loyalty to the Hanoverian regime and to repudiate the pope's claims to any civil authority.

It was not, however, Blackstone's vitriolic condemnation of popery but his comments on the laws concerning the Protestant Nonconformists, also known as Dissenters (i.e. those who were not members of the Anglican, or episcopal, church) that attracted criticism. Blackstone distrusted Dissenters almost as much as Catholics. Those who differed from the Church of England 'as well in one extreme as the other, are equally and totally destructive of those ties and obligations by which all society is kept together' (IV. 68). Somewhat simplistically, given the complexity of the political situation that led to the upheavals of the seventeenth century, Blackstone blamed the religious bigotry of Protestant sectaries for the seventeenth-century civil wars that overturned 'church and monarchy [and] shook every pillar of law, justice, and private property' (IV. 69). In his fourth chapter Blackstone's account of offences against God by Nonconformists is divided into two parts: the 'positive' offence of reviling the church's ordinances and the 'negative' offence of failing to participate in Anglican worship. In some ways Dissenters were more culpable than Catholics, since Catholics acted on 'material, though erroneous reasons', whilst many of the reasons for Protestant Nonconformity stemmed from disagreement with certain points of the liturgy and so on 'matters of indifference or, in other words, upon no reason at all' (IV. 34). Blackstone considered that the various statutes against Nonconformists were still in effect, although suspended by the Toleration Act of 1689, so effectively enabling him to describe Dissenters as criminals whose guilt was tolerated rather than punished.

Within months of the first printing of this volume, the Nonconformist theologian and scientist Joseph Priestley had published a response that was highly critical of Blackstone's text.[22] Priestley was prompted to respond by a fear that Blackstone's sentiments were shared by the government of the day, suggesting the possibility 'that some design is formed to establish a system of civil and ecclesiastical tyranny' by reviving and enforcing statutes that had long been regarded as obsolete. Priestley particularly complained of Blackstone's remarks on the crime of reviling the ordinances of the Church of England:

> Why may I not speak in derogation of the book of common-prayer, or even in contempt of it, if I really think it a defective and contemptible performance? Where is the

[22] It was advertised in *Lloyd's Evening Post*, 27–29 September 1769.

> crime, if, insulted as the Dissenters have always been, with the malice, and nonsense of high churchmen, they should, now and then, speak, or even write in their own vindication …[23]

He also challenged Blackstone's simplistic account of the events that led up to the civil wars, observing that 'the nation not the Dissenters only, asserted their natural and civil rights' and that the end result would have been the same even if the army had 'consisted of Mahometans'.[24]

Priestley was not the only critic to take issue with Blackstone over Chapter 4. The legal writer, Owen Ruffhead, who was himself an Anglican rather than a Dissenter, reviewed Book IV for the *Monthly Review* shortly before his death in October 1769. In the course of the review, he regretted Blackstone's 'narrow and somewhat illiberal turn of mind in relation to Protestant Dissenters' and condemned his 'littleness and peevishness of spirit'.[25] A much lengthier, more closely argued and wide-ranging response to Blackstone was published the following year by the dissenting minister, Philip Furneaux, who maintained that religious truths could not be established by means of legal penalties.[26] Yet, for all his liberal sentiments Furneaux agreed that anti-Catholic laws were essential; in the 1771 edition of his letters he agreed 'that to guard against the prevalence of popery, by every method which appears to be calculated for that end … is mere self-defence'.[27]

Blackstone had never before engaged with his critics in public, though he did in private.[28] He preferred either to ignore them 'if I thought them mistaken or trifling' or simply to correct his text in a subsequent edition.[29] But already embroiled in controversy over his support of the expulsion of John Wilkes from the House of Commons,[30] he decided to respond directly and speedily to Priestley's 'very angry pamphlet', probably because Priestley was a public figure who was well-known outside dissenting circles and whose criticism could do real damage. Blackstone explained his public response by referring to Priestley's 'reputation in the literary world' and insisted that he did not write 'with an intention to enter into personal altercation with Dr Priestley'. Blackstone was particularly anxious to establish that his text was not meant to be a personal attack on Priestley and to acquit himself of accusations of being 'a bigotted High-Churchman and of a persecuting spirit in matters of religious differences'. Although maintaining somewhat pedantically that the various laws against Nonconformists were still in force against those who did not comply with the provisions of the Act of Toleration, he stressed that Priestley had misinterpreted his survey of the relevant statutes, which had merely been intended

[23] J. Priestley, *Remarks on some paragraphs in the fourth volume of Dr. Blackstone's Commentaries on the laws of England, relating to the Dissenters* (1769), 7.

[24] Priestley, *Remarks*, 29, 31.

[25] *Monthly Review*, 41 (1769), 295.

[26] P. Furneaux, *Letters to the Honourable Mr Justice Blackstone* (1770).

[27] Furneaux, *Letters* (1771 edn.), 127.

[28] See for example his response to Charles Yorke in 1766 and to Granville Sharp in 1769: *Letters*, ed. Prest, 11–12, 138–9.

[29] W. Blackstone, *Reply to Dr Priestley's Remarks* (1769), 4.

[30] See volume editor's introduction to Book I (I. xiii).

to provide a historical context to explain their passage.[31] Nevertheless, he admitted that on re-reading his text it did seem

> somewhat incorrect and confused; and might lead a willing critic to conclude, that a general reflection was intended on the spirit, the doctrines, and the practice of the body of our modern dissenters. A reflection which I totally disapprove … And so far am I from wishing to perpetuate or widen our unhappy differences, that I shall make it my care, in every subsequent edition of this volume so to rectify the clause in question, as to render it more expressive of that meaning which I here avow; and which, if read with a due degree of candour, might before have been easily discerned.[32]

Blackstone's rather barbed reference to Priestley's failure to appreciate the finer nuances of his text was repeated at the end of the pamphlet, where he commented that only a 'superficial and captious reader' would have misunderstood his intent and hoped that Priestley would come to wish he had written less hastily.

Priestley's response, published in the *London Chronicle* of 10–12 October, described the *Reply* as 'a genteel and liberal answer to a pamphlet written, as you candidly and justly conjecture, in great haste' and then went on to reiterate his critique of Blackstone's text. Priestley adopted a restrained and civil tone, but his response was more than a little prickly:

> If I mistook your meaning, in supposing that your reflections were intended for the modern Dissenters, I can assure you, that, superficial and captious as you take me to be, I was far from being singular in that mistake. It was the construction that every person, that I have yet conversed with upon the subject, put upon them; and the paragraphs I have animadverted upon were actually considered, by many persons, as a notification to Dissenters, in what light they were considered by those who are now in power. They even gave offence to many worthy and distinguished members of the established Church …

Blackstone was as good as his word. The next edition of Book IV, published the following year, contained substantial revisions that were clearly intended to placate his Dissenting critics. His remarks about reviling the ordinances of the Church were softened by referring to the indecency of 'virulent and factious' opposition to the Anglican Church, rather than of opposition *per se* (IV. 33, 295). He qualified his justification of the continuance of the laws against Nonconformists by making it clear that they were there *in terrorem*, as a warning against treating the church with contempt rather than to prevent 'rational and dispassionate enquiries' (IV. 33, 296). Even this needed to be further softened in the fifth edition, almost certainly in response to Furneaux, who had remarked that 'If any one say, it is right to keep a rod *in terrorem*, though it would be injustice or inhumanity to use it: I should be apt to suspect, that, notwithstanding his fair pretences, when a proper opportunity offers, he will not fail to use it.'[33] Accordingly, from the fifth edition onwards, Blackstone no longer referred

[31] Blackstone, *Reply*, 3–5, 9–11.

[32] Blackstone, *Reply*, 10–11. The remainder of the pamphlet re-states Blackstone's arguments, originally expressed in Book I, that the liturgy of the Church of England was frozen at the Union of England and Scotland in 1707 and that any attempt to change it would amount to a dissolution of the Union.

[33] Furneaux, *Letters* (1770 edn.), p. ix.

to the old laws being kept *in terrorem*, and only justified the continuance of 'the milder penalties'.

A far more significant alteration was the omission in the fourth edition of Blackstone's comparison of the principles of Catholics and Dissenters, which had ended with a condemnation of the Dissenters, whose role in the political upheavals of the seventeenth century meant that they had achieved what Catholics had failed to do, 'the ruin of our church and monarchy' (IV. 34, 297). Instead he expanded on his arguments to the effect that the various penal laws against Dissenters were still in force but were suspended so that all those 'who will approve themselves no papists or oppugners of the trinity, are left at full liberty to act as their consciences shall direct them' (IV. 35, 297). Presumably the omission was specifically aimed at quieting his critics rather than as an indication of his own change of heart. Neither in the fourth nor in any subsequent edition did he change the sentences in chapter 8 that, like the original text of Chapter 4, blamed Dissenters for the civil wars and execution of Charles I. Nor did he change other derogatory references. He continued to imply that Dissenters had 'weak consciences' (IV. 34), overtly accused them of the sin of schism and attributed their beliefs to 'weakness of intellect … misdirected piety … perverseness and acerbity of temper' or to hopes of 'a prospect of secular advantage in herding with a party'—a reference to the identification of Dissenters as Whig sympathizers (IV. 34–5). Whether intended or not, his analysis of the reasons for the laws against Dissenters provided ammunition for the debates over the repeal of the Test and Corporation Acts that prevented Catholics from holding public office and which would occupy politicians over the next several decades.[34]

Reception

Blackstone's remarks on Dissent and Dissenters seems to have been the only aspect of Book IV that drew significant criticism in his own day. Jeremy Bentham's *Comment on the Commentaries* remained unfinished and was available only in manuscript until publication in the early twentieth century. Bentham's *Fragment on Government* published in 1776 attacked Blackstone's 'universal inaccuracy and confusion' and 'obscure and crooked reasoning', but the critique was pinned on the introduction to Book I and, unlike Priestley, Bentham was relatively unknown and lacking in influence. To be sure, Bentham did mention Book IV, but more as a matter of point-scoring than sustained critique. He picked holes in Blackstone's logic, using as one example Blackstone's discussion of burglary in chapter 16 when 'after telling us, in express terms, there must be an "actual breaking" to make burglary, he tells us, in the same breath, and in terms equally express, where burglary may be without actual breaking; and this because "the Law will not suffer itself to be trifled with" '.[35]

[34] [Anon.], *The Danger of Repealing the Test Act* (1790), 5–6.

[35] *A Fragment on Government* (Collected Works of Jeremy Bentham), ed. J. H. Burns and H. L. A. Hart (1988), 406–7.

Bentham's strictures do not appear to have been influential during Blackstone's own lifetime or even in the immediate aftermath of his death; indeed Bentham himself described the *Commentaries* as having 'a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable) than any other writer who on that subject has ever yet appeared'.[36] By 1779 Blackstone was being quoted in the latest edition of Hale's *History of the Common Law.* Both his prose and his organizational schema were heavily plagiarized by subsequent writers: his prose turns up in Tomlyn's *Law Dictionary* whilst in 1780 the *Commentaries* inspired the little-known London lawyer, William Ayres, to publish a work comparing the operation of the law in England and Ireland as well as addressing the issue of the power of the British parliament over the Irish parliament.[37] The *Commentaries* similarly formed the model for Zephaniah Swift's *System of the Laws of Connecticut* (1795–6). Other works that cited Book IV with approval included John Macarthur's *Treatise of the Principles and Practice of Naval Courts Martial* (1795) and Thomas Gisborne's *An Enquiry into the Duties of Men in the Higher and Middle Classes of Society in Great Britain* (1795). When Samuel Glasse published his *Magistrate's Assistant* in 1788 he specifically referred to Blackstone's 'ingenious, elegant and learned commentaries' and the resultant hope that 'the chair of magistracy will in future more easily be filled by persons of consequence and respectability'.[38] A new and revised issue of a treatise on the jury quoted 'that great man, Judge Blackstone' and his remarks on the value of the jury in Book III at length for the benefit of those who 'though they *ought*, may not perhaps be possessed of his valuable *Commentaries*'.[39]

Yet praise for Blackstone was not entirely unqualified. A manual for trainee barristers credited him for 'bringing darkness to light' and reducing 'to system a farrago of legal knowledge scattered over a vast range of black-lettered lore'. Nevertheless the author was anxious to emphasize that Blackstone had merely provided an introduction to the subject. The serious student of law was advised to interleave the pages with blank paper so that

> The marginal references to the authorities should be examined, the books referred to, be consulted; notes should be entered of errors, if any be found; together with what additional ideas may be collected on the subject, which the writer of a compendium only might think it unnecessary to insert. The topic should not even then be considered as finished, but subsequent notices should be inserted, as future reading, observation and practice, may tend to render the knowledge of the law, on each head, more full, or present determinations in any wise alter the doctrine laid down by precedents of past times …[40]

Similar remarks were made by St George Tucker when he produced an edition that he had revised to be suitable for the nascent US republic. The *Commentaries* had

[36] *Fragment on Government*, 4.

[37] W. T. Ayres, *A Comparative View of the Differences between the English and Irish Statute and Common Law. In a series of analogous Notes on the Commentaries of Sir W. Blackstone*' (1780).

[38] S. Glasse, *Magistrate's Assistant* (1788), p. xiv.

[39] J. Hawles, *Hamilton's Jury Guide or the Englishman's Right* (1794), preface.

[40] T. Ruggles, *The Barrister or Strictures on the Education Proper for the Bar* (Dublin, 1792), 8, 187–91.

produced 'the semblance of a regular system' but had also had pernicious consequences, since 'it has contributed to usher into the profession a great number, whose superficial knowledge of the law has been almost as soon forgotten, as acquired'.[41]

The 'regular system' to which Blackstone reduced the laws did not go far enough for later commentators who, like Bentham, have found Blackstone lacking in conceptual rigour. As Simon Stern has recently written, 'Blackstone's interest in presenting the conceptual basis of the criminal law often seems to promise more than it delivers.'[42] Yet for the student of the eighteenth-century English criminal justice system what is remarkable about Blackstone's account is not so much the limitations of its conceptual approach to the criminal law, but rather the limitations he imposed on his own text by remaining firmly within a descriptive narrative. This was very much a reflection of the relatively undeveloped state of the criminal law. Although the prosecution was required to provide evidence of guilt, it was largely up to the defendant to demonstrate his or her innocence. Trials were quickly over. Beattie noted that at the Surrey assizes on 18 August 1751, ten cases were heard in the space of seven hours, two of which resulted in capital sentences. Over the space of just four days, the court disposed of forty-three cases: thirty-seven felonies and six misdemeanours. That disposition could be so speedy is attributable to the way in which criminal trials were regarded as simple fact-finding exercises.[43] Defendants thus had little option but to plead the general issue, since they either were or were not guilty of the facts as alleged. Judges (and juries) were wary of confessions obtained through force or favour and were equally wary of uncorroborated evidence given by accomplices in return for a pardon or immunity, but the rules of evidence were somewhat crude. Much that would be crucial to a modern trial was irrelevant in Blackstone's day.

At its simplest, one might well be surprised by Blackstone's statements (IV. 198) about the need for indictments to be of 'precise and sufficient certainty', since he must have known what historians have long since established, that eighteenth-century indictments were full of legal fictions. Fulfilling the 'precise' requirements of the law did not mean that the information about an individual's occupation or residence had to be accurate. Furthermore, although statutory offences were distinguished from common law ones by the phrase 'against the statute', the statute in question was never specified. Blackstone's encomiums in Chapter 27 on the role of the grand and petty jury in protecting defendants from the crown (or prosecution) sit somewhat oddly against his discussion of informations *ex officio*—that is, prosecutions initiated by the crown's law officers in the court of King's Bench. Such prosecutions were controversial because they were perceived to be repressive, as they bypassed the grand jury and were usually reserved for political offences.[44] Yet Blackstone justified their

[41] St G. Tucker, *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States* (Philadelphia, 1803), pp. iii–iv.

[42] S. Stern, 'Blackstone's Criminal Law: Common Law Harmonization and Legislative Reform (1769)', in M. D. Dubber (ed.), *Foundational Texts in Modern Criminal Law* (Oxford, 2014), 65.

[43] J. M. Beattie, *Crime and the Courts in England 1660–1800* (Oxford, 1986), 339, 341, 377.

[44] D. Hay, *Criminal Cases on the Crown Side of King's Bench: Staffordshire, 1740–1800* (Stafford, 2010), 277–8.

use as 'necessary, not only to the ease and safety but even to the very existence of the executive magistrate' (IV. 200).

Although Blackstone referred on several occasions to cases that were ultimately decided by the twelve judges of the central common law courts (King's Bench, Common Pleas, and Exchequer), he made no attempt to explain the process by which a jury returned a special verdict or by which a judgment was reserved by the presiding judge for further consideration. A special verdict occurred when the jury returned a statement of facts but professed themselves uncertain of how the law should be applied to those facts. The statement of facts was then subject to collective deliberation by the twelve judges at Serjeants' Inn.[45] The closest Blackstone came to a discussion of such cases was a few sentences in Chapter 27 which described a special verdict as one where the jury '*doubt* the matter of law, and therefore *chuse* to leave it to the determination of the court' (IV. 232–3). He did not indicate that on the rare occasions on which a special verdict was returned it was at the direction of the presiding judge, so leaving it to be implied that this was an example of the jury exercising power in its own right. Interestingly, given the emphasis throughout on describing procedure, he did not go on to explain how such a verdict then came before the twelve judges for resolution.

A further striking omission in Blackstone's account of the way in which the criminal justice system processed defendants occurred in his very limited discussion of the appellate process. As noted above, defence counsel were only just beginning to appear in criminal trials. Coupled with the rapidity of trials, this meant that defendants were almost always at a disadvantage: despite the maxim, repeated by Blackstone himself, that it were better that ten guilty men go free than that one innocent man be convicted, miscarriages of justice must have been commonplace.[46] As Blackstone indicated, the only method available to set aside a judgment was by writ of error to King's Bench. A writ of error dealt only with mistakes on the face of the record which, since the record did not recite the evidence on which a verdict had been based, was of very little use to a defendant who had been wrongfully convicted. They were extremely rare in criminal cases.[47] Blackstone identified a further layer of appeal, in that it was possible to remove a verdict in King's Bench to the House of Lords. This was technically correct but it seems highly unlikely that criminal cases were ever taken to the House of Lords, though the final conclusion on that issue must await further research.

Yet the absence of a formal appellate system does not mean that there was no way to challenge a guilty verdict, even though Blackstone omitted discussing it. Appeals were mounted, and mounted successfully, but the mechanism by which this was

[45] J. Oldham, 'Informal Law-Making in England by the Twelve Judges in the Late 18th and Early 19th Centuries', *Law and History Review*, 29 (2011), 181–220.

[46] The ratio of ten guilty men to one innocent was well established throughout the British Isles long before Blackstone included it in his writings. It can be found as early as 1694 in a sermon delivered in Scotland, and was mentioned in a private letter from Jonathan Swift to Alexander Pope in 1721: J. Webster, *A Sermon preached in the High Church of Edinburgh at the Election of Magistrates of the City* (Edinburgh, 1694), 8; *The Works of Alexander Pope Esq.* (1752), ix. 29.

[47] I rely here on my own unpublished research into the metropolitan jurisdiction of King's Bench. It should also be noted that Douglas Hay's survey of Staffordshire cases heard in King's Bench between 1740 and 1800 does not identify any appeals in criminal cases brought by writ of error: Hay, *Criminal Cases*.

done was through applications for clemency. In Chapter 1 Blackstone referred to the judges respiting half of those capitally convicted through 'compassion', but petitions for clemency were made, and granted, on a far wider range of grounds than compassion alone. Petitions for clemency and the judges' reports on them are found fitfully in the state papers before 1784; they survive in greater numbers in a discrete series after Blackstone's death (covering 1784 to 1830). Recurring themes both during Blackstone's life and earlier were the previous good character of the defendant and his or her age (whether old age or youth).[48] They also, as one might expect, included claims of innocence—effectively an appeal under another name. The petitions were referred to the judge who presided over the trial in question and the ensuing reports sometimes took on an appellate character, as they included a review of the evidence as well as of the credibility and reliability of witnesses.

Although the character of the criminal trial was changing during the eighteenth century it seems likely that the character of requests for clemency did not. In 1685, in response to the petition of John and Hanna Clyatt, the presiding judge at their trial certified that the evidence against them was doubtful.[49] In 1728 the bishop of Exeter petitioned on behalf of defendants who had been found guilty of murder, alleging that the evidence was insufficient and the conviction was made against the direction of the presiding judge.[50] Joseph Smith received a conditional pardon in 1789 in part because the witness against him was of 'bad character'.[51] Occasionally the judges even considered fresh evidence. In August 1769—shortly after the publication of Book IV—a temporary reprieve was issued for Moses Alexander when new evidence suggested his innocence.[52] Michael Gough was pardoned in 1789 as the judge was convinced, following an investigation by 'a gentleman of credit & fortune', that the sole witness was 'mistaken as to the person of the prisoner'.[53] George Shawell was convicted of assault with intent to extort after he failed to convince a grand jury that Charles Henry Brawn was guilty of an attempted homosexual act. He was pardoned in 1786 when subsequent events, attested by 'three irreproachable witnesses', suggested that Brawn was guilty of a sexual assault on a young boy, leading to the belief that Shawell had indeed been the victim of a homosexual predator.[54]

The Afterlife of the *Commentaries*

Much of Book IV is irrelevant to any modern jurist. Its references to specific statutes meant that it required constant updating, even (as has been seen) during Blackstone's lifetime, let alone in the centuries since. What is left is, as it were, the more complex,

[48] For a wider discussion of the social function of clemency, see D. Hay, 'Property, Authority and the Criminal Law', in D. Hay, P. Linebaugh *et al.*, *Albion's Fatal Tree* (1975).

[49] *Calendar of State Papers. Domestic Series*: *James II: 1685*, pp. 114–15.

[50] TNA, SP 36/5/7.

[51] TNA, HO 9/26, ff. 115–16.

[52] *Calendar of Home Office Papers*, 1766–9, p. 486.

[53] TNA, HO 47/8/2, ff. 2–3.

[54] TNA, HO 47/5/71, ff. 231–2.

and arguably rather more important, containing text—the wider attempts to explain the laws and to supply a historical context and rationale for them.

It is this that gives Book IV an enduring afterlife. The *Commentaries* continue in some respects to be regarded as authoritative, in that Blackstone is thought to have produced an accurate picture of English law as it was practised and understood in eighteenth-century England. This is particularly true of the USA, where, despite the strictures of St George Tucker and Thomas Jefferson, originalists (those who maintain that the American constitution should be interpreted as if its meaning were fixed at its enactment) somewhat surprisingly hold that Blackstone, who was a Tory, a committed monarchist, and enemy of American independence, provided a portrait of English law as it would have been understood—and accepted—by the founding fathers. Indeed, Jessie Allen has recently pointed out that the rise of originalism is amongst the factors that have resulted in the *Commentaries* undergoing 'a renaissance at the Supreme Court'.[55]

The difficulties of such a renaissance are readily illustrated by reference to just two Supreme Court citations. In one case, for example, Justice Alito quoted Coke and Blackstone for a definition of extortion.[56] The citation to Blackstone is superfluous because it is circular. Blackstone referenced his definition to Hawkins; Hawkins referenced it to Coke, and indeed Blackstone's wording is far closer to Coke than to Hawkins.

A more disconcerting example is Justice Scalia's dissenting opinion in *Roper v Simmons*, in which he cited Blackstone and Hale in support of the notion that in 1791, when the eighth amendment (prohibiting cruel and unusual punishments) was passed, 'the death penalty could theoretically be imposed for the crime of a seven-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of fourteen'.[57] The operative word, of course, is 'theoretically', for Blackstone was simply paraphrasing Hale. Hale can scarcely be used as evidence of opinion in 1791; by that date he had been dead for over a century. Blackstone's examples of minors who were actually executed also came from Hale and belonged to what was then already a distant past. Nor was this past one to be emulated, for it is quite clear from his other references that Blackstone was extremely uneasy about capital punishment, even for adults, let alone for minors. As already noted (p. xiv), his one reference to a sentence of death passed on a minor in his own lifetime was to the case of William York, whose life was spared precisely because the execution of children was indeed repugnant to jurists half a century before the passage of the eighth amendment.

One is tempted to repeat Thomas Ruggles' injunction to interleave blank pages so that the reader can track and take note of Blackstone's citations. Perhaps the best advice one can offer about using the *Commentaries* for modern purposes is 'treat with care'.

Ruth Paley

[55] J. Allen, 'Reading Blackstone in the Twenty-First Century', in W. Prest (ed.), *Re-interpreting Blackstone's Commentaries* (Oxford, 2014), 215.

[56] Sekhar v United States, 133 S. Ct 2720 (2012).

[57] Roper v Simmons, 543 S. Ct 551 (2005).

Note to the Reader

This edition seeks to identify Blackstone's changes to the text of the *Commentaries* between the first edition of 1765–9 and the ninth and first posthumous edition which appeared in 1783 under the editorship of Dr Richard Burn.[1] All such authorial 'varia' are marked in each chapter by a preceding numeral enclosed in angled brackets. These cues are keyed to sequential lists, similarly numbered and grouped by chapter, at the end of each volume. Here, every item is preceded by the number of the edition in which the authorial change first occurred, enclosed in square brackets. The listing commences with the relevant word, clause, sentence, or longer passage from the first edition, followed by a vertical divider | separating the original from the altered text. Omitted text or footnotes are annotated accordingly, or indicated by an omission on the right-hand side of the divider. Textual changes to the same sentence or paragraph over more than one edition are represented by inserting the relevant information in square brackets, or listed sequentially following the first numbered entry.

To keep the varia lists within manageable proportions, the following are generally ignored: (i) changes in punctuation and/or spelling; (ii) unambiguous typographical errors, including misspellings, omissions, and erroneous repetition of single words corrected in subsequent editions; (iii) incorporation of footnotes in text or vice versa; (iv) changes in cross-references due to different pagination in later editions; (v) alterations made in one edition reversed in the next or following editions; (vi) changes of form which do not change meaning, as where adjacent words are transposed, or paragraphs are recast.

No attempt has been made to modernize Blackstone's language. While his spelling often does not accord with current usage, most variants are simply phonetic equivalents of the modern form. Except for removing the apostrophe from the possessive 'it's', a similar policy applies to punctuation, italics, and the use of capital letters, although evident misspellings and typographical errors are silently corrected.

Blackstone's footnotes present difficulties of a different kind. Apart from the use of lower-case letters of the alphabet rather than numerals, both for in-text cues and foot-of-page markers (usually, but not always, without the letters 'j' and 'v'), the notes themselves include often cryptic and inconsistent bibliographical citations, to which no key was originally provided. While the following list of Abbreviations identifies most such references, a few uncertainties remain. It should also be noted that Blackstone's quotation marks often denote paraphrases rather than verbatim transcriptions.

Editorial annotations and interventions are enclosed in square brackets, while editorial footnotes are placed below those of Blackstone. Where his footnotes refer to published reports of identifiable law cases, the case name is added before the citation. An appended Table of Cases provides dates and, where possible, a reference to the

[1] A fuller account of editorial methodology appears in the first volume (I. xliii–xl).

corresponding volume of the *English Reports* (although Blackstone sometimes cites differently paginated early editions of the nominate reports reproduced in that standard series), the yearbooks, or other sources. The Table of Statutes, also found at the end of the volume, is a chronological list and page index of charters and parliamentary legislation mentioned both in the text and footnotes.

In the text, the original pagination is indicated by numbers placed in the margins. In the footnotes Blackstone's own cross-references are retained, but supplemented with editorial cross-references keyed to the pagination of this edition.

The *Commentaries* use the old-style Julian calendar, in which each new year began on 25 March rather than 1 January, for events and parliamentary statutes before 1752, when Great Britain adopted the Gregorian calendar. Thus the Bill of Rights, presented to William and Mary in February 1689 according to our modern calendar, is dated by Blackstone to the previous year.

Wilfrid Prest

Abbreviations

Books listed were published in London, unless otherwise noted; the date given is that of first publication, together with the date of any later edition which appears to have been owned or used by Blackstone; for relevant book lists see Prest, *Blackstone*, 36–9. Books of the Bible (King James version) are not separately listed.

General Abbreviations

Abr.	Abridgment
A.R.	*anno regni* [regnal year]
append.	appendix
b.	book
B.R.	*Bancum Regis* [King's Bench, court of]
c., ch., cap.	chapter
d.	penny; died
f.	folio
fl.	flourished
H., Hil.	Hilary (term)
in calc	to the end
L., *l.*, lib.	book *or* pound sterling
L., LL	*leges* [laws]
M., Mich.	Michaelmas (term)
OBO	The Proceedings of the Old Bailey, www.oldbaileyonline.org
OT	Old Testament
pl.	plea(s), pleading
s.	shilling
stat.	statute
t., tit.	title
tr.	tract; translated
Trin.	Trinity (term)
Westm.	Westminster
YB, Yearb.	yearbook

Bibliographical Abbreviations

Anders., And.	*Les Reports du Treserudite Edmund Anderson*, 2 vols (1664–5)
Ass., Ass. Pl.	*Liber Assisarum et Placitorum Coronae* (*c.* 1514; 1678)
Bac. Elem., Elem.	F. Bacon, *The Elements of the Common Lawes of England* (1630)
Bacon, of English gov	N. Bacon, *An Historical and Political Discourse of the Laws and Government of England* (1689)
Barr., Barrington on the statutes	D. Barrington, *Observations on the… Statutes* (1766)
Becc., Beccar.	C. Beccaria, *Dei Delitti e del Pene* (1764), tr. as *On Crimes and Punishments* (1767)
Bracton Bract.,	H. de Bracton [attrib.], *De Legibus et Consuetudinibus Angliæ* (1569)
Brad. Hist.	R. Brady, *A Continuation of the Complete History of England* (1700)
Briton Britt.,	*Summa de Legibus Anglie que vocatur Bretone* (*c.* 1530; 1640)
Bro., Bro *Abr.*	R. Brooke, *La Graunde Abridgement* (1573)
Brownl.	[R. Brownlow and J. Goldesborough], *Reports of… Cases in Law*, 2 parts (1651–2)
Bulstr.	*Reports of Edward Bulstrode* (1657–9)
Burn., Burn's Justice	R. Burn, *The Justice of the Peace and Parish Officer*, 2 vols (1755)

Burnet's Hist.	[G. Burnet], *Bishop Burnet's History of His Own Time*, 2 vols (1724–34)
Burr.	J. Burrow, *Reports of Cases… in the Court of King's Bench, Part the Fourth*, 5 vols (1766–80)
Caesar *de bell. Gall.*	Caesar, *Commentarii de Bello Gallico*
Carte, Life of Ormond	T. Carte, *An History of… James, Duke of Ormonde*, 3 vols (1735–6)
Cic.	Cicero
Cic. *de LL.*	Cicero, *De Legibus*
Claus., claus	see *Rot. claus.*
Co. Litt.	E. Coke, *The First Part of the Institutes of the Laws of England, or A Commentary upon Littleton* (1628)
Cod. Cod.	*Codex Justinianus*
Com. Journ.	*Journals of the House of Commons* (1742–)
Comyns Dig.	J. Comyns, *Digest of the Laws of England*, 5 vols (1762–7)
Consid., *Considerations on the law of forfeiture*, *Law of forfeit.*	[C. Yorke], *Some Considerations on the Law of Forfeiture for High Treason* (1744)
Cosmogr.	S. Munster, *Cosmographia* (1574)
Cowp.	H. Cowper, *Reports of Cases… King's Bench* (1783)
Cro. Car.	*The Reports of Sir George Croke Knight* (1657)
Crompt.	A. Fitzherbert and R. Crompton, *LOffice et Aucthoritie de Iustice de Peace* (1583)
Dal.	W. Dalison, *Les Reports des divers special Cases* (1689)
Dalt. *Just.*	M. Dalton, *The Countrey Justice* (1618; rev. edn. by W. Nelson, 1727)
Dav.	J. Davies, *Le Primer Report des Cases* & *Matters en Ley… en les Courts del Roy en Ireland* (Dublin, 1615)
De M. G., De mor. Germ.	*see* Tacitus
de off.	Cicero, *De Officiis*
Decret.	*Decretum Gratiani*
Decretal.	*Decretals, collected* (various editions)
Dialog. de Scacch	*Dialogus de Scaccario* in T. Madox, *The History and Antiquities of the Exchequer* (1711)
Domat. publ. law.	J. Domat, *Les Loix Civiles dans leur Ordre Naturel* (Paris, 1689), tr. as *The Civil Law in its Natural Order*, 2 vols (1720)
Dr. & St.	C. St German, *Doctor and Student: Or, Dialogues between a Doctor of Divinity and a Student in the Laws of England* (1528–31; 1697)
Duck *de authorit. jur. civ.*	A. Duck, *De Usu et Authoritate Juris Civilis Romanorum* (1653)
Dufresne. Gloss	C. Du Fresne du Cange, *Glossarium ad Scriptores Mediae* & *Infimae Latinitatis*, 6 vols (Paris, 1678; 1733–6)
Dyer	[J. Dyer], *Cy Ensount Ascuns Novel Cases* (1585)
Eadm.	Eadmer, *Historia Novorum in Anglia*, ed. J. Selden (1623)
Eir., Eirenarch	*see* Lamb. *Eir.*
Ellys, Of English Liberty	A. Ellys, *The Spiritual and Temporal Liberty of Subjects in England* (1765)
Ess. on gov.	J. Locke, *Two Treatises of Government* (1689)
Extrav.	*Extravagantes* [papal decretals]
F. N. B.	A. Fitzherbert, *La Novelle Natura Brevium* (1534; 1635)
Farr.	T. Farresley, *Modern Cases Argued and Adjudged in the Court of King's Bench* (1716)
Festus	V. Flaccus, *De Verborum Significatione*, ed. S. P. Festus (*The Lexicon of Festus*)
Feud.	*Libri Feudorum*
Ff.	Justinian's *Digest*
Fitzh. Survey	John Fitzherbert, *Boke of Surveying* (first printed 1523)
Fitzherbert	*see* Crompt.
Finch. L	H. Finch, *Law, or a Discourse Thereof* (1627; 1678)
Flet.	*Fleta, seu Commentarius Iuris Anglicani*, ed. J. Selden (1647)
Fortesc. *de LL. Angl.*, *de laude LL. Angl.*	J. Fortescue, *De Laudibus Legum Angliae* (1543?)

Fost. Foster. Foster Rep.	M. Foster, *A Report of Some Proceedings … for the Trial of the Rebels in the Year 1746, to which are Added Discourses Upon a Few Branches of the Crown Law* (Oxford, 1762) [Foster's *Crown Law*]
Fox, Acts and Mon.	J. Foxe, *The Book of Martyrs, the Acts and Monuments of the Church* (1563)
Gilb. Exch.	G. (or J.) Gilbert, *A Treatise on the Court of Exchequer* (1759)
Gilb. Hist. C. P.	G. (or J.) Gilbert, *The History and Practice of the Court of Common Pleas* (1737)
Glanv., Glanvil	Ranulf de Glanvill [attrib.], *Tractatus de Legibus et Consuetudinibus Regni Angliae* (*c.* 1554)
Gloss., *Glossar*	Sir Henry Spelman, *Glossarium Archaiologicum* (1664)
Grand coustumier	*Le Grand Coutumier … de Normandie* (Rouen, *c.* 1483); also ed. G. Le Rouillé (Rouen, 1539)
Grand instructions for framing a new code of laws for the Russian empire	[Catherine II], *The Grand Instructions to the Commissioners appointed to frame a new Code of Laws*, tr. M. Tatischeff (1768)
Gravin. *Orig.*, *orig. jur.civ.*	G. Gravina, *Originum Juris Civilis*, 2 vols (Naples, 1713)
Grotius, On Numb.	*Hugonis Grotii Annotationes in Vetus* & *Novum Testamentum* (1727)
Grotius, *de j. b.* & *p.; de jure b.* & *p.*	H. Grotius, *De Jure Belli ac Pacis* (Paris, 1625; Amsterdam, 1720)
Guicciard. Hist	F. Guicciardini, *The Historie of Guicciardine, conteining the Warres of Italie* (1579); *The History of Italy*, 10 vols (1754)
Hal. Hist. C. L.	M. Hale, *The History of the Common Law of England* (1713)
Hal. P. C., Hal. Sum	M. Hale, *Historia Placitorum Coronae. The History of the Pleas of the Crown*, ed. S. Emlyn, 2 vols (1736)
Hawk P.C.	W. Hawkins, *A Treatise of the Pleas of the Crown*, 2 vols (1716–21)
Hengham	R. de Hengham, *Magna* and *Parva*, ed. J. Selden, in J. Fortescue, *De Laudibus Legum Angliae* (1616)
Hist. of Reb.	E. Hyde, earl of Clarendon, *The History of the Rebellion and Civil Wars in England*, 3 vols (Oxford, 1702–4)
Hob.	*The Reports of That Learned Sir Henry Hobart* (1641)
Holingsh.	R. Holingshed, *Chronicles*, 2 vols (1577)
Hor. *ad Aug*	Horace, *Ad Augustum*
Hughes	*The Works of Mr. Edmund Spenser*, ed. J. Hughes, 6 vols (1715)
Hume, Hume Hist. of G. B.	D. Hume, *The History of Great Britain*, 2 vols (1754–7)
Hutt.	*The Reports of … Sir Richard Hutton* (1656)
Ingulph	*Rerum Anglicarum Scriptores post Bedam … Ingulphi Abbatis Croylandensis Historiarum lib. I*, ed. H. Savile (1596)
Inst.	E. Coke, *Institutes of the Lawes of England*, 4 vols (1628–44)
Jon.	*Les Reports de Sir William Jones* (1675)
T. Jones	T. Jones, *Les Reports de Divers Special Cases* (1695), tr. as *Reports of Several Special Cases* (1729)
Judic. Civit. Lund. Wilk.	*see* Wilk. *LL. Ang. Sax.*
Keilw.	*Relationes quorundam Casuum Selectorum ex Libris Roberti Keilwey* (1602)
Kel, Kelyng, Kelynge	J. Kelyng, *A Report of Divers Cases in Pleas of the Crown* (1708)
Kitch. of courts	J. Kitchin, *Le Court Leete, et Court Baron* (1580), tr. as *Jurisdictions: Or The Lawful Authority of Courts* (1651)
Lamb. Arch.	W. Lambarde, *Archeion, or A Discourse upon the High Courts of Justice in England* (1635)
Lamb. Eir.	W. Lambarde, *Eirenarcha: or, Of the Office of the Justices of Peace* (1581)
LL. Athelstan., *Aethelst.*, *Edm.*, *Edw. Conf.*, *Edw.*, *Aelfr.*, *Aelfredi*, *Alured*, *Inae*, *Cnuti*, *Canut*	*see* Wilk. *LL. Ang. Sax.*
Lord Kaymes	[H. Home, Lord Kaymes], *Historical Law Tracts*, 2 vols (Edinburgh, 1758)
Lords Journ.	*Journals of the House of Lords* (1767–)

Lyndewode	W. Lyndwood, *Constitutiones Provinciales Ecclesiae Anglicanae* (Oxford, 1483; 1679)
Mirr., Mirror	A. Horne [attrib.], *The Booke Called, the Mirrour of Justices* (1646)
Mod.	Modern Reports. or Select Cases, 12 vols (1682–1741)
Mod. Un. Hist., Mod. Univ. Hist.	*The Modern Part of an Universal History, from the Earliest Account of Time,* 44 vols (1759–66)
Montague, Lady M.W. lett.	*Letters of the Right Honourable Lady M[ar]y W[ortle]y M[ontagu]e*, 3 vols (1763)
Montesq. Sp. L.	C.-L. de Secondat, Baron de Montesquieu, *L'Esprit des Loix* (Paris, 1748); tr. as *The Spirit of Laws*, 2 vols (1750)
Moor.	*Cases Collect and Report per Sir Fra[ncis] Moore* (1663)
North's life of lord Guilford	R. North, *The Life of the Right Honourable Francis North, Baron of Guilford* (1742)
Nov.	Justinian's *Novellae Constitutiones*
P. W[ms]	W. Peere Williams, *Reports of Cases… in the High Court of Chancery*, 3 vols (1741–6)
Petit. *LL. Attic.*	S. Petit, *Leges Atticae* (Paris, 1635)
Plato *de LL.*, *de Leg.*	Plato, *Of the Laws*
Plowd.	*Les Comentaries, ou les Reportes de Edmund Plowden*, 2 vols (1571–8)
Plutarch in vit.	Plutarch, *Lives*
Pop., Poph.	*Reports and Cases Collected by the Learned Sir John Popham* (1656)
Potter, Pott. Ant., Potter. Antiq., Potter. Antiqu.	J. Potter, *Archaeologiae Graecae or the Antiquities of Greece* (Oxford, 1697)
PROME	*The Parliament Rolls of Medieval England 1275–1504*, ed C. Given-Wilson, 16 vols (2005)
Pryn. on 4 Inst	W. Prynne, *Brief Animadversions on… the Fourth Part of the Institutes of the Lawes of England… compiled by… Sir E. Cooke* (1669)
Pryn. Rec. Append.	W. Prynne, *An Exact Chronological Vindication and Historical Demonstration*, 3 vols (1665–8) [Prynne's Records]
Puff., Puffendorf, *Law of Nat. and N.*, Puff. *L of N., L. of Nat. and N.*, *L. of N.*	S. von Pufendorf, *De Jure Naturae et Gentium* (Lund, 1672), tr. as *Of the Law of Nature and Nations* (1703)
Qu. Curt.	Quintus Curtius, *Histories of Alexander the Great*
Rast. Ent.	W. Rastell, *A Colleccion of Entrees* (1566)
Raym.	T. Raymond, *The Reports of Divers Special Cases* (1696)
Rep.	*Les Reports de Edward Coke*, 13 vols (1600–59)
Robertson. Cha. V	W. Robertson, *The History of the Reign of the Emperor Charles V*, 3 vols (1769)
Roll. Rep	*Les Reports de Henry Rolle*, 2 vols (1675–6)
Rot. claus.	*Rotuli Clausarum* (Close rolls)
Rot. Parl.	*Rotuli Parliamentorum*, 7 vols (1767–77)
Rushw., Rushw. Coll.	J. Rushworth, *Historical Collections*, 7 vols (1659–1701)
Rym., Rym. Feod.	T. Rymer and R. Sanderson, eds., *Foedera, Conventiones, Literae*, 20 vols (1727–35)
Salk.	W. Salkeld, *Reports of Cases adjudg'd in the Court of King's Bench*, 3 vols (1717–24)
Saund.	*Les Reports du… Edmund Saunders* (1686)
Scobell	*A Collection of Acts and Ordinances*, ed. H. Scobell, 2 vols (1657–8)
[Selden] *de legib. Hebræor*	J. Selden, *De Jure Naturali et Gentium juxta Disciplinam Hebraeorum* (1640)
Seld. *In Flet.*	*Fleta, seu Commentarius Juris Anglicani*, ed. J. Selden (1647)
Selden, judic. in parl.	J. Selden, *Of the Judicature in Parliaments* (1681)
Seld. tit. of hon.	J. Selden, *Titles of Honor* (1614)
[Selden] *Uxor Ebraic*.	J. Selden *Uxor Hebraica* (1646; 1673)
Show.	*The Reports of Sir Bartholomew Shower*, 2 vols (1708–20)
Sid., Siderf.	T. Siderfin, *Les Reports des Divers Special Cases… en le Court del Bank le Roy*, 2 parts (1683–4)
Smith's common.	T. Smith, *De Republica Anglorum* (1583)

Sp. L.	*see* Montesq.
Spelm. *Gloss.*	H. Spelman, *Glossarium Archaiologicum* (1664; 1687)
Spelman Cod.	*see* Wilk. *LL. Ang. Sax*
Spencer's state of Ireland	*see* Hughes
St German	*see* Dr. & St.
St. Tr., State Tr., ST	*A Complete Collection of State Trials*, ed. S. Emlyn *et al.*, 10 vols (1730–66)
Staundf. P. C.	W. Staunford, *Les Plees del Coron* (1557)
Stiernhook, *de jure Sueon.*, Stiernh. *de jure Sueon.*, Stiernhook, *de jure Goth.*	J. Stiernhöök, *De Jure Sueonum et Gothorum Vetusto* (Stockholm, 1672)
St., Stra.	J. Strange, *Reports of Adjudged Cases*, 2 vols (1755)
Styl. Rep.	W. Style, *Narrationes Modernae, or Modern Reports* (1658)
Tacitus, *de M. G.*, *de More Germ.*	Tacitus, *Germania*
Tho. Rudborne *Hist. maj. Winton.*	T. Rudborne, *Historia Major de Fundatione et Successione Ecclesiae Wintoniensis* (1691)
Tovey's *Angl. judaic.*	D. Tovey, *Anglia Judaica: or the History and Antiquities of the Jews in England* (Oxford, 1738)
Tully	*see* Cic.
Utop.	T. More, *Utopia* (Glasgow, 1750)
Valer. Maxim.	*Valerii Maximi de Factorum Dictorumque Memorabilium Exemplis Libri Novem* (Paris, 1588; London, 1673)
Vern.	*Cases Argued … in the High Court of Chancery*, 2 vols (1726)
Voltaire *Siecl. Louis xiv*	Voltaire, *Le Siècle de Louis XIV* (Berlin, 1751)
Vouglans	P.-F. M. de Vouglans, *Institutes au droit criminel* (Paris, 1757)
West. Symbol.	W. West, *Symbolaeographia* (1590)
Wilk. Concil.	D. Wilkins, *Concilia Magnae Britanniae et Hiberniae, 446–1717*, 4 vols (1737)
Wilk. *LL. Ang. Sax.*	D. Wilkins, *Leges Anglo-Saxonicae Ecclesiasticae et Civiles … subjungitur Henr. Spelmanni Codex Legum Veterum Statutorum Regni Angliae …* (1721)

COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE FOURTH.

BY

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OXFORD,
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M. DCC. XLIX.

OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

We are now arrived at the fourth and last branch of these commentaries; which treats of *public wrongs*, or *crimes* and *misdemesnors*. For we may remember that, in the beginning of the preceding volume[a], wrongs were ⟨1⟩ divided into two sorts or species; the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemesnors; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly, their several degrees of guilt, as 2
principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemesnor.

First, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the *pleas of the crown*: so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence[b].

The knowlege of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to its adequate and necessary penalty, is of the utmost importance to every individual in the state. For (as a very great master of the crown law[c] has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

[a] Book III. ch. 1.
[b] See Vol. I. p. 268 [I. 173].
[c] Sir Michael Foster. pref. to rep. [Foster, *Crown Law*, iii.]

In proportion to the importance of the criminal law, ought also to be the care and
3 attention of the legislature in properly forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as lord Bacon[1] expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence; from some, or from all, of these causes it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute enquiries concerning the local constitutions of other nations; the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own[d]. But even with us in England, where our crown-law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike;—even here we shall occasionally find room to remark some particulars, that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the antient common law, when the reasons have ceased upon which those
4 rules were founded; from not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons, who know what provisions the law has already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereo[e]. And

[d] Baron Montesquieu, marquis Beccaria, &c.

[e] See Vol. II. p. 345 [II. 234–5].

[1] According to Francis Bacon, Henry VII's laws were 'deep, and not vulgar; not made upon the spur of a particular occasion for the present, but out of providence of the future, to make the estate of his people still more and more happy': *The History of the Reign of King Henry VII*, in *The Works of Francis Bacon*, 3 vols (1753), ii. 294.

surely equal precaution is necessary,[2] when laws are to be established, which may affect the property, the liberty, and perhaps even the lives, of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or to cut down a cherry tree in an orchard[f]. Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy,[3] to be seen for one month in the company of persons who call themselves, or are called, Egyptians[g].[4]

It is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public: but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles: and it is the duty of such a one to hint them with decency to those, whose abilities and stations enable them to apply the remedy. Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to savour of arrogance, I proceed now to consider (in the first place) the general nature of *crimes*.

I. A crime, or misdemesnor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemesnors; which, properly speaking, are mere synonymous terms: though, in common usage, the word, "crimes," is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprized under the gentler name of "misdemesnors" only.

The distinction of public wrongs from private, of crimes and misdemesnors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemesnors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the

[f] Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.

[g] Stat. 5 Eliz. c. 20.

[2] Since 1706 procedure in the House of Lords (where most private bills originated) had required the judges to scrutinize and report on every such bill before it could be considered by the House.

[3] See further IV. 236–41.

[4] i.e. the Romani, those travelling people whose supposed Egyptian origins led to the term 'gypsy', now widely regarded as pejorative; see further IV. 108–9.

6 community. Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury: but as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set, for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but, were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong; which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe, but it affords room for a private compensation also: and herein the distinction of crimes from civil injuries is very apparent. For instance; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment: and the party beaten may also have his private remedy by action of trespass for the injury, which he in particular sustains, and recover a civil satisfaction in damages. So also, in case of a public nusance, as digging a ditch across a highway, this is punishable by indictment, as a common offence to the whole kingdom and all his majesty's subjects: but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender
7 may be compelled to make ample satisfaction, as well for the private injury, as for the public wrong.

Upon the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: *viz.* not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent; the manner of doing which was the object of our enquiries in the preceding book of these commentaries: but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

II. The nature of *crimes and misdemesnors* in general being thus ascertained and distinguished, I proceed in the next place to consider the general nature of *punishments:* which are evils or ⟨2⟩ inconveniences consequent upon crimes and misdemesnors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemesnors[h]. It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind; since all are by nature equal. Whereof the first murderer Cain was so 8
sensible, that we find him[i] expressing his apprehensions, that *whoever* should find him would slay him.[5] In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state, (though, in fact, never exercised by any) of punishing not only their own subjects, but also foreign embassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt[k].

As to offences merely against the laws of society, which are only *mala prohibita* [wrong because forbidden], and not *mala in se* [intrinsically wrong]; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions: and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness therefore of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent; ⟨3⟩ it is part of the original contract into which they entered, when first they engaged in society; it was calculated for, and has long contributed to, their own security.

This right therefore, being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all its members, as each individual member had naturally over himself or others. Which has occasioned some to doubt, 9
how far a human legislature ought to inflict capital punishments for *positive* offences; offences against the municipal law only, and not against the law of nature; since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah, their common ancestor and representative, "whoso sheddeth man's blood, by man

[h] See Grotius, *de j. b.* & *p. l.* 2. *c.* 20. Puffendorf, L. of Nat. and N. b. 8. c. 3.
[i] Gen. iv. 14.
[k] See Vol. I. pag. 254 [I. 164–5].

[5] A reference to the story of Cain and Abel, sons of Adam and Eve, as told in the book of Genesis 10. 1–14.

shall his blood be shed[l]." In other instances they are inflicted after the *example* of the creator, in his positive code of laws for the regulation of the Jewish republic; as in the case of the crime against nature.[6] But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature; as for forgery, for ⟨4⟩ robbery, and sometimes for offences of a lighter kind. Of these we are principally to speak: as these crimes are, none of them, offences against natural, but only against social, rights; ⟨5⟩ not even robbery itself, unless it be a robbery from one's person: all others being an infringement of that right of property, which, as we have formerly seen[m], owes its origin not to the law of nature, but merely to civil society.

The practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, sir Matthew Hale[n]: "when offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legislature in putting him to death that commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late empress Elizabeth, than under her more sanguinary predecessors? Is it now, under Catherine II, less civilized, less social, less secure? And yet we are assured, that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death: and the latter has, upon full ⟨6⟩ experience of its being useless, nay even pernicious, given orders for abolishing it entirely throughout her extensive dominions[o]. But indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded waggons is

[l] Gen. ix. 6.
[m] Book II. ch. 1.
[n] 1 Hal. P. C. 13.
[o] Grand instructions for framing a new code of laws for the Russian empire. §. 210 [tr. M. Tatischeff, 1768].

[6] The general reference is to Mosaic law, as found in early books of the Old Testament; 'the crime against nature' refers to sexual practices considered unnatural, primarily homosexuality; see further IV. 142–3.

universally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual.[7] But it does not therefore follow, that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provisions of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never justify such a 11
law to the dictates of conscience and humanity. To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I WOULD not be understood to *deny* the right of the legislature in any country to inforce its own laws by the death of the transgressor, though persons of some abilities have *doubted* it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it: and to this public judgment or decision all private judgments must submit; else there is an end of the first principle of all society and government. The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations, that are given by the sovereign power.

2. As to the *end*, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the supreme being: but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut poena* (as Tully[p] expresses it)[8] *ad paucos, metus ad omnes perveniat* [punishment for a few puts all in dread];" which gives rise to all ignominious punishments, and to such executions of justice as are open and public: or, lastly, by depriving the party injuring of the power to do future mischief; which is 12
effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholsome correction; or whether he be disabled from doing any farther harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other

[p] *pro Cluentio*. 46.

[7] Blackstone refers to laws regulating e.g. the width of wheels and the number of horses to pull carts. In a criminal justice system dependent on private prosecution, such 'victimless' crimes were enforced by encouraging informers to prosecute in return for a share of the fines imposed.

[8] Cicero's speech was made in 66 BC in defence of Aulus Cluentius Habitus Minor, accused of murdering his stepfather.

citizens. The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears *incorrigible:* which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment: and in such cases it would be cruelty to the public, to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villanies.

3. As to the *measure* of human punishments. From what has been observed in the former articles we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.

Hence it will be evident, that what some have so highly extolled for its equity, the *lex talionis* or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases indeed it seems to be dictated by natural reason;
13 as in the case of conspiracies to do an injury, or false accusations of the innocent: to which we may add that law of the Jews and Egyptians, mentioned by Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody, should himself be obliged to take it. But, in general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may sometimes be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians,[9] which demanded an eye for an eye, was in this instance judiciously altered; by decreeing, in imitation of Solon's laws[q], that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour, and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the

[q] Pott. Ant. b. 1, c. 26.

[9] A tribe settled in the central region (Locris) of ancient Greece.