COMMENTARIES ON THE LAWS OF ENGLAND

BOOK IV OF PUBLIC WRONGS

WILLIAM BLACKSTONE

WITH AN INTRODUCTION, NOTES, AND TEXTUAL APPARATUS BY RUTH PALEY

OXFORD

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THE OXFORD EDITION OF BLACKSTONE

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COMMENTARIES ON THE LAWS OF ENGLAND

The Oxford Edition of Blackstone

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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.