SELECTED WRITINGS OF

James Fitzjames Stephen

A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND

EDITED BY

K. J. M. SMITH

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Selected Writings of James Fitzjames Stephen

A General View of the Criminal Law of England
Liberty, Equality, Fraternity
A History of the Criminal Law of England
The Story of Nuncomar and the Impeachment of Sir Elijah Impey

ALSO FOUR VOLUMES OF SELECTED ESSAYS:
On History and Empire
On Justice and Jurisprudence
On the Novel and Journalism
On Society and Religion

AND
The Life of Sir James Fitzjames Stephen
by Leslie Stephen

For my son, Tom.

ACKNOWLEDGEMENTS

In preparing this edited edition of Fitzjames Stephen's *A General View of the Criminal Law of England* I have greatly benefited from the observations and suggestions of Professor Sir Christopher Ricks and Professor Patrick Polden.

K. J. M. Smith

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INTRODUCTION AND COMMENTARY

GENESIS AND WRITING OF THE GENERAL VIEW

By the autumn of 1858, at the age of 29, Fitzjames Stephen had good cause to feel moderately sanguine about his reputation at the criminal bar and in higher journalism. Since its launch in January 1856, Stephen had been a core contributor to the *Saturday Review*, staffed by 'young men with the proper confidence in their own infallibility'; a journal soon to become the great political and literary weekly of the period, and justly earning the epithet 'Saturday Reviler'.[1] Here, Stephen's contributions ranged over all and everything, including literature, religion, ethics, history, and, not least, law. Most of his earliest published views on law reform, the criminal defence of insanity, capital punishment, codification, and criminal procedure had appeared in the *Review* by 1858. Beyond the *Saturday Review* his important, wide-ranging essay, 'The Characteristics of English Criminal Law', appeared in 1857 as a contribution to *Cambridge Essays*. Additionally, three *Papers read before the Juridical Society*, on the defence of insanity, defining crimes, and the interrogation of suspects, were all published in 1858. And while his peripatetic life on the Midland circuit was often physically extremely demanding, over the period of less than four years Stephen's practice at the Bar had progressed at a decent, though not spectacular, rate.

Against this recent history of professional advancement, by October 1858 Stephen's apparent sense of dissatisfaction with the nature or limitations of life at the Bar is beginning to take distinct form. As he relates to his wife whilst on circuit at Nottingham Assizes:

> If I laid aside my Law books for the next six months I could write a volume [on criminal law] in an entirely new style for a law book. I mean something like my Cambridge Essay which would be thoroughly readable and interesting for all educated men.

The particular incentive to write such a book was the recent resurfacing of the 'likely' establishment in the next parliamentary session of a system incorporating public prosecutors. Not only would this 'fit in with [my] views', Stephen would also be keen to secure one such appointment. More generally, the book would 'make some money' and probably boost his chances of securing 'whatever may be going legally'.[2]

Within a couple of days, Stephen's distinguished father, Sir James, had wind of the scheme and was sufficiently concerned to strongly counsel caution on his son's part. Rather than embark on this speculative venture, 'Fitzy' should focus on existing professional commitments:

[1] K. J. M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988) 11.

[2] Stephen to his wife, Mary, October 18, 1858. Stephen Papers, Cambridge University Library, Add. MSS. 7349/7. In the five years, 1858–63, as well as a considerable volume of legal and non-legal articles, Stephen published *Essays by a Barrister* (1862, a collection of articles from the *Saturday Review*) along with *The Defence of the Reverend Rowland Williams* (1862).

I think you undervalue the difficulty of the task of writing a book on criminal law in a hurry. To extemporize a law book is almost as to do the same thing with a book of natural science . . . you are too well known to fail in such an attempt with impunity.[3]

No doubt Sir James' warning contributed to his son's evident decision to indefinitely postpone the planned criminal text. As well as executing his duties as secretary of the Newcastle Commission on Education, Stephen continued to embrace firmly the pleasures and profits of higher journalism across the usual infinitely diverse spread of topics. Such professional backsliding by the young barrister was checked when his grand, career-enhancing book project was resurrected around the spring of 1861. Writing from Derby, when starting to prepare his collection of *Saturday Review* pieces for republication as *Essays by a Barrister* (1862), Stephen announces, 'that the time has come to go in decisively for the law and therefore I shall now contract literary [work] into the smallest space . . . using my time in London to read law, bringing out this *Essays* at once, and a criminal law treatise as soon as it can be written'.[4]

However, this resolve was no match for his natural desire to spend the latter part of 1861 and early 1862 turning his success as defence counsel for Dr Rowland Williams on charges of heresy into the *Defence of the Reverend Rowland Williams* (1862).[5]

On the available evidence, *A General View of the Criminal Law of England* appears to have been written in under a year; mainly between the second half of 1862 and late spring of 1863. By December 1862 work was well under way, with the French element entailing considerable disagreeable labour:

I have been [in Warwick] all day, unsuccessfully working at that detestable French trial—which is a regular bête noir to me . . . French trials are so tiresome that they will fairly break my heart. They are vile in themselves [and show them] perfectly ignorant of the very nature of evidence . . .

Having now moved on to Nottingham Assizes he is thankful to say, 'I have, at last finished Léotade's case. I thought I should never get through the bottomless abyss of lies which it contains. [But] the other French trials will not be half so hard . . .' Two days later, Stephen owns that the '. . . rest of the book will be written with a rush and ready for the proofs before long. I have it all simmering in my head, and know just what to say.'[6]

The following March, again in Nottingham, spurred on by the prospect of career advancement,[7] Stephen is '. . . correcting and preparing for the press a good deal of my book', and sounding out his colleague and friend, Franklin Lushington, who '. . . said many kind things . . . of [*sic*] which I was greatly interested and delighted,

[3] Sir James Stephen, October 20, 1858; MSS. 7349/1. Following retirement as Under Secretary at the Colonial Office in 1847, Sir James was appointed Regius Professor of Modern History at Cambridge in 1849, after which he took up a chair at Haileybury, the East India Company College, until its closure in 1858.

[4] Stephen to Mary Stephen, March 20, 1861; MSS. 7349/1.

[5] Stephen to Mary Stephen, October 21, 1861, expressing the hope of completing the book by the following Easter; MSS. 7349/1.

[6] Stephen to Mary Stephen, December 4, 5, and 7, 1862; MSS. 7349/1. He also reports buying a copy of the famous murder trial of Donellan, which '[I] hope to put in my chamber of horrors, for the admiration of the public'. December 5. Donellan and Léotade are two of the detailed illustrative case studies incorporated at the end of the book.

[7] Stephen to Mary Stephen, January 8, 1863; MSS. 7349/1.

as the chapter which he had read was particularly grim—the chapter about madness'.[8]

The *General View* appeared in June of that year. Soon after, Stephen, perhaps a touch sourly, records receipt of '. . . several notes, not particularly amusing, from judges about my book. Not one of them can have read it.'[9] However, even if they had not ventured beyond the book's preface, there is no doubting that they would have had a fair notion of its contents from the author's assertive initial disclaimer and claim of the social and political centrality of the criminal law:

> The present book is intended neither for practical use nor for any introduction to professional study. Its object is to give an account of the general scope, tendency, and design of an important part of our institutions, of which surely none can have a greater moral significance, or be more closely connected with broad principles of morality and politics, than those by which men rightfully, deliberately, and in cold blood, kill, enslave, and otherwise torment their fellow creatures.[10]

Furthermore, as Stephen later observes, the work was aimed at locating his analysis of criminal law amongst the emerging, empirically-based social sciences, and expanding the study of the subject into an 'art founded on science, the art of making wise laws the science of understanding and correctly classifying large departments of human conduct.'[11]

At least in part, the inspiration for such ambitions was the jurist John Austin, whose reissued *Province of Jurisprudence Determined*, Stephen had reviewed two years earlier, and where Austin's positivist gospel was seen as providing an investigative path and technique for dispersing analytical muddle

> . . . which is continually arising between an actual and ideal state of things; between the rights or powers protected by laws which do exist, and those which upon some principle or other ought to exist, and this confusion has given the tone to almost all controversies upon such subjects which have agitated and still continue to agitate mankind.[12]

Viewed in this light, the respective roles of jurist and legislator were distinct and relatively clear-cut. The task of jurists and the science of jurisprudence were to draw

[8] Stephen to Mary Stephen, March 9, 1863; MSS. 7349/1.

[9] Stephen to Mary Stephen, June 30, 1863; MSS. 7349/1. For reviews of the *General View*, see below, 'Reviews'.

[10] *General View*, (hereafter, GV) 51. Similar ambitions for jurisprudence generally were expressed by J. S. Mill later in 1863 in his review of John Austin's *Lectures on Jurisprudence*, 116 *Edinburgh Review* 439.

[11] Stephen, 'English Jurisprudence' (1861) 114 *Edinburgh Review* 456. Stephen's emphasis on the 'science' of law, or scientific analysis, reflects an increasingly broad determination of many mid-Victorian legal writers to sift and separate the pure grain of fundamental principles from the chaff of long-established practices and procedures. Such an approach might be deployed, as by Austin and Sir Henry Maine, in seeking general principles of jurisprudence or law's common evolutionary features; or, as in Stephen's case, to identify fundamentals in a particular area of law. This vogue for claimed 'scientific' analytical rigour and exposition in law texts owed much to highly critical assessments of professional legal education from the mid 1840s, followed by practical reforms in the 1850s. See R. C. J. Cocks, *Foundations of the Modern Bar* (1983) chs. 3–5; and Maine: *A Study of Victorian Jurisprudence* (1988) 14–19.

[12] Stephen, 'English Jurisprudence', 470. Stephen reviewed Austin's *The Province of Jurisprudence Determined* (1832) in tandem with Henry Maine's *Ancient Law* (1861). In his 1863 review of Austin's *Lectures*, Mill followed Stephen in regarding Maine's historical jurisprudence as complementary to Austin's positivist analysis in locating the universals common to all developed legal systems. This was surprising bearing in mind Austin's jaundiced view of the common law system coupled with his espousal of *a priori* assertions on law's foundations.

attention to the legal character of social problems and the limitations which the nature of human affairs places on their legislative solution: essentially an ethically neutral role. Austinian jurisprudence exposed the nature and structure of law; it did not prescribe what its content should be:

> In this way jurisprudence . . . is not, strictly speaking, the science of law but the science which classifies and describes the relations with which law has to deal. Thus the first service rendered by the jurist to the legislator is to submit to him the series of alternatives placed at his disposal by the state of human affairs. [For example] he can say you may regard a crime either as a sin against God; an injury to the abstraction called the state; an injury to the sovereign; or an injury to a private person . . . [W]hich of these views shall be taken is a question for the legislator not the jurist.[13]

Promoting such an approach, Stephen felt the *Province* succeeded in establishing jurisprudence as a moral science, as important as the '. . . propositions of Adam Smith and Ricardo on rent profits and value'.[14] Quite how close Stephen approaches achieving such ambitious aims is debatable. Clearly, when put alongside established social scientific works on, say, political economy, the *General View*'s 'scientific', theoretical, or speculative credentials look decidedly thin. However, a far more appropriate and revealing comparison would be with contemporary or earlier legal treatises, especially those on criminal law where content and style were almost wholly fashioned by practitioners' needs.[15] But while frequently invoking the restraining practicalities and functional limitations of the law and law-making, Stephen rarely permits his analysis to be much constrained by such considerations. Rather, both directly and implicitly, the law's political and moral dimensions frequently inform discussion. Even when focusing on technical analysis of the criminal law's structure, substance, and procedures, the *General View* offers a succession of wide-ranging insights of a practical and conceptual nature previously found only scattered in the works of Bentham and later in Reports of Brougham's Criminal Law Commissioners, from the 1830s and 1840s.[16]

Reviews

Following publication of the *General View* in 1863, a good handful of largely favourable reviews appeared over the subsequent two years. Most of them applauded Stephen's attempt to open up to critical scrutiny both the elemental principles of criminal law and their practical application. For the *Law Times*, the book was a '. . . rare phenomenon in legal literature—a treatise on the philosophy of law, [with

[13] GV 286. This functional distinction resembles Bentham's separation of the sciences of law and legislation. See, *Of Laws in General*, ed. H. L. A. Hart (1970) ch. xix.

[14] Stephen, 'English Jurisprudence', 463–4. On the contemporary rarity of this insight, see W. L. Morrison, *John Austin* (1982) 5 and 149.

[15] Even the more discursive practitioners' texts, such as Russell's *A Treatise on Crime and Misdemeanors*, 1st ed. 1819, added little to Blackstone's analysis of the underlying principles of criminal law. *Commentaries on the Laws of England*, vol. 4, *Of Public Wrongs* (1767–73). On nineteenth-century criminal law texts, see more generally, K. J. M. Smith, *Lawyers, Legislators and Theorists* (1998), 19–159.

[16] In Bentham's case, principally *An Introduction to the Principles of Morals and Legislation* (1789) (hereafter IPML) and *Rationale of Judicial Evidence*, ed. J. S. Mill (1827). The Criminal Law Commission set up by Lord Chancellor Brougham in 1833 produced a wide range of analytically acute and well-informed reports by the time of its dismantling in 1849.

Stephen's] language so correct, his manner so lively'. So much so, that to '. . . do full justice to this singularly thoughtful volume would be the not unworthy work of half-a-dozen articles'. Beyond doubt, with the *General View*, 'Mr Stephen has established his reputation as a jurist.'[17]

In similar vein, the *Law Magazine*'s anonymous reviewer thought Stephen's 'ambitious' attempt to articulate the criminal law's 'philosophical principles and nature' was broadly successful. Moreover, in respect of professional ethics, the *General View* was well 'calculated to foster and encourage upright conduct and honourable feelings' amongst practising lawyers; and to remind them of a 'higher and nobler duty to [their] profession and to the public'.[18] A year later, as part of an analysis of 'Criminal Law reform', published in the *Edinburgh Review*, Liberal Party grandee, Robert Lowe, characterized the book as a 'work which gives the fair and impartial view of a man of sense and learning . . .'[19]

The work's only decidedly lukewarm reception appeared in the relatively obscure *St. James's Magazine*. Here the reviewer, while regretting the absence of the lawyer's '. . . more intimate acquaintance with jurisprudence', then proceeded to carp at what was seen as the *General View*'s inadequate coverage of certain recondite areas of legal history.[20] With rather more justification, the *Law Magazine* regretted that Stephen's 'Historical Sketch' had devoted '. . . so much industry on the Anglo-Saxon and Norman periods' and comparatively so little effort on the three centuries leading up to the Victorian era. As well as spending many review pages redressing this general omission, the reviewer made a particular effort to counter Stephen's misleading, casual dismissal of the alleged occasional institutional employment of torture in Tudor and Stuart times.[21]

Beyond the work's general ambit and style, the particular choice of substantive comments naturally reflects a mixture of personal interests and topicality—or, as *The Jurist* put it: 'Defects and proposed alterations in the criminal law which of late years have agitated minds.' One prominent example was agitation over the absence of a formal system of public prosecutions. Stephen's qualified endorsement of publically funded, but independent, counsel, attracted *The Jurist*'s approval. On Stephen's defence of the need for jury unanimity, the same journal was equivocal: 'Even those who may not agree . . . will, we think, admit that there is considerable force and originality' in Stephen's arguments.

Two further illustrative causes of 'agitation' treated in the *General View* were the related topics of criminal appeals and executive mercy or clemency. In common with Stephen, Lowe, in the *Edinburgh Review*, rejected the creation of a fully fledged Court of Criminal Appeal, with power to hear appeals on questions of fact or law, as

[17] (1862–3) 38 *Law Times* 564–5. (1863) 9 *Jurist* 302–3, 308–10, read it 'with pleasure and profit'.

[18] (1864) 18 *Law Magazine* 139, 169.

[19] (1865) 121 *Edinburgh Review* 109. At the time, Lowe was chairman of the Capital Punishment Commission.

[20] (1864) 11 *St. James' Magazine* 500–10.

[21] *Law Magazine*, 146–7. GV 76. Curiously, the *Law Magazine* (140–3) felt that Stephen, unlike 'the late Mr. Austin', had blended an insufficient level of 'positive morality' with 'positive law' in his opening chapter. Essentially, it is suggested that Stephen is too timid in being merely analytically descriptive of the law, rather than offering an *a priori* approach to legal principles. Whether or not a fair comment on this early section of the book, it is patently untrue of the *General View* taken as a whole.

'. . . utterly impracticable'. But, Lowe regarded Stephen's proposals for a specially constituted tribunal to replace the Home Secretary's executive appellate role as potentially a '. . . fatal blow to the independence of juries', preferring to preserve the acknowledged existing anomalies of executive justice.[22] However, there was agreement on the need for fresh, revised offence definitions of those employed in the extensive 1861 consolidating legislation, coupled with the truth-revealing benefits of making all defendants subject to judicial or prosecutorial interrogation.

Amongst the reviews, only the *Law Magazine* and *St. James's Magazine* chose to comment on the *General View*'s notably extensive treatment of the nature of judicial evidence. Approvingly, Stephen's analysis is seen as reflecting the fundamental importance attached to the subject by Bentham, well captured by his quip that:

> Questions of evidence are continually presenting themselves to every human being every day and almost every working hour of his life. Domestic management turns upon evidence. Whether the leg of mutton now on the spit be roasted enough, is a question of evidence, a question of which the cook is judge.[23]

Set against this are the complaints of the *St James's Magazine* reviewer that Stephen had misguidedly approached the subject in 'too metaphysical a spirit'.[24]

Finally, somewhat surprisingly, there is an absence of any direct commentary on the *General View*'s concluding endorsement of a Department of Justice, along with novel judicial powers to restate and codify case law. While noticed by several reviewers, none offers a critique. However, *The Jurist* in a separate article immediately following its review of the *General View* sceptically considers such proposals alongside a recently reported speech of Lord Chancellor Westbury also advocating a Department of Justice equipped with revising and reformulating powers.[25]

To modern readers, the initial impressions of the *General View*'s structure and substance tend to suggest distinct imbalances of treatment between its constituent parts. For instance, the 'Historical Sketch', principally devoted to criminal law developments from Saxon times to the seventeenth century, attracts more of Stephen's attention than, for example, the general and specific requirements of criminal responsibility in Victorian England. Similarly, with the exception of insanity, there is no serious attempt to consider the full range of general defences to criminal liability. Other rather curious omissions include regulatory or strict liability offences, which are barely hinted at. The nature and functioning of summary justice fare little better. Such comments are also merited by the decidedly perfunctory treatment of the development of policing and the practices of criminal punishment.

Apart from the exceedingly light touch in the treatment of these topics when contrasted with his extensive and spirited analysis of procedural and evidential matters, what is readily apparent is that Stephen was simply far more engaged by the processes and policies involved in the establishing of guilt or innocence than in substantive law and theory. Yet, observations of this nature on the *General View*'s structure and content need also to be set in the contemporary professional context together with Stephen's prefatory comments. Certainly, judging by the number and

[22] R. Lowe, 'Criminal Law Reform' (1865) 121 *Edinburgh Review* 132.
[23] *Law Magazine*, 160. [24] *St. James' Magazine*, 509. [25] (1863) 9 *The Jurist* 299, 300.

range of treatises and legal articles published in the early 1860s, those on procedure and evidence easily led the field. So, his expositional preferences and concerns could be regarded as unexceptional. Furthermore, although particularly in respect of the conceptual underpinnings of judicial evidence he was in danger of falling foul of trying to give a 'general notion of the law [by] looking at a landscape through a microscope' (Preface v.), he is, nevertheless, largely faithful to his expressed objective of giving an account of the 'general scope, tendency, and design' of the criminal justice system. And in doing this, he informs his account with the 'broad principles of morality and politics' (Preface vi.). For Stephen, it is especially within the areas of procedure and evidence that he perceives the key functioning of moral norms and, notably, the political nature of the role of juries—a thesis to which he returns frequently.

THE 'PROVINCE' OF 'LAW' AND 'CRIME'

Before embarking on his 'Historical Sketch', Stephen feels obliged to open the *General View* with a concise attempt to pin down the definitions of both a 'law' and a 'crime'. Having fairly recently reviewed a fresh edition of John Austin's *The Province of Jurisprudence Determined*,[26] it is no surprise that for this task he generally deploys Austinian analysis, and specifically the command theory of law. From this it could be concluded that a crime was 'an act of disobedience to a law forbidden under pain of punishment'.[27]

But while acceptable for 'practical purposes', Stephen is keen to at least expose his readers to some of the hidden difficulties entailed in constructing the notoriously elusive, jurisprudentially satisfactory, definition of a crime. Should, for example, the definition draw in immorality? Certainly, in the 'common use of language' a crime necessarily connoted behaviour 'revolting to the moral sentiments of society'. Yet, he argues, even in the most serious of crimes, such as murder, the range of possible immorality involved may run from the grossest to what would be commonly regarded as none at all.[28] Rather than the 'popular use of moral detestation', the marker of a crime 'ought' to be that which is 'forbidden by the law under pain of punishment . . . imposed for the public and at the discretion and by the direction of those who represent the public'.[29]

Not quite content with this, Stephen offers a further definitional gloss, needed to cope with the fact that many crimes are also 'civil injuries'. Consequently, in such cases whether unlawful actions are 'crimes or torts' will be settled by the nature of proceedings and their outcomes: a crime if punishment could be imposed; a tort if damages could be awarded.[30] However, as Stephen doubtless recognized, in effect he was ultimately limited to explaining how to recognize a crime and criminal proceedings and not identifying directly just what was the essence of all crimes.

[26] Stephen, 'English Jurisprudence', 456. [27] GV 57.
[28] GV 58, 59. Similarly, Austin, *Province*, Lecture V.
[29] GV 59. Compare Stephen's later, more elaborate definition in the *History of the Criminal Law* (1883) 3–5. Hereafter, HCL.
[30] GV 60–1.

'HISTORICAL SKETCH'

As an introduction to his examination of nineteenth-century criminal law and institutions, Stephen's 'Historical Sketch' surveys the development of the subject's most distinctive and characteristic features from Anglo-Saxon times. It is an outline account of sometimes long extinct, peculiar examples of ancient legal thinking and practices, combined with the origins and evolving forces of fundamental features of the criminal justice system flourishing in Victoria's reign. As might be anticipated, Stephen's selection of topics and the prominence given to each are as much indicative of his nineteenth-century concerns as their objective, intrinsic historical significance. Spanning a thousand years, the sketch devotes roughly equal attention to criminal procedure, institutions, criminal law, and punishment.

Though offering a generally cogent, condensed account of the criminal justice system's institutional and procedural evolution, based on leading classical and secondary works, in the main its essentially descriptive nature makes no claim to originality. Yet, elements of this part of the *General View* do go beyond the merely descriptive. One instance which dovetails with an argument later pursued with some vigour is Stephen's assertion that from the Anglo-Saxon period to the fourteenth century, the underlying character of criminal trials varied between litigious and inquisitorial. Much of this claim is underpinned by his distinction between how proceedings were perceived by 'popular sentiment', and the objective quality of procedures. Anglo-Saxon trials were viewed as litigious because 'proceedings were entirely at the discretion of the parties', and largely concerned with extracting compensation. Contrastingly, Norman procedures were inquisitorial in nature because of the fact-gathering, administrative functions of early itinerant judges: visiting justices in eyre. But despite this, a litigious (civil) character came to be superimposed by virtue of tradition, perceptions and the 'temper of the parties'; a tendency which was reinforced by 'ordeal in Saxon times, and the Norman appeals [by combat], litigations in the full sense of the word'.[31] As Stephen twice comments at this point, the early fundamental distinctiveness of English criminal procedure from existing and later continental practice becomes a prominent and important theme of the *General View*'s later treatment of the Victorian criminal justice system.[32]

Of course, restricting his historical analysis and evidence to a fairly narrow compass risked over-simplification. And, as a consequence, Stephen's claims might need qualification, for even in pre-Conquest times, criminal justice exhibited inquisitorial features. This was true, for example, of early forms of asserting the King's peace through itinerant members of the royal council, allied particularly to the peace-keeping responsibilities of sheriff and other local heads. To this might, arguably, be added the ancient Anglo-Saxon institution of frankpledge, involving the collective local obligation of preventing and detecting crime.[33] Furthermore, it was not wholly persuasive of Stephen to suggest that inquests were perceived as litigious because the

[31] GV 72.

[32] 'I shall, in future, have frequent occasion to describe the extent to which it prevails'. GV 72. Similarly, 73

[33] GV 73–4.

initial information was supplied by third parties.[34] However, this said, there is no doubting the historical validity of his concentration on the means and mechanisms of initiating criminal proceedings when seeking to identify prominent legal and constitutional characteristics of the evolving criminal justice system.

More generally, while it was necessarily limited in depth of coverage, some of what must have been calculated omissions from the 'Historical Sketch' are eccentric. This is particularly true of Stephen's decision to offer no more than cursory references to the system of summary justice. Given the significant peace-keeping and law-enforcing functions of sheriffs, shire knights, and, later, justices of the peace (at petty and quarter sessions) over many centuries up to and beyond Victorian times, their effective absence is difficult to account for. Consistently though, Stephen's treatment of summary justice in the nineteenth century, is, again, prominent by virtue of its relative neglect.[35] And in view of its then increasingly central role in the criminal justice system, the virtual absence from anywhere in the *General View* of the evolving nature of policing is also puzzling. [36]

Following an overview of the establishment and development of the criminal courts and their procedures, the 'Historical Sketch' is completed by considering the conceptual origins of the most serious and characteristic criminal offences, along with the growth of the rules of criminal evidence, and concluding with a fragmented outline of the evolution of judicial punishment. To a greater or lesser degree, each constituted historical hors d'oeuvres for the later, more detailed exposition of the elements of the mid-Victorian criminal justice system.

As the historically 'commonest and most important crimes', Stephen selects for review treason, homicide, non-fatal offences against the person, arson, and theft. While, at this stage, decidedly sparing with overarching principles of liability—particularly, general notions of criminal fault and moral agency—his most frequent and persistent discursive topic is the creative, 'legislative' role of the judiciary. Alongside this defining of common law, the statutory contribution to creation of the substantive law is depicted as very much of secondary significance: parliament was, in most cases, content to act as the enterprise's junior partner, with its function largely confined to 'supplementary' provisions or modifications of the common law, itself a product of judicial creativity, 'according to their views of justice, symmetry, or convenience'.[37]

Treason heads Stephen's group of principal, indicative offences. Going beyond its long history of being almost infinitely flexible in application and all-embracing in scope, Stephen tackles the legal conundrums thrown up by what he labels as the 'political branch' of treason.[38] Reflecting on the 'revolutions of the 16th and 17th centuries', when governments 'by degrees came to occupy the position formerly belonging to the monarch', he identifies the pressing politico-legal choice facing judges, of either creating a 'new offence of treason' or for courts to 'construe the old one . . . to apply to new circumstances '. As Stephen observes, following the 'uniform

[34] GV 74–5.

[35] Even in the much more extensive treatment in Stephen's *History*, summary justice is given relatively short shrift, and less attention, for example, than Roman legal antecedents. HCL, vol. 2, 116–26.

[36] For a rare mention, GV 77. [37] GV 78–9. [38] GV 83–4.

practice of English lawyers' the latter, pragmatic course was adopted, permitting earlier common law and statutory powers 'founded on a different view of government and society' to meet fresh needs.[39] However, while later in his discrete treatment of the history of misdemeanors,[40] when exploring the development of public order liability, no well-warranted commentary follows on the territory that treason and public order offences came to share, or the political significance of the latter mainly taking over the role of the former.

Appropriately, the historical overview of homicide most concerns itself with the separation of murder and manslaughter and especially murder's mental culpability requirement. Beginning with Bracton's mid thirteenth-century, loose description of murder, Stephen deftly identifies the emergence of the doctrine of malice aforethought. Not only was it an expression that broadly captured the distinctive quality of murder, its imprecision easily facilitated judicial creativity in the subsequent refinement and more specific articulation of culpability requirements. This process, he shows, was tempered to a degree by legislation gradually excluding murder from the ancient defence device of benefit of clergy, a process completed in Henry VIII's reign.[41] By this time the distinction between (non-clergyable) murder and manslaughter had become relatively well established.

In contrast, as Stephen underscores, for non-fatal harm, 'the common law treated personal violence, however outrageous, with absurd lenience, till a very later period': a wounding less than maiming was regarded as more a civil than criminal matter.[42] Additionally, as he illustrates by reference to the Coventry Act (1670) and the Black Act (1722)[43], gradual statutory recognition of a broader range of serious criminal woundings followed the parliamentary approach of drafting penal provisions in highly specific forms; which in turn often led to extremes of judicial hair-splitting, interpretative practices.

Reflecting their rise to numerical dominance in criminal courts, coupled with relative legal complexity, Stephen's most sustained historical analysis is reserved for crimes against property, and most particularly theft.[44] His special concerns are justifiably the steady expansion of the offence's subject-matter and the related question of theft's possible forms of commission. Here, centuries of social and economic development are calibrated to what the law could regard as open to stealing. Stephen compares the limited range of everyday personal property in the earliest times to the eventual vast range and complexity of property rights created by a full-blooded commercial and industrial society. Thus, necessarily accompanying this great expansion in the potential subject-matter of theft was the corresponding legal need to recognize completely novel forms of stealing. On the central, defining, and shaping doctrine of possession, Stephen again underlines the interaction of growing social and commercial property rights with the criminal law's evolution. Most especially, he

[39] GV 81–2.

[40] GV 95–101, see nn. 46–8 and text.

[41] 23 Hen. VIII, c.1. For Stephen's account of the nature and gradual restriction of benefit of clergy, GV 87 and 106.

[42] GV 87. Maiming (mayhem) was the loss of a limb or causing serious incapacitation. Both mayhem and rape were non-capital felonies until rape was made capital in 1285 by the Statute of Westminster II, c.34.

[43] The Coventry Act, 1670, 22&23, ch. 11 c.1; Waltham Black Act, 1722, 9 Geo.1, c.24.

[44] Criminal damage as arson attracts a brief tracing of statutory accretions and levels of punishment.