

UC Berkeley

Boalt Working Papers in Public Law

Title

Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence

Permalink

<https://escholarship.org/uc/item/6pg8w562>

Author

Lieberman, David

Publication Date

2000-09-01

Mapping Criminal Law:
Blackstone and the Categories of English Jurisprudence

David Lieberman
Jurisprudence and Social Policy Program
University of California, Berkeley

[forthcoming in Norma Landau (ed.),
Law, Crime and English Society, 1660-1840
(Cambridge University Press)]

Preliminary draft - please do not cite or quote

September 2000

Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence*

I. The Map of English Law

John Beattie's contributions to the historical study of crime and criminal justice have been so formative and so distinguished that it seems almost presumptuous for someone not engaged in this specific field of inquiry to attempt any characterization of his achievement. Still, for the purposes of this essay it is useful to observe some of the important general lessons of his researches for understanding legal change in eighteenth-century England. Beattie, himself, concluded his magisterial account of Crime and the Courts in England, by emphasizing the prominence of this particular theme. During the period 1660-1800, 'significant changes' occurred throughout England's system of criminal justice: 'in the criminal law, in criminal procedure, in prisons, and in punishment'; and cumulatively these 'transformed the system of judicial administration'.¹ Interpreting this transformation required not only the historical recovery of patterns of crime and their prosecution, but even more a reconstruction of the technical administrative structures and legal processes through which the criminal law was enforced. The transformation of criminal justice, as charted by Beattie, did not occur without public debate and controversy; and on infrequent occasion, as in the case of the 1718 Transportation Act, it depended critically on parliamentary intervention. But in contrast to the more immediately visible statutory law reforms of the Victorian era, legal change in eighteenth century rarely involved any direct or sweeping dismantling of historical practices and forms. Instead, institutional change outwardly preserved inherited routines by operating through the piecemeal adaptation and adjustment of existing institutional routines and legal understandings. The criminal law of 1800, in its transformed state, remained a system of clergyable and non-clergyable offenses; treasons and felonies; grand and petty larcenies; praemunire and misprisions.

My concern in this chapter is to explore some of the distinctive ways in which eighteenth-century common lawyers attempted to identify and delineate criminal law as a discreet and specific component of the legal order, distinguishing the legal categories of ‘criminal’ from ‘civil’ and, in this setting, the related distinction between ‘public’ and ‘private’. The discussion will attend principally to the analysis of these topics presented by Blackstone in his mid-century Commentaries on the Laws of England, taking up Blackstone not only as a singularly elegant and influential treatment of these issues, but also as a convenient point of entry for examining some of the alternative and rival approaches adopted by his near-contemporaries. As we shall see, this was an episode in the history of English jurisprudence that contained key elements of transformation. In presenting England’s criminal law, Blackstone chose not to highlight settled procedural distinctions and arcane terms, but instead invoked a distinctive kind of legal wrong he identified as ‘public’ in nature. Nonetheless, this conceptual ‘transformation’ fully conformed to the kind of legal change Beattie has taught us to identify for this period. Blackstone’s innovative map of criminal law did not rely upon the explicit introduction of novel terms and fresh categories. Rather, it involved a selective rationalization and adaptation of a messy and technical body of inherited materials.

Recent scholarship on the history of crime and criminal justice helpfully reminds us of some of the challenges facing any juristic effort to provide a clear definition of England’s criminal law. The terms ‘crime’ and ‘criminal law’, while enjoying wide linguistic currency, were not part of the technical vocabulary of the law, which instead recognized other general categories such as felony and trespass, as well as the intricate procedural routines by which specific injuries were prosecuted at specific courts.² The practical operation of the law, moreover, undermined any easy application of the modern categories of ‘criminal’ or ‘civil’ in the classification of legal disputes. In a system in which the initiative and most of the costs of all prosecutions fell to private

parties (including penal cases formally indicted by the crown and its officers), decisions about what kind of suit to initiate and before which tribunal naturally turned on considerations of costs and access. As Beattie and other historians have shown, the high rate at which seemingly-criminal indictments for assault, riot or other non-felonious offenses actually ended in a private settlement between prosecutor and defendant indicates that the aim of such prosecutions was not the state's punishment of a delinquent, but an out-of-court payment of compensation to the prosecuting party. Beattie captured the ambiguity of such common cases by characterizing them as 'quasi-civil settlements'; while Norma Landau similarly maintained that these indictments 'were, in essence, civil suits'.³

And yet, for all the proper allowance that must be given to the technical and complicating contours of eighteenth-century English law, it would be equally misleading to suppose that the jurisprudence of that era simply lacked any more general or abstract conception of an area of law that might properly be distinguished 'criminal'. Already in the medieval period, English law was explicitly differentiating between civil and criminal materials. And as is immediately disclosed by the titles of such works as Lord Kames 'History of the Criminal Law' (1758) and William Eden's Principles of Penal Law (1771), eighteenth-century jurists certainly supposed there existed a general category of law that might serve as the object of their scholarly attention.⁴ The adopted terminology, admittedly, was by no means uniform, nor necessarily very precise. William Hawkins' widely-consulted and frequently-reissued A Treatise of the Pleas of the Crown of 1716, became, in the alternative language of its late-century editor, 'this admired treatise of criminal law'.⁵ And contributors to the increasingly lively eighteenth-century debate over the principles governing the severity and application of criminal sanctions, shifted readily among such phrases as 'penal law', 'penal jurisdiction', 'criminal code', 'the penal or criminal laws', or more idiosyncratically, 'executive justice'.⁶

This terminological range and variation makes plain that legal commentators did not lack resources for labeling what Richard Wooddeson more carefully described as that ‘part of the civil institutions’ of the state ‘which defines the several species of crimes, limits their punishments, and prescribes the mode of prosecution’.⁷ What the varied usage in most contexts did not require was any special effort to establish a boundary that fixed the criminal law as a distinct component of the larger legal order; nor to identify those characteristic features that served to identify this part as specifically criminal law; nor to indicate how this classification related to the older and established categories of the common law (such as felonies and trespasses). It is on these matters that the project of Blackstone’s Commentaries proves especially helpful. Blackstone, at the outset of his four-volume survey, expressly presented the work ‘as a general map of the law’, concerned to mark ‘out the shape of the country, its connexions and boundaries, its greater divisions and principal cities’.⁸ And in concluding the final volume, he returned to the same theme (if not to the earlier cartographic metaphor). ‘It hath been the endeavour of these commentaries,’ he emphasized, ‘to examine [the law’s] solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of these several parts to demonstrate the elegant proportion of the whole.’⁹

Blackstone’s, of course, was by no means an unprecedented attempt in the canon of English legal letters to fashion an orderly map of English law (though the immediate success of the Commentaries, along with its numerous later editions and abridgments, meant that it came to overshadow all of its near-contemporary rivals). What did distinguish the Commentaries was the special circumstances of its composition. Unlike the vast bulk of English legal literature before the nineteenth century, the Commentaries was a product of the university lecture hall. Blackstone, a Fellow of All Souls and unsuccessful candidate for Oxford’s Regius Professorship of Civil [Roman] Law, in 1753 began offering private lectures on English law at Oxford. Five years later

he was elected to the recently established Vinerian Professor of English law at Oxford. This appointment made him the first professor of English law at an English university. Several years later, between 1765-69, Blackstone's lectures appeared in published form as the Commentaries.¹⁰

The Commentaries' exceptional origins had a pervasive impact on the work.¹¹ In the first place, it involved two distinct audiences for English legal learning. In addition to seeking to instruct those beginning students destined for professional careers in the law, Blackstone also aimed his jurisprudence at 'such other gentleman' who merely sought 'some general acquaintance' with the English legal system. To reach both groups, he 'made it his first endeavour to mark out a plan of the Laws of England so comprehensive as that every Title might be reduced under some or other of its general Heads', and yet 'at the same time so contracted that the Gentleman might with tolerable application contemplate and understand the Whole'.¹²

The realization of this objective, as Blackstone and his contemporaries well appreciated, placed great priority on matters of legal arrangement, organization and classification. In order to supply such a comprehensive overview of the English legal system, it was necessary to bring a vast - and notoriously, labyrinthine - body of abstruse, highly technical, and irregular legal materials into a manageable, synoptic order. But the challenge went beyond matters of pedagogic communication. Order and organization further involved a settled project of institutional legitimation. English law, according to a familiar complaint, simply lacked much by way of system or coherent organization, particularly as compared with Roman law, which hitherto dominated university law studies and which set the relevant standard for juristic elegance. 'It has been thought impracticable to bring the Laws of England into a Method', explained one of Blackstone's eighteenth-century precursors, 'and therefore a Prejudice has been taken up against the study of our Laws, even by Men of Parts and Learning'.¹³ On this basis, English law could not become an object of rational learning, and instead had to be mastered through the practical,

craft-like techniques of legal apprenticeship. Blackstone, like earlier generations of common lawyers, was confident of the law's credentials as a rational system. In presenting the virtues of English law, he accordingly and frequently emphasized its achievement as a true system: a body of legal materials that displayed order, balance, consistency, coherence.

Unfortunately, as Blackstone glibly acknowledged in his outline-preview of the Commentaries, the 1756 Analysis of the Laws of England, the established canon of English legal letters had done little to vindicate the project of 'reducing our laws to a System'. There he critically detailed the limitations of such antiquated, though illustrious predecessors as "Glanvil and Bracton, Britton and the author of Fleta"; moved on to consider the more recent efforts of jurists such as Bacon, Coke and Finch (Coke's famous four-part Institutes being found 'as deficient in Method as they are rich in Matter'); and finally embraced as his leading model, Matthew Hale's posthumously published Analysis of the Law as 'the most natural and scientific' of 'all the Schemes hitherto made public for digesting the Laws of England'.¹⁴

Blackstone has often appeared, particularly in his political and constitutional doctrines, a distinctively insular voice of whiggish English pieties. Nonetheless, his basic project to produce 'a general map of the law' made him a participant in a broad genre of early-modern law writing, in which jurists composed systematic statements of national law, often, as in Blackstone's case, producing these synthetic texts as part of the introduction of courses in native law at the European universities.¹⁵ The archetype for this legal literature was Justinian's Institutes, the most famous introductory law book in the western canon; and frequently, the early-modern instructional texts echoed this title. Thus, in the case of Scots law, George Mackenzie's influential survey of 1684 appeared as the Institutions of the Law of Scotland; and in the case of English law, Thomas Wood's 1720 An Institute of the Laws of England.

Justinian's Institutes served as a model in two ways. First, it provided an aspirational model: the example of a concise, ordered, single-volume presentation of the basic structure of an entire legal order. Second, it provided something of a methodological model. Following an early declaration that 'the whole of the law' under examination 'relates either to persons, or to things, or to actions' (Book I, Title ii), it then proceeded through the space of four, roughly balanced books to expound the major categories and concepts of Roman private law: the law of persons (in Book I); of things or property (in Book II); of succession, contracts and quasi-contracts (in Book III); and of non-contractual obligations (in Book IV). This juridical structure and set of categories were readily exploited in the early-modern institutes of national law.

Of course, there was much in the classical law of ancient Rome which ill-served early-modern European law, especially English law. Much of the Roman law of persons was dominated by the institution of chattel slavery (a legal category whose absence in the eighteenth-century law English jurists took pride in highlighting).¹⁶ The Roman law of property knew nothing of 'the feudal system' or 'military tenures', which common lawyers routinely understood to be the organizing elements of English real property.¹⁷ And since these rights of real property proved 'the most important, the most extensive, and ... the most difficult' components of English law, this legal material enjoyed central prominence in legal pedagogy and literature.¹⁸ The effort of the Roman law scholar, John Cowell, in the early seventeenth century, literally to set out the whole of English law according to all the titles of Justinian's Institute had been strongly condemned by common lawyers (a repudiation made easier by the standard linking of Roman law and continental absolutism as the political antipode to common law and English liberty).¹⁹

Nevertheless, even in England, the general, organizing structures of Roman law enjoyed evident and acknowledged prestige and influence. Matthew Hale thus organized his Analysis of the Law by first covering the law of persons before moving on to present the 'rights of things'.

The adopted order, he explained, conformed 'to the usual method of civilians', even though 'that must not be the method of a young Student of the common law ... (who) must begin his study here at the Jura Rerum'.²⁰ Richard Wooddeson, Blackstone's successor as the third Vinerian Professor, likewise explained that his own Oxford University lectures, published in 1792 as A Systematical View of the Laws of England, were organized according to 'the same three-fold division' utilized by 'the Institutes of Justinian'; this arrangement appearing 'the most clear and analytically just'.²¹

II. Criminal vs. Civil

Given this background, it is possible to read the Commentaries as the product of a set of critical decisions over the presentation and ordering of English law. Easily rejected was the crude expedient of earlier legal primers and law dictionaries, which simply presented English law through an alphabetical listing of major topics and titles. More substantial was the decision not to elaborate the law in terms of the procedural machinery of English justice and legal process. The common law, after all, was a casuistical system of jurisprudence, generated by the network of royal courts and their officers. The vast body of English legal literature, since the twelfth century, had been learning about cases and the methods of processing cases: reports of cases; formularies of writs; commentary on pleadings and forms of action; and digests and abridgments which summarized this learning for more modern practitioners. The Commentaries necessarily covered a great deal of this procedural system in its survey of English law; indeed, Blackstone treated it with rare elegance and lucidity. But by the eighteenth-century, the system of writs and forms of action had become so cumbersome and technical as to render this structure an unlikely vehicle for the kind of ordered and balanced survey Blackstone sought to supply.

Nor was the program all that much better served if the scheme of classification shifted from the procedural machinery of English law to a more substantive ordering of legal materials in terms, chiefly, of the organization of magistrates and tribunals. According to this ordering structure, the basic parts of the law were identified in terms of the specific institutions in which claims of legal right were presented and resolved. This approach (which also appeared regularly in the legal literature and which, again, received coverage in Commentaries) considerably simplified the classification of law, but only to a degree. Thomas Wood's Institute, for example, offered one such version of this ordering of English law, which itself comprised a simplification of a typology in Coke's Institutes:

There is another Division of our Laws ... as into the Prerogative or Crown Law; the Law and Custom of Parliament; the Law of Nature; the Common Law; the Statute Law; reasonable Customs; the Law of Arms, War and Chivalry; Ecclesiastical or Canon Law in Courts in certain Cases; Civil Law in certain Courts and Cases; Forest Law; the Law of Marque and Reprisal; the Law of Merchants ... the Laws and Customs of the Isle of Jersey, Guernsey, and Isle of Man; the Law and Privileges of the Stannaries.²²

Blackstone, following Hale's example, pursued a far more abstract and analytical classificatory scheme. He defined the positive law of an organized political community as 'a rule of civil conduct ... commanding what is right and prohibiting what is wrong'; and then devoted his first two volumes of the Commentaries to the system of rights in English law, and the next two volumes to the system of wrongs and their remedies.²³ The titles of the first two books (much less their contents) directly echoed the leading titles of the first two books of Justinian's Institutes: 'Of the Rights of Persons' [jura personarum] and 'Of the Rights of Things' [jura rerum]. The

former treated constitutional arrangements as well as individual rights, and the latter was dominated by the summary of law of real property.

The titles of the latter two volumes ‘on wrongs’ (that is, volumes 3 and 4 of the Commentaries) conformed much less tightly to the Justinian model, although the general ordering of materials sustained the Roman Institutes’ basic distribution of law as relating to either persons, things, or actions. Here Blackstone’s terminology, however, did not replicate classical titles. Thus, he wrote of ‘rights and wrongs’, rather than the more Latinate ‘right’ and ‘injury’ [ius and injuria]. Presumably, by this time, the phrase ‘rights and wrongs’ had become such a standard terminological trope that Blackstone deployed it, preferring ‘wrongs’ to the older English legal category of ‘trespasses’ and to the available alternative, generic term of ‘offenses’.

The two volumes on wrongs covered what Blackstone also described as ‘remedial law’; and here he surveyed much of the complex, technical apparatus for processing cases which formed so much of the traditional juristic learning of the common law. Nonetheless, the books were ordered on a different basis. Volume 3 treated ‘private wrongs’ in contradistinction to Volume 4’s coverage of ‘public wrongs’. And this division between private and public wrongs marked the distinction between civil injuries (on the hand) and crimes and misdemeanours (on the other). As he explained at the outset of the final volume:

... in the beginning of the preceding volume wrongs were divided into two 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 misdemeanours ...²⁴

Unifying all this material under the generic label of ‘wrongs’ enabled Blackstone to maintain the overall symmetry of the four volumes (again: two volumes on rights and two on wrongs), while the classification of wrongs into two main species enabled him to capture a familiar

juristic distinction between civil and criminal. In this rendering, what distinguished the category of 'civil injuries' was their private character. These offenses, exemplified in injuries caused to personal property, 'are a privation of the civil rights which belong to individuals, considered merely as individuals'. In contrast, crimes and misdemeanours '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'. Thus, such exemplary instances of crime as 'treason, murder, and robbery' were properly identified as public wrongs, since these offenses 'strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity'.²⁵

This qualitative difference in kinds of wrong, in turn for Blackstone, grounded a secondary distinction between kinds of legal remedies and sanctions. In the case of private wrongs, the restoration of the violated property right or 'a civil satisfaction in damages' properly served to 'atone' for 'an injury to private property'. But in the contrasting case of wrongs that were 'public' in nature, the law's concern was to protect the public by preventing such acts through the instrument of punishment.²⁶

In so distinguishing civil from criminal and compensation from punishment, Blackstone navigated a set of distinctions which were commonplace in English jurisprudence. The categories themselves were Roman in origin, and in the medieval period they figured prominently in canonist materials which drew on the Roman law sources. As David Seipp has explained in a valuable treatment of the early common law, already in Glanvil in the late-twelfth century and in Bracton in the thirteenth century, English lawyers were utilizing these terms of classification.²⁷ Some of this trend reflects a more general 'Romanizing' pattern within medieval English jurisprudence, for which Bracton is the famous (though controversial) benchmark. At the same time, as Seipp proposes, a more direct, political dynamic likely was also at work. The great institutional struggle of the twelfth century between the royal courts and the ecclesiastical courts concerning

jurisdiction over clergy in England was resolved through a compromise in which (roughly) the royal courts gained authority over clergy in civil suits, while in criminal causes clergy were entitled to appear before a church court. The political conflict facilitated the adoption of the canonist categories of civil and criminal into English law; while the terms of its resolution gave incentive to the common lawyers to enlarge the sphere of civil suits, since it was here that the royal courts enjoyed authority over accused clerical offenders.²⁸

Significantly, however, Blackstone's handling of the categories differed in critical respects from this earlier jurisprudence. Originally, the distinction between criminal and civil was utilized to classify procedural options available at common law to those seeking redress against alleged injuries and wrongs. The categories served to classify types of pleas and forms of action, according to whether the injured party sought compensation (a civil plea) or vengeance and punishment against the wrongdoer (a criminal plea). The very same injury could stimulate either a criminal or a civil proceeding (for example, an 'appeal of felony' as opposed to a 'writ of trespass'); and the very same injury could stimulate a proceeding initiated by a private party or by a royal official (for example, an 'appeal of felony' as opposed to an 'indictment of felony').²⁹

In the early-modern literature of the common law, the terminology was again deployed for the purposes of classifying procedural forms. Thus, Coke in his Institutes, invoked the medieval jurists to support his account of how the common law writs and forms of action were distinguishable as 'some be criminall and some be civill or common'; and he relied on earlier authority in further classifying the civil branch of actions into the sub-categories of 'reall, personall, and mixt'.³⁰ The eighteenth-century surveys of English law retained the same scheme. 'Actions are either Criminal or Civil', Thomas Wood explained. 'Civil are either Real, Personal or Mix'd.'³¹ Of course, at this point in time, the actual system of common law writs and remedies to which this classification was applied differed dramatically from the legal order observed by Glanvil

and Bracton. By the end of the Tudor period, the original structure of common law process had been transformed by the introduction of a newer and more flexible family of actions named ‘trespass on the case’ (or ‘trespass on the special case’). And common law practice now relied overwhelmingly on these more modern forms, such as ‘ejectment’ (for disputes involving real property); ‘trover’ (for disputes involving personal property); and assumpsit (for disputes involving agreements and contracts).³²

Blackstone, in a well-chosen metaphor, likened the resulting ‘system of remedial law’ to ‘an old Gothic castle’ whose ‘magnificent and venerable’ original quarters had been ‘neglected’, and whose ‘inferior apartments’ had been successfully remodeled ‘for a modern inhabitant’. Yet, as he properly acknowledged, the mass of legal ‘fictions and circuities’ through which this modernization occurred, left the law ‘winding and difficult’.³³ Eighteenth-century surveys obviously struggled to manage the cumulative, technical complexity. The antiquated legal forms contained in the first sub-category of civil actions, ‘real’ actions, could be sketchily treated as a result of their now being ‘much out of Use’.³⁴ Yet they still demanded some discussion, if only to the extent required for making sense of their modern replacements. The historically-fashioned cluster of legal forms under the action of trespass likewise defied easy summary. When, for example, Wooddeson in his Systematical View reached the uneven class of legal suits and claims that were ‘denominated’ by common law to be ‘actions of trespass on the case’, he simply gave up any pretence of being able to provide a satisfactory definition or comprehensive survey of ‘these anomalous suits’.³⁵

These specific taxonomic complexities all concerned the discussion and organization of legal materials within the ‘civil’ branch of common law process. But the same patterns of historical development and adaptation likewise complicated efforts to distinguish between civil and criminal. The term ‘trespass’ itself remained ambiguous. It still appeared in a generic, though

increasingly antiquated, form as a synonym for misdeeds or wrongs (including criminal misdeeds and wrongs), as well as being used more technically to identify the large family of (non-criminal) common law writs.³⁶ Furthermore, the earliest trespass writs of the medieval period concerned alleged wrongs committed ‘with force and arms and against the king’s peace’ (vi et armis et contra pacem regis). This formula denoted a jurisdictional claim, indicating why the alleged wrong should be heard by a royal court; and these actions of trespass from the start were identified as civil pleas. Nonetheless, the classification meant that the types of misconduct covered under the category of civil actions included kinds of wrong-doing that might as readily be labeled criminal. Thus, Blackstone, immediately following his rehearsal of the established classification of civil actions into ‘personal, real, and mixed’, went on to describe a quite different and alternative ordering of ‘civil injuries’, between those committed ‘without force and violence’ (such as ‘breach of contract’) and those ‘coupled with force and violence’ (such as ‘batteries’). The ‘latter species’, he reported, ‘savour something of a criminal kind, being always attended with some violation of the peace’; and this distinction between ‘injuries with and without force’, he further explained, would be found ‘to run through all the variety’ of civil injuries.

Further terminological messiness resulted from the impacts of parliamentary statutes on the common law system. One common function of both medieval and early-modern legislation was to specify new, and usually more severe penalties for those convicted of existing offenses; or to create new kinds of offenses by specifying penalties or remedies for previously unsanctioned forms of conduct. The term ‘penal statutes’ was applied to label one typical version of this legislation: ‘such acts of parliament’ that inflicted ‘a forfeiture’ as the penalty ‘for transgressing the provisions therein contained’.³⁷ Often parliamentary legislation operated in a manner that chiefly affected the ordering of legal materials within the civil or criminal branches of the law. The 1278 Statute of Gloucester, that specified ‘treble damages’ in certain cases involving ‘an

action of waste', shifted what previously had been a 'real' form of civil action into the sub-category of a 'mixed' kind of action.³⁸ Statutes specifying new forms of treason or removing benefit of clergy from certain types of offenses altered legal matter within the criminal branch.³⁹

At the same time, however, the legislative materials also worked to introduce further terminological complexity to an already burdened domain. Some of the confusion was the result of the frequently-lamented vagaries of parliamentary draftsmanship, where it was evident that the statutory language failed to honor the technical niceties of English law.⁴⁰ But, additional complications arose from the practice of referring to a class of statutes as 'penal acts' or 'penal laws' in a setting where the range of meaning ascribed to the term 'penal' was itself unsettled. Some legal writers reserved the term 'penal' to refer to this specific kind of legislative enactment, and to the common law suits that were authorized by these statutes. The brief title on 'Penal Laws' in Giles Jacob's popular New Law Dictionary, for example, was exclusively devoted to the 'Penal Statutes' enacted 'upon many and various occasions to punish and deter Offenders'.⁴¹ And under this specific usage, penal law might readily support forms of action and suits at common law that were classified as civil, as in the situations where a statutory penalty provided the legal foundation for an 'action of debt' or an action of 'trespass on the case'.⁴² Here penal law and penal causes were linked to 'civil' matters; and, as a result, needed to be distinguished from criminal law and criminal causes. 'Penal actions were never yet put under the head of criminal law or crimes', insisted Lord Chief Justice Mansfield; by which he meant that a civil action brought in support of a claim to a statutory penalty did not turn the action into a 'criminal cause'.⁴³

Unfortunately, however, this narrow and technical common law usage of 'penal' law was easily at odds with more general linguistic practice that tended to join 'penal' and 'criminal' as two parts of a unified field of legal ordering. The term, 'penal', Jeremy Bentham noted in 1789, 'is

wont, in certain circumstances, to receive the name of criminal.⁴⁴ This alternative (and now more familiar) usage commonly figured in the eighteenth-century debate over the reform of parliamentary sanctions, where the discussion of penalties was firmly directed at the matter of crime and punishment. Thus, when William Eden presented to his readers, the Principles of Penal Law, his subject-matter was explicitly ‘the right of punishment and the different classes of punishment’ in connection with ‘the several species of crimes, their definitions and gradations’.⁴⁵

All this terminological complication reinforces the level of challenge Blackstone faced in seeking to bring order and division to English legal practices. Volume 3 and Volume 4 of the Commentaries, of course, fully detailed those procedural differences that formed the center-piece of the common law’s established approach to the distinction between the criminal and civil branches of the law. Blackstone’s important innovation, however, was the attempt to fashion out of these materials an alternative foundation for the familiar categories. His typology of England’s remedial law did not in the first instance invoke procedural options. Instead, he suggested a substantive difference in areas of law, distinguished according to qualitatively different kinds of wrongs. Some kinds of wrongs were ‘public’ in nature; these kinds of wrong demanded ‘punishment’ by the community; and these kinds of wrongs comprised ‘crimes and misdemeanours’.

III. Pleas of the Crown

As we shall see, serious difficulties attended this attempt to map a boundary between private and public wrongs in English law. Nonetheless, the project was greatly facilitated by yet another important technical legal category which Blackstone deployed to identify ‘public wrongs’: pleas of the crown. Public wrongs, he explained, included the law 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'.⁴⁶ 'Pleas of the crown' referred to those actions at common law in which the crown appeared formally as the party prosecuting the individual charged with the offense in question.⁴⁷ And it was this identification of criminal law with pleas of the crown, rather than Blackstone's category of 'public wrongs', that represented standard common law usage in the seventeenth and eighteenth centuries. Coke, for example, introduced his subject-matter in the Third Part of his Institutes, by explaining that 'we are to treat de malo, viz. of high treason and other pleas of the crowne, and criminall causes'. And Thomas Wood similarly titled the relevant section of his own Institute, 'Of Crimes and Misdemeanours, or of the Pleas of the Crown'.⁴⁸

This general identification of English criminal law with 'the doctrine of the pleas of the crown' (or 'crown law') was made possible as a result of the earlier historical development in which these pleas replaced the larger number of older procedural options for the prosecution of crime. The process in which the institutions of the state wrested control of the punishment of crime from the practices of private vengeance formed the organizing theme of eighteenth-century accounts of the historical development of the criminal law. In these treatments, the public administration of punishment for the acknowledged purposes of collective welfare formed a basic indicator of societal progress and refinement.⁴⁹ And, as Blackstone perceived, since the most serious forms of crime were now virtually always prosecuted through a plea of the crown, this legal form further clarified what was 'public' about the class of public wrongs. The crown was the proper prosecutor of these wrongs since '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'.⁵⁰

In fact, as English jurists acknowledged, the category of pleas of the crown could not quite serve to stabilize the boundaries of criminal law itself. In one respect, the crown law was too large: it ranged over areas of law which plainly did not involve crimes or criminal causes.

Thus, for example, in his famous treatise on The History of the Pleas of the Crown, Matthew Hale distinguished the criminal and the civil pleas, the latter of which concerned ‘franchises and liberties’.⁵¹ In another (more familiar) respect, the crown law was too narrow: it did not contain all the law governing criminal causes in England. Thus, Hale in his Analysis of the Law, only arrived at the pleas of the crown following a series of divisions which made plain the number of criminal offenses which did not fall under the ‘conuzance’ of the courts of common law: crimes under the ‘conuzance’ of the ecclesiastical courts (adultery, fornication, incest); those under the ‘conuzance’ of the Admiral’s Court (piracy); and those under the ‘conuzance’ of the Constable and Marshal’s Court (usurpation of coats of arms).⁵²

Even more serious for Blackstone’s classification was the survival in eighteenth-century law of the older criminal pleas, the common law ‘appeals of felony’, in which ‘a private subject’ prosecuted another ‘for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offense against the public’. Blackstone, inevitably, placed ‘this private process for the punishment of public crimes’ within the English law of ‘public wrongs’, notwithstanding the anomalous features. He discussed the procedure ‘very briefly’, emphasizing its rare appearance in the operations of current law.⁵³ The ‘appeal of felony’ may have posed a rather unthreatening exception to Blackstone’s classificatory scheme, given its plain status as an antiquated vestige of an earlier era of English criminal justice.⁵⁴ Other complications, however, could not be marginalized in this fashion. Much more common and contemporary was a form of action, termed qui tam, which undermined the terms of Blackstone’s categories by purposefully inviting the collaboration of private parties and the government in the prosecution of particular offenses. Qui tam actions were supported by numerous parliamentary statutes that provided the opportunity for the prosecution of particular offenses either by the crown or by a private party;

and which, in the latter case, specified a monetary penalty that was divided between the crown for ‘some public use’ and the private ‘informer or prosecutor’.⁵⁵

Both the appeals of felony and qui tam actions disclosed some of the difficulties in preserving the boundary between ‘private’ and ‘public’ wrongs. Still, even in the absence of such procedural hybrids, the Commentaries’ map for the criminal law faced a more systematic and analytical challenge. Many of the most familiar kinds of public wrongs treated in volume 4, such as murder or assault, involved just as much a wrong done to a particular ‘private’ individual by another ‘private’ individual as did the kinds of offenses identified as private wrongs in volume 3. Blackstone, of course, was well aware of the difficulty. His solution was to allow that ‘every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community’. The provision of punishment rather than compensation was, in this sense, a decision to allow ‘the private wrong’ to become ‘swallowed up in the public’.⁵⁶ In these comments, Blackstone recognized the many cases in which the division of civil injuries and public crimes was less a distinction between two kinds of wrongs than it was a juridical characterization of two separate elements of the same conduct. But this refinement concerning the private dimensions of public wrongs still left unexplored the public dimensions of those wrongs which the law treated as private. If the public, ‘considered ... in its social aggregate capacity’, had an interest in the prevention of wrongs like murder and assault, in what sense did it lack an interest in the prevention of violations of civil rights and personal property?⁵⁷

The relevant complications tended to surface in those cases where English law treated an offense as either a civil injury or a crime. The offense of libel, the Commentaries explained, allowed ‘as in many other cases, two remedies’: as a ‘public offense’ by indictment, or as a civil injury ‘by action’.⁵⁸ The difference turned on the now familiar question of which procedure was utilized, one of which led to punishment and one of which led to compensation. Blackstone,

however, again sought to rationalize the difference in terms of the qualitative distinction in kinds of wrongs. What made the personal injury to reputation in libel a public wrong was the ‘tendency’ of ‘every libel’ to lead ‘to a breach of the peace, by provoking the person libeled to break it’.⁵⁹ But, this rationalization would equally serve to transform perhaps every private injury into a public wrong: each of these civil injuries potentially might likewise provoke the victim into a line of retaliatory conduct which would threaten the public peace.

IV. Public vs. Private

The public/private distinction has become such an important and even notorious object of scrutiny in the critique of liberal legal and political theory that one might readily pursue, in the manner undertaken by Duncan Kennedy, a far more ambitious criticism of the inadequacies and instabilities of the Commentaries’ program of classification.⁶⁰ In utilizing this terminology, Blackstone, once more, sought to adapt and stabilize a cluttered inheritance of legal categories and concepts. The ultimate legal source for this terminology was classical Roman law, where public law referred (roughly) to what concerned ‘the welfare of the Roman state’, and private law referred to what concerned ‘the advantage of the individual citizen’.⁶¹ By the eighteenth century, a version of these Roman categories was equally familiar in the natural law tradition associated with Grotius and his successors, where so much of the analysis of rights and obligations was examined in terms of the transformations wrought by the introduction of public authority and positive law.⁶² The generality of this terminology probably eased its utilization in English law, where it was applied in a range of classificatory settings. Acts of parliament, for example, earlier classified as either ‘general’ and ‘special’, came additionally to be distinguished as ‘public’ and ‘private’.⁶³

Eighteenth-century English law utilized the terms ‘private’ and ‘public’ with a frequency and range sufficient to frustrate any precise or simple definition.⁶⁴ Nonetheless, the term was routinely given at least two distinctive meanings, both of which figured in Blackstone’s conceptualization of ‘public’ wrongs. ‘Public’ could refer to the institutions and agents of state authority. Thus, for example, Thomas Wood, in discussing cases of ‘Justifiable Homicide’ in English law, distinguished between those ‘of a Publick’ and those of a ‘Private Nature’. Public justifiable homicide occurred in the legitimate operation of governmental authority: as ‘when judgment of Death is given by one that hath jurisdiction in the Cause’. In contrast, private forms of justifiable homicide occurred ‘in defence of One’s person, house of goods; as when a woman kills one that attempts to ravish her’.⁶⁵ In addition and more loosely, the term ‘public’ was used to denote situations of collective benefit or interest, where the benefit derived or the harm avoided was not to be assigned or limited to any particular individuals. Thus, Wood, in treating the common law of ‘nusesances’, identified as ‘Publick’ those nuisances that affected ‘the whole Kingdom’, in contrast to ‘Private’ nuisances which injured ‘a particular Person, as to his house, mill, etc’.⁶⁶

Blackstone, in his category of public wrongs, plainly drew on a well-established stock of linguistic usage. Crimes and misdemeanours were ‘public’ in the sense of matters of state-action, since in the case of these wrongs the law gave the crown distinctive prosecutorial responsibilities. And crimes and misdemeanours were ‘public’ in the wider sense of matters of collective concern, since these were the wrongs that harmed ‘the whole community, considered as a community, in its social aggregate capacity’.⁶⁷ There was little novelty to either claim as a substantive point about how English law generally handled criminal offenses. Blackstone’s readers did not need the Commentaries to instruct them that the law legitimately punished crimes for the sake of the collective welfare of the community (and not for personal vengeance); and that the routine

prosecution of these offenses involved the mobilization of government authority in a manner that plainly differed from other legal suits. What was innovative about Blackstone's map here was the attempt to unify these legal practices in terms of a distinctive kind of wrong, and to attach the label 'public' to it.

Blackstone's immediate successor to the Vinerian professorship, Robert Chambers, in his Oxford lectures of 1767-73, embraced this terminology more ambitiously, and presented a revised classificatory scheme that utilized 'public' and 'private' categories to arrange the whole of English law. In this classification, 'public law' referred 'that law of government by which the supreme power in a state regulates its own conduct and that of its subordinate officers', which in England covered the rules governing the arrangement of the constitution and the operation of royal government. 'Private law' comprised the law 'by which the particular rights of the subject are protected'. Between these two juxtaposed branches of the law, Chambers introduced a distinct and separate category of 'Criminal Law', which contained features of both public and private law. Criminal law treated offenses (such as 'murder, robbery and mayhem') that simultaneously comprised 'a private injury' to 'him whose natural and civil rights are thereby invaded' as well as a 'public crime' against 'the peace and good order of the commonwealth'.⁶⁸

Chambers' tripartite arrangement neatly avoided the challenges Blackstone encountered in seeking to secure a clear boundary between public and private kinds of wrongs since it explicitly situated criminal law as a mediating category that combined public and private elements. At the same time, his lectures (which he struggled to compose and declined to publish) relied on an avowedly Roman conception of 'public law' that remained generally foreign to English orthodoxies. When in 1803, for example, the Scottish jurist, John Millar, deployed the categories of 'public' and 'private' law, in manner that echoed Chambers and the classical Roman usage, to distinguish 'that part' of the law 'which regulates the powers of the state' from the part 'which

regulates the conduct of the several members' of the political community, he promptly acknowledged that the adopted terminology did not represent 'the common acceptance'.⁶⁹ Millar's observation was reflective of the important elements within English jurisprudence that served to resist any sharp boundary between a discrete body of public law relating to the state and another discrete body of private law relating to the conduct among the individual members of the kingdom.⁷⁰

Instead, English law regularly characterized the structures of political life in terms of the categories and doctrines of private jurisprudence.⁷¹ The franchise, government office and even the kingship thus were conceptualized as various forms of personal property or estate, held (respectively) by the parliamentary elector, the magistrate and the monarch himself. The common law jury epitomized the democratic elements in English governance as much as did the House of Commons; specific legal forms, such as of the writs of habeas corpus and quo warranto, were as foundational to the system of public liberty as was the mixed constitution. 'By a constitutional policy', Burke enthused in the Reflections in the Revolution in France, 'we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit our property and our lives'.⁷²

Blackstone, himself, cogently sustained this understanding of the permeability and continuity between public and private legal realms in his organization of the first volume of the Commentaries, which included discussion of the law concerning the central bodies of government: crown, parliament, and courts of justice. Given this material, it became common for later writers to treat the book as Blackstone's account of 'constitutional law'. However, as we have seen, Blackstone's own title for the volume was, 'the Rights of Persons'; which he began with a chapter-length survey of 'the three great and primary rights' of English subjects: 'personal security, personal liberty, and private property'. The kingdom's political arrangements (such as

‘limitation of the king’s prerogative’ and ‘the constitution, powers and privileges of parliament’) were introduced next as part of a larger network of ‘auxiliary subordinate rights’ designed to protect the basic ‘primary rights’ of the individual subject.⁷³ And finally Blackstone went on to survey, in ample detail, ‘the rights and duties of persons’ who exercised ‘supreme’ magistracy (king and parliament); the ‘rights of persons’ exercising ‘subordinate’ magistracy (sheriffs, constables, etc.); the rights associated with particular social ranks and stations (clergy, nobility, military, etc.); the rights ‘in private oeconomic relations’ (master-servant, husband-wife, etc.); and the rights of ‘artificial persons’ (corporations). In elaborating this hierarchical system of ‘rights of persons’, Blackstone did at one point contrast ‘public relations’ between ‘magistrates and people’ from ‘private oeconomic’ relations within a domestic household. Nonetheless, the overall approach served to erode the kind of organizing boundary between state and society, and between public and private spheres, that featured in later treatments of English constitutional law.

74

Blackstone’s readiness thus to combine a classification of the ‘rights of persons’ which united government structures and private conditions (on the one hand) with a classification of legal ‘wrongs’ which separated public crimes and private injuries (on the other) largely followed from the Commentaries’ basic didactic and expository purposes. The point was to develop a structure for introducing the legal order to a non-professional audience; and this required as much literary skills, partial borrowings and selective innovations as it did pristine categories and rigid classifications. Blackstone, however, in displaying his map did not emphasize the heuristic and provisional nature of this exercise. For all his express debts to Matthew Hale’s Analysis of the Law for the arrangement of the Commentaries, he declined to follow his mentor in conceding any final failure ‘to reduce the Laws of England’ to ‘an exact Logical Method’.⁷⁵ Instead, as in the division of private and public wrongs, Blackstone’s language suggested some firmer, more

essentialist foundation to his adopted categories. And this left the Commentaries especially vulnerable to attack for its methods of classification and arrangement.

The criticism of Blackstone's methods began within a decade of the appearance of the Commentaries, when an unknown jurist, who earlier had attended the Vinerian lectures at Oxford, anonymously published A Fragment on Government in 1776. Included among the multitude of crippling defects Jeremy Bentham there identified for censure was what he termed Blackstone's 'technical arrangement' of English law: 'a sink', as Bentham put it, that 'will swallow any garbage that is thrown into it'.⁷⁶ The details of Bentham's attack, and the later critical reactions to Blackstone's more specific efforts to classify and delimit criminal law, cannot be pursued here. But, there is one particular feature of Bentham's response to Blackstone that deserves brief notice. This is the extent to which Bentham, for all his dismissive repudiation of the Commentaries' classificatory scheme, in his own jurisprudence fully sustained the Blackstonean project to systematize analytically the law; and did so in a way that relied extensively on the ordering logic of public vs. private, civil vs. criminal.⁷⁷ Later English jurisprudence likewise routinely returned, often without acknowledgment, to the well-rehearsed distinctions and categories that Blackstone's celebrated Commentaries placed firmly in the foreground of the map of law. In the 1820s, for example, John Austin embarked on another comprehensive analysis of the organizing concepts and categories of positive law, as part of his duties as professor of jurisprudence at the new London University. Drawing once more on the materials and arrangement of classical Roman law, Austin soon found himself in a painfully familiar set of conceptual tangles. 'In order to determine the place which should be assigned to the Criminal Law', he casually reported in his commentary on the Roman institutional arrangements, 'it would be necessary to settle the import of an extremely perplexing distinction: namely, the distinction between Public Law and Private (or Civil) Law'.⁷⁸

* Earlier versions of this chapter were presented at the 1997 meeting of the North American Conference on British Studies and at the Legal History Workshop at the Buchmann Faculty of Law, Tel Aviv University. I am grateful to the participants at these occasions for their comments and questions. I also have received valuable guidance from several friends and colleagues: Lindsay Farmer, Claire Finkelstein, James Gordley, Ron Harris, Sanford Kadish, Thomas Green and Robert Post. Much my greatest debts are owed to James Oldham and to Michael Lobban: both supplied detailed comments on an earlier draft, and both generously alerted me to important source material I otherwise would have neglected.

¹ J.M. Beattie, Crime and the Courts in England 1660-1800 (Princeton, 1986), p. 619.

² See G.R. Elton 'Introduction: Crime and the Historian', in J.S. Cockburn (ed.), Crime in England 1550-1800 (Princeton, 1977), p. 2.

³ Beattie, Crime and the Courts, p. 457, and Norma Landau, 'Indictment for Fun and Profit: A Prosecutor's Reward at Eighteenth-Century Quarter Sessions', Law and History Review, vol. XVII (1999), p. 508.

⁴ Henry Home, Lord Kames, 'History of the Criminal Law', in Historical Law-Tracts, 2 vols. (Edinburgh, 1758), vol. I, pp. 1-90; William Eden, Principles of Penal Law (1771), 3rd edn. (London, 1775).

⁵ William Hawkins, A Treatise of the Pleas of the Crown (1716), 6th edn. by Thomas Leach, 2 vols. (Dublin, 1788); 'Preface to the Present Edition', vol. I, n.p.

⁶ See Eden, Principles of Penal Law, p. 3; Richard Wooddeson, A Systematical View of the Laws of England, 3 vols. (London, 1792-3), vol. II, p. 544; Martin Madan, Thoughts on Executive Justice, with respect to our Criminal Laws (London, 1785), pp. 7, 19-20.

-
- ⁷ Wooddeson, Systematical View, vol. II, p. 544.
- ⁸ William Blackstone, Commentaries on the Laws of England (1765-9), 11th edn., 4 vols. (Dublin, 1788), vol. I, p. 35.
- ⁹ Commentaries, vol. IV, p. 433.
- ¹⁰ For background on the creation of the Vinerian Chair and the circumstances of Blackstone's election, see J.L. Barton, 'Legal Studies,' in L.S. Sutherland and L.G. Mitchell (eds.), The History of the University of Oxford: The Eighteenth Century (Oxford, 1986), pp. 600-5; and Lucy Sutherland, 'William Blackstone and the Legal Chairs at Oxford,' in Rene Wellek and Alvaro Ribeiro (eds.), Evidence in Literary Scholarship: Essays in Memory of James Marshall Osborn (Oxford, 1979), pp. 229-40.
- ¹¹ In characterizing Blackstone's project in the next several paragraphs, I draw on the important discussions by: S.F.C. Milsom, 'The Nature of Blackstone's Achievement,' Oxford Journal of Legal Studies, vol. I (1981), pp. 1-12; John W. Cairns, 'Blackstone, An English Institutist: Legal Literature and the Rise of the Nation State,' Oxford Journal of Legal Studies, vol. IV (1984), 318-60; Michael Lobban, 'Blackstone and the Science of Law,' Historical Journal, vol. XXX (1987), pp. 311-35; Alan Watson, 'The Structure of Blackstone's Commentaries,' Yale Law Journal, vol. XCVII (1988), pp. 795-821. For a valuable examination of the broader context of contemporary legal writing in England, see Michael Lobban, 'The English Legal Treatise and English Law in the Eighteenth-Century,' Iuris Scripta Historica, vol. XIII (1997), pp. 69-88.
- ¹² William Blackstone, An Analysis of the Laws of England (Oxford, 1771), p. iv.
- ¹³ Thomas Wood, An Institute of the Laws of England, or The Laws of England in their Natural Order, according to Common Use (1720), 4th edn. (London, 1728), p. i.
- ¹⁴ Blackstone, Analysis, pp. v-viii.

-
- ¹⁵ See Klaus Luig, 'The Institutes of National Law in the Seventeenth and Eighteenth Centuries,' Juridical Review, vol. XVII (1972), pp. 193-226.
- ¹⁶ See Commentaries, vol. I, pp. 122-3; and the further discussion in James Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth-Century, 2 vols., (Chapel Hill, 1992), vol. II, pp. 1221-44.
- ¹⁷ See Commentaries, vol. II, p. 44-58, and John Dalrymple, An Essay towards a General History of Feudal Property in Great Britain (1757), 2nd edn. (London, 1758).
- ¹⁸ Francis Stoughton Sullivan, An Historical Treatise on the Feudal Law, and the Constitution and Laws of England (London 1772), p. 18.
- ¹⁹ For details of this example, see the discussion in J.P. Sommerville, Politics and Ideology in England 1603-1640 (London, 1986), pp. 121-7.
- ²⁰ Matthew Hale, The Analysis of the Law (London, 1716), p. 55.
- ²¹ Richard Wooddeson, Elements of Jurisprudence, treated of in the preliminary part of a course of Lectures on the Laws of England (London, 1783), p. 111.
- ²² Wood, Institute of the Laws of England, p. 10.
- ²³ Commentaries, vol. I, p. 44, and see vol. III, p. 1.
- ²⁴ Commentaries, vol. IV, p.1, and see vol. II, p. 2.
- ²⁵ Commentaries, vol. IV, p. 5; and see vol. I, p. 122, for Blackstone's first presentation of the division between public and private wrongs.
- ²⁶ Commentaries, vol. IV, pp. 6-7, 11-12.
- ²⁷ David J. Seipp, 'Distinction Between Crime and Tort in the Early Common Law', Boston University Law Review, vol. LXXVI (1996), pp. 59-87. See also Seipp's more general treatment of these medieval materials in, 'Bracton, the Year Books, and the

‘Transformation of Elementary Ideas’ in the Early Common Law,’ Law and History Review, vol. VII (1989), pp. 175-217.

²⁸ Seipp, ‘Distinction Between Crime and Tort’, pp. 80-3.

²⁹ Seipp sets out the details of these specific procedural forms in ‘Distinction Between Crime and Tort’, pp. 61-78

³⁰ Edward Coke, Institutes of the Laws of England (1628-44), 4 Parts (London, 1817), Part 2, p. 40, and Part 1, p. 284b.

³¹ Wood, Institute of the Laws of England, p. 534. See also Blackstone, Commentaries, vol. III, pp. 117, and Wooddeson, Systematical View, vol. III, pp. 1-2.

³² This historical transformation of the common law system is summarized in J.H. Baker, Introduction to English Legal History (London, 1979), pp. 49-61. For an important and more detailed, recent exploration, see D.J. Ibbetson, Historical Introduction to the Law of Obligations (Oxford, 1999), pp. 95-151. (Ejectment was derived from the earlier form of ‘trespass vi et armis’, rather than the later form of ‘trespass on the case.’)

³³ Commentaries, vol. III, pp. 267-8.

³⁴ Wood, Institute of the Laws of England, p. 534.

³⁵ Wooddeson, Systematical View, vol. III, pp. 167, 217.

³⁶ Thus, for example, the opening of the entry, ‘Trespass’, in Giles Jacob’s law dictionary: ‘Is any Transgressing of the Law under Treason, Felony, or Misprision of either: But it is most commonly used for that Wrong or Damage which is done by one private man to another.’ See Giles Jacob, New Law Dictionary (London, 1729), ‘Trespass (Transgressio)’.

³⁷ See Blackstone, Commentaries, vol. III p. 161, and vol. I, p. 88.

³⁸ In ‘real’ actions, the plaintiff pursued what was solely a claim of real property. In the case of an ‘action of waste’, the Statute of Gloucester’s treble damages added a monetary claim

-
- against the injury to supplement the real property claim, and thereby created a ‘mixed’ kind of action. The statute furnished a standard illustration of this kind change to the common law forms; see Blackstone, Commentaries, vol. III, p. 118, and Wooddeson, Systematical View, vol. III, p. 31.
- ³⁹ Thus Coke, in introducing the Third Part of his Institutes on ‘pleas of the crowne and criminall causes’, explained that ‘most of them’ were created ‘by act of parliament’; Coke, Institutes, Part 3, ‘Proeme’, n.p.
- ⁴⁰ The common law courts developed specific rules for the interpretation and application of this class of ‘penal’ laws, in response in part to the perceived defects in legislative drafting; see Blackstone, Commentaries, vol. I, p. 88. See also the specific problems in the language of several statutes noted in the judicial rulings in the case of *Atcheson v. Everitt* (1775), 1 Cowp. 382, English Reports, vol. XCVIII, pp. 1147-8, and in the case of *R. v. Clark* (1777), 2 Cowp. 610, English Reports, vol. XCVII, pp. 1267-8. (I am indebted to James Oldham and to Michael Lobban for drawing my attention to this and other case law material.)
- ⁴¹ Jacob, *New Law Dictionary*, ‘Penal Laws’.
- ⁴² Such actions ‘grounded on a *particular act of parliament*’ are helpfully surveyed in Wooddeson, Systematical View, vol. III, 192, 214-6.
- ⁴³ See *Atcheson v. Everitt* (1775), 1 Cowp. 382, English Reports, vol. XCVII, p. 1147.
- ⁴⁴ Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (1789), ed. J.H. Burns and H.L.A. Hart (London, 1970), p. 299.
- ⁴⁵ Eden, Principles of Penal Law, p. 83.
- ⁴⁶ Commentaries, vol. IV, p. 2; and see vol. I, p. 268.

-
- ⁴⁷ This was the process that usually began with an indictment, which was then considered by a grand jury, before proceeding on to trial involving a petty jury. For an account of the procedures, see J.H. Baker, 'Criminal Courts and Procedure at Common Law 1550-1800', in Cockburn, Crime in England, pp. 15-48.
- ⁴⁸ Coke, Institutes, Part 3, 'Proeme' (n.p.); Wood, Institute, p. 339.
- ⁴⁹ Among the most elaborate and best-known rehearsals of this historical theme was Kames' essay on the 'History of the Criminal Law'. For similar contemporary discussions, see Eden, Principles of Penal Law, pp. 2-3; Robert Chambers, A Course of Lectures on the English Law (1767-73), ed. Thomas M. Curley, 2 vols. (Oxford, 1986), vol. I, pp. 305-26; and Woodderson, Systematical View, vol. III, pp. 564-6.
- ⁵⁰ Commentaries, vol. IV, p. 2. Although the crown, as a matter of legal form, prosecuted these offenses, in practice the processes of criminal justice still depended on the initiative of private parties; see Beattie, Crime and the Courts, pp. 35-41.
- ⁵¹ Matthew Hale, Historia placitorum coronae: The History of the Pleas of the Crown (1726), 2 vols. (London, 1736), vol. I, 'Proemium', n.p.). (Hale did not in fact complete this projected section on 'franchises and liberties'.)
- ⁵² Hale, Analysis of the Law, pp. 98-9.
- ⁵³ Commentaries, vol. IV, pp. 312-3.
- ⁵⁴ Blackstone's account, moreover, constituted something of a premature obituary for a procedure that remained good law and did not lack for judicial defenders. Chief Justice Holt, in a 1699 decision, praised the appeal of felony as 'a Nobel prosecution, and a true badge of English liberties.' The statement proved embarrassing for those, like Blackstone, who sought to marginalize the legal form; see Woodderson, Systematical View, vol. III, p. 566.

⁵⁵ See Commentaries, vol. III, pp. 161-2, and vol. IV, p. 308. (I am indebted to James Oldham for first drawing my attention to these qui tam actions.)

⁵⁶ Commentaries, vol. IV, p. 6.

⁵⁷ Commentaries, vol. IV, p. 5. Blackstone's own presentation of the positive rules governing the transmission of private property drew attention to these considerations of public convenience; see Commentaries, vol. II, pp. 1-15.

⁵⁸ Commentaries, vol. III, p. 125.

⁵⁹ Commentaries, vol. III, pp. 125-6, and see vol. IV, p. 150.

⁶⁰ Duncan Kennedy, 'The Structure of Blackstone's Commentaries,' Buffalo Law Review, vol. V, (1979), pp. 209-382. The wider critical discussion in political theory of the 'liberal conception of public and private' is usefully surveyed in the contributions by Anthony S. Walton, Eugene Kamenka and Carole Pateman to Stanley I. Benn and Gerald F. Gaus (eds.), Public and Private in Social Life (London and Canberra, 1983).

⁶¹ See The Institutes of Justinian, trans. J.B. Moyle (Oxford, 1913), Book I, Title I, p. 3.

⁶² Early-modern treatments of natural law and natural right tended to utilize the categories of 'nature' and 'civil society' to mark this distinction between pre-political and political forms of human society. The phrase 'civil society' and its derivatives (civil authority, civil law, etc.) was derived from the Latin 'civitas', which Locke, for example, took to signify 'any Independent Community' and for which he proposed 'Commonwealth' as the generic English equivalent. Nonetheless, it was common, more loosely, to associate this 'civil' state with the term 'public' and its linguistic derivatives. Thus, in treating the aims of 'political society' and of the 'Supream Power of any Common-wealth', Locke emphasized the 'Peace, Safety, and publick good of the People'. See John Locke, Two Treatises of Government (1690), ed. Peter Laslett (Cambridge, 1964), pp. 371, 373.

⁶³ Blackstone utilized and explained the terminology at Commentaries, vol. I, pp. 85-6. However, the nomenclature represented a rather forced rationalization of a distinction that was chiefly sustained by procedural forms in the processes of parliamentary law-making; see Sheila Lambert, Bills and Acts: Legislative Procedure in Eighteenth-Century England (Cambridge, 1971), pp. 84-109.

⁶⁴ Here the range of legal usage conformed to the patterns of more general linguistic usage. Samuel Johnson's Dictionary supplied five meanings for 'publick' in its adjectival form, including the meanings noticed above. For valuable discussion of the wider linguistic practice, see J.A.W. Gunn, Beyond Liberty and Property (Kingston and Montreal, 1983), chapter 7, and John Brewer, 'This, that and the other: Public, Social and Private in the Seventeenth and Eighteenth Centuries', in Dario Castiglione and Lesley Sharpe, eds., Shifting the Boundaries: Transformation of the Languages of Public and Private in the Eighteenth Century (Exeter, 1995), pp. 1-21.

⁶⁵ Wood, Institute, pp. 360-1.

⁶⁶ Wood, Institute, p. 443.

⁶⁷ Commentaries, vol. IV, p. 5.

⁶⁸ Chambers, Course of Lectures on the English Law, vol. I, pp. 89-91, 122.

⁶⁹ Millar, An Historical View of English Government (1803), 4 vols. (London, 1818), vol. IV, p. 285.

⁷⁰ This theme provides an organizing thesis for J.W.F. Allison's recent study of 'English public law', which maintains that notwithstanding occasional usage: 'The old English authorities general ignored, rejected, or rendered insignificant the distinction between public and private law' (A Continental Distinction in the Common Law (Oxford, 1996), p. 8.) See

also the helpful article by Alice Erh-Soon Tay and Eugene Kamenka, ‘Public Law – Private Law’, in Public and Private in Social Life, pp. 67-92.

- ⁷¹ In what immediately follows here, I draw on material I explore more fully in ‘The Mixed Constitution and the Common Law’, in The Cambridge History of Eighteenth-Century Political Thought, eds. Mark Goldie and Robert Wokler (Cambridge University Press, forthcoming), especially Part 5.
- ⁷² Burke Reflections on the Revolution in France (1790), ed. Conor Cruise O’Brien, (Harmondsworth, 1969), p. 120. (Burke linked this ‘constitutional policy’ to Coke ‘and the great men who follow him to Blackstone;’ see pp. 117-8.)
- ⁷³ Commentaries, vol. I, pp. 136-9.
- ⁷⁴ Commentaries, vol. I, p. 422. For the contrasting, later approaches to constitutional law, see the criticisms of Blackstone offered by A.V. Dicey in Law of the Constitution (1885), 9th edn. (London, 1948), pp. 7-8.
- ⁷⁵ Hale, Analysis of the Law, ‘Author’s Preface’, n.p.
- ⁷⁶ Jeremy Bentham, A Fragment on Government (1776), in A Comment on the Commentaries and A Fragment on Government, eds. J.H. Burns and H.L.A. Hart (London, 1977), p. 416.
- ⁷⁷ I explore the manner in which Bentham’s early theory of legislative was developed through a critical and protracted engagement with Blackstone’s Commentaries in my Province of Legislation Determined: legal theory in eighteenth-century Britain (Cambridge, 1989), chapter 13. See also the illuminating discussion by J.H. Burns in, ‘Bentham and Blackstone: A Lifetime’s Dialectic’, Utilitas, vol. I (1989), pp. 22-40.
- ⁷⁸ John Austin, Lectures on Jurisprudence (1861), 2 vols. (London 1885), vol. II, p. 928.
- Subsequent efforts in this area of English jurisprudence, both during and after Austin’s era, are critically examined by Lindsay Farmer in ‘The Obsession with Definition: The

Nature of Crime and Critical Legal Theory', Social and Legal Studies, vol. V (1996), pp. 57-73, and in 'Reconstructing the English Codification Debate: the Criminal Law Commissioners, 1833-45', Law and History Review, vol. XVIII (2000), pp. 397-425.