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# An Empire of Conduct: On the Jurisprudence of Criminal Procedure

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degree of Doctor of Philosophy

# Abstract

Criminal procedure describes the conduct of lawful conduct. This thesis addresses how criminal procedure came to be the preponderant way through which the conduct of law was expressed and represented. A jurisprudential shift in procedure was accompanied by the recruitment of the criminal law into the administration of the British Empire. The argument of the thesis is that this emergence and subsequent transformation is a product of the practical involvement of a series of jurists of criminal law with imperial administration. These jurists include Jeremy Bentham, Thomas Macaulay, Henry Maine, and James Fitzjames Stephen. The thesis follows the jurisprudential writings of these thinkers and their involvements with various styles of imperialism to re-describe their contributions to the development of criminal law in light of this proximity to the government of empire.

*An Empire of Conduct* argues for an increased sensitivity to criminal procedure in thinking about the conduct of empire and the government of lawful conduct. Procedure describes not only how the rules of law apply to those subject to them, but also how those procedures were part of a process to re-organise the holding of office in the administration of law, colonies and government. To this end, the thesis looks at criminal procedure as an example of governmentality, concerned with how styles of conduct, rule and administration were shaped and then in turn shaped the holding of public office. By paying attention to questions of officeholding, it argues that the office of the jurist changes its political valence with respect to procedure: the thesis narrates changes in authorities, autonomies and privileges of office as the ascendency of legislative form, and how hierarchically imposed rules of official and juristic conduct contribute to changes in how law is administered.

This thesis contends that criminal procedure is best understood as first inspired and then refined through jurists' involvement with imperial administration, and simultaneously, as a

vector for the development of strategies of government that both facilitated and constrained the emerging British Empire. As a jurisprudence, it accounts for a relationship between procedure as a mode of conduct that standardises the administration of law while providing an idiom for styles of modern government. To this end, the economic structure and material technologies of empire impose themselves in this story: as shipping, commodities, and labour all pose questions that a steadily accreted know-how of procedurally organised criminal law is increasingly marshalled to address.

# Declaration

I hereby declare that the thesis comprises only my original work towards the degree of Doctor of Philosophy; due acknowledgement has been made in the text to all other material used; and the text and argument of this thesis is fewer is than 86,000 words in length, exclusive of tables, maps, bibliographies and appendices, however footnoted referencing practice means that the total length is 114,053 words.

**Thomas J Andrews**
14 December 2020

# Acknowledgments

I would like to acknowledge the Wurundjeri people of the Kulin nation; on whose lands the University of Melbourne is located. I would like to pay my respects to the Elders both past and present of this nation as the traditional owners and custodians of these lands, and recognise that sovereignty was never ceded. As a thesis concerned with how empire is conducted according to law, it is an entirely inadequate gesture, but my hope is that some of its arguments may prove useful in understanding the history of contemporary struggles with the authority of law, the violence of policing and the conduct of government.

I am finishing this thesis in the midst of the covid-19 pandemic. The last few months in Melbourne, Australia have been spent in various degrees of mandated isolation from the world. Writing this from lockdown and unable to access my university—where my archive and office have been locked away from me for months, visit the library, or engage with my colleagues in the absence of scheduled video-calls—has made this a strange and lonely run to completion. My hope is that I can offset the myth of authorship by acknowledging some of the many people without whom the privilege of finishing this doctoral thesis would not have been realised, under any, let alone these, conditions.

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Some portions of Chapter Three have been presented at the Law, Literature and Humanities Conference in 2018. I have also presented a summary of this this work at a staff seminar at La

Trobe University in 2019. Some portions of the Introduction and Chapter One are currently in press as the Criminal Procedure entry in the *Routledge Handbook on Law and the Humanities* (2020).

Lastly, some personal thanks. To Pete for the friendship that we've built over the duration of this project. The support has been immeasurable, and the ideas and the rigor of their application here have germinated through our conversation. To James, thank you for your positivity, encouragement and support through to the very end of this project. To my brothers, Jed and Ben, thank you for keeping me grounded and in good cheer. Mum and Dad, this work is only possible on the back a lifetime's love and unconditional support. Lastly, to my partner Joanna, who has lived with this thesis for far too long and generously proofread the document in its final form. This isn't the forum to express my love. It's elsewhere and that's as it ought to be. I would say this is for you, but it isn't: after not knowing me without the spectre of criminal procedure lurking in every corner of the spare moments of our shared lives, being done with it is instead.

Tom Andrews

July 2020.

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# **Introduction**, or, How Should One Proceed? Orientation, Method, and Structure

'It may—I am well aware of it—be objected
that procedure is not a good theme
for academic discussion'.[1]

Before the law, there is procedure. This can be understood in several senses. Texts, judicial and legislative, only assume the force of law through the citation of conduct.[2] Prior to the hearing, there is the writ, the warrant, or the indictment.[3] The decorum of a jurisdiction is ordered: rules prescribe the propriety of speech and action.[4] The violence of punishment is restricted:[5] it follows rituals of accusation and conviction. Procedural styles of writing, diction and conduct are rendered technical. Training in the forms of procedure is undertaken primarily after the conclusion of formal studies in law.[6] And yet, this situation isn't and wasn't always so. This thesis seeks to recover and redescribe a jurisprudence of criminal procedure.

[1] Frederic William Maitland, *Equity; also, the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge University Press, 1910), 295.
[2] See Jacques Derrida, 'Signature Event Context' in *Limited Inc* (Northwestern University Press, 1988) 1.
[3] Cornelia Vismann, *Files: Law and Media Technology*, tr Geoffrey Winthrop-Young (Stanford University Press, 2008).
[4] See Edward Mussawir, 'Jurisdiction of Control: Judgment and Procedural Forms in *Thomas v Mowbray*' (2010) 19(2) *Griffith Law Review* 307.
[5] Robert Cover, 'Violence and the Word' (1986) 95(8) *Yale Law Review* 1601.
[6] *Legal Profession Uniform Admission Rules 2015* (Vic & NSW), sch 2.

Procedure is now the preponderant idiom through which law is conducted. This thesis offers an account of the emergence and transformation of criminal procedure from the middle of the eighteenth century until around 1870. The thesis pays historical attention to how broader questions and techniques of conduct and government turned to procedure, and specifically criminal procedure, in reforming the administration of law (and the law of administration) in the British Empire. It interrogates how criminal procedure emerged as a specific technique for regularising authority, ordering institutional life, and providing the syntax that first imagines and then conjures the operation of a modern criminal law. *An Empire of Conduct* argues that procedure's empire was founded on procedure's utility for empire.

The jurisprudential consequences of the history and politics of criminal procedure emerge more clearly when approached with an eye to a broad suite of questions concerning conduct and government. This involves revivifying the problems and questions from which jurists developed criminal procedure as a practical, or prudential, solution.[7] In brief, the style of criminal procedure defined by policing and by a reliance on the use of summary powers of conviction was one possible solution to the problem of how to govern an empire, its subjects, officers and objects.

## I. Research Question

This is a story of procedure written from the perspective of empire. It takes as its starting point a governmental enigma that sits alongside a great many other hauntings in the founding of New

[7] For a reflection of prudence (understood in the Aristotelian sense as *phronesis*), critique and modern law, see Costas Douzinas and Ronnie Warrington, 'The Face of Justice: A Jurisprudence of Alterity' (1994) 3 *Social & Legal Studies* 405.

South Wales ('NSW').[8] Prior to European departure, a 1787 Act of British Parliament advanced the idea of NSW as both penal outpost *and* settler colony.[9] The legislation stated that

> 'it may be found necessary that a colony and a civil government should be established in the place to which such convicts shall be transported… and that a court of criminal jurisdiction should also be established within such place as aforesaid with authority to proceed in a more summary way than is used within this realm according to the known and established laws thereof.'[10]

This passage holds a series of riddles that fixed my attention. Perhaps in retrospect it is unsurprising that government and the criminal law might be synonymous in a penal colony, but, at a particular moment at my desk in the middle of the night, it wasn't to me: the contingency revealed itself. What captured my attention was the casual manner with which the legislature declared NSW a *summary* jurisdiction. The Parliament detailed how prison discipline was to be enforced through a martial jurisdiction; licensed to punish prisoners following a summary procedure to convict. The following labyrinthine legislative provision prescribes a procedure in advance of the colony it heralds. The legislation mediates how proscribed conduct is to be parsed through its ambiguous delegation of jurisdiction to declare—or charge—the similitude between an "outrage" or "misbehaviour" and old-country treasons, felonies and misdemeanours.[11] It committed the colony to government by antipodean re-enactments of institutional forms, while improvising their substance in military dress:

> 'as occasion may require, a Court of Judicature for the trial and punishment of all such outrages and misbehaviours as if committed within this realm would be deemed and taken according to the laws of this realm to be treason or misprision thereof felony or misdemeanour which court shall consist of the judge advocate to be appointed in and for such place together with six officers of his majesty's forces by sea or land which court shall proceed to try such offenders by

[8] See e.g. Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (UNSW Press, 1981).
[9] *New South Wales Courts Act, 1787* (27 Geo III c 2). On settler colonialism, see Wolfe, Patrick, 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era' (1994) 36 *Social Analysis* 93.
[10] *New South Wales Courts Act, 1787* (27 Geo III c 2).
[11] David Neal, *The Rule of Law in a Penal Colony: Law and Politics in Early New South Wales* (Cambridge University Press, 1991).

> calling such offenders respectively before that court and causing the charge against him her or them respectively to be read over which charge always be reduced into writing and shall be exhibited to the said court by the judge advocate and by examining witnesses upon oath to be administered by such court as well for as against such offenders respectively and afterwards adjudging by the opinion of the major part of the persons composing such court that the party accused is or is not (as the case shall appear to them) guilty of the charge and by pronouncing judgment therein (as upon a conviction by verdict) of death if the offence be capital or of such corporal punishment not extending to capital punishment as to the said court shall seem meet and in cases not capital by pronouncing judgment of such corporal punishment not extending to life or limb as to the said court shall seem meet'.[12]

And yet, in London, the *Middlesex Justices Act* was still a generation away.[13] Justices of the Peace had been for centuries entrusted with the *ad hoc* adjudication of a disparate raft of statutory offences.[14] The conduct of proceedings, or, procedure, was largely left to the determination of particular justices and particular Quarter Sessions. And yet, it would take another 80 or so years for a cohesive statement of summary procedure to be outlined in the United Kingdom; this procedure was gradually becoming the predominant form that the laws governing wrongdoing were, in time, to take. Put simply, although the phrasing here is ambiguous, it was clear that procedure in this nascent colony was at once and in simplified form, a precursor to a century's worth of legal change in criminal legal procedure and doctrine that would later be described to Australians as *derived* from the metropole.

This research project began from a stubborn, misplaced, naive or simply ill-informed sense (in truth, a combination) that the operation of Australian summary jurisdictions, and their close relationship with police discretion, began as English templates adapted or improved in the antipodes from an archive of inherited jurisprudence. There was a story to be told from the periphery.

[12] *New South Wales Courts Act, 1787* (27 Geo III c 2).
[13] *Middlesex Justices Act 1792* (3 Geo III c 53).
[14] See Chapter Six.

Over the sempiternal duration of this project, the research revealed itself to be addressed not to the specificities of NSW but to the broader jurisprudential question of *how the conduct of law became expressed as the law of procedure*.[15] In responding to this question, a line of inquiry emerged as a related but subsidiary concern, namely, that the history of procedure tracked alongside reforms not only to the government of specific colonies, but also to the broader field of imperial government. It became clear that the related, subsidiary, but perhaps larger question might be phrased as "how did government come to be articulated through the argot of procedure"?

Across the chapters of this thesis, care is taken to re-constitute the conditions of contingency under which conduct emerged as problem.[16] One of the rote gestures that inaugurates contributions to the slender volume of academic jurisprudence addressed to the theme, problems, and theory of procedure is to call attention to the lack of sustained scholarly attention over which the terrain of procedural jurisprudence presides.[17] While this might be formally the case in the contemporary academy, there is a longer history of jurisprudential attention to questions of conduct and government that is concerned with questions of procedure, office-holding, and government. So, in place of this brush clearing exercise, this thesis develops a jurisprudential account of criminal procedure that situates the conduct, practice, office-holdings and forms of law through which a tradition of jurists—now associated with what we

[15] While NSW features in the background of some chapters—particularly Chapter Three—the experiences and law of that colony are not itself addressed directly in the thesis.

[16] On the importance of foregrounding antecedent problems for understanding the social implications of technology see Sheila Jasanoff, 'The Idiom of Co-production' in Sheila Jasanoff (ed), *States of Knowledge: The Co-Production of Science and Social Order* (Routledge, 2004) 1.

[17] A few recent examples that adopt this approach to begin their own study, include Richard Vogler, *A World View of Criminal Justice* (Ashgate, 2005), 2; Tanya Mitchell, 'Understanding the Summary Jurisdiction in NSW' (PhD Thesis, Sydney Law School, University of Sydney, 2018), 8. Shaunnagh Dorsett notes that 'the history of civil procedure has received little attention', and rightly recognises that while some more has been paid to criminal attention, it does not command a large archive: 'The First Procedural Code in the British Empire: New Zealand 1856' (2017) 27 *New Zealand Universities Law Review* 690, 713.

name in the contemporary as the criminal law—innovated procedural thought, order and action. The consequences of the emergence of procedure played out across a number of important registers in this legal culture: the writing technologies of law were reformed,[18] and institutional life terms of its officeholdings and subjectivities changed accordingly, along with the styles of training thought appropriate.[19] The imposition of procedure was a project that violently displaced extant jurisdictions, as its model of conduct of lawful authority was re-centred and re-ordered.[20] Although the transition might only become visible in retrospect, an aim of this thesis is to return the vitality of contingency and activity in legal thought—with a view to describing how contemporaneous jurisprudences of procedure were expressed in shapes and forms that responded to the particularities of on-the-ground problems.[21]

By titling this thesis *An Empire of Conduct*, I draw attention to two major themes in the transformation of procedure. The first is the obvious implication that central to understanding a shift in the conduct of law is the role of jurists in developing not only the intellectual architecture of imperialism, but also in crafting the legislative diagram for the conduct of the

[18] See Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson, 1990), 122.

[19] On the anachronism of the public life distinction see Conal Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge University Press, 2006). Pragmatically, consider Philip Stern's *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford University Press, 2011), which sought to draw attention to the imprecision and classificatory failure of describing the jurisdiction of the East-India Company as either private or public: it is at once a jurisdiction both and neither.

[20] See Robert Cover, '"The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 4.

[21] For the distillation of this as an expression of historical method adapted to the demands of following the adaptations of jurisprudence and law to the demands of situated and lived practical activity within traditions of thought and living, I am indebted to Ann Genovese and her reflections on method. See Ann Genovese, 'On Australian Feminist Tradition: Three Notes on Conduct, Inheritance and the Relations of Historiography and Jurisprudence' (2014) 38(4) *Journal of Australian Studies* 430; Ann Genovese and Shaun McVeigh, 'Nineteen Eighty Three: A Jurisographic Report on *Commonwealth v Tasmania*' (2015) 24 *Griffith Law Review* 68; Ann Genovese, Shaun McVeigh and Peter D Rush, 'Lives Lived with Law: An Introduction' (2016) 20 *Law Text Culture* 1.

apparatus of government of colonies.[22] The relocation and labour of the jurist in the colonies, particularly those most associated with contemporary criminal law, provides an imperative and an archive of activity that, as a critical gesture, should be read alongside formal and scholarly genres of jurisprudential writings in recovering their concerns with questions of conduct. Secondly, the title points, in a manner which is perhaps less obvious but more important, to the centripetal logic or vector of procedural change in the law of crime: it at once standardises, crystallises and facilitates the promulgation of a mode of conduct through its various media technologies, of which the legislative form is the most important. As a writing technology, changes in the legislative form provide an index to, and an archive of, the mediations of the accretion of procedure. Chapters Five and Six narrate both changes in legislation, as the content and form of statutes were adapted to novel requirements, and how these reforms could themselves shape justiciable norms of government.

To this end, I am principally concerned with the transition to modern criminal law and the thinkers who contributed to its jurisprudence. To that end, this thesis re-describes the writings and legacies of William Blackstone,[23] Jeremy Bentham,[24] Thomas Macaulay,[25] James Fitzjames Stephen,[26] and Patrick Colquhoun,[27] amongst others, in terms of their contributions to both writing and implementing changes to criminal procedure. In terms of the development of criminal procedure, each is important in terms of either their role in colonial administration, their proximity to government, or, for the credit they receive for changing the intellectual

[22] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Vintage Books, 1977). See Chapter Three.
[23] Chapters One and Two.
[24] Chapter Three and Six.
[25] Chapter Five.
[26] Chapters Four and Five.
[27] Chapter Six.

foundations of its jurisprudence. It perhaps goes without saying in a work of criticism, but the selection of jurists should not be read as approval of their thought, actions or politics.

An additional dimension of this standardising impulse is its potentiality to provide additional templates and techniques for later consideration and adaptation in the metropole while disavowing the antipodean colonial laboratory and experience. By focusing on jurists—Blackstone, Bentham, Stephen, Macaulay—that move through a multiplicity of legal offices, it is possible to follow how procedure emerges from the interstices of their jurisprudence, as well a style of imperial "know-how" in administration, that accretes a more material form as careers and concepts follow the shipping lanes of the British Empire. While this thesis doesn't claim to be a history of empire, or, an intellectual history of the Victorian era, this context is imperative for understanding changes in criminal procedure. Therefore, this thesis follows the conceptual and categorical antecedents from which contemporary criminal procedure emerged and stabilised into its contemporary form. This might be, in brief, categorised as a mode of law that is predominately reliant on the institutional form of summary proceedings and facilitated in terms of both the enclosure of prosecutorial authority and the ready and professionalised provision of testimony evidence, by policing agencies of the state.

It is significant that the form that law takes becomes infused with a procedure and moreover, that this procedure, addresses the mechanisms of lawful conduct. Procedure in turn becomes part of the armature of lawful authority, and while these theories are described in the context of imperial projects, it remains a matter of core importance for this argument's footing within jurisprudence that authority is regularised, organised, and deployed through changing jurisdictional techniques.[28] The most ardent and unvarnished supporters of British imperialism,

[28] This point is made in echo of one regarding an earlier period by EP Thompson, *Whigs and Hunters: The Origins of the Black Act* (Allen Lane, 2013), 208-9.

of whom James Fitzjames Stephen is an appropriate avatar,[29] make plain that even violently imperial administration was designed and implemented as a *specifically* legal enterprise.[30]

## II. Argument and Orientation toward Method

This thesis offers a study of the domain of jurisprudential "know-how" called "procedure", steeped in what Michel Foucault has described as 'the complex interconnection with a multiplicity of historical processes'.[31] Since jurisprudence is not political theory, instead, this thesis offers a study in how ideas or concepts and practical questions of conduct in government find expression through law. The argument here is to present an outline of how "procedure" became an isomorphic capacity or technique for the government of conduct, in the field of criminal law. While on a superficial level procedure appears as a concept situated within this body of scholarship as an example of discipline, sovereignty or security, at the level of method my concern is not to locate this thesis within a body of work that applies Foucault's concepts to an ever-widening array of contemporary issues. And while Foucault and I share a question regarding how concerns of conduct intersect with government, I have not conceived this work as falling squarely within the methodological paradigm of what has become a series of studies in governmentality.[32] Instead, the thesis offers a supplement to Foucault's genealogy of conduct by historicising criminal procedure in the eighteenth and nineteenth centuries, from the position of common law jurisdictions and the empire that is governed according to its ways and

[29] E.g. James Fitzjames Stephen, 'Letter to the Editor of the Times', *The Times of London* (1 March 1883).
[30] See Chapters Four and Five.
[31] Michel Foucault, 'Questions of Method' in James D Faubion, *Power: Essential Works of Foucault 1954-1984* (Penguin, 2000) vol 3, 223, 225.
[32] See eg Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991). See also Nikolas Rose and Peter Miller, 'Political power beyond the State: Problematics of Government' (1992) 43(2) *British Journal of Sociology* 173; Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality' [2006] 2 *Annual Review of Law and Social Science* 83.

means.[33] Put more directly: the concept of procedure as a technique in and of conduct can be better situated in the modern history of government by law. As such, this thesis follows these questions within the domain of jurisprudence, particularly an archive of sources that are part of a discourse of and on the government of the conduct of others.

The thesis that follows narrates the contingency of how a kind of codified, prescribed procedure that came to be reliant on the use of powers of summary judgment emerged. This thesis contributes to knowledge by placing contingencies in the logic, claims, and organisation of conduct through procedure back into a series of historicised engagements with questions of lawful conduct and its government in their 'historical field of problems',[34] from which particular regimes of practice emerged. The paths of transformation are not linear. As such, this thesis focuses on texts and events that, read in the context of a broad literature on procedural change, have the quality of indicating exemplary, transformative or emergent qualities.[35] Likewise, across the chapters of this thesis, my aim is to develop a careful and situated reading of the texts chosen in order to follow the emergence of a form of procedural rationality, adapted to the task of the governmentality of law in the context of nascent capitalism and imperial administration,[36]

[33] On this point, a larger discussion of the reception of Foucault's re-description of Jeremy Bentham's panopticon is taken in up in later chapters of this thesis.

[34] Foucault, 'Questions of Method' (n 26) 224. I share Douglas Hay's concerns with both criminology and criminal law historiography whereby 'theoretical writing led many to move from the important insight of Michel Foucault that power was everywhere in society to the bizarre conclusion that it was concentrated nowhere', Douglas Hay 'Introduction' in Douglas Hay, Peter Linebaugh, John G Rule, EP Thompson and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Verso Press, revised ed, 2011), xxxiii.

[35] To this end, the statement on an ethics or approach to method in Deborah Cowen's *The Deadly Life of Logistics: Mapping Violence in Global Trade* (Minnesota University Press, 2014), 17-18 has proved instructive.

[36] I am of course not the first person to make these claims of procedure in general terms. Eclectically, Niklas Luhmann (in *A Sociological Theory of Law*, tr Elizabeth King and Martin Albrow (Routledge & Kegan Paul, 1985), makes a similar argument in the idiom of systems theory attempting to understand increasing legal complexity as the outcome of evolution of a system, as does Frederick Pollock, 'English Law Before the Norman Conquest' (1898) 14(3) *Law Quarterly Review* 291.

through the careful mapping of linkages between these selected texts. Each chapter explains the selection of key texts and the particular example to which it relates.

Procedure provides a mechanism for studying more abstract concepts in jurisprudence, too. It provokes questions of conduct, agency, responsibility, duty, malfeasance, rule and authority. It provides a study in change, delegation, organisation, and ordering. These are issues that emerge through close attention to the particularities of empire, biography, climate, administration, fiscal management, shipping logistics, pedagogy and historiography as the multitude of unruly influences that impose on discourses and technologies of procedure.

## III. Structure of Thesis

The thesis is arranged into two parts with five substantive chapters that follow a broadly historical arc. Most chapters address the development and situation of particular jurists' labours. There are exceptions where the material or the argument necessitated breaking with this pattern.

**Chapter One** offers an account of how questions of procedure can be asked in a jurisprudential idiom capable of sustaining questions of conduct. It does so by arguing for an alertness to how early-modern government takes place across a plurality of jurisdictions and finds expression in a changing discourse of officeholding. This vocabulary is presented as a series of pitons for holding onto the question of lawful conduct across the thesis and to provide points of orientation as the connotations of these words change from chapter to chapter.

We then move into **Part 1** of the thesis outlines important moments in the transformation of the Jurisprudence of Procedure. **Chapter Two** then considers the construction of proceedings and officeholding in Blackstone's *Commentaries*. This is done to account for both the structure of public wrongs in this text, and also to re-situate this claim alongside the text's pitch to

establish the university as a site of education in law, away from the supposedly corrupting influence of the Inns of Court, for the young men who would assume public office in later life. To appreciate its concerns about training in conduct of office, this chapter also explicates an arrangement of offices that provide doctrinal structure for the punishment of wrongdoing—mapping the process for its punishment.[37]

The **third chapter** re-considers the career and procedural philosophy of Jeremy Bentham. This chapter is concerned with re-articulating the context and importance of Bentham's work on procedure.[38] His *Principles of Judicial Procedure* represents the first book in the English language to propose a jurisprudence of procedure without reference to the substance of the law that it operationalises. The drafting of the book followed shortly after the failure of the panopticon to be adopted as the new, and supposedly rational model of punishment, losing its competition with penal transportation to NSW. The chapter maps out the origins of the panopticon from a labour government device that was actually thought up by his brother Samuel to discipline expatriate artisanal woodworkers inclined to drunkenness, into training peasants how to manage the Russian Prince Potemkin to construct naval ships and dockyards. Thus, this chapter functions as a re-orientation of the study of procedure towards the role of jurists in providing both ideas and labour to the project of empire. It invites a more sustained re-engagement with the project of utilitarianism and its material connections to both criminal procedure but also to the spoils sought through imperial government.

**Chapter Four** marks a threshold by narrating the place that procedure occupies in two sides of the jurisprudential career of James Fitzjames Stephen, whose *General View of the Criminal Law*

[37] Again, the architectural paradigm discussed above provides an insight into how profoundly different this world was from that of second decade of the twenty first century.

[38] My focus here is on procedure as distinct from evidence law, however, all things tend to be tentacular in the world and phraseology of Bentham.

*of England* marks the emergence of a body of doctrine that might be capable of being called for the first time, criminal law.[39] This chapter describes the hinge that procedure provides throughout this text's account of the transubstantiation of the laws of crime into a body of law. The second part of this chapter evaluates Stephen's jurisprudence in light of his arguments regarding the practical and political advantages of criminal procedure for government administration in British India, where he was to have a second career as a colonial legislator following the publication of his treatise.

**Part 2** of the thesis follows the implications of criminal procedure's influence on two jurisdictions in the British Empire: India and the Docks of the Thames. This inversion of approach necessitates a change of archive and voice, as the argument shifts to following changes in the techniques of authority at two important nodes. Here, the thesis follows a redescribed procedure as a specific set of techniques for governing the conduct of conduct in order to follow contours in the transformation of criminal law as it maps onto contemporary forms of government, most notably the rise of police.

**Chapter Five** considers the reform of procedure in British India after the East India Company's rule. It is in British India that criminal procedure is comprehensively legislated. The decision to codify procedure reflects changes in both the understanding of imperial authority and in the way law is to be read and used as a part of government. This chapter investigates the shifting basis of the jurisdiction to govern British India from the perspective of procedure: it looks at how authority to legislate is delegated and regulated, how the office of legislator assumes a new importance, and how the question of conduct is re-framed in light of this shift in the media technologies of law. As a study in jurisdiction, questions of conduct and government are traced

[39] Shaun McVeigh and Peter Rush, 'Cutting Our Losses: Criminal Legal Doctrine' in Peter Rush, Shaun McVeigh, and Alison Young (eds), *Criminal Legal Doctrine* (Ashgate Dartmouth, 1997) 182.

along three related vectors. First, there is a story of how political authority is organised and delegated that takes the form of a description of the conduct, affordances and responsibilities of the office of colonial legislator. Second, there is a story of the legislative medium: where new Codes are adopted to rationalise, tabulate and describe the conduct of those who are to work with criminal law and those who are to be re-constituted as the objects of its jurisdiction. Third, there is a story about the organisation of civil administration and how the experience of ruling British India generated a foothold for arguments about the reform of training for public office to begin to assume a modern form. Together, this chapter argues that experiments with procedure in India provide a template for judicial administration and broader techniques of government.

**Chapter Six** breaks with the existing structure of chapters and traces procedures for summary conviction back through the statute books that govern the legality of the role of the Justice of the Peace. In part, this disjunction reflects a discontinuity that emerges in nineteenth century historiography of the criminal law:[40] these new offences are at once lesser, catching jurists unawares, and simultaneously patterning the procedure of law to follow. In part it also provides a means of returning to the principal concern about procedure as a mechanism of government from the reverse side of the coin: these forces re-converge on the docks of the River Thames as new summary procedure mechanisms are deployed to deal with the commodities shipped in from the reaches of Empire only to languish (at times for months) in the Thames as the laborious process of unloading a pre-containerised ship was performed by a workforce thought to be in need of discipline. The solution? A combination of founding the first public funded police force and an intensification and refinement of the summary procedures they would be authorised to

[40] See FW Maitland, *Justice and Police* (Macmillan, 1885).

exercise. The enabling legislation was drafted by none other than Jeremy Bentham as the silent partner of the more respectable and entrepreneurial Patrick Colquhoun. It is in the shallow waters of the Thames that procedure's imperial connections eddy with domestic concerns.

The final chapter is a short **Conclusion**, which offers some concluding remarks regarding the jurisprudential implications of procedure as redescribed in this thesis.

## IV. Conclusion

This introduction has outlined the question and orientation of how the thesis that follows develops its account of the emergence of criminal procedure. *An Empire of Conduct* re-describes the jurisprudence of criminal procedure. In doing so, it investigates changes in its offices and idioms, media and genres, and its objects and subjects, its personae and institutions. This thesis makes the argument that procedure represents an important and understudied dimension of broader changes in the conduct of government. To this end, it contributes historiographic weight to Dubber and Farmer's argument that

> '[s]ystems of criminal law do not develop in isolation to each other but are embedded in power relations between different states or between states and their colonies, and as a consequence it is necessary to trace the movement of concepts between systems as part of a project of colonial or imperial governance'.[41]

The movement of criminal procedure also involved reframing theoretical justifications and refining the practice, or know-how, of authority. In other words, as jurisprudence, criminal procedure is aligned with the practice, or conduct, of governance. In the chapters that follow, this thesis addresses how jurisprudence changes through a series of encounters with the

[41] Markus D Dubber and Lindsay Farmer, 'Regarding Criminal Law Historically' in Markus D Dubber and Lindsay Farmer (eds) *Modern Histories of Crime and Punishment* (Stanford University Press, 2007) 1, 5.

imperial: it returns the techniques of procedure to the register and contingencies of conduct and its lawfulness.

# Chapter One:
# **A Question of Conduct**: Finding an Idiom of Criminal Procedure, Jurisdiction, and Office

'Procedure was not substance but spirit, and in its exactitude it covered all law'.[42]

## I. Introduction

Changes to procedure should be understood and interpreted in the context of changes in the techniques that pertain to the broad project of how people govern others. This chapter provides a series of idioms for describing changes in the patterning and codifying of the conduct of lawful conduct. In this sense, procedure can be inverted and located as a second order concept: procedure describes a jurisprudence of conduct's conduct. In addressing the question of conduct, this thesis has taken up and responded to some dimensions of Michel Foucault's later work on the concept of government.[43] And while a significant literature has developed following Foucault's insights into governmentality, my focus in this thesis is to continue asking some similar questions, rather than enter into debates within this literature with respect to theories of state or the onward march of security.[44] In other words, while Foucault's work represents a

[42] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003), 65.

[43] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, tr Graham Burchell (Picador, 2007), particularly chapters two to four ("*STP*"); Michel Foucault, *On the Government of the Living: Lectures at the Collège de France 1979-1980*, tr Graham Burchell (Palgrave Macmillan, 2014), chapter one ("*Government of the Living*").

[44] Within this literature, the following have been a guide to my thinking: Pat O'Malley, *Risk, Uncertainty and Government* (GlassHouse, 2004); Peter Chambers, *Border Security: Shores of Politics, Horizons of*

starting point, it is only that: it provides an adaptable rubric for thinking about what an approach to government might offer in historicising procedure in its relationship to questions of conduct rather than in terms of what he comes to call "governmentality". My aim here is to as quickly as possible bypass this terminology.

This chapter is best understood as establishing the idiom through which the argument of the remainder of the thesis unfolds. To this end, Part II of this chapter offers a brief account of the question of government and conduct. Part III addresses how the concept and rubric of jurisdiction can be adopted to sharpen thinking about the conduct of law, particularly by providing a route around anachronisms such as "criminal law" or the "state".[45] Part IV explains how a language of office holding can provide a way of holding onto changes in responsibilities to law. I describe this second order change in the conduct of official conduct as an ergonomics of government. This concept has two dimensions. First, it highlights that the concept of officeholding changes form as responsibilities are increasingly shaped by the imposition of standardised procedure. Second, it calls attention to the isomorphic quality of procedure: its usefulness as a way of ensuring compliance from political subordinates by shaping how the work of law and government is conducted. Across the thesis, we follow changes in the conduct of office, training for public life, and the changes introduced to those concepts by the jurisprudence of criminal procedure. The aim of this chapter is to introduce the idioms and some of their points of intersection, in order to give some shape to a vocabulary of procedure jurisprudence. By holding on to questions of conduct, office, and government the argument

*Justice* (Routledge, 2019); Mark Brown, *Penal Power and Colonial Rule* (Routledge, 2014); Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (Pluto Press, 2000); Nikolas Rose and Peter Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43(2) *British Journal of Sociology* 173.

[45] This is of particular relevance to Chapters Two, Four, and Five where these separate conceptual arrangements, in each chapter, coalesce in increasingly familiar ways.

developed here is that it is possible to follow the changes that refinements in the theory and practice of criminal procedure, in the context of the authority and administration of law in empire.

## II. A Language of Conduct

In reviewing his lectures from the previous year, Michel Foucault noted that his project of studying "power" was itself a 'now worn and hackneyed theme',[46] and that his future studies were to focus on 'government, which seemed to me to be much more operational than the notion of power'.[47] Such a turn represented an attempt to move away from concerns of the State to a wider series of practices of government so as to encompass 'in the broad sense, and old sense moreover, of mechanisms and procedures intended to conduct men, to direct their conduct, to conduct their conduct'.[48] In particular, he specified that he was investigating the political and historical conditions that sustained the turn toward 'the government of men by the truth'.[49] This language of conduct, in other words, is a bridgehead to questions of government and its techniques. This inaugurated his renewed study into a series of transformations in the rationality, manner and art of government.[50] Jeffrey Minson usefully paraphrases this line of critique as 'no evaluation of the conduct of government without reference to the government of conduct'.[51] This part will first enter into a dialogue with

[46] Foucault, *Government of the Living* (n 2) 11.
[47] Ibid 12.
[48] This is often mis-quoted as the "conduct of conduct". Ibid 12.
[49] Ibid 11.
[50] The preceding lectures considered the rise of neoliberalism: Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*, tr Graham Burchell (Palgrave Macmillan, 2008) ("*Birth of Biopolitics*".
[51] Jeffrey Minson, *Questions of Conduct: Sexual Harassment, Citizenship, Government* (Macmillan, 1993) 5.

Foucault's work on conduct and government as a rubric for procedure, before reading a segment from Henry Maine's *Dissertations on Early Law and Custom* through this lens.

**A. Holding on to Government and Conduct**

The investigation of criminal procedure should proceed by interrogating the relationship between the styles of truth, arts, and ascetics required to conduct government. Foucault usefully describes this line of inquiry as one drawing together a broad suite of questions concerned with the "know-how" of governance. He asked:

> 'How, in fact, could one govern men without know-how, without knowledge, without being informed of the order of things and the conduct of individuals? In short, how could one govern without knowing what one governs, without knowing those one governs, and without knowing the means of governing both these things and these people?'.[52]

A history of procedure can be located alongside a more generalised historical and theoretical concern with the question of conduct. As a work of jurisprudence of procedure, subsequent chapters of this thesis address this question descriptively: each in ways that historicise and privilege the order of conduct and government as the "-how" part of know-how. Whereas Foucault's line of inquiry directed him to the question of truth as an expression of a shifting regime of order, this thesis turns to questions of technique and from there back to conceptualisations of the conduct of authority.

This bifurcation offers a productive and critical mechanism for the explication of how questions of conduct and government are posed. For jurisprudence, the language of conduct offers a vocabulary for describing how styles of authority, techniques, modes of more and less successful address, and how regimes of dogma might be ordered. To this end, consider how Foucault deals with the pastoral and subsequently ecclesiastical government of the soul

[52] Foucault, *Government of the Living* (n 2) 2-3.

> '… the word "conduct" [*conduite*] refers to two things. Conduct is the activity of conducting (conduire), of conduction (*la conduction*) if you like, but it is equally the way in which one conducts one's self (*se conduit*), let's one's self be conducted (*se laisse conduire*), is conducted (*est conduit*), and finally, in which one behaves (*se comporter*) as an effect of a form of conduct (*une contuite*) as the action of conducting or of conduction (*conduction*)'.[53]

In reflecting on this passage, Graham Burchell, its translator, notes that the word "conduction" 'is used as a process noun for the practice of conducting (the process of producing conduct), along the lines perhaps of his coinage "veridiction" for the practice of truth'.[54] We might productively add to this analysis that criminal procedure can be read as a style of jurisdiction and an axiom of jurisprudence which becomes the dominant, if not lawful then at least jurisdictional, technique for authorising and conducting conduct. Put differently, if veridiction is the knowledge that attends to *know*-how,[55] then repertoires of jurisdictional practices can be read as the specific and specified means by which political authority is translated into specific and specified modes of lawful conduct (or, the know-*how* of a particular conduct of government), of which procedure comes to be paradigmatic.[56] Foucault argues for according a measure of importance to jurisprudence not only because it provides theoretical support and doctrinal explication of law, but also for its practical dimension. Jurisprudence is also part of ensembles, or repertoires, of political 'strategies… that can perfectly well be understood in terms of their rationality.'[57] Foucault notes in passing that the novelty and genius of Jeremy Bentham

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[53] Foucault, *STP* (n 2) 193.
[54] Ibid 193, fn †.
[55] Ibid.
[56] This argument is elaborated in terms of the procedures of evidence in Michel Foucault, 'Truth and Juridical Forms' in *Power: Essential Works of Foucault 1954-1984* (Penguin, 2000), vol iii, 1. Although this fact apparently did not come to the attention of Foucault, it seems important that the first English language philosophy of legal procedure was written by Jeremy Bentham. See Gerald Postema, 'The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication' (1977) 11 *Georgia Law Review* 1392. See Chapter Three.
[57] Michel Foucault, 'Questions of Method' in *Power: Essential Works of Foucault 1954-1984* (Penguin, 2000) vol 3, 223, 232 ('Questions of Method'). 'The logic of strategy is the logic of connections between the heterogeneous and not the logic of the homogenization of the contradictory', Foucault, *Birth of Biopolitics* (n 9) 43.

was that 'the utilitarian philosophy was the theoretical instrument that underpinned the government of populations'.[58] A year later, Foucault returned this argument, concluding that utilitarianism represented

> 'an attempt to define the sphere of competence of government in terms of utility on the basis of an internal elaboration of governmental practice which is nevertheless fully thought through and always endowed and permeated with philosophical, theoretical, and juridical elements. In this respect utilitarianism appears as something very different from a philosophy or an ideology. Utilitarianism is a technology of government.'[59]

Nevertheless, the overarching theme is that 'this type of programming didn't just remain a utopia in the heads of a few contrivers', [60] such as Jeremy Bentham—who will come to figure heavily in this thesis.[61] But, that these kinds of projects, strategies and their techniques should be critically interpreted as

> 'fragments of reality that induce such particular effects in the real as the distinction between true and false implicit in the ways men "direct," "govern," and "conduct" themselves and others. To grasp these effects as historical events—with what this implies for the question of truth (which is the question of philosophy itself)—this is more or less my theme. You see that this has nothing to do with the project—an admirable one in itself—of grasping a "whole society" in its "living reality".'[62]

Here, Foucault offers perhaps a stronger, or at least, a more explicit reading of how questions of conduct can frame, influence and operate as important components in the transformation of

[58] Foucault, *STP* (n 2) 74.
[59] Foucault, *Birth of Biopolitics* (n 9) 40-1.
[60] Foucault, 'Questions of Method' (n 16) 233.
[61] See Chapters Three, Five and Six in particular.
[62] Foucault, 'Questions of Method' (n 16) 233. There is a methodological point that's important here, as it concerns the distinction between jurisprudence and sociology: the question of how authority is imagined, patterned, refined and deployed is in this thesis asked in the idioms of jurisprudence, in terms of how a story might be told about that authority's own authority rather than through the equally valid methods of empirical sociology. The difference being that this thesis, similar to Foucault's project, aims to apprehend how the authority of criminal procedure came to provide an isomorphic technique for the government of conduct at and through law (see Part IV of this Chapter).

government.[63] And this utilitarian language of government was accompanied by a series of changes in the regimes of conduct through which it was performed and understood.

Questions that interrogate the ordering and authority of conduct should also be asked of jurists of criminal law. While changes of this kind are visible in retrospect, their ineffable and widespread transformation is by no means implemented through a simple or linear process. Nevertheless, there are some general tendencies that emerge: there is a slow erosion of the latitude of officeholders to organise their conduct,[64] and the performance of their duties according to the traditions of habitation of office. In other words, conduct is within the domain of an *ethos* understood as a critique of modes of dwelling in office and public life. In its place, legislation increasingly prescribes the conduct of office as procedure. The shift might be variously categorised as one from conduct of office as an ethical technique to a technology of office, or to risk overstating the degree of the shift ever so slightly: the authority to conduct one's conduct is relocated from the political art of officeholding to the early prototypes of bureaucratic rationality. As shall be demonstrated in this thesis, this change invites and invokes pedagogical reform in training in the various arts of governmental conduct. Alternatively, it can also be understood as a change in the locus and wellspring of social authority—there is an ascendency of centrally issued legislation that organises particular local concerns at a distance. Likewise, and although by no means finally, because office-holding is not supplanted as a political and ethical concept, there is a shift in authority between offices: the legislator assumes an increased prominence within a jurisdiction. A study in procedure therefore needs to

[63] Foucault's lecture then returns back to its broader concern with an argument for the role of a form of Christian pastoral government in a history of the broader concept of governmentality. The next move in the argument is to discuss various forms of resistance to the ambiguity of the double concept of conduct.
[64] Foucault's lecture then returns back to its broader concern with an argument for the role of a form of Christian pastoral government in a history of the broader concept of governmentality.

transverse a number of different axes in order to hold onto the objects and subjects of procedure in their particularity and their multiplicity.

**B. Re-installing Procedure at the End of the Victorian Era**

Questions of procedure are not novel to common lawyers. In the final chapter of his *Dissertations on Early Law and Custom*, Henry Sumner Maine reflects on the methodological benefits of studying British India in terms of developing a working taxonomy that separates the modern from the primitive in terms of law. Maine, in adapting both the positivistic impulse towards order and the language of scientific method, describes British India as a laboratory for testing the relationship between criminal procedure and conduct. His hypothesis is that the "modern" alternative to so-called "ancient" legal systems are marked by the procedural consciousness of 'the Court standing before all men's sight as the alternative to forcible reprisals, and as the avenger of their victim',[65] and the substitution of procedure for 'the force which arms the law… [so that] it lies in reserve, in (so to speak) a compact and concentrated form which enables it to keep out of sight'.[66]

> 'We need not, moreover, go to historical records for proof that this is a natural condition in men's minds. The phenomena can be reproduced, and are in fact not uncommonly reproduced, in the country which has only lately emerged from anarchy into which it fell long after the laws of Manu and Narada had ceased to be administered in it by tribunals which they describe. When a province hitherto specially ill-governed is annexed to British India, the first effect ordinarily is neither satisfaction nor discontent, neither the peaceable continuance of old usages nor the sudden adoption of new, but an extraordinary influx of litigation into the British Courts, which are always at once established…. [T]he proper conclusion to draw is that… Courts of Justice have an immense ascendancy over men's mind and a singular attraction for their tastes, when they are first presented as a means of settling disputes which were either violently adjusted or slumbered because they could only be settled at prodigious risk'.[67]

[65] Maine, 384
[66] Maine, 386
[67] Maine 384-5.

This passage has been quoted at length because it offers of an index of the concerns of this thesis in responding to changes in criminal procedure and its relationship to the broad domain of conduct and government. Maine highlights that the concern of procedure is the shaping of conduct, and this is understood and communicated in the language of subjectivity. In his argument, concepts of modernity and its other, and anarchy and its alternative,[68] are constructed through the governmental potentiality of procedure.

Maine then turns to the question of peaceability and obedience as a taxonomical exercise that grids authority to pedagogy, consciousness to training, and procedure's political valence to the government of empire. He interprets his surprise at the 'fact of the existence of the Courts of Justice regularly enforcing the law is constantly in the minds of the natives of India subject to their jurisdiction',[69] as a failure of the proper internalisation of the authority. This is failure to colonise the subject fully` is a cause for the imperialist's concern: because even if '[t]he law is obeyed in India, as in England, but then it is much more consciously obeyed'.[70] In other words, the rejection of English law is read by Maine as a failure of conscience; as the stunted development of the sense Freud will come to call the superegoic injunction, rather than successful resistance to internalise an externally imposed imperial authority supported by more literal garrisons.[71]

> 'The law and the Court have an importance which may be measured by circumstance related to me on good authority that in many parts of India youths learn the texts of the Penal and

[68] For a more detailed critical engagement with Maine, see Kirkby, Coel, 'Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961' (2018) 58(4) *American Journal of Legal History* 535, 535-42; Coel Kirkby, 'Henry Maine and the Re-Constitution of the British Empire' (2012) 75 *Modern Law Review* 655; Mantena, Karuna, Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism (Princeton University Press, 2010).

[69] 386

[70] 385-7.

[71] Sigmund Freud, *Civilisation and its Discontents* (1929), cf. Fort St James. "Civilization, therefore, obtains mastery over the individual's dangerous desire for aggression by weakening and disarming it and by setting up an agency within him to watch over it, like a garrison in a conquered city."

> Procedure Codes in daily lessons, as did the young Romans of Cicero's day in the *cantilena* of the Twelve Tables. But with us, I scarcely say, there is little conscious observance of legal rules'.[72]

And yet, Maine is aware that this consciousness, and the programme of training in conduct in its image, is the outcome of a pedagogy that reinscribes the class structure of imperialism that is simultaneously a reiteration of a differential regime of knowledge that stands alongside the governance of and in empire. As the quote shows, in Maine's argument rumour is held epistemologically equal to common sense; the mental training of legal pedagogy is an artifice that compares poorly to (unspoken) English moral intuition; a circuit of imperial authority detours via the imagination of Rome as it recodes the virtues of youth, citizenship and applicable pronouns.

It is only after this divergence of reasoning through the example of the colonial laboratory that Maine elects to finish his book by reflecting on the general theme of procedure in positivism *qua* "natural" history and legal thought. Procedure is at once of a 'primitive importance… that survived long after it had lost its meaning',[73] and yet, the contribution of Jeremy Bentham to jurisprudence has been 'to recover from its hiding-place the force which gives its sanction to law'.[74] Maine, in other words, argues that the principal distinction between the ancient and modern is a procedural distinction where 'the Rules relating to Actions, to pleading and procedure, fall into a subordinate place and become, as Bentham called them, Adjective Law'.[75] Memorably, he classifies the common law's reliance on writs, indictments and statutes as being such that 'substantive law has the appearance of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical

[72] Henry Sumner Maine, *Early Law and Custom*, 1890 386
[73] Ibid 388.
[74] Ibid 389.
[75] Ibid.

forms'.[76] And yet, as is clear from Maine's work that procedure represents an important strategy of the broader practice of the enterprise of imperial government itself—as well as in the more focused exercise of government over persons and territory. This thesis therefore develops a more detailed account of the importance of procedure not only to Victorian jurists, but to the conduct of empire and the organisation of its jurisprudence.

## III. Jurisdiction: Thinking with Plural Orders and Authorities of Procedure

This thesis follows and narrates the conduct of law within the now consolidating tradition of scholarly attention to the jurisprudence of jurisdiction.[77] This project contributes to this literature an account of the transposition of procedure into a second order concern for and over lawful conduct as a question of jurisprudence, located in the particularities of jurisdictions. To think jurisdictionally is to pose the question of law in the register of critique. The questioning of jurisdiction at once historicises and pluralises: it provides a language for apprehending overlapping traditions of authority and legitimacy. Even when jurisdiction is asserted as a technical matter, its invocation necessarily reveals an irreducible quivering of contingency, artifice and plurality in the domain of law.[78] As Peter Rush argues

[76] Ibid.

[77] A sizable literature that takes jurisdiction as its idiom has developed: some key examples include McVeigh's (ed) *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007). See also Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012); Shaunnagh Dorsett and Shaun McVeigh 'Jurisprudences of Jurisdiction: Matters of Public Authority' (2014) 23 *Griffith Law Review* 569. Edward Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law* (Routledge, 2011); Marc Trabsky, *Law and the Dead: Technology, Relations and Institutions* (Routledge, 2019); Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Routledge, 2016); James Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Cambridge University Press, 2015); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); Mariana Valverde, 'Jurisdiction and Scale: Legal `Technicalities' as Resources for Theory' (2009) 18(2) *Social & Legal Studies* 139.

[78] Cf. Tanya Louise Mitchell, 'Understanding the Summary Jurisdiction in NSW' (PhD Thesis, Sydney Law School, University of Sydney, 2018).

> '[j]urisdiction is not so much a discourse, not so much a statement of the law, but a site or space of enunciation. It refers first and foremost to the power and authority to speak in the name of the law and only subsequently to the fact that the law is stated—and stated to be something or someone'.[79]

This thesis builds on arguments for thinking with jurisdiction by attending to criminal procedure as a distinct modulation in the 'practice of authority and the creation of lawful relations'.[80] One argument followed in this thesis is that criminal procedure offers important optics into state formation within the British Empire;[81] as procedure becomes a technique itself subject to refinement by criminal law jurists officiating over legislative jurisdictions in the colonies, and themselves learning how to subject those colonies to more effective government. Presumptions about the capacity, competency, method, and intensity of government that arise when using the word "state" risks inhibiting attentiveness to precisely how authority is mobilised, how institutions both conduct and administer their official business, and the fault lines within Parliamentary politics of the Victorian era and how the "rule of law" was thought, articulated and practiced.[82] In its place, a focus on jurisdiction as a practical activity of empire, and a conceptual ensemble, facilitates a closer engagement with how particular institutional formations, technical forms, and modes and manners of conduct exceeded or slipped the boundaries of the nation state and the intellectual resources of sovereignty.[83] In other words, it

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[79] Peter Rush, 'An Altered Jurisdiction: Corporeal Traces of Law' (1997) 6 *Griffith Law Review* 144, 150.

[80] Dorsett and McVeigh, *Jurisdiction* (n 28), 32.

[81] See John Brewer, *The Sinews of Power: War, Money and the English State, 1688-1783* (Unwin Hymen, 1989), where in the fiscal-military state paradigm, the centrality of juridical apparatus was one element of revenue gathering and social control in the absence of developed bureaucracy.

[82] Conel Condren's efforts at recuperating a language of office as a means for the reading of political and ethical action edges out the anachronistic imposition of "Liberalism" in the period of study, as akin to the state centric thinking from the twentieth century onwards, '[w]e get only fleeting glimpses of such theories in seventeenth-century England, their significance distorted by overlooking that rights were attached not to individuals qua moral agents with rights, but to *personae* tied to duties'. *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge University Press, 2006), 33.

[83] Hussain (n 1) 65. See also David Saunders and Ian Hunter, 'Bringing the State to England: Andrew Tooke's Translation of Samuel Pufendorf's *De Officio Hominis et Civis*' (2003) 24(3) *History of Political Thought* 218.

provides a lens for interrogating the imperial migration of form,[84] techniques for the regularisation and government of conduct,[85] and providing a rubric through which to narrate the effects of procedure in the re-organisation of public authority and official autonomy while remaining sensitive to both changes in the form or structure of office-holding, and the many and varied relationships sustained of and to particular legal offices.

Finally, it is important to remember that empire was defined as much by its plural centres of authority as much as is from the metropolitan centre. Perhaps more so. Any claim to the unification, founding, or exercise of jurisdiction are at once statements of political authority and as such are contested, resisted, and contestable. The focus of this thesis is on the role English jurists of criminal procedure play in the refinement of techniques of government and the role of jurisprudence in shaping questions of conduct to the ends of that particular empire.[86] As such, it provides a critical account of the role that criminal procedure continues to play in supporting this project.

Criminal procedure provided a site, a problem, and an opportunity too for jurists and jurisprudence to innovate and accrete techniques for the exercise of authority, modes of lawful address, and styles of conduct that support claims to have and to exercise the authority of law over others. Consequently, this thesis is concerned to subject the media and the text of

[84] See for example Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law 1800-1850* (Harvard University Press, 2016); Shaunnagh Dorsett, 'The First Procedural Code in the British Empire: New Zealand 1856' (2017) 27 *New Zealand Universities Law Review* 690; Keally McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law* (Oxford University Press, 2016).
[85] E.g. Ranabir Samaddar, 'The First Procedural Reason' (2015) 60(3-4) *Diogenes* 58.
[86] As Peter Goodrich cautions common law theorists: 'It is useful to go back to the Romans, but a little civil law can also be a dangerous thing': 'Disciplines and Jurisdictions: An Historical Note' (2010) 48 *English Language Notes* 153, 154.

legislation to a reading in terms of its changing jurisdictional valence:[87] both in terms of its status as a technology of legal writing,[88] but also as an evolving cluster of techniques for the exercise, expression and representation of authority.[89]

## IV. Toward an Ergonomics of Government: Re-structuring Office and Procedural Isomorphism

This Part of the Chapter sets out and orients the basic idioms of the thesis that will be used to re-describe criminal procedure's emergence and transformation. The thesis narrates a shift in the jurisprudence of conduct from the late eighteenth century to roughly the middle of the nineteenth century. This Part first addresses concept of early-modern concept of office (Section A), then considers how the concept of office changes as the broader context of government and the imposition begin to shift the nature of administration, its staffing, and the styles of training of those roles. The final Section of this Part addresses procedure's intervention in the domain of conduct: that conduct becomes externally patterned, imposed from above, and develops without a clear concern for the substance of the law. Together, these changes represent the shift in the ergonomics of law that this thesis elucidates: namely, that procedure instigates a slow but discernible shift in the conduct of law that encompasses changes to practical dimension of legal know-how. These include changes in the administration of imperial (and British) government, movement in the authority of offices that administer the law (principally as procedure accrues

[87] Cornelia Vismann, *Files: Law and Media Technology* (Stanford University Press, 2008). This text is consequential for beginning the task of translation of the scholarship of media archaeology towards the written words and textual practices of law. Writing in a civil tradition, the implications of Vismann's contributions towards the place of the statuary in common law jurisdictions are yet to be fully ventilated.

[88] This at once gestures towards a series of important question regarding the grammatology of authority as text and speech eddy. See Peter Goodrich, 'Visive Powers: Colours, Trees and Genres of Jurisdiction' (2008) 2(2) *Law and Humanities* 213.

[89] See Desmond Manderson, 'Motet: Statutes and Music—An Aesthetic Methodology' in *Songs without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2000) 50.

authority of one kind to the legislature, but distributes another kind to the police, the judiciary, and the magistracy), and changes to the practices that impact on its conduct—such as its media technologies, genres, and institutional forms. Together, these lines of questioning allow us to hold on to some of the ways that the jurisprudence of procedure alters the conduct of lawful conduct. These shifts take place in jurisprudential discourse, but they also take place in the organisation of those institutions charged with writing, administering, enforcing or avoiding the criminal law. As such, procedure comes to describe the dominant mode of contemporary laws governing officeholding, or, an ergonomics of temporal or civil government: a *nomos* of the work or achievement (*ergon*)[90] of governing.[91] The concept of *nomos* likewise draws attention to the relationship between law, land appropriation, authority, and imperialism.[92]

One of the principal advantages of an approach to reading the texts of the early criminal law through the lens of jurisdiction is that it provides a method for holding on to questions of the order and representation of authority that avoids being predicated on the concept of "state". The reasons for this are to do with avoiding anachronism in terms of thinking about the organisation of the political community of the United Kingdom of the latter stages of the early-modern period. Just as "criminal law" is a doctrinal outcome of transformations in procedural form, so too the State is better understood as being retroactively seen as the outcome rather than a presumption of this period.[93] After all, '[g]overnment without bureaucracy of police, and

[90] Although *ergon* is translated as work in by the discipline of ergonomics, its meaning also incorporates ideas of function and achievement in its understanding of work as something achieved rather than the effort directed toward its attainment.

[91] This thesis is not focused on the ecclesiastical government of the Church and in public life through the parish, but follows transformations in the procedure of secular offices.

[92] See Carl Schmitt, *The Nomos of the Earth in the International Law of* Jus Publicum Europaeum (1950, Telos Press, 2006 ed), ch 7.

[93] The word "state" here functions as a shorthand for different articulations of a concept: the Prussian state was ordered along different lines and according to a body of articulated and inarticulable principles to that of the English.

with little or no standing army, must give an alienating inflection to the term "regime", and we need to be cautious in the way we call it a state, especially if the modern state is the outcome of its intricate processes of participation'.[94] An understanding of *how* the work of government was conducted, particularly through the medium of law, necessitates an alertness to the plurality of jurisdictional orderings in which those functions were performed in refracted form. In particular, early-modern criminal procedure provided one important mechanism for involving the communities in local governmentality while at the same time fashioning relationships of governance through its rubrics.[95] Indeed, criminal procedure emerges as one example of government amongst others. Consequently, changes in the authority and exercise of government came to be at once visible and authorised through changes in the conduct of the conduct of the criminal law. This relationship between authority, jurisdiction, conduct and officeholding is one that plays out similarly to Hindle's observation that

> 'State authority was created, negotiated and deployed in those interactions and dialogues between centre and localities in which "certain sorts of jurisdictional claims and legal practices, certain senses of the public good and public authority" were contrived and contested'.[96]

Hindle argues that local governance was primarily exercised by the gentry through a patchwork of manorial jurisdictions until the second half of the seventeenth century,[97] and in particular locales 'where numerous manors fragmented the territory of the parish, it might not be until the eighteenth century that the vestry became a more significant body than the manorial court'.[98] Importantly, the question of the authority of social office was at once dispersed, more

[94] Condren (n 43) 57. See also Mark Goldie, 'The Unacknowledged Republic: Officeholding in Early Modern England' in T Harris (ed) *The Politics of the Excluded, c1500-1850* (Oxford University Press, 2001) 153.
[95] Goldie (n 55), 155-6.
[96] Steve Hindle, *The State and Social Change in Early Modern England, 1550-1640* (Palgrave Macmillan, 2002) 17.
[97] Ibid 207-8.
[98] Ibid 208.

local than perhaps anticipated despite administering a centrally issued law, and as such, was caught in its own dynamics of jurisdiction.

As the chapters of this thesis progress, the juristic modality of office-holding shifts from the judicial to the legislative. A further, but less directly observable shift within the discourse of officeholding, takes place across the thesis in terms of how the responsibilities of office are understood. Procedure begins to change the way official life is conducted: it begins to change the government of office and accompanying styles of training. The mode of habitation of office shifts from one governed by a persona shaped by the history and responsibilities that come *a priori* with the holding of particular offices, with traditions of conduct becoming something to be governed externally as a principle of subjugating one model of officeholding to another. A shorthand might be to call these early stages of an emerging bureaucratic form of administration. As always, these are matters of emphasis and degree rather. Nevertheless, as a varied and plural vocabulary for conceptualising public life, the language of office connects status and dignity to responsibilities and duties and rights and privileges. It provides a means for apprehending both the *persona* of the officeholder and expectations for conduct in office. The presumption of office assumes dialogue between the responsibilities of office and its bearer, and with other holders of public office. In the domain of criminal law, the emergence and transformation of procedure changes these relations and changes the internal qualities of officeholding.

**A. Officeholding and the Early Modern**

A thorough account of officeholding as an aspect of the administrative culture of early modern Britain provides a mechanism for following shifts in procedure,[99] as the formalisation of

[99] This point is often made in passing by scholars of the civil service, consider for example Cohen's remark regarding the organisation and financing of office-holdings performing what we might now call public

procedural jurisprudence re-constitutes a relationship between temporal offices of government and occupant in a different mode. A number of thinkers have proposed that using a rubric of officeholding provides a way to conceive of early-modern England's social life, modes of political activity, and civil governance provides a more accurate way of conceiving of both questions of personhood formation and the practical operation of governance:[100] this is particularly so in a world defined by plural and overlapping jurisdictions.[101] In his study of the presupposition[102] of office in the early modern discourse, Condren begins by noting that 'the changing scope of institutional office has been recognised as crucial to the formation of the modern state'.[103] There a body of scholarship where changing constructions of office have been analysed by historically

functions, 'at the end of the eighteenth century, each public office carried on its business in its own way, using whatever methods of organisation its traditions or its necessities dictated and the public tolerated' (Emmeline W Cohen, *The Growth of the British Civil Service 1780-1939* (Frank Cass, 1965), 33). This was due, in part to an absence of consistent procedures and mechanisms for administration across public offices, that, at this time 'were organized independently; it is not easy to find conditions common to all of them. There were, as we have seen, no common salary scales; no commonly adopted device for providing for retired officers': Emmeline W Cohen, *The Growth of the British Civil Service 1780-1939* (Frank Cass, 1965), 30. Her analysis carries across to the spending and collecting of public monies, which she describes as a 'hopeless confusion prevailed in the accounts both of those who spent and those who collected the public revenue' (Emmeline W Cohen, *The Growth of the British Civil Service 1780-1939* (Frank Cass, 1965), 31). See also Henry Roseveare, *The Treasury: The Evolution of a British Institution* (Allen Lane, 1969), 145-51 for a description of how Members of the House of Commons Select Committee on Public Accounts inspired by utilitarian critique improved the procedures of the Treasury in the 1820s in advance of the Whig reforms of the 1830s.

[100] Goldie (n 55); Condren (n 43) 3. For a discussion of how office-based thinking might intersect with a sovereignty predicated model of the contemporary state, Jeffery Minson's 'How to Speak Well of the State: A Rhetoric of Civil Prudence' (2014) 4(1) *UC Irvine Law Review* 437, 460-465 is particularly alert to the issues that are raised in this thesis. John Howes Gleason, *The Justices of the Peace in England, 1558-1640: A Later Eirenacrcha* (Clarendon Press, 1969); Norma Landau, *The Justice of the Peace, 1679-1760* (University of California Press, 1984); Irene Gladwin, *The Sheriff: The Man and His Office* (Gollancz, 1974).

[101] See Dorsett and McVeigh, *Jurisdiction* (n 28).

[102] By presupposition, he means 'something that in a given context is taken for granted' Condren (n 43) 3.

[103] Ibid 1.

inclined jurisprudents in a variety of contexts including the politician,[104] royalty,[105] the constable,[106] the coroner,[107] scholar,[108] judge,[109] and indeed, the office of the jurisprudent.[110]

Condren's claim about the place of office in the early-modern period is not that it was 'a world of offices, but a fairly cohesive vocabulary through which the world was constructed officially',[111] where responsibilities and duties were understood as arising from one's office that sustained 'formal relational identity through responsibility'.[112] Condren's definition of office is:

> 'an identifiable and discriminate constellation of responsibilities and subordinate rights, or liberties, asserted to be necessary for their fulfilment, manifested in a persona and regarded as in some way socially necessary or acceptable. It was given shape over time, in relation to adjacent offices, and by the patterns of its negation; it affirmed a social being analogous to human corporeal identity of flesh, fluids, bones and humours, seen over time, in space and subject to pathology'.[113]

Officeholding, therefore, 'took proper conduct to be by a *persona* as a function of office'.[114] As such, the *persona* was assumed with a degree of seriousness and sometimes marked with ritual such as the formality of oaths of office.[115] A way of thinking about life that involves both the cultivation of a *persona* (as such, a concern with the ethics of finding a way to live with the self) and, importantly, 'a *persona* is *being as* and *seeing as* and subject to a prior responsibility'.[116] In

[104] Max Weber, *Politics as a Vocation* (1919).
[105] Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 2016).
[106] Joan R Kent, *The English Village Constable 1580-1642: A Social and Administrative Study* (Clarendon Press, 1986).
[107] Marc Trabsky (n 38).
[108] Olivia Barr, 'A Moving Theory: Remembering the Office of Scholar' (2010) 14(1) *Law Text Culture* 40.
[109] Shaunnagh Dorsett and Shaun McVeigh, 'The Persona of the Jurist in Salmond's Jurisprudence: On the Exposition of 'What Law is…'' 38 *Victoria University of Wellington Law Review* 771 ('Persona of the Jurist').
[110] Shaun McVeigh, 'Afterword: Office and the Conduct of the Minor Jurisprudent' (2015) 5 *UC Irvine Law Review* 499; Shaun McVeigh, 'Jurisprudent of London: Arts of Association' (2016) 20 *Law Text Culture* 189.
[111] Condren (n 43) 22.
[112] Ibid 54.
[113] Ibid 29.
[114] Ibid 6.
[115] Ibid 25.
[116] Condren (n 43) 24.

this tradition, the priority of office meant that '[m]oral, political and intellectual judgement was a function of office'.[117] As such, Condren is concerned to distinguish *personas* from 'merely roles being assumed, officia could be formalised as moral beings, making even the notion of an office as a duty to itself sometimes misleadingly incomplete'.[118]

The domain of interaction between offices that Condren seeks to describe is one defined by 'relative association with adjacent spheres of social activity'.[119] Ethical distinctions between the proper exercise of patronage and styles of nepotism that shaded into venality were ethical distinctions that made sense to those who wielded (and were subject to) patronage in an era where officeholding remained, outside of judicial offices,[120] to be a form of property.[121] This took place at a time when the role of networks of family and patronage were of vital significance to the administration of government in general.[122] William Blackstone describes office as the fifth

[117] Ibid 25.
[118] Ibid 7.
[119] Ibid 26. Condren's account usefully it elucidates an account of a contested world view where 'disputes over office, who might rightly claim it, or suffer its imposition, and how its vocabularies of justification and accusation might be deployed, constituted the largest part of the development of what we now see as early-modern moral and political theory' (22).
[120] See Dougal W Allen, 'Purchase, Patronage, and Professions: Incentives and the Evolution of Public Office in Pre-Modern Britain' (2005) 161(1) *Journal of Institutional and Theoretical Economics* 57, particularly 68-72.
[121] See Norman Chester, *The English Administrative System 1780-1870* (Clarendon Press, 1981), 18, 123-168 on the change of legal character of those who performed administration, characterised by a broad shift from office-holding to employment contracts.
[122] Brewer (n 42) 81 reflects that this is a general condition of government service between 1600-1800. For a detailed discussion of this point in the context of household office attending to the Royal family across broadly the same period see RO Bucholz, 'Venality at Court: Some Preliminary Thoughts on the Sale of Household Office' (2018) 91(251) *Historical Research* 61, particularly 76-8. In the context of the East India Company see Jacob Thiessen, 'Anglo-Indian Interests and Civil Service Education, 1800-1858: Indications of an East India Company Line' (1994) 5(1) *Journal of World History* 23. The observation of family projects was consistent with other dimensions of nineteenth century administration consider here McBride (n 45), chapter 2, on the Stephen family's multi-generational involvement in the law of colonial administration. See also Catherine Hall, *Macaulay & Son: Architects of Imperial Britain* (Yale University Press, 2012)

example of an incorporeal hereditament,[123] distinct from but 'bear a near relation [to]',[124] the various forms of dignity in civil life.[125] He defines office as form of estate that carries 'a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging'.[126]

The duties of offices require those that occupy them to render decisions autonomously, but, from a specified position that parses other activity through the *a priori* responsibilities, duties and obligations of conduct that form the office, such that it becomes a mechanism through which to observe and adjudicate the adjacent social world.[127] This insight has a number of consequences for a grammar of responsibility: office-holding, akin to jurisdiction, denotes a world of pluralities;[128] but pluralities that come with an assumed constancy over time. This saw casuistic reasoning as a means of negotiating differing ethical paradigms.[129]

[123] Blackstone, *Commentaries* II, 37.

[124] *Commentaries* II, 37. See also *Commentaries* I, 156-60.

[125] A dignity was not a form of property although, it might be attached to an estate or an office. An example of which is heraldry or the ornamentation of office. Here the status, designation and right to exhibit coats of arms are regulated by the Court of Chivalry. There, it has been re-affirmed that the right to bear arms is conceived of as a dignity rather than an example of property, and consequently the question of arms falls beyond the jurisdiction of the common law.

[126] *Commentaries* II, 36

[127] Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (Cambridge University Press, 2001), particularly his chapter on Pufendorf's attempt to provide a legal theory of political community that adopted the rubric of office-holding to situated and sustain 'the separation of civil and political government' (168) along civil and non-transcendental principles.

[128] See also following how the translation of plural orders became a project of democratic governance in the early American colonial context: Sumner Chilton Powel, *Puritan Village: The Formation of a New England Town* (Wesleyan University Press, 1963). Cf. Minson (n 61) 461 who argues that '[c]ivil prudence redefined office as impersonal comportment by pluralising moral personality'. Minson also notes that, following Pufendorf, 'pluralisation of moral personality has limits: some "hats" should not be worn by the same individual' (464). For an account of malfeasance arising due to plurality in the US see: Gene B Conkin, 'Plural Office Holding' (1949) 28 *Oregon Law Review* 332.

[129] Condren (n 43) 28. On the role of casuistry in the history of common law reasoning, see Costas Douzinas and Ronnie Warrington, 'Cases of Casuistry: The Common Law and a Lost Tradition' in *Justice Miscarried: Ethics, Aesthetics and the Law* (Harvester Wheatsheaf, 1994) 93. See David Lieberman, 'Mapping Criminal Law:

**B. The Restructuring of Office**

Changes in the ergonomics of government can be apprehended in the shift in the architectural metaphors for public life that accompanies some accounts of modernity that focus on the emergence of bureaucracy. Consider the office as a conceptual territory of liminality between self and community. It is a threshold or an anteroom—neither court nor camera—but perhaps a territory that pre-exists and binds its inhabitant to the demands of its proper habitation, an accompanying and demanding constellation of *ethos*, modes, habits, etiquettes, dress and dignities. While this conception of office might predate its occupancy, it accords a kind of autonomy to its occupant—one must reconcile the conduct of office with one's personhood and *vice versa*. This question of self-formation can be, and is, posed as one of ethics, or, the conduct of conduct as one of its central themes and conundrums of life lived in common with others.[130] By placing the writing desk as the central metaphor of government of and by law, questions of the conduct of authority, self and community are also re-placed.[131] After all, a shift in procedure echoes a move in the locus of power from anterooms of the gentry,[132] and open air, multi-use spaces,[133] to specialised and ordered buildings, with pre-determined paths of circulation.[134]

An example will illustrate. For William Blackstone, the question of procedure long related closely to his similarly abiding interest in architecture.[135] As an undergraduate at Oxford,

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Blackstone and the Categories of English Jurisprudence' in Norma Landau (ed) *Law, Crime and English Society, 1660-1830* (2002, Cambridge University Press) 139, 146.

[130] See Dorsett and McVeigh, '*Persona* of the Jurist' (n 70) 774.

[131] The bureau, with its titular reference to the haberdashery, as an organised and moving writing media and shared writing practice represents a material change in administration that echoes the changes that procedure institute in the increasing standardisation and disciplining of the conduct of conduct. See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1968) vol 2, ch xi.

[132] Landau (n 61).

[133] Linda Mulcahy, *Legal Architecture: Justice, Due Process, and the Place of Law* (Routledge, 2011), 17-26.

[134] Ibid 48-56.

[135] Wilfrid Prest, 'Blackstone as Architect: Constructing the *Commentaries*' (2003) 15 *Yale Journal Law and the Humanities* 103.

Blackstone produced a manuscript on the mathematical and theoretical principles of classical architecture which was later revised into a second treatise that was also unpublished, across the half-decade that followed.[136] Wilfrid Prest writes that architecture was not 'a juvenile enthusiasm soon displaced by weightier legal concerns… [but a lifelong] close personal and practical interest in the design and building of structures'.[137] Throughout Blackstone's career, an interest in architecture provided him with metaphors of law in terms of both the location and movement of action. Indeed, as will be read in Chapter Two, Blackstone describes the process of conviction and punishment as a *procession* through a striated assortment of interconnected offices: from the grand jury to the executioner. In his narrative of procession, the prisoner is metaphorically dragged by the scruff of their neck before each office-holder who is tasked with the exercise of a specific legal function.[138] This concern with the appearance and technics of space recurs throughout his legal writing. Most famously, the spatiality of procedure is described in his *Commentaries* in the following terms:

> Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.[139]

Blackstone's published metaphor demonstrates a striking consistency with his own earlier musings on the order of the common law as a twenty-three-year-old junior barrister at Middle Temple:

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[136] Ibid 113-4.
[137] Ibid 119.
[138] The metaphysics of the spatiality of procedure in Kafka's *The Trial* see Edward Mussawir, 'Justice "from room to room": Toward a Concept of Procedural Space in Kafka's The Trial and the Fictional Work of Western Jurisprudence' in Chris Butler and Edward Mussawir (eds) *Spaces of Justice: Peripheries, Passages, Appropriations* (Routledge, 2017) 37.
[139] *Commentaries IV*, 268

> I have sometimes thought that ye Common Law… resembled a regular Edifice where ye Apartments were [?purposely: word crossed through] disposed, leading one into another without Confusion, where every part was subservient to ye whole, all uniting in one beautiful Symmetry, & every Room had its distinct Office allotted to it. But, as it is now, swoln, shrunk, curtailed, enlarged, altered & mangled by various & contradictory Statutes &c; it resembles ye same Edifice, with many of its most useful Parts pulled down, with preposterous Additions in other Places of different Materials & coarse Workmanship according to Whim, or Prejudice, or private Convenience of ye Builders. By which means the Communication of ye Parts is destroyed, & their Harmony quite annihilated; & now it remains a huge, irregular Pile, with many noble Apartments, tho' awkwardly put together, and some of them of no visible Use at present. But if one desires to know why they were built, to what End or Use, how they communicated with ye rest & ye like; he must necessarily carry in his Head ye Model of ye old House, which will be ye only Clew to guide him thro' this new Labyrinth.[140]

In both instances, the problem of space and order is a foil for the problem of movement and action. The figure of the 'Clew' invokes the procedural: there is ambiguity as to whether this connotes the metaphor of an unspooling ball of yarn used for navigation or simply the archaic spelling of the modern "clue". In both instances, movement and its ordering are structured by a supervening mapping: conduct still needs to be conducted (either through the improvised and immanent technology of the yarn or through the transcendental sibylline mapping of the hint) and yet across a career the offices of law remain frightfully organised (even if they might be better decorated than on first inspection). Prosecution, or the achievement of punishment, follows a similar progression through an arrangement of cellular offices each composed of one integer of authority after the next.

Much like the language of office and criminal procedure, British public architecture also changes to a radical degree in the century following the publication of the *Commentaries*. The principle ergonomic innovation is the ascendency of the corridor, which only became a common feature of public buildings across the course of the nineteenth century.[141] Indeed, this change of

[140] Transcribed in Wilfrid Prest, 'Blackstone as Architect: Constructing the *Commentaries*' (2003) 15 *Yale Journal Law and the Humanities* 103.

[141] The exemplar of this new paradigm might be the Palaces of Justice, completed in 1876, and although 'the building has all the appearance of a hulking medieval castle… [t]he inside is a different matter all together'

the interior logic of offices is such that architectural historian and theorist Mark Jarzombek describes its newfound prominence in facilitating more efficient modes of circulation of people and things a 'corridic modernity'.[142] Indeed, one might argue that through the concept of the corridor, there has been a complementary movement in the status of an office—that of the messenger or courier—to both an architectural paradigm and an interior territory as 'a military term referring to spaces in fortifications that enabled rapid communication with troops'.[143] Jarzombek's contention is that corridors, with their purposeful overlapping of the military and the political, demonstrated, in the language of architecture, 'England's imperialist intentions and its usurpation of the technology associated with its new status as a colonial empire, namely speed."[144]

The establishment of procedure changes the territorialising ethos of office-holding by imposing rules of conduct that both governs the conduct of political subordinates and templates the circuits through legal institutions. Procedure, therefore, can be productively read as an

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(Mark Jarzombek, 'Corridor Spaces' 36(4) *Critical Inquiry* 728, 753). Likewise, the contemporaneously constructed Houses of Parliament were designed according to similar spatial principles where even

> 'if the outside of the building is purposefully historicist, the spatial planning of the interior is all modern. If anything, the corridor was an imprint of the increasingly complex social structure of Victorian society, introducing social stability and, very importantly, enforcing a sense of decorum in the insides of a public building. It guaranteed that everyone was in their proper position; awkward contacts with people outside of one's peerage were kept to a minimum'.

Indeed, the Houses of Parliament represent a departure from existing design paradigms that touch on the domain of law: perhaps in recognition of this new paradigm of paradigm of the role of the legislator: the change in form is still clad in the dignity of the mediaeval while belies the structural transformation of the interiority and its mode of operation. Jarzombek notes that '[w]ell into the 1820s, courthouses did not have corridors or hallways. Lawyers and clients were expected to meet in nearby inns or coffeehouses.' (Ibid, 749). However, by the middle of the nineteenth century, the interior layout of public buildings had become defined by the circulatory systems provided for by corridors.

[142] Ibid, 748. This is a paradigm of modernity that he contrasts with French styles of architecture that layer anterooms, and privilege the *galerie* sustains privacy in contrast to the movement and efficiency-oriented modernity of espoused through the spatial grammar of the corridor. See also Roger Luckhurst, *Corridors: Passages of Modernity* (Reatktion Books, 2019).

[143] Jarzombek (n 102) 732. He classifies the H-shaped barracks designed for cavalry offices as 'an antimetaphysical space that cuts soldiers out of the natural order of life and family to reconstitute them into a new social order. [The barracks] is, in other words, the first purely corridic building in the history of architecture and clearly the prototype for the modern corridor building' (Ibid 749-50).

[144] Mark Jarzombek, 'From Corridor (Spanish) to Corridor (English); or, What's in Your Corridor?' (2006) 32 *Thresholds* 6, 10.

intervention in the techniques of jurisdiction; one that requires a commensurate change in the register of analysis that comes into focus by treating procedure as a second order concept: the government of the conduct of conduct. Historicising procedure as a question of conduct of conduct therefore enables a new axis in governance to become visible. On this score, a study in criminal procedure facilitates the writing of a history (partial, incomplete and provisional) of the conduct of lawful conduct in the context of the movement and transportation of the common law's mechanisms for apprehending and organising the punishment of wrongdoing. [145] Lawful conduct calls attention to the jurisdictional register of law and consequently problematises conduct in its proximity to justice.

This thesis is concerned with a component of office thinking in the domain of criminal procedure, insofar as this rubric of social life and political organisation speaks to a broad set of practices that provide a shift in the structuration of the obligation and responsibility of the jurist—particularly those whose professional or official lives involved the legislative drafting and jurisprudential imagination of the role of the jurisdiction over conduct that comes to be legally metabolised as "crime".

**C. The Isomorphism of Procedure: Legislation and Substance Agnostic Law**

Jeremy Bentham, in writing the first English language philosophy of legal procedure,[146] aimed to separate the actuation of law from its substance.[147] As such, procedure was written into being as an isomorphism: adaptable, distinct from rights and remedies, and capable of being applied

[145] On this note, the present work benefits from studies such as Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press, 2010); Paul Carter, *The Road to Botany Bay: An Exploration of Landscape and History* (Alfred A Knopf, 1988) into the spatial imagination of empire.

[146] See Postema (n 15). This will be more thoroughly explored in Chapter Three.

[147] See Chapter Three.

regardless of the substantive law. Procedure became capable of remaining stable while its objects and subjects changed.[148] Indeed, the principal technical shift, perhaps obvious once stated, is that criminal procedure is expressed as a jurisdictional device crafted in the genre and medium of legislation. Within the historiography of criminal law scholarship, concerns regarding changes in legislative *form* are typically voiced through the study of various attempts at the codification of criminal law of the nineteenth century.[149]

A concern of this thesis is with analysing the medium, genre and technique of legislation. Ultimately, it is through this medium that procedure becomes expressible as procedure of this kind. This redounds as a series of jurisprudential concerns about the implications that follow movements in format, order, address, typesetting, and promulgation. At a practical level, the choice and moderation of language and its translations, alongside the shaping of content, forms a bridgehead between imperial centre and colonial terminus that criminal procedure legislation attempts to span. Additionally, questions of content, purpose, and authorship (both as draft and in terms of enactment) remain important sites of interrogation in attempting to locate criminal procedure in the context of the broad and prodigious growth in the legislative form of law, starting in the eighteenth century.[150] The proliferation of legislation increasingly requires that particular offices are instituted to draft and prepare statutes. The role that procedure plays

[148] See FW Maitland, *Equity; also, the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge University Press, 1910).

[149] See Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45' (2000) 18(2) *Law and History Review* 397; Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' (2005) 23(3) *Law and History Review* 631. Ian Leader-Elliot, 'Benthamite Reflections on Codification of the General Principles of Criminal Liability' (2006) 9(2) *Buffalo Criminal Law Review* 391; Martin Friedland, 'Codification in the Commonwealth: Earlier Efforts' (1990) 2(1) *Criminal Law Forum* 145; Michael Lobban, 'How Benthamic Was the Criminal Law Commission' (2000) 18(2) *Law and History Review* 427.

[150] See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (Cambridge University Press, 1989).

in mediating questions of the authority and authorship of legislation is explored in Chapter Five. That chapter follows the role procedure plays in the delegation of legislative jurisdiction in India from Parliament to the East India Company to the officer responsible for writing the law.

Two texts from Bentham, other than his more direct work on procedure, help to clarify the relationship between legislation and the work of government. *Nomography; or the Art of Inditing Laws*,[151] is a style manual—addressing 'the *form*, in contradistinction to the *matter*',[152] of the drafting of legislation. The document then is best read as an example of a governmentality as well as a caustic treatise on the 'general depravity of the style of English statutes'.[153] It is a guide to writing the conduct of government, as a 'branch of discourse which is employed by a *superior*, to the purpose of giving direction to the conduct of a corresponding inferior'.[154] The aim is to craft a language in such a way that 'maximize[s] its conduciveness to the ends whatever they may be of the legislator, which the legislator, whoever he may be, may have in view'.[155] Regardless, as a domain of jurisprudence, the drafting of 'legislation is a practical operation, having on each occasion a practical object,—viz. the attainment of a practical end'.[156] Likewise, Bentham is concerned with the idioms and techniques required for the exercise of jurisdictions 'when addressing yourself to those who are subject to your power, for own ends you call for obedience, you speak intelligibly'.[157] This includes a guide to

[151] See Jeremy Bentham, 'Nomography; or the Art of Inditing Laws', in John Bowring (ed) *The Works of Jeremy Bentham* (1843), vol 3, 231.
[152] Ibid 233.
[153] Ibid § 8.
[154] Ibid 233. Bentham's reasoning begins by drawing attention to the form of government through analogy with the family and the police or economy of family government.
[155] Ibid.
[156] Ibid 236.
[157] Ibid 328.

grammar,[158] vocabulary,[159] repetition,[160] and calling for logical divisions in the text of statutes: the use of sections and parts based on principles akin to those of equal precision and care as those taxonomies developed in the natural sciences.[161] The aims are twofold and each reinforces the other: *regularisation*, the avoidance of the mechanism of the pardon to remedy poor governance, and the use of procedure to avoid *arbitrariness* and the politics that flows from ill-defined laws, particularly where this *ambiguity* is part of a strategy of governance.[162] A school of nomography is proposed and this can be read as an example of concerns of jurisdictional form requiring both institutional expression (in the form of a school) and training in the arts of office (pedagogy).[163]

The final example of isomorphism is Bentham's *On the Influence of Time and Place in Matters of Legislation*, a guide to 'transplanting laws'[164] from one culture into another. Bentham's is an instance and projected imperialism of *form*. His aim was not only to be conscripted as a legislator (he sought work of this kind from a number of empires),[165] but he was also intimately involved in developing more effective mechanisms to protect the commodities of the West India Merchants from labourers claiming customary rights as stevedores.[166] This speaks to a

[158] Ibid 264.
[159] Particularly the avoidance of technical language and legal fictions, particularly where terms of art are the same as the common usage of words, leading to error: Ibid 269-70.
[160] Ibid 265.
[161] Ibid 265-6, 273. Although he frames his invective by comparing English law to astronomy conducted with the language of astrology, the deeper structure of his remedy is found in the classification of plants. Here Bentham's interest in botany shines through in narrating what he sees as the in rationalisation of categories of plants and laws, particularly, from outward qualities to the reproductive qualities that founds the basis of Linnaeus' taxonomy.
[162] Ibid 283: by this he means reserving the right to blame the courts for the consequences of decision made following poorly conceived legislation.
[163] See Malik Bozzo-Rey, 'Publicity and Nomography: Bentham's School of Legislation' (2010) 12 *Journal of Bentham Studies* 1. See also Bentham, Jeremy, 'General View of a Complete Code of Laws', in John Bowring (ed) *The Works of Jeremy Bentham* (1843), vol 3, 155. Bentham (n 112), 272.
[164] Jeremy Bentham, 'The Influence of Time and Place in Matters of Legislation', in John Bowing (ed) *The Works of Jeremy Bentham* (1843), vol 1, 169 ('Time and Place').
[165] See Chapter Three.
[166] See Chapter Six.

distinction between Bentham's politics and ethics that requires further investigation. Regardless, Bentham's *On the Influence* provides a study in the office of the imperially minded legislator and proscriptions for its proper conduct of that office.[167] Bentham's essay addresses the theme of how to transpose the legislation of one culture to another. As such, it is a document that at once addresses the methodology for legislation at a cultural and geographic distance and expounding a theory of conduct that ought to govern the office of the legislator. In effect, it describes a method—or procedure—addressed to the theme of becoming a global legislator according to his abstract and "objective" principles of utility.

The method, though simple is predicated on an impossibility: '[c]omplete perfection requires universal accuracy: universal accuracy requires infinite detail'.[168] It instead describes the starting point of supposing the laws of England to be the best possible for England, a 'magnificent and presumptuous dream I indulge myself without control; and for the purposes of argument, I must be allowed to indulge myself'.[169] The labour itself is one of a speculative and imperial imagination both in terms of the practicality of execution and the traversal of matters of substance and knowledge of principles 'though it would be impossible to travel over the whole extent of it upon paper, he may upon occasion travel over any or every part of it with what degree of attention he thinks proper, in his own mind'.[170] Of course, the jurist with this capacity is Bentham, to whom he reserves the genius of

> 'the plan upon which this inquiry is to be conducted, is already, then, completely drawn: the great task of invention has been performed: what remains is little more than manual labour.

[167] Cf. Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press, 2005), 118.
[168] Bentham, 'Time and Place' (n 125) 172.
[169] Ibid 170.
[170] Ibid 172.

> The assist in him in the execution of it, the legislator should be provided with two sets of tables'.[171]

Within this narrative, Bentham is at once the jurist-legislator, chief statistician and, at least in the realm of metaphor, the mediator of the divine for he passes on the gift of law (here as procedure) and bestows the now clerical Moses with the task of coming up with two sets of tables.[172] And yet, despite insisting on the genius of method, when it comes to comparing and preparing a comparative criminal procedure,[173] Bentham notes 'it would not be easy to bring the points of difference to view in so striking a manner',[174] as comparing, for example the consequences of 'a wound in a hot and unhealthy climate' or '[s]tripping a man stark naked, might cause death in Siberia, in circumstances in which it would be only play in the East Indies'.[175]

The final theme that I want to draw out of this document regards the conduct of the legislator. As an imaginative and a methodological matter, consider the way that in this passage holds together questions of procedure, conduct, government and place:

> Legislators who, having freed themselves from the shackles of authority, have learnt to soar above the mists of prejudice, know as well how to make laws for one country as for another: all they need is to be possessed fully of the facts; to be informed of the local situation, the climate, the bodily constitution, the manners, the legal customs, the religion, of those with whom they have to deal. These are the data they require: possessed of these data, all places are alike. If they are more at home in their own country than elsewhere, it is only because the requisite stock of facts in the former situation is already possessed by them, without their being obliged to wait the time which, in a foreign country, it would require to seek them out.[176]

Bentham's legislator is a pioneer of reason: literally autonomous, inhabiting the pandect's perspective, and capable of collapsing all difference through the logic of method and data:

[171] Ibid 173.
[172] Ibid.
[173] He does however discuss the applicability of the jury for Bengal (at 178-9).
[174] 177.
[175] 173.
[176] 180-1.

'possessed of these data, all places are alike'.[177] In Bentham's prescription: isomorphism is part of the drafting skills of the legislator. Bentham finishes his account of the legislator's conduct with a description of the second order of that conduct. He goes on:

> 'The general result of these rules is, that the legislator, in producing great changes, ought to be calm, collected, and temperate in well-doing: he ought to fear to enkindle the passions, and to excite an opposition which may irritate even himself. If it is possible, he ought never to drive his enemies to despair; but, surrounding his labours with a triple rampart of confidence, enjoyment, and hope, to spare, to conciliate, to provide for all interests; indemnifying those that lose, and making an alliance, so to speak, with time, the true auxiliary of all useful changes, the chemist which amalgamates contraries, dissolves obstacles, and unites discordant parties. When he possesses real strength, it is not necessary that he should exert it, that it may be perceived: while it is only half discovered, he is sure of success: every one knows his own interest consists in joining as speedily as possible with the strongest party; and none will join in useless resistance, unless their self-love has been wounded'.[178]

And thus we've reached the utopian conduct manual setting out the arts of legislation and the guide to which the universal legislator might proceed with the obligations of their office. This conduct of conduct is of course, an abstraction layered on top of others, and provides an insight into the isomorphic writing project of this mode of procedure: one concerned with providing services in the refinement of governmentality, a dream of government independent of politics, place and time.

## V. Conclusion

This chapter has provided a series of idioms through which this thesis will approach its materials and examples. It has argued that positioning criminal procedure as a means of reading the government of conduct is a way of posing questions of conduct that criminal procedure comes to raise for government. The idiom of conduct of government provides a means for recovering a jurisprudence of procedure from its technical expression. From the end of the eighteenth

[177] 180-1.
[178] 184

century, there has been a shift in the outward appearance of law (such as the formalisation of legislation) were accompanied by changes in the priority of its offices (most prominently in terms of a shift in emphasis from the judge to the legislator, and the rise of the police), and in the administration of law and government. This final shift in administration and procedure is perhaps the hardest to follow, as the connotations of concepts such as "office" are at once durable and mobile. The rise of the corridor in architecture functions as a more literal metaphor for, apprehending how the rise of procedure renovates the interiority of legal administration and officeholding. Throughout, the manifold problems of empire appear variously as impetus, site, laboratory, and incentive. While criminal procedure's emergence signals a change in the form and format of government by law that is at once broad and ineffable, it can be brought to view by holding shifts in the conduct of office to changes in jurisdictionally specific arrangements of responsibilities and authority. This is done to give a structure to the reading of procedure's emergence and transformation into the predominant form of the conduct of law and law's conduct in empire.

# Part One – Jurisprudences of Procedure

# Chapter Two:
# **The Procession of the Accused**: The Shape of Doctrine in Blackstone's Radical Jurisprudence of Crimes

'The legal theorist, to whom the grand theorist paid no attention at all, was the scullery maid who made it possible for him to set a good bourgeois table'.[1]

## I. Introduction

Sir William Blackstone's 1769 publication of the fourth and final volume of his *Commentaries on the Laws of England* is addressed to the theme of "Public Wrongs".[2] The juxtaposition of a concept of "public" to the plurality of "wrongs" facilitates a doctrinal intervention in the taxonomies represented by the 'settled procedural distinctions and arcane terms' of the eighteenth century.[3] Instead, Blackstone ordered the extant treasons, felonies and misdemeanours that were, at the time, referred to as "crimes" (but in an informal, supplementary or vernacular sense) into a more lawyerly domain as a novel doctrine.[4] From

[1] Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 287 *Buffalo Law Review* 205, 354.
[2] Blackstone, William, *Commentaries on the Laws of England* (1765–1770, Oxford University Press edition, 2016 ed) vol 4 ("*Commentaries IV*").
[3] David Lieberman, 'Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence' in Norma Landau (ed) *Law, Crime and English Society, 1660-1830* (2002, Cambridge University Press) 139, 140.
[4] See GR Elton, 'Introduction: Crime and the Historian' in J S Cockburn (ed) *Crime in England: 1550-1800* (Princeton University Press, 1977) 1, 2-6. This important volume highlights the problem with the concept modern concept of "crime" being read back onto a jurisdictionally plural society, where a central distinction between temporal and spiritual offences risks confusing temporal wrongs (felonies, treasons, misdemeanours and the increasing breadth of statutory offences) and sins. Likewise, punishment was the province of the Church and temporal jurisdictions. The re-constitution of crime as a category of analysis is to read for 'an artificial construct, a compound comprising breaches of the law which at the time of being committed were regarded as diverse and separate' (2). Peter Beattie too in his analysis of procedural and institutional reform, reaches a similar conclusion when considering changes in those two dimensions

Coke[5] to Hale,[6] and then to Hawkins,[7] "crime" and "criminal" were words descriptive of classes of offences rather than determinative of classification, statutory basis or procedure at law. Crime, in other words, was an adjective mapped onto a loose variety of legal concerns with wrongdoing. Consider Hawkins' *Treatise of Pleas of the Crown,* where the preface states that the purpose of the book is to collect *'the Laws concerning criminal Matters, and to reduce them into as clear a Method'*,[8] and the question of method maps onto process or, '*the Manner of bringing Offenders to Punishment*'.[9] Hawkins uses the words "crime" and "criminal" for their descriptive value—either of actions or persons—but his systematising efforts nevertheless build on the doctrinal categories of felonies, treasons and other actions capable of being prosecuted by the Crown as those with legal import.[10] Blackstone's novelty consists in asserting conceptual clarity where crimes and misdemeanours are 'properly speaking… mere synonymous terms: though in common usage the word crimes is made to denote such offences as are of a deeper and more atrocious dye"[11]—rather than describing any particular class of cause of action or an institutional

of the law of crime: see *Crime and the Courts in England, 1660-1800* (Princeton University Press, 1986), 619. Chapter Four of this thesis returns to this dynamic from the perspective of James Fitzjames Stephen's jurisprudence, as it assembles a modern doctrine of "criminal law" in a manner which is recognisable today. See further David Lieberman, 'Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence' in Norma Landau (ed) *Law, Crime and English Society, 1660-1830* (Cambridge University Press, 2002) 139. Likewise, Thomas Sweeney reminds us that this porous definitional membrane has effects on both sides whereby '[i]t is a serious error on the part of modern discount the importance of "moral" offences… [and even if] many of these offences have been decriminalized in the twentieth century they were just as "real" and just as criminal in the nineteenth century as were property offences', 'The Extension and Practice of Summary Jurisdiction in England, c. 1790-1860' (PhD Thesis, University of Cambridge, 1986), 6.

[5] Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminall Causes* (1644).

[6] See also on this point Matthew Hale, *Historia Placitorum Coronæ or The History of the Pleas of the Crown* (1736), vol II.

[7] William Hawkins, *A Treatise of the Pleas of the crown, or, A System of the Principal Matters Relating to That Subject* (1716) vol I; William Hawkins, *A Treatise of the Pleas of the crown, or, A System of the Principal Matters Relating to That Subject: Digested Under Their Proper Heads* (1726) vol II.

[8] Hawkins, *A Treatise of the Pleas of the crown*, Vol I (n 7), np (emphasis in original).

[9] Ibid.

[10] Ibid, 65.

[11] Blackstone, *Commentaries IV* (n 2) 3.

process, prosecutorial, curial or otherwise.[12] In other words, this abstraction was asserted with brevity in defining a situation of no small complexity. The distinction between crime and its other was not plainly located in the categories of common law doctrine, and vernacular usage of "crime" and "criminal law" was subverted by institutional forms that introduced practical difficulties in sustaining conceptual distinctions between public and private, criminal or civil actions.[13]

This chapter develops a point from which to contrast developments in the jurisprudence of criminal procedure. However, it does not follow that Blackstone's work is either uninteresting or uninspired. Indeed, the rich novelty of Blackstone's approach is apparent when contrasted to a contemporaneous literature on the criminal law published within twelve months of this volume of the *Commentaries*.[14] For example, Stubbs and Talmash's *Crown Circuit Companion*, which is addressed to those who prosecute Crown cases, and is primarily composed of a digest of accumulated precedents of indictments relevant to the Assizes and Quarter Sessions.[15] The *Companion* is a manual for lawyerly practice and it makes no attempt at critically intervening in the schema of indictments it bundles, organises and communicates. Blackstone's *Commentaries*, by contrast, are significantly more expansive in their jurisprudential ambitions and jurisdictional orientations.

[12] Cf. Glanville Williams' definition that 'a crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal': 'The Definition of Crime' (1955) 8 *Current Legal Problems* 107, 130. See also Lindsay Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5 *Social and Legal Studies* 57.

[13] See also Norma Landau, 'Indictment for Fun and Profit: A Prosecutor's Reward at the Eighteenth-Century Quarter Sessions' (1999) 17 *Law and History Review* 508 ('Indictment').

[14] On both the contemporaneous literature, and more interestingly, on the issue of genre and audience, see Lindsay Farmer, 'Of Treatises and Textbooks: The Literature of the Criminal-Law in Nineteenth Century Britain' in Angela Fernandez and Markus Dubber (eds) *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Hart Publishing, 2012) 145.

[15] W Stubbs and G Talmash, *Crown Circuit Companion; Containing the Practice of the Assizes on the Crown Side and of the Courts of General and General Quarter Sessions of the Peace* (Worrell and Tovey, 1768).

Doctrinal change is facilitated by the newly institutionally located practice of scholarly writing from the university.[16] As a mechanism for legal change, it no doubt applies a subtle force unsanctioned by either the legislature or common law judges. However, the origin and authorship of Blackstone's text from within university holds its jurisprudential discourse in conversation with the practical teaching and scholastic expectations attached to the institution of the university. As such, the treatise (in general, and in particular) functions simultaneously as a manual for training in the conduct of both law and its government for prospective lawyers and judges, and a broader body of students who were not entering legal practice.

The aim of this chapter is jurisdictional in the sense of following Blackstone's categorisation and ordering of the law governing wrongdoing. However, it is equally concerned with re-situating this question of order as a question of authority. This chapter does so by way of explicating the discourse that at once constitutes and describes the conduct of the law of government taken in its broadest sense, and is simultaneously addressed to wrongdoing in particular. Blackstone's discourse writes a "public" into a particular kind of being (after all, the *Commentaries*, are addressed to the constitution of English law).[17] Part III of this chapter looks to training for public office as a question of pedagogy and the cultivation of style of conduct of government that is both narrated and exemplified through the text. Finally, and more significantly in Part IV, the chapter then follows the two developed lines of inquiry to offer a critical re-appraisal of the conduct of government proposed by Blackstone as a procession of authorities addressing wrongdoing. This model of process for punishing wrongdoing at once addresses the governmental paradigm for which training is proposed, and describes a doctrine through which process is brought into relation with broader jurisprudential questions concerning the punishment of wrongdoing.

[16] See Section III of this Chapter.

[17] See Chapter One. Cf. WS Holdsworth, 'Some Aspects of Blackstone and His Commentaries' (1932) 14(3) *Cambridge Law Journal* 261, 275-6.

The purpose of this starting point to the thesis lies in its contrast value. Blackstone's description of the law relating to what we might broadly refer to as "wrongdoing" does not have a distinct procedural mechanism to accompany it. However, this does *not* mean that decisions were understood to be made without procedures or reference to standards, and this chapter develops an account of Blackstone's novel style of cogency. Michael Lobban also focuses on contemporaries of Blackstone to develop his own sense of this changing logic. In doing so he draws attention to other legal historians of the eighteenth century common law, narrating 'system of forms and remedies changing over time in response to the newly perceived wrongs emerging in society… the law was a system of logical reasoning with which to redress any kind of wrongs'.[18] His argument is that common law reasoning, as a species of casuistry, meant that common law rules did not need to specify particular punishments for particular wrongs.[19] Rather than starting from a deductive logic, the common law was instead organised around a style of actions, a 'system… based on procedures for an infinity of circumstances, it was felt that just as what constituted a crime could vary, so could the punishment'.[20] The jurisprudential labour of cataloguing these procedures and writing practices under a single standard calls attention not only to the mediation of purpose and judgment into the negotiation of technical forms, but also to the relationship that these literal forms of authority have with the practices of learning and the logics that sustain them. In other words, these arrangements might not be (in light of even then contemporary standards) sensible, but it is important to appreciate that this understanding was involved in actively making sense of a social and political world.

This chapter reads Blackstone for a germ of a theory of criminal procedure that he endeavoured to craft from doctrine proceeding from the pleas of the crown. Blackstone's argument involved rethinking the authority to punish as a technical concern that attempted to link ideas of

[18] Michael Lobban, *The Common Law and English Jurisprudence 1760-1850* (Clarendon Press, 1991), 56.
[19] Ibid 55.
[20] Ibid.

community to the *potentiality* of prosecutorial authority of the English Crown, in the face of the widespread practice of private prosecutions.[21] The pleas of the crown operated as Blackstone's prosecutorial, indeed, procedural, lynchpin that held the task and institution of prosecution to changing notions of public injury.[22] As such, this chapter is not directly concerned with exploring relationships between the Crown and subjects, but more narrowly argues that Blackstone's work is better understood as a defence of an understanding of English legal method that is predicated on the status of those holding judicial office. This defence takes as its object both the legislative reform of criminal law that was underway, and negotiating critiques of monarchy from liberal philosophers as well as the scholarly interrogation of punishment emerging from the inquisitorial jurisdictions of continental Europe.[23] Of course, this together discloses a mode of authority in re-configuration: one that was expressed by earlier jurists as a multiplicity of procedures, that governed through prosecutorial and magisterial prudence alongside the common law's epistolary technics of forms, writs, and indictments. And yet, as doctrine is re-framed and re-formed, concerns with more fundamental questions of government, the constitution of a public, the conduct of office and the notion of wrong iterate in the meanders of Blackstone's argument.

This at once implicates, and is an implication of, genre. Blackstone is, rhetorically, writing an *apologia* for particular common law forms of understanding of offending, crime and lawful relations. Following Peter Goodrich, *apologia* in pre-modern treatise writing

> 'instances that which the subject should desire, imitate and identify with as a sense of community, paternity or patria. Rather than specify in detail the positivity, identity or substance of specific apologetics, it is more important to return to the questions of form. The

[21] See Landau, 'Indictment' (n 13); Douglas Hay, 'Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850' in Douglas Hay and Francis Snyder (eds) *Policing and Prosecution in Britain 1750-1850* (Oxford University Press, 1989) 343; Douglas Hay and Francis Snyder, 'Using the Criminal Law, 1750-1850: Policing, Power and the State' in Douglas Hay and Francis Snyder (eds) *Policing and Prosecution in Britain 1750-1850* (Oxford University Press, 1989) 3.

[22] See Lieberman (n 3) 153-6.

[23] See Blackstone's remarks on summary offences: *Commentaries IV* (n 2) ch 20.

> apology aims to establish community, to found law either in the formative period of an institution or during a period of crisis… In terms of the apology as a discourse of foundation, identity is built against the image of other doctrines, against other gods and other laws, against an outsider that represents an other as the threat of the nomadic, the alien, peregrine, feminine or strange… It conjures identity by showing the face, the plurality or void, of evil'.[24]

The style of Blackstone's defence of the common law's treatment of the problem of crime can be brought into focus by paying attention to how he integrated and mediated recently translated critiques from Europe of 'the cruelty of punishments and the irregularity of criminal procedure', such as Beccaria's *An Essay on Crimes and Punishments*.[25] Beccaria proposed that all laws—particularly those proscribing punishment—need to be appraised for conformity with the moral principle of 'the greatest good for the greatest number'.[26] Blackstone transposed this principle in the following way: 'that punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those be most severely punished, which are the most destructive of the public safety and happiness'.[27] The moral program of critique is affirmed, only to be immediately mediated by the artifice of "reasonableness". This device oversees the diversion from Beccaria's critique of the assumption of the justice of lawful violence into a vernacularised but defanged form where those "crimes of different natures" (which are themselves transposed from Beccaria's "public good") as the evaluation of public "goodness" bifurcates into the more conservative appraisal of "public safety and happiness".[28] By not dwelling on this conceptual transposition of the subject and object of critique, Blackstone's analysis is able to move from a graduated account of different forms of malfeasance to consider 'crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which

[24] Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (University of California Press, 1995), 48-9.
[25] Cesare Beccaria, *On Crimes and Punishments*, tr David Young (1764), 5.
[26] Ibid.
[27] Blackstone, *Commentaries IV* (n 2), 10.
[28] Security and happiness are better read as two elements of a power of police or a power over domestic economy. "Happiness" as an object of attainment for Blackstone's public law refers more likely refers to "good fortune" in the sense of prosperity linked to an economy of property rather than a deep, emotional, sense of satisfaction and comfort.

therefore the offender has the strongest inducement to commit'.[29] The movement from threats to public safety to less serious issues of order proceed forward through a series of images, frame by frame: responding to seriousness by moving through the logic's temporal and horizontal arrangement that draws cancerous equivalences between elements: moving from from opportunity to insecurity; from insecurity to temptation and the moral economy of the subject. Blackstone therefore is able to proceed from the moral injunction to critique punishment to the licentious and potentially unruly subject. There is a procedural dimension to this arrangement that reveals itself in the itinerary of examples that at once follows and provides proof for the statement of principle:

> 'Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of treason; in another it is only murder: to steal a handkerchief, or other trifle, privately from one's person, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only'.[30]

As *apologia*, this is a masterful paragraph that at once neuters the critical—continental, peregrine—alterity of this upstart criterion of good law and just administration by absorbing and mutating difference in support of an extant body of procedural principles.[31] The critique ends up supporting the existing regime of procedural distinctions that sustains class and property relations, casuistry as logic, while subordinating the ethical injunction of Beccaria to the concerns, procedural distinctions and doctrine that warranted its issuance.

Stepping back from the construction of paragraphs to the broader implications of Blackstone's work in the genre of the treatise. This ambitious yet ambiguous moment is referenced in the preface to the recent Oxford University Press edition by historian Ruth Paley who praised its

[29] Ibid 10.
[30] Ibid.
[31] See Kennedy (n 1) 350-5, for a further critical exposition. Here, my focus is more on the reconciliation of a different order of dissonance to Kennedy's, but his critique remains instructive. For an account that considers Blackstone's biography as it pertains, in a broadly salutary manner, to his reading of texts in this tradition see Holdsworth (n 17), 279-83.

'conceptual innovation',[32] and the 'originality… [with] which it imposed a coherent structure on matters that previously seemed arcane',[33] while at the same time acknowledging that '[m]uch of Book IV is irrelevant to any modern jurist'.[34] And yet from the time of its publication, what remains of value and interest is a relationship of *form*,[35] as the way doctrine and process organised questions of conduct around an understanding of office that displaced the requirement of a technical knowledge of the writs to successfully prosecute crimes in the courts of common law.

## II. Ordering Crime and Punishment

Blackstone's fourth book of *Commentaries* addresses the subject of public wrongs, in a time prior to the administrative state, when questions of jurisdiction were not entirely given over to centralised authority or even bodies charged with responsibility for prosecutions beyond a limited set of offences that touched on the royal interests.[36] Against a backdrop of specific writs, venues and office-holders, the larger structure of the *Commentaries* attempts to conform to the Roman jurisprudential categories of persons, things and actions.[37]

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[32] Ruth Paley, 'Editor's Introduction to Book IV' in William Blackstone, *Commentaries on the Laws of England* (1765–1770, Oxford University Press edition, 2016 ed), vii.

[33] Ibid ix.

[34] Ibid xxv. According to Kunal Parker, from the time of publication the *Commentaries* were considered working document and subject to frequent revision. Within a few decades of their initial publication and the author's own issuing of updated editions 'became a kind of multi-authored composite, crowded with the comments of a large number of writers…. The saleability of an edition of the Commentaries was linked precisely to its ability to gather as many different footnotes, by as many different updaters, as possible' Kunal M Parker, 'Historicising Blackstone's *Commentaries on the Laws of England*' in Angela Fernandez and Markus Dubber (eds) *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Hart Publishing, 2012) 22, 31.

[35] Parker's work is agin instructive, noting that Blackstone's more persistent jurisprudential innovation was at the stylist, his style of writing influenced generations of jurists: Parker (n 34) 39-40. See also AV Dicey, 'Blackstone's Commentaries' (1930-1) 4 *Cambridge Law Journal* 296.

[36] See Chapter One of this thesis.

[37] Carol Matthews, 'A "Model of an Old House": Architecture in Blackstone's Life and the Commentaries' in Wilfrid Prest (ed) *Blackstone and His Commentaries: Biography, Law, History* (Hart Publishing, 2009).

Blackstone's work is structured to recall the symmetry and logical distinctions of Justinian's *Digest*, and this relationship to the form of the text situates an understanding of criminal law as an object of legal doctrine.[38] In the genre of instructional texts, nationalist aspirations were often reflected through reference to the 'archetype' of the Justinian manuscript, which was increasingly adopted as a part of courses of study and scholarship that sought to merge the assertion of nationhood and an accompanying legislative jurisdiction with concepts and textual forms derived from that tradition of reason.[39] Consequently, these programmes of translation linked the genre of legal writing to the institutions of the university. As such Blackstone's work, alongside other treatise writers, should be read as part of both jurisprudential and literary production of the authority of the nation state in addition to its government.[40] In doing so, questions of jurisdiction—those which link authority, order and territory—become clearer in the context of the plurality of English procedures and venues for redressing wrongdoing and settling disputes.[41]

In considering the criminal law of the eighteenth century, one of the dominant historiographic narratives follows how the British state wrested an interest in the prosecution of particular categories of crime from private litigants.[42] These became known—in revised form—as the pleas

[38] See Lieberman (n 3) 143.

[39] Ibid 144. For a discussion of how the reception of Roman Law was negotiated in a number of jurisdictions in Europe, see Klaus Luig, 'The Institutes of National Law in the Seventeenth and Eighteenth Centuries' (1972) 17 *Juridical Review* 193, ff 201.

[40] See John W Cairns, 'Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State' (1984) 4(3) *Oxford Journal of Legal Studies* 318; Quentin Skinner, 'A Genealogy of the Modern State' (2009) 162 *Proceedings of the British Academy* 325, 352-4.

[41] See Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012); Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, 1996); Piyel Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (Routledge, Cavendish, 2007).

[42] See the most prominent example of twentieth century historiography is Leon Radzinowicz's four volume study of the emergence of the contemporary criminal law, particularly: *A History of English Criminal Law and its Administration from 1750: The Clash between Private Initiative and Public Interest in the Enforcement of the Law* (Stevens & Sons, 1956), vol 2. For a critical appraisal, see KJM Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (Clarendon Press, 1988).

of the crown. Pleas of the crown were characterised by a procedure where the crown appeared as the prosecutor in serious cases, and this allowed Blackstone to redescribe them as public in nature.[43] One of the lasting contributions that Blackstone makes to English jurisprudence is to establish categories of doctrine distinct from the procedural options that were both familiar and available to contemporary lawyers.[44] The choice of procedure for obtaining a specified or preferred outcome, prior to Blackstone, necessitated different causes of action, which although now recognised as either civil or criminal (although this distinction was lost on the lawyers of the time), accounted for differences in venue, treatment of the parties, and methods of evidence and standards of proof.[45] Blackstone offered a different foundation for understanding what distinguishes the criminal from the civil: his contribution was to recognise that there was a public nature to the wrongs punished as criminal.[46]

Blackstone communicates the difference between the two books in the following way:

> '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'.[47]

This passage marks an important jurisprudential intervention in the jurisdiction of the common law over wrongdoing. While following from an aesthetic choice to balance structure in a way that privileges the order and symmetry of topics, this formulation nevertheless required the articulation of jurisprudential categories also capable of sustaining this structure as a cogent doctrine of "public wrongs". However, the procedural 'category of pleas of the crown was not sufficient to stabilise the boundaries of criminal law itself'.[48] It was too narrow. There were also

[43] Lieberman (n 3) 154.
[44] Ibid 149.
[45] David J Seipp, 'The Distinction between Crime and Tort in the Early Modern Common Law' (1996) 76 *Boston University Law Review* 59.
[46] Again, recall Elton's (n 4) warning that the modern category of crime describes a more consistent and shared context than the eighteenth century word allowed.
[47] Blackstone, *Commentaries IV* (n 2) 1.
[48] Ibid 154.

private prosecutorial options (e.g. appeals of felony) in common usage for crimes that did not involve the crown in the bringing of an action.[49] Likewise, there were *qui tam* actions that allowed for mixed prosecutions, where any monies levied were shared between the Crown and private prosecutor.[50] Such analytical categories and their institutional expressions warrant further consideration.

**A. "Public" Authority: A Prosecutorial Crown and the Procession Model**

Blackstone's *Commentaries* can be read productively as intervening in the jurisdictional orderings of the eighteenth-century penal law in two senses. The first, and broadest scale, is conceptual. At this level of understanding, Blackstone attempted to recast doctrine according to an understanding that felonies and misdemeanours should be viewed as a species of public wrong, that stand in contrast to private wrongs.[51] The second, narrower sense, is that Blackstone provides a redescription of the processes of prosecution and punishment that is organised as stages in a *process*, rather than on the basis of the instruments or writs that enable these actions. It is Blackstone's narration of process as a procession that connects "wrongs" to the institutional role of prosecution. The stages of this process are linked to a discrete or cellular understanding of plural and sequenced offices, each with their own responsibilities of and to law.[52] At the same time, in interpreting the structure of authority that Blackstone articulates, we should be attentive to the contingency of its construction in a time of plural ordering of forms of law—in this sense, it might be read as 'a triumph of elegance over experience'.[53]

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[49] Ibid 154-5.
[50] Ibid 155.
[51] In order to follow Blackstone's account, it is important to recognise that 'the separation, derived from modern theoretical modelling, of a private realm from the "public spheres" of offices, strong associated with an emerging state' does *not* map onto the usage at this period of time. Indeed, public character maps more closely onto the procedural form of the pleas of the crown precisely to avoid democratising the concept of public. See Conal Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge University Press, 2006), 54.
[52] This argument is explicated in greater detail in Part IV of this Chapter.
[53] Ibid 55.

Blackstone argues for an understanding of public wrongs that unifies crimes and misdemeanours through the Crown's nominal authority to prosecute a limited range of offences. In this way, the fourth *Commentary* attaches the laws of crime to the formation of the ideas of the state at the university, through the genre of the scholarly treatise. David Lieberman interprets the importance of the Roman instructional material as providing a model for Blackstone's text, ordered according to the jurisprudential categories of persons, things and actions.[54] Despite the ill-fitting conceptual nature of Roman law for communicating an empirical statement of the workaday operation of eighteenth century common law, there was some measure of recognition that the organising structure was worthwhile. For Lieberman, Blackstone's presentation of the criminal law involved fashioning a style of public wrong in distinction to the category of private wrong.[55] This distinction between wrong and right involved drawing boundaries around criminal law in substantive terms that differed from many of the procedural devices that Blackstone could have nominated as the defining feature for the treatment of the wrongs of the time, for example, the relationship of the prosecutor to the wrong (a victim, a related party, or on behalf of the Crown), or 'whether the injured party sought *compensation* (a civil plea) or *vengeance* and punishment against the wrongdoer'.[56]

Blackstone conjures his idea of the public through the prosecutions that are procedurally open to the Crown: it is through legislation and through the potentiality for prosecution of the pleas of the crown that any such violation can become cognisable. It is with this association, that crime and the criminal (both as adjective and noun) are adopted as technical terms in law. This should be read as a radical conceptual innovation that saw a notion of "public" attached to both

[54] David Lieberman, 'Mapping criminal law: Blackstone and the categories of English Jurisprudence' in Norma Landau (ed) *Law, Crime and English Society, 1660-1830* (2002, Cambridge University Press) 139, 144.
[55] Ibid 145-53.
[56] Ibid 149.

the categories of crimes and punishment.[57] The procedure for criminal prosecutions is enlisted in the introduction of Blackstone's project for re-categorising the law of public wrongs:

> 'the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the pleas of the crown: so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public right belonging to that community, and is therefore in all cases the proper prosecutor for every public offence.[58]

In this description there is an immediate displacement from the substance of the 'general nature of crimes and their punishment',[59] to the instruments establishing a right to prosecute these offences.[60] The recruitment of a fiction—the injury of the person—is sustained through the procedural assumption of the right to prosecute. It is important to recognise that this definition is normative and not an empirical statement of prosecutorial authority: in the absence of formal policing and professional prosecutorial staff, most prosecutions in England were *still* of a private nature. Put differently, the procedure of the pleas of the crown enabled the unity of public wrongs with the various crimes that were previously understood a collection of felonies and misdemeanours rather than a 'branch of jurisdiction' entire.[61] Blackstone is aware that the royal assumption of a jurisdiction over crime is speculative at best and illusory at worst. It is thus that the introductory chapter takes the form of 'an apology for some of the ensuring remarks'.[62] Blackstone invites readers to understand crimes or misdemeanours as 'an act committed, or omitted, in violation of a public law, either forbidding or commanding it'.[63] This version of

[57] Blackstone, bk iv, Ch 1
[58] Ibid 2.
[59] Ibid.
[60] Of course, the rhetoric needs to be considered. This is a normative rather than an empirical displacement, again, see David J Seipp, 'The Distinction between Crime and Tort in the Early Modern Common Law' (1996) 76 *Boston University Law Review* 59 for a variety of different methods for obtaining redress or relief for injuries that can simultaneously be conceptualised as criminal and not.
[61] Blackstone, *Commentaries*, 4, 2
[62] Ibid 5.
[63] Ibid 5

Blackstone's definition of crime is predicated on a procedure that elides the very public it relies on in order to elevate it to the status of crime.

Blackstone also considered whether the inherent qualities of an act were capable of seeing it defined as a criminal offence. '[P]ublic wrongs, or crimes and misdemeanours, are a breach and a violation of the public rights and duties, owed to the whole community, considered as a community, in its social aggregate capacity'.[64] In this definition, procedural structures form; and questions of conduct are framed as questions of malfeasance. For it is the action brought on behalf of the crown, as a proxy for the community, that then distinguishes different legal interpretations of an action. For example, the concurrent availability of criminal prosecution and the bringing of an action in tort, doesn't allow this distinction to be maintained with the rigidity that it is asserted. On both definitions of a public wrong, it is a procedural device which sustains the lawfulness of public authority and the authority of public lawfulness. The Crown's potential to prosecute a prohibited activity is an important part of what holds Blackstone's community, in an aggregate, governmental or political capacity, to law.

**B. Institutions: Places for Proceedings**

The latter half of Blackstone's commentary on public wrongs describes the jurisdiction and process for accounting for public wrongdoing. Blackstone follows 'the method of inflicting those punishments, which the law has annexed to particular offences; and in which I have constantly subjoined to the description of crime itself'.[65] This section follows the method that Blackstone proscribes for obtaining punishment, as this process structures how Blackstone understands the operation of public wrongs, and yet, procedure is not the conceptual rubric for that attachment or operation.

[64] Ibid 5
[65] Ibid 255.

Blackstone begins by offering an account of the various courts in England capable of exercising jurisdiction over wrongdoing. His organisation of courts is situated in a rubric. The first order concerns the specificity of jurisdiction and narrows both in terms of subject matter and territoriality: from those with general jurisdiction to those with local jurisdiction. Accompanying this ordering of space and subject matter, Blackstone introduces the related hierarchy of the defendant's status, each ranked 'according to their dignity'.[66] As such, he provides an account of both generality and fragmentation, equality and hierarchy, and within this matrix of status and territory, each court (and each office) has its own rules regarding the proceedings therein.

The subsequent issue pursued in promoting this taxonomy regards the jurisdictionally specific rules of proceeding. Rules for proceedings, Blackstone notes, bifurcate into two broad categories according to whether they are 'plain, easy and regular' proceedings or summary proceedings.[67] In keeping with his defence of common law method, he points out twice on the first page that summary proceedings are alien to English jurisprudence, except in cases of contempt where they persist as both a matter of logic for curial authority as well as a practice predating institutional memory.[68] As such, this short *precis* of a minor jurisdiction marks a threshold in the *Commentaries'* rhetoric: in order to expound the virtues of the ascendant jurisdiction, the argumentation that establishes its subordination offers an insight into not only broader themes of the organisation of punishment, but also addresses concerns regarding the institutional and jurisprudential qualities of the conduct of the government of punishment.

Each of the three branches of summary proceedings prove, in important but distinct ways, to be incompatible with Blackstone's understanding of the common law. The first branch concerns the executive tribunals that address 'offences and frauds contrary to the laws of the *excise*, and

[66] Ibid 256.
[67] See Ibid 277.
[68] See Ibid.

other branches of the *revenue*'.[69] Blackstone is ambivalent about summary powers being used by officers of the crown in such a way. Given the volume of executive offices subject to possible fraud, summary adjudication straddles a line between being 'absolutely necessary for the due collection of the public money, and… a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent prosecutions by indictment'.[70] The increasing use of summary jurisdictions forced an appraisal of the changing location of institutional power, where 'these offices of the crown over the property of the people is increased to a very formidable height'.[71] And yet, even if this is so, Blackstone still feels that summary procedures remain a problematic structure of government even if traditionally staffed by appropriate appointments such that in his assessment, 'such has usually been then conduct of the commissioners, as seldom (if ever) to afford just grounds to complain of oppression'.[72] In other words, increased governmental discretion gives rise to problems of the governance of the conduct of office: and that this problematic is situated on a fault-line of necessity, mercy and potential abuse of an increasing number of offices concerned with financing the Crown.

The second and most substantive body of summary convictions is the 'vast variety' of legislated offences adjudicated by Justices of the Peace. The conduct of proceedings 'it must be owned, is extremely speedy'.[73] However, 'for particulars we must have recourse to the several statutes, which create the offence, or inflict the punishment; and which chalk out the method by which offenders are to be convicted'.[74] Blackstone identifies two main concerns that flow from the 'divers[e] petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences'.[75] The first is institutional, namely that there has been a shift in the

[69] Ibid 278 (emphasis in original).
[70] Ibid.
[71] Ibid.
[72] Ibid 277.
[73] Ibid 280.
[74] Ibid.
[75] Ibid 278

responsibility of business of public order and minor criminality away from manorial jurisdictions and changes in *form*:[76] offences are tried summarily rather than by jury in the court-leet.[77] His second concern is also institutional, insofar as the quantity of offences has the effect of 'the burthensome increase of the business of a Justice of the Peace, which discourages so many gentlemen of rank and character from acting in the commission'.[78] The feared consequence being that the 'high formidable' powers of office might be 'prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment'.[79] Blackstone's prescription is to 'observe the necessity of not deviating any farther from our antient constitution'.[80]

Finally, Blackstone addresses contempt of court as a species of summary decision-making. These powers are important in thinking about procedure and the process of conviction because they provide an insight into how Blackstone conceptualised this mechanism as simultaneously novel and extraordinary but also constitutional; a power which 'must necessarily be as antient as the laws themselves'.[81] While Blackstone's concern is with how to protect the authority and order of the court, jurisprudential issues arise with respect to proximity, where complexity arises beyond the distance of the court's capacity to apprehend a contempt (i.e. all those beyond the face of the court). In cases where sensory limits prevent an apprehension of potential contempts, the court is empowered to require the accused 'answer upon oath such interrogatories as shall be administered to him'.[82] The impact of this sentence is not lost on its author: 'this method, or

[76] The manorial jurisdiction has a long place in the regulation of social life in the United Kingdom. Pollock, for example remarks that in Anglo-Saxon times, justice was to be 'sought… as a rule, at their [Anglo-Saxon's] primary local court, the court of the hundred, which met once a month, and for greater matters at a higher and more general court, the county court which met only twice a year' (1989) 14 *Law Quarterly Review* 291, 292.
[77] See Bk 4, 270-1, 279.
[78] Ibid 279.
[79] Ibid.
[80] Ibid.
[81] Ibid 282.
[82] Ibid 284-5.

making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance'.[83] The authority of the court to maintain decorous conduct required an exception from standard common law practice. Its justification:

> 'I shall only for the present observe… the method of examining the delinquent himself upon oath, with regard to the contempt alleged., is at least of as high antiquity [as the process by attachment], and by long and immemorial usage is now become the law of the land'.[84]

Again, we can detect the absorption of critique into immemorial usage: the alterity of the problem posed by judicial discretion has ossified into part of the structure of the community's own shared and forgotten memory. Of course, this stands in contrast to the way that the threat of summary conviction was introduced at the beginning of this chapter, which Blackstone highlights 'has of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury'.[85] Blackstone's concerns are not therefore with summary proceedings *per se*, but more with novel extensions of this power. This is a jurisdiction which has been expanding 'professedly for the greater ease of the subject, doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offence'.[86] As such, the next section of this chapter considers how Blackstone's text discloses a relationship between jurisdiction and the status and responsibility attached to property.

## III. Legal Education and the Formation of Personae: Audience, Aristocracy, Authority

Legal pedagogy is an important part of Blackstone's imagination of early modern social order. Published in the first of his *Commentaries* is Blackstone's inaugural lecture at Oxford University

[83] Ibid 284.
[84] Ibid 285.
[85] Ibid 278.
[86] Ibid 277.

on assuming the Vinerian Professorship of Common Law in 1758.[87] The title, 'On the Study of Law' might suggest a pedagogical focus, but this would be misleading. Instead it should be read as an argument for universities becoming sites of legal training promoted to the gentry in deciding where the most appropriate education, supervision and moral direction might be provided to their issue.[88] This lecture can be read alongside his criminal law jurisprudence as a description of the social virtues that the study of law might offer the adolescent aristocracy. In particular, it is a description offered that focuses on the public requirements of a training in office that attends to the status of the gentry.[89] In this regard, it should be read as a preface to the jurisprudential work in the fourth book, where Blackstone addresses the question of public wrongs. Notions of public and legal intervention in wrongdoing figure closely in Blackstone's description of the obligations of class. Indeed, status can be read as providing a structure for the organisation and ranking of jurisdiction, offences, and victims.

This diegesis is important because of the jurisprudential emphasis placed on developing a description of the laws of crime that link a variety of public statuses and dignities to the authority of the Crown in order to constitute a style of 'public'.[90] Consequently, this nascent understanding of crime, expressed as it is through the processes of prosecution, is also enlivened in discussing the implications of training in jurisprudence designed specifically for the aristocracy through this newly established course in English law. The better interpretation of Blackstone's decisions about course design is to locate them in a context of training in the

[87] Blackstone, bk 1, 3

[88] Wilfrid Prest, 'Legal Education of the Gentry 1560-1640' (1967) 38 *Past & Present* 20, 26.

[89] These public functions of the landed gentry have a long jurisprudential history in the administration of justice in the United Kingdom. Frederick Pollock notes that even if unable to find evidence to substantiate his historical instinct that

> 'the right of holding courts of their own and taking the profits in the shape of tines and fees' long pre-dated Norman Conquest, by '[t]wenty years after the Conquest, at any rate, we find private jurisdiction constantly mentioned in the Domesday Survey… about the same time, or very shortly afterwards, it was recognised as a main ingredient in the complex and artificial system of feudalism'.

Frederick Pollock, 'English Law Before the Norman Conquest' (1898) 14 *Law Quarterly Review* 291, 293.

[90] The previous section of this Chapter addressed this argument from the perspective of procedural responsibilities for prosecution.

responsibilities of office and government, rather than technicalities and procedure for the practicing attorney.

Blackstone's argument begins by addressing his understanding of the proper conduct of gentlemen. Writing first about their role as jurors, or legal decision-makers in questions of fact, Blackstone notes that '[a]ll gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations and sometimes to dispose the lives of their fellow-subjects'.[91] Blackstone is quick to pivot from the function of juror to that of magistrate, the office of which 'is principally with this order of men that the commission of peace is filled'.[92] At this stage in his argument, Blackstone seeks to link the benefits of legal and moral education offered by the university to learning how to properly fulfil those obligations. The accoutrements of class are alloyed to the responsibilities of education:

> 'And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and the idle; by protecting the peaceable and industrious; and, above all, by healing petty differences and preventing vexatious prosecutions.'[93]

Blackstone constructed an ideal of universities, promoting a wholesome educational vista distanced from the Inns of Court, which he argued were both responsible for educating 'the inferior branch of the profession' and 'neither commodious nor proper for the resort of gentlemen of any rank or figure'.[94] Instead, the university was a place where '[g]entlemen may here associate with gentlemen of their own rank and degree'.[95] In contrast to the Inns, the university promised parents both moral and academic 'superintendence'.[96] And lastly, university corresponded with the correct time in a young person's life for an education in lawful

[91] Bk 1, 8
[92] Ibid.
[93] Ibid.
[94] Ibid 25.
[95] Ibid 26.
[96] Ibid 25.

conduct—as afterwards the gentry 'have seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction'.[97] In this regard, Blackstone positions the place of legal education in the university as not merely instruction in the rules and forms of the common law,[98] but instead as an environment to nurture prudence in the performance of public office.

> 'Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct'.[99]

Blackstone argued that the shaping of disposition is important in terms of the judicial implications of exercising poor judgment, although his general proposition is that '[w]hat is said of our gentlemen in general… will hold equally strong or still stronger with regard to the nobility of this realm'.[100] Certainly, Blackstone sees a difference in office-holding linked to status, and this plays out in his rhetorical interrogation of the possible consequences of the irresponsibilities of office:

> 'how much more serious and affecting is the case of a superior judge, if without any skill in the laws he will boldly venture to decide a question upon which the welfare and subsistence of whole families may depend! where the chance of his judging right, or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress!'[101]

Thus, Blackstone sells university education as germane to the inter-generational transmission of both responsibilities to law and to the superintendence or government of a community of

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[97] Ibid 25-6.

[98] The course of study at Oxford was directed at those who weren't aspiring to careers in law:

> 'such for whom the knowledge of practice is absolutely necessary; such, I mean, as are intended for the profession: the rest of our gentry (not to say our nobility also) having usually retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land, and indeed with hardly any opportunity of gaining instruction, unless it can be afforded them in these seats of learning'.

Ibid 26.

[99] Ibid 8-9.

[100] Ibid 11.

[101] Ibid 12

political inferiors. Peers and their heirs have a juridical responsibility to the maintenance of the property relations of the realm

> '[i]n… their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper, and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review, can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady'.[102]

The grammatical structure of the final clause equivocates as to whether he means here the jurisprudence of property law, or a social order predicated on the feudal authority of landholding.[103] For now, it is enough to say that Blackstone's identification of proper conduct, status, and the cultivation of a style of prudence together constitute a pedagogy of the persona required of the propertied classes to assume their juridical responsibilities.[104]

## IV. Procession: Office and Doctrine

In Blackstone's text, procedure is not an organising concept. Reconstructing it is an exercise in anachronism, for it is not how he understood his task. For example, although paradigmatic of criminal procedure today, there is no detailed treatment of the rules of evidence. Instead, Blackstone has written a book of criminal *process* that follows the trajectory of an eighteenth-century case, or, because it follows the movement of "the prisoner" from office to office, it is more accurately a *procession*. Procedure appears primarily in the form of description of the roles of office, and the technical documents required to bring a criminal proceeding at the time. While training for office was discussed above, it is important to note that Blackstone's concern

[102] Ibid 11.

[103] See Pollock (n 89). Regardless, Blackstone follows these comments with a defence of the constitutional arrangement of judicial power in the hands of the aristocracy:

> '…vast as this trust is, it can nowhere be so properly reposed as in the noble hands where our excellent constitution has placed it: and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank: and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth; which, as on the one hand it will prevent either interest or affection from interfering in questions of right, so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birth-right to decide' (Ibid 12).

[104] See Condren (n 51) 6.

with the authorities of office were not restricted to the dilution of appropriate status within the ranks of Justice of the Peace. He was also wary of incursions from the legislative branch in the administration of matters to do with wrongdoing. After all, Blackstone's apologetics begin with an admonishment of the historical role and contemporary talents of the legislature: '[i]n proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it'.[105] Blackstone's care for form and force is directed to institutional memories that ought to recall the traditions of a law containing the legislative sediment of 'successive conquerors or factions[']' disposition towards 'avarice, ambition, and revenge'.[106] Against this broad threat, he recruits the temperament of common law judge as capable of navigating 'obsolete or absurd' rules, those ossified in 'the antient [sic] common law, when the reasons have ceased upon their founding'.[107] In order to write a doctrine of the laws of crime *qua* public wrongs, Blackstone first established his jurisprudence through the concepts of office and history.[108] This section considers how this doctrine is constructed from an authority grounded in relations established and consolidated through a grammar of property rights.

**A. Authority, Process & Aristocracy**

Understanding how Blackstone structures a criminal proceeding at the end of the early modern period is assisted by drawing on Conal Condren's observation that the social world of early modern England was defined through the concept of office.[109] Indeed, proceeding from the authority of office enables a cogent reading of his concept of the public which, as Duncan

[105] *Commentaries* 4, 3
[106] Ibid.
[107] Ibid.
[108] In this regard, I am adapting Pollock and Maitland's observation that the feudal ordering of law, can be argued to be predicated on the importance of land tenure and the related cluster of concepts such as office, jurisdiction, dignity and personhood that nevertheless are overlaid with a series of ongoing relationships with both land and property: see Frederick Pollock, and Frederick William Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1968), 229-231.
[109] See analysis in Chapter One. See also Condren (n 51).

Kennedy noted, was predicated on the authority of status rather than property *per se*.[110] This means Blackstone was able to construct an account of public law, as procedures open to prosecution by representatives of the Crown without a recognisably modern conception of "the public", understood in terms of the state, *polis* or *demos*. This section therefore reconstructs Blackstone's notion of the "public" subject of wrongdoing at law through his innovative reading of the prosecutorial options open to the Crown for some treasons and felonies.

Blackstone's narrative emphasises the accused's "procession" rather than its accompanying procedure. His account of public wrongs is predicated on the movement of the prisoner, delinquent or accused through a variety of judicial and penal offices, arrayed both in sequence and in hierarchy.[111] As a treatise, this jurisprudence conforms to the genre's traditions of offering descriptive, proscriptive and pedagogical instructions to its readers. At the same time, the expression of both sequence and hierarchy play out in the content of his work, as public wrongs are written into being through a procedure that understands the accused as an object in procession through the offices that his students will occupy. This stands in contrast to other possible orderings, as the treatise is not written from the perspective of the accused or even from the perspective of a prosecutor. Instead, each chapter break in Blackstone's text marks the progress of the accused through an arrangement of juridical offices.[112] Blackstone describes the process of conviction and punishment as a procession through a striated assortment of connected offices: from the grand jury to the executioner. In his narrative of procession, the prisoner is metaphorically dragged by the scruff of their neck before each office-holder who is

[110] Kennedy (n 1) 291.

[111] This account of procedure accords more than a little with Ed Mussawir's account of the fictive process of Kafka's Trial and the imaginative procedural space that it inaugurates: see 'Justice "from room to room": Toward a Concept of the Procedural Space in Kafka's The Trial and the Fictional Work of Western Jurisprudence' in Chris Butler and Edward Mussawir (eds) *Spaces of Justice: Peripheries, Passages, Appropriations* (Routledge, 2017) 36.

[112] See Chapter One for a discussion of spatial metaphors in Blackstone.

tasked with the exercise of a specific jurisdiction.[113] By working within the rubric of office, Blackstone is able to account for a procession from office to office without providing an account of the procedures that govern their occupation—positioned somewhere akin to self-evidence, the techniques of dwelling in office and how to conduct oneself therein are left in abeyance by Blackstone. Questions regarding the proper conduct of office in Blackstone's rubric fall to the officeholder to assume and to make their own. This is not an oversight, but, his pedagogy and his jurisprudence are both directed toward the preparation of the person for their own dialectal negotiation of the conduct required of official responsibilities.[114] A procession model describes the residuum left when narrating that order through the description of responsibilities of those offices at their respective stages in a proceeding.[115] Blackstone's text is, in part, a manual for the training of the aristocracy in how to exercise their authority over the subjects of their jurisdictions.

The *Commentaries* are prudential in the sense that they aim only to orient students to the relative position of offices and their relationships to others, leaving questions of how lawful conduct might be conducted to the practice or preference of the officeholder. His text describes the rules for deciding cases at particular junctions such as arrest, bail and trial, but it does not offer a description of the manner by which those decisions ought to be made. Judges or Justices of the Peace are not presumed to work within the realm of an externally or institutionally (in the sense that this would provide a certain kind of liminal externality applied to the shaping of

[113] On metaphysics and spatiality in the jurisprudence of procedure, see Edward Mussawir, 'Justice "from room to room": Toward a Concept of Procedural Space in Kafka's The Trial and the Fictional Work of Western Jurisprudence' in Chris Butler and Edward Mussawir (eds) *Spaces of Justice: Peripheries, Passages, Appropriations* (Routledge, 2017) 37.

[114] Following Condren's argument, office-holding does not describe a role *per se* but instead represents the formalisation of conducts of that produce the *officia* as moral beings, see (n 51).

[115] Ibid, 7. Additionally, in Condren's account the 'ceremonial affirmation of office… is… often literally, a progress, or procession of an office in action': (Ibid 45). In this regard, the procedural spaces through which the accused proceeds becomes a virtualised component of the pedagogy of the assumption of judicial office: it narrates and maps on the page the then familiar experience of processions that performed elements of the work of judicial office (47).

conduct) administered justice. Instead, those roles already carry the demand of an *ethos*: a responsibility for making legal determinations according to the responsibilities inherent to the role, but open to interpretation in terms of *how* one performs those responsibilities. Hence, Blackstone's focus on the cultivation of a kind of prudence: a pedagogy that opens up the possibilities of idiosyncratic conduct, directed toward the juristic personas encountered by the accused on their march toward the gallows.

**B. Doctrine and Public Wrongs**

Doctrine, in this context, refers to the imposed schema of organisation and order that Blackstone imposed on the vast number of offences that he bundles, classifies and narrates as public wrongs. At a technical level, doctrine is a taxonomical rubric that assigns order and consequence to the parts of law. On a broader jurisprudential reading this order is one of aesthetics in terms of its preferences for particular orders of logic, and gestures towards how bodies of law might be shaped and re-constitute an understanding of the world.[116] In continuation of themes above, this section explores how the *Commentaries* offer two intersecting modes or geometries of procedural ordering which together provide a structure to Blackstone's construction of public wrongs.[117]

These can, in brief, be described as an order of concentric gravity predicated on status,[118] and an order of what we might call "punitive consequence". The first offers a scaffold for understanding how acts might be ordered and properly understood based on *who* is wronged in the public capacity. The second is concerned with the consequences of that action. In other words, the gravity of the particularity of the offence is constituted with reference to its consequence within

[116] This section is indebted to Kennedy (n 1). See Shaun McVeigh, and Peter Rush, 'Cutting Our Losses: Criminal Legal Doctrine' in Peter Rush, Shaun McVeigh, and Alison Young (eds), *Criminal Legal Doctrine* (Ashgate Dartmouth, 1997) 182.
[117] Kennedy (n 1) 229.
[118] Ibid, 292.

a fundamentally feudal understanding of social order, but also with respect to the way procedure organises the consequences of a guilty verdict. It is by classifying an offence as a felony, and prosecuting it in accordance with the writ of indictment appropriate, that one's property might be stripped in consequence of the verdict. In this sense, undergirding the operation of order is a reliance on forms of incantation that allow the writs of indictment to follow. Blackstone focuses on the acts of jurisdictional officeholders as moments in procession here, rather than the procedural mechanisms and the legal instruments for their proper accomplishment. This renders Blackstone's authorial and pedagogical address as giving students a sense and a cartography of the punishment for which they may well be responsible in future as amateur justices.[119] The point though is that this is only ever partially successful: the accretion of forms and wrongs from courts and legislatures means that doctrinal order is provisional, an attempt at corralling crimes as "public wrongs". Blackstone understands public wrongs to be those wrongs for which the Crown might appoint a prosecutor and not those for which it cannot. This assumption stands, rather than making any attempt at finding either an internal logic of offending, as a style of jurisprudence or proposed supervening structure of sociality capable of generating its own rubric or bestiary of wickedness or vice.

The question of punishment is deferred from the elaboration of offences as criminal acts. At this time, punishment was a procedural question, where prosecutorial options and mechanisms for bringing action determine the basis of a distinction between various forms of treasons, felonies and misdemeanours. This approach provided an earlier basis of understanding different groups of offences based on earlier treatise writers and the development of a considerable jurisprudence, particularly around felony. However, the doctrinal task here is to shift these procedural categories into a different and broader terrain, unifying them under the rubric of a

[119] On Justices of the Peace, see Chapter Five.

"public". And yet, Blackstone's understanding of public wrong doesn't quite conform to contemporary or democratic standards of understanding of the term.[120]

The place of office in Blackstone's jurisprudence is crucial for appreciating his doctrinal construction of wrongs as a series based on a hierarchy of responsibilities to others that is at once plural yet predicated on a clear and hierarchical structure of social obligations. The described treasons, felonies and misdemeanours take on a feudal resonance as they accrue their gravity within a logic of tenure that descends from Church,[121] to King, to Commonwealth, to Individuals.[122] It is only when beginning to describe the offence of homicide, Blackstone pivots from offences against the public dimensions of office to offences against those *without* office, 'private subjects'.[123] It is here that the rhetoric of "public wrong" reveals its potential as sustaining a logic of government through offices rather than the subjects, objects or victims of the offence. If a concept of office might be read as providing a structure for the orientation of the text towards its processes, then in its doctrinal mode, we might see the residuum of the feudal gravity of office importing obligations on those that interact with *officia*—as at once a plurality of responsibilities of office, and as a hierarchy of responsibilities *to* office shaped in complex ways by the position and occupation of the accused.[124]

Blackstone then proceeds to describe the crimes organised by degree of threat to the hierarchy of social obligations and status that sustains his view of the order of the public, organised around the Crown. This order proceeds from offences against religion, to those which threaten the outward facing responsibilities owed towards the dignities and dignitaries of other nations, as well as the threat posed by the renunciation of allegiance to nations at all. In this sense, it is

[120] See Lieberman (n 3) 157-8.
[121] Blackstone, *Commentaries IV* (n 2) ch 4.
[122] Ibid chs 14-16.
[123] Ibid ch 14.
[124] Treasons provide a key example of this: these are primarily offences by the aristocracy against the King. Likewise, in a society without policing or legal structures for policing interpersonal conflict between people small acts of interpersonal violence disappear.

perhaps not surprising if it is hierarchy itself that is being supported through this doctrinal order: arising from God and consequently of intrinsic value, expressed in the King and shared by his Commonwealth and subjects. The text, of course, then pivots to the variations of treason, against the King, before turning to offences that harm the Commonwealth as an extension of an affront to the King's household, communicated and understood as questions of economy and hygiene. It is only at the bottom of this structure do offences against the person of the individual emerge.

The public good appears in Blackstone's work in describing offences against the Commonwealth as

> peculiarly pointed against the lives and security of private subjects, are also offences against the king, as the pater-familias of the nation; to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws, which the people themselves in conjunction with him have enacted[125]

The office of the King carries responsibility for the protection of community in ways that 'affect the common-wealth, or public polity of the kingdom'.[126] The first class of offences that pertain to this royal protection are a number of wrongs attached to the failings of subordinate officeholders to adequately fulfil their duties.[127] While public economy offences also include things such as prison-breaks, trading in stolen goods, breaches of the peace and offences against quarantine of plague, they begin with directions to public officeholders because this structures Blackstone's conceptualisation of "public" as a doctrine at once concentric and hierarchical. The next section illustrates how Blackstone's doctrine of murder provides a procedural device for attaching the body of persons without office to his arrangement of authority via the indictment of the accused.

[125] Ibid ch 10.
[126] Ibid.
[127] Blackstone begins with 'IMBEZZLING or vacating records, or falsifying certain other proceedings in a court of judicature' and then moves '[t]o prevent abuses by the extensive power, which the law is obliged to repose in gaolers' and 'obstructing the execution of lawful process', (Ibid ch 10).

## C. Felonious Homicide, or, Procedures for the Killing of those Without Office

The doctrine of homicide in Blackstone is instructive, not only because it is—as is commonly presumed—to be an exemplar of criminal legal doctrine, but because it is a *procedural* and substantive fulcrum in Blackstone's argument: homicide is an offence where a killing can be indicted as a felony rather than a treason. When read this way, the offence of murder emerges as a procedural category that sustains a series of substantive relationships to structures of class and civil life: a murder is the killing of a person lower in status or without office. The body capable of bearing the letter of homicide is itself an office, at once, a subject of a public wrong and in the liminal sense mediated by position in an hierarchy of *officia* and procedurally distinct on account of it.[128] Likewise, as a highwater mark of the early modern period, we might also productively read Blackstone's intervention in the domain of personhood through the construction of the victim as coming into being as a subject of public wrong: a procedure that binds the body of the deceased to law and public life as an office.

There is a point of concern in his text at this point for the assertion of what we might call the jurisdiction of the common law of crimes. The jurisprudential point is how to make the death of a private subject—one without office—a matter of public concern that pulls it within the ambit of Blackstone's understanding of crimes and misdemeanours developed so far in this account. The structure of Blackstone's rhetoric is important because it ultimately pivots to a point of procedure that hitches the prosecution of the homicide of a subject to the Crown. The injury or death of a private person, or interference with their property (which forms the basis of

[128] This exercise in procedural taxonomy on Blackstone's behalf might be productively interpreted as an example of how 'the enlargement of the political nation or the democratisation of the polity, is to be discovered less in the expansion of the franchise than in the rectoral extension of office' functions in Condren's argument apropos of the expansion of office without a formal account of public life. Condren (n 51) 26.

this pivot, we have not yet shifted focus to homicide in particular) requires Blackstone to begin by stating the taxonomic problem:

> 'WERE these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured'.[129]

The rhetoric of his response is interesting, because no single response is commensurate with the next within the domain of logic: they either each add to the other cumulatively, or there is a struggle to hold the object of attachment.

> 'But the wrongs, which we are now to treat of, are of a much more extensive consequence; 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, that, besides the private satisfaction due and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime'.[130]

The structure of this passage constructs a shift in jurisdiction through the movement of styles of authority. The first step is to assert the homology between the political and the moral. The political comes second, and so this becomes an echo of the structure of authority of public wrongs in the book: first god, then man. The next move is to reproduce the public *qua* security in the maintenance of the King's peace as an expression of the economy of the nation as a subset and contingency that hitches the suppression of violence to divine-moral-political right. The final extension is to simply say that without their inclusion as public wrongs 'they threaten and endanger the subversion of all civil society'.[131] Of course, this isn't the case either empirically or jurisprudentially, as the very next sentence acknowledges the civil remedies that exist alongside prosecutions for the very same acts. Instead, the answer is a blunt assertion of prosecutorial authority: 'And the prosecution of these offences is always at the suit and in the name of the king, in whom by the texture of our constitution the *jus gladii*, or executory power of the law,

[129]Blackstone, *Commentaries IV* (n 2) 176.
[130] Ibid 176-7.
[131] Ibid.

entirely resides'.[132] These phrases together form an argument proceeding rhetoric and casuistry rather than strict logic; propositions that support the assertion in a broad way, only to shift in the final sentence and claim that the true attachment is procedural: in contrast to the contingencies of possibility above, it is only in through the name and power of the Crown that authority does 'entirely reside'. Indeed, it provides political authority for bringing the body of the victim within the public domain: a letter of indictment announces precisely how the accused is to be dragged from one juristic office to another within Blackstone's procession toward conviction.

## V. Conclusion

Blackstone's treatise represents an attempt to shape the problem of public wrongs through a doctrine that continues and exemplifies a concern for the structure of the social order in which he is writing. It presents a picture of the concerns for security and wellbeing of the Commonwealth that are commensurate with Condren's observations that the social life of the early modern period was understood through the presupposition of office. Blackstone's treatise is published in the later period of the early modern. After the writings of Jeremy Bentham, Blackstone's reputation has largely been that of a conservative proponent of a complex and arcane common law no longer held applicable to the world it sought to regulate.[133] This is patently not the case.

The point to be made here is that Blackstone, in his book on public wrongs, is attempting the task of renovating the treasons, felonies and misdemeanours into a unified concept of "public wrongs" that is nonetheless facilitated by a process that reveals the ordering of authority in the England that he was writing to. It is an attempt at bridging a gap between English practice and Roman law, he also reimagines the common law as capable of resisting the tyrannical impulses

[132] *Ibid*, 177.
[133] Jeremy Bentham, *A Fragment on Government* (Clarendon Press, first published 1776, 1891 ed).

of the Civil jurisdictions of Europe. Throughout the text, Beccaria is cited as an ally for the kind of transformation through translation that he is arguing for. The concept of nation is one way through which this is achieved, by virtue of the Crown and its authority to prosecute. Blackstone quotes Beccaria at length as supporting the unification of the right of the public to punish in the Crown

> 'The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others.'[134]

The critique of despotism on the continent lands strangely in England, as support for the centrality of the Crown to the process of organising the authority to punish. However, this citation is not consistent with any theory of representation that Blackstone advances. Rather than a democratic understanding of the right to punish, this is expressed through the pleas of the crown and as such remains firmly seated in the class structure and politics of the times. Curiously, some of the more developed remarks on the procedures of the Crown, their history and an imagined future, take place with respect to the shift from the common law of private wrongs at the end of Blackstone's third book. In summarising the common law of property, as it relates to the Crown, Blackstone reflects on changes to what we will come to call procedure. The situation he describes is similar to his earlier discussion describing changes to public wrongs. Instead, as he performs the jurisprudential task of rearrangement of laws into an attempt at a cohesive body of public wrongs, we see a similar gesture.

Blackstone's problem is how to govern the social changes brought about from the 'the gradual influence of foreign trade' and a shift in the nature of the nation based on changes to the social

[134] Beccaria (n 25) ch 43.

order that has seen an increase in prosperity, facilitated by a period of political stability.[135] The consequence for civil procedure was that

> 'the spirit of our military tenures began to decay, and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feudal actions… were ill suited to that more simple and commercial mode of property which succeeded the former, and required a more speedy decision of right, to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old established forms…'.[136]

This summary of the procedure in the remains of tenure seems broadly accurate in its continued applicability to the domain of public wrongs. The jurisprudential labours of reorganising treasons, felonies and misdemeanours into a digest of crimes that links the structure of the tenure to the requirements that the aristocracy be trained in the responsibilities that attend to their office-holdings is a monumental achievement.[137] At once a work of conservation, or heritage restoration, Blackstone developed an approach to the rise of the nation that preserved the existing arrangement of authority while at the same time bringing order to the jurisdiction over which the Crown might punish.

The concepts of crime and misdemeanour were literally underwritten by an archive of indictments, warrants, writs, and a body of statute law that define and shape the prosecution of wrongdoing. Apart from case law and the occasional references to statute, the media of the common law do not overtly form the basis of Blackstone's argument or his archive of sources. But just because Blackstone does not focus on the traditional written and writing media of the common law does not mean that he completely abandoned its procedural technologies. Instead, he develops a doctrine based on concentric circles of authority of the Crown through either office-holding or prosecution rights over private persons. Additionally, in describing prosecution, his object isn't so much to describe procedure if that is understood as the rules

[135] William Blackstone, *Commentaries on the Laws of England* (1765–1770, Oxford University Press edition, 2016 ed) vol 3, Ch 17.
[136] William Blackstone, *Commentaries on the Laws of England* (1765–1770, Oxford University Press edition, 2016 ed) vol 2, 267.
[137] David Kennedy's quip taken as the epigraph to this chapter is worth reflecting on here.

that govern conduct of the conduct of a legal proceeding. Instead, those rules are communicated in a way which situates them within a proceeding. A procession of responsibilities develop and take the form of describing the responsibilities of decision-makers in the style of a prudence attendant to the decision-maker. Rather than provide the rules for structuring decision-making, an ethics of decision-making is presented across the text as a description of conduct that is non-procedural, but remains lawful.

The value of reading this work in a thesis on procedure is that it provides a final snapshot of a form of authority that is in transformation. Here, Blackstone describes a waning tide but regardless resists the economic and transportational shifts that are changing the orientation of the political organisation of power away from those last vestiges of feudal or chivalrous social authority. On its own terms, this is a monumental effort. It represents a clear attempt to protect what is understood by its author as a deeply valuable and learned style of lawfulness. That it was historically unsuccessful is beside the point.

The presence of the nation embodied in the Crown and the way royal authority is dispersed throughout the social order of office-holding is important. And it is important to hold onto this as a point of difference. This is a criminal law that takes the Crown as a legal hieroglyph of its understanding of a community,[138] structured along lines of filiation. Rather than a guide to procedure, Blackstone has produced a guide to the offices that form this jurisdiction. It is only in the writing of this text that a jurisdictional form becomes possible at all, and that this authority is exercised through the institutional form of plural offices is an important observation as to its difference from work produced a generation later.

The absence of an institutional account of the procession of public wrongs is also telling. While certain procedural forms such as the writs of indictment for felonies provide a way of suturing

[138] Peter Goodrich, 'Disciplines and Jurisdictions: An Historical Note' (2010) 48 *English Language Notes* 153, 156.

together the claim of public wrong and its prosecutorial authority, this is neither the story of doctrine told nor is it the story of the laws of England. Instead, doctrine proceeds from the holding of offices: from offending the Church to the way homicide is used as a hitching point between the private body and the body public, and at each point the possibility of national intervention through the Crown secures this relationship. And yet, Courts aren't conceived of as worlds unto themselves. The decision-makers are imagined as exercising greater autonomy than perhaps they themselves had, but nevertheless, Blackstone's world is one of magistrates rather than magistrates' courts. Regardless of the need to follow the letters and letter of the law, this is properly the domain of the particular ethics of office (magistrate, justice of the peace, gaoler, assize judge, jurist, aristocrat, gentryman, prisoner, corpse &c), and these offices are linked together through the writ. If procedure here is a procession, then it is the accused that is imaged as being dragged from arrest to punishment. This is not a view of a world where procedure exists to protect the rights and liberties of the accused. Even the famous dictum that 'all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer',[139] isn't so much directed to the possibility of securing innocence through rigorous tests of evidence, but instead is expressed with the citation of two practical rules from Sir Matthew Hale: a judge ought never convict for theft of goods of unknown origin, and all prosecutions from homicide require a body to be produced.[140] In this regard, even something that has been drawn into popular parlance as a statement of liberty needs to be re-considered as a procedural statement addressed to the banality of its original context: practical advice to barely trained pseudo-judges not to lose the body or the property in question.

[139] Blackstone Commentaries IV (n 2) 358.
[140] See Ibid ch 27.

# Chapter Three:
# **A Singular Utility:** The Bentham Brothers, Intersecting Imperialisms and the Jurisprudence of Procedure

'[F]rom beginning to end, an English book of procedure (*book of practice* is name of such a book among English lawyers) presents no other object than a system of absurdity directed to no imaginable good end'.[1]

'I do not like … to look among the Panopticon papers. It is like opening a drawer where devils are locked up—it is breaking into a haunted house.'[2]

## I. Introduction

1803 was the last of a few bad years for Jeremy Bentham. After having toiled for some 16 years on the planning, politics and philosophy of rationalising punishment, his dream of realising the construction and governorship of his penitentiary, the panopticon, faltered in the very swamp that was set aside for its construction. Literally and metaphorically, the project was mired by a combination of objection at the original (and preferred) site for its construction,[3] and shifting

[1] Jeremy Bentham, 'Principles of Judicial Procedure with the Outline of a Procedure Code', in John Bowring (ed) *The Works of Jeremy Bentham* (1843), vol 7, 5, 12 ("Judicial Procedure").

[2] Jeremy Bentham, *The Works of Jeremy Bentham: Memoirs Part I and Correspondence*, John Bowring (ed) (William Tait, 1843) vol 10, 250 ("*Correspondence*, Vol 10").

[3] Land belonging to Earl Spencer was Bentham's preferred site, but Spencer was not willing to relinquish part of his estate for the construction of a penitentiary. Instead, a methane laden wetland, less than half of the proposed and required size was eventually selected but no costing was to be provided to assist with the drainage works that would be required to make the site sanitary and dry enough for yearlong occupation.

expectations regarding the volume of convicts to be housed under the contract.[4] The newly formed Addington government also needed to address the not insubstantial problem of Napoleon Bonaparte and the French military gathering on the other side of the English Channel and contemplating invasion throughout 1802-3.[5] Indeed, the month after the 1803 declaration of war with France, the Home Office finally communicated to Bentham, via an intermediary, that the panopticon was not going ahead. Janet Semple, in her seminal study of the contract negotiations for the panopticon, summarises that

> 'Bentham seems to have found it very hard to realize that the subject that obsessed his own mind must have been of small importance to the men he was dealing with. He was oddly aloof, seemingly untouched by patriotic fervour and undisturbed by fears of invasion'.[6]

In the shadow of changing government at home, and the threat conjured by Bonaparte abroad, Britain's convicts would remain on hulks in the River Thames, and the policy of transportation to New South Wales ("NSW") was thought impossible to discontinue.[7]

Jeremy Bentham was devastated. He interpreted the outcome as malevolent and the process as conspiratorial.[8] He proclaimed that the cost of the negotiations were such that the Treasury and Home Office 'have murdered my best days'.[9] In exchange for these years, he sought from the government a package of compensation representing, by his calculation some £689,062 11s[10] and

[4] Indeed, during the final stages of their negotiations, after making the decision, it took Treasury some eight months to convey to Bentham that they wished to reduce the size of the panopticon by three quarters while reducing the available budget by a commensurate amount. Bentham was concerned not only about the delayed communications, but that this would render the project financially unviable.

[5] Coincidently, Jeremy Bentham who also held French citizenship, voted for Bonaparte to be appointed as Consul for Life in the 1801 plebiscite, recording that he 'once a good opinion of Napoleon: and as a French citizen I voted for his being Consul for life. I do not distinctly remember the grounds which induced me to do this: I thought it was the least evil'. Bentham, *Correspondence*, Vol 10 (n 2), 571.

[6] Janet Semple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (Clarendon Press, 1993), 220.

[7] Ibid, 238.

[8] Bentham Project, UCL, Box 120, Folios 466-8.

[9] Bentham Project, UCL, Box 120, Folios 466. Also quoted in Semple (n 6).

[10] Quoted in Semple (n 6), 280. Translating this figure into an expression of 2019 currency denominations is not a straightforward task. If measured simply by compounding rates of inflation, then this represents around £70m, however, if this sum is extrapolated as proportion of GDP, then its contemporary worth sits at greater than £4billion. Neither of these calculations are definitive, but they do provide some

began to publicly agitate against the constitutionality, policy and legality of transportation to NSW.[11] Indeed, '[t]he elaboration of these points, together with an account of his grievances against the administration in relation to his prison scheme, dominated Bentham's written output for 1802'.[12] The last years of the panopticon project read as deeply dispiriting: Semple ends a chapter on the last year of the project describing how 'Bentham had been treated with indifference, contempt, and outright rudeness; his interests had been trampled underfoot, and his ideals shattered'.[13] It is perhaps no surprise then, that while his efforts in campaigning against the colony constituted much of Bentham's writings, 1802 also marked the year that Bentham begins to draft a book-length project outlining a general law of procedure. While most of the text of the *Principles of Judicial Procedure* was written between 1820-27, in 1802 he wrote the introduction and the first chapter dealing with the general view of procedure.[14] This book has received surprisingly little critical attention.[15] This lack of interest remains surprising, given that as late as the 1970s, 'Bentham's theory of adjudication represents the only sustained attempt in

guidance to the size of the package of compensation that Jeremy Bentham sought, which might assist in explaining Semple's interpretation of Bentham's conduct was that he was 'living in Cloud-cuckoo if he believed that Treasury would pay him compensation remotely in that area'. After arbitration, he eventually received £23,779 3s as a final compensation.

[11] Bentham published a series of arguments against the colony: Jeremy Bentham, 'Panopticon *versus* New South Wales: Or the Panopticon Penitentiary System, and the Penal Colonization System Compared' in John Bowring (ed) *The Works of Jeremy Bentham* (1843) vol 4, 173; 'A Plea for the Constitution' in John Bowring (ed) *The Works of Jeremy Bentham* (1843), vol 4, 249.

[12] RV Jackson, 'Luxury in Punishment: Jeremy Bentham on the Cost of the Convict Colony in New South Wales' (1988) 23(90) *Australian Historical Studies* 42, 42.

[13] Semple (n 6), 253.

[14] Richard Donne, 'Note by the Editor', in John Browning (ed) *Jeremy Bentham, The Works of Jeremy Bentham (Judicial Procedure, Anarchical Fallacies, works on Taxation)*, vol 2, 1, 2.

[15] Notable scholarly work that engage with the general question of procedure that book raises include Shaunnagh Dorsett and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking' (2012) 36 *Melbourne University Law Review* 470, 486; Albert Kocourek, 'Substance and Procedure' (1941) 10 *Fordham Law Review* 157. It is notable that in his argument for the importance of thinking about procedure in analytical legal philosophy, Jeremy Waldron does not consider Bentham's work on this question to warrant discussion: see 'The Rule of Law and the Importance of Procedure' (Working Paper, New York University Public Law and Legal Theory, 1 August 2010).

the English language… at a philosophical account of the law of procedure'.[16] While this alone would warrant a sustained study of Bentham's jurisprudential writings on procedure, as seen above, the greater confluence of contexts into which the panoptic prison was proposed and declined gives us a clearer sense of the waters in which Bentham eddied.

The aim of this chapter is to provide an account of Bentham's jurisprudence of procedure. In order to properly situate Bentham's concerns with procedure at law generally, it is necessary to understand something of his concerns with *how* punishment was actuated in the nineteenth century. It is because of the problem of the *methods* of punishment that drew such vitriol from Bentham that an insight can be gleaned into how a general law of procedure might respond to the problem of administering a legal system. In contrast to Blackstone's account of process in the previous chapter, Bentham's theorisations de-emphasise the person of the judge and the cellular model of interconnected offices in favour of an administrative mechanism for connecting means to ends. Learning to administer the administration of method, or to govern through interventions in the conduct of conduct represents one of Bentham's quieter but more important insights for the practice of law. This chapter therefore starts by investigating the ways in which the cancellation of the panopticon project shaped both Bentham's jurisprudence, and facilitated emergence of a cogent conceptualisation of legal procedure as a domain entire and detached from specific purpose. A theory and model of procedure emerges through this process as a systematisable mechanism to connect the bridgeheads of ends to means in Bentham's utilitarianism. Procedure comes to offer a way of diagramming the connection of ends to means, while at the same time providing a description of the conduct of those means. Bentham's general understanding of the law of procedure provides a legal description of the means of animating principles of substantive law (it is in this sense that he describes procedure as 'adjective law' in

[16] Gerald J Postema, 'The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication' (1977) 11 *Georgia Law Review* 1393, 1393. NB Postema makes an exception for Lon Fuller's then recently unpublished 'The Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Review* 353.

his grammatical elements of jurisprudence); it structures the functional differentiation of roles in a legal system to enable that animation (it provides a schematic of the dispersal and movement of functions); it provides a way of tracing the operation of ends to their means (it offers a sort of rationality of rational administration in pursuit of legitimate ends).

Procedure comes to function as the legislative substrate that sutures the means of punishment to the aims or ends of punishing. Bentham's blinkered process of utilitarian reasoning must be read in the context of his attempt to solicit private gain, both monetary and egoistically, against the broader story of public benefit and approbation wrought by the decision to send prisoners to the antipodes. Procedure can be read as that way of tracing legitimate action into the material actuality of moving people, ships, goods and capital.[17] It is his answer to the question of how one does the doing of punishment. Procedure ultimately comes to connect ends to means; and in doing so it simultaneously connects the legitimate social authority to texts, bodies, land and boats.

## II. On the Origins of the Panopticon Project

Bentham's panopticon has been subject to a voluminous critical literature from the 1970s onwards in law and criminology.[18] Michel Foucault famously interprets its genius as

> 'a diagram of a mechanism of power reduced to its ideal form; its functioning, abstracted from any obstacle, resistance or friction, must be represented as a pure architectural and optical system: it is in fact a figure of political technology that may and must be detached from any specific use'.[19]

However, I want to begin with two points about this understanding of the project to build the panopticon: the first is that while *a* Bentham was the originator of the idea, it was his brother

[17] See Chapter Six.
[18] For a contemporary review of this literature, see Andrea Mubi Brighenti, *Visibility in Social Theory and Social Research* (Palgrave MacMillan, 2010).
[19] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Vintage Books, 1977), 205 ("*Discipline and Punish*").

Samuel, rather than Jeremy, who first imagined the architectural paradigm in question.[20] The second is that the panopticon emerged in a different and particular context than Foucault emphasises: it was designed in Russia to assist in the disciplining of skilled English labourers in training Russian shipbuilders. Jeremy Bentham's role here is better understood as promoting the vision and virtue of Samuel's insight into the capacity of architecture to impose one's will on the wilful. This brings the panopticon project into a much closer and more interesting relationship with problems of shipping and labour.[21] It provides a window into thinking about the commercial projects of utilitarian reformers that take place both in the context of attempting to regulate the labour that enabled British mercantilism and the desire of Jeremy Bentham to build, administer and profit from the brothers' innovation.[22]

**A. Potemkin's Panopticon & Problem of Labour**

Samuel Bentham, the younger and only surviving brother of Jeremy Bentham, apprenticed as a naval engineer at the Woolwich dockyards, and then the Royal Navy dockyards at Portsmouth. Unable to find employment in England, despite possessing considerable talents as an engineer, shipbuilder and naval architect, due to the family's middle class status lack of cultivated patronage, meant that he was not considered for administrative positions in the Royal Navy.[23]

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[20] A number of scholars have made this point, although it doesn't seem to have made inroads into discussions about panopticism, which remains associated with Jeremy Bentham.

[21] These observations are developed in greater detail in Chapter Six of this thesis.

[22] Indeed, a number of important historical studies of the prison remark that Bentham's panopticon project was, in part, motivated by the possibility of commercial gain. Indeed, Michael Ignatieff argues further that '[i]n turning its back on the idea of running prisons like factories, ruling opinion also rejected the idea of modelling the authority relation between state and prisoner on the relation between employer and worker', see *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850* (MacMillan, 1978), 112; Semple (n 6) 10-11; LJ Hume, 'Bentham's Panopticon: An Administrative History—II' (1974) 16(62) *Australian Historical Studies* 36; Dario Melossi and Massimo Pavarini, *The Prison and the Factory* (MacMillan, 1981), 1 and 40.

[23] Ian R Christie, *The Benthams in Russia 1780-1791* (Berg Publishers, 1993), 7-8 ('*Benthams in Russia*'). Indeed, the problems of entrenched administration by way of patronage rather that skill returns as a source of conflict in Samuel Bentham's career when he is eventually employed as the Inspector General by the Admiralty.

The younger Bentham spent two periods of time in Russia.[24] The first came after his graduation, where, unable to attain employment in Britain, he moved to Russia in 1780.[25] There, in 1784 he entered the employment of Prince Potemkin after spending a period of time touring continental naval and shipbuilding facilities, venturing as far as Siberia.[26] Specifically, his first role was 'to establish a shipyard for the construction of river transports',[27] and to facilitate domestic industry by 'the training [of] men as sailors and shipwrights, and building ships for the Russian navy'.[28] However, Samuel worked widely and examples of his duties include participating in a war against Turkey; improving breweries; and assisting Prince Potemkin in the construction and command of a worm-shaped vessel on which Catharine the Great toured the rivers of the southern part of her Empire.[29]

In mid-December 1785, Jeremy Bentham ventured to join him for a period and they spent a considerable amount of time together in Krichev.[30] There, Jeremy provided 'clerical assistance'

[24] NB Christie notes that Russia was seen as an emerging power that offered a geopolitical advantage to the English insofar as Catherine the Greats territorial gains in Poland and Turkey were to Britain's advantage, as these states were more closely allied with France. This tolerance for the proxy campaign provided one backdrop to the support for British military and engineering expertise to both spend time in Russia and hold out the possibility of offshoring some production of vessels and supplies there.

[25] For biographical information, see Maria Sophia Bentham, *The Life of Brigadier-General Sir Samuel Bentham KSG* (Longman, Green, Longman & Roberts, 1862).

[26] Indeed, this proved of some relief to Bentham's father, who was comforted by the knowledge that he had signed a 10-year contract of employment for the running of Potemkin's industries. See Letter 565, from Jeremy Bentham (co-signed with Samuel, although the letter is authored from Jeremy's perspective) to his father Jeramiah explaining the relief that Samuel had found a way of getting money (17/28 March 1786) in *The Correspondence of Jeremy Bentham: Volume 3 January 1781 to October 1788*, Ian R Christie (ed) (Athlone Press, 1971), 460-3.

[27] Christie, *Benthams in Russia* (n 6) 131.

[28] Philip Steadman, 'Samuel Bentham's Panopticon' (2012) 14 *Journal of Bentham Studies* 1, 2.

[29] The implications of the work for the political philosophy of the panopticon project are explored in Simon Werrett's two publications on Samuel Bentham's work and the political philosophy of the Russian Empire: Simon Werrett, 'Potemkin and the Panopticon: Samuel Bentham and the Architecture of Absolutism in Eighteenth Century Russia' (1999) 2 *Journal of Bentham Studies* 1; Simon Werrett, 'The Panopticon in the Garden: Samuel Bentham's Inspection House and Noble Theatricality in Eighteenth-Century Russia' (2008) 3 *Ab Imperio* 47.

[30] For a brief account of his travels, the introduction to the volume of letters published during this period of his life is instructive: Jeremy Bentham, *The Works of Jeremy Bentham: Memoirs Part I and Correspondence*, John Bowring (ed) (William Tait, 1843) vol 10.

to Samuel.[31] The reason for Jeremy Bentham moving to Russia was the speculative pursuit of a legislative reform project. In the absence of career traction in England,[32] Jeremny's was a similar relocation in search of opportunities.[33] The brothers shared intellectual labour in attempting to solve the problems that they confronted in attempting to organise a shipyard for Prince Potemkin.[34] They came to describe the problem that confronted them thus: while '[a]t no time… did the peasants offer Bentham any particular problems of discipline',[35] there was a lack of skilled craftsmen amongst the serfs on Potemkin's estate.[36] To improve their work, Samuel had imported a group of master craftsmen from Britain to provide instruction and superintendence: they proved 'increasingly difficult to control', due to their proclivity for drink.[37] It is this problem that precedes the first description of the panopticon in Jeremy Bentham's letters.[38] A circular inspection house was Samuel's solution to the problem of these skilled yet ill-disciplined supervisors.[39] Indeed, before describing the solution, Jeremy Bentham offered a lengthy

[31] Ibid, 174.

[32] In his letters, Jeremy's father's concern about his son's failure to find remunerative career after an aborted period as a largely disinterested barrister, was a source of tension in their relationship.

[33] Christie, *Benthams in Russia* (n 23), 9-10.

[34] Indeed, he served in a formal capacity, as secretary of Samuel's operations: Jeremy Bentham, *The Correspondence of Jeremy Bentham: Volume 3 January 1781 to October 1788*, Ian R Christie (ed) (Athlone Press, 1971), 502.

[35] Werrett, 'Potemkin and the Panopticon' (n 29) 6.

[36] It perhaps is obvious that ship construction was produced by craftsmen, organised through trades and their respective guilds, prior to Fordist innovations in production, the large warships in contemporary services therefore required considerable skill in manufacturing in addition to the architectural knowledge to design vessels that could sustain the imperial ambitions of Catherine the Great. The solutions worked up to the combined problems of workshop and dock design (architecture) and the need for skilled labour (and mechanical means of simplifying construction methods) were to provide Bentham with the key means for advancement in his naval career.

[37] Werrett, 'Potemkin and the Panopticon' (n 29) 6.

[38] See Jeremy Bentham, Letter to Charles Brown (580) (18/29 December 1786) Ian R Christie (ed) *The Correspondence of Jeremy Bentham: Volume 3 January 1781 to October 1788* (Athlone Press, 1971), 503-8.

[39] For a number of studies on the panopticon that note the Russian origins but fail to further interrogate the Bentham's and the solution see: Semple (n 6), 99-100; Christie, *Benthams in Russia* (n 23) 177. Interestingly, the problem seems to inhere in the way labour was administered in England – not so much from the perspective of those doing the work, but instead from the entrenched interests of those tasked with the responsibilities and assumption of supervisory roles. Entrenched, pre-bureaucratic forms of management by commissions with distinct but intersecting jurisdictions were the problem that Bentham rallied against during his later employment by the Royal Navy. On these reforms within the Navy and

description of the problems encountered with a quarrelsome employee as a 'two legged tormentor'.[40] In the immediately preceding section of the same letter, where Jeremy Bentham writes to an acquaintance in December 1786:

> 'My brother has hit upon a very singular new and I think important /though simple/ idea in Architecture which is the subject of a course of letters I have just finished for my Father which it is not improbably may find their way to the press... The architectural idea ~~consists in nothing but~~ /in the plan of what we/ call an Inspection-house is that of a circular building so contrived that any number of persons may therein be kept in such a situation as to either be, or what comes nearly to the same thing to seem to themselves to be, constantly under the eye of the person or persons occupying a station in the centre which we call the Inspector's Lodge. You will be surprised when you see the efficacy which this simple and seemingly obvious contrivance promises to the businesses of schools, manufactories, Hospitals and all sorts of Prisons, and even Hospitals, if one may venture to say so to an adept.'[41]

Jeremy Bentham again attributes the innovation to Samuel in a letter to their father that was begun on the same day as the above.[42] Here, Jeremy at once demonstrates his enthusiasm for Samuel's idea and hints to his father the possible commercial applicability of the invention:

> 'When I sat down to write, I intended but one letter, to which I intended no other publicity that what you might think fit to give it, by communicating it to your Brethren of the Magistracy for whose use it was designed. But when I saw the extensive applicability of the idea, I saw no reason for confining the communication to any one set of men'.[43]

In this letter Jeremy Bentham highlights that the idea for the Inspection-house was first considered capable of additional implementation by the *magistracy*. This sense of originality and enthusiasm for its generalisability seems to be properly attributed to being of Jeremy's origination.[44] These early, enthusiastic writings suggest that Bentham sensed from the outset that there was jurisprudential potential in this invention; after all, he sought for his father to

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Bentham's position within that organisation, see Roger Morriss, *Naval Power and British Culture, 1760-1850* (Ashgate, 2004), chs 6 and 7 ("*Naval Power*").

[40] See Jeremy Bentham, Letter to Charles Brown (580) (18/29 December 1786) in *The Correspondence of Jeremy Bentham: Volume 3 January 1781 to October 1788*, Ian R Christie (ed) (Athlone Press, 1971), 502-3.

[41] Ibid.

[42] See Jeremy Bentham, Letter to Jeremiah Bentham (582) (18/29 December 1786) in *The Correspondence of Jeremy Bentham: Volume 3 January 1781 to October 1788*, Ian R Christie (ed) (Athlone Press, 1971), 509-12.

[43] Ibid, 509.

[44] Werrett, 'Potemkin and the Panopticon' (n 29) 22.

mention the device to magistrates—where it could assist with their substantive business or administration.

While some scholars have noted that the panopticon project had its origins in Russia, few have fully thought through the implications of the specificity of context in which this architectural design was posed as a technical solution. For example, Christie describes the panopticon's invention as emerging from the problem of errant labour, but also of the imposition of discipline by administrators

> 'Samuel's preoccupation with the general problem of supervision of unskilled industrial labour gave birth during 1786 to the famous scheme of "central observation" .... Samuel conceived that training of and supervision of large numbers of unskilled Russian workmen by a handful of skilled craftsmen from the West might be best carried out in an "Inspection House".[45]

Critically, what is missing in this text is an engagement with the broader labour politics that it intervenes in, and the colonising impulse, where middle class British discipline was sought to be imposed in order to extract value from an "unskilled" indigenous workforce, that is directed towards securing advantage for the British and Russian empires.[46] That these men were engaged with thinking about the transformation of the broader economy is evidenced by Samuel Bentham's specific request that Jeremy forward him Adam Smith's *Wealth of Nations* as he departed into Potemkin's employment.[47] Certainly, this provides some evidence that this text, opening as it does with the thesis that a division of labour is central to the generation of national wealth and rightful prosperity of those who command a labour force.[48] Smith's text was discussed as part of the preparation undertaken for Samuel Bentham's expansive new role in

[45] Christie, *Benthams in Russia* (n 23) 177.

[46] The broader context of this plan was to secure a source of lumbar for British shipbuilding in exchange for knowledge in the design and manufacture of ships.

[47] Samuel Bentham, Letter to Jeremy Bentham (492) (12/24 March 1784) in *The Correspondence of Jeremy Bentham: Volume 3 January 1781 to October 1788*, Ian R Christie (ed) (Athlone Press, 1971), 248.

[48] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), 1, chapter 1. For a relevant critical appraisal, see Mark Neocleous, 'Policing and Pin-Making: Adam Smith, Police and the State of Prosperity' (1998) 8(4) *Policing and Society* 425.

southern Russia. Likewise, in a previous letter, where he explains the material and reformist opportunities afforded by entering into Potemkin's service:

> 'Consider then my inventive disposition and the imperfect state of things every department here and you will have no doubt but I must have a multitude of proposals for improvement which have arisen from what I have seen in this country, over and above those which /we/ have talked over together and which are applicable to most countries'[49]

The sale of Potemkin's estate in Krichev in 1787 meant that the first experimental panoptic workhouse designed to facilitate the supervision of bricklaying instruction was planned but ultimately not constructed.[50]

In 1795, Samuel Bentham was appointed by the Board of Admiralty of the Royal Navy to the newly created office of Inspector General of Naval Works.[51] Peter Linebaugh interprets his eventual ascension to high office within the Navy as a result of his 'considerable experience of mechanical design and shipbuilding, together with his equally important experience of the problems of controlling a large, insubordinate workforce'.[52] However, it was his refinements in management and manufacturing technique that set Samuel Bentham aside from his peers. One example from early 1791 involves his realisation that where machinery is involved in manufacturing, 'wholly disregarding the customary artificial arrangement according to trades' and 'classing the several *operations* requisite in the shaping and working up of materials of whatever kind',[53] improved construction processes. Similar to Frederick Taylor in the early twentieth century, [54] Samuel Bentham sought to design 'machines by which [those operations]

[49] Samuel Bentham, Letter to Jeremy Bentham (488) (20/31 January 22 January/2 February 1784) in *The Correspondence of Jeremy Bentham: Volume 3 January 1781 to October 1788*, Ian R Christie (ed) (Athlone Press, 1971), 241.
[50] Christie, *Benthams in Russia* (n 23) 178.
[51] The Commission was formally established by the Admiralty and the King in Council on 23 March 1796: Roger Morriss, 'Ideology, Authority and the Politics of Innovation in the Royal Dockyards, 1796-1807' (2014) 16(1) *Journal for Maritime Research* 15, 18.
[52] See Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Allen Lane, 1991), 373.
[53] Maria Bentham (n 24) 98.
[54] Frederick Winslow Taylor, *The Principles of Scientific Management* (1911).

might be performed, and that, independently of the need for skill or manual dexterity in the workman'.[55] The problems of English naval construction and its labour force bear a striking similarity to Samuel Bentham's problems with skilled yet unruly labour in Russia. Samuel Bentham's widow saw the link between these two problems: paragraphs on his steam powered machines to assist with carpentry and shipbuilding segue directly into a discussion of Jeremy's work on the panopticon: the connection is labour efficiency. She remarked that Jeremy's plans 'depend[ed] on his brother Samuel for the contrivance of such machines as might be profitably worked by unskilled hands'.[56] These machines were to be included in the panopticon's workrooms so as to better exert from prisoners a product independent of their skills and talents.[57] The solutions to the problems of the day involve an attempt to use space and procedure to bring an unruly world to order.

The second occasion for Samuel Bentham to travel to Russia was as an emissary of the Naval Board,[58] who nominally sought his assistance in negotiating a contract for the offshore construction of British warships in Russia.[59] His connections positioned him to negotiate an arrangement with the Russian government whereby Admiral Tchitchagoff, the Minister of the Marine, agreed that they could build ships if 'for every vessel laid down to the English Government, a similar one should be commenced for Russia'.[60] Despite the Admiral's support for the plan, Tsar Alexander personally declined his request for the building of English ships in Russia giving the reason that the Tsar did not want the timber resources of Russia being used in the construction of English ships.[61] Regardless, in exchange Samuel organised the

[55] Maria Bentham (n 24) 98.
[56] Ibid.
[57] Ibid 99.
[58] In the British Navy, the Naval Board had administrative responsibility for both the treasury and dockyards of the Royal Navy,
[59] Maria Bentham (n 24) 236-7.
[60] Ibid 237.
[61] Philip Steadman, 'Samuel Bentham's Panopticon' (2012) 14 *Journal of Bentham Studies* 1, 5. The purchase of timber provided the cause of protracted diplomatic negotiations between Russia and England, where

construction of a School of Arts in the style of the panopticon on the banks of the river Ochta. It was hoped that the school would assist in negotiations; and while it was unsuccessful in that aspect, Samuel Bentham did oversee the construction of this new school for Russian craftspeople in more advanced techniques for manufacturing naval equipment and supplies.[62] This building was constructed in 1807, only to be lost to fire in 1818 due to the construction of structural columns from wood rather than the specified iron.[63]

**B. From Isolated Problems to Isomorphism**

The cost and complexity of building a warship from the timber of a foreign power cannot be understated as a task of skill, diplomacy, craft, supervision and technical difficulty. The previous section has considered some of the factors that informed the emergence of the panopticon as a potential solution to a problem of labour and struggle steeped in the politics of place and time. And yet, the solution should not be allowed to subsume the problem, which was one of how to order productivity, govern a complex labour force, and regularise the conduct of wilful persons. Conceptually, these concerns provided Bentham with a vantage from which to re-think the architecture of government,[64] the government of conduct, and discursive involvement in a number of imperial projects. In the reading offered here, the specificity of the project inspired what Jeremy Bentham and Michel Foucault both recognised as obtaining a general application or diagrammatic quality in explaining a transformation of power. Nevertheless, my concerns are

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the latter sought to have the timber purchased in Russia for the construction of two frigates sent to England duty free after the emperor refused to permit the construction of ships in Russian docks.

[62] Ibid.

[63] Ibid 12. Bentham was forced to leave Russia in 1807 due to the outbreak of the Anglo-Russian war which was declared due to treaty obligations imposed following Napoleon's military campaign into Prussia. During this period, on account of his standing with the Emperor, Samuel Bentham was still able to inspect and annotate his notes on the Russian shipbuilding facilities: MS Bentham, n 54, 246-7

[64] What Sheila Jasanoff might term a co-production, as the vitality of the question is re-asserted necessary for animating the priority and importance of that which saw a solution brought into being, see 'The Idiom of Co-Production' in Sheila Jasanoff (ed), *States of Knowledge: The Co-Production of Science and Social Order* (Routledge, 2004) 1.

narrower, and I've sought here to follow the relations of government and how questions of conduct might be made visible in the discursive remains.

What difference does a brother's input make? After all, Michel Foucault half-jokingly dismissed questions of the author-function arising alongside 'the murmur of indifference',[65] in favour of an understanding of the place of revivified discourse in the present. The first mention of both Bentham and the panopticon in *Discipline and Punish* notes that 'Bentham's *Panopticon* is the architectural figure of this composition' of disciplinary surveillance.[66] True to his method, Foucault refers only to an ambiguous Bentham in his text, reserving the initial "J" only in the bibliography and figure attribution.[67] Rather than representing a "tiresome repetition" about the rules of attribution and filiation,[68] the question of origination and fraternity, the styles and conduct of labour that both brothers engaged, the conditions of generation of a discourse speaks to a series of important relays between the insight into mechanisms of control and the changing politics of power to which Jeremy Bentham's text stands as Foucault's own paradigm.

It is worth reflecting on how both brothers communicated their understanding that the innovations were addressed to the domain of administration—through both procedural mechanisms and the various prosthetic devices, such as the panopticon—configured as they were to better enforce their uptake. For Samuel Bentham, these administrative principles were employed in his new role at the head of the naval shipyards, in addition to his designing and implementing improvements in the machination of the shipbuilding and dry-docking process.[69] Jeremy Bentham however, retained his interest in both the penal and juridical applications of

[65] Michel Foucault, 'What is an Author' in DF Bouchard ed, *Language, Counter-memory, Practice: Selected Essays and Interviews by Michel Foucault* (Cornell, 1977) 113, 138.
[66] Foucault, *Discipline and Punish* (n 19), 200
[67] Curiously, the English translation of this text never clarifies which Bentham is referred to. The word Jeremy does not appear beyond Alan Sheridan's translator's note.
[68] Foucault, 'What is an Author' (n 65) 138
[69] See Morriss, *Naval Power* (n 39) ch 6

the panopticon, alongside his later work on preventative policing.[70] At all stages in Jeremy's career, we can detect a yearning towards abstract order and the methodisation of practice to better lead toward a prescribed objective. However, when looking to the consequences of their efforts rather than their intentions, the brothers Bentham took advantage of these intersecting imperialisms in order to solicit both employment and opportunities to reform systems of law and its administration. The panopticon was designed to facilitate the superintendence of skilled, artisanal, labour, as part of the technologically and logistically complex task of constructing ships. In this regard, it is neither a metaphor nor a diagram, but the very problem that the Benthams sought to find a way to govern. Procedure, empire, and the process of commodification float down the same river.

## III. Jeremy Bentham's Principles of Procedure

In the months following the formal refusal of the Home Office to adopt the panoptic model of penitentiary reform, Jeremy Bentham set about composing a long-planned book on legal procedure.[71] The introduction to this book was one of the first documents that he wrote on hearing of the Home Office's refusal to build his penitentiary. It is in this context of disappointment and Bentham's concern about decision making inside government, that he turns his attention to thinking through a utilitarian procedure model for the administration of law. In the *Principles of Judicial Procedure*, Jeremy Bentham imagines and argues for a general philosophy of procedure and outlines a series of precepts which would animate a formally legislated code of procedure along utilitarian lines. In the service of this aim, Bentham published an idiosyncratic work of jurisprudence not beholden to extant conventions of genre. Its prose is awash with the same prudential and legal tensions that inform the text's context and substance.

[70] See Chapter Six.

[71] In Bentham's archives, there are preparatory materials that discuss procedure in the late eighteenth century. Boxes of papers from 1790 onwards include notes and preparatory materials that were made for this and other projects that were neither completed nor published. See UCL Boxes 50-1.

That is to say, politely, that Bentham's text at times haphazardly pivots genre from a charismatic, normative argument for re-thinking procedure, to rigorous deductive explications from clarified and articulated first principles, to questionable inductive critique situated in a style of unverifiable empiricism, to passages of cutting polemic invective. These shifts in idiom stand out as a partial reflection of the problem generated by attempting to rethink an extant arrangement of office-holdings into an abstract and systematic form for holding the question of conduct without reference to ends of laws but instead oriented toward the ends of law. In this regard, the texture of the writing itself expresses a search for a language of institutional conduct capable of holding and sustaining the utilitarian ambition of calculable moral certitude as a precept of lawful activity.[72] As such, this section will present an account of *Principles of Procedure* as an attempt at forming a cogent procedure of juridical government. For Bentham, the challenge is at once to find a language for this new procedure which is capable of both articulating its novel forms while also sustaining the rhetorical capacity to slough off Bentham's perception of the common law's methods as a centuries old sediment of cruft and grift.

In the interpretation that follows, I want to offer an account of the jurisprudential substance of Bentham's reimagination of how the conduct of lawful conduct might be arranged according to a utilitarian ethos that remains tethered to the political context from which it emerged. Bentham recognised that the shaping of judicial procedure had the capacity to assert and pattern the government of law, and as such represents an argument for the 'complete inaptitude of the established system with reference to its professed purpose'.[73]

If the overarching question concerns how to govern the activity of law such that its conduct can be more closely aligned with the guiding principle of utility maximisation, then procedural

[72] These principles are worked out in a variety of sources in Bentham's writings, from his Fragment on Government onwards Jeremy Bentham, *A Fragment on Government* (Clarendon Press, 1891 ed) ("*Fragment*").
[73] Bentham, *Judicial Procedure* (n 1) 5.

reform of English civil and ecclesiastical law represents a mechanism by which to subject those principles that ought to govern the pragmatic or prudential dimensions of law to standardisation. If this sounds abstract as a technique of jurisdiction, Bentham was equally and sensitively aware of the material contestation that would follow such a call to reform. After all, the material politics are those whereby 'real improvement [is] obstructed, and even improbabilized, by the construction of new offices, with enormous salaries attached to them'.[74] To this end, the proposed reforms are directed squarely at the nineteenth century common law judges and 'the mode in which their remuneration has commonly been allocated'.[75] Bentham argues that the plurality of existing mechanisms which have been 'baptized the *technical*',[76] are an artifice of obfuscation, 'a purposely and most elaborately organised system of confusion'.[77] His critique is that existing common law procedures from the issuance of writs and indictments by which judges govern 'this branch of the law [that] has had for its object, or end in view, the interest of this class of the functionaries concerned in the making of it.'[78] Forms and their attendant fees quite literally compose the nub of his critique of the 'retail way' judges supplemented their salaries while 'the poverty of the greatest part of the contributors' to a need for judicial services meant that potential litigants were precluded from accessing the public service of adjudication.[79] More radically, he argues that this is part of the constitutional marrow of the jurisdiction of the common law;[80] derived as it is from a project of monarchical power in the arguments regarding the virtues of tradition, 'the only end of the English system that is ever

[74] Ibid 5.
[75] Ibid 6. Bentham points out that, in contrast to the institution under critique, he does not personally stand to profit from his arguments here. On the managerial resonances of Bentham's arguments for public administration: LJ Hume, *Bentham and Bureaucracy* (Cambridge University Press, 1981) ("*Bentham and Bureaucracy*").
[76] Bentham, *Judicial Procedure* (n 1) 7, emphasis in original. By way of contrast to the system of writs, see from p. 36 the script for the oral hearing to commence a suit.
[77] Ibid 7.
[78] Ibid 6.
[79] See Ibid 11-12.
[80] See Ibid 14.

brought to view, is—the keeping up the customs commenced in the darkest ages'.[81] The judiciary therefore does not escape his broader critique about the conduct of power and political life, where 'the actual ends of government have been the maximisation of the happiness of the aggregate of persons bearing respectively a part in their exercise of the powers of government'.[82] And yet, as Bentham quips of attempts at reforming procedure: '[n]o housebreaker has an interest in preventing the abolition of housebreaking'.[83] So what follows is Bentham's address to the question of how law might be conducted as a utilitarian enterprise. It represents a rethinking of the conduct of law through the responsibilities and activities of its principal officers and the government of the translation of political or legislative priorities into action.[84] The object to be realised is that legal procedure should provide those

> 'instruments the people… look for, at the hands of the government:—such are the securities which in a government, in the breasts of the members which any regard for the greatest number had place, would lose no time bringing into existence'.[85]

Consequently, a key component is a procedure that, when stripped of technicality, facilitates 'the maximization of redress for the injured in the character of pursuers, with the minimization on the innocent in the character of defendants'.[86] Technique should be repurposed as a mechanism for the better government of law.

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[81] Ibid 11. This is an ongoing refrain in Bentham's critique of Blackstone's fortification strategy as his apologist *par excellence* of the common law) where the darkness describes both an architectural preference for gloom, but also, while also being adopted to describe a mode or rhetoric of relation between both people and critique:

> 'He should have considered, that it is easier for *him* to turn the Law into a Castle, than it is to the imaginations of impoverished suitors to people it with Harpies. He should have thought of the den of Cacus, to whose enfeebled optics, to whose habits of dark and secret rapine, nothing was so hateful, nothing so dangerous, as the light of day',

Bentham, *Fragment* (n 72) 112-3. See also Chapter One of this thesis.

[82] Bentham, *Judicial Procedure* (n 1) 11. He also describes this as 'the sweets of government: power, wealth, factitious dignity; ease, at the expense of official duty, and vengeance at the expense of justice' (11).

[83] Ibid 12.

[84] Ibid.

[85] Ibid.

[86] Ibid 9.

In his attempt at a clarification of method, Bentham starts by outlining a concern with the existing state of plural jurisdictions. He reads this situation as generative of additional complexity for litigants, prosecutors and accused alike:

> 'common law, equity law, civil law, penal law, ecclesiastical law, admiralty law, general sessions law, petty sessions law, and so on—all differing from each other while pretending to be directed to one and the same object—the discovery of truth in regard to facts, by means of evidence'.[87]

Although Bentham makes no specific reference to the common law media of writs, indictments and the like, his argument for the unification of jurisdictions necessarily and properly involves generalising the availability of punishments and remedies open to the judge in resolving a dispute:[88]

> 'For the judge to be able to give execution and effect to the appropriate portion of the law involved… what is necessary is,—that the means of execution be in his power—at his disposal—in his possession, or at his command'.[89]

The argument here is to propose a model of veridiction capable of not only a flattening of the epistemology generative of distinct traditions of epistolary and aural evidence in different jurisdictions and insist that the form is generalisable, and detached from forum. The ongoing existence of multiple jurisdictions with their own procedural devices, remedial possibilities and evidential paradigms are symptoms of an injustice of and through law.[90] Institutional differences and competing traditions of thought and reasoning are instead parsed *contra* the general character of modern legislation as 'the particular and sinister interest of the institutors, at the expense of and by the sacrifice of, the general interest'.[91] Such a reworking of plural procedures into a single, isometric, jurisprudence of procedure is asserted as an enlightenment

[87] Ibid 7.
[88] This plays out as both a question of the availability of particular remedies open to different courts, but also to the plurality of jurisdictions in which different rules of evidence might be applied to the same facts with a plurality of different remedial outcomes. Ibid 10-11.
[89] Ibid 10.
[90] Ibid 10-11.
[91] Ibid 7.

virtue to accompany the advantages and supposedly neutral transformation of laws into a single law.[92]

### A. On What Procedure Is: Connection of Judicial Means to Empirical Ends

Procedure establishes the internal logics of institutions insofar as Bentham imagined the standard of utility maximisation as a template of institutional forms of activity through which to maximise the realisation of legislative will in the world. Broadly speaking, Bentham views the institutions of law as a public medium for the conduct of disputes between parties, and for legitimating the punishment of the guilty, and for the protection of the innocent from the processes and expenses of the law. His jurisprudence of procedure therefore describes the co-ordination of institutions, so that the 'the ends of justice' might be realised through the judiciary. That principle binds procedure to two ends:

> 'the one positive, maximizing the execution and effect given to the substantive branch; the other negative, minimizing the evil, the hardship, in various shapes necessary to the accomplishment of the main specified end.'[93]

Procedure emerges as modern in the sense that it is envisaged as a form of second order conduct: procedure answers the question of how to conduct the conduct of legislative will, of how to connect ends to means. It is, 'an accessory code, which, as we have seen, has for its end in view, and occupation, the giving execution and effect to a correspondent principal code.'[94] Because second-order concepts are neither simple or mere doublings, procedure escapes its definition as a pure accessory, where the 'substantive code should, as mathematicians say, be given, or the adjective can have no meaning'.[95] Its impurities are a necessary supplement for its operation in

[92] Robert Cover also noted this tendency in contemporary, state articulated positive law, whereby he was concerned about the capacity of the law of the nation state to override the interests of other orders of lawful conduct. See 'The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 4 ('Nomos and Narrative').
[93] Bentham, *Judicial Procedure* (n 1) 8.
[94] Ibid 15.
[95] Ibid.

the world, '[i]f it did apply to its whole extent, this work would, from first to last, be unintelligible and useless'.[96] Consequently, the barest requirements of procedure necessitate that it should be intelligibly isometric; it should be possible to give shape and form to procedure in the absence of specific details about the substantive effects that it is directed towards. Bentham outlines what might be called a general law of freestanding procedure, or that

> 'which may be given without the previous exhibition of any part of the system of substantive law. The means for coming at the truth, as to matters of fact, are the same in all cases; the means for obtaining and exercising the powers necessary to the giving execution and effect to the ordinances of substantive law, are the same in all cases.'[97]

In other words, procedure concerns standardising the lawful apprehension of the world: it is empirical, it prescribes a newly ordered and abstracted model for the conduct of veridiction.[98] Procedure appears in this model as a technology that mediates the ideational world of the law and the messy empiricism of the worlds that it governs. Procedure comes to describe the suite of forms and concepts available to the jurist while simultaneously modelling its prudent or skilful application, shaped as it is, within but before a body of codified or legislated principles. Consequently, Bentham's procedure obtains a 'correct and undeniabl[y]'[99] porous interiority: at once describing a body of law that outlines the conduct of lawful interpretation while also sustaining a rubric or standard for the assessment of lawful conduct. Equally, one of porosity's other virtues is that it lets the light in, facilitating surveillance or superintendence. Bentham's procedure is oriented toward preserving 'the tutelary exercise over the judge by the public eye',[100] because

[96] Ibid.
[97] Ibid.
[98] In the context of evidence, see Draper, Anthony J, '"Corruptions in the Administration of Justice": Bentham's Critique of Civil Procedure' (2004) 7(1) *Journal of Bentham Studies* 1, 7.
[99] Bentham, *Judicial Procedure* (n 1) 15.
[100] Ibid 8.

> 'the grand security of securities is publicity:—exposure—the completest exposure of the whole system of procedure—whatever is done by anybody, being done before the eyes of the universal public.'[101]

Procedure, in echo of the lessons learned from the panopticon project, takes as one of its predicates the necessity of governing the conduct of judicial labour by designing an architecture of potential superintendence.[102] This opening of *in camera* decision-making represents a jurisprudential explication of a transition from a plural assortment of jurisdictionally distinct offices to an administrative arrangement of legal work, in which jurisdiction is reconfigured away from plural institutional interests toward a cogent arrangement of conduct, itself capable of sustaining institutional form.[103] One important mechanism for achieving this is by way of inviting the public into specifically judicial deliberations in deciding questions of punishment. One of Bentham's ideas involves reconfiguring the composition and procedural role of juries, whom he notes represent 'an occasional body of non-professional and non-official judges, employed to constitute and apply a check to power of a professional or official judge'.[104] The reason for this involves explicating the virtue of a jury, as they are responsible for

> 'infusing a general weakness into the powers of government: into the powers of government taken in the aggregate, but more especially when considered in relation to the people… The benefit produced by the jury with its unanimity, is produced by striking the laws every now and then with impotence'.[105]

It is worth reiterating that Bentham's project concerns how 'the whole frame of government' might come to be expressed through the argot of procedure.[106]

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[101] Ibid. Bentham follows this principle in its positive form: that without the appearance of justice it is immaterial to a broader public whether the actions of the judiciary brought about real justice (See discussion at 20-22).

[102] To this end, he discusses the layout of antechambers and choreography of doorkeepers: Ibid 35.

[103] A similar argument is advanced by Oren Ben-Dor, 'The Institutionalisation of Public Opinion: Bentham's Proposed Constitutional Role for Jury and Judges' (2007) 27(2) *Legal Studies* 216.

[104] Bentham, *Judicial Procedure* (n 1) 118

[105] Ibid 125. Note Bentham's proposed formulation for the expansion of this function into a novel institutional form will be discussed in the following section.

[106] Ibid 119.

The real innovation here is that Bentham synthesises a common set of concerns about the conduct of lawful conduct that is capable of intelligibility without knowledge of, or indeed, the existence of, a set of primary rules or aims to which it is directed. In penal and civil law, Bentham reduces this task to the practical mantra, 'the accomplishment of punishment of the delinquency-effectuation of well-grounded claims'.[107]

Bentham sets procedure in motion as an isometric tool of governance, a common procedure applicable regardless of the substantive aims and ordinances: 'the means of obtaining and exercising the powers necessary to the giving execution and effect to the ordinances of substantive law, are the same in all cases'.[108] Consider for example, the tasks accomplished by the writ of *habeas corpus*, an arrest warrant or even imprisonment as contexts in light of this statement:

> 'Taking possession of a man's body, for the purpose of securing, on his part, compliance with ordinances—ordinances of the substantive law, and thence, those of adjective law employed in giving effect to them. This power, once possessed, is in its nature, applicable to any one purpose as well as any other: to the exaction of service in any shape—to the infliction of punishment in any shape'.[109]

The task is taking possession, regardless of purpose, and Bentham argues that the jurisprudential genre of procedure should position activity prior to purpose and form in its organisation and orientation. Likewise, in thinking about punishment, Bentham binds legislative will to judicial purpose through a schema or arrangement capable of deploying a species of applied deductions adapted with increasing sensitivity from general principles in order to apply a more measured violence to the body of the prisoner.[110] Once a punitive activity has been identified, to its achievement or articulation symphonic expression of reason is

> 'the best that can be pursued, for the purpose of giving execution and effect to the whole system of substantive law—execution and effect down to that stage in which the execution in

[107] Ibid 20.
[108] Ibid 15.
[109] Ibid.
[110] See Robert Cover, 'Violence and the Word' (1986) 95(8) *Yale Law Review* 1601.

> each instance (in the instance of each service, and in the instance of each punishment) is actually to be done; the tenor of the definitive decree must be accommodated and adapted to the particular service—to the particular punishment'.[111]

Or as he puts it, '*rendering justice*—taking that course in every case which co-incides with the track marked out beforehand by the finger of the law'.[112] Of course, notwithstanding the possibility of self-referentiality or the closure of a textual world, such a track is itself marked out by the legislature, with definitional consequence for procedure when 'the course taken for the execution of the laws, viz. for the accomplishment of the will declared'.[113] And any revised 'system of judicial procedure, it has been seen, has for its proper object, the giving execution and effect to the ordinances of the legislature'.[114] The revision of procedure is therefore a political project whereby 'the only defensible object, or say, end in view is the maximisation of the execution and effect given to the substantive branch of the law'.[115] As such, utilitarian procedure can be understood as an administrative sinew or bridgehead between means and ends. Procedure describes the principles governing the organisation (the arrangement, alignment, and inter-operability of instructional forms) of the project of the carriage and conduction of the administration of Bentham's legislative paradigm into effect.

The aim of Bentham's reimagined code of procedure was to provide the most rational means of enabling the ends of legislation to be realised. Although this procedure is pragmatic in aim, it can also be thought of as tuning the conduct of law to the maximisation of utilitarian ends. As

[111] Bentham, *Judicial Procedure* (n 1) 16.
[112] Ibid 20. Bentham here is not referring to traditional procedure, but instead tries to institute a new form dogmatism that intuits a relationship between the furrows through which an attachment to institutional life might become dogmatically attached. However, in contrast to this orthodoxy, here the tracks aren't those traditional furrows of time immemorial but are the product of the geometric imagination of the legislature. Although his thinking is superficially defined by its scepticism, nevertheless he at times returns to sustain both continuity of form against a tradition he seeks to overthrow: reaffirming the hold of methods and instruments, hold while nevertheless distancing himself from precise instances of attachment. See further, Yifat Hachamovitch, 'The Ideal Object of Transmission: An Essay on the Faith Which Attaches to Instruments (*de fide instrumentorum*)' (1991) 2(1) *Law and Critique* 85.
[113] Bentham, *Judicial Procedure* (n 1) 5.
[114] Ibid 33.
[115] Ibid 6.

such, it is a project that marries the political to a utilitarian rationality, with parts both pragmatic and abstract, insofar as Bentham sought to arrange conduct so as to minimise impediments to the smooth translation not only of legislative will to judicial and executive action, but also of remedying illegalities and bringing litigants' affairs into comity with law. In assessing the rationality of any procedure, Bentham recognises that there is a 'pervading and perpetual'[116] tension between 'maximising the execution and effect given to the substantive branch' and 'minimising the evil, the hardship, in various shapes necessary to the accomplishment of the main specified end'.[117] Alongside an abiding interest in optimising the efficient use of time and of the legal system for legitimate non-vexatious purposes is a concern to develop institutional arrangements for the governance of truth maximisation and falsity minimisation. Because this conflict invites systematic and individuated injustices through the application of judicial procedure, judgments should be subjected to the 'the grand security of securities… *publicity*'.[118] The aim is political: to expose the government of the law to informed critique, to ask if its ends are obtained in each atomised instance of decision-making. In keeping with Bentham's model, the advantages of transparency are voiced as necessarily fractal, extending from the workaday minutiae of procedural decision-making in the course of litigation to broader concerns about the government of law, directed at avoiding

> 'put[ing] into the hands of the oppressor—of every oppressor who is rich and wicked enough to purchase the use of it… an instrument by which under the yoke of one-tenth of the population, nine-tenths are kept in an oppressed state'.[119]

There are two ends specifically adapted to the penal branch of law. First, how to ensure the 'infliction of punishment' on the guilty.[120] And the second aim is how to ensure the non-punishment of the innocent.[121] Bentham is alert to the fact that while his procedure code might

[116] Ibid 8.
[117] Ibid.
[118] Ibid.
[119] Ibid 9.
[120] Ibid 17.
[121] Ibid.

aim toward these two ends, assessing the relative merits of reform requires also mediating a number of related issues: (1) demanding time from participants in a proceeding; (2) 'confinement in place',[122] either through imprisonment or through the requirement to attend; (3) financial cost; (4) psychological cost; (5) a combination of effects and affects brought about secondarily by these issues generated by the application of procedure.

Rather than being content to state that a choice of procedure generates a set of irresolvable tensions, Bentham is convinced that these are problems capable of singular resolution rather than a balanced or tensioned compromise. Consider the concept of delay as a case in point:

> 'by delay, therefore, neither more nor less is understood than the consumption of any portion of time that would be sufficient for the abolishment of the several ends of procedure in their respective greatest degrees of perfection, whatever it may be'.[123]

The relationship between timeliness and delay is one such example of how these outcomes stand in a tension that Bentham can at once recognise and dismiss as resolvable through a style of empiricism that disavows its norms: what is sufficiency? How is the "greatest degree of perfection" articulated? Why dismiss them as "Whatever they may be"? In thinking about delay, Bentham's procedural jurisprudence reveals its claim to universality and its superficiality. The point here isn't to be critical of Bentham's genius for its recourse to shallow empiricism, but to point out that the resolution of complexity through this gestural recourse to both a style of empiricism and a superficial logic are themselves symptoms of the kind of epistemology that underwrites this jurisprudence; at once as content and confident in its predictive capacities,[124] as it is with statistical abstraction as a style of appreciation or apprehension of the truth of experience and with respect to the politics of translating law into action.

[122] Ibid.
[123] Ibid 17. Cf Niklas Luhmann, 'Tautology and Paradox in Self-Descriptions of Modern Society' (1988) 6(1) *Sociological Theory* 21, on the importance of paradoxes for understanding coherent wholes.
[124] Bentham, *Judicial Procedure* (n 1) 18.

**B. Institutions for the Conduct of Lawful Government**

How should conduct be ordered as procedure? In a self-satisfied moment, Bentham describes his pleasure in tuning the conduct of law to the ends of government. In the following passage, technique and metaphor, method and object are revealed as ordered through the taxonomic and epistemological aspirations borrowing from the scholastic logic of the porphyrian tree.[125] Bentham writes

> 'On no occasion can it fail to be matter of satisfaction to the mind, to feel that it has within its grasp the whole of the subject-matter which it has taken for consideration. But on every such occasion, a movement necessary to this purpose is the occupation of the universal vantage ground, by ascending to the summit of the porphyrian tree. To endeavour to communicate to the mind of the reader this pleasurable sensation, is the business of the present chapter.' [126]

In order to describe the ordering of procedure, Bentham outlines the axioms of his model of how procedure is to work. To this end, procedure is

> '... an aggregate of connected actions, exercised by divers[e] actors; the first of which has, or professes to have, for its object, or say end in view, the giving on some individual occasion, for some individual purpose, execution and effect to some determinate portion or portions of the substantive code, or say branch, of law.'[127]

This understanding of procedure infuses the conduct of law and the institutions of legal judgement with an individuating ethos. Law itself is atomised to those articulable statutory portions, and likewise, they are rendered available or executable through the agency of self-interested individuals.

Bentham's model translates utilitarian principles and concepts into an institutional form.[128] As such, his re-working of procedure also pre-figures a novel jurisdictional arrangement which not only addresses the familiar questions of territorial operation and subject matters of adjudication but the administrative arrangement of courts, a plan for training officials, and the regulation of

[125] On the related question of the ordering of legal subjects, human and otherwise, through the scholastic rubrics: see Piyel Haldar, 'Law and Animalities' (2009) 3(1) *Law and Humanities* 71.
[126] Bentham, *Judicial Procedure* (n 1) 24.
[127] Ibid 25.
[128] See on this point Oren Ben-Dor (n 103).

the legal profession. Bentham's preference is for judges in a court to number 'in no instance more than one'.[129] In contrast to the extant arrangement of jurisdictions, all courts were to possess a subject-matter 'omnicomptence', to address any legal questions within their jurisdiction.[130] This was to be tempered by a right of appeal to a central, London-seated, appellate judicatory.[131] Additionally, the courts are to be supervised by 'the presence of a good public or say committee of the public-opinion tribunal'.[132] While this at first scans as an awkward description of the press, it instead represents an insistence that listening to earlier trials possesses a pedagogical valence and an assistive potential for either solicitors in training, jurors awaiting empanelment, those awaiting their hearing, government solicitors, and the eleemosynary advocate (or court appointed lawyer for 'the otherwise helpless, among suitors'[133]).[134]

Judicial office consists of judges performing three judicial functions: '1. The auditive; 2. The Inspective; and 3. The lective'.[135] To ensure that their time is spent on these functions, courts are also 'attached 1. A Registrar; 2. A government advocate; 3. An eleemosynary advocate',[136] each of which can also assign deputes as required by workload.[137] When the court's workload exceeds its 'quantity of judge-power, using the term in the same sense as in the cases of clerk-power or horse-power',[138] the judge has 'the power of locating deputes, permanent and occasional, in

[129] Bentham, *Judicial Procedure* (n 1) 11.
[130] Ibid 22.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Bentham argues that every courtroom 'is a school of justice… In it, the part of master is performed by the judge; the part of scholars by the jurymen; and what takes place, takes place in a company more or less numerous of spectators'. Ibid 125.
[135] Ibid 23.
[136] Ibid 22. Bentham's understood legal assistance as the furtherance of charitable outreach rather than democratic or public participation.
[137] Ibid 23.
[138] Ibid.

number to which no present limits can be assigned'.[139] Training for judicial office is not at the bar, but instead by way of a period of apprenticeship as a judge-depute.[140] Indeed, in breaking from the common law tradition of the judiciary being appointed from the barristerial ranks, he spells out that 'no person who has ever acted in the capacity of a professional lawyer will be capable of being located in the situation of a judge'.[141]

To follow this thought, let's return to Bentham's porphyrian tree of judicial procedure (Figure 1, diagrammed below), recalling that his aim is to strip procedure of its technical idiom and return questions of government to a broader register. Bentham divides procedure into the allocation of powers between actors in accordance with the legislative's substantive code and how to actuate those powers in the world following the apprehension of facts about it. My focus here is on the question of conduct rather than evidence, so that will be where attention remains.

[139] Ibid

[140] Ibid. See also Anthony J Draper, '"Corruptions in the Administration of Justice": Bentham's Critique of Civil Procedure' (2004) 7(1) *Journal of Bentham Studies* 1, 8-11.

[141] Bentham, *Judicial Procedure* (n 1) 23.

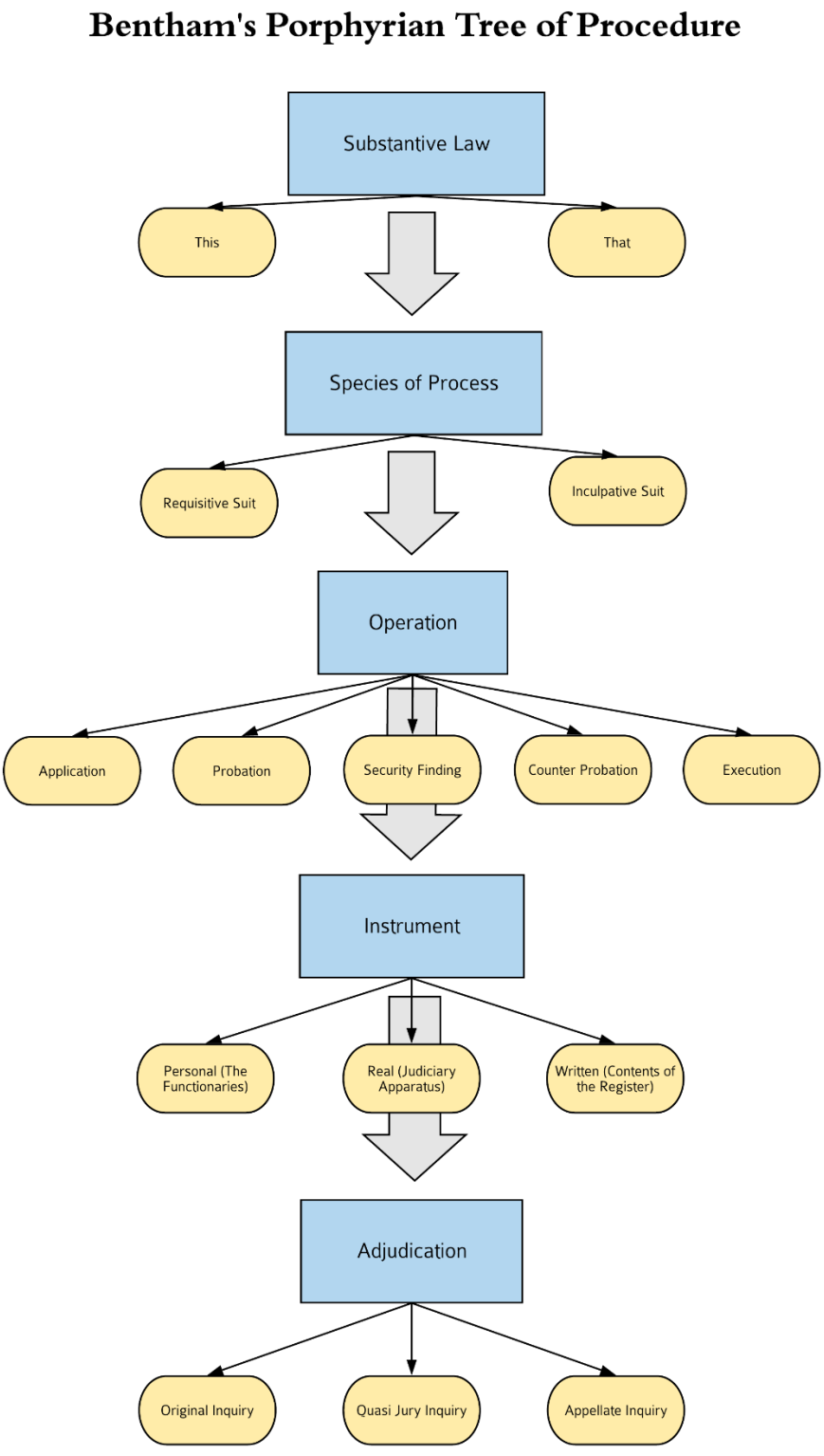


*Figure 1: Author's map of Bentham's model of procedure*

### i. Operations

Finding a language for the conduct of law required Bentham to distinguish a grammar of actions from a vocabulary of results. Operations are here understood as actions, 'the idea attached to the word motion'.[142] For Bentham, an operation pertains to the 'relation and character of a *means*'.[143] As such, it is abstracted from the intentional will and becomes 'fictitious, emanating as it were from the real entity',[144] distinct from an operator (here called an Instrument, see below). There is a difficulty of language that Bentham acknowledges, the structure of the verb conveys 'the want of two different appellations for the designation,—one of the act, or say the operation—the other, of the result, whatever it be, of that same act or operation."[145] At heart though, Bentham is trying to convey a sense of the movement of subjects and instruments of law through a series of institutional events. And, while movement provides the organising concept, it is haunted by a linguistic bifurcation of actions and effects/operators and operations. Bentham's schematic here privileges the ordering of activity rather than either the media technologies or the techniques of contemplation (which is reserved as the internal process of operators).[146] The reason for this is that Bentham articulates procedure as that which organises the *activity* or processes for apprehending the truth of claims (here, we might see a doubling over of contemplation of action linked to the contemplation of verification):

> 'Abhorrent to natural procedure is the distinction between allegation, or information, and evidence. In technical procedure alone—in that system alone which had for its object the generation of lies, for the purpose of maximizing the number of groundless suits and defences,—could any such distinction have originated.' [147]

[142] Ibid 24.
[143] Ibid.
[144] Ibid.
[145] Ibid.
[146] See Ibid 25. On the relationship between media technologies and forms of law see Cornelia Vismann, *Files: Law and Media Technology*, tr Geoffrey Winthrop-Young (Stanford University Press, 2008).
Files:
[147] Bentham, *Judicial Procedure* (n 1) 25.

As such, the movement of procedure is conceived here as a sort of dynamic set of concerns with proving the contemplation of actions as the judicial action of contemplation: movement at once precedes and remains elemental to the practical moments of judgment as a form of communication (the lective conduct of judiciary office) designed to either effectuate rights or deal with delinquency. This dynamic is read as an attempt to bifurcate operators and the effects of operations, but also to hold the two together in the grammar of Bentham's schema. In either case, Bentham's aim, like Muybridge's photographs of the *Occident* half a century later, is to image the movement of judgment from its elements.[148]

**ii. Instruments**

In order for operations to take place, it is necessary that there are operators, or, in Bentham's vernacular, instruments: 'for every one of those operations, therefore, will be found instruments'.[149] However, because these are linked to the movements of procedure, the Instrument is not a person entire but an office or its persona, and thus an instrument of procedure can take the form of writing.

For our purposes, it is worth considering the instruments for initiating a criminal case under this model of procedure.[150] Bentham calls this a 'natural system' of procedure as one which begins with a personal petition to a judge for the intervention of the law,[151] that assigns 'to the judge, and for him [sic] alone, belongs the power to give execution and effect to' that petition.[152] If the judge decides to approve an application for a 'litiscontestational' case, this necessitates 'a correspondent memorandum be entered on the register"[153] and the issuance of '1. A proposed defendant's attendance-requiring mandate… 2. A proposed defendant's examination-

[148] See Friedrich A Kittler, *Gramophone, Film, Typewriter* (1996, Stanford University Press) 119-20.
[149] See Bentham, *Judicial Procedure* (n 1) 25
[150] See Ibid 63-74.
[151] A judicial script with stage directions: Ibid 37.
[152] Ibid 63.
[153] Ibid 64. Before issuing a demand, judges are required to ascertain from either the pursuer or other judicatories that no other suits are afoot for the same complaint.

mandate'.[154] Demand papers were to replace the indictment and related writs, of which Bentham claims 'always have more or less falsehood in it' and the drafting 'attorney utters this falsehood knowingly and wilfully, and without any apprehension, because without danger of suffering from it'.[155] Petition could be by either victims or the government advocate, with a single judge replacing the grand jury.[156] Depending on the nature of the offending (principally, based on its coding as criminal or civil), the demand paper could 'be brought ready filled up under the proposed heads, time will so far be saved, and trouble saved to the judge',[157] but judges are also able to modify or complete a demand paper where 'an uninformed and unassisted individual comes to tell his story to the judge'.[158]

### iii. Judication: Judges and Juries

In Bentham's schema, before procedure comes the authority that is performed in the court, 'that which has been called the judicial theatre'.[159] This authority is not founded on the territorial location of an offence, residence, or other requirement of a cause action but is instead determined by assessing 'the aggregate convenience of the several parties'.[160] The practice of judication is composed of a discrete series of procedural moments, each taking place serially: '[w]ithout permission to proceed, no applicant can be suffered to proceed' and so it continues through the process of assessment of operations.[161] In performing this task of procedural decision-making, Bentham privileges oration over letter writing as the ordinary mode through which adjudication should proceed, as it is in his estimation 'best adapted to each of the several

[154] Ibid 63.

[155] Ibid 170. Bentham describes writs in the following way:

> '[T]he judge keeps open a shop, at which, on payment of a fixed sum, without so much as supposing himself to be in the right, any man may purchase the assistance of the judge, toward ruining the other man; the judge by his proposed ignorance, escaping all responsibility for the misery to which he gives birth and he profits' (73).

[156] See Ibid 171.

[157] Ibid 66.

[158] Ibid.

[159] Ibid 27.

[160] Ibid.

[161] Ibid.

ends of justice: to the avoidance of non-decision and misdecision—to the avoidance of delay, vexation and expense'.[162] The aim here is to align the principle of supposed innocence with a procedure that moves swiftly to vindicate the innocent rather than impose 'suffering on the absolutely or comparatively indignant'.[163]

Finally, while Bentham's procedure seeks to locate the adjudication of guilt with a professional judge, he proposes a novel style of jury—what he calls "quasi-jury"—to involve the public in the process of government. Bentham argues that his reimagined role for the public in procedure is an improvement on the traditional jury, that 'the proper question here is—not what has been, nor what might have been, but what ought to be'.[164] While the quasi-jury is to be composed of three members rather than twelve,[165] the principal difference is that they are not empowered to decide cases but to instead offer a concurrent but advisory opinion on the proceeding at its conclusion.[166] In addition, Bentham requires the approval of the quasi-jury in the 'immediate' trial before appeal to a superintendent tribunal is to be allowed, noting that in contemporaneous English criminal cases there was no existing right of appeal against judgment.[167] The advantage is that

> 'the use of a jury consists in its exercising, and being seen to exercise, the function of an inspector of the conduct of a judge, the presence of this safeguard is useful, not to say necessary, from the very commencement of the procedure in the presence of the judge until the very end of it'.[168]

[162] Ibid 28.
[163] Ibid 168-9.
[164] Ibid 149.
[165] Ibid 157.
[166] Ibid 154-55, 149. Bentham's reason for the softer corrective of a public opinion tribunal is that publicity does most of the moral work of supervision. He also adds that it would be unfair for quasi-jurors, who are not professional and trained in judication or logic, to be required to give reasons for their decision-making in a public forum—this is the judge's responsibility.
[167] Ibid 149, 155-6.
[168] Ibid 146.

In other words, the jury hears all evidence and arguments in the same room as the judge.[169] Their supervisory function inheres in 'forcing out of the mouth of the official judge, grounds and reasons for the decision which it is his desire should have place'.[170] And again, unlike in English procedure, the quasi-jury is to be present throughout the entire suit and are permitted to ask witnesses and counsel questions.[171] Likewise, Bentham argues that the quasi-juries 'operation in the character of a school of justice',[172] is capable of improving the governmental capacity of members by providing participants with practical experience in the conduct of judicatory office, while at the same time inverting the tutelary gaze, and seeing quasi-jurors 'exposed to the public eye'.[173]

**iv. Strictures for the Legislative in Devising Rules of Conduct**

Procedure does not merely describe and constrain the conduct of judges and those that appear before them. It also offers a template or a "track" for subsequent movements or operations (in his vernacular) for the legislature that might seek to use their prerogative to reorder particular laws. It becomes a form of law, a mode of conduct, its authority is anterior and of precedence. In putting forward a utilitarian style of administration of judicial conduct, procedure becomes a technology that forms conduct and conducts the use of forms that govern judges and litigants. The fixed shape of Bentham's procedure is an intervention in the domain of means that is designed to shape the legislature's capacity to re-align their substantive concerns in terms of the transient ends of politics and risk of poor executive administration. The authority of procedure is precedent of a technical kind: conduct is fixed into a style or pattern.

The *Principles of Judicial Procedure* reveals just how the procedural form comes to offer Bentham not only a language but a conceptual repertoire by which to hold utilitarianism to an

[169] Ibid 157.
[170] Ibid 146.
[171] Ibid 145-6, 153-54.
[172] Ibid 149.
[173] Ibid 157.

institutional form capable of locating its maxims in practice rather than critique. In a chapter which provides a series of guidance notes to the draftsperson of procedure, Bentham's first advice is to 'minimize the sum, or the balance of evil, composed of the evils opposite… to these ends'.[174] In doing so, Bentham is not beyond suggesting rebuttable presumptions, such as one in favour of the pursuer of a case in procedural matters, and in penal matters this defaults to the prosecution.[175] Likewise, procedural rules (and the decisions authorised under them) should be made to avoid 'irreparable evil',[176] which in criminal procedure Bentham argues should be primarily understood as 'the impunity of the defendant'.[177] To this end, Bentham's instruction to legislators is to 'on no occasion, to lay down inflexible rules (in particular, inflexible rules as to quantity)'.[178]

The rules also provide guidance for judges. A subtext of Bentham's argument is to structure a mechanism for inculcating judicial responsibility for the consequences that follow their decisions as a part of the procedure. From necessitating the adjudicating of the commencement of a suit through to its final determination, Bentham's procedure necessitates that judges render the logic of their decisions plain, for public appraisal. Curiously, the genre of reportage that this mechanism takes resembles the form of a kind of ledger. Bentham states that the conduct of judicial decision-making throughout is a form of calculus: to maximise the 'fulfilment of the direct ends of justice',[179] while also minimising the transactional evils accrued in their progress to that overall aim. Bentham views any law that seeks to lay down procedural rules to eliminate the use of arbitrary judicial power or discretion as an 'illusory' aim.[180] Instead, proper conduct here is unsurprisingly understood as a consequentialist accounting rather than slavish

[174] Ibid 28.
[175] Ibid 32.
[176] Ibid 28.
[177] Ibid 29.
[178] Ibid.
[179] Ibid.
[180] Ibid.

adherence to publicised rules, instead 'it will be his [sic] care to purpose that course, but that taking of which, the balance on the side of good is greatest on the whole'.[181] The genre of procedural judgment becomes framed quite literally as a public ledger, where the judge 'will settle his own mind, and make public declaration of, the reasons by the consideration of which his conduct has been determined'.[182] And 'proportioned to the clearness with which they are expressed will be the satisfaction afforded to superordinate authorities to whom he [sic] is responsible'.[183] This is a curious concession, for Bentham admits here that utilitarian calculus is less a science of utility than another style of casuistry, one where the quality of retrospective description, or the archival propensity, of recognisable cost and benefit governs the assessment of the latitudes of this jurisdiction.

### C. On Bentham's *Principles*

The real innovation here is that Bentham synthesises a common set of concerns about the conduct of lawful conduct. It is concerned with unifying the conduct of conduct without reference to the substance of that conduct. It sets procedure in motion as an isomorphic tool of governance. In thinking about punishment and penal sanction, Bentham is concerned with linking legislative will to judicial purpose through an isomorphic schema that mobilises all of the respective elements in a sort of symphonic arrangement:[184]

> 'the best that can be pursued, for the purpose of giving execution and effect to the whole system of substantive law—execution and effect down to that stage in which the execution in each instance (in the instance of each service, and in the instance of each punishment) is actually to be done; the tenor of the definitive decree must be accommodated and adapted to the particular service—to the particular punishment'.[185]

[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] For a discussion of interpretations as to how detailed this process of deduction is in Bentham's writings, see Francesco Ferraro, 'Adjudication and Expectations: Bentham on the Role of Judges' (2013) 25(9) *Utilitas* 140.
[185] Bentham, *Judicial Procedure* (n 1) 16.

One of the objects here is to minimise the differences between penal and non-penal branches of law. Bentham reads the loss of property in a civil suit as a type of suffering that is akin to imprisonment in light of a penal offence.[186] Here, the comparative sense of loss does a lot of work. Each part is substitutable, and only then is each part tuned to a particular application. This is vitally important to Bentham's model of procedure, for unless 'every object rendered plain and clear: without it, every object will be obscure—the whole system will continue to present to view the same chaos as at present'.[187]

## IV. Conclusion

In a way, by starting with the panopticon as a novel corrective institution, this chapter mimics and inverts the structure of Bentham's own *Introduction to the Principles of Morals and Legislation* insofar as the question of procedure begins with that of punishment. After all, 'the idea of punishment presupposes the idea of offence: punishment, as such, not being inflicted but in consideration of offence'.[188] The mechanisms of punishment provide 'a standard for the operations performed by government, in the creation and distribution of property and other civil rights'.[189] This insight encapsulates two strands in this chapter's argument, by looking to mechanisms of punishment as providing templates for the operation of government and its changing forms of standardised conduct. Punishment might have provided one element of the impetus in the transformation of governance, but as this chapter has made clear, it was through a process of bureaucratic negotiation and ultimate failure that criminal procedure emerged as a theoretical solution to the problems of connecting the ends of utilitarian ideals of penalty to the politics of the day. However, it is procedure that emerges as his means of re-structuring the

[186] Ibid.
[187] Ibid.
[188] Jeremy Bentham, *The Principles of Morals and Legislation* (1789), 7 ("*Morals and Legislation*").
[189] Ibid.

conduct of office as capable of performing the legislator's preferred operation.[190] After all, in the *Principles* Bentham notes that legislation, 'the logic of the will', is to law as anatomy is to medicine.[191] The problem of 'the connection … between a body of laws which belongs to the subject of procedure and the rest of the law at large',[192] remains un-answered in this text. It is only through the writing of a book on procedure that the texture of the practical reason of the legislator is explicated in Bentham's thought.

The importance of Bentham's insight isn't reducible to a call for a version of the rule of law—it is more varied and more politically or democratically interesting than that—but instead it makes a jurisprudential claim that sees law re-imagined as proceeding through internal mechanisms for standardising conduct in the service of avoiding punishment. This theme emerges again toward the end of the text when Bentham returns to the question of how to distinguish the limits of the penal law from the law.

It is at the end of this chapter that we might be better positioned to review and reflect on the place that procedure occupied in Bentham's world. In the closing substantive chapter of her book on the panopticon Janet Semple also mused on the style of utopianism 'J.B."[193] aspired to. Her account draws attention to the parapraxis, or Freudian slips found in marginalia, literally, pencilled in the margins of the boxes of panopticon papers in the Bentham archive.[194] Her narration of the archival material reads:[195]

[190] Even in the *Principles*, Bentham is aspiring to universalise law, 'which to be complete, with reference to any political state, must consequently be calculated for the meridian, and adapted to the circumstances, of some one such state in particular', (Ibid 10). The aim was produce the frictionless ideal and adapt it to the particularities of place and time. This is explored at length in Jeremy Bentham, 'The Influence of Time and Place in Matters of Legislation', in John Bowing (ed) *The Works of Jeremy Bentham* (1843), vol 1, 169.
[191] Bentham, *Morals and Legislation* (n 188) 12.
[192] Ibid, 225.
[193] See Semple (n 6), 286.
[194] See Ibid.
[195] Which is available at UC Box 107 / ff 71, 72, 74

> 'The panopticon was to be the centre of new trading and exploration ventures. Ships would be sent across the oceans of the world to West America, "Cook's shores", and California to collect specimens of plants and seeds, especially valuably hardy timber trees, the raw materials for the woodworking machinery of the panopticon. These new specimens would be propagated in the panopticon nurseries; and the voyages could be made profitable by the sale of these plants and proceeds from the publication of illustrated accounts of the expeditions'.[196]

Semple's narration of this material is in the service of describing Bentham's adolescent fantasies of the swashbuckling botanist. A more careful reading of these materials might draw attention to the capillary action that these remarks reveal as operating in Bentham's panoptic schema and jurisprudential thought. The obvious remark is that the panopticon is envisaged as the centre of an imperialism of Bentham's own founding: one also founded on extraction from the antipodes, predicated on existing shipping technologies, which would be improved by extracting new species of timber, milling and crafting wood in the workshops of his prison. In another table of notes, outlining his self-imposed strictures for writing about procedure, Jeremy Bentham leaves an apology for his perceived need to render the particular elements in a system of thought in single words:

> 'Apology for word-coining to be had from Botanists, from Natural Historians in general.
> No *sesquidpedalia verba*, like those extirpated [breeded out] by Linnaeus. They will be 1. few. 2. as little learned as possible. 3. a catalogue will be given of them and or an index'.[197]

LJ Hume offered the observation that reading Bentham's thought is to 'enter[…] a Hegelian world, where everything is connected with everything else in multiple ways'.[198] While Bentham's writing certainly suggests the construction of a philosophical world entire and a commitment to synthesis and systems, it also differs in that it lacks the dialectical impulse of Hegel: instead, Bentham's taxonomy is arboreal and his thinking remains committed to calculation and tabulation. In other words, his attempt to find a language for procedure is riven with an idiosyncratic writing style that focuses on 'word-coining' that, by his own strictures risks shading into *sesquidpedalia verba*, rather giving voice to a dialectical processing of process. After

[196] See Ibid 286.
[197] UC 027/140/002. Spelling and formatting as original.
[198] Hume, *Bentham and Bureaucracy* (n 75) 8.

all, the same table observes the '[n]ecessity of studying physics in order to get good arrangements for the objects of legislation'.[199] This is certainly one of the stranger confluences of influences and fascinations.

Bentham's procedure marks a shift from what he calls "traditional procedure" to a more abstract form, one predicated on devices of supervision, an actuarial ethics of consequence calculation, and ultimately finding a language to communicate a utilitarian procedure capable of instantiating his positivist jurisprudence. Bentham's work sometimes struggles to find a language for procedure: in attempting to communicate his insight into the administrative possibilities of shaping how law is conducted, his writing tends toward the obtuse. Regardless, the change from Blackstone's procession-based conception, where law is conducted through one office after another, to Bentham's model with its focus on following processes and attending to *how* they should be subjected to a regime of rationalised consistency by holding the "adjectival", procedural, means more rigorously and systematically to the ends of the law in question. This involves addressing, at various levels of scale, how these ends are to be realised through the performance of their means.

This does not mean Bentham abandoned all traditional concepts: after all, his writing at once sought to install subtle shifts in the responsibilities of office (recall how the role of jurors are conceived) while sniping at the extant arrangements of practice (the dismantling of pleadings or the banning of lawyers from the office of professional judge). Instead such concepts have been renovated, their facades retained but their interiority is re-configured to metabolise new relations. It has been argued throughout this chapter that Bentham's procedure describes a novel jurisdictional technology: Bentham is describing a renewed grammar to govern the conduct of law, one that might be capable of sustaining his proposed legislative arrangements. Critical to this endeavour is the refusal of plurality and in its place the assertion of a series of

[199] UC 27/ff140.002

singularities: of public good, of method of adjudication, of calculus of advantage. Bentham's procedure is jurispathic:[200] it razes the governmental heterogeneity and history of plural jurisdictions with their multiple traditions of practice and conduct with an isometric procedure. He suggests a single geometric procedure capable of infinite permutations within his demarcated boundaries but yoked to a single formulation of proper conduct and (although not the focus of this chapter) singular evidentiary mechanism for veridiction. It is designed to condition its participants to this style of law: transparent, consequentialist in its ethical disposition, predicated on a rhetorical tradition of public reason, and oriented toward Bentham's conception of public good. It is this abstract tendency, the capacity to reduce difference to a calculus of a uniform utility, that both sustains Bentham's critique of contemporary legal and governmental practice while at the same time lending elements of this proposal more and less attractive rubrics for later reforms in the domain of procedure.

[200] To use Robert Cover's neologism out of context. Cf Cover, *Nomos* and Narrative' (n 92) 40-2.

# Chapter Four:
# **Criminal Procedure and the Jurisprudence of Rule:** James Fitzjames Stephen and the Government of Conduct

'I think the evidence shows that, whatever may be the cause, the fact is that the administration of justice is not in a satisfactory state in any part of the Empire'.[1]

## I. Introduction

Sir James Fitzjames Stephen was one of the pre-eminent jurists of the nineteenth century. He is important to the history of criminal procedure, not only for his jurisprudence, but because his career afforded him the opportunity to translate his theory into a durable statutory form through his role as a colonial legislator over British India. His *General View of the Criminal Law of England* ("*General View*") represents perhaps the most important contribution to the jurisprudence of English law of crime since Blackstone in the 1760s.[2] Indeed, it is credited as the first book of criminal law.[3] Stephen's publication arrived in an England where '[t]he rapid

[1] James Fitzjames Stephen, 'A Minute by the Hon'ble J. Fitzjames Stephen on the Administration of Justice in British India', Selections from the Records of the Government of India, Home Department (No 89, Home Secretariat Press, 1872), 30 ('Minute').

[2] For example, Stephen J Morse agrees with this proposition *vis-à-vis* the question of criminal responsibility in modernity: 'Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility' (2008) 5(2) *Ohio State Journal of Criminal Law* 505.

[3] Leon Radzinowicz, 'Sir James Fitzjames Stephen, 1829-1894 and his Contribution to the Development of the Criminal Law', *The Selden Society Lectures 1952-2001* (William S Hein, 2003) 151, 174 ('Stephen'); Penny Crofts, *Wickedness and Crime: Laws of Homicide and Malice* (Taylor and Francis, 2013), 113, 116; Shaun McVeigh and Peter Rush, 'Cutting Our Losses: Criminal Legal Doctrine' in Peter Rush, Shaun McVeigh, and Alison Young (eds), *Criminal Legal Doctrine* (Ashgate Dartmouth, 1997) 182, 188-93.

growth of wealth and prosperity which took place during the latter part of the seventeenth and the whole of the eighteenth centuries continually brought to light the deficiencies in this rugged and meagre system'.[4] Economically, industrialisation was apace. Suffrage was beginning to extend beyond the very elite. Cities, particularly London, had radically expanded in size and density. England was now an imperial power. Intellectually, the political charge of Benthamite utilitarianism was beginning to wane.[5] In the context of this changing milieu, Stephen was an antagonist in public debate.[6] More importantly, his jurisprudential writings re-engineered the basic doctrinal arrangement of contemporary criminal law by articulating a cogent and cohesive model of criminal responsibility for the first time.[7] In other words, his jurisprudence provided an architecture of criminal law doctrine and procedure capable of sustaining the intellectual burden of translating the moral, and juridical, regulation of conduct into a reimagined institutional context.

As a scene setting gesture, a biographer introduces Stephen as 'an outstanding, almost oversize, example of a variety of individual that Victorian England is sometimes credited with having made a symbol of the age'.[8] Alongside his legal career, first at the bar and then at the bench, he spent time in British India as the Legal Member of the Governor General's Council, where he was responsible for revising the Code of Criminal Procedure and drafting the Evidence Codes.[9] While a sitting trial judge on the High Court, he wrote the monumental three-volume *History*

[4] Stephen, James Fitzjames, *A General View of the Criminal Law of England* (MacMillan, 1st ed, 1863), 66 ("*General View*"). Of course, Stephen's view here is one of unbridled positivity at these developments.
[5] See Eric Stokes, *The English Utilitarians and India* (Clarendon Press, 1959), ch 4.
[6] See for example, his edited collection, *Horae Sabbaticae* (MacMillan, 1892), collection of his voluminous newspaper and journal articles across a wide range of topics.
[7] See Morse (n 2); McVeigh and Rush (n 3).
[8] KJM Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge University Press, 1988), ix.
[9] For appraisals of this work see Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003); Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge University Press, 2010).

*of Criminal Law*.[10] A brief flirtation with politics consisted of two unsuccessful tilts at the House of Commons as a Liberal Party candidate. He codified procedure, evidence and the substantive criminal law of England, however, as with all English efforts, none of these were ultimately adopted by that legislature.[11] Instead, his codes were, with varying degrees of fidelity, adapted and adopted throughout the colonies, including in Canada, New Zealand, Western Australia, Tasmania, and Queensland.[12] Perhaps Stephen's most famous book is his work of political philosophy, *Liberty, Equality, Fraternity*.[13] This text was drafted on the return voyage from India and it reads as a pugnacious critique of nineteenth century liberalism, drawing on his experience legislating over the Raj. The book is primarily a refutation of John Stuart Mill, with whom a previously professional relationship had years earlier descended into animosity over a political dispute about the morality of military force and Stephen's conviction as to the legality of protecting imperial interests in the Caribbean, even with at times barbarous violence.[14] In his later years, he publicly argued for Britain's unshrinking assumption of the entailments of empire: wealth, race privilege, and the judicious use of English force in the service of those ends.[15] Across his life, his writings offer a defence of British superiority and the righteousness of

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[10] James Fitzjames Stephen, *A History of the Criminal Law of England* (Burt Franklin, 1883), three vols ("*History*").

[11] On the broad debates around the virtues and pitfalls of codification, see Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45' (2000) 18(2) *Law and History Review* 397.

[12] Radzinowicz, 'Stephen' (n 3) 174. Regarding Stephen's influence on Sir Samuel Griffith's code in Queensland, Australia and Canada, see Barry Wright, 'Self-Governing Codification of English Criminal Law and Empire: The Queensland and Canadian Examples' (2007) 26(1) *University of Queensland Law Journal* 39.

[13] James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Cambridge University Press, 1967) [2nd ed, 1867].

[14] The seeds of the dispute between Mill and Stephen begun with respect to a difference of opinion over the morality of military force to suppress an uprising in Jamaica. Leslie Stephen describes the interpersonal relationship between the two men in the following way:

> 'Mill seemed to him not so much cold-blooded as bloodless, wanting the fire and the force of the full-grown male animal, and comparable to a superlatively crammed senior wrangler, whose body had been stunted by his brains. Fitzjames could only make a real friend of a man in whom he could recognise the capacity for masculine emotions as well as logical acuteness, and rightly or wrongly Mill appeared to him to be too much of a calculating machine and too little of a human being'.

Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (Smith, Elder, & Co, 1895), 231

[15] See James Fitzjames Stephens, 'Indian Criminal Procedure' *The Times* (London, 1 March 1883) 8.

its imperial ambition. In his mid-twenties he published his view that Britain had 'girdled the world with its empire, which rules those who submit, and strikes down those who resist, with more than Roman force and Roman justice'.[16] Toward the end of his life, his position on empire was largely unchanged.[17] And yet, his unapologetic despotism was to be tempered by the rule of law.[18] Always.[19]

There isn't the space to fully recount the history of the Stephen family and its longer history in the context of imperialism in Britain, but for a few remarks.[20] Fitzjames Stephen's grandfather was a radical slavery abolitionist and Fitzjames, as his brother Leslie (himself, a celebrated biographer and Virginia Woolf's father) calls him,[21] was 'raised in the bosom of the Clapham Sect'.[22] Likewise, the most recent book length treatment of this family, Keally McBride's *Mr Mothercountry*,[23] emphasises the role of the Stephen family in the administration of the British Empire. Her book takes its name from Stephen's father, James Stephen, who was the undersecretary for the Colonial Office for over thirty years.[24] Confusingly, James Fitzjames Stephen is the third inheritor of the name James Stephen in this family of lawyers and reformers

[16] James Fitzjames Stephen, 'University Reform' *National Review* (London, April 1856) 355.

[17] See James Fitzjames Stephen, 'Foundations of the Government of India' (1883) 80 *The Nineteenth Century* 541.

[18] Keally McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law* (Oxford University Press, 2016), 101 describes this as

> 'Stephen's self-appointed task was to build a framework for law whose exercise would be more tempered than the notorious oriental despots who preceded the British in India… but would nonetheless recognize the character deficiencies of colonial subjects and their masters… [where] the more benign exercise of the force of law would be impossible'.

[19] Consider, writing in 1876 about his dismay at European administrator's attitude toward lawyers who

> 'seemed to look instinctively upon lawyers of all kinds as their natural enemies, and upon law as a kind of mysterious power, the special function of which was to prevent, or at all events to embarrass and regard, anything like vigorous executive action'.

James Fitzjames Stephen, 'Legislation under Lord Mayo', in WW Hunter (ed) *A Life of the Earl of Mayo: Fourth Viceroy of India* (Smith, Elder & Co, 1876) vol ii 143, 154-5.

[20] See Peter Rush, 'Autobiographic Fragments: The Life of Criminal Law' in Peter Rush, Shaun McVeigh, and Alison Young (eds), *Criminal Legal Doctrine* (Ashgate Dartmouth, 1997) 200.

[21] Leslie Stephen (n 14) *in passim*.

[22] McBride (n 18) 41.

[23] Ibid.

[24] Ibid 5.

of relevance to the broader history of the British Empire.[25] Fitzjames Stephen's father, (also James Stephen), earned his sobriquet, "Mr Mothercountry", for his unwavering commitment to the rule of law and ethical fortitude as undersecretary of the Colonial Office. During the thirty-year period of his tenure, the staff within the Colonial Office 'did not surpass twenty-five people'[26]—a state of affairs that McBride nominates as 'almost absurd, comical' when considering how many people were affected by the empire.[27] While the momentous scope of these responsibilities remained formally reviewable by the Secretary of State, this was a rare occurrence meaning that '[t]he minimal supervision over Stephen put him in the mind-boggling role of being perhaps the sole guardian of the rule of law in the British Empire'.[28] After retiring from the Colonial Office following a breakdown in 1847, Stephen's father then taught history at Cambridge, and later at Haileybury, the training college for the East India Company.[29] In sum, India and the broader question of empire—its ethics, its law and its governance—were long part of the Stephen family.

Of Stephen's character, Leon Radzinowicz's biographical remarks provide an apposite description: '[i]n physical appearance he bore a strong resemblance to a cliff, and his mental makeup was no less craggy'.[30] His temperament was marked by a 'puritan side' that, Radzinowicz claimed

> 'derived viability from an almost physiologically reasoned acceptance of the survival of the fittest. He was convinced of the damned unworthiness of mankind and their incurable apathy toward salvation'.[31]

[25] Indeed, the importance of the Stephen family in shaping the common law of the empire and then commonwealth until contemporary times is described by Karen Fox, with a particular emphasis on the family's migration to Australia in 'Australian Legal Dynasties: The Stephens and the Streets' Australian Dictionary of Biography, National Centre of Biography, 17 Feb 2015 <http://adb.anu.edu.au/essay/10/text30750>.
[26] McBride (n 18) 47.
[27] Ibid 47.
[28] Ibid, 50
[29] See Chapter Six.
[30] Radzinowicz, 'Stephen' (n 3) 157.
[31] Ibid 162.

And yet in his estimation he nevertheless 'remains the greatest draftsman and codifier of criminal law this country has produced'.[32] Eric Stokes in his study of the English reformers in British India declared Stephen the 'political philosopher' of authoritarian liberalism,[33] meaning that '[h]e showed how a man could consistently favour every aspect of a free society and yet deny the gift of political freedom itself'.[34] The current chapter develops an account of his important work as it pertains to procedure, with a reading that pays attention to how the influence of his time in British India textures his politics and jurisprudence.

Stephen's career provides an optics for apprehending the fulcrum between formal mechanisms for and expressions of the government of conduct (as criminal law becomes predicated on a philosophy of conduct organised around a newly rationalised doctrinal ordering) and the conduct of government, which itself necessitated an analysis of how the administration of colonies required and generated jurisprudential and institutional know-how. Wider again is the discourse that encourages a sustained look at the relationships between some of the leading Victorian jurists and intellectuals in the project of British-ruled India including James Mill,[35] J.S. Mill,[36] Jeremy Bentham,[37] Henry Sumner Maine,[38] and Thomas Babington Macaulay as avatars

[32] Ibid 174.

[33] For a longer formal analysis of Stephen's contribution to this development in nineteenth century liberalism see Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press, 2010).

[34] Stokes (n 5) 305.

[35] See for example Javed Majeed, 'James Mill's "The History of British India" and Utilitarianism as a Rhetoric of Reform' (1990) 24(2) *Modern Asian Studies* 209.

[36] See Lynn Zastoupil, 'J.S. Mill and India' (1988) 32(1) *Victorian Studies* 31. Likewise, it is also worth considering the role that his experience apropos of India plays in the formulation of legitimate government of political inferiors in JS Mill, *On Liberty* (Parker, 1859) and JS Mill, *Considerations on Representative Government* (Parker, 1861). See also Eileen P. Sullivan, 'Liberalism and Imperialism: J. S. Mill's Defense of the British Empire' (1983) 44(4) *Journal of the History of Ideas* 599.

[37] Bentham's friend and literary executor, John Bowring (later, governor of Hong Kong) wrote that 'Of Mill, Bentham used to say: "Mill will be the living executive—I shall be the dead legislative of British India. Twenty years after I am dead, I shall be a despot, sitting in my chair with a dapple in my hand, and wearing one of the coats I wear now"' in *The Works of Jeremy Bentham: Memoirs Part I and Correspondence*, John Bowring (ed) (William Tait, 1843) vol 10, 450.

[38] Coel Kirkby, 'Henry Maine and the Re-Constitution of the British Empire' (2012) 75 *Modern Law Review* 655.

of change in the thinking that accompanied and resisted imperialism across the nineteenth century.[39] Here, Stephen's career provides a route into considering this relation and the appraisal of how procedure provides one kind of imperial know-how that infused a broader discourse about the conduct of government.[40]

This chapter has two aims. First, it seeks to trace how procedure and government intersect in Stephen's jurisprudence. This will be conducted in Part II, through a reading of his *General View*, in light of its influence on modern criminal law theory in common law jurisdictions. The Chapter then inverts this line of interrogation and asks how Stephen understands the proper role of procedure in defining, asserting and assessing the proper conduct of government. Part III describes how Stephen's treatment of criminal procedure as a theoretical and practical activity intersected with his jurisprudence in his thinking about the legitimacy of imperial government. A close analysis of Stephen's codification of procedure in British India is provided in the following chapter in order to better situate that document's context and chronology of renovation in a more appropriate rendering.

## II. 'The Province of Criminal Law' and the Government of Conduct

Stephen's treatise, the *General View*, ends with a reflection on the possibilities that follow learning the teachings of criminal law at the middle of the nineteenth century. He claimed that

> '[t]he study of the criminal law might be made an instructive and interesting part of a liberal education, but, in order that this may be done, it must be viewed, not merely as a trade but as an art founded on a science, the art of making wise laws, the science of understanding and correctly classifying large departments of human conduct'.[41]

Stephen argues for an expanded role of the jurisprudent of criminal law: it is a discourse and a doctrine capable of bridging the gap between the legislator, the wise, and the rational, and the

[39] See Zareer Masani, *Macaulay: Britain's Liberal Imperialist* (Bodley Head, 2013). See also McBride (n 18); Hussain (n 9).
[40] This theme is developed in greater detail in the following two chapters of this thesis.
[41] Stephen, *General View* (n 4) 337.

anthropological. At once he suggests a theory of government and also a claim to a possession of novel, rational, techniques for both understanding and intervening in the conduct of people. The advantages are predicated on a distinction between the scientific and the technical or the artful. In large part, this is the outcome of his own commitment to a tradition of jurisprudential thought that starts with Hobbes and Bentham,[42] but finds a contemporary and focused articulation in Austin's command theory of law. Following Austin, Stephen seeks to distinguish a science of jurisprudence from one of law.

He begins drawing attention to the supplementary role of jurisprudence in governance, where '[i]t is the province of the jurist to point out the limitations which the nature of human affairs imposes on the legislator, and the character of the problems which he will have to solve'.[43] The jurist is an anthropologist of conduct (yet, his is an empiricism reliant on "common sense" and experience).[44] The criminal jurisprudent then, has a practical duty to intervene in the subject matter of government while attending to their responsibilities for outlining the objects and methods of law and the proper conduct of persons. The proper conduct of the jurist is to supplement the law, or, at least the conscience of judges with a scaffold, categorising human relations to support the rendering of lawful judgement, while at the same time sketching the justification of the scaffold. Stephen casts the domain of criminal jurisprudence as neither the history of the common law and its taxonomies of treasons, petit-treasons, felonies or misdemeanours,[45] nor a training in a dogmatic and rhetorical tradition of reasoning through

[42] Stephen praised Hobbes' Leviathan as 'the ripest, the most complete, and the most perfectly-written books of the sort in the whole range of literature': 'Hobbes's "Leviathan"' in *Horae Sabbaticae* (MacMillan, 1892) vol 2, 19, 20. See also, James Fitzjames Stephen, 'Hobbes on Government' in *Horae Sabbaticae* (MacMillan, 1892) vol 2, 1.

[43] Stephen, *General View* (n 4) 330.

[44] See Coel Kirkby, 'Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961' (2018) 58(4) *American Journal of Legal History* 535.

[45] At this juncture, I remind the reader that the focus of this chapter is Stephen's *General View*, rather than his *History of Criminal Law*, where he adopts an alternative route through the historical material.

casuistry,[46] nor in the dispassionate tabulation of human infelicities.[47] Instead, Stephen's jurisprudence is assertive in its normativity, comfortable in its epistemology, and outwardly concerned to yoke force to the government of cultural, moral, and political matters: '[t]he jurist prepares the way for the legislator'.[48]

Fittingly, the preface to the *General View* offers an outline of its intentions in this regard. This book tantalises its reader with

> 'an account of the general scope, tendency, and design of an important part of our institutions, of which surely none can have 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'.[49]

Stephen's book offers a description of a body of doctrine at the same time as it hides its argument about procedure in plain sight. To study criminal law is to inquire into just how (and how just) violence *can* be aggregated, rendered moral and deployed after deliberation about the nature of its application. Criminal procedure provides Stephen's answer to that question in its most literal asking.[50] This treatise mounts an argument to render criminal law's violence palatable and philosophically defensible by grounding it in logic (and invested in rational subjects) rather than in morality and the righteous visitation of a retributive terror. As a critique, Stephen's argument somewhat awkwardly straddles a sympathetic description of existing arrangements while also re-grounding the theoretical foundations of criminal law on a positivist

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[46] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson, 1990), 273-4. See Costas Douzinas and Ronnie Warrington, 'Cases of Casuistry: The Common Law and a Lost Tradition' in *Justice Miscarried: Ethics, Aesthetics and the Law* (Harvester Wheatsheaf, 1994) 93.

[47] Stephen remarked of Bentham's 'laborious and idle output' as brilliance confounded by 'the task of throwing what he had thus thought out, into a shape in which it might become acceptable to the rest of the world, was barely tolerable to him': 'Bentham's "Theory of Legislation"', *Horae Sabbaticae* (MacMillan, 1892) vol 3, 210.

[48] Stephen, *General View* (n 4) 332.

[49] Ibid vi, emphasis added.

[50] While Stephen builds his account from Austin's definition of positive law as predicated on a hierarchy of might, where a command is 'an intimation from a stronger to a weaker rational being, that if the weaker does or forbears to do some specified thing, the stronger will injure or hurt him' (Ibid 1).

plinth. Throughout, he offers his advice on minor alterations desired to better adapt the received oddities of the common law to contemporary needs. As will be discussed below, this awkwardness in ambition manifests itself in issues of genre and in the rigor of Stephen's deployment of his method and the constancy of his epistemology. This section will therefore follow how procedure is adopted as a workable rhetorical fulcrum between the conduct of government and the government of conduct.

The central jurisprudential problem of the book is how to resolve a commitment to a tradition of condemnation and punishment while adapting the arguments for its legitimacy to a logic capable of both maintaining cogency and sustaining the moral and political weight that Stephen ascribes to the criminal law. It is therefore entirely unsurprising that Stephen's very first illustration of the conflict of logic and tradition is as follows: '[t]o common apprehension, the laws of inheritance are absolutely unrelated to the criminal law, yet in fact, they repose upon it'.[51] Stephen's example speaks at once to the somnambulant filiation and latent potentiality of violence that underwrites civil order and the transmission lines of both familial and property relations;:it also addresses method. The treatise is a question regarding the legitimacy of the inheritance of the laws of crime. Criminal law, in this account, is founded on an attempt to bind the tradition of English law and the conduct of proper relations to the requirements of a logic that exceeds its superficial visage.[52] Tradition, in other words, can be made to conform to the strictures of positivist jurisprudence.

How then to separate out the criminal as a body of doctrine within the broader set of commands called law? For Stephen, this is a case of acknowledging the issue of logic in defining "criminal law" on positivist grounds, and appealing back to the same tradition that is incapable of

[51] Ibid, 1.

[52] For a reading of the contribution to jurisprudence text through the lens of Freud's concept of substitute formation, see Shaun McVeigh and Peter Rush, 'Cutting Our Losses: Criminal Legal Doctrine' in Peter Rush, Shaun McVeigh, and Alison Young (eds), *Criminal Legal Doctrine* (Ashgate Dartmouth, 1997) 182.

sustaining its own legitimacy. The 'consequence may appear paradoxical, but it is true',[53] Stephen notes of the syllogism if '[a] law is a command enjoining a course of conduct',[54] and a 'crime is an act of disobedience to a law forbidden under pain of punishment'.[55] Therefore, '[i]t follows from these definitions that all laws are in one sense criminal'.[56] Nevertheless, he asserts that

> '[t]hough the notions of law and crime are thus, in reality, correlative and co-extensive, and though the phrase "criminal law" may thus be accused of tautology, it may be and generally is used in a sense definite enough for practical purposes, but much narrower.'[57]

In other words, even if the above were a sound deduction that can be sustained through abstract reason, concepts in common usage must nevertheless yield to an anthropological objection generated by a shared or vernacular "sense" to respect such a tautology. After all,

> '[c]rimes being thus described as acts punishable by law, criminal law may be described as that part of the law which relates to crimes, and it will at once become apparent that these definitions extend the sphere of criminal law considerably beyond the narrow routine of the cases which usually occupy the criminal courts. In this country an immense mass of affairs which in other parts of the world fall under the head of civil administration are transacted by the help of the criminal law'.[58]

The institutional and historical traditions of the common law therefore mean that the designation "criminal law" is a procedural category, where 'the distinction arises not from the nature of the acts contemplated, but from the manner in which they are treated'.[59] This procedural definition means that the criminal law's governmental apparatus and ambit of effect 'extends to every act [forbidden by law], no matter what its moral quality'.[60]

[53] Stephen, *General View* (n 4), 1.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid 2.
[58] Ibid 5-6.
[59] Ibid 6.
[60] Ibid.

What is being defined might be more properly called a law governing punishment rather than a law governing prohibited acts. To this end, Stephen agrees with both Blackstone and Bentham that '"[p]enal" would be a better phrase than "criminal" law',[61] because that adjective better delineates that the principle distinction is drawn by the punitive 'manner in which [such acts] are treated'.[62] The key is that Stephen's definition is *procedural*: the adjective "criminal" is not based on the classification of style of prohibited conduct or action, nor even the remedy and its object. Likewise, what matters is not *why* one punishes or even that punishment takes place at all: but *how* one inflicts that punishment. How conduct is governed by the institutions of criminal justice determines its status. This refrain appears across his oeuvre, where the question of "why" is continually displaced in favour of an approach that describes the mechanism of punishment. Indeed, perhaps most telling here is the proposal of a "simple view of the matter" to both inscribe a sense of method and to deflect harder matters to their worldly articulation.

**A. Institution, Conduct, Activity: On History and Personhood**

If Stephen's analysis 'according to the order of thought'[63] reads somewhat unconvincing, perhaps it is because he isn't himself entirely convinced by appeals to abstract logic. Instead, Stephen's explanatory preference hews toward the history of institutions. He explains that

> '[i]n the order of time, the law of criminal procedure precedes the law of crimes and punishments; for definitions of crimes, the general principles which regulate the view the courts take of them, and the provisions for their punishment, have, in this country, been, to a great extent, the creatures of the courts of justice'.[64]

In Stephen's ordering, it is the conduct of the courts, and their various modes of provision of administrative and punitive responsibilities that gives shape and texture to the way that the common law has developed to punish illegalities, provide governmental fora, and regulate its

[61] Ibid.
[62] Ibid.
[63] Ibid 10.
[64] Ibid 11.

own regulation.[65] This suggests a broader role of procedure in Stephen's thought. While procedure appears on first gloss to govern only the roles of legal professionals and "prisoners",[66] a close reading of his theory of criminal responsibility reveals a deeper commitment to procedurally mediated apprehensions of conduct that enable political and moral issues of punishment and blame to be first instituted and then adjudicated.

The institutional role of criminal procedure in the governance of conduct is proposed in a number of ways. This institutional approach plays out in Stephen's claim that the constitution requires the use of criminal procedure to identify the precise terms of the law itself. He argues that the great body of legislated misdemeanours, drafted in an unsystematic function and concerned with locally proximate and contemporaneous matters (later, occasionally stripped of original context) without proscribing definitions or procedures means that:

> '[p]rosecutions for misdemeanours have always been the great instrument of legal discipline, and have constantly brought the government, and sometimes to the administration of the law itself, into collision with public feeling. It is evitable that when men claim to exercise authority over their fellows in broad terms and on grounds that have never been clearly or systematically expressed, there should be an extensive debateable land in which it is hard to say what is legal and what is not'.[67]

Stephen acknowledges that prosecutions become the vehicle for resolving disputes about the law. As such, it is only through the procedure of the criminal law that 'the constitutional mode afforded by law for ascertaining [the Crown's] rights' can be exercised.[68] Consequently, criminal procedure offers a governmental mechanism for remedying legislative defects and the settlement of legal questions: procedure's structural function in this regard tracks closely to Stephen's definition of jurisprudence.

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[65] Ibid 10-11. Of course, this is an imposed continuity—Stephen ignores the plural jurisdictions that also regulated different understandings of wrongdoing and sustained their own practices punishment, such as the ecclesiastical courts.
[66] Ibid *in passim*, his to-hand description of the accused.
[67] Ibid 59-60.
[68] Ibid 60.

However, there is a deeper institution of the government of forms of conduct constituted by procedure in Stephen's thinking; one that pertains to how he apprehends liability as the institutional appraisal and determination of *loci* of responsibility. To unpack this contention, the starting point is Stephen's solution to the paradox engendered by the definition of criminal law as describing 'actions punishable by law'.[69] He reasons that the interpretation of activity is the activity of interpretation and proceeds by deduction: the incumbent task of a jurist becomes the determination of the conditions and elements that form 'a necessary condition of criminality'.[70] Recall that these "conditions" are hermeneutic rather than inherent qualities, insofar as they are structured by the procedural availability of punishment rather than a quality of the action in question.

As crimes are *actions* punishable at law, then Stephen's desire for an account of the general conditions of criminal law required him to develop a thorough understanding of "action" in general, and only then a bestiary of those "actions punished". Stephen sees action as 'a set of voluntary bodily motions combined in the mind in reference to a common object'.[71] To recognise this apparatus is to see how the personhood of expressing activity is assembled as a subject composed of

> 'a combination of certain external motions, with certain internal sensations, the existence of which, in the person moving, is inferred from the fact that similar motions on the part of the observer are preceded and accompanied by such sensations'.[72]

The subject of criminal law is, therefore, the reading of a trace of a movement: at once the subject of evidence and comparison; themselves, an object for another, apprehended through the empathetic imagination of the adjudicator.

[69] Ibid 75.
[70] Ibid.
[71] Ibid.
[72] Ibid.

> 'All that any one person can, under any circumstances, positively know of any other is that his body is capable of a certain shape, colour, &c. and that on particular occasions it moves in a certain way'.[73]

That it is an 'inference', writes Stephen, is 'made with so little consciousness, that the fact that it is an inference may deserve notice'.[74] It is observation and movement that produce the subject of criminal law for others, where '[m]uch may be expressed by the glance of the eye or a motion of the nostril, but unless the eyeball or nostril does actually move that information will not be given'.[75] Criminal law required that the movement of the body be linked to a hermeneutics—and thus to its adjudication—in order to enable the application of the categories of law.

These categories come to include not only "action", but also a commensurate understanding of "personhood", that is dynamically and inter-subjectively constituted

> 'when we ascribe action to a person we mean to assert that, by reason of certain inward sensations, his body moved in a certain manner – the motions affording the evidence from which we infer the existence of the inward sensations'.[76]

It is for this reason that a discussion of the language of action—'the use of active verbs asserts an action real or metaphorical'—follows immediately in Stephen's account.[77] He takes two figures of speech, "the fish swims" and "the bullet strikes the man"[78] to be, respectively, examples of real and metaphorical action. Stephen is concerned that metaphorical language collapses the 'differences between the two classes of expression',[79] where

> 'in the first case the speaker does, and in the second he does not, mean to assert that the visible occurrence of a body moving along the earth… is accompanied and preceded by a set of sensations… inside that body… like those he which he would experience in his own person before and at the time of similar changes in its position'.[80]

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[73] Ibid.
[74] Ibid.
[75] Ibid 76.
[76] Ibid.
[77] See Ibid.
[78] See Ibid.
[79] Ibid.
[80] Ibid.

The object of judgment is to ascribe activity as at once a task of interpretation, to distinguish vivacious action from "mere occurrence".[81] If '[t]he sensations which accompany every action and distinguish it from a mere occurrence are intention and will',[82] then the activity of judgment is to reconstruct 'a mental image… of the thing to be done',[83] the development of 'the resolution to do it', and finally to consider 'the selection of means for its execution'.[84] It is this process that Stephen calls intention, and as should be apparent, "intention" is a juridical representation and recreation of the imagination, resolution, and preparation of constituting a subject by virtue of this interpretation.

Whether or not a subject realises their intention requires what Stephen understands as 'will'.[85] For Stephen, '[t]o will is to go through that inward state which, as experience in forms us, is always succeeded by motion, whilst the body is in its normal condition'.[86] In this metaphysics of action, it is the aggregate of these '[t]hese bodily motions, together with the mental antecedents inferred from them, are actions'.[87] And

> '[t]he absence of both or either [will or intention] would either prevent the action from taking place at all, or reduce from an action to a mere occurrence, and in either case there would be no crime'.[88]

In Stephen's jurisprudence, the "criminal" appears only in the reading of the evidence, capable of judicial examination, represented as a posited expression of an intention. What emerges from his understanding of this dynamic of action as a movement resulting from an "internal sensation", gives rise to a more defensible dynamic of procedure at the heart of his substantive

[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid 77.
[86] Ibid.
[87] Ibid 76.
[88] Ibid 78.

definition of a crime. It is through the category of action that something understood as intention or will can become cognizable as a description of an event and an index of character.

In Stephen's argument, it is the task of procedure to provide a mechanism for the co-ordination of bodily movements, or conduct, and to facilitate the judicial interpretation of the representations of will and intention expressed through the traces of movement of the accused's body. It is through the co-ordination of '[w]ill and intention… essential elements of every crime whatever, [that] are charged in every indictment, by the use of the active verb to which the prisoner's name is the nominative case'.[89] Stephen also notes that although all actions are, by definition, intentional, this is necessary but not sufficient for a crime. It is not criminal conduct 'unless the intent, the mental element of it, is a state of mind forbidden by the law'.[90] That a state of mind be forbidden is a general proposition, and '[t]his state of mind varies according to the nature of the case'.[91]

Stephen adopts malice as a procedural device, through which he attempts to evacuate moral content from the doctrine of criminal responsibility, by asserting that the laws of crime have come to mean a process by which conduct 'is blamed and under certain circumstances punished'.[92] He reads malice as having become that which denotes the intention to carry out a particular act,

> 'the consequence of making malice in general terms a necessary element of crimes is, that certain acts… are declared to be *prima facie* wicked actions, though circumstances may exist by which their wickedness is either removed or diminished'.[93]

[89] Ibid 80.
[90] Ibid 81.
[91] Ibid.
[92] Ibid 82.
[93] Ibid 83.

Penny Crofts has explored the implications of Stephen's argument for a morally agnostic doctrine of criminal responsibility for understandings of wickedness.[94] It is enough to note here that malice moves from the substance of wrongdoing to the procedure for its punishment. In Stephen's description of presumptions and burdens of proof 'in the case of murder when one man kills another, the presumption is that he did so maliciously, and so committed murder; but this presumption may be rebutted'.[95] Crofts argues that Stephen's removal of malice from the substantive body of criminal law comes at the cost of its moral authority. It is clear from Stephen's text that his aim was only to sideline it for the sake of procedural workability, using malice as a substantive concept when the established categories of intention for a given action failed. Stephen notes that '[t]he practical importance of this inquiry into the constituent element of crime is best shown by its application to the question of responsibility'.[96] For Stephen, responsibility is not so much a metaphysical or moral category, but instead 'means nothing more than liability to punishment'.[97] Procedure holds liability as both a perquisite institutional apprehension (as evidence) of a moral and factual category as well as the procedural category that assigns later capacities to punish. Liability enlivens a series of procedural mechanisms that are legal as opposed to moral: such categorisation imposes future duties on others.

It is critical to note that with this move responsibility itself becomes double: liability to punish on the one hand, and a responsibility to punish as duty or official conduct on the other. Responsibility bifurcates as responsibility for one's passions, and the dispassionate performance of one's duties of office.[98] Procedure therefore provides the structures, mechanisms and

[94] Crofts (n 3) chapter four argues that malice persists as a residuum of the irrational within his broader project of rationalisation, an irrational stain on reason in criminal law produced through its 'reduction'.
[95] Stephen, *General View* (n 4) 83.
[96] Ibid 84-5.
[97] Ibid 85.
[98] See Ibid 153-57.

methods of punishment. Its rules describe how liability is to be inscribed onto the condemned, and in doing so it enables, delineates, organises and constrains those institutions responsible for punishing.

Stephen's solution of crime being the intended commission of a punishable action, gives rise to an innovative understanding of criminal law that positions the procedural and evidentiary tasks of the solicitor and the barrister at its core. Criminal law becomes best understood as an iterative process of demonstration, where the judge holds the jury to a single isomorphic question as to the procedure for conviction: '[i]n every instance… the question is the same, namely, whether or not the elements necessary to constitute crime did, or did not, meet together on the particular occasion in question'.[99] Stephen's first aim holds that the criminal law has direct benefit in prevention by terror. Echoing the language of Hobbes' description of the authority of the sovereign,[100] Stephen notes that 'the prevention of crime by terror – must from the first be co-extensive with the criminal law'.[101] Terror, in other words, have benefits beyond criminal law, but it requires an attachment to that law: in Stephen's view, it is always a means of action and deterrence which sits external to doctrine, as much as it forms a purpose that underwrites the reasoned order of doctrine.

**B. Assigning Purposes to Procedure**

Stephen follows Bentham's lead in terms of looking to the ends of criminal law when considering the morality of its means. Unlike Bentham, who understood the first aim of the criminal law to be deterrence,[102] Stephen was a firm advocate of a retributive understanding of

[99] Ibid 85. On the concept of isomorphism, see Chapters One and Three

[100] See Thomas Hobbes, *Leviathan* (Oxford University Press, 1996), bk 2, ch 12.

[101] Stephen, *General View* (n 4) 99.

[102] This really is the argument that Bentham makes across his 'An Introduction to The Principles of Morals and Legislation' in John Bowing (ed) *The Works of Jeremy Bentham* (1843) vol 1, 84. NB Jeremy Bentham, 'Principles of Penal Law' in John Bowing (ed) *The Works of Jeremy Bentham* (1843) vol 1, 365. There he starts from a proposition that continues the theme from law into punishment, where '[t]he principal end of punishments is to prevent like offences' (365).

the purpose of punishment.[103] His conclusion is that the criminal law exists to temper the passions of revenge, analogically as such it stands 'in much the same relation as marriage to the sexual appetite'.[104]

Stephen's argument here is that the law is not properly rational due to the history of legislative reform and the refusal to reorganise or replace common law rules and exceptions. He sees it as having accrued a disfiguring complexity through too many minor interventions. The consequence being that the existing order of treasons, felonies and misdemeanours makes little logical or moral sense. This reads as an antecedent position which, in time, will lead him to advocate its remedy through codification: to replace wholesale the sedimentary model of criminal law with a rationalised code that better enlivens the asserted aims of criminal law.[105] In Stephen's argument 'procedure… may be defined as that part of the law which regulates the ways in which general provisions are applied to particular cases'.[106] It provides the mechanism through which legal claims are realised. Stephen sees the principal question for the conduct of criminal law to revolve around whether a trial is

> 'a public inquiry, in which the object is to ascertain the truth for the sake of the public interest, or they regard it as a private dispute, in which the object of the accuser is to obtain… the infliction of legal punishment for an alleged crime'.[107]

While Stephen's treatise aims to explicate *how* criminal procedure governs the prosecutorial *process*, this interrogatory is not merely descriptive, as 'the character of procedure will be found to depend upon the tacit assumptions which pervades it'.[108] Indeed, Stephen's attempt at

[103] 'I think it is highly desirable that criminals should be hated, that punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means of expressing and gratifying a healthy natural sentiment can justify and encourage it'. Stephen, *History* (n 10) vol 2, 81-2.
[104] Stephen, *General View* (n 4) 99.
[105] See Ian Leader-Elliot, 'Benthamite Reflections on Codification of the General Principles of Criminal Liability' (2006) 9(2) *Buffalo Criminal Law Review* 391.
[106] Stephen, *General View* (n 4) 153.
[107] Ibid.
[108] Ibid.

understanding process is governed by a set of concerns that are both legal and not. While the criminal process is straightforwardly described as a series of necessary events, procedure is that law which governs *how* each stage in that process operates. Stephen frames the case as a process, where each step in that process is governed by a defined procedure. One conducts a case, but procedure offers a second order of rules: a form of order that governs how a person is conducted through the process of criminal law.

The object of the law of procedure is 'to regulate the way in which persons may be punished for having done acts which the law has forbidden them to do'.[109] But the complications arise by holding procedure to its outcomes. Stephen's understanding of procedure is adverbial, that is to say he understands procedure as a second order action: it modifies and directs action and shapes the desired consequence. This presents a problem: in attempting to answer the question of how the law of procedure operates, Stephen's text confronts procedure as both law and not. For example, procedure also gestures toward the courtly ethos of the barrister, those 'tacit assumptions which pervades [procedure]',[110] in describing the operation of the formally described rules. Likewise, procedure and the conduct of a life at law tends towards the autobiographical insofar as it also describes the means of holding office. It is where '[m]any of the observations on the practical workings of our system of criminal procedure being based on personal experience, I ought to say that my experiences of criminal practice is confined to my own'.[111] Stephen's description of English criminal procedure therefore isn't one of a system, composed of rules and forms, but remains situated between the law and the life lived with it.[112]

[109] Ibid.
[110] Ibid.
[111] Ibid FN156.
[112] See Ann Genovese, Shaun McVeigh and Peter D Rush, 'Lives Lived with Law: An Introduction' (2016) 20 *Law Text Culture* 1.

As such, this represents an important continuity with the early-modern accounts of procedure described earlier in this thesis.[113]

If conviction at trial operates as the precise mechanism for licensing punishment, then the means of conducting that multitude of actions, forms, and processes becomes the province of procedure. In the trial stage, this is evinced by the existence of the plea which evidences the 'exclusively litigious' character of English procedure.[114] The litigious model stands in contrast to an alternatively inquisitorial model, and as such Stephen 'assumes the trial is a question between prisoner and prosecutor'.[115] Of course, one such 'tacit assumption' comes out in the personae conscripted into Stephen's account of the conduct of office: "the prisoner" is neither the accused nor the prosecutor. Beyond concerns with the presumptions of innocence, there are broader process concerns that arise from this model. On his reading, Stephen understands that the accusatorial model of procedure adopted in common law systems meant that in the nineteenth century little attention was given to the detection and apprehension of accused persons.[116] Likewise, the historical arrangement of criminal justice process brings with it a set of institutional or office-orientated problems. In common law systems, an accusatory model of criminal justice without a public prosecutor has, in Stephen's prognosis, presided over the atrophy of investigative concerns whereby 'the Law of England, as it now stands, makes no special provision for either the detection or the apprehension of criminals'.[117] While police did exist in some rudimentary form in Stephen's time, they 'ha[d] no special facilities for carrying on any of the inquiries comprised in the process of instruction, nor is there any public officer who is bound by his public duty… to set such inquiries on foot'.[118]

[113] See particularly Chapter Two.
[114] Stephen, *General View* (n 4) 159
[115] Ibid. See also Ibid 153.
[116] Ibid 154.
[117] Ibid.
[118] Ibid, 154-5.

Procedure comes to function in Stephen's writing as that which gives form to conduct, and thus shapes the ends of truth and the production of legal persons as it regulates the movement of rhetoric, evidentiary materials and people within the requirements of a process. The relationship between conduct and person is mediated by the procedure of obligations to truth where specific rules attach to particular roles in the process of prosecution. The prosecutor, although not occupying a public office, is 'universally admitted… [to be] morally and professionally bound always to keep in sight the ultimate objective - namely the discovery of truth'.[119] The demands of the office of the prosecutor are conduct rules that extend first to the profession and the institution, but secondly, penetrate the carapace of office and Stephen holds the occupant morally responsible for their assumption of responsibilities towards truth. This understanding of responsibilities as relating to the categories of truth and person apply differently to the accused, where

> 'no such obligation is laid upon the prisoner and those who represent him because it is too much to expect of human nature that they should discharge it, and it is better not to impose an obligation which is sure to be systematically violated'.[120]

Stephen likewise sees criminal procedure as regulating the conduct of persons before the law against 'human nature'.[121] At stake at each stage of his argument is how procedure mediates the obligations of particular offices towards a relationship to truth, where '[b]oth sides… are bound in the strongest way not to do anything to propagate falsehood'.[122] This dispensation towards truth finds itself reconciled with a set of second order conduct rules; that ineffable 'number of professional rules not reduced to any express form, but well understood and constantly acted on'.[123] What is produced is an ethics of office that dictates the conduct of lawful conduct

[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Ibid.

governing 'honourable and dishonourable attack and defence as clearly as the laws of war distinguish between honourable and dishonourable warfare'.[124]

Writing of the office of judge, Stephen attempts to preserve earlier notions of the conduct of common law office,[125] where questions of conduct are governed through conscience, training and experience. Questions of office are resolved through prudence *qua* feeling: a species of uncommon sense; a virtue prerequisite to, and cultivated by, judicial office. By this I mean that the law of criminal procedure, in describing the conduct of conduct is both law and not, both before the law, and the law before the law. Stephen concludes his chapter on procedure in general with a reflection of the way that counsel follow the rules of criminal procedure, where

> '[t]he neglect or observation of these and other rules of the same kind practically establishes a wide distinction, and one which, to a practiced eye is easily recognised between those who exercise a noble profession, and those who disgrace it. The distinction is all the more real because no system of rules can fully embody it. It must be a matter of sentiment and good feeling'.[126]

Procedure is at once a system of rules, abstract and (as his treatise bears out) capable of sustaining an argument regarding the sense of unity that binds doctrine into discourse as a body of law. It is a matter for institutions, but also exceeds itself, and becomes a question of the conduct of the person.

This Part of Chapter Four has followed the role that procedure plays in Stephen's construction of criminal law as doctrine. It has argued that procedure provides a coherent model for understanding the structure of his argument about the punishment of crime and the organisation of an institutional arrangement dedicated to the same. In this sense, there is an analogue between Stephen's work in its use of procedure, and Blackstone's use of process: although there is a shift to a second order of conduct, throughout there is a concern with how

[124] Ibid.
[125] See Chapter Two.
[126] Stephen, *General View* (n 4) 168.

office is conducted, even if this conduct becomes abstracted perhaps haphazardly, and is in need of bringing forward by way of an aporiatic reading of Stephen's jurisprudence. The next Part of this Chapter turns attention away from Stephen's ministry to the profession and towards his own varied and influential professional encounters with procedure in litigating and legislating procedure in the context of empire and its administration.

## III. 'Somewhat grim presents':[127] On the Conduct of Government and his Logic of Rule

Stephen left port at Bombay on the same day he resigned his post as the Legal Member of Council in India in 1872.[128] For the duration of the voyage he was to be occupied with an ambitious and disciplined schedule of 'an article a day till he gets to the Suez'.[129] In all, it was to take Stephen thirteen days to reach the Suez Canal, which had only been open for roughly the duration of his time in India; a commission he held for two and half years, roughly half of a standard term. The first twenty-four hours of his westward journey across the Arabian Sea toward Egypt were marred, improbably, but with a fine example of pathetic fallacy, when his iron writing chair generated magnetic interference with the ship's compasses.[130] When he was finally able to settle into a course of writing, Stephen's ambitions had shifted bearings and he was able to begin the task of reflection on the broader questions raised by his tenure in British India. His last months in India were, by any standard, tumultuous. The key event was the assassination of the Governor-General of India. Lord Mayo was stabbed while touring a convict

[127] Stephen, *History* (n 10) vol 3, 345.
[128] 22 April 1872. See India Office, *The India List and India Office List for 1905* (Harrison & Sons, 1905), 119.
[129] Leslie Stephen (n 14) 298.
[130] Ibid.

settlement in the Andaman Islands, an archipelago in the Bay of Bengal, two months prior to Stephen's departure.[131] The impact on Stephen was profound.[132]

At sea, Stephen's ideas move from the particular situation of India and begin to take shape as a general work of political theory, addressing what he saw as the intellectual vacuity of Mill's theory of liberty.[133] After five days at sea, no longer navigationally askew—courtesy of moving the chair—and finding inspiration in the rhythm of the passage, he 'reports "firing broadsides into John Mill for about three hours"',[134] in an afternoon. India provided 'a sort of second University course'.[135] Obviously, Stephen's time abroad as a legislator in India was not an academic exercise. Keally McBride writes Stephen's career in India

> 'reflects developments in colonial economy, potential technologies of administration, and a growing understanding of the need for new forms of population control and policing because of events such as Morant Bay. Stephen did not resist these new forms of population control; instead he saw the opportunity to use the law to make them more palatable than the alternatives: despotism or anarchy'.[136]

The remaining task of this chapter is to provide a way of understanding how Stephen came to inhabit this at once bellicose and benevolent view of the governance of another people, by way of assertive administration and criminal law. This section, and its companion in the next chapter, considers the conduct of government in British India.[137] It addresses the place of procedure in Stephen's description of legislative office and his interpretation of the proper

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[131] See Helen James, 'The Assassination of Lord Mayo: The "First" Jihad?' (2009) 5(1) *International Journal of Asia Pacific Studies* 1

[132] Leslie Stephen (n 14) 293-6. Note also *Liberty, Equality, Fraternity* was dedicated to Sir John Strachey, who was appointed Governor-General of India following the assassination of Lord Mayo. The acknowledgment of the book makes express mention of '[t]he sorrow which we both felt for a man whom each of us had so many grounds, public and private, to love and honour' Stephen (n 13) v.

[133] Stephen, *Liberty, Equality, Fraternity* (n 13) ch 1.

[134] Quoted in Leslie Stephen (n 14) 299.

[135] Ibid.

[136] McBride (n 18) 104.

[137] An analysis of the Code of Criminal Procedure that was passed by Stephen following revision by his hand, but drafted originally by Thomas Babington Macaulay is more easily appreciated in light of Macaulay's work in India, so for those reasons this section represents bookends to that analysis which is found in the next chapter.

conduct of government, and then returns to consider Stephen's final intervention in the government of India, through a reading of his approach to jurisdiction in criminal proceedings involving English accused in India.

### A. On Codification and Procedure Reform

Stephen's basic position on rule in India was that 'the responsibility of the direct government of India, was forced on the [East India] Company, and afterwards on the Crown, by the course of events, and to a great extent against their will'.[138] Stephen's account of the development of colonial law in India is one of the transformation of company regulations into post-facto legislative status, conferred by the Parliament in England:[139] crudely put, the argument made is one of increasingly standardised form and practice of law making rather than *ad hoc* rules for the commercial interests of the trading company.

> 'I feel bound to say that no one who has not been in India can have the faintest conception of the enormous magnitude of the task we have taken upon ourselves, or of the unspeakable difficulties by which it is encumbered. The wonder is not that holes can be picked in the institutions and laws by which we have governed India at all, that there should be laws and institutions there to criticise. There is plenty of fault to be found, no doubt, and it is right that it should be found, but whatever else might be said of Indian law and government, it has done its work as effectively as Rome itself, and far more humanely'.[140]

The theme of autonomy recurs in Stephen's discussion of the role of the legislator. 'The true secret of government is to give absolute power to a vigorous man and leave him to be a law to himself. Of course, we ought to remember that all the laws of all the codes in the world cannot make a good ruler, but the best ruler cannot govern without law'.[141] Of course, Stephen's attempt to pare back his statement is a *non-sequitur*: the issue of absolute authority and the autonomous

[138] James Fitzjames Stephen, 'Codification in India and England: Opening Address of the Session 1872-3 of the Law Amendment Society' (1872) *1 Law Magazine and Review Both Branches Legal Profession Home and Abroad 4th series* 963, 964 ('Codification in India and England'). See Chapter Five of this thesis for a further discussion of this point.
[139] Ibid 966.
[140] Ibid 967.
[141] Ibid 969.

remain un-addressed by his recourse to the pragmatic requirements of law for governance. These principles were developed through his recollection of the re-organisation of the Punjab. As '[w]hen the Punjab was conquered, it became necessary to provide, at a moment's notice, a whole system of civil government for a country which, roughly speaking, maybe he said to be as large as Italy, and which had got into a state of utter anarchy'.[142] This method of colonisation—first by force, then by law—'proves to demonstration, not that law can be dispensed with in government, but that clear, short, and simple laws are absolutely indispensable to a vigorous form of government which is to produce lasting effects'.[143]

The first draft of the Indian Code of Criminal Procedure was drafted from England, by the Indian Law Commission in 1853.[144] This code was designed to supplement the *Penal Code* drafted by Thomas Babington Macaulay in India in the 1820s.[145] A *Code of Criminal Procedure Act* finally passed into law in 1861.[146] The passage of the Penal, Civil and Procedure codes mark a change in legal administration following the Great Rebellion of 1857, and the Crown's assumption of direct rule.[147] It was under Stephen's tenure as Legal Member of the Viceroy's Council in India that the Procedure Code was re-legislated. As member, he sat at the apex of a small technical staff of legislative drafters, editors and reviewers. Stephen recalls the method for performing these committee meetings

[142] Ibid 968.
[143] Ibid 969.
[144] Ibid 971.
[145] Ibid.
[146] XXV of 1861
[147] There is a voluminous literature on the 1857 War of Independence or Mutiny. In reflecting on this chapter I have drawn on the following works: Chakravarty, Gautam, *The Indian Mutiny and the British Imagination* (Cambridge University Press, 2005); Shaswati Mazumdar (ed), *Insurgent Sepoys: Europe Views the Revolt of 1857* (Routledge, 2011); Sabyasachi Bhattacharya (ed), *Rethinking 1857* (Orient Longman, 2007); Eric Stokes, *The Peasant Armed: The Indian Revolt of 1857* (Clarendon Press, 1986); Christopher Herbert, *War of No Pity: The Indian Mutiny and Victorian Trauma* (Princeton University Press, 2008).

> '[w]e used to sit five, six, or seven hours a day for months together. The secretary read out the whole Bill (541 sections) and as each section was read, the criticisms upon it were referred to by one or other of the members who took charge of them'.[148]

The member is 'assisted by committees which sit upon every measure introduced, minutely criticize its details, and frequently remodel it. The public debates, though occasionally very animated, are of far less practical importance than the deliberations of the committees'.[149] He considered there to be 'a number of virtues found in this process. The first was that it yielded a result that is comprehensible and readily communicated'.[150] After all, Stephen saw clear legislative benefits in a process of drafting that restricted the number of participants in the process to 'a knot of experts',[151] who could be employed at increments to improve their earlier work in light of changed circumstances or problems uncovered by the judiciary while applying the Code in question. As such, re-enactment and revision 'is a very laborious business, but it is essential to the real utility of a code, and to the maintenance of the simplicity which it is intended to produce'.[152] Stephen didn't view simplicity as merely an aesthetic consideration in legislation: '[t]he system is not unattended by evils; but it is absolutely necessary to enable a few hundred Civilians to govern a continent. Persons in such a position must be provided with the

[148] Stephen, 'Codification in India and England' (n 138) 987.

[149] Ibid 972. See also 987 for a further discussion of this process and its virtues. Perhaps most surprising is Stephen's surprise that care and minute attention would yield improvement in the structure and expression of legislation. By the time this particular document was authored, in 1872, Henry Thring had held the Office of Parliamentary Council for approximately three years, following its establishment in 1869. The office was formed to improve the clarity, logic, and sequencing of government bills as well as to promote the standardisation of the form and expression of statutes. Thring's views conform closely to Stephen's own description of the virtues of clarity, succinct drafting an intelligibility to the public. Where they differ is with respect to how these two roles interact with the parliament: Thring understood the role as one of technical assistance in translating political programs into a particular form, whereas Stephen wanted greater autonomy for law reform commissions to propose their own programs of reform subject to parliamentary oversight. Critically, Stephen wanted the parliament to be answerable *to* the commissions by requiring it to outlining their reasons for adopting or jettisoning their proposals. On the Office of Parliamentary Counsel and its first officeholder, see George Engle, 'The Rise of the Parliamentary Counsel' (1996) 16(1) *Estates and Representation* 193.

[150] Stephen, 'Codification in India and England' (n 138) 972.

[151] To adopt Stokes' pithy phrase: (n 5) 257.

[152] Stephen, 'Codification in India and England' (n 138) 975.

plainest instructions as to the nature of their duties'.[153] As Stephen reflects, this was obvious to the participants in the administration and statutory drafting, as direct rule brought with a shift in the legal language of politics:

> 'Then came the Mutiny, which in its essence was the breakdown of an old system; the renunciation of an attempt to effect an impossible compromise between the Asiatic and the European view of things, legal, military, and administrative. The effect of the Mutiny on the Statute book was unmistakable'.[154]

As such, a turn to procedure followed. Stephen's re-drafted criminal procedure both simplified and standardised, in an attempt to engineer the shape of procedure to the demands of a more precarious imperial politics. The stripping of English procedure down to 'concise, even beautiful form, the spirit of the law of England; the most technical, most clumsy, and the most bewildering of all systems of criminal law';[155] this new procedure—bereft of technicality, then can't be read as a plainly technical exercise nor can the plain language of procedure be understood as a mere aesthetic preference in the drafting of legislative provisions. For Eric Stokes, the 1857 Mutiny marks the transition to 'reform … carried out in the spirit of racial conquest that succeeded the Mutiny, with all the strong-handedness of the Punjab school but with none of its personal kindness or affection'.[156]

Stephen understood reorganising office to sustain and re-inforce the authority and workability of government meant that 'this Act is very much more than a mere Code of Criminal Procedure'.[157] In particular, under the argot of procedure, Stephen formalised the organisation of the courts of criminal jurisdiction in India exercisable over non-Europeans, as it sets out 'the constitution of all of the criminal courts in the country' excluding the High Court,[158] where

[153] James Fitzjames Stephen in George Otto Trevelyan, *Life and Letters of Lord Macaulay* (Oxford University Press, 1968), 417.
[154] Ibid 417.
[155] Ibid 418.
[156] Stokes (n 5) 269. See also Mark Condos, *The Insecurity State: Punjab and the Making of Colonial Power in British India* (Cambridge University Press, 2017).
[157] Stephen, 'Codification in India and England' (n 138) 975.
[158] Ibid.

criminal jurisdiction over Europeans in India was exercised. In other words, the object here was to set up a durable regime of governance with a more fortified procedure: to this end, an expansion and reclassification of powers was underway. Stephen's Act collected a number of disparate administrative functions under the legislative rubric of criminal procedure. The powers here are concerned with a sense of administration which might be understood as a series of police powers, at least in the sense that Blackstone used the term.[159] They are understood as

> 'numerous matters connected with the internal government of the country in which magistrates are concerned, such as the removal of nuisances, the provisional settlement of disputes about the possession of land, the making of orders for the maintenance of wives and families, the supervision of vagrants, and the employment of troops in cases of riot'.[160]

Stephen also understood his Code to have 'described the whole duty of magistrates'.[161] Indeed, a separate importance is placed not only on the heteronomy of jurisdictional competences—the family, the province, property rights, labour and idleness, and the application of military force—but also on the attempt at the standardisation of conduct and setting out the rules of conduct of office, as 'every European Government official passes the greater part of his official career as a magistrate'.[162] To be clear, an imposed, regularised and binding articulation of the conduct of office saw procedure formalised in such a proscriptive style for the first time in a nominally common law jurisdiction. 'These matters', Stephen writes, 'besides every step to be taken in relation to crime, from the discovery of the offender by the police, down to the execution of the final sentence of the court, is minutely provided for in the code'.[163] In many ways, these roles echo the variety of responsibilities of the Justice of the Peace or magistrate in England, however, the difference appears as one of taxonomy: those vestigial jurisdictional functions of justices of the peace, the aristocracy of the early-modern period, are re-categorised in relation to both political power and criminal law, and standardised. The shift in language and the classification

[159] See Chapter Two
[160] Stephen, 'Codification in India and England' (n 138), 975.
[161] Ibid.
[162] Ibid.
[163] Ibid.

of authority might be small, but its importance pertains to the government of conduct and the conduct of government—criminal procedure becomes a way of exercising power over a large number of political inferiors, both in the colonies but also in the metropole.

That legal reform of India took the form of legislation, and legislated codes, as a particular legal form is an important dimension of the reform to procedure that ought not to be overlooked. While the word "codification" is yet another linguistic innovation bequeathed by Jeremy Bentham,[164] the utilitarian legacy looms larger in addressing the form of legislation.

Lindsay Farmer's thoughtful reading of the English codification debates of the early-mid nineteenth century makes the comment that if codes of law on the continent were used to 'mark the transition to the modern legal and political order',[165] then there are a number of peculiarities to outside observers, such as Max Weber, in the English situation. First, that English 'economic modernisation was achieved in spite of the apparent failure of legal modernization'.[166] And second, that criminal law in the English tradition 'is largely treated (and taught) as an adjunct of private law; that is, concerned primarily with the definition and protection of private rights and interests'.[167] Critically, the period in which the Criminal Law Commissioners sat was approximately the same time that Thomas Macaulay drafted his Penal Code for India.[168] The successes of the Victorian era were to be found in colonies rather than the metropole, where utilitarianism had been in the decades prior afforded more latitude in governance than at home.[169] However, by the time Macaulay and Stephen found their way to India, the influence of

[164] Gunther A Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) 25 *Yale Journal of International Law* 435, 448. The first published use of the word is in a letter from Jeremy Bentham to Tsar Alexander I, Emperor of Russia in 1815. This was published in Jeremy Bentham, *Supplement to Papers Relative to Codification and Public Instruction* (Payne and Foss, 1817), 40.
[165] Farmer (n 11) 399.
[166] Ibid 400.
[167] Ibid.
[168] Macaulay drafted his code in 1835, although it would not pass into law until after his death in 1859.
[169] Wright (n 12) 44-9.

Jeremy Bentham in India was becoming more diffuse. Stokes concluded that by the Victorian era

> 'it was no longer as a closed system of thought that utilitarianism made its appeal. Rather was it for a certain toughness of mind, a fearless hard-hitting logic, that it was prized by later generations which wished to deal with a few specific problems rather than construct society anew'.[170]

Legislative reform in India was to take place against the waning of the 'clarity and simplicity [that] had been the products of the eighteenth-century Enlightenment… [instead] this intellectual self-confidence was denied to the hazier, more troubled mind of the Victorian period'.[171]

**B. Ergonomics, or, the Work of Jurists**

Prior to beginning his programme of Indian criminal law reform, Stephen sought to understand the jurisdictions he was to administer through the research and production of a substantial report entitled a 'Minute… on the Administration of Justice in British India'.[172] It represents Stephen's effort at thinking through in a precise manner the way that the technicalities of criminal procedure might be attached to the work of colonial government. Consequently, this task necessitated clarifying his position on the purpose and mechanisms of rule, and providing an opportunity to work out his formal response to arguments in circulation about force and executive action that pre-dated his arrival as legislator. In short, it is a memorandum written as an opportunity to think through his approach to resolving a series of tensions as a legislator employed to 'administer as good a system for the administration of justice as is consistent with the maintenance of British power in India'.[173] The necessity of reconciling law, effective government, and the possibility of violent resistance forms an important theme in his writing.

[170] Stokes (n 5) 242.
[171] Ibid 241.
[172] Stephen, 'Minute' (n 1).
[173] Ibid 33.

Outlining his approach to resolving these tensions he reflects that as a jurist in this particular legislative office, prudence consists in navigating 'the form in which practically inevitable evils are to be endured than as to the way in which they are to be removed'.[174] As such, the task of government and its alignment to law represents 'the best hopes both of the permanence and utility of our power, lie in a due appreciation and in a proper management of it. My own view is that, by steadfastness, patience, and firmness, it may be made the strongest of all securities for our rule'.[175] As such, the document represented an opportunity for Stephen to consider the axioms of his own response to debates about the moral and political conditions of government by law in colonial rule. What follows addresses how Stephen's approach to the conduct of government was shaped by a relationship to criminal procedure.

**i. Administering Rule**

Stephen's Minute addressed a number of arguments concerned with how to best organise a coherent jurisdiction in terms of how to maximise its authority, limit internal and illegal non-compliance, and resolve inefficiencies in its division of juridical labour. This document was prepared after canvassing views on the different systems of administering law and militarised order across India. Causing particular problems were those Provinces where British officers were used to performing both executive and judicial functions as they governed districts away from the cities.[176] This, he noted was because differences in jurisdictional ordering and the proper *loci* of authority 'rest upon different theories of Government'.[177] As such, this sub-section will trace Stephen's conclusion that 'the best division of labor at present to be had would divide not the judicial and executive branches of the service, but civil jurisdiction and criminal jurisdiction united with executive power'.[178]

[174] Ibid 91.
[175] Ibid 105.
[176] These issues are described in detail Ibid 3-7. Stephen noted pressures were most acute in the work required for the extraction of taxation revenue (5).
[177] Ibid 7.
[178] Ibid 33.

Stephen was able to frame questions regarding the conduct of empire as matters of procedure by addressing questions of government and political authority through a rubric of jurisdiction; one concerned with the conduct of law, the distribution of responsibility, and the styles of law appropriate to particular officeholdings. As a matter of rhetoric, his Minute is addressed to the concerns of those officers that would disagree with the basic principle of government according to law at all. His response to this approach is two-fold: to first render questions of authority as questions of office administration, and then to frame questions of law as procedure questions concerning the work done by District Officers and Judges.[179] Of the jurisdiction of the District Officers, Stephen concludes that '[w]ithin their own limits, and as regards the population of their own District, the District Officers are the Government, and they ought, I think, to continue to be so'.[180] Stephen begins his argument for reforming the administration of Indian law with the proposition that '[t]he government of every Province… must be and is conducted according to law, though the law by which it is conducted ought, no doubt, be adapted to the circumstances of the country to which it applies'.[181] As a consequence of this general assertion, Stephen can reframe his analysis to focus on the questions of the *form* of law rather than its political or moral claim while precluding questions of efficacy or utility:

> 'The question, therefore, is between one kind of law and legal administration and another, not between government by law and government without law. The question, indeed, lies much more between different forms of administration than different forms of law'.[182]

By arranging the argument in this way, where the question of the conduct of government is framed as between alternative administrative forms, the question 'in what circumstances is it

[179] Consider here how the movement of authority within a jurisdiction shifts so that the legislator is able to open space for procedural reform:

> 'To united *by law* all authority in one hand, to give *by law* wide individual discretion to the person in whose hands all authority is so united, to make the laws so administered as few, as plain, and as simple as possible, are, no doubt, good principles for the administration of a wild Province; but all this is government by good law as opposed to government by bad law on the other, unless, indeed, it is asserted that laws are scientific in proportion to their intricacy, and technicality, and not in proportion to their brevity and simplicity'. (Ibid 8)

[180] Ibid 29-30.
[181] Ibid 8.
[182] Ibid.

desirable, and in what circumstances is it not desirable, to unite all powers in one hand?'[183] can be asked as a question of office administration rather than as one of styles of rule. To this end, Stephen's rhetoric is able to shift the register of arguments concerned with governing through the limits and exceptions to general procedure as questions of work; where the utility of despotic power is that '[t]he man who was popularly supposed to be a benevolent despot becomes neither more nor less than an overworked official burdened with a number of heterogenous functions'.[184] Additionally, Stephen was worried that the demands of executive work beyond the cities risked the integrity of officers, where 'the wilder the District the greater the necessity for preventing the officers in charge of it from contracting fierce and arbitrary habits'.[185] In echo of his *General View*, Stephen argued that the proper role of the jurist was to assist government by confirming the legality of the authority under which executive officers act, because 'nothing can be more destructive of all executive vigor than an uneasy suspicion that the course which an officer intends to take may very probably be illegal'.[186] Stephen's aim was never to implement the kind of separation of powers expressed in liberal political theory, but to tune styles of administration to the practical requirements of effective colonial rule. To this end, Stephen's axiom for the organisation of this jurisdiction was that

> 'the first principle which must be borne in mind is, that the maintenance of the position of the District Officers is absolutely essential to the maintenance of British rule in India, and that any diminution in their influence and authority over the Natives would be dearly purchased even by an administration of justice'.[187]

The point being that the 'District Officers [should retain] such an amount of power as will lead the people at large to regard them as, in a general sense, their rulers and their governors'.[188] This

[183] Ibid.
[184] Ibid 9. Likewise, these functions are such that 'his double character furnishes an idle man with, or man who dislikes either branch of his work, with a ready excuse for inefficiency', (Ibid 11).
[185] Ibid 95.
[186] Ibid 105.
[187] Ibid 29.
[188] Ibid 30.

attitude dovetails with Stephen's view of India as that 'a primitive people like a single ruler',[189] and that he doesn't 'think that it would be at all in accordance with the general principles on which our policy proceeds to consider the feelings of Natives on a subject on which we are clearly right as a final reason for adopting this or that system'.[190] The system of government, 'must, as long as it lasts, be a system administered by foreigners cast in a mould singularly different from that in which their subjects are cast',[191] and '[t]ill some change in the national character takes place, justice must be administered amongst people to whom every form of falsehood is familiar, and who appear (as I am informed) to regard falsehood in a European court as absolutely no crime or sin at all'.[192] To this end, Stephen's report occupies a strange process of veridiction: it speaks the necessity of procedure reform as a jurisdictional solution to his own confessed ignorance of customs (or reluctance to countenance resistance to colonial rule). In sum, Stephen's conclusion rests on his view that '[t]he exercise of criminal jurisdiction is, both in theory and in fact, the most distinctive and most easily and generally recognized mark of sovereign power. All the world over the man who can punish is the ruler'.[193] Together, Stephen's interpretation of the conditions of government mean 'each of the codes of procedure proceeds upon the notion that an elaborate and intricate system of appeal is a security for the administration of substantial justice'.[194] The next sub-section will offer a view of how hierarchy, pedagogy and character inform Stephen's arguments regarding the institutional arrangement of this jurisdiction.

[189] Ibid 16.
[190] Ibid 34.
[191] Ibid 32.
[192] Ibid.
[193] Ibid 33
[194] Ibid 32-33.

## ii. Inferiority and Interiority: On the Conduct of Institutions and the Institution of Conduct

Stephen's view was that procedure legislation predicated on wide access to appeals could remedy some of the most egregious issues of poor administration.[195] This sub-section will address how questions of office, responsibility and character inform the conduct of colonial administration. The key to understanding Stephen's theory of administration is that his insistence on legislated procedure is founded on a racist distrust that shapes how he approaches the administration of the conduct of the district officers, the judges and their subjects. Stephen was required to consider the problem of how to manage Indian judges, whom he deemed to be of "lesser quality" than their English equivalents.[196] Although Stephen distinguished between the appeals procedure and formal mechanisms of superintendence, both are animated by the same principle: how to effectively 'treat[…] the inferior Judges altogether as political inferiors'.[197] Stephen diagnoses the root of the problem as being that unlike an English judgeship which because it is, in his estimation 'one of the principal prizes in a career',[198] a mark of quality, instead, 'the very opposite of all this is the case with an Indian Mofussil Judgeship'.[199] Against this backdrop, Stephen concludes that 'appeals as of right to a certain extent are a necessary evil',[200] that must be tolerated if this is to remain the mode of advancement of the judiciary. The procedure of appeals is not linked to a deep commitment to the Raj's provision of substantive

[195] The quality of administration was discussed in the previous sub-section.
[196] Ibid 31. Stephen's thoughts on remuneration are apposite here, in thinking about his prejudices as to race and how this maps onto his perception of the quality of the judiciary:

> 'I may here observe that it appears to me quite unnecessary to pay Native Judges at the anything like the same rate as English Judges or officials. An Englishman who adopts India as his profession has to be paid a large salary by way of compensation for the follow amongst other matters: He has to live in an unhealthy and unpleasant climate; he has to leave his home for the best part of his life; he has to live in a very expensive manner, *e.g.* the expense of educating his children is greatly increased; he has to retire from active life far earlier than would be the case if he were in England, and yet at a period when it is practically too late for him to turn to other pursuits. The high pay which he receives in India is compensation for all this. Is it obvious that no one of these considerations applies to a Native official?' (Ibid 49).

[197] Ibid 61.
[198] Ibid 31.
[199] Ibid.
[200] Ibid 53.

justice but instead devolved to concerns regarding the skill and work ethic of the judiciary.[201] Stephen concludes that:

> 'the use of appeals is rather to keep the subordinate Judges up to their work than to correct their mistakes. As a rule, the chance that the first decision will be right is better than the chance that any subsequent decision will be right, particularly in criminal proceedings; still, in order *to provide proper security that Judges will do their duty*, it is, I think necessary to retain substantially the existing system of appeal and superintendence'.[202]

At the same time as attempting to govern the use of judicial power by way of a procedure that built both hierarchy and appeal rights, Stephen was also concerned to rationalise the government of conduct: the very interior space of judicial office holding was also to be subject to superintendence in the absence of what Stephen reads as "quality", "honour" or conscience. In other words, his concerns with the conduct of government also extended to optimising the government of conduct. Although criminal jurisdiction and executive power might be invested in the same person, '[t]here is an obvious difference between the judicial and the executive temper'.[203]

The figure of the "wilder districts" appear throughout the Minute as a reference for a frontier zone where the rule of law is challenged, and his political refrain is that criminal procedure offers 'a guide for the Judge and a rule for the public'.[204] This metaphor also offers an 'additional reason which the Judge's official superiors should keep a firm hand on him'.[205] Ensuring that government is conducted "properly" involved the balancing of distinctly Victorian-era masculine virtues in the conduct of office, where '[a] vigorous man brought into contact with barbarous tribes is apt to require a great deal of supervision for fear he should more or less sink to their level'.[206] It is, in Stephen's opinion, the existence of a rational procedure that legitimated

[201] E.g. his recounting of an anecdote 'I have heard that in former times as many as three or four witnesses would be under examination at once by different mohurrirs [translator and transcriber] in various parts of the Court, whilst the magistrate was occupied with other business' (Ibid 57).
[202] Ibid 60
[203] Ibid 9.
[204] Ibid 92.
[205] Ibid.
[206] Ibid 95.

and rendered durable the British incursion into the so-called wilderness, also operating as a tether for the preserving order and good government in the district and the *persona* of the District Officer.[207]

**iii. Procedure as Genre and Media: On the Practical Aspect of Codified Legislation**

Moving away from the text of the *Minute* to consider Stephen's reflections on what he considered to be the principal interventions in the government in British India in terms of its legislative media: the Code of Criminal Procedure was legislated in the distinctive *form* of a code. Stephen presents codification as an important part of ensuring the integrity of British rule in India. He presents a view of his work where he was required to defend the importance of enabling and not merely constraining executive and military activities in India through the imposition of enforced laws. There was by his admission, a view from the days of the East India Company's rule that persists, where 'many persons object not so much to any particular laws, as to the government of the country by law at all'.[208] He explained the difference as 'between the government which we have established and the government which it superseded is, that one is in the fullest sense of the word a government by law, and that the other was a government by mere personal discretion'.[209] Stephen held that while arbitrary power and discretionary punishment are antithetical modes of providing security in civil life,[210] the assumption of the responsibilities of government means that 'whatever else we do in India, we must keep the peace; and this is strictly equivalent to saying that we must rule by law'.[211] The role of law in establishing rule is metaphysical and a mechanism for rendering physical security more efficient;it 'constitutes in itself a moral consequence more striking, more durable, and far more

[207] The obverse of this argument is made again in the conclusion, that '[n]othing can be more destructive of all executive vigor than an uneasy suspicion that the course which an officer intends to take may very probably be illegal', (Ibid 105).
[208] Stephen, 'Legislation under Lord Mayo' (n 19) 153.
[209] Ibid 161.
[210] Stephen held that 'the notion of a compromise between law and despotism is like a compromise between straight and crooked. The two ideas exclude each other' (Ibid 162).
[211] Ibid 167.

solid, than the physical conquest which renders it possible'.[212] In writing about the increasingly availability of studies in Anglo-Indian law at Indian universities, Stephen leaves readers in no doubt about his view of the moral qualities and political advantages of this pedagogy insofar as '[o]ur law is in fact the sum and substance of what we have to teach them. It is so to speak, the gospel of the English, and it is a compulsory gospel which admits no dissent and no disobedience'.[213]

His redrafted Procedure Code, which will be discussed in far greater detail in Chapter 5, was done with a view to synthesising 'the whole subject of the prevention of crime',[214] rather than stating the law pertaining to trial procedure. The purpose, recounted some four years after its passage, was thoroughly administrative: it was a working document that was designed so 'that a student who carefully acquainted himself with all the provisions of this Act, would have a complete theoretical knowledge of all the more important of the general duties which he would have to discharge as a District Officer'.[215] Codification—'[t]o reduce the law to a compact, intelligible form'—was an experiment in the politics of genre designed to facilitate efficient and lawful administration where '[e]very official European in the country is more or less concerned in its administration… and the due discharge of those duties is so essentially necessary to the maintenance of peace and order, and all of that depends on them, that the evils of intricacy and uncertainty in law make themselves felt at once by every District Officer'.[216] Stephen continued by addressing the precise theme of how the ergonomics of codification was a question of genre and the furniture, both physical and dispositional, of rule where it was practically impossible to supply 'Indian District Officers with law libraries or with the means of carrying them, or with

[212] Ibid 168.
[213] Ibid 169.
[214] Ibid 203.
[215] Ibid 204.
[216] Ibid 178.

the habits of mind necessary to refer to them'.[217] This was how Stephen understood the Codes, in practical terms, to work.

### C. A 'defect inseparable from the existence of British power in India': Jurisdiction Over Actions and Persons

In 1883, Stephen inserted himself into debate regarding the passage of amendments to the *Code of Criminal Procedure* in India, which would allow criminal jurisdiction over Europeans to be exercised by Indian judges.[218] The bill itself eventually passed into law. But, more important than the passage of changes to the code of criminal procedure was the vitriolic debate that this extension of jurisdiction stirred amongst the English, both in India and in the metropole. This was a bill that 'considerably strained and undermined the relation between the ruling race and the Indian middle-class intelligentsia'.[219] Stephen played a prominent role in arguing against both the bill's necessity and the utility of its object.

Reflecting on the Indian Code of Criminal Procedure, Stephen notes at the outset that there are issues of a practical kind that attend to the jurisdiction over the English in British India. The object of this legislative intervention was to ameliorate some of the procedural issues for Europeans operating far away from the criminal courts that had jurisdiction to punish them for infractions of the law. As Stephen summarised the issue

> '[i]n the remoter parts of the country they nearly enjoyed something equivalent to impunity in criminal cases which were not of sufficient importance to attract special attention… This grievance was more and more strongly felt as the growth of trade and the use of English capital

[217] Ibid 178. Stephen remarks that codification generates a pedagogical efficiency, whereby
> 'anyone who had thoroughly mastered the… [codes of British India] would have an amount of positive definite knowledge of the institutions of the country, a grasp of legal principles of the very highest importance, which is not to be attained at all by English law-students except as a result of much independent study, long practice, and investigation of a kind for which few people have either leisure of inclination'. (204).

[218] For a discussion of the media, particularly newspaper, context and ecology of the time, see Chandrika Kaul, 'England and India: The Illbert Bill, 1883' (1993) 30(4) *Indian Economic and Social History Review* 413.

[219] Sommath Roy, 'Repercussions of the Ilbert Bill' (1970) 32(2) *Proceedings of the Indian History Congress* 94, 94. Indeed, it was held to have exacerbated tensions and helped to fuel then nascent nationalism (see 98).

> in railways, plantations, and other things introduced into India a large number of Europeans of a class likely to commit crimes'.[220]

The renovated 1872 *Code of Criminal Procedure* attempted to remedy this issue by providing Sessions Judges who could deal with less serious offending, 'being European British subjects, were empowered to sentence them [Europeans] up to 12 months' imprisonment and a fine'.[221] Of course, the difference in the rights of subjects, based on race, is telling: '[t]he judge who can sentence a native to death is still unable to sentence an Englishman to more than a year's imprisonment'.[222] The reasons for this were borne out in Stephen's understanding of the relative qualities of English and Indian judges. Consider the implications of Stephen's hypothetical and its precisely tuned balance of racial stereotypes and its accompanying sympathies and competencies:

> 'I can hardly imagine a more distressing position than that, say, of a railway guard who, which having misconducted himself when drunk, is brought up to be tried before a man who has no sort of knowledge of him or sympathy with him, and only half understands him. If it is said that a native before an English Judge is equally ill off, it is hardly true for every effort is made to familiarise English judges with both the language of country and the characters of the natives, whereas natives have no familiarity at all with the character of the lower class of English, and few know our language well enough to administer justice in it. In so far, however, as the observation is true, it proves too much, for it is based upon a defect inseparable from the existence of British power in India'.[223]

It is, based on this constructed understanding—one of wayward, drunken railwaymen, that the political situation of British India is to be apprehended. The stereotypes of the diligence and linguistic competence of English judges, sit counterposed to his racist construction of negligent, vindictive illiteracy of Indian natives. It is worth noting that Stephen himself could not speak "Hindustani" and wrote privately that it was a language 'in which there was little worth

[220] Stephen, Letter to the Editor of the Times (n 24).
[221] Ibid.
[222] Ibid.
[223] Ibid.

reading'.[224] Likewise, it is also worth bearing in mind that this anthropological vignette on the operation of Indian justice bears little resemblance to Stephen's own work on the nature of judicial administration. Indeed, it is through the problem of the drunken railway man that criminal procedure collides with what he calls a 'defect' in imperial authority: as he claims, the authority of rule comes from the fact of its existence not from its claim to justice. He went on to write, '[i]t does not represent the native principles of life or of government, and it can never do so until it represents heathenism and barbarism'.[225]

Within the precarious jurisdiction of the criminal law in British India sits the broader problem of the political actuality of imperial governance. To change the criminal procedure of India such that Indian judges could have criminal jurisdiction over the Europeans in India involved confronting 'the foundations on which British India rests: '[i]t is essentially an absolute Government, founded, not on consent, but on conquest'.[226] These proposed changes to the criminal procedure of British India stand, in Stephen's terms, as a 'symptom… of a determination to try and govern India upon principles inconsistent with the foundations on which British power rests'.[227] Stephen argues that the basis of rule is that of

> 'a belligerent civilisation, an[d therefore] no anomaly can be so striking or so dangerous as its administration by men who, being at the head of a Government founded upon conquest, implying at every point the superiority of the conquering race, of their ideas, their institutions, their opinions, and their principles, and having no justification of its existence except that superiority, shirk from the open, uncompromising, straightforward assertion of it, seek to apologize for their own position, and refuse from whatever cause, to uphold and support it'.[228]

Reflecting on his position in light of criticism in the press, Stephen conceded that he 'may have yielded to the temptation of expressing my opinions in a needlessly trenchant and unpopular

[224] Stephen to Lyall, papers in the British Library, 1889, quoted in Gary Peatling, 'Race and Empire in Nineteenth-Century British Intellectual Life: James Fitzjames-Stephen, James Anthony Froude, Ireland, and India' (2007) 41(1&2) *Éire-Ireland* 157, at 173
[225] Stephen, Letter to the Editor of the Times (n 24).
[226] Ibid.
[227] Ibid.
[228] Ibid.

style'.[229] Regardless, he maintained the correctness of his position: conquest is 'not a matter of reproach', 'the class from which rulers have hitherto been usually taken, namely the rich and the educated, are far wiser than the poor who form… the bulk of the community', 'the "belligerent civilisation" of which I spoke consists… in compelling by force all sorts and conditions of men in British India to live in peace with, and to tolerate each other'.[230] At home, he finds the 'tending in the democratic direction' of the Parliament 'an unwelcome truth'.[231]

## IV. Conclusion

This chapter has considered changes in the criminal law through two vignettes in Stephen's long career: one concerned with his formal jurisprudence and the other looking at how law shaped his view of proper government during his career a colonial administrator. His jurisprudential importance to the development of criminal procedure can be understood as at least twofold. First, his early book, the *General View* offers an original account of criminal responsibility. However, rather than dwelling on the substantive contributions to the doctrinal reorganisation of criminal offences, my concern here has been to show that, the procedural form provides a deeper structure to Stephen's jurisprudence. Additionally, it is the capacity for abstract thinking of systems of jurisprudence and political theory that Stephen used to advance his arguments concerning the political economy of coercion, where self-awareness of abstract process functions as a yardstick for critiquing John Stuart Mill's assertion of a widespread advancement from what Mill called barbarity.[232] In the second vignette composing this chapter, Stephen's own office moved from that of a barrister seeking to bring conceptual clarity to his law to colonial legislator: prescribing law unto others in British India. In this role, he developed a way of holding law to questions of the proper conduct of government through the idiom of procedure. To this

[229] Stephen, Foundations of the Government in India (n 17).
[230] Ibid.
[231] Stephen, Foundations of the Government in India (n 17).
[232] Stephen, *Liberty Equality Fraternity* (n 13), 72

end, the language of procedure offers a way to shape how colonial rule is performed, and imagines its performance and legitimacy, in order to hold moral or political questions at a pragmatic distance. To this end, procedure becomes the both the terrain and the map for negotiating, in the jurisprudence of criminal law, questions of how to conduct empire.

This Chapter has shown how the language of procedure could be adapted to provide a more rigorous structure to criminal law than Blackstone's earlier notion of public wrongs. Additionally, it was procedure rather than particular institutions or processes upon which Stephen's jurisprudence proceeded. While his account of procedure is one of a less distilled and systematic kind than Bentham's, this is because the world Stephen moved through was not merely one of designing theoretical systems, but necessitated exercising judgment both as a barrister, a colonial legislator, and latterly as a judge. Stephen believed that the rule of law, expressed and systematised through procedure, was a means of legitimating the project of empire by yoking its most violent excesses to standardised uses of force and a rationalised framework of reasons for its application.[233] This at once was directed outward: a better rule of subjugated populations, but was also concerned with governing internal frontiers and modulating the responsibilities of British office in India. Stephen's conclusions about the role of law in empire remains worthy of attention, not only for its procedural inventiveness but also precisely for the unapologetic, indeed, characteristic, way he stares down the contradictions in which he operates and proceeds regardless. Indeed, procedure was often his way of legitimating the holding of the political and ethical knot of domination, extraction, subjugation, force, veridiction, and steadfast confidence in the rightness of one's project to lawfulness. To this end, this chapter has followed how Stephen's labours produced an understanding of responsibility capable of re-organising the juridical subject of a modern criminal law along a deeply procedural axis. His work as an imperial administrator, echoes this axis along a parallel line, but also

[233] McBride (n 18).

provided him with an opportunity and a site to refine and deploy these ideas, leaving a legacy of codified criminal law that persists to this day.

# Part Two – Jurisdictions of Procedure

# Chapter Five:
# **Procedure and the Government British India:** Criminal Jurists and the Conduct of Empire

'[T]he whole civil and military government of India is in your hands, and for what is good or evil in the administration of it, the honour or dishonour will redound upon you'[1]

'Utilitarianism is the most temperate of all philosophies which makes its study within the context of British India, well before the invention of efficient air conditioning, all the more fascinating'[2]

## I. Introduction

This chapter considers the history and effects of the governance of India by tracing criminal procedure legislation. It reads the idioms, texts and institutional expression of procedure jurisprudence to re-construct a narrative about the gradual emergence of both an imperial technology for the government of criminal conduct and, more importantly, follows how criminal procedure provided a model for reforms in the conduct of the British Empire. Criminal procedure became a cudgel of empire neither entirely by chance nor by design. Instead, it modelled a style of conduct derived, adapted and metabolised by those English administrators who read Jeremy Bentham and translated elements of his thought into action. What was

1 From the Board of Directors, East India Company, to the Government of India, 'Despatch from Accompanying the Government of India Act, 1833 (3 & 4 Will IV, s. 5), (No. 44, 10 December 1834), [78] ('Despatch'). James Mill is believed to have authored the first draft of this document on Behalf of the East India Company Directors: John William Kaye, The Administration of the East India Company: A History of Indian Progress (R Bentley, 1853), 137; Courtenay Ilbert repeats this claim 'according to a tradition in the India Office', The Government of India: Being a Digest of the Statute Law Relating Thereto (Clarendon Press, 1898), 92.

[2] Piyel Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters (Routledge, Cavendish, 2007)*, 129.

eventually implemented was neither Benthamite nor strictly utilitarianism, but a novel creature of government benefiting from a refined theory of conduct. A leading historian of British India concluded that '[t]he enduring legacy of utilitarianism on India must be looked for in the administrative and legal system'.[3] This chapter seeks to recover some of these changes by following the idiom of procedure as the form of administration moved from the East India Company to direct rule. Be forewarned, this is something of a messy study in the accretion of governmental technique: it is a story of changing conduct that plays out as the British government assumed direct rule over India and gradually refined the technical devices that sustained its possibility. Unlike Nasser Hussain's exemplary work on the technology of emergency, this is a study in the slow refinement of norms of conduct.[4]

This introduction offers some historical remarks on how direct rule was fashioned from the jurisprudence of the East India Company. It then considers the transmission of jurisdiction by following how various governmental authorities delegated their power to make law with a view to illuminating how criminal procedure was envisaged as both cause for concern and mode of governance. In this regard, it is a story of conduct that pays attention to the movement of procedure and the protocols that are instituted to govern that conduct. Criminal procedure was instituted as part of the governance structure of a new jurisdiction over Indian territory. It formed part of a broader program, outlined under the directions of the Directors of the East India Company and carried to draft stage by Thomas Babington Macaulay.[5] Macaulay was appointed as Legislative Member of the Indian Law Commission and arrived in India in the

[3] Eric Stokes, *The English Utilitarians and India* (Clarendon Press, 1959), 320 ("*Utilitarians*").

[4] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003).

[5] A number of biographies of Thomas Macaulay have been published that narrate his navigation of the various threads of imperialism and liberalism: John Clive, *Thomas Babington Macaulay: The Shaping of the Historian* (Secker & Warburg, 1973). See Zareer Masani, *Macaulay: Britain's Liberal Imperialist* (Bodley Head, 2013), particularly chapter 8. See also Owen Dudley Edwards, *Macaulay*, Historians on Historians (Widenfield and Nicholson, 1988). Also see Jane Millgate, *Macaulay* (Routledge & Kegan Paul, 1973), where chapter 4, 'The Indian Years: Engagement and Withdrawal' usefully narrates his time in India.

summer of 1834; his posting was to last for approximately three and a half years.[6] Macaulay's model for reform was to be effected through the technique of codified legislation.[7] His procedure code was drafted in 1837,[8] as part of a series of reforms aimed at transforming the governance of this jurisdiction by the Company, although it was not implemented until 1861. He outlined his thoughts on the benefits of codification in the same speech to the Commons:

> 'I believe that India stands more in need of a code than any other country in the world, I believe also that there is no country on which that benefit can more easily be conferred. A code is almost the only blessing—perhaps it is the only blessing—which absolute governments are better fitted to confer on a nation than popular governments'.[9]

However, a Code of Criminal Procedure was only enacted in 1861.[10] And this Code was subject to a significant revision in 1872,[11] conducted by James Fitzjames Stephen during his tenure as the Legal Member of the Governor General in Council.[12] This was some 15 years after the assumption of direct rule and decades after Macaulay had returned from his time in the service of the Company. This closeness between Stephen and Macaulay's careers exhibits the qualities of a certain linearity of shared projects across decades that is taken as illustrating the messy proximities of the relationship that inheres between colonial administrators, prominent jurists, procedure, and the birth of modern ideals of civil service. Macaulay understood that if the Company was to assume legislative and governmental authority over India at the expense of being a trading body it would require 'the assistance of a commission for the purpose of digesting and reforming the laws of India, so that those laws may, as soon as possible, be formed

[6] He arrived in Madras on 10 June 1834: Clive (n 5) 291.
[7] On the history of various experiments in writing technologies and their impacts on Indian society see Bhavani Raman, 'The Duplicity of Paper: Counterfeit, Discretion, and Bureaucratic Authority in Early Colonial Madras' (2012) 54(2) *Comparative Studies in Society and History* 229. See also Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge University Press, 2010) ("*Colonial Justice*").
[8] Stokes, *Utilitarians* (n 3) 213.
[9] Thomas Babington Macaulay, 'Government of India', Hansard, House of Commons (10 July 1833) [12].
[10] *Code of Criminal Procedure 1861* (India) Act XXV of 1861 ("*1861 Code*").
[11] *Code of Criminal Procedure 1872* (India) Act X of 1872 ("*1872 Code*").
[12] See Chapter Four of this thesis.

into a Code'.[13] He therefore proposed a style of legislation as well as the institutional form required for drafting such a constitution from such a starting point. His analysis involves a consideration of the legislator's role, where 'a quiet knot of two or three veteran jurists is an infinitely better machinery for such purpose than a large popular assembly divided, as such assemblies almost always are, into adverse factions'.[14] His preference for expert rule rather than agonistic politics aside, the legislative task was viewed as one of facilitating the settlement of a particular kind of constitutional equality where:

> 'we do not mean that all people of India should live under the same law: far from it: there is not a word in the bill… susceptible to such an interpretation. We know how desirable that object is; but we also know that it is unattainable…. We propose no rash innovation; we wish to give no shock to the prejudices of any part of our subjects. Our principle is this; uniforming where you can have it; but in all cases certainty'.[15]

The proposed office of the Company legislator expressed Macaulay's belief in the virtues of 'an enlightened and paternal despotism',[16] as a theory of both government and law. Without a developed case law or knowledge of local jurisprudence, what the judge 'administers is not law but a kind of rude and capricious equity' incapable of consistent or principled decisions, 'the Magistrate should know what law he is to administer'.[17] Of course, this is predicated on there being a law to administer, a knowledge prior to that law to oversee its implementation, and the know-how that facilitates its application. Macaulay argued that the end of the Company's commercial privileges that formed the basis of the bill under consideration,[18] might supply a window conducive to such a change, being proposed

> 'at precisely that point of time at which the advantage of a complete written code of laws may most easily be conferred on India. It is a work which cannot be well performed in an age of barbarism, which cannot without difficulty be performed in an age of freedom'.[19]

[13] Macaulay, 'Government of India' (n 9).
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Macaulay, 'Government of India' (n 9).
[18] See next section.
[19] Ibid.

In making this argument, Macaulay was prepared to highlight his own not-unthinking tension between autonomy and authority as a style of relation between laws and people. But if Macaulay was attentive to the form of relations, his speech was also an argument for his view that it was the role of the jurist to improve government through the techniques of modern law, which he found exemplified by codification.

## II. On the Procedural Legacy of the End of the East India Company

The East India Company ('the Company') is not the focus of this thesis, but it is necessary to say a few words about the Company and its role in contemporaneous debates around the assumption and exercise of jurisdiction and the legislating of criminal procedure. Historians seem to largely agree that the Company's rule isn't entirely the product of a strategy of nationalist or commercial bellicosity; that 'the Company's expansion in the mid-eighteenth century most frequently arose from events dictated by the native powers in India, and without direction from London or the Presidencies'.[20] Starting with Robert Clive's victory over the Nawab of Bengal and the installation of 'a puppet ruler beholden to the East India Company',[21] the Company increasingly came to both hold territories and assume increasingly governmental functions including powers to tax, and to enter into diplomatic relationships with other Indian nations.[22] The institutional consequence of this assumption of political power, and one that is of greater relevance to the question of administration and procedure, is that 'the entire

[20] Philip Lawson, *The East India Company: A History* (Routledge, 2014), 92.
[21] Ibid 90.
[22] Although described rather prosaically in this paragraph, these powers in many ways became the antecedent conditions for the problems that will emerge in from 1813. Similar to procedure, the jurisprudence of property necessitated revision across this timeframe, for an excellent discussion of how the jurisprudential bases of property shifted through the East India Company's assumption of rule: Faisal Chaudhry, 'A Rule of Proprietary Right for British India: From Revenue Settlement to Tenant Right in the Age of Classical Legal Thought' (2016) 50(1) *Modern Asian Studies* 345.

apparatus of government on the subcontinent had been built upon and attuned to the commercial imperatives of the Company and the demands of the Directors in London'.[23]

The Company had lost most of its monopoly trade rights in 1813.[24] The lasting consequence of territorial gains and the gradual extinguishment of monopoly rights was that 'the Company had come to take on the identity of a bureaucratic shell'.[25] As the nineteenth century continued, the Company was operating in increasingly turbulent intellectual and financial waters: monopoly powers were treated with a newfound economic suspicion,[26] and the Company's financial position had deteriorated significantly due to increased military expenditure and the associated costs of administering annexed territories.[27]

**A. Dismantling the East India Company**

In the 1830s the position of the East India Company was altered significantly by the Parliament,[28] as British demand for access to South-East Asian trade, along with shifts in attitudes toward the use of military force in the service of commercial ends, saw the relationship between the Parliament and Company shift.[29] Philip J Stern's work on the East-India Company provides a template for thinking about it as a complex *sui generis* political and mercantile entity.[30] Stern's argument compels us to read the Company as a jurisdiction: as a legal entity that was both at

[23] Mark Brown, 'The Most Desperate Characters in All India: Reconsidering Law and Penal Policy in British India' (2001) 3(3) *Punishment & Society* 433, 435.
[24] The Company was to retain monopoly rights over the export of tea from China, while other interests were opened up to competition. *East India Company Act 1813* (53 Geo III c 155).
[25] Lawson (n 18) 42.
[26] An extended analysis of this debate is found in Emily Erikson, *Between Monopoly and Free Trade: The English East India Company, 1600-1757* (Princeton University Press, 2014). Perhaps the most famous critique of monopoly powers in the context of the dissolution of the East India Company is Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).
[27] See Lawson (n 18) 100, also 132-7.
[28] The company was initially incorporated by Queen Elizabeth in 1600: *Charter of Queen Elizabeth to the East India Company* (31 December 1600).
[29] This relationship grew apart as toward the end of the 18th century as the military dimension of the Company's operation become increasingly separate from its profit-making centres. See Lawson (n 18) 160.
[30] Philip Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford University Press, 2011).

once a political and juridical authority and politically, legally and financially subservient to both Britain and the Company's Board of Directors. It was, at the same time, a mercantile entity gradually stripped of its valuable trading advantages. As a consequence, the Company eludes categorisation within categories of commercial and political organisation, but nevertheless it combined these roles and operated as an entity of government capable of governing populations, entering into relations with other states; and it maintained a standing army. In debating the remaining monopoly rights over trade that were at risk of being stripped from the Charter of the Company in 1833,[31] Thomas Macaulay was to encapsulate the peculiarity of both Company rule and form in a famous address to the House of Commons

> 'The Company had united in itself two characters, the character of trader and the character of sovereign.... It is a mistake to suppose that the Company was a merely commercial body till the middle of the last century. Commerce was its chief object; but in order to enable it to pursue that object, it had been... invested from a very early period with political functions. More than a hundred and twenty years ago, the Company was in miniature precisely what it now is. It was intrusted with the very highest prerogatives of sovereignty. It had its forts, and its white captains, and its black sepoys; it had its civil and criminal tribunals; it was authorised to proclaim martial law; it sent ambassadors to the native governments, and concluded treaties with them...
>
> It is true that the power of the Company is an anomaly in politics. It is strange, very strange, that a joint-stock society of traders, a society, the shares of which are daily passed from hand to hand, a society, the component parts of which are perpetually changing, a society, which, judging a priori from its constitution, we should have said was as little fitted for imperial functions as the Merchant Tailors' Company or the New River Company, should be intrusted with the sovereignty of a larger population, the disposal of a larger clear revenue, the command of a larger army, than are under the direct management of the Executive Government of the United Kingdom. But what constitution can we give to our Indian Empire which shall not be strange, which shall not be anomalous? That Empire is itself the strangest of all political anomalies... General rules are useless where the whole is one vast exception. The Company is an anomaly; but it is part of a system where everything is anomaly. It is the strangest of all governments; but it is designed for the strangest of all empires.'[32]

[31] Economically, this transition away from monopolies begins a more formal ascendency of capitalism as a mode of business and political theory. Adam Smith's savaging of the Company's monopoly had proven persuasive, and gradually Britain's colonial acquisitions where being opened to other sources of capital, in the hope that competition would be a path to financial success. These arguments found support as the military and administrative costs of the East India Company had been steadily undermining its profitability for decades.

[32] Macaulay, 'Government of India' (n 9).

With the passage of the Act,[33] a jurisdiction over India was legislated into being from the other side of the world.[34] With it, the Company ceased to be a commercial operation with trading rights and was instead restricted to performing legislative,[35] executive,[36] and war fighting,[37] responsibilities within Company territories.[38] The Act required that the Law Commissioners of the East India Company's government of India confront the peculiarity of the character of its own political power, cleaved now from its mercantile base. The first task assigned by the Parliament to this administrative husk was to draft legislation for the administration of the newly instituted political body. The Act instructed the Governor-General in Council to begin a process of law reform such that:

> '…a general System of Judicial Establishments and Police, to which all Persons whatsoever, as well *Europeans* as Natives, may be subject, should be established in the said Territories at an early Period, and that such Laws as may be applicable in common to all Classes of the Inhabitants of the said Territories, due Regard being had to the Rights, Feelings, and peculiar Usages of the People, should be enacted, and that all Laws and Customs having the Force of Law within the same Territories should be ascertained and consolidated…'.[39]

In order to give substance to this aim, the Governor General in Council of India was instructed by the British Parliament, to assemble a group of five jurists, a group 'styled "The *Indian* Law "Commissions"'[40] to:

> 'fully inquire into the Jurisdiction, Powers, and Rules of the existing Courts of Justice and Police Establishments in the said Territories, and all existing Forms of Judicial Procedure, and into the Nature and Operation of all Laws, whether Civil or Criminal, written or customary, prevailing

[33] *Government of India Act 1833* (3 & 4 Will 4, c 85) ('*1833 Act*').
[34] Prior to this act, there were a series of smaller political territories that were referred to as a geographical region: this piece of legislation amalgamated the territory through the assertion of a super-intendent jurisdiction.
[35] *1833 Act* (n 31) s 43. Note that there were jurisdictional restrictions over the applicability of such laws to pass laws 'to sentence to the Punishment of Death any of His Majesty's natural-born Subjects born in Europe, or the Children of such Subjects': Ibid s 46.
[36] Ibid s 39.
[37] See Board of Directors, 'Despatch' (n 1) [100].
[38] An introduction to this shift in the nature of the Company's basis can be found in Lawson (n 18), 156-162.
[39] *1833 Act* (n 31) s 53.
[40] Ibid (emphasis and inverted commas in original).

> and in force in any Part of the said Territories, and whereto any Inhabitants of the said Territories whether Europeans or others, are now subject'.[41]

In proposing the Penal Code, the Law Commissioners sought limit of the grant of extraterritorial jurisdiction to 'all servants of the said Company within the dominions of Princes and States in alliance with the said Company'.[42] In this regard, questions of territory and the personhood of legal subjects compelled the Law Commissioners to address the issue of jurisdiction in the idiom of power and sovereignty as a means for apprehending its limits, as

> '[i]t is in our opinion most desirable that this power, a power which is whether legal or not was exercised without being questioned… before the passing of the late Charter Act, should extend not only over natives but also over British-born subjects of the king'.[43]

The Commissioners address both the particular political character of the Company and the nature of its relationships, through an assertion of jurisdiction that interposes a quivering meridian of equality: governments that are posed as not *quite* attaining the sovereign status of European States, on account of an "alliance" being understood as a hierarchical détente that necessitates that the Company consider the welfare of subjugated minor-sovereign's subjects.

Equality is a rhetorically useful device. The Law Commissioners 'beg permission most respectfully to observe that every such exception is an evil, that is an evil that any man should be above the law, that it is still a greater evil that the public should be taught to regard as a high venerable distinction the privilege of being above the law'.[44] In other words, equality here is not an equality of persons or status but an equality of subjection to the substantive requirements of the law of the Commissioners.[45]

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[41] Ibid s 53.

[42] Indian Law Commissioners, Letter to the Governor General (2 May 1837), [27].

[43] Ibid, [28]

[44] Indian Law Commissioners (n 40) [33].

[45] This claim was also sensitive to internal inequalities in the territories it was administering:

> 'The peculiar state of public feeling in this country may render it advisable to frame the law of procedure in such a manner that families of high rank may be dispensed, as far as possible, from the necessity of performing acts which here are regarded, however unreasonably, as humiliating'

**B. The Discharge of Legislative Office: Instructions for Founding a Novel Jurisdiction**

The Charter of 1833 required the Company to first legislate and then govern the new jurisdiction of India.[46] This peculiar regime would govern India for a quarter century until the Crown assumed direct rule over the territory following the dissolution of the Company in the wake of the 1857 mutiny.[47] In addition to providing a template for the administration of India, the legislation needed to also balance the vested interests of the Company, the authority of British Parliament, and the statutory requirement to govern according to the rule of law.[48] The mechanisms through which the Company directed the legislative re-imagination of the liberalisation of European access to the sub-continent offer an insight into the relationship between procedure and administration.

It was James Mill who drafted the letter of detailed instructions, on behalf of the Company's Board of Directors, as to how the newly instituted Government of India ought to proceed with fulfilling its mandate. The Board of Directors' letter communicates both the assumptions and jurisprudential principles through which the re-organisation of jurisdiction is to become a

[46] *Government of India Act 1858* (21 & 22 Vict, c. 106). And see Mill's discussion of this power: Board of Directors 'Despatch' (n 1) [64].

[47] *Government of India Act 1858* (n 44). There is a voluminous literature on the 1857 War of Independence or Mutiny. In reflecting on this chapter I have drawn on the following works: Shaswati Mazumdar (ed), *Insurgent Sepoys: Europe Views the Revolt of 1857* (Routledge, 2011); Sabyasachi Bhattacharya (ed), *Rethinking 1857* (Orient Longman, 2007); Eric Stokes, *The Peasant Armed: The Indian Revolt of 1857* (Clarendon Press, 1986); Kim A Wagner, *The Great Fear of 1857: Rumours, Conspiracies and the Making of the Indian Uprising* (Peter Lang , 2010).

[48] On this point, my reading is informed in large by the body of excellent scholarship that has attempted to navigate the broader questions of the rule of law's applicability in the Victorian-era British Empire. In particular, I am following the vein of scholarship that accords additional focus and weight on the role of jurisdiction and less on concepts of State (as might be a more familiar rubric within, for example, political science or international relations. See Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press, 2010); Coel Kirkby, 'Henry Maine and the Re-Constitution of the British Empire' (2012) 75 *Modern Law Review* 655; Kolsky, *Colonial Justice* (n 7); Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' (2005) 23(3) *Law and History Review* 631 ('Codification'); Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press, 2005). For a discussion of imperial context in which the first sustained work of jurisprudence on the rule of law emerged see, Dylan Lino, 'The Rule of Law and the Rule of Empire: A. V. Dicey in Imperial Context' (2018) 81(5) *Modern Law Review* 739.

practical task, delegated to jurists. The following interpretation of this document traces the place of criminal procedure in this broader project of attempting to confer governmental power at a distance and regularise authority through the re-arrangement of lawful relations according to a rubric of the rule of law.

It is important to have a clear sense of the problem of order that the Directors were attempting to resolve with legislation

> '[t]he Act unsealed for the first time the doors of British India to British subjects of European birth… It is therefore necessary that the local government should full means of dealing with them, not merely in extreme cases, and by a transcendental act of authority but in the current and ordinary exercises of its functions and through the medium of laws carefully and promptly and impartially administered'.[49]

In other words, the Company was aware that the ingress of private and un-regulated capital was the immediate problem to be regulated and governed. As the Company lost its monopoly over trade, its commercial ethos nevertheless patterned the marrow of the its understanding of government and law.[50]

**C. The Company's Procedural Concerns**

A broad suite of procedural reforms were aimed at facilitating the regularisation of governance. As such, the Board's instructions regarding criminal procedure address a number of tensions within the administration of a colony by liberal principles subject to the rule of law. Substantive

[49] Board of Directors, 'Despatch' (n 1) [9].

[50] Consider the following instruction:

> 'In acting on these instruction, we earnestly desire you to keep primarily in view the interests and the welfare of the natives; but next to this principle object, and at no great interval below it, we would enjoin you to direct your efforts to the promotion of… liberal purposes…. The Act assumes that the British capitalist, seeking to establish himself in the country, comes as a friend, not as an enemy, and the policy of the Act would be defeated if the designs of such person were to meet with any unnecessary hinderance or embarrassment', (Ibid [48]).

reform of lawful conduct and rules of government could be achieved by regularising existing administrative and judicial institutions.[51]

The Board prioritised the preservation of a legal order and its sustenance over concerns about the sensitivities of Europeans being subject to local laws administered by local courts. European persons living in the interior of India, away from the former Presidency towns, would now be subject to the jurisdiction of the locally administered mufassil courts.[52] The Board reasoned that because Europeans were no longer there 'purely by the tenure of sufferance… now that they are become inhabitants of India they must share in the judicial liabilities as well as in the civil rights pertaining to that capacity'.[53] The Board acknowledged that the overarching aim of ordering the potentially unruly incursion of capitalism into the interior involved a recognition of the role of local legal institutions and procedural mechanisms. As we shall see, this universality of procedure did not accord with a substantive equality between the subjects of those same procedures.[54] The Board's style of instructions saw broad principles stated and then walked back through a series of exceptions (consider the statement that eventually 'the entire people of India, whether of Eastern or Western, extraction [will be] under one and the same system of law, police and judicature',[55] and in the interim, 'all British-born subjects throughout India shall forthwith be subject to the same tribunals with the natives').[56] However, it is important that the discussion of equality or universality concerns remained procedural, directed as they were to

[51] Ibid [52]-[54].
[52] This aim was never legislated, and 'under the Criminal Procedure Code Indian Magistrates were debarred from trying European British subjects in the Mofussil': Thomas R Metcalf, *Aftermath of Revolt: India 1857-1970* (Princeton University Press, 1964), 309.
[53] Board of Directors, 'Despatch' (n 1) [59].
[54] Ibid [52].
[55] Ibid.
[56] Ibid [59].

the institutions of adjudication within the Indian legal system rather than rights, remedies, substantive offences and punishments.[57]

At this juncture, it is important to read for precisely how criminal procedure was envisaged as facilitating governance according to the Company's understanding of the reasoning and principles behind the rule of law. In fulfilling this role, the jurisdiction of the Company was shaped by Parliament insofar as '[t]he clause which effect this great alteration in our Indian policy are not restraining but enabling enactments'.[58] In practice, this was understood to mean that in writing and administering the penal and procedural law,

> '[t]he conditions which you shall see fit to impose on private persons coming from Europe for the highly proper purpose of placing or keeping them within the supervision of an all-seeing police must not be more than necessary for that object'.[59]

The Directors are keen to make clear that the jurisprudential aim was to constitute a

> '…system of criminal judicature which you adopt must be formed with especial regard to the advantage of the natives rather than of the new settlers, not because the latter are themselves less worthy of consideration, but because they are comparatively few, and laws and institutions exists not for the few, but of the many'.[60]

However, in spite of this assertion of the interests of the population, the instructions for a regime of criminal procedure are an attempt to manage the shared mandate of facilitating European exploitation of the Indian labour market. This contradiction or paradox in governmentality was achieved by facilitating discretion in the application of the rules of law to the behaviour of Europeans.[61] As this section will describe, it is possible to map the Board's instructions for this mechanism of administration—procedural equality was coupled with

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[57] Ibid [58]. For example, it was intended that only the King's Court could pass capital sentences again British-born subjects.
[58] Ibid [43].
[59] Ibid.
[60] Ibid [63].
[61] On this point, my analysis is informed by Niklas Luhmann, 'The Third Question: The Creative Uses of Paradoxes in Law and Legal History' (1988) 15(2) *Journal of Law and Society* 153. And more generally apropos of this problem in systems theory see 'Tautology and Paradox in Self-Descriptions of Modern Society' (1988) 6(1) *Sociological Theory* 21.

substantive exceptions; clear, codified, and promulgated laws supported by discretions in favour of sustaining public order and private investment. Likewise, while the Governor General in Council was vested with powers over emergencies,[62] the object of the Act was to establish a system enabling and directing the formulation of procedures to facilitate and limit regularised order. But limits still constitute boundaries of acceptability.

The Board sought to install equality of procedure, in terms of criminal justice process and the available venues for prosecution, while maintaining a distinction in the legislated substantive matter. The instructions to the legislator display a concern with finding a way to navigate the contradictions of formal equality offset by substantive difference:

> 'Though an Englishman be made amenable to the same tribunal with the native, and though his rights be placed under the same supervision and protection, it does not follow that those rights are to be determined by the same rule.... Even in criminal cases where such distinctions are least desirable, they may yet sometimes be necessary, since it is conceivable that what would operate as a severe penalty to a Hindu would be felt as none by an Englishman; but variances like these do not affect the main principle'.[63]

However, it is important to recognise that while race is one frame for interpreting these exceptions, the interests of access to labour markets and the protection of nascent capital is equally a factor in the Board's instructions to the Government. In order to preserve this enabling constraint and sphere of permissibility, the Law Commission was instructed to draft legislation such that

> '[t]he regulations which you shall make with the just and humane design of protecting the natives from ill-treatment must not be such as to harass the Europeans with any unnecessary restraints, or to give him uneasiness by the display of improper distrust and suspicion. Laws framed in such a spirit tend to produce the very mischiefs they aim at preventing'.[64]

[62] *1833 Act* (n 31) s 49.
[63] Board of Directors 'Despatch' (n 1) [61].
[64] Ibid [43].

Likewise, the Board advocated that banning slavery necessitated 'great delicacy, and require[d] to be treated with the utmost discretion';[65] their logic being that a more permissive approach was more likely to secure its abolition. This attitude accompanied the Board's concern with how laws surrounding the investigation and punishment of offences by Europeans were to be policed. Protection was understood to be achieved through light governmental touch with respect to those who might be at risk of exploiting or injuring local people: lest the government "produce the very mischiefs they aim at preventing". Additionally, the Board set the tone of authority in such a way as to regularise violence in a manner which is subject to the discretion of the executive:

> 'if any act of insult or outrage should occur which loudly calls for redress, and for which the law affords no remedy, the arm of power must interfere; but, here, also, caution is to be used. The necessity for interposition must be clear, and its limits must not be exceeded. Flagrant wrong is not to be permitted; but neither is to be repressed by officious or too violent an effort on the part of the Government. Care, above all things, should be taken not to make casual misconduct the occasion of harsh legislation. To put down abuse, even by a strong act of authority were better than to give it importance and in some sense perpetuity by founding on it, when it takes place, a severe and undiscriminating law'.[66]

Regardless, this tension in the applicability of law—which has the dual purpose of protection of people and the sustenance of an environment for capital—can be mitigated by insisting on equality of access to judicial venues while directing the government to administer policing violence so as to avoid 'officious' conduct. The instructions of the Board are such that they require a paradox of inter-related interests to be simultaneously sustained, and communicated to the legislator as the condition for the operation of jurisdictional re-ordering.

Protection 'of the natives from insult and outrage… you cannot possibly fulfil unless you render both natives and Europeans responsible to the same judicial control. There can be no equality

[65] Board of Directors, 'Despatch' (n 1) [72], also [73]-[75]. Given that the *Slavery Abolition Act 1833* (3 & 4 Will IV, c 73) was passed only months prior and was due to commence in at the start of December 1834. The existence and quality of slavery with the Company's territories could be presumed to be in the minds of the Board. As with the abolition of slavery in England, compensation for slaveholding 'will be due to the owner; but that will seldom be a heavy charge' [75], rather than to the enslaved person.
[66] Board of Directors, 'Despatch' (n 1) [44].

of protection where justice is not equally and on equal terms accessible to all'.[67] For the Board, this was to be implemented through

> '[t]he system of criminal judicature which you adopt must be formed with especial regard to the advantage of the natives rather than of the new settlers, not because the latter are themselves less worthy of consideration, but because they are comparatively few, and laws and institutions exists not for the few, but of the many'.[68]

To this end, the Board invited experiments with the available forms of criminal procedure for the trial of offences allegedly committed by European born subjects. For example, the jury trial in India does not need to be

> 'an exact copy of that which subsist in England. Whatever may be the prejudices of Englishmen, we strongly deprecate the transfer to India all the peculiarities of our criminal judicature. We are not satisfied that these peculiarities are virtues'.[69]

While one might be able to detect a hint of awareness at the foreseeable problem pertaining to an English accused being subject to the jury of the local mufassil court, this restraint stands in contrast to the aggressive manner that arguments about racial superiority and European exceptionalism would be made in debates regarding the same terrain a generation later.[70] There is also a tendency in the Board's writing to critique the institution of the jury trial on its own grounds:

> 'We would not blindly yield to the opinion or the prejudice that it is the inalienable right an Englishman under a criminal accusation to be tried by a jury. The only inalienable right an accused Englishman is justice and if he resides in the interior of India, he must be content with such justice as is dispensed to the natives'.[71]

The logic here distinctly echoes the tone of Bentham's line of critique,[72] but the inflection and method is not one of abstract reason but of 'consideration of the expediency, or inexpediency

[67] Ibid [59]
[68] Ibid [63].
[69] Ibid.
[70] See for example Keally McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law* (Oxford University Press, 2016), 112.
[71] Board of Directors, 'Despatch' (n 1) [62].
[72] See Chapter Three for Bentham's critique of the jury. 'There is no inherent perfection in the number twelve, nor any mysterious charm in an enforced unanimity of opinion', (Ibid [63]).

of adopting it generally'.[73] In other words, the delegation of decision-making also carried an instruction to innovate in matters of truth finding and adjudication even if the motives for doing so are clouded by other considerations. How these instructions were received forms the basis of the next section of this chapter.

**D. Legislating the Role of the Company Legislator**

In light of the hubris of the task assigned to the Law Commissioners, it is worth pausing to consider how the Board and Parliament interpreted their assumption of legislative office. Relations of office come to be increasingly governed by layers of procedure that both allocate responsibilities and direct the governing conduct of the Law Member of the Governor General in Council. In the two examples below, a view of the relationship between jurisdiction and office emerges that distinguishes responsibilities to law from responsibilities for administration: these highlight a tension between the operation of procedures for legislative process and their displacement in moments of emergency.[74] In a notable divergence from the norm of emergency powers, which perhaps speaks to Parliamentary interest in seeing Company rule governed by law rather than force, the aim of this emergency power is to enable the passage of Company legislation rather than the suspension of the law.

Section 53 of the *Government of India Act 1833* grants jurisdiction, '[t]hat the Superintendence, Direction and Control of the whole Civil and Military Government of all the said Territories and Revenues of India' in the Governor- General of India in Council.[75] The Governor General in Council was composed of the Governor General, three Ordinary Members,[76] and the Law Member who was subject to different requirements for the holding of this commission whereby

[73] Ibid [62].
[74] Cf Hussain (n 4) for an exemplary study of the politics of emergency in British Indian law.
[75] *1833 Act* (n 31) s 53.
[76] Ibid s 40. Ordinary Members were required to have been in the service of the Company 'for at least Ten Years'.

'the last-mentioned Member of Council shall not be entitled to sit or vote in the said Council except at Meetings thereof for Making Laws and Regulations'.[77] The Board's interpretation is that the Commission of Law Member is one that 'Parliament manifestly intended that the whole of his time and attention, and all the resources of knowledge and ability which he may possess, should be employed in promoting the due discharge of the legislative functions of the Council'.[78] This is described as a dispensation to perform

> 'the task of giving shape and connexion to the several laws as they pass, but also in the mighty labour of collecting all that local information… thus enabling the Council to embody the abstract and essential principles of good government in regulation adapted to the peculiar habits, character, and institutions of the vast and infinitely diversified people under their sway'.[79]

The Board instructed that the legislative function was defined by its reliance on a shared image of "abstract and essential principles of good government", which necessitated subjecting both the object and subject of its jurisdiction to both this imposed understanding and shared, but ill-defined, sense of goodness.[80] The Commission called for the collection of knowledge of a "vast and infinitely diversified people" for the purpose of instrumentalising that knowledge in the service of rule.[81] Their use of the verb "adapted" suggests a cognisance that cataloguing and translation efforts were to precede the subsequent erasure of those same jurisdictions under observation: indigenous laws were to be replaced—regulated by others in their interpretation of an abstract and supposedly essential form.[82] Macaulay generally agreed with this principle,

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[77] Ibid.

[78] Board of Directors, 'Despatch' (n 1) [21].

[79] Ibid.

[80] The instructions here resonate with Jeremy Bentham's description of the role of the legislator for another people, see 'The Influence of Time and Place in Matters of Legislation', Bowing (ed) *The Works of Jeremy Bentham* (1843), vol I, 169. See also Chapter One of this thesis.

[81] In practice, the method adopted was far less consultative than a generous reading of this provision might suggest. An example, while the legislation produced by the Council was published in 'the languages of the country, the draft Acts were only published in English'. Suggestions that they might do so were ignored See CD Dharker, *Lord Macaulay's Legislative Minutes: Selected with a Historical Introduction* (Oxford University Press, 1946), 35-6.

[82] The attitude seems evidence in describing those bound by the laws in effect in India as of "peculiar habits, character, and institutions". On this point, see Kolsky, 'Codification' (n 48) 679; Jessica Hinchy,

writing in the context of drafting the Penal Code, that English legislators were not capable of drawing up a workable Code for India because

> 'whatever might be the neatness of its arrangement, the terseness of its style and the correctness of the distinctions it might contain, would probably leave great classes of evils wholly unprovided for and excite strong feelings of hostility among the native population'.[83]

In setting out their directions to the Commissioners, the Board of Directors stressed both the primacy of process and specified that the suspension of procedure was a *legislative* rather than an executive responsibility. The emergency, in their view, is a situation that required an a-procedural moment to bring the exceptional into a relationship with law via legislation rather than by the government relying on a prerogative to suspend either the institution of the legislature or legal force of the text of legislation.[84] The Board instructed[85] the Council to proceduralise the conduct of legislative drafting

> 'The first principle is that no law, except one of an occasional kind, or arising out of some pressing emergency, should be passed without having been submitted to mature deliberation and discussion'.[86]

The Board's instructions remained instrumental in nature, indicating that a more certain rule was to be achieved through mandating, as a matter of dispositional principle, a proceduralised approach to law making, notwithstanding the lingering exigencies of "emergency" or the limit of the "occasional". To this end, the Board was quiet with respect to just how the suspension of law was to be provided in those situations where 'the Safety, Tranquillity or Interests of the

*Governing Gender and Sexuality in Colonial India: The Hijra, c.1850–1900* (Cambridge University Press, 2019), 206-7.

[83] Thomas Babington Macaulay, Legislative Minute (2 January 1837)

[84] Cf Agamben, State of Exception; Carl Schmitt, Political Theology

[85] The Process proposed paragraph is outlined at [16]. The Standing Orders of the Council of India (6 July 1835) reflect this paragraph.

[86] Board of Directors, 'Despatch' (n 1) [15]. The Statute also granted the Governor General broad powers in the context of legislative drafting, to 'of his own Authority and on his own Responsibility, to suspend or reject the Measure so proposed in Part or in Whole, or to adopt and carry the Measure so proposed into Execution, as the said Governor General shall think fit and expedient'.

British Possessions in India' are interpreted as 'essentially affected'.[87] In other words, no Company line was prescribed for the Governor General's political judgement. In the Board's description of how to proceed with legislating, they intimate that the role of procedure was to try and immunise the judgment of the Council against 'cases in which the pressure of popular feeling forces a law prematurely into existence'.[88] Indeed, this concern was symptomatic of the Board's imagination of the quality and state of governance, order and the passions in India,[89] as

> 'the occasions which compel the use of these extreme remedies rarely occur in well-governed states… in general, we are persuaded that in a punctual, constant, and even fastidious adherence to your ordinary rules of practice, you will find the best security not only for the efficiency, but also for the despatch of your legislative proceedings'.[90]

The Board was clearly concerned to downplay the powers of the Governor General, and their commentary assumes the primacy of their legislative role responsibilities rather than their executive powers.

This section has considered the jurisdictional consequences of the dismantling of the East India Company and narrates the jurisprudential efforts to subsequently re-constitute a colony through legislation and the procedures that accompany this aim. As a matter of jurisdiction, this Part of the Chapter has followed the way that practical autonomy to legislate was construed and constrained through procedure, as a technique for governing government. To this end, this Part has followed the constitution of the office of colonial legislator by attending to how various modes of procedure at once authorised and ordered the limited and politically subordinate assumption of the authority to write law for British India.

[87] *1833 Act* (n 31) s 49.
[88] Board of Directors, 'Despatch' (n 1) [16], also [18].
[89] See Haldar (n 2).
[90] Board of Directors, 'Despatch' (n 1) [18].

## III. Codifying Procedure: A Template for the Government of Conduct

In this section, attention shifts from the general role that procedure played in its framing of the work of the Commission and in the Company's communication, to consider the output of specific legislators. There are three principal sources to which I will be referring in this section, and those are Macaulay's legislative minutes that were drafted in advance of the legislation, as a kind of discussion paper preceding the drafting of the legislation; and his Procedure Code that was mothballed until 1861, after the Crown's assumption of direct rule; and lastly Stephen's 1872 redraft of the Code.

The project of colonial codification was one of imposed and diagrammed or utopian ordering: codes were imagined as governmental cosmologies. In preparing to complete the Indian Penal Code, Macaulay reflected that a 'Code, I mean a Code which deserves the name, is not a mere series of unconnected provisions it is one great and entire work symmetrical in all its parts and pervaded by one spirit'.[91] Additionally, the codification project was envisaged as a series of interlocking projects, and the Law Commissioners were concerned, for example, that without a code of procedure, the Penal Code would remain, in an architectural metaphor that seems to channel Blackstone's critique of the common law,[92] 'dark and confused'.[93] As such, while the language of unity that accompanies the insistence on a purity of form might resonate with utilitarian confidence, Stokes indicates that 'the debt to Bentham lies in informing the spirit of the Code and its general doctrines of jurisprudence rather than in matters of detail'.[94] Supporting this interpretation is the Governor General's letter that accompanied the draft Code. It conveyed Macaulay's emphasis as falling less on the structural unity of symmetrical parts infused with authorial brio but instead conveyed a sense of a document responding to the

[91] Ibid.
[92] See Chapter 1.
[93] Thomas Babington Macaulay, Legislative Minute (11 January 1836)
[94] Stokes, *Utilitarians* (n 3) 233.

workaday demands of the practical, perhaps benefiting from the prudential.[95] A law "great and entire", is shaped instead by the practical reason and applied context of the judge, magistrate and lawyer:[96]

> 'The arrangement we have adopted is not scrupulously methodical… we have never hesitated about departing from it [a methodical approach] when we thought by doing so we should make the law more simple. We conceived that it would be mere pedantry to sacrifice the practical convenience of those that who were to study and administer the Code for the purpose of preserving minute accuracy of classification'.[97]

While the priority of interests is here accorded to those that are employed by the Company to administer the Code, the Commissioners' larger concern regarded the politics of interpretation, 'that… a penal law should be drawn in words which convey no idea to the bulk of the people who are to obey it is an evil'.[98] And yet, the problem of the expression and textual form is one with jurisprudential consequence because the legislature was not only concerned with the text of the law but with the moral implications for misconduct of office:[99] for 'a loosely worded law is not law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions and resigns the power of making law to the courts of justice'.[100]

The Commissioners' concerns regarding ambiguity extended to broader questions of the jurisdiction of the legislative body. Legislation—loosely worded, vague or incomprehensible to its audience—was argued to fall out of the juristic competence of the legislator and land within

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[95] Consider also the problem of language as it is stated: 'to unite precision and simplicity in definitions intended to include large classes of things, and to exclude others very similar to many of those which are include, will often be utterly impossible. Under such circumstances, it is not easy to say what is the best course', Indian Law Commissioners (n 40) [17].

[96] Ibid [13]. 'Thus some rules of construction and some definitions which might seem from their nature entitled to a place in the first chapter will be found, not in that chapter, but in the vicinity of the penal clause with which they are most closely connected' [14]

[97] Thomas Babington Macaulay, Legislative Minute (2 January 1837), [16].

[98] Indian Law Commissioners (n 40) [18].

[99] As Conal Condren reminds us, an account of office necessitates a careful attention of the conditions of misconduct in the exercise of the responsibilities that officeholding carries: see *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (Cambridge University Press, 2006), 16.

[100] Indian Law Commissioners (n 40) [18]. See also [22] for a criticism of the power of judges to make law through interpretation.

the jurisdiction of the judge.[101] The problem of precision is addressed through 'as many illustrations as we thought necessary for the purpose of explaining it'.[102] For Stephen, the use of illustrations throughout Macaulay's code rendered it clear and practical; a document that avoided the unworkable pitfalls of Bentham's obsessive, unreadable prose.[103] To this end, the jurisdiction of the legislator involves a responsibility not only for imagining the structure or order of the law, but in providing such 'illustrations [as] exhibit the law in full action and show what its effects will be on the events of common life'.[104] As a technique of jurisdiction, the legislation was written in two genres: (1) a provision that provided the letter of the law; and (2), the illustration, lesser than the law, but nevertheless capable of carrying a vivacious yet supplementary imaginary of the law in operation. As such, the image empowers and enlivens the letter, as that it becomes capable of more ready application both as law (within the ecology of the code) and in the world by assisting its readers, users and interpreters.

The question of how to remedy ambiguity is not only an issue of grammatical construction. Perhaps more seriously, a failure of linguistic transmission poses deeper questions of the overlapping interpretive obligations of legal offices. Cases where interpretations of points of law are reversed on appeal 'ought to be reported to the legislature'.[105] The quality of legislative expression, recalling that this determines its legal status, if found to be 'attributed to weakness, carelessness, wrong-headedness, or corruption on the part of an individual' judge is parsed as a failing of the duties of that office.[106] The Commissioners, in addressing the failure of Company employees to uphold appropriate diligence or probity, allowed forms of castigation unfamiliar to a liberal understanding of a judiciary, whereby, '[t]he Executive Government may, if such a

[101] On this relationship between jurisdiction and the place of the statute in common law thinking, see Peter Goodrich, 'Disciplines and Jurisdictions: An Historical Note' (2010) 48 *English Language Notes* 153.
[102] Indian Law Commissioners (n 40) [19].
[103] Stokes, *Utilitarians* (n 3) 230.
[104] Ibid.
[105] Ibid [25].
[106] Ibid.

course be thought advisable, admonish or dismiss the offender'.[107] However, if the Commission finds 'that the words of the law are not sufficiently precise', then the remedy is not that those words cease to obtain the quality of law, but 'in such a case it will generally be expedient to add an illustration such as may distinctly show what the legislature intends the law to be understood'.[108] There again, the illustration—the liminal text, neither law nor image, but spur to imagination—is seen as remedying the questionable status of the word. Lastly, and for completeness, if the ambiguity proceeds from a 'silence' in the Code, 'it will be proper to supply the omission'.[109]

**A.1861: A Code of Criminal Procedure**

The 1861 Code of Criminal Procedure represents the first drawing together of the rules of criminal procedure in a single legislative instrument over the territorial jurisdiction of British India. If the Indian Penal Code of 1860 was the first code of criminal law passed into law in the British Empire, then the Code of Criminal Procedure of 1861 has the lesser honour of being the second such successful codification of criminal law.[110] The desire to implement a procedure code does not seem to be derived from Macaulay's archive of preparatory work, but from the work of the Indian Law Commission in London recognising that '[t]he suppression of the mutiny and the dissolution of [East India] Company… [be] naturally followed by various administrative and legislative reforms'.[111] The Indian Procedure Code was written in consultation with a number of sources. The first and earliest was Edward Livingston's draft code of criminal procedure for

[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] A recent collection of essays celebrating the 150th anniversary of the Penal Code of 1861 makes no reference to the Procedure Code. It doesn't appear in the index, or in the first essay that charts the history of the drafting and implementation of the codification of Indian criminal law. Its absence is conspicuous, but so too is procedure in this volume: the procedural reforms are likewise absent from the index and scant reference is made throughout Wing-Cheong Chan, Barry Wright, and Stanley Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate, 2011).
[111] Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (Smith, Elder, & Co, 1895), 248.

Louisiana, which was published in 1833.[112] Curiously, Livingston's procedure code came with a long essay describing its aim and the importance of replacing what he saw as the defective and perhaps inapplicable dimensions of common law procedure to the colony of Louisiana.[113]

The Procedure Code was, from early on, interpreted as a supplement. Stephen, reflecting on the history of codification in India commented that after the passage of the Penal Code into law, the drafting of the 1861 Code of Criminal Procedure was a 'natural, not to say necessary, addition to it'.[114] It was legislation that 'brought together a large part of the laws and regulations then in force, more or less in the manner of an English consolidation act; but it was incomplete and also obscure and confused in its arrangement'.[115] It is worth considering this Code, before moving on to Stephen's 1872 revision.[116] Its arrangement and obscurities are of interest insofar as they can tell us how the mechanisms of penal enforcement were understood to operate in India when viewed from the perspective of metropolitan legislative drafters.

The procedure developed by the Code exhibits the qualities of being at once personal, isomorphic, and centripetal: it demarcates limits of lawful action in British India while proscribing the methods, mechanisms and forms of their articulation.[117] The Procedure Code establishes rule through juridical isomorphisms: the rules of procedure that establish, constrain and annotate the conduct of conduct are thereafter standardised according to that animating action, rather than activities being conducted in the name of the law according to the personal

[112] Whitley Stokes, *The Anglo-Indian Codes: Volume II Adjective Law* (1887), 1. NB a significant portion of his text simply reproduces Edward Livingston, 'Introductory Report to the Code of Criminal Procedure' in *The Complete Works of Edward Livingston on Criminal Jurisprudence* (1873).

[113] E.g. there was an issue regarding the constitutional applicability of procedural reforms passed in England after 1805, despite the penal law of Louisiana requiring the application of English procedure: Ibid 333.

[114] James Fitzjames Stephen, *A History of the Criminal Law of England* (Burt Franklin, 1883) vol 3, 324 ("*History*").

[115] Ibid.

[116] *1872 Code* (n 11).

[117] Indeed, *1861 Code* (n 10) s 444 of the Code provides the pattern for novel cases before irregular venues and courts.

preferences of the official.[118] The Code attaches jurisdiction to the persons within the territory of British India: the person is conscripted, their relationship to law is governed. The territorial aspects of jurisdiction are secondary considerations. For example, in determining the jurisdiction of particular magistrates (rather than the magistracy *per se*) the question is posed as one of administrative locality rather than the root of statutory authority to investigate, put to trial, or to punish.[119] The Code also lays down the vectors of its operation. Procedure in British India was dispersed throughout a patchwork of Districts and provinces, but its tendency pulls toward the centre. Magistrates are accorded a tremendous and important series of discretions within the procedure to facilitate local and timely responses to disputes, accusations and issues of local order. And yet, these discretions are subject to a textual process of reporting and superintendence, as the Code prescribes any number of requirements to collect data, supervise decision-making, and send certain objects and persons towards legislatively mandated colonial centres. Records, accused Europeans, prisoners are each in their various ways simultaneously subject to dispersed discretions, but nevertheless they are each as the objects of a jurisdiction compelled toward the various district centres, themselves subject to a fractally similar level of centripetal administrative compulsion.[120]

**i. Structures of Authority: The Legislative Organisation of a Jurisdiction**

The conventions of statutory drafting had not assumed a standardised form in the mid-nineteenth century. As a consequence, it is worth noting the structure and organisation of the Code itself, as it represents an idiosyncratic style of legislation. Its form is an important dimension of how its authority is both composed and imagined to be exercised. The Act has three principal components: (i) the Code itself; (ii) an appendix consisting of a compendium of relevant forms; and, (iii) a table of offences and their relevant procedural requirements. There

[118] See e.g. Ibid s 275.
[119] See this Chapter Part III(B)(i)
[120] See this Chapter Part III(B)(v) on record-keeping, and the section the jurisdiction of "European British", Part III(B)(iv).

are 31 chapters, and 445 sections which are numbered sequentially across the Act. While there is no table of contents provided for the Act as a whole, each chapter consists of a brief summary of each section, followed by the sections themselves. This arrangement presumes and necessitates a familiarity with its structure and relevant provisions in order to navigate the document. The chapters are best described as organised according to the particular actions that attend to stages in an investigation, trial, sentencing and appeal. More general powers—such as the issuing of warrants, arrest, search and investigation are provided for in the early chapters of the procedure—before focusing on trials and special powers of magistrates and those exercising similar powers. Coincidentally, the table of offences that follows the Code[121] is structured more rigorously than the Code itself; which suggests that when read as a medium for the law, this index was more pragmatically important than the law in its discursive genre. Likewise, the Code prescribes specific written forms, and it made uniform the epistolary or documentary media of criminal law in British India as it standardised the communications between legal officeholders and subjects of law.[122]

The Code was not designed to replace the Penal Code's description of the powers of police, but to supplement them. Typically, this was by expanding declaratory powers and the related discretions of magistrates. For example, the Code also lists and describes a number of powers required for dealing with riot,[123] nuisance,[124] weights and measures,[125] family breakdown,[126] and property rights in land and water.[127] Magistrates were granted powers for dealing with offences of amenity—those 'injurious to' 'health' or 'comfort', or representing a 'danger' to residents of a

[121] The row of headings is excerpted below, see Fig 1.
[122] Of course, procedural irregularities do not give cause for a reversal of a judgment if they are not of such a kind to 'have occasioned a failure of justice': *1861 Code* (n 10) s 439.
[123] Ibid s 62.
[124] Ibid ss 63, 308.
[125] Ibid s 129.
[126] Ibid ch xxi.
[127] Ibid xxii. NB these powers are temporary in land and water disputes, until a court of civil jurisdiction could adjudicate the property law issues.

district, or in an early vocabulary, "offences of public economy".[128] These included issuing directions to resolve the issue in question. To this end, magistrates were granted broad executive powers to intervene in the local economy: they could alter the course of the construction, maintenance and demolition of buildings (including orders to tear down buildings); the regulation or cessation of particular trades; and the conditions of storage flammable substances and liquids.[129] This was enforceable by criminalising disobedience of a public servant.[130] If the accused should disagree with any order they may petition a magistrate for a jury to enquire whether the order was 'reasonable and proper'.[131]

A number of forms are provided by the Act. They appear either in the specific Appendix of Forms, or alternatively are listed within the Act, with the correct formulation of charges falling within this latter category.[132] The Appendix of Forms contains those forms which require the action of parties external to criminal justice administration: for example, summonsing,[133] issuing warrants,[134] requiring and returning bonds[135]—including good behaviour bonds,[136] providing securities,[137] and demanding recognizance to prosecute or give evidence.[138]

The Code's final major part is the Schedule: a table organised by the offences described in the *Indian Penal Code* (1860) which provides procedural information in an accessible shorthand form.

[128] Ibid s 308.
[129] Ibid s 308. A power to grant an injunction is provided for in s 310
[130] Ibid s 188.
[131] Ibid s 310.
[132] E.g. Ibid s 239.
[133] Ibid, s 69.
[134] Ibid ss 76, 222.
[135] Ibid ss 284, 300.
[136] Ibid s 284.
[137] Ibid s 300.
[138] Ibid ss 158, 300.

| 1. | 2. | 3. | 4. | 5. | 6. | 7. |
|---|---|---|---|---|---|---|
| Section. | Offence. | Whether the Police may arrest without warrant or not. | Whether a warrant or a summons shall ordinarily issue in the first instance. | Whether bailable or not. | Punishment under the Indian Penal Code. | By what Court triable. |

*Figure 1 - Schedule: Code of Criminal Procedure 1861*

This table of some 80 pages is organised according to the offences numerated in the *Indian Penal Code* of 1860. The order of its columns suggests that it is designed to provide police with a working chart of their powers and the consequences of their action. In this sense, the importance of this table is its capacity to bring visual, rather than conceptual, order to the discretion of police.[139] It outlines the quality of police powers followed by the possible consequences of the exercise of them (arrest, punishment, trial). The question of the court's jurisdiction is relegated to the final column. The choice of venue is important under the Code because it provides the key mechanism for the operation of the criminal law according to race in India.

### ii. Personal Jurisdiction and its Exceptions: Race and Procedure

The precise mechanism for ascribing jurisdiction over persons marks an imperial tension between a claim to universality, and a more nuanced strategy for the preservation of advantage for the coloniser—what Parthha Chatterjee has described as 'the rule of colonial difference'.[140] Nasser Hussain explains this same phenomenon slightly differently, when stating that 'the rule of law in a colonial regime could be maintained… by absorbing the elasticity required of it in the realm most close to it, legal procedure'.[141] At law, the arrangement of jurisdiction provides one such site for examining the mechanisms of difference or elasticity by tracing precisely how the procedure codes modulate the authority of law.

[139] It is important to note that the operative distinction, the section, does not refer to a judicial discretion but to a policing one: police determine at first instance the charge, and the consequences flow from that decision in the logic of the table rather than the judicial or jury determination.

[140] Partha Chatterjee, *The Nation and its Fragments: Colonial and Post-Colonial Histories* (Princeton University Press, 1993), 16-22.

[141] Hussain (n 4) 65.

In the 1861 Act, the claim to universality of jurisdiction is advanced for persons all within British India,[142] and 'no person shall, by reason of place of birth, or by reason of descent, be exempt from the rules of Criminal Procedure contained in this Act'.[143] Instead, the universal jurisdiction is to have its application restricted to specified courts, whereby 'nothing in this Section shall be held to authorise the trial before any Criminal Court of any person who, in respect of the offence with which he is charged, is not subject to the jurisdiction of that Court'.[144] As a general rule, offences are to be tried where they are committed. And yet, where the accused is a 'European British',[145] the requirement is that they be 'tried and convicted in the Supreme Courts of Judicature for offences committed beyond the local limits of such Courts'.[146] Charging, committals and bail are also subject to restrictions on the basis of race. Consider, it is only after a "European British" is 'charged with an offence triable by a Supreme Court of Judicature' that 'any Magistrate may hear the complaint against such person, and may issue a warrant of arrest, or hold to bail such person, with a view to the complaint being investigated by a Justice of the Peace'.[147] In such a case, if arrested under the order of a magistrate, the Justice of the Peace before whom the accused is brought is required to conduct a further inquiry into the accused's case before committal.[148] This is because only Justices of the Peace can 'commit or hold to bail, any European British subject to take his trial before a Supreme Court of Judicature'.[149]

The outcome here is that, procedurally, cases against Europeans are more complicated, with additional layers of safeguards for defendants.[150] Consequently this inscribed fewer options for

[142] 1861 Code (n 10) s 24.
[143] Ibid s 25.
[144] Ibid.
[145] This is not defined in the 1861 Code.
[146] Ibid s 26.
[147] Ibid s 40.
[148] Ibid s 41; see also s 226 requiring that the accused be sent to the Supreme Court of Judicature for trial.
[149] Ibid s 39.
[150] E.g. there are three specified degrees of competence and authority within the Indian Magistracy on top of the requirement that there be a Justice of the Peace involved with specific offences. Ibid s 22.

justice —even for those classes of offences that are tried in Supreme Courts—in legislation. These concessions are perhaps best understood, paradoxically, not as a lack of judicial oversight of Europeans in India, but quite the opposite: instead, the intensification of procedural requirements and the increased formality of any curial processes have the practical effect of exclusion, even as they boast of standards appropriate to the elevated status and mission of the Europeans in India.[151] This might generally describe the mechanism of privilege described by the Code, but there are exceptions. Prominent is the narrowing of the jurisdiction of the power of all judicial officeholders other than Justices of the Peace that extends to the trial of offences by British European subjects against the very institutions, processes, and civil servants of the Raj itself.[152] Of course, this latitude doesn't extend to cases where violence of a kind that threatens the Peace is envisaged or predicted, meaning that where a magistrate possesses 'credible information that any person, whether a British European subject or not, is likely to commit a breach of the Peace' there is power to summon that person to 'show cause why he should not be required to enter into a bond to keep the Peace…'.[153]

### iii. The Composition of Juries before the Courts of Session

The race of the accused is the guiding factor for the composition of juries under the Code of Criminal Procedure. In thinking about the use of juries, Stephen noted that in British India, unlike in the metropole, '[i]t is only in exceptional cases that criminals are committed to the Sessions. An immense majority of cases are tried by the Magistrates in a summary way'.[154]

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[151] One need only refer back to Stephen's description of the importance of difference to see this in discursive operation: here, the procedure code operationalises that preference.

[152] See the list of offences in *Indian Penal Code 1860* (India) Act XLV of 1860 ch x ("*Penal Code*"). The procedural requirements for protection of Europeans are read here as of greater value than the protection of government itself from its exemplary subjects.

[153] *1861 Code* (n 10) s 282.

[154] James Fitzjames Stephen, 'A Minute by the Hon'ble J. Fitzjames Stephen on the Administration of Justice in British India', Selections from the Records of the Government of India, Home Department (No 89, Home Secretariat Press, 1872) 54 ('Minute').

The Code provides that the category of relevance here is race rather than nationality or citizenship.[155] Here, if a European is committed for trial in the Court of Session, the Code of Criminal Procedure offers a number of provisions regarding jury composition. For example, a jury, 'if such European or American desire it, shall consist of at least one-half of Europeans (whether British subject or not) or Americans, if such a jury can be procured'.[156] At the trial phase, the legislation shifts—without explanation or definition—from a language which, at least nominally, changes its idiom from "nationality" to "race". There a number of implications follow this shift. The Code acknowledges that the privileges and special procedures are reserved for Europeans rather than all (legally equal) subjects of the British Empire.[157] Further, this exception isn't accorded to the British by dint of imperial privilege but is extended to the broader category of Europeans and Americans. The privileges extend to the ability to nominate whether or not they wish to be tried summarily in the Court of Sessions, unless it is decreed that certain offences must be heard by jury.[158] Indeed, the Indian subject of the criminal code is conspicuously absent here: they are described as '[i]f in a trial before the Court of Session in which a person not belonging to the races mentioned in Section 323 shall be tried, at least one-half of the Jury, if the person desire it, shall consist of persons not belonging to either of such races'.[159] If a European or American and 'a person not belonging to one of those races mentioned… are charged jointly' and the European or American seeks to avail themselves of that jury composition, the other person can choose 'to be tried separately'.[160]

[155] *1861 Code* (n 10) s 326.
[156] Ibid s 323.
[157] Here, it is worth recalling the British Parliament's abovementioned promise of legal equality in India.
[158] Ibid.
[159] Ibid 325.
[160] Ibid 326.

### iv. Exceptions: The Law of Theft, Arrest, and Vagrancy

In British India, as in the United Kingdom,[161] the offences of theft and vagrancy were subject to a number of exceptions from the general criminal procedure.

> 'Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust, in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine'.[162]

The Criminal Procedure Code states that this can amount to theft under the Indian *Penal Code of 1860*.[163] The Procedure Code allows this substitution of charges as a partial defence, as the lesser charge carries with it a lesser punishment. Importantly, this substitution is typically also a simpler offence to prosecute, meaning one with *fewer* elements requiring proof. Coincidentally, the Procedure Code also provides for the reverse: being that if the evidence for the *lesser* and simpler offence is used to prove the original, more complex offence, the decision can stand despite the manifest evidential shortcoming and procedural irregularity.[164] Together, these sections operate to make it significantly easier to punish property offences in ways that betray a flexible commitment to the rule of law.

The policing of class through procedural mechanisms directed toward those classified as vagrants, vagabonds, and the idle are a conspicuous component of police powers under the Code. Police Officers are able to

> 'without orders from a Magistrate and without a warrant, arrest or cause to be arrested any person found lurking within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself, or any person who is a reputed robber, house-breaker, thief, receiver of stolen property knowing it to be stolen property, or is of notoriously bad livelihood'.[165]

[161] See Chapter Six Part III of this thesis.
[162] *Penal Code* (n 152) s 407.
[163] Ibid s 378.
[164] *1861 Code* (n 10) 423-4.
[165] Ibid s 101.

This amounts to a power to arrest someone on suspicion of character, income, reputation or visible signifiers of wealth. Evidentially, guilt is presumed.[166] The burden of proof falls on the accused to *disprove* the suspicions of the officer in the giving of a satisfactory account of themselves to the police.

In addition, a grant of general policing authority saw officers under a legal obligation to prevent those offences that allow for arrest without a warrant.[167] This procedural device provides one of the column headings in the Scheduled table of offences. Here it is important to note that it is the procedural distinction that determines the actuation of a preventative police power based on the officer's apprehension that a possible offence *may* happen. Likewise, if the offence does not allow for arrest, a failure to give one's name or 'shall give a name or residence which there is reason to believe is fake' will give rise to a power of arrest.[168] Following the arrest of such a person, a magistrate was able to place them on a 'good behaviour bond' for a period of time up to three years,[169] if they are not satisfied 'from the evidence as to general character adduced before him'.[170] If there is any issue with the provision of security or a default on its terms—which doesn't seem beyond the realm of possibility in light of the conditions that give rise to their arrest—then the person is liable to be imprisoned without a trial for the mere fact of default.[171] Provisions such as these are more technically precise examples of powers that have historically been invested in Justices of the Peace in England.[172] Important differences aren't found in the substance of the offence of appearing destitute, but reside in the supplementary procedural space: decision-making authority has shifted from the courts to the police.

[166] See Chapter Six.
[167] *1861 Code* (n 10) s 102.
[168] Ibid s 108.
[169] Ibid s 297.
[170] Ibid ss 295, 297.
[171] Ibid s 301.
[172] See Chapter Six of this thesis.

**v. Discretion: Authority, Shape, and Archival Necessities**

The Code of Criminal Procedure diagrams how lawful authority is expected to be exercised in British India. It can be understood as the legislative expression that describes how the *Penal Code* was to be operated. In this section, I will develop an account of the associated techniques of authority that sit alongside the more obvious establishment of jurisdiction and grants of authority. This section will describe how the authority of law is supplemented and sustained by a repertoire of extra-judicial techniques that gesture towards a bureaucratic ordering and authority such that criminal procedure comes to also embrace new techniques of archiving and ergonomics, alongside discretions that at once were enabled, constrained and made reportable under the Code. Here, the shift in procedural focus should be read against the description of office-holding in earlier chapters of this thesis, where the conduct of office is a privilege and incidence of the judgment of an office holder. This marks a change towards standardising the internal rules governing the conduct of process. As such, we should be alert to how procedural interventions (those concerned with matters of how conduct is conducted) mandate the form as a part of the documentary or stationery habitus of the legislation and the offices in question, and the necessity of writing by hand as providing a forensic check on the authoring and authorisation of translations and accounts. As an apparatus, the form at once governs, and is itself governed by, the standard and the signature.[173] As the procedure for arrest determines subsequent action in the *Code of Criminal Procedure*, the Indian criminal law makes no reference to the English categories of treasons, felonies and misdemeanours.[174] Likewise, the Code requires no grand juries and no indictments.[175]

[173] See Jacques Derrida, 'Signature Event Context' in *Limited Inc* (Northwestern University Press, 1988) 1.
[174] In England, these categories began to be abolished in the 1940s, but were only formally dissolved in the 1960s with the passage of the *Criminal Law Act 1967* (UK).
[175] Stephen comments that the '[Penal] Code wisely… makes no attempt at the classification of crimes. It knows nothing of either felony or misdemeanour' (*History* (n 114) iii, 304). Consequently, having recognised this distinction as a 'defect of the criminal law of English criminal law' (ibid), he eventually comes to argue for its abolition in England.

In contrast to the adversarial British procedure, in India criminal process is of an inquisitorial kind: prosecution must be initiated by police,[176] or by a magistrate, depending on the nature of the offence. Whether or not a warrant is required for arrest is the main factor in determining which procedure is to be followed.[177] Accompanying this change in the initiation of proceedings is a move away from the precise requirements of *specific* indictments to the generalised *form* of charge. This represents a significant change in criminal procedure and the media of criminal law: in place of specific indictments there is a generalised charge.[178] In terms of the substance of offending, the documentation becomes both agnostic *and* refinable or correctable throughout the process of prosecution.[179] The 1861 Code situates the description of the Charges not with an Appendix (as are template warrants, bail forms, summonses, and recognizances) but as a form within the general part of the Code.[180]

The 1861 Code instituted a process that was simultaneously more bureaucratic (exerting in centralised style of documentary discipline on the police and the magistracy) and juridical, insofar as it begins a formal criminal proceeding. As such, the charge and its bureaucratic reporting requirements—themselves required to conform to parallel standardised procedures—creates a documentary archive that is authorised and evidenced as an archive through the handwriting of the judge and the curial seal.[181] Magistrates are required to write memoranda about the substance and demeanour of testimony, and that document 'shall be written and signed by the Magistrate with his own hand and shall form part of the record'.[182] The evidence 'shall not ordinarily be taken down in the form of question and answer, but in the form of a

[176] These being: a) seeing a Colum 3 arrestable offence, b) acting on a complaint with reasonable basis for believing the veracity of the complaint, c) if a hue and cry has been called for the accused, d) a proclaimed offender, e) anyone possessing stolen property, f) if obstructing a police officer.
[177] *1861 Code* (n 10) sch.
[178] Ibid ss 233-4.
[179] Ibid ss 244-47.
[180] Ibid s 239.
[181] Ibid ss 191-2, 233.
[182] Ibid s 267.

narrative'.[183] If the evidence is not recorded in the hand of the magistrate, they were required to attach a memorandum to the evidence 'that shall further state that the evidence was taken down in the presence and hearing of the Magistrate'.[184]

Stephen's interventions are directed toward governing the judiciary. Often, this takes on an orientalising fear of excessive corruption finding its way into the administration of justice.[185] This paranoid anxiety manifests particularly in cases where Stephen discusses how the deficiencies of judges with respect of Indian languages can coincides with the taking of evidence. The object of these rules, Stephen notes in his review of judicial administration in British India, is to prevent the practice of

> 'delegating to Native clerks or mohurrirs the task of taking the evidence of witnesses. I have heard in that in former times as many as three or four witnesses would be under examination at once… whilst the Magistrate was occupied with other business'.[186]

Stephen's concern with this practice is that unscrupulous magistrates would be able to employ a number of scriveners, the effect of which would 'be to transform the mohurrirs into the real Judges of the case, which, of course, would be a mockery of justice'.[187] While Stephen concedes that the issue may stem from 'the imperfect acquaintance of English Judges with the Native languages… [that] render it necessary to employ mohurrirs'.[188] He doesn't contend that issues of justice in and of translation are broader than the hand that performs transcription. The requirement that evidence be taken as narrative means that concerns about the recording of evidence are of a different order to so-called simple stenography. It almost goes without saying

[183] Ibid s 198.
[184] Ibid s 199.
[185] Stephen, 'Minute' (n 154) 101.
[186] Stephen, 'Minute' (n 154) 57.
[187] Ibid.
[188] Ibid.

that public authorship is a significant part of the performance of authority, one that supersedes understanding and attempts at a resolution of issues in depth.[189]

Within the Procedure Code there is a persistent concern to hold the hand of the judges to the memorandum: the signature appears again and again as the vouchsafe of the integrity of justice. Given that the procedure seems predicated on an apparatus of writing, memoranda, reporting and diarising, the signature functions to authorise the body of records upon which the broader system of criminal justice operates. The 1861 Code required that a magistrate certify the evidence if it wasn't in their own hand, transforming mohurrir's evidence into 'a reed on which an idle or unscrupulous Judge can lean'.[190] Here, this seemingly irretraceable concern with evidential authenticity rearticulates, in a different key, Stephen's broader worry that the greatest risk of absolute government sliding into despotic rule is the overwork of magistrates as both executive and judicial officers.[191]

There were broad writing and record keeping requirements for police and the judiciary. Police officers were required to keep day books,

> 'setting forth the time at which the complaint or other information reached him, the time at which he began and closed his enquiry, the place or places visited by him and a statement of the circumstance elicited by his enquiry, and shall forward day by day a copy of such diary to the District Superintendent of Police, which shall without delay bring to the notice of the Magistrate of the District any part of such diary which he shall consider it to be important that such Magistrate shall know'.[192]

They were also required to keep a diary of complaints before their station, in order to facilitate record keeping for executive government of the District.[193] Police were required to report all

[189] This recall's Cornelia Vismann's discussion on the administrative performance of writing as a link between administration, law and political power. *Files: Law and Media Technology*, tr Geoffrey Winthrop-Young (Stanford University Press, 2008), ch one.
[190] *1861 C*ode (n 10) s 58.
[191] See Stephen, 'Minute' (n 154) 9.
[192] *1861 C*ode (n 10) s 154.
[193] Ibid s 139.

arrests, and whether bail had been taken, to the magistrate of the district.[194] Officers were required to account for the fullness of their time and the results that are to show for it. Reports, once diarised, moved up the hierarchy of a police district before encountering the discretion of the Superintendent. The records are not considered 'evidence of the facts, except against the Officer who made it'.[195] As such, these diaries functioned as mechanisms of internal accountability to their superiors at the station and district level, and also to the local magistracy and the broader executive government.[196] They also interfaced with formal judicial processes, when at the completion of the investigation, there was a requirement that the Police Officer produce a report that consisted of a brief of evidence complete with

> 'the names of the parties, the nature of the complaint, the names of the witnesses, without any expression as to the guilt of the accused person, and shall also transmit any weapon or article which it be necessary to produce before the Magistrates'.[197]

For all exercises of judicial power, written judgments were required. Stephen noted that this requirement 'would be open to great objection if it were not for the peculiar position of the Indian Judges and the necessity of maintaining an unusually stringent control over them'.[198] And while Stephen is impressed that '[e]very act of every court in India is elaborately recorded in writing, and a system is provided by which judicial officers send up at fixed periods returns to their superiors',[199] he recognised that this wasn't always conducive to good administration. He finds this issue to be most acute in jury trials, where the judge is required to summarise the evidence, 'I can hardly imagine how a man is to sum up well and effectively unless he does so

[194] Ibid s 160.
[195] Ibid s 154.
[196] This reads as more addressed to the problem of ensuring police are working, rather than evaluating the quality of that work. There is nothing here to suggest police were accountable to the people they policed.
[197] Ibid s 155.
[198] Stephen, 'Minute' (n 154) 59.
[199] Ibid.

with considerable freedom, and this can scarcely be the case when he must report to a superior authority the substance of what he said'.[200]

**vi. Conclusion**

This section has provided an account of the criminal procedure administered by the Crown in British India after the assumption of direct rule following the Mutiny of 1857, and contrasted differences in procedure with the metropole. Colonial procedure has an ordered and systemic quality which was distinctly lacking in Britain. This quality is at once defined and prescribed through its legislative instantiation. As this section has argued, order and standardisation form a constitutional and constitutive style of authority; one that is imagined as meticulously bureaucratic as it works in a centrifugal manner. The Code also imposed a regime of superintendence over the conduct of empire prescribing the record keeping and writing practices of officers, keeping an auditable archive of documentation and evidence of discretionary action. These documents were to return to their centres even as discretionary authority is directed towards the dispersed districts. Significant decision-making remains robustly autonomous: its form (literally, its stationery forms) might be prescribed but these are, of necessity, both literally and figuratively full of blank spaces. The formless form of the charge within this edition of the Code seems to be a kind of metaphor for the mechanisms of attaching procedure to the specifics of "crime": internal, documented, yet, unfilled and not quite fulfilled. The preponderant understanding of procedure within this particular Code was predicated on ordering and organising a newly open and extended use of summary procedures that operated by way of an institutional assemblage of a legislatively defined magistracy working closely with a police force.

The 1861 *Code of Criminal Procedure* is situated along many of the moral and political fissures of the late-Victorian period. It at once legalised procedure and process, but the substance and

[200] Ibid.

standards of decision-making were largely left to the magistrates, police and judges that fell under its jurisdiction. Likewise, the Code espouses equality as it legislated the privileges of race as a series of procedural advantages that softly expressed procedural difficulties that complicate and add friction to those mechanisms re-constructed after the Mutiny of 1857 to nominally enhance justice under British Rule.

**B. Stephen's Revisions: 1872**

Years after his time in India, Stephen reflected on the 1872 Code of Criminal Procedure that he contributed to the government of the Raj:

> 'If it be asked how the system works in practice, I can only say that it enables a handful of unsympathetic foreigners (I am far from thinking that if they were more sympathetic they would be more efficient) to rule justly and firmly about 200,000,000 persons of many races, languages, creeds, and, in many parts of the country, bold, sturdy, and warlike.... The Penal Code and the Code of Criminal Procedure are somewhat grim presents for one people to make to another, and are little calculated to excite affection'.[201]

His answer seems to be more accurately addressing the question of how *well* the Code works rather than the one he set himself. Allowing the *non sequitur,* Stephen's response bespeaks his alacrity with the moral and political tensions that run athwart the assumption of direct rule: authority, racism, administration, equality, violence and history. Indeed, the Procedure Code provides a way of understanding the mechanism for actuating the rule of law according to the very rules of that law—establishing the diagram for how exactly one might "rule justly and firmly" by that standard. Stephen paints a sympathetic portrait of quality of the government that the Code needed to both authorise and support through the standardisation of conduct. In the preparatory materials for the revised Code, Stephen wrote that

> 'In a civilised town like Calcutta, it is said, you must govern by fixed rules. On the Panjáb frontier such rules are out of place; you must have a king and a leader, uniting in himself all functions, executive and judicial, and whilst responsible to his own superiors, presenting

[201] Stephen *History* (n 114) iii, 344-5.

> himself to the feeling and imaginations of those over whom he rules, as the "Hakim," the general representative of authority of all sorts'.[202]

The view of a need for firm rule in the provinces was to be tempered by the understanding that discretion, as a broad authority, was to be tethered to the legal form rather than situated outside it. Stephen's argument, that he sought to advance through his preparatory work and, indeed, the Code itself was that 'all this is government by good law as opposed to government without law on the one side, and government by law on the other…'.[203] In keeping with Stephen's general understanding of the virtues of authority enabled through the rule of law, supplied with "good law", the combined authority of this kind of administration becomes more a question of personal capacity, talents and management rather than one of any greater moral or political valance, for '[t]he man who was popularly supposed to be a benevolent despot becomes neither more nor less than an over-worked official burdened with a number of heterogenous functions'.[204] Stephen's jurisprudence of procedure is one that seeks to shape, and regulate, the performance of administration as much as it seeks to exert social control through that same mechanism. Governmental responsibilities were more institutionally or functionally delineated in the colony, '[t]he superior officers of police are not part of the staff of the magistrates of the districts. They form a separate branch of the service, and in many cases are military officers'.[205] Instead, governance according to law, necessitated that 'no part of the institutions by which India is governed required more careful watching',[206] than the police. Notwithstanding, the administration of police was formally excluded from the Code for fear of making the legislation 'too cumbersome'.[207] Nevertheless, Stephen claimed that one of the aims of his revised legislation was the prevention of 'petty oppression' from police;[208] to his mind, '[t]he Code… is

[202] Stephen, 'Minute' (n 154) 7-8.
[203] Ibid 8. See Chapter Four, Pt III.
[204] Stephen, 'Minute' (n 154) 9.
[205] Stephen, *History* (n 114) iii, 331.
[206] Ibid.
[207] Ibid 330.
[208] Ibid 331.

full of provisions intended to guard against this and at the same time to make the police more efficient for their purpose'.[209]

Part B of this Section of this Chapter addresses Stephen's Code. As such, it follows the principal changes that Stephen's re-drafting effort introduced. Consequently, the sub-sections below map closely onto those used in Part A, in describing the 1861 Code. The aim here is to show how procedure in British India changed in terms of how it communicated and organised political authority, the arrangement of jurisdiction of policing and adjudication, the powers of the magistracy, role of race, and the redoubled emphasis on policing.

**i. Structure of Authority: The Form of Legislation**

The Code re-enacts the jurisdiction of criminal procedure by asserting its operation across 'the whole of British India'.[210] Unlike Macaulay's Code, the 1872 Stephen Code does not define the territory of British India through the deferred authority of the Crown's assumption of direct rule earlier represented through citations to Acts of the Realm. Here, authority is asserted through the somewhat more strident vernacular of a territory and its descriptive relation back to empire. Perhaps fittingly for the inaugural gesture of a more assertively imperial procedure—that now assumes its authority through the adjective—the Code is limited in its institutional applicability to those areas beyond the remit of 'the procedure of the High Courts or the Police Magistrates in Presidency towns'.[211] A territorial account of procedure isn't sufficient, however, for understanding precisely how the jurisdictional claims of the Code sought to shape the institutions and conduct relevant to its subject-matter. To that end, Stephen's Code constructs three concurrent jurisdictions under the rubric of codified procedure. As they relate to the criminal law of India, the first is the jurisdiction over judicial process,[212] the second is the

[209] Ibid.
[210] *1872 Code* (n 11) s 1.
[211] Ibid s 1.
[212] Ibid pt ii, 'Constitution and Powers of the Criminal Courts'.

procedural dimension of policing,[213] and finally, there is what the Code describes as the 'Preventative Jurisdiction of Magistrates',[214] but might be better described as the executive or policing powers of magistrates. This schema designates as it organises the procedural rules governing the conduct of each institution with respect to its particular subject-matter, relevant to the criminal law of India.

Stephen's Code thoroughly re-arranged the order and drafting of its sections, and some important changes in the layout and organisation of the document itself. These reforms are important for understanding the context of use. The Codes were documents designed to be carried in saddlebags, for use by police and District Officers, and explaining proper courtroom procedure to magistrates and judges. At the level of structure, this document is provided with a table of contents—unlike Macaulay's Code. The structure of the Act has changed; the division of the Act into Parts adds a supervening level of structure onto the chapters of the previous Code. The logic of its organisation is now, in a modernising gesture, included in the navigational structure of the Act itself.

With respect to that organisation, the first three parts describe the jurisdictional implications of the Code in territorial, institutional and policing terms. The Parts then follow, broadly, an account of criminal process from the perspective of the Court: compelling appearance, trial and inquiry phases, post-trial appeals, and how punishment is to be prescribed. The Code is then directed toward the law of evidence and the incidental procedures: of the role of form and the prescription of forms. The preventative jurisdiction of magistrates is given the penultimate part as its own, suggesting its apartness from general procedure, and its status as a different and minor jurisdiction. Finally, the Act contains a Part dedicated to miscellany that segues without clarity into the Schedules that make up roughly one third of the statute's printed mass. The

[213] See Ibid pt iii, 'Of the Police'.
[214] See Ibid pt xi.

Schedules are organised differently from the earlier code. The forms of charge are given their own Schedule, of three pages. The revised Code includes the table of offences organised according to the Penal Code. This should draw attention to the fact that the Code, although appearing significantly revised due to its re-structuring, in fact keeps a significant amount of the text. In fact, most of the jurisprudential (as opposed to formal) innovations of the first Code survive scrutiny to find a place in the second.

**ii. Reorganising Jurisdiction: General, Residual and Special Procedure**

The jurisdiction of the Code of Criminal Procedure provides a way of understanding how the authority of the substantive penal law of British India comes to be attached to its various subjects and objects. This section describes how the Stephen Code organised jurisdiction. It is at once a general procedure and a series of derogations from that generality, as these exceptions include difference within the legal ambit of the Code. In other words, the Code largely works to *include* its derogations within the law rather than exclude them into some other domain of administration. In this sense, we should not be surprised to see a number of different ways by which the 1872 Code asserts a partial yet particular understanding of totality.

The police jurisdiction articulates the duties of police in India both in terms of their obligations to administer the criminal law and their responsibilities to government. In other words, it provides a guide to the conduct through which police interface between the juridical institutions, the penal code, and the governing authorities. The technological form of this procedure is that of a Table of Offences—to this end, the 1872 Code follows the 1861 Code.[215]

In terms of subject matter, the Code established, 'consolidat[ed] and amend[ed]',[216] the general criminal procedure (which it re-enacts and describes) while at the same time providing for the

[215] Ibid sch 4. On the technological dimension of jurisdiction see Shaunnagh Dorset and Shaun McVeigh, *Jurisdiction* (Taylor & Francis, 2012), ch 4.
[216] *1872 Code* (n 11) preamble.

"saving of special procedure", which are those 'not expressly repealed in the first schedule to this Act'.[217] These vestigial procedures aren't to be 'deemed to have been impliedly repealed by reason of its being inconsistent with the provisions of this Code'.[218] Consequently, a number of jurisdictional tensions emerge: between the general and the special procedure; between codified consistency and the admission that inconsistencies are to be recorded, between scheduling transparency and that remainder of procedure: noted, but conspicuously absented from the newly restated general procedure Code. These tensions in the procedural strata are perhaps better understood as indicative or productive of a particular mode of administration: in this regard, the method reveals something of the object. Two examples might clarify this point by looking specifically at how "special" criminal procedures operated alongside the Code.

First, the *Criminal Tribes Act of 1871*, established separate procedures for government officials to declare groups of people to be "criminal", meaning 'addicted to the systematic commission of non-bailable offences', in order to permit extensive policing and control of those populations.[219] The racial and gendered dimensions of this category has received substantial academic criticism.[220] My focus here is on the procedural dimensions of this particular law

[217] Ibid s 2.
[218] Ibid.
[219] E.g. *Criminal Tribes Act* (India) Act XVII of 1871, s 2 (*Criminal Tribes Act*). This Act was also drafted by Stephen.
[220] See e.g. Sanjay Nigam, Disciplining and policing the 'criminals by birth', Part 1: The making of a colonial stereotype—The criminal tribes and castes of North India' (1990) 27(2) *Indian Economic and Social History Review* 131; Sanjay Nigam, 'Disciplining and policing the "criminals by birth", Part 2: The development of a disciplinary system, 1871-1900 (1990) 27(3) *Indian Economic and Social History Review* 257; Meena Radhakrishna, 'The Criminal Tribes Act in Madras Presidency: Implications for itinerant trading communities' (1989) 26(3) *Indian Economic and Social History Review* 269; Andrew J Major, 'State and Criminal Tribes in Colonial Punjab: Surveillance, Control and Reclamation of the "Dangerous Classes"' (1999) 33(3) *Modern Asian Studies* 657; Meena Radhakrishna, *Dishonoured by History: 'Criminal Tribes' and British Colonial Policy* (Orient Longman, 2001); Henry Schwartz, Constructing the Criminal Tribe in Colonial India: Acting Like a Thief (Wiley-Blackwell, 2010); Mark Brown, 'Race, Science and the Construction of Native Criminality in Colonial India' (2001) 5(3) *Theoretical Criminology* 345; Mark Brown, 'Crime, Liberalism and Empire: Governing the Mina Tribe of Northern India' (2004) 13(2) *Social & Legal Studies* 191; Mark Brown, *Penal Power and Colonial Rule* (Routledge, 2014). On the policing of tribespeople under the Criminal Procedure Code, see Anastasia Piliavsky, 'The Moghia Menace, or the Watch Over Watchmen in British India' (2013) 47(3) *Modern Asian Studies* 751.

rather than the construction of racial categories and group subjectivities. Notwithstanding the language of "addiction", even when the *Criminal Tribes Act* established a special procedure, it was still deeply reliant on the category of "non-bailable offences" found in Schedule to the *Criminal Procedure Code*. As such, so-called "special procedures" are perhaps better understood within the broader rubric of criminal procedure: they aren't so much exceptions to the rule, as specific enunciations of *how* British administration was to be exercised: through a general legislative fiat riven with local discretions of wide latitude. This attitude regarding the need to legislate authority stands in contrast to the earlier practice of pardoning magistrates who have engaged in the same behaviour without regard for legal authority.[221]

A group became a "criminal tribe" when the local government published a notification of this in their local Gazette.[222] However, in order to do this, the local government was required to tender a report[223] 'to the Governor-General in Council requesting a permission to declare such a tribe, gang or class to be criminal tribe'.[224] The Governor-General in Council needed to be convinced that the group was addicted to non-bailable offences, and would have some means of subsistence should they be declared a "criminal tribe".[225] Once this was gazetted, 'every such notification will be conclusive *proof* that the provisions of this Act are applicable to the tribe, gang or class specified therein'.[226] In other words, this non-judicial declaration was to be irrefutable in the course of proceedings before a judge. This allowed for individuals to be registered,[227] and subject to administrative conditions in terms facilitating the regulation of

[221] *Criminal Tribes Act* (n 219) s 23 granted retrospective indemnification to all officers for 'past registrations and detentions', prior to the passage of this Act, see s 23.
[222] Ibid s 6.
[223] Ibid s 3 describes the content of such a report.
[224] Ibid s 1.
[225] Ibid ss 3-4.
[226] Ibid s 6, emphasis added.
[227] Ibid s 8, calls for punishment under the *Penal Code* for failure to register one's self a member of a criminal tribe.

movements and surveillance.[228] Entire groups could be lawfully relocated,[229] or placed into 'reformatory settlement',[230] and yet, the procedures for re-settlement are not described, methods of movement are at the discretion of local government.[231] Non-compliance with these executive impositions 'shall be punished with rigorous imprisonment for a term which may extend to six months, or with fine, or with whipping',[232] with steeper penalties for repeat offending.

The second example is the *Murderous Outrages Act* of 1867,[233] which was drafted by Sir Henry Maine and passed into law between the two major revisions of the Code of Criminal Procedure. This Act carved out a territorial exemption for the Punjab region, which allowed persons to be classified as a "fanatic", a newly improvised legal subjectivity.[234] When such a person was accused of murder, a summary trial was permitted before a district judge and two assessors, to adjudicate the matter.[235] The imposition of the death penalty didn't require confirmation from a superior court,[236] as normally required by the Procedure Code.[237] The magistrate could dispose of the body of the condemned as they pleased, including, as Elizabeth Kolsky notes, desecration and burning of the body after public hanging.[238] Mark Condos argues that, following the violent suppression of the Morant Bay uprising in Jamaica, there was a growing concern about the

[228] See the regime of possible forms of intervention in Ibid s 18(6) for movement; attendance at roll calls: s 18(7); the conditions of surveillance and search of residences, nb the statute places no restrictions on these powers—this is an entirely enabling provision, s 18(8).
[229] Ibid s 13 (if found to be nomadic) and s 14 (if found to have a settled territory).
[230] Ibid s 17.
[231] Ibid s 18(10).
[232] Ibid s 19.
[233] *Murderous Outrages Act* (India) Act XXIII of 1867 ("*Murderous Outrages Act*").
[234] Ibid s 2.
[235] See Mark Condos, 'Licence to Kill: The Murderous Outrages Act and the rule of law in colonial India 1867-1925 (2106) 50(2) *Modern Asian Studies* 479, 480-2; Elizabeth Kolsky, 'The Colonial Rule of Law and the Legal Regime of Exception: Frontier "Fanaticism" and State Violence in British India' (2015) 120(4) *American Historical Review* 1218, 1221 ('Colonial Rule of Law').
[236] *Murderous Outrages Act* (n 233) s 7
[237] *1861 Code* (n 10) s 380.
[238] *Murderous Outrages Act* (n 233) s 8; Kolsky, 'Colonial Rule of Law' (n 235) 1237-9.

potential illegality of excessive force and summary violence by British colonizers.[239] An important sidenote is that Stephen was appointed the barrister for the so-called Jamaica Committee headed by JS Mill that sought to have Governor Edward Eyre indicted for murder following the declaration of Martial Law that saw hundreds of Jamaicans killed.[240] Differences of opinion emerged through the litigation regarding Morant Bay: while 'Mill felt more keenly the moral dimensions to the case' whereas Stephen held that although Eyre was 'violent, tyrannical and imprudent to a degree which I hardly imagined possible',[241] he nonetheless came to accept that violence was morally and legally permissible in the context of a slave insurrection, even if he thought it would otherwise constitute murder.[242]

In this sense, Stephen's account of violence and law adds a slightly different inflection to Elizabeth Kolsky's argument that statutes such as the *Murderous Outrages Act* 'expanded the colonial sovereign's legal right to kill by creating a new class of criminals with an already known motive for murder'.[243] Here, excusable violence is less the exception and more the dutiful yet logical consequence of a mode of lawful order predicated on rule by conquest. Preservation germinates its own lawfulness.[244] An alternative interpretation holds that the Act might also be seen as a way to preserve the ideological position of the rule of law, and consequently 'the law really was being used to legitimize a pervasively criminal culture of colonial punishment along

[239] Condos (n 235) 496.

[240] See McBride (n 68) 94-100. See also KJM Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge University Press, 1988), 136.

[241] Letter to his Mother, quoted in Smith (n 240), 137

[242] Leslie Stephen recounted that in the hearings before the Courts it was evident that 'Fitzjames 'felt much sympathy for the persons who had been placed in a position of singular difficulty, and found it hard to draw the line between the energetic defence of order and over-severity to the rebels… It must be awkward to say a man is legally a murderer when you mean only that he has lost his head and gone too far under exceedingly trying circumstances. The Jamaica Committee did not admit of any such distinction' (Leslie Stephen (n 111) 230).

[243] Kolsky, 'Colonial Rule of Law' (n 235) 1240. My argument here is these Acts preserved the technicity of the rule of law by carving out liminal spaces for retribution, racism and excess.

[244] Cf Carl Schmitt, 'Definition of Sovereignty' in *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2005) 5, 12.

the frontier: the *Murderous Outrages Act* literally did legalize lawlessness'.[245] In support of this analysis, Mark Condos quotes Henry Maine arguing before the Legislative Council for the bill he had drafted proposing this procedural exception for the Punjab region:

> 'The Bill was not so much a Bill permitting officers on the trans-Indus frontier to order summary execution, as a Bill recognizing the fact that summary trial and execution were occasionally unavoidable in the trans-Indus territory, but planning the practice under regulation and restraint'.[246]

In Henry Maine's account, the issue was less one of the grand structure of sovereignty as one of diffusing the politics of violent colonial rule into the technicity of procedure: after all, between summary execution and the rule of law is the liminal procedural device of the summary trial and the violence that follows in its way.[247]

Both of the above examples of recently passed legislation involve significant deviations to the procedure listed within the Code. As such, these "special procedures" represent both the rougher edges of the rule of law and the opaque mode of transparency of judicial administration. The important point isn't so much that these set the boundaries of exception, but rather that they demarcated the mode by which the British were able to govern through law in India.

### iii. On the Jurisdiction of Courts

Alongside the expansion of territorial reach, the revised Code also sought to rationalise the classification, powers and authorities of magistrates. Stephen used this change in classification to re-title the courts with reference to the class of magistrate that takes office therein. The particular jurisdiction of each court is established in the Schedule. The punitive authority of the various classes of magistrate are graduated down to where Magistrates of the Third Class cannot try offences that have a maximum penalty of greater than one year's imprisonment.[248]

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[245] Condos (n 235) 498.
[246] Henry Maine quoted arguing before the Legislative Council in Condos (n 235) 480-2.
[247] See Chapter One for a discussion of Maine and the question of conduct.
[248] *1872 Code* (n 11) s 8.

magistrates were appointed and removable by the local governments:[249] they lacked security of judicial tenure and the choice of appointment devolved to local government.[250] Importantly, all classes of magistrate had a formal grant of summary jurisdiction,[251] allowing them to both determine charges and adjudicate the outcome of cases.[252]

The court hierarchy formally obeys two geometries: (1) a hub and spoke pattern of jurisdictional demarcation and (2) an order of delineation that is organised first in terms of territory, then authority to punish degrees of offending. In each Local Government province,[253] there are a number of Sessions Divisions and each division has one Court of Sessions.[254] Local government was required to appoint at least one Sessions judge.[255] By way of contrast, the superior Sessions Court had the broadest jurisdiction, with all offences falling within its ambit. It was also given commensurate authority to sentence: including death and transportation.[256] In comparison, magistrates had limited powers to pass sentences, according to their magisterial classification.[257] Magistrates also had broadly enumerated powers beyond sentencing. Stephen re-invested magistrates with administrative powers over nuisance, obstruction, family maintenance and possession.[258] Additionally, there is a superintendent Magistrate of the District with supervisory powers over the magistrates appointed within their district.[259]

[249] Ibid s 9.
[250] Ibid.
[251] The growth of the grant of decisional jurisdiction in England in the contexts of Justices of the Peace is discussed in Chapter Six.
[252] *1872 Code* (n 11) ss 21(19), 222.
[253] Subject to the control of the province government: Ibid s 13.
[254] Ibid ss 12, 15.
[255] Ibid s 16.
[256] Ibid s 15: any offence, any sentence – but not any accused.
[257] For example, First Class Magistrates can imprison for up to 2 years, fine to R1000, and authorise whipping whereas Third Class Magistrates could only imprison for up to one month, fine up to R50 and could not authorise whipping.
[258] Ibid s 21.
[259] Ibid s 35.

The Code established the formal articulation and limitation of Magisterial powers alongside an expansive capacity for executive autonomy of the Local Government over process and procedure. This autonomy sits alongside formally demarcated hierarchies of jurisdiction where sentencing options and superintendence[260] were generative of a process of formal reporting that facilitated discipline and allowed for the efficient processing of accused persons. The hierarchy of the Magistracy afforded a tremendous amount of latitude to District Magistrates and allowed Division of District Magistrates to intervene in either individual or classes of cases from particular subordinate magistrates,[261] or classes of cases from all of their subordinate magistrates.[262] Together, these powers represented a capacity to order the hierarchy of the magistracy from the level of the Local Government (who may or may not also be vested with magisterial powers) and within the magistracy itself. This translated into a tremendous discretion with respect to shuttling the accused between different classes of magistrate in order to secure harsher punishment.[263] The remission for punishment of the accused takes place after their trial, even though the magistrate could have nominated to send the case up the hierarchy at committal.[264]

The adjudicatory powers of the Magistracy could be granted to members of the executive of the District in question. The Code provided that the Deputy Commissioner in charge of a number of regions in India, including the frontier Punjab region, might be invested with the powers of magistrate:

[260] This is formally described in Ibid s 41.
[261] Ibid s 47.
[262] Ibid s 48.
[263] For example, Magistrates have the authority to submit their cases to a Class of Magistrate with greater options in sentencing when within their jurisdiction 'finds an accused person guilty, and considers that he ought to receive a more severe punishment than such a Magistrate is competent to adjudicate', Ibid s 46.
[264] Ibid.

> 'the executive administration of the district in criminal matters, with the power to try as a Magistrate all offences not punishable with death, and to pass sentences for a term of imprisonment not exceeding seven years'.[265]

Stephen's Code continued the practice of granting significant local autonomy to magistrates while balancing their discretionary and decisional authority against their answerability, in terms of their job performance, reporting, and employment generally, to the Local Government that they themselves, as individuals exercising another office, may be part of. Indeed, for Stephen, this crossover was not so much a part of the bureaucracy of accountability as much as a means of legitimating the authority to punish in the districts.[266]

**iv. Revising Race**

The preliminary sections of the revised Code indicate that the procedures regarding European British subjects had a more immediate importance in this iteration.[267] Rather than requiring European British subjects be tried in the Courts of Judicature, jurisdiction over this group of people is extended to the Sessions Courts and First Class Magistrates,[268] so long as they share the same privilege of race as the accused.[269] Attention is directed, from the first chapter, to the special procedures of investigation and trial for European British subjects, which indicates something of the importance of these changes to those who read this revised Code. The largest change here is the explicit requirement that European British subjects can only be investigated by or try other European British subjects.[270] In other words, whereas before the race of the accused determined the jurisdiction and procedure exercisable over an accused person in India, in Stephen's revision, the race of the adjudicator is also determinative.

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[265] Ibid s 36.
[266] This was explored in Chapter Four, Part III.
[267] *1872 Code* (n 11) s 11.
[268] Ibid s 72. NB The Magistrate of the first class must be a) European British and b) also a JP. Likewise, any Justices of the Peace inquiring into a complaint must also be a Magistrate of the First Class.
[269] Stephen, 'Minute' (n 154) 32.
[270] *1872 Code* (n 11) s 72.

The definitional issues pertaining to the status of persons in the previous iteration of the Code had been resolved in favour of a clearer statement of who is a European British subject under the 1872 re-statement.[271] A "European British" subject is now defined as

> '[a]ll subjects of Her Majesty, born, naturalized or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American, or Australian Colonies or Possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal'.[272]

Indeed, the 'European' status of privileged persons bears greater relation to ethnicity than the geography of birth, naturalisation or domicile, as one might be considered 'of Europe' despite birth in Africa or Australia. Additionally, privilege under the Code of Criminal Procedure accrues to '[t]he children and grandchildren of any such person by legitimate descent'.[273] Where descent is illegitimate, case law on the previous Code held that an accused whose 'great-grandfather was, according to the tradition of the family, a European residing in Madras, and his great-grandmother a Native Hindoo or Mahomedan',[274] that '[p]ersons not born in wedlock follow the nationality of their Mothers'.[275] In Stephen's argument, this functioned to protect the integrity of the ideology of European-ness; as the status bears no relation to geography, and displays his fear of miscegenation it also speaks to his desire to prevent dilution of privilege.[276]

The procedure and degree of punishment is limited by the Code depending on the Court exercising jurisdiction over a European-British accused. If before the Sessions Court, then 'not less than half the number of jurors, shall be European British subjects'.[277] Even if Magistrates of the First Class were racially competent to hear the case, their sentencing options were

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[271] See this Chapter, Part III(A)(ii).
[272] *1872 Code* (n 11) s 71(1).
[273] *1872 Code* (n 11) s 71(2).
[274] *Rollo v Smith*, Calcutta High Court, 19 November 1867. This case is reported in Henry Thoby Prinsep, *The code of criminal procedure, Act XXV of 1861, and Act VIII of 1869, and other laws and rules of practice* (Thacker, Spink, 3rd ed 1869), 384.
[275] Ibid 385.
[276] See Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 *Journal of Genocide Research* 387.
[277] *1872 Code* (n 11) s 78.

reduced.[278] Rather than the judiciary, the Local Government had the authority to determine where, 'either specially or generally', a European British subject is to be imprisoned.[279] The provincial Sessions Judge had a wide discretion 'at any stage of the proceedings' to remit the case to the High Court should they 'think… the offence cannot be adequately punished by such a sentence'.[280] This required transporting the accused and 'the complainant and witnesses to appear before the High Court'.[281] Together, these requirements provided significant procedural concessions to accused persons who could claim the privileges of European British status.[282] Discretions were formally and expansively legislated while the requirements of jurisdiction and the punitive entailments of conviction were lessened. The 1872 Code represented a significant expansion of the privileges that existed in 1861: here, they were encoded into the Criminal Procedure of British India in a more detailed, nuanced, and strident manner than before.

**v. Police Procedure: Investigation, Reporting, and Governing**

The 1872 Code develops a thorough account of the role of police in the administration of the criminal law in British India. The governance of a police jurisdiction necessitated the imposition of obligations of conduct on police officers and the subjects of colonial policing. In British India, police occupied a more prominent role in criminal procedure than they did in other common law jurisdictions at the time. Apart from their increased formal role in investigation and prosecution, the Stephen Code also sees the organisation of offences as primarily in response to police powers rather than, but concurrent with, any sense of the legal gravity or moral turpitude of the offence in question. This section will explore how the revised Code described the role and conduct of police.

[278] The maximum term of imprisonment is limited in such cases to three months, but the maximum fine remains at R1000. Ibid s 74.
[279] Ibid 88.
[280] Ibid s 76.
[281] Ibid
[282] The status of European British is described as a privilege capable of waiver in Ibid s 84.

The Stephen Code distinguished between the obligations of policing conduct pertaining to both the police and the public that they nominally oversee. The Code constituted policing as a necessary and widespread social practice beyond the formal institutions of police. The Code delegated responsibility for surveillance to 'the public' insofar as they were required by legal 'duty' to report their knowledge of the commission of particular criminal offences to 'the nearest Police officer or Magistrate'.[283] While there are more specific responsibilities attached to particular occupations and classes of person,[284] section 92 expands the responsibilities of the public. In contrast to the clear and tabulated guides for the benefit of police the section that lists public responsibilities is illegible on its own. The nature of the prescribed offences aren't described: instead sections of the Indian Penal Code are listed in cardinal form, and of those sections, the Procedure Code often directs the reader to the Penal Code's statement of the maximum punishment of an offence rather than the substantive definition of the conduct in question.[285] Independent of the difficulty navigating the statement of duty, are the effects of the legal obligations themselves. The listed offences fell into four broad categories: treason and unlawful warfare against allies of the Crown,[286] culpable homicide and murder,[287] damage to property by way of arson or explosion,[288] and, robbery or banditry.[289] By classing this duty as a police matter, this section reads as imposing the responsibility on the colony for its own order

[283] Ibid s 89.

[284] See Ibid s 90 which requires 'Every Village Headman, Village Watchman, owner or occupier of land [or their agent]… and every Native officer employed in the collection of revenue of rent of land on the part of Government or Courts of Wards' are required to report stolen goods, 'any person or persons known or reasonably suspected of being a thug or a robber; the commission or intention to commit suttee or other non-bailable offence' and any un-natural deaths in the village. Those with administrative responsibilities are given clearer and, procedurally, more specific duties than the public at large.

[285] An example to demonstrate is that the Code requires the public to inform the police or magistrate of murder, however, instead of directing a reader to the section outlining the definition of the form of homicide that is classed as murder (*Penal Code* (n 152) s 300), they are instead required to report all instances of *Penal Code* (n 152) s 302: 'Whoever commits murder shall he punished with death, or transportation for life, and shall also be liable to fine'.

[286] *Penal Code* (n 152) ss 121, 121A, 122, 123, 124, 124A, 125, 126, and 130.

[287] Ibid ss 302, 303, and 304.

[288] Ibid ss 435-6.

[289] Ibid. ss 382, 392, 394, 395, 396, 397, 398, 399, 402, 449, 450, 456, 457, 458, 459, 460.

through the imposition of broad duty of surveillance. Additionally, the Code extends a less stringent duty "binding" the public to assist magistrates and police in the 'prevention of the peace, or in the suppression of a riot or affray, or in the taking of any other person whom such Magistrate or Police officer is authorized to arrest'.[290]

How then should the authority granted to police by the Procedure Code be understood here, especially if a more expansive understanding of the concept and political entailments of jurisdiction is taken into account? Firstly, policing has an overarching dimension of surveillance in its official and private dimensions. The duties to police are dispersed throughout the "public", who are likewise constituted as subjects required to report offending to police. Second, official policing (meaning that conducted by Police Officers), is predicated on a wide delegation of autonomy that is offset by constraints in cases with either political sensitivity,[291] or where there are antecedent legal questions preceding the charging of offenders.[292] Third, policing itself was thoroughly administered through a series of reporting and diarising requirements, hinging autonomy to accountability for one's time. Fourth, hierarchy prevailed with senior police able to exercise discretion to end investigations.[293] As always, these decisions are reportable and reviewable by the Magistracy.[294]

The police jurisdiction of the Criminal Code is enlivened, in the first instance, by the offences categorised as "cognizable".[295] As a purely procedural category, a cognizable offence is one by which a police officer 'may by any law in force for the time being, arrest without warrant'.[296] Without an offence being classified as cognizable, a police officer is not permitted to begin to

[290] *1872 Code* (n 11) s 91.
[291] For example, waging war against a non-allied nation to the Queen is not a cognizable offence
[292] For example, cases where an alleged offender was part of a group but not in attendance.
[293] *1872 Code* (n 11) s 117.
[294] Ibid s 117.
[295] Ibid s 109
[296] Ibid s 4 definition

investigate or arrest, 'without the order of a Magistrate of the first or second class'.[297] In a real sense, because the bulk of scheduled offences were tabled as cognizable, this meant that the police had significant formal responsibility for instigating investigations, arrests and charges.

The Code also sought to formalise requirements of reporting and superintendence within the Police. The policework of British India is generative of an archive of reports. Police were subject to multiple requirements to record their activities: activities of their person, and their station. The entries were then to be processed: collated by place or person, and then organised according to the rigidities of time. As such, reporting represents a mechanism for disciplining police as much as encouraging investigative rigor. And, to this end, the process of reporting had two principal related functions.

The first was to provide an official accounting of investigations, interviews, charges and decisions regarding the accused. This interfaced with procedural requirements. For example, the right to silence was significantly diminished in British India: police officers could issue summonses for any witnesses during the investigation into possible offences, and 'any person so summonsed shall be bound to attend to answer all questions (other than questions which would criminate him)'.[298] Indeed, during committal proceedings, the presiding magistrates can ask questions of the accused which 'may be put in evidence against him, not only in the case under inquiry, but also in trials for any other offences which his replies may tend to show he has committed'.[299] There is no punishment for refusing to answer, 'but the Magistrate shall draw such inferences as may to him seem just from such refusal'.[300]

[297] Ibid s 110.
[298] Ibid s 134.
[299] Ibid s 193.
[300] Ibid.

At the conclusion of any investigation, police were required to report what had been done with the accused,[301] and to complete

> 'a form prescribed by the Local Government, setting forth the names of the persons who appear to acquainted with the circumstances of the case, and shall also send to the Magistrate any such weapon or article which it may be necessary to produce before him'.[302]

Police were required to keep books recording in writing complaints made to them of offences, signed by the complainant.[303] Likewise, if the charge is non-cognizable, it must be entered into a 'station diary' and referred to a magistrate of competent jurisdiction.[304] This functioned as a discretion for the police officer to defer decision-making about action or investigation to a superintending magistrate at a later date.

The second function of reporting involved the supervision and disciplining of police officers by the District Magistrates. Consider how an accounting of time is used to organise what police officers are called upon to document in their investigations, whereby they are required to individually

> 'day by day enter his proceedings in the investigation in a diary, setting forth the time and place at which the complaint or other information reached him, the time at which he began and closed his investigation, the places or places visited by him, and a statement of the circumstances ascertained by his investigation'.[305]

As such these diaries provided for the superintendence of police officers in terms of how their time was spent. The rule as to the legal status of the contents of a police notebook underlines their ambivalent evidential status in the British Indian trial apparatus, where the presiding judge or magistrate is entitled to

[301] This includes any arrests: Ibid s 132.
[302] Ibid s 126.
[303] Ibid s 112.
[304] Ibid s 113.
[305] Ibid s 126.

> 'send for the Police diaries of a case under inquiry or trial… and may use such diaries to aid it in inquiry or trial. Neither the prisoner nor his agents shall be entitled to call for them, nor shall he or they be entitled to see them merely because they are referred to by the Court'[306]

However, if a police officer used their diary as an aide memoire while testifying then 'the provisions of the law relating to documents used for such purposes shall apply to them'.[307] These were not curial texts nor part of a brief of evidence. Instead, they form an ambiguous archive: primarily investigative, but also disciplinary - and yet could tip into juridical evidence during the course of a trial in the form of an aide memoire.

**vi. Conclusion**

Stephen's Code deploys a worldview that steadfastly and unflinchingly assumes the right to exercise violence against a subject population. As a jurisprudential technique of authority, this right is exercisable at law through the form of procedure: it has a mechanical, principled, and nominally rule-based diagram of operation that sought to maximise the effectiveness and authority of rule. As *rules*, procedure demarcates major aspects of the shape and mechanisms of the Raj's overt forms of authority while, at the same time, developing a programme of tactics to minimise the possibility of neglect and negligence—understood as inefficiencies—that sat parallel to the power to rule and authority to punish. In the background of the Code sits a different but less stable relationship to force, as the Criminal Procedure Code provides: a strategy where power is deployed in British India according to a developing yet deniable imperial logic.

## IV. Rule at a Distance: Legacies of Indian Administration in Britain

The final substantive Part of this Chapter returns to the theme of conduct of government by following arguments regarding training for roles in the administration of India. In this sense, it represents a continuation of the argument although it moves back in time. This necessitates

[306] Ibid.
[307] Ibid.

returning to Thomas Macaulay's career. In his final role for the East India Company, he was contracted to review training for office in the Indian Civil Service in 1854, decades after his return to the United Kingdom. These recommendations provided a foundational contribution to the formation of the British Civil Service Commission, and as such, the way in which Macaulay's arguments for criminal procedure jurisprudence appeared as a template for reforms to government warrant greater attention. Thus we are returning to the theme of how the careers of administrative jurists provide a trajectory for the movement of idioms of government and shifting logics of conduct with them through empire.

The conduct of empire carries with it a story about the government of imperial office bearers and debates about selection and training. It recalls that each of the major thinkers of procedure had pedagogical designs for how to best translate their ideas on the conduct of institutional life into being. As such, Macaulay's important interventions addressed not only imperial government, but intervened in a broader debate about problems generated by the obligations of patronage and how the business of government was to be conducted in the mid-nineteenth century.[308] Indeed, Macaulay's report 'contained the core philosophy not only for the ICS [Indian Civil Service] but also the Home Civil Service'.[309]

Before we can discuss Macaulay's efforts and procedural idioms for formulating a jurisprudential pedagogy in the training for holding office in colonial administration, it is necessary to say a few words about the context in which the selection for this role took place. In light of the outsize influence of the East India Company on British society, along with the scale of the inventive program of legislative reform, it should not be surprising that some of those principles of government administration might be considered as possible reforms in London. These challenges from the antipodes find voice in a debate about the correct training for

[308] For a discussion of bureaucracy's ingress into the administration of British government, see Emmeline W Cohen, *The Growth of the British Civil Service 1780-1939* (Frank Cass, 1965), 81.
[309] Richard A Chapman, *Civil Service Commission 1855-1991: A Bureau Biography* (Routledge, 2004), 12.

administrative office and the changing virtues of procedure that adhered to it. What is at stake is a debate about how access to lucrative overseas positions within the East India Company might be obtained. In the years preceding the Mutiny, before the Company was to lose its remaining administrative responsibilities, the debate we are to follow concerns access to the training in office, or pedagogy, for those who are to act as magistrates and district officers in India. The question of access to official positions in government abroad touched also on the question of status and the regulation of access to the lucrative rewards that an overseas posting could provide. As such, in the background of debates around good government abroad is the material interests and structures of domestic government, that remained steeped in patronage networks.

Debates about reform to training for office only make sense when considered in the context of the structure of formal and informal patronage that suffused the social relations of eighteenth century Britain.[310] Patronage provided a mechanism for hitching familial and social advancement and security to existing forms of influence and wealth, which were at the time principally related to rank and its related agricultural holdings.[311] In addition to offering lucrative pathways to potential social advancement,[312] significant wealth could become available to the nascent English middle class.[313] After all, patronage in 'India was one avenue for an English

[310] Vincent Harlow, *The Founding of the Second British Empire 1763-1793* (Longmans, Green and Co, 1964) 2; Cohen (n 308) 41, 65-6, 75.

[311] See JM Bourne, *Patronage and Society in Nineteenth Century England* (Edward Arnold, 1986), 16-23 for a discussion of how patronage operated as a mechanism to advance the interests of landed gentry and the tensions that the relationship between that mechanism of social advancement generated (on the one hand) and the shifting of an economic base toward trade (vis a vis industry and imperial wealth).

[312] Sir Edward Blunt describes the situation where 'many of the Company's servants, after a relatively brief residence in India, had returned home with large fortunes, to buy landed estates and rotten boroughs, and under of the nickname of "nabobs", to make themselves detestable to the gentry, into whose ranks they tried to force their way' (*The I.C.S.: The Indian Civil Service* (Faber & Faber, 1937), 30.

[313] Eric Stokes pushes this idea a little further that I do, and notes that it was the existence of 'India [that] provided that element of scale and expansiveness to the new middle-class mind' (*Utilitarians* (n 3) xii). For Sir Edward Blunt notes that '[f]rom the beginning… the [East India] Company had supplemented its servants wages by permitting them to invest in the stock of a voyage… it also taught them to look for their

middle class in formation to secure posts for its elder sons'.[314] Over time, the activities and profits of the East India Company were a significant factor in the changes to British society across the 18th and 19th centuries.[315] This change in the economy, with its concomitant shift in the possibilities of acquiring wealth, carried consequences that, quite apart from their effects on India's people,[316] have been interpreted by historians to have 'threatened the stability of the nation',[317] or, in more dramatic phrase: 'the British as a society c[o]me very near to being rotted by the getting and spending of Indian loot.'[318] To the landed aristocracy, the vastness of the wealth available to Company servants and, for example, traded, visible and portable luxury (most notably diamonds), suggested a changing basis of wealth, and consequently 'represented another paradigm, one that seemed radically speculative and which had the threatening potential to be wildly democratic'.[319] Chapman notes that, in hindsight, middle class agitation

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remuneration to other sources than their salaries' (Blunt (n 312) 16). See also EN Gladden, *A History of Public Administration: Volume II - From the 11th Century to the Present Day* (Frank Cass, 1972), 241.

[314] Colin Newbury, 'Patronage and Professionalism: Manning a Transitional Empire, 1760-1870' (2014) 42(2) *Journal of Imperial and Commonwealth History* 193, 197. It is worth considering the obviousness with which how the early composition of Company servants shifted following the realisation of ready fortunes to be acquired such that 'the gentry too began to turn their eyes toward India and its wealth, and everybody who had some young dependant for whom to provide, strove to secure a nomination for him from some director'. In consequence, '[t]he character of the service changed: it was now filled with men who "had no recommendation but their high birth and great interest", and no object in going to India except to make the maximum of money in the minimum of time'. Blunt (n 312) 30-1).

[315] See for example, Tillman Nechtman, *Nabobs: Empire and Identity in Eighteenth-Century Britain* (Cambridge University Press, 2010); Tillman Nechtman, 'Nabobs Revisited: A Cultural History of British Imperialism and the Indian Question in Late-Eighteenth-Century Britain' (2004) 4(4) *History Compass* 645, 648-50 considers the effects of an emerging culture of expression of wealth in objects brought back by East India Company servants and shareholders from India.

[316] While debated, a recent popular account is provided by Shashi Tharoor, *Inglorious Empire: What the British Did to India* (Scribe, 2016).

[317] Tillman Nechtman, 'A Jewel in the Crown? Indian Wealth in Domestic Britain in the Late Eighteenth Century' (2007) 41(1) *Eighteenth Century Studies* 71, 74 ('A Jewel in the Crown?').

[318] Harlow (n 310) 6. See also PJ Marshall, 'Empire and Authority in the Later Eighteenth Century' (1987) 15(2) *Journal of Imperial and Commonwealth History* 105, 113-4.

[319] Nechtman, 'A Jewel in the Crown' (n 317) 76. This was a fear of rapidly acquired and vast fortunes, built on the basis of trade rather than agriculture, and the velocity of change is perhaps best articulated through the way that a diamond bought in India by Thomas Pitt for £24,000 and later sold to £135,000 to the Duke of Orléans in 1717. As Nechtman notes 'The Pitt diamond thus formed the financial basis of a British dynasty that would produce two Prime Ministers' (77). See Chapter 3, on Bentham for a discussion of one of the Prime Ministers Pitt.

for changes to the recruitment and administration of government were 'unsurprising if the electoral arrangements of government were being reformed',[320] in ways that reflected the changes in society brought on, in large part, by the industrial revolution.[321] In other words, changes that were taking place in the context of the industrial revolution and an increasing suffrage saw segments of the middle classes express an increasing discontent with patronage as 'part of the aristocratic system of government… and it was both inefficient and indefensible'.[322] In addressing these three concerns—aristocratic patronage, efficiency, and moral or political defensibility—the Indian Civil Service provided a study in how to proceed with reform and a model in the form of the extant institutions for the education of those responsible for forms of public administration.

Macaulay had a long history of proposing changes to the administration of the East India Company's employment. In 1833, he was advocating for competitive entrance examinations to the service of the East India Company and 'proposed that for every vacancy in the civil service of the four candidates shall be named, and the best candidate selected by examination'.[323] Meritorious selection was not adopted. Change, instead, happened through the more circuitous route of modifying the access to education and curriculum reform for future civil servants.[324] Amongst the notable innovations developing a bureaucratic culture of administration was 'Haileybury College [which] had been founded in 1806 to provide suitable education for the

[320] Chapman (n 309) 12.
[321] For example, the *Great Reform Act of 1832* (2 & 3 Wm. IV, c. 45) extended the franchise to approximately 1 in 5 adult males in response to severe riots in manufacturing centres such as Bristol and Manchester. As suffrage became increasingly predicated on lower property holdings, the bulk of the increase in of the electorate came from the emerging middle classes rather the lower classes and majority of the population. John A Phillips and Charles Wetherell, 'The Great Reform Act of 1832 and the Political Modernization of England' (1995) 100(2) *American Historical Review* 411.
[322] Chapman (n 309) 12.
[323] Macaulay, 'Government of India' (n 9).
[324] RJ Moore, 'The Abolition of Patronage in the Indian Civil Service and the Closure of Haileybury College' (1964) 7(2) *Historical Journal* 246, 247-8.

young men nominated to join the civil service of the East India Company'.[325] This risks mis-interpreting the role of the College: Jacob Thiessen argues that the selection of students through 'the director's absolutely free hand with patronage',[326] and the selection of teaching staff from returned Company servants,[327] had less to do with a preparation for Indian service and more to do with preserving 'the director's commitment to the long-term interests of the Anglo-Indian families'.[328]

By 1854, the College's role and suitability for supplying candidates for public service in India was under review by a panel convened by the President for the Board of Control, and the author of this report was Macaulay.[329] The tendered report, by openly reviewing and arguing for reform of the admission and education requirements of Haileybury College, had broader import, and has been interpreted as having 'provided experience of overcoming recruitment problems and eliminating, or at least reducing, patronage' in the making of arguments for the review of the broader civil service in Britain.[330] The British Civil Service Commission was instituted the following year.[331] The establishment of a Civil Service Commission marks an important threshold in the slow and uneven transition from a civil service, organised as a collection of offices, to an administration organised by principles of increasing organisational rationalisation, and an attempt at disrupting existing patronage networks.[332] And while 'the successful operation

[325] Chapman (n 309) 12.
[326] Jacob Thiessen, 'Anglo-Indian Interests and Civil Service Education, 1800-1858: Indications of an East India Company Line' (1994) 5(1) *Journal of World History* 23, 40
[327] For example, James Stephen (Fitzjames' father) was appointed as a Professor after his time in the Colonial Office.
[328] Thiessen (n 326) 39. NB Thiessen uses "Anglo-Indian" to refer to the social milieu that were based in England and had the majority of their financial interests and career prospects linked to the Company.
[329] GO Trevelyan, *The Life and Letters of Lord Macaulay* (Oxford University Press, 1968), 380.
[330] Chapman (n 309) 12.
[331] Ibid, 11; Paul du Gay, 'Machinery of Government and Standards in Public Service: Teaching New Dogs Old Tricks' (2006) 35(1) *Economy and Society* 148, 152-3. Of course, bureaucracy always refers to a multiplicity of forces: Paul du Gay, 'The Values of Bureaucracy: An Introduction' in Paul du Gay (ed) *The Values of Bureaucracy* 1, 3.
[332] The Northcote-Trevelyan Report, in proposing competitive examinations and the organisation a centralised bureaucracy, noted that

of a non-territorial empire of trade depended on the existence of a strong, stable, native administration in the territories concerned',[333] this was never a centrally managed structure but a more disaggregated arrangement. In the domain of administration, efforts at reform represent a shift away from the type of governmental understanding of a series of linearly interconnected offices as described by Blackstone; a model unified by a promulgated commitment to a particular style of standardised conduct with a related institutional form.[334]

The major reforms of judicial administration in India, as discussed earlier in this Chapter, occurred after authority was transferred from the East India Company to the Crown following the Mutiny in 1857. In Harlow's summary, after the Company 'became a government, the basis of their self-interest changed'.[335] Reforms of colonial administration necessitated broad reconfigurations of the mechanisms of government administration that addressed existing patronage networks and shifting attitudes toward the centralisation of administration. The model that was eventually adopted in the United Kingdom was in part adapted from the experience of the reorganisation of the privatised administrative service that was founded and employed by the East India Company, and in part, from efforts at reforming the understanding of how public responsibilities, such as civil service, ought to be recruited and sustained.[336] This section follows an established body of literature in noting that the transformation the British bureaucracy developed through its institutional and jurisprudential encounters with India

> '[t]he existing system is supported by long usage and powerful interests; and were any Government to introduce material alterations into it, in consequence of their own convictions, without taking the precautions to give those alterations the force of law, it is almost certain that they would be imperceptibly, or perhaps avowedly, abandoned by their successors'.

Stafford H Northcote and CE Trevelyan, *Report on the Organisation of the Permanent Civil Service* (Parliamentary Papers, House of Commons, 1854), 23 ('Northcote-Trevelyan Report').

[333] Harlow (n 310) 5.

[334] These points are foregrounded in: Chapter 1 Part VII (for an overview) and Chapter 2 (for an account of office holding procedure in the context of penal law as was made to map onto public wrongs).

[335] Harlow (n 310) 6.

[336] On this score, the Northcote-Trevelyan Report provides an important statement of the reformed role of the civil service, Northcote-Trevelyan Report (n 332).

(sometimes as a place, and at other times as an oriental idea[337]) and its administration. The quality of this transfer has been variously interpreted as a site for experimentation,[338] a model of successful reform, and an exercise in rule at a distance.[339]

**A. Macaulay's Submission Regarding the Indian Civil Service**

Macaulay's report to the Board of Directors of the Company addressed the subject of the requirement that the pre-condition for attaining entrance into the Indian Civil Service was a candidature at Haileybury College.[340] Pupillage at the College was entirely at the discretion of the Directors' of the Company. Thiessen's archival research offers an impression of the quality of teaching and learning prior to qualification for the Indian Civil Service:

> 'Haileybury's professors could not expel students for misconduct. They could not force students to achieve fixed levels of proficiency… Until 1816 they did not even grade their students, nor could they compel their students to attend classes regularly'.[341]

While ostensibly concerned with reform to admissions and suitability of education at Haileybury College for the Company, Macaulay's report outlines a theory of civil service vocation and an ethic of office attuned to the needs of administering a colony. This raises questions that are at once of a more specific but also of a more general character:

> 'If the question of India was to take on such an importance for the more general question of styles of administrative rule in the Nineteenth Century (indeed, the term 'civil servant' originated in the context of Indian government), the reason for this lies in the fact that country posed for its British rulers, in an exemplary way, what might be described as the central problem of liberal government; that is, putting matters starkly—the question of how one is to govern *at* a distance'.[342]

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[337] See Piyel Haldar, 'Utilitarianism and the Painful Orient' (2007) 16(4) *Social & Legal Studies* 573.
[338] See Pitts (n 48); Stokes, *Utilitarians* (n 3); Clive (n 5), 339-41.
[339] Thomas Osborne, 'Bureaucracy as Vocation: Governmentality and Administration in Nineteenth-Century Britain' (1994) 7(3) *Historical Sociology* 289, 295; See also Nikolas Rose and Peter Miller, 'Political power beyond the State: Problematics of Government' (1992) 43(2) *British Journal of Sociology* 173.
[340] Thiessen (n 326) 39.
[341] Ibid. Thiessen quotes the Minutes of the Committee of College, 26 March 1816.
[342] Osborne (n 339) 294.

This chapter will now offer a reading of this document attuned to Macaulay's examination of officeholding and the attendant exercise of jurisdiction. This report appears both *at* and *as* a juncture of interest. First, the Macaulay Report was understood to signify the erosion of the College's standing,[343] simplifying the decision to close Haileybury College following dissolution of the East India Company. Second, Macaulay's own role in drafting and re-imagining the professionalisation of criminal procedure in India sees his ideas regarding the exercise of jurisdiction take on an important pragmatic character, and as such, we should be attentive to how these play out in the context of the civil service more broadly. This is particularly the case given the influence of this report on the formation and organisation of a British bureaucratisation of administration in the years following its publication.

Prior to Macaulay's intervention, to qualify for the Indian Civil Service, one needed to graduate from the Company's school. The effect of the age of admission requirements of Haileybury College were 'drawn as if it had been expressly meant to exclude bachelors of those [Oxford and Cambridge] universities'[344] from seeking employment in India. Alongside the express intention of dismantling networks of patronage, the Commission also 'hope and believe that the successful competitors will frequently be young men who have obtained the highest honours of Oxford and Cambridge'.[345] The Committee recognised, 'with much diffidence',[346] that the opening of a career in the Indian Civil Service to competitive entry 'be scarcely an event less important to this country than to India',[347] and 'felt in every seat of learning throughout the realm'.[348] The Committee envisaged offering 40 positions[349] to study at Haileybury a year and

[343] Moore (n 324) 256-7.
[344] Thomas Babington Macaulay, *Report on the Indian Civil Service* (November 1854).
[345] Ibid.
[346] Ibid, 120.
[347] Ibid, 120.
[348] Ibid, 120.
[349] The Committee compared proposed scholarships to Haileybury in terms of availability and prestige to the four fellowships on offer at Trinity College, Cambridge,

that '[e]very one of these prizes is nothing less than an honourable social position, and a comfortable independence for life'.[350] Macaulay's rhetoric invokes the possibility of both private benefits accruing to the candidate, and a public benefit to England that might flow from the institution of admission via competitive examination to the training college to the Universities.[351]

**B. Admission and Apprenticeship: A Shift from Patronage to Status by Proxy**

Macaulay's report made little secret of the problem it sought to solve: '[h]itherto the admissions have been given by favour. They are hence forth to be gained by superiority in an intellectual competition'.[352] In so doing, the Committee argues for a shift in the locus of status in the Indian Civil Service from patronage networks to merit.[353] Patronage and its resulting economy of nominations to the Indian Civil Service, which 'were given as the price of political support or to service private interests or provide for family connexions or friends', [354] replaced earlier practices where Writerships to the colonies were sold for profit.[355] In providing some context for the gravity of the change to be advocated by the Commission's report, Macaulay's son and biographer described the directorship of the East India Company as 'the most valuable

'the largest and wealthiest of the colleges… held only on condition of celibacy, and the income derived from them is a very moderate one for a single man… What, then, is likely to be the effect of a competition for prizes which are more than ten times as numerous as the Trinity fellowship and of which each will be more valuable than a Trinity fellowship?'

[350] Macaulay, Thomas Babington, *Report on the Indian Civil Service* (November 1854), 120. This doesn't seem to be a significant change in the number of students at the College where in 1849-50, there were a total of 91 students: John Michael Bourne, 'The Civil and Military Patronage of the East India Company, 1784-1858' (PhD Thesis, University of Leister, 1977), 226.

[351] So too the Northcote-Trevelyan report recognised that competitive examination for careers in the public service constituted 'an inducement [that] would probably do more to quicken the progress of our Universities… than any legislative measures that could be adopted': 'Northcote-Trevelyan Report' (n 332) 14.

[352] Macaulay, Thomas Babington, *Report on the Indian Civil Service* (November 1854), 120.

[353] Consider Macaulay's assertion that 'A director would naturally wish his son or his nephew to be handsomely provided for at 19, rather than at 23, and be able to return to England with a competence at 44 rather than at 48'. Ibid.

[354] LSS O'Malley, *The Indian Civil Service: 1601-1930* (Frank Cass, 2nd ed, 1965), 229-30.

[355] James Holtzman, 'The Nabobs in England: A study of the returned Anglo-Indian, 1760-1785' (PhD Thesis, Columbia University, 1926), 22.

patronage which had existed in the world since the days when the Roman Senate sent consuls and proprætors to Syria, Sicily and Egypt'.[356]

The notion of "merit" was introduced and defined in order to displace the privileges and complexities that accompanied patronage. Consider how "merit" is constituted in the treatment of competence in classical languages prior to admission to study at Haileybury:

> 'The marks out… to be distributed… in such a manner that no part of the kingdom, and no class of schools, shall be exclusively furnish servants to the East India Company. It would be grossly unjust, for example, to the great academical institutions of England, not to allow skill in Greek and Latin versification to have considerable share in the determining the issue of the composition'.[357]

Macaulay makes the point in stronger terms when proposing translations of Greek and Latin are assessed to a standard 'not less severe than those examinations by which the highest classical distinctions are awarded at Oxford and Cambridge'.[358] It was understood prior to the drafting of the report that these proposed changes were to the distinct advantage of the universities,[359] and the Committee's conclusion is that 'a considerable number of the servants of the company should be men who have taken a first degree in arts at Oxford or Cambridge'.[360] In addition to classical languages, candidates needed to prepare for an examination that included sections on the natural sciences, political economy, moral sciences, mathematics and English language and literature.[361] And indeed, while Sanskrit and Arabic, the 'two languages that may be called the

[356] Trevelyan (n 329) 270. Note also that the Northcote-Trevelyan report makes a similar argument, but there is a sense that their argument for a singular Civil Service in England is predicated less on the class markers of a classical education. Although similarly predicated on competitive examination, 'we consider that the right of competing should be open to all persons, of a given age, subject only… to the necessity of the their giving satisfactory references to persons able to speak to their moral character…' ('Northcote-Trevelyan Report' (n 332) 13).

[357] Macaulay, Thomas Babington, *Report on the Indian Civil Service* (November 1854), 123.

[358] Ibid, 121.

[359] On the lobbying of efforts of representatives of the universities in question, see Moore (n 324) 250-1

[360] Macaulay, Thomas Babington, *Report on the Indian Civil Service* (November 1854), 119.

[361] The complete list of subjects under examination are: England language and composition (Composition, [English], History), Greek, Latin, French, German, Italian, Mathematics, Natural Sciences, Moral Sciences, Sanskrit and Arabic. (p. 123)

classical languages of India… are by no means without intrinsic value in the eyes of both philologists and men of taste'[362], to the Committee '[i]t seems… quite clear that those vernacular Indian languages which are of no value except for the purpose of communicating with the natives of India, ought not to be subject of examination'.[363] The proposal was designed to be severe—'[i]t seems to us probable, that of the 6,875 marks, which are the maximum, no candidate will ever obtain half'.[364]

**C. The Jurisprudential Administrator: On the Conduct of Civil Service**

'[I]ndustry, self-denial, a taste for pleasures not sensual, a laudable desire of honourable distinction, a still more laudable desire to obtain the approbation friends and relations' offer 'securities from vice' appropriate to the young men who apply for a career with the Company.[365] As such, the Committee views the selection, cultivation and disciplining of applicants to the civil service as an important dimension of section, where the 'intellectual test… will be found in practice to also be the best moral test that can be devised'.[366] And yet, while rank and status are displaced by success in competitive examination, it is unquestioned that candidature remains the province of young men and, occasionally, boys.[367] Drawing on Foucault's definition of ethics,[368] Thomas Osborne reads the civil service reform in terms of authority and authorisation to rule: his formulation of the appropriate question for studying 'ethical competence to rule…. [is] "what do those who rule have to do to themselves in order to be able to rule?".[369] In contrast

[362] Macaulay, Thomas Babington, *Report on the Indian Civil Service* (November 1854), 121.
[363] Ibid.
[364] Ibid, 123. By the time the examination became widespread in the Home Office from 1856, 'the standard was well below that required for university degrees. However, the examinations did secure, for the first time, a certain minimum standard for Home Office (and other) recruits': Jill Pellew, *The Home Office 1848-1948: From Clerks to Bureaucrats* (Heinemann Education Books, 1982), 14-5.
[365] Macaulay, Thomas Babington, *Report on the Indian Civil Service* (November 1854), 127.
[366] Ibid.
[367] '[E]xcept in very rare and extraordinary cases, it is not desirable to that a lad should be admitted so early as eighteen': Thomas Macaulay Babington, *Report on the Indian Civil Service* (November 1854), 119
[368] See Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress' in Paul Rainbow (ed) *The Foucault Reader* (Pantheon Books, 1984) 340, 352.
[369] Osborne (n 339), 290. See also 291-3.

to the broader ambit of the *Report on the Organisation of the Permanent Civil Service*,[370] the Macaulay Report is concerned with the slightly narrower question of professional education.

Youth was a virtue,[371] because '[i]t is undoubtably desirable that the civil servant… should enter on his duties while still young; but it is also desirable that he should have received the… most finished education that his native country affords'.[372] This is because the office in question privileges autonomy, necessitating that education is sufficiently general and specific to the tasks of administration. After all, 'the servant of the company is often stationed, during a large part of his life, at a distance from libraries and from European society, and will therefore find it peculiarly difficult to supply by study in his mature years the deficiencies of his early training'.[373]

The ideal administration, in Macaulay's description, is akin to the 'most illustrious English jurist';[374] a philosopher-administrator equipped not only with technical skill but with the practical capacity for autonomy and the stamina for moral action. The education that Macaulay prescribes for the administration of the East India Company is one that attempts to rule through the cultivation of a specifically *jurisprudential* quality of judgment because 'the duties of even a very young servant of the Company are more important than those which ordinarily fall to the lot of a professional man in England'.[375] Due to how the Committee viewed this, they argued for a broadening of the base of education rather than an increase in its technical focus. They are that 'we [do not] think that we should render any service to India by inducing her future rules

[370] Northcote-Trevelyan Report (n 332).

[371] The Northcote-Trevelyan report spells out this logic in plainer terms:

> 'as a general rule, it is decidedly best to train young men… the superior docility of young men renders it much easier to make valuable public servants of them, than those more advanced in life. This may not be the case of the higher class of offices, but is unquestionably so for those where the work consists chiefly of account business. The maintenance of discipline is also easier under such circumstances, and regular habits may be enforced, which would be difficult to impose for the first time on older men.'

Northcote-Trevelyan Report (n 332) 8.

[372] Thomas Babington Macaulay, *Report on the Indian Civil Service* (November 1854), 119 ("*ICS Report*").

[373] Ibid.

[374] Ibid 121.

[375] Ibid 119.

to neglect, in their earlier years European literature and science, for studies specifically Indian'.[376] The aim of this education was to instil a specifically prudential species of judgment in the minds of the probationary civil servants that enabled the particularly juristic style of administration they were being trained for. This involved the cultivation of a disposition capable of a kind of autonomy, and an appreciation for the procedures of jurisdiction and sufficient nous for quick veridiction.[377] The argument is that the nature of the role benefits from an early and profound understanding of a tradition of both the humanities and the natural sciences, rather than merely the techniques of administration. The aim of this education was in the training of the person first as a jurist (and also, coincidentally, in his logic it is also the last) rather than as an administrator. Yet, the jurists that Macaulay are proposing to train, are not a preternatural caste of professoriate emeritus, but, instead, young men aged 18 to 25 being prepared for rule and government, 'the business of the cutcherry'.[378]

Macaulay was concerned with how the civil service in India might be improved through reforming the education of its employees. While the report is only legible in the context of the politics of patronage, his aim was not to break these networks open as an end in itself. Rather, his arguments were aimed at the improvement of the administration of the Company's interests. Consequently, graduates of Haileybury were expected to understand not only the 'constitution of our Government, and the nature of the relations between and its vassals, Mussulman, Mahratta and Rajpoot'.[379] Macaulay and the Committee were concerned to prescribe a curriculum of both general and applied jurisprudence as part of the practical dimension of their

[376] Ibid 121.

[377] 'The most illustrious English jurists have been men who have never opened a law book till after the close of a distinguished academical career; nor is there any reason to believe that they would have been greater lawyers if they had passed in drawing pleas and conveyances the which they gave to Thucydides, to Cicero, and to Newton. The duties of a civil servant of the East India Company are of so high a nature that in his case it is peculiarly desirable that an excellent general education such as man enlarge and strengthen his understanding should precede the special education which must quality him to dispatch the business of the cutcherry', (Ibid, 121).

[378] Ibid

[379] Ibid 124.

education during their time as probationary civil servants and 'that the general principles of jurisprudence may be studied here [in England] with more advantage that in than in India will be universally acknowledged'.[380] Studies in jurisprudence became practical rather than theoretical exercises because 'the great majority of civil servants are employed in the administration of justice'.[381]

Macaulay was aware that any changes to the curriculum at Haileybury may necessitate changes in the staffing and pedagogy of the College. An education in the latitudes afforded by a mastery of procedure was singled out as of particular interest. Consider the final paragraph of this report to the Board of the East India Company and how it pivots from the complexities of theoretical jurisprudence to the need for a practical education in procedure:

> 'As respects law, indeed, we doubt whether the most skilful instructor will be able at Haileybury to impart to his pupils that kind of knowledge that which it is most desirable that they should acquire. Some at least of the probationers ought, we conceive, not merely to attend lectures, and to read well-chosen books on jurisprudence, but to see the actual working of the machinery by which justice is administered. They ought to hear legal questions, in which great principles are involved, argued, by the ablest counsel, and decided by the highest courts in the realm. They ought to attend both civil and criminal trials, and to take notes of the evidence, and of the discussions respecting the evidence… A probationer, while thus employed, should regularly submit his notes of arguments and of evidence to his legal instructor for correction. Such a training as this would, we are included to think, be an excellent preparation for official life in India…'[382]

It is here that we can see, not only that the study of jurisprudence underwrites much of the Macaulay Committee's logic of education, but that the cultivation of a kind of familiarity learned through exposure, consideration, and tutelage in procedure and evidence provided a model of preparation for administration abroad. Indeed, one can read the argument for the professionalisation of the ICS as an argument for the installation of a jurisprudential disposition as the ideal of colonial administration.

[380] Ibid.
[381] Ibid.
[382] Ibid 126-7.

## V. Conclusion

Prior to drafting amendments to the 1861 Code, James Fitzjames Stephens reflected of the criminal law of British India that

> '[i]n some respects, it appears to me to contrast favourably with the administration of justice in England. In the first place, there is hardly any nonsense at all in the system. It is a system carefully and laboriously constructed… It is not a heap of institutions, resting upon no principle, founded upon no system, and incapable of being understood except by a long course of historical study'.[383]

This chapter has been less concerned with the historical conditions and debates about the codes, and more concerned with tracing how they both instituted and instantiated particular, but shifting, models for the conduct of authority.[384] This chapter has followed the proximity of procedural reform to changes in the jurisdictional arrangements for the governance of British India. The conduct of government gradually assumed a more procedural form, as a jurisprudence for the constitution of delegated, but autonomous, legislative authority in Part II. Procedure reform proved an important dimension of how rule and authority was consolidated in the aftermath of the 1857 Mutiny, and this chapter investigated the shifting logic of conduct across the textuality of two Codes of Criminal Procedure in Part III. Finally, Part IV considered how these changes to procedure were used as a mechanism for superintending lawful authority of the conduct of government. It looked at how procedure jurisprudence returned to England with Thomas Macaulay, author of the first Procedure Code and instigator of reform to the administration of the Indian Civil Service. What is important here is how the conduct of government is at each stage accompanied by a jurisprudence, which in turn offers a structured way of thinking about the conduct of office. To this end, procedure can be narrated as a specific form for organising the conduct of law in British governed India. Procedure offered a

[383] Stephen, 'Minute' (n 154) 106

[384] Kolsky's book provides an excellent summary of some of the debates in this area, particularly regarding the contestation of Europeans based in India for exceptions to the law: *Colonial Justice* (n 7) 78-96.

jurisprudence for the conduct of government: itself as a theory, a template for a series of codes, and a logic of practice capable of adaptation on return to England.

To conclude this chapter, a few thoughts on the jurisprudence of procedure and the transmission of its forms, and the form of its transmission, seem warranted. What has been argued here has not been a story of causation, but rather a careful reconstruction of how shifts in the texts, media technologies, and language of procedure jurisprudence function as a way of describing a particular style of government. What has been narrated through this archive of texts is a story of revision and refinement rather than wholesale reform: the changes are subtle and their effects are diffuse, but I would argue, present.

Eric Stokes, the author of a definitive study of utilitarianism's influence on the government of British India, in the last years of his life,[385] returned to the question of causation in studying the transmission and impact of ideas on bureaucracy and administration in India on the organisation of the Civil Service in Britain.[386] In terms broader than the argument of this chapter, Stokes, offered a caution for reading the effect of Bentham on bureaucracy and India. In a subtle essay, Stokes cautioned against historians assuming linear causation in both the transmission of ideas and the germination of reformers' theories in the absence of practical (e.g. financial) restraints. At the same time, he argued against historical accounts of institutional change that see political actors as somehow partitioned or immunised from broader changes in an intellectual landscape as failing to appreciate the role of ideas in shaping attitudes to governance. In a way, the place of criminal procedure both echoes and critiques Stokes' assessment of the period from 1827 until the Great Rebellion of 1857 as 'a period mainly of paper planning—of law codes, educational schemes, scientific land revenue system, railways,

[385] He passed away in 1981. *The Peasant Armed* (Clarendon, 1986) was compiled from manuscripts by CA Bayly.

[386] Eric Stokes, 'Bureaucracy and Ideology: Britain and India in the Nineteenth Century' (1980) 30 *Transactions of the Royal Historical Society* 131 ('Bureaucracy and Ideology').

irrigation projects, and the like—only a skeleton form of which took shape at the time because of the chronic shortage of funds'.[387] That work of planning and revision 'formed the period of "sacred fertility" on which later generations were to live',[388] when sufficient revenue was available to effectuate these efforts. However, where Stokes posits this as a caution against historians over-investing in the "paper planning", this overlooks precisely how procedure reform is only ever a paper plan: what is important is how procedure effects shifts in professional attitudes, official idioms, and provides a tutelary rubric for returning to questions concerning the conduct of administration according to law. Stokes reflects on changes to the offices of civil administration across the British Empire, that '[a]lthough economy provided the initial opening and motive, it is noticeable how rapidly bureaucratic reform passed over to a concern for efficiency in its own right'.[389] This shift, to thinking about the conduct of government as a virtue of office 'in its own right', is *precisely* the qualitative shift that this chapter has sought to describe as a jurisprudence of procedure. Stokes never quite walks away from his claim that the administration of India remains accented by Bentham's influence, where

> '[o]nce the attempt to analyse practical reality in terms of general principle is given a less restrictive interpretation than is connoted by the term tutelary Benthamism, it is arguable that the ultimate structure owed everything to this initial mentality, even though the men who were responsible for its subsequent elaboration were conscious pragmatists largely ignorant of the theory.'[390]

Legislation certainly proved a key technology through which the so called "pragmatists" implemented or elaborated projects of government reform. In the domain of criminal law and its procedure, it is not true that Macaulay and Stephen were ignorant of Bentham's thought or had ruminated on his writing.[391] Bentham's influence was felt in

[387] Ibid 154.
[388] Ibid 153-4
[389]Ibid 151.
[390] Ibid 155.
[391] James Fitzjames Stephen published on Bentham's jurisprudence: see 'Bentham's "Theory of Legislation"' in *Horae Sabbaticae* (MacMillan, 1892) vol 3, 210.

> 'the revolutionary use now made by government of the instrument of parliamentary legislation for the purpose of providing a national framework of matters [of government regulation]... The enforcement of the new legislation was left for the most part to the courts and the magistracy, and the funding and execution, wherever possible, to the various local government authorities'.[392]

This chapter has argued that this gesture of centralisation, expressed through the medium of codified legislation, and privileging of an entire economy of control over the apparatus of policing and the judiciary represents a larger innovation in criminal law and its administration than perhaps Stokes thought. But only perhaps. After all, returning to the claim that the Northcote-Trevallyn report followed the logic of Macaulay's incursion into the ICS, although the impetus for the former was different and '[i]t is a sobering thought that the most creative ideas in the evolution of the modern British state structure emerged in response to a prolonged public economy drive'.[393]

> 'It was in this double crisis of finance and order that the ideologue found entrance and political "inventors... were allowed onto the historical stage. The essential innovatory principle was the separation of control and execution, enabling central government growth and expenditure to be kept to a minimum. The device of the central commission and field inspectorate was not in itself new; colonial conditions such as Ireland or India lent themselves to quasi-military solution, so that there were precedents in plenty for policy, prison, factor, or poor-law reformers to draw upon from 1828 onwards'.[394]

Stokes' argument here is that models, or forms, were available to be drawn upon from their colonial laboratories: that governance followed an isomorphic pattern and that available solutions that could be later deployed to address different objects in novel spaces and contexts. These changes may not necessarily have appeared at once in administration, in the texts of law,

[392] Stokes, 'Bureaucracy and Ideology' (n 387) 138.
[393] Ibid 141-2. Cf. The insistence on financing the Navy and warfighting generated debt that needed to be repaid in the context of a fear of a domestic emulation of democratic revolution: GE Aylmer, 'From Office-Holding to Civil Service: The Genesis of Modern Bureaucracy' (1980) 30 *Transactions of the Royal Historical Society* 91.
[394] Stokes, 'Bureaucracy and Ideology' (n 387) 143.

or institutional structure but they represented a shift in jurisprudence: as a steady accretion of know-how regarding the conduct of government, its media, and the economy of its exercise

# Chapter Six:
# **A Jurisdiction, Summarily Authorised:**
# Mooring the Police and the Magistracy in the Government of Conduct

'We have been turning toward the rising sun'[1]

## I. Introduction

This chapter accounts for how, as a matter of the conduct of lawful conduct, the technique of summary conviction became the principal method through which preventative policing became the authority of law. The object is to generate an account of the trend away from the jury trial in criminal procedure in common law jurisdictions, toward policing and courts of summary jurisdiction. In order to understand how police changed criminal procedure, as a jurisprudential category, it is necessary to follow the Magistracy and the forms of procedure that attach to their office, its ambit and its responsibilities. As such, this Chapter tells a slightly different story to those that that preceded it. And yet it does so in order to re-construct a story addressing the conduct of the criminal law from the elements discussed thus far. Superficially, this Chapter is concerned with a change to the statutory genre of law as it maps onto a gradually but ever more professionalised magisterial office. If we are prepared to hold questions of procedure to the conduct of law as a question of jurisprudence, then the focus of the argument becomes slightly

[1] FW Maitland, *Justice and Police* (1885, MacMillan), 129.

more complex. This chapter therefore focuses more closely on movements in the delegated authority and conduct of the office of the Justice of Peace ("JP") than it does on the synoptic arrangements of Office of the Legislator in the previous chapter. Likewise, at the same time this chapter follows how the office of JP becomes increasingly subject to legislative oversight, and how this is as enabling as it is constraining of the authority to render judgement.

Shifts in institutional focus and the jurisprudential questions that attend to changes in the form of the trial map onto an emerging repertoire of procedural solutions to material and commercial problems that emerge with the unloading of returned goods from the periphery of the British Empire. The transformation of metropolitan policing in the 1820s was preceded by changes in the institutions that performed work similar to what would come to be understood as the contemporary police function. The earlier Thames River Police (or the Marine Police, as they have variously been called), offers a study in both the geography and economy of criminal law jurisprudence. It was a site where new thinking about prevention and property intersected with institutional inventiveness and evolving prosecutorial forms that could convict without the expense and uncertainty of the common law trial. Put starkly, the rise of prevention as a *jurisprudential* paradigm on the docks corresponded with a widespread change in the procedures of prosecution and adjudication. The account offered here follows the relationships between institutions responsible for policing and the criminal procedures adopted and adapted to its new demands.

This is not to claim that social work similar to policing wasn't performed previously—it is clear from the work of historians that the London Metropolitan Police ('LMP') were more re-organisation than innovation. First amongst these institutions is the Night Watch,[2] from which many policing responsibilities and staff were adopted by the Metropolitan Police under Sir

[2] See Elaine Reynolds, *Before the Bobbies: The Night Watch and Police reform in Metropolitan London, 1720-1830* (MacMillan Press, 1998). For a similar account of civilian policing in Dublin see Anastasia Dukova, *A History of the Dublin Metropolitan Police and its Colonial Legacy* (Pelgrave MacMillan, 2016).

Robert Peel's supervision. While Reynolds' exemplary history of the formation of the Metropolitan Police from the Watch describes the political machinations that lead to the change, we need to look elsewhere for an account of the procedural changes that the formation of the LMP both relied on and subsequently expanded.

An account of these relationships must also look to the rise of summary procedures, the offices responsible for their administration and the offences they adjudicate: the claim advanced here is that police power has a jurisprudence that contains a procedural or adverbial mode that has grown with its formalisation. In contrast to cases decided by jury trial, comparatively little has been written about the exercise of summary jurisdiction. The reasons offered for an absence of scholarly attention shift from the perceived jurisprudential triviality of their cases,[3] to 'the poor survival of court records and the paucity of qualitative data' that offers methodological constraints for historians.[4] In recent decades, a small body of work on the summary courts that looks to their procedures and role has built up,[5] alongside a literature concerned with the biography of specific magistrates and the operation of particular courts.[6]

[3] See Doreen McBarnet, *Conviction: The Law, the State and the Construction of Justice* (MacMillan, 1981), ch 4.

[4] For the purposes of this chapter, I am less concerned with the cases and outcomes of magistrates' courts as with their movement into regulation. *Pace* Drew D Gray, 'The Regulation of Violence in the Metropolis; the Prosecution of Assault in the Summary Courts c.1740-1820' (2007) 32(1) *The London Journal* 75, 77.

[5] Pat Carlen, *Magistrates' Justice* (Martin Robertson, 1976); Drew D Gray, *Crime, Prosecution and Social Relations* (Springer, 2009); Peter King, 'The Summary Courts and Social Relations in Eighteenth-Century England' (2004) *Past & Present* 183 ('Summary Courts'); Bruce P Smith, 'Circumventing the Jury: Petty Crime and Summary Jurisdiction in London and New York City' (PhD Thesis, Yale University, 1996) ("Circumventing the Jury'); Faramerz Dabhoiwala, 'Summary Justice in Early Modern London' 121(429) *English Historical Review* 796; Thomas Sweeney, 'The Extension and Practice of Summary Jurisdiction in England c 1790-1860' (Cambridge University, PhD Thesis, 1985). For an account of the emergence of summary courts in Scotland, see Lindsay Farmer, 'The Law of the Land: Criminal Jurisdiction 1747-1908' in Peter Rush, Shaun McVeigh, and Alison Young (eds) Criminal Legal Doctrine (Ashgate, 1997) 63. ('Law of the Land'). See also Bruce P Smith, 'The Presumption of Guilt and the English Law of Theft, 1750-1850' (2005) 23(1) *Law and History Review* 133 ('Presumption of Guilt'); Norma Landau, 'Summary Conviction and the Development of the Penal Law' (2005) 23(1) *Law and History Review* 173.

[6] See for example Norma Landau, *The Justice of the Peace, 1679-1760* (University of California Press, 1984) ("*Justice of the Peace*"); JM Beattie, 'Sir John Fielding: The Bow Street Magistrates' Court, 1754-1780' (2007) 25(1) *Law and History Review* 61 ('Sir John Fielding'); Brodie Waddell, 'Governing England through the

Jurisdiction over crime was increasingly defined by the rise of summary procedure: trials held by JPs without a jury, implementing statutory offences without the protections of the procedures that accompanied allegations of crime via the common law.[7] As such, this Chapter follows Lindsay Farmer's insight that in modernity the concept of criminal jurisdiction 'moved away from being a question of legal competence relating to geographical space, the nature of the crime and the power of the particular court to punish. Jurisdiction came to be defined primarily in terms of procedure'.[8] This transformation in the conduct of law has its history in a long governmental practice for punishment marked by amateurism and idiosyncrasy, and '[m]uch was left to the discretion of the magistrate, and procedure and punishment were consequently irregular'.[9] Put differently, this chapter argues that a jurisdiction over policing coagulated from the aggregation of myriad legislated offences and techniques for conviction that were appended to the judicial and governmental office of the JP.

Scholars have noted the importance of changes to the summary jurisdiction in the nineteenth century. In their classic text, Radzinowicz and Hood reach the conclusion 'whatever the interpretation,—and any interpretation must remain conjectural,—the movement for summary jurisdiction stands out as one of the most significant developments of the nineteenth century in the perception and control of crime'.[10] They nevertheless conclude that the expansive reforms to summary jurisdiction in the nineteenth century are 'usually explained' in light of keeping children out of remand gaols, and efficiencies in prosecutions in terms of not only cost, but also

Manor Courts' (2012) 55(2) *Historical Journal* 279; John Cruickshank, 'Courts Leet, Constables and the Township Structure in the West Riding, 1540-1842' (2017) 54(1) *Northern History* 59.

[7] McBarnet (n 3); Tanya Mitchell, 'Understanding the Summary Jurisdiction in NSW' (PhD Thesis, Sydney Law School, University of Sydney, 2018).

[8] Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997), 74 ("*Tradition and Legal Order*").

[9] Ibid 78.

[10] Leon Radzinowicz and Roger Hood, *A History of the Criminal Law of England and its Administration from 1750: The Emergence of Penal Policy* (Steven & Sons, 1986), 623-4.

the likelihood of conviction before JPs rather than a jury.[11] A contemporaneous effect is ascribed to Edward Troup, namely that the shift toward summary jurisdictions provides a practical illustration of the 'very old doctrine that quickness and certainty in punishment is more efficacious for the repression of crime than severity of punishment'.[12] Unfortunately, while Radzinowicz and Hood can point to the visibility of inflection points in the administration of crime in the historical record, their analysis offers little in terms of interpreting the shift in the jurisdictional ordering that summary offences represent.[13] Martin J Weiner argues that as the criminal law became more effectively administered, Parliament increasingly turned to its techniques and procedures to intervene in an ever broader array of social phenomena and that this

> 'gradually loosened the bonds that previous generations had tightened between personal character and social harm. And as the bonds relaxed, the discourse of criminal policy became less moral and more administrative'.[14]

The reconstruction of policing was accompanied by contemporaneous changes in criminal procedure: as police power was increasingly centralised, professionalised and exercised by formal government bodies, so too 'went a series of acts, beginning in 1820 and running throughout the century, that transferred jurisdiction over many categories of offences and offenders from jury trial to magistrates court'.[15] A consequence of this shift in procedure, was that as indictable offences became triable without juries, the quantum of punishment open to sentencing magistrates lessened and with it the possibility of attaching moral opprobrium to

[11] Ibid, 619.
[12] Edward Troup, 'Criminal Statistics… for 1893' (C.7725) 1825 Parliamentary Papers vol 108, 1, 78 quoted Radzinowicz and Hood (n 10) 623.
[13] In spite of the text's ambitious breadth, the authors' orientation toward progress means that continuities are downplayed, and the consequences of certain actions aren't always explained in fullest context.
[14] Martin J Weiner, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830-1914* (Cambridge University Press, 1990), 259.
[15] Ibid.

conviction was loosened.[16] Weiner identified that this sets in motion a dynamic where 'making an existing offence triable summarily both made a statement that it was regarded less seriously and institutionalized a process that would further diminish its seriousness'.[17]

This Chapter therefore follows the emergence of a jurisdiction over crime defined by summary proceedings and preventative policing. To that end, Part II looks at the changing relationship between the juridical and government functions of the office of the justice of the peace. Part III traces the statutory development of summary procedure as it gradually combines property and status-based offences in order to offer more effective policing of possession of increasingly interchangeable or fungible commodities. Part IV draws these two histories together by narrating the example of the River Police. This part assesses Patrick Colquhoun's contribution to criminal law jurisprudence. Colquhoun was, in VAC Gatrell's assessment, one of the few public figures who was beginning to 'think about "crime" aggregatively'.[18] Importantly, he was actively involved in both the reformation of policing bodies, and advocated for the use of summary procedures to assist in this process. In other words, this Chapter develops a reading of how the authority of kinds of government (both public and private) is re-shaped in its legal expression through two, related, shifts in the proceduralisation of institutions and the institution of procedure in the shipping hub of the British Empire.

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[16] See also Radzinowicz, and Hood (n 10) 618-9.

[17] Weiner (n 14) 264. This shift is, in his argument, the precursor to the 'new, more welfarist or administrative approach to crime [that] was about to emerge'.
For a survey of some of the arguments regarding the proper locus of intention and study in reading the transformation of policing at the end of the eighteenth and early nineteenth centuries see: FM Dodsworth, 'The Idea of Police in Eighteenth Century England: Discipline, Reformation, Superintendence, c. 1780-1800' (2008) 69(4) *Journal of History and Ideas* 58; John L McMullan 'Crime, Law and Order in Early Modern England' (1987) 27(3) *British Journal of Criminology* 252; John L McMullan, 'Social Surveillance and the Rise of the "Police Machine"' (1998) 2(1) *Theoretical Criminology* 93; John L McMullan, 'The Arresting Eye: Discourse, Surveillance and Disciplinary Administration in Early English Police Thinking' (1998) 7(1) *Social & Legal Studies* 97.

[18] VAC Gatrell, 'Crime, Authority and the Policeman-state' in FML Thompson (ed), The Cambridge Social History of Britain 1750-1950: Volume III: Social Agencies and Histories (Cambridge University Press, 1990), 243, 249.

## II. Early History of the Justice of the Peace and their Summary Procedures

From the time of their first use in 1383, summary procedures offered the mid-fourteenth century Crown two principal advantages over the common law. First, cases could begin without the lengthy pre-trial procedures of the common law such as the indictment or appeal.[19] Indeed, JPs were even compelled to take notice of offending and punish petty forms of offending, status offences or misdemeanours without the mediating formal procedures of the common law. It is for this reason that we can see that a power over summary convictions is related to contempt *in facie curiae*, but, more broadly, also to the authority of those responsible for the government of inferiors, as the country JP was. Second, the magistrate is able to render judgment and punish accused persons without reliance on a jury for the determination of questions of fact. This section will follow the jurisprudential consequences of these procedural options.

It is useful to distinguish the procedure of summary conviction from the origination of the office of the JP, and their jurisdiction over persons, objects and actions.[20] Medievalists such as Bertha Haven Putnam contend on the basis of early parliamentary records that JPs 'do not deserve the epithet "Statute Creature" contemptuously applied to them by later lawyers'.[21] The first recorded statutory commission for 'the better keeping and maintenance of the Peace, the King will, that in every County good Men and lawful, which be [no Maintainers of Evil, or Barrators]' in the Country',[22] was recorded in 1327. While the commission for Keepers of the Peace was legislated by Edward III in 1344,[23] the origins of commissions to keep the peace pre-dated their statutory

[19] See Chapters One and Two.

[20] John Langbein argues that the summary powers of the magistracy developed *sui generis* in the Parliament as opposed to magistrates acting in imitation of continental procedure: *Prosecuting Crime in the Renaissance: England, Germany, France* (Harvard University Press, 1974), 64-75.

[21] Bertha Haven Putnam, 'The Transformation of the Keepers of the Peace into the Justices of the Peace' (1929) 12 *Transactions of the Royal Historical Society* 19, 48 ('Transformation'). See also Bertha Haven Putnam, *Proceedings Before the Justices of the Peace in the Fourteenth and Fifteenth Centuries, Edward III to Richard III* (Ballantyne & Co, 1938), cxxi ("*Proceedings*").

[22] 1 Edw III, s 2, c. 16 (1327).

[23] 18 Edw III, s 2, c. 2 (1344).

recognition,[24] and the office is mentioned in manuscripts and records from around the twelfth century.[25] These commissioners were empowered 'to deal with felonies and trespasses by normal common law procedure'.[26] Although there is significant evidence from the rolls that the procedures and categories of the common law were adapted throughout the fourteenth and fifteenth centuries such that their procedure was, in Theodore Plucknett's phrase 'consciously unprofessional';[27] an archive produced by 'hard-pressed officials were too busy to indulge in verbosity, and when the indictment was a rough and ready instrument of law rather than a game of skill for special pleaders'.[28] Additionally, Edward III also legislated to hold the Keepers of the Peace accountable so as to render them liable for 'imprisonment of their Bodies, and by Fines to be made to Us, according to the Manner, Quality and Quantity of the Faults' for 'negligence in the Execution of their Office'.[29]

In 1361, the Commission for the Keeping of the Peace was formally recognised as a specifically judicial office,[30] in formal recognition of the shift in the nature of the duties that were being performed by those holding this commission.[31] This included a gentle qualification requirement

[24] Edward III's pending departure to fight a war in France gave cause for the selection and appoint of local gentry to the Commission of Keepers of the Peace in 1338. The success of the gentry in performing this role in his absence is argued to have given the Commons cause and faith in its governmental efficacy to legislate this office into being. See Anthony Verduyn, 'The Selection and Appointment of Justices of the Peace in 1338' (1995) 67(165) Historical Research 1. See William Paley, *Law and Practice of Summary Convictions on Penal Statutes by Justices of the Peace* (Pheney and Sweet, 1814), xv-xvi; Alan Harding, 'The Origins and Early History of the Keeper of the Peace' (1960) 10 *Transactions of the Royal Historical Society* 85.

[25] Putnam, 'Transformation' (n 21) 22-4. Note also that these powers intersected and were held parallel with other Commissions, most notably, over the *Statute of Labourers 1351* (23 Edw III), with jurisdiction over the economic, social and governmental problems generated by the plague in England. For the earlier jurisdiction of the Justices of Labourers, see Bertha Haven Putnam, *The Enforcement of the Statutes of Labourers: During the First Decade after the Black Death, 1349-1359* (Columbia University, Studies in History Economics and Public Law vol XXXII, 1908)

[26] Putnam, 'Transformation' (n 21) 48.

[27] Theodore Plucknett, 'A Commentary on the Indictments' in Putnam, *Proceedings* (n 21) cxxxiii, cxxxvi.

[28] Ibid, cxxxv.

[29] 31 Edw III, c 5.

[30] 34 Edw III, c 1.

[31] Putnam, 'Transformation' (n 21) 46.

that the Lord and 'three or four of the most worth in the County', and additionally that 'some should be learned in the Law'.[32] Additionally, this office carried with it a broadening of the statutory jurisdiction to include 'Power to restrain the Offenders, Rioters, and all other Barators, and to pursue, arrest, take, and chastise them according their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the law and Customs of the Realm'.[33] Although the statute is imprecise in terms of its allocation of jurisdiction to punish, this statement does not appear to grant a power to adjudicate, but a power to arrest and then to apply the common law.[34] The role of the Justices in policing the itinerant is reaffirmed, as the statute assigns a power to punish in the event that a surety cannot be provided as to their good fame.[35]

John Langbein's study follows the powers assigned to JPs that compelled forms of pre-trial investigation or decision-making in the pre-Marian statutes, and his conclusion is that '[w]hat needs to be noticed is that the procedure involved in the justices' summary powers differed radically from their relative role in administering the older jury procedures… In more than thirty statutes predating the reign of Mary the JPs are explicitly commanded to proceed by examination'.[36] His interest is one in the examination mechanism rather than the procedure for conviction. Although 'the statute came of age in the sixteenth century, doubtless affected by the newfound capacity of the printing press to make the command operative with an efficiency unthinkable before Gutenberg',[37] the powers of the JPs pre-existed the growth of legislation.[38] The best interpretation of the available evidence seems to be that powers of summary conviction

[32] 34 Edw III, c 1.
[33] Ibid.
[34] Further, in the same paragraph the statute empowers the JP 'to take and arrest all those that they may find by Indictment, or by Suspicion, and to them in Prison'.
[35] Ibid. '[T]ake of all them that be [not] of good Fame, where they shall be found, sufficient Surety and Mainprise of their good Behaviour towards the King and his People, and the other duly to punish'.
[36] Langbein (n 20) 66.
[37] Ibid 64.
[38] Ibid 66.

were a distinct statutory innovation, appended to the already existing office of the JP.[39] For Norma Landau, during the course of the fourteenth century,[40] 'the justices truly became justices, for they acquired the power to hear and determine criminal cases'. John Langbein is more precise and dates the first unambiguous instruction to convict summarily to a statute of Richard II written in 1383 to address vagrancy and vagabondage.[41] The criminalisation of vagabonds provides a mechanism for following developments in the transformation of summary jurisdiction, as by the late eighteenth century, historians suggest that 'the broad language of the vagrancy laws were [used] to convict defendants when the circumstances strongly suggested that the suspect had planned, attempted or even compelled a larceny'.[42] And in later centuries 'magistrates resorted extensively to the vagrancy laws as a means of prosecuting homeless persons, beggars, and minor thieves' in London.[43]

The problem of people refusing to offer their labour appears in a variety of guises across the early statutes provided as moments of legislative modification, ratification, or confirmation of a jurisdiction to convict summarily. This problem offered an important proving ground for the development of the summary jurisdiction, and by tracing some of the statutory interventions through the domain of the problem of wandering people provides a way to see how the procedures describing the exercise of the powers of summary conviction might be exercised.[44] This provides a way of following how jurisdiction over summary conviction is perhaps best

[39] Smith 'Circumventing the Jury' (n 5) 80-1.
[40] Landau, *Justice of the Peace* (n 6) 6.
[41] *Justices, &c. empowered to bind over Vagabonds to their good Behaviour, &c. 1383* (7 Ric II, c 5).
[42] Smith, 'Circumventing the Jury' (n 5) 23, also 34-5.
[43] Ibid 24.
[44] In tracing these powers, I have been relying on the Statutes of the Realm translations, and the cited secondary literature. In all instances, this analysis is restricted to offences and procedural innovations that are unambiguously a shift toward contemporary powers or alternatively, are phrased in such a way that presages a strong interpretative possible in favour of summary procedures. More ambiguous statutes, particularly those dealing with administrative and governance matters were been considered, but not analysed for these purposes.

interpreted as a steady accretion of piecemeal actions,[45] communicated by statute, until procedures of general application replaced this subject matter approach in the 1840s.

In broad terms, the summary jurisdiction is transformed as a social order organised around agriculture and governed by a landed aristocracy which encountered a series of challenges to the authority of rule and good ordered sociality of a feudal, agrarian economy.[46] The first instance of a power of summary conviction empowered JPs to:

> examine them diligently, and to compel them to find Surety of their good bearing, by sufficient Mainpernors, of such as be distrainable, if any Default be found in such Feitors and Vagabonds; and if they cannot find such Surety, they shall be sent to the next Gaol, there to abide fill the coming of the Justices assigned for the Deliverance of the Gaols, who in such Case shall have Power to do upon such Feitors and Vagabonds so imprisoned, that thereof to them best shall seem by the Law'.[47]

In 1391, Richard II granted JPs the jurisdiction to investigate by forcible entries. If they 'find any that hold such Place forcibly after such Entry made, they shall be taken and put in next Gaol, there to abide convict by the Record of the same Justices or Justice, until they have made Fine and Ransom to the King'.[48] While JPs clearly have the power to convict, this statute reads as though the basis of the offending is the refusal to accede to their authority, their 'Power of the County', insofar as the statute holds that liability for conviction is predicated on the holding of 'such place forcibly after such Entry'. The authority to convict here is therefore *sensory*, a-procedural and founded in either paradox or impotence: the lawful exercise of a power to punish necessitates that the Justice witnesses the accused ignoring their authority. This statute was

[45] See William Paley (n 24) xviii-xix.

[46] It is worth remembering that in addition to the risk of disease such as bubonic plague thinning the population in the absence of a biological understanding disease (let alone effective antibiotics), that there remained a general risk of starvation that comes from failed harvests etc were not yet problems which can be remedied through import or synthetic fertilisers. See Michael Mann, *The Sources of Social Power: A History of Power from the Beginning to 1760 AD* (Cambridge University Press, 1986), vol I, particularly from 509. For an account of the tremendous suffering in consequence for export reform for India, see Mike Davis, *Late Victorian Holocausts: El Nino Famines and the Making of the Third* World (Verso, 2001).

[47] *Justices, &c. empowered to bind over Vagabonds to their good Behaviour, &c. 1383* (7 Ric II, c 5).

[48] 15 Rich II, c 2 (1391).

extended in 1411, as the final statute of Henry IV's reign, to both provide for summary convictions for riot and also to enable an investigation into riots in the previous month.[49] The offence is expressed as the 'Power to record that which they shall find so done in their Presence against the Law', and as such the grant of summary powers based on their visual apprehension of those present, 'in the same manner and form as is contained in the Statute of forcible Entries'.[50] If the Justices arrive after the event, they are required to 'diligently inquire', and pass on the results of their investigation for possible prosecution before the King's Bench.

The procedure governing conviction was again extended in 1414, to address the 'Contempts and Trespasses' of those 'Servants and Labourers of the Shires of the Realm [that] do flee from County to County' and caused 'the great Damage of Gentlemen and others',[51] which, in the view of the Parliament, constituted an insufficiently policed offence under the Statute of Labourers.[52] While the statute required the justices to hold Quarter Sessions, it also extended their powers to

> 'henceforth have Power to examine as well all Manner of Labourers, Servants, and their Masters, as Artificers, by their Oaths, of all Things by them done contrary to [their] said Ordinances and Statutes, and upon that to punish them upon their ['Confession' or 'Conisaunce and knowlache'[53]] after the Effect of the Statutes and Ordinances aforesaid, as though they were convict by Inquest'.[54]

In other words, JPs were assigned additional powers to punish after confession, following their own inquiry. Summary discretions were also enlisted to help landowners in compelling labourers to assist with the harvest, in a statute from 1562,[55] where

[49] The statute states the nature of the offence against Law thus: if 'Riot, Assembly or Rout of People against the Law' in [Parties] of the Realm, that Justices of the Peace, Three or Two of them at the least… shall come with the Power of the County, if Need be, to arrest them'.
[50] 13 Hen 4, c 7.
[51] 2 Hen V, c 4.
[52] *Statute of Labourers 1351* (23 Edw III). See 12 Ric II, c 3.
[53] NB here the translations of the translations of the Statues of the Realm differ according to the manuscripts consulted. The law French provided describes the process as 'les punir sur lour conisance'.
[54] 2 Hen V, c 4.
[55] In the fifteenth century, the category Artificers included craftsmen although across the Parliamentary Rolls this term is also used in proximity to Vagabonds and Vagrants

> 'upon request and for thavoyding of the los any Corne Granyne or Heye, shall and may cause all suche Artificiers and ꝑsons as be meete to labour, but the discretions of the said Justices… according to the skill and qualite of the ꝑson; and that none of the said ꝑsons shall refuse so to doo, upon payne to suffer Imprisonement in the Stockses by the space of twoo days and one night'.[56]

Here, the availability of summary punishment is predicated on failure to accede to a 'request', rather than by the particular Justices' impression of offending. It offers a reminder that the use of summary powers was integrated into a broader series of material interests, social problems, and orders. Here, the statutes describe the carapace of conduct: where instructions to convict leave procedure questions pertaining to the conduct of how conviction is adjudicated by office to its inhabitant.[57] The techniques by which JPs come to be authorised to exercise the power to punish has history external to the interiority, or conscience, of their judgement. This was a matter of both parliamentary intention and also begins to gesture toward a consolidating jurisdictional logic: where '[c]entral to the justices' powers of summary conviction was the notion that Parliament had intended the justices and only the justices judge the facts of cases which they could determine summarily'.[58] Norma Landau begins her history of the Justice of the Peace by noting that this is an office defined through the stubborn independence of those that take the commission and their methods for performing their responsibilities. She concludes her study with an account of the changing discourse of conduct in the privately published manuals that described the responsibilities of the office of JP.[59]

By the eighteenth century, JP manuals described 'a triumphant reconciliation of contradictions: England's justices were amateur volunteers; their rule was nearly autonomous but despite their lack of legal training and autonomy they were part of the legal system, their government

[56] *An Acte towching dyvers Orders for Artificers Laborers Servantes of Husbandrye and Apprenticers 1562* (5 Eliz c 4), s 15
[57] This approach resonates with the description of the obligations of office described in Chapter Two.
[58] Landau, *Justice of the Peace* (n 6) 349.
[59] Ibid chapter 11.

accorded with the principles of English law'.[60] Landau describes a transition to justices becoming a part of the legal system, whereby '[t]he subordination of the image of the justice to that of the legal system therefore induced an analysis of the powers of the justice within that system'.[61] As an example of the discourse, consider how this issue was treated in Richard Burn's popular 1755 manual which included a series of discussions of the powers of summary conviction.[62] Consider how the preface at once introduces Burn's method of exposition, while at the same time aligning the office of the magistrate to the pastoral responsibilities of Christ the Shepherd, with His responsibilities to flock expressed in the idiom of statute and subject to the temporal desiderata of industrial manufacture in a contemporary export market:[63]

> 'Thus to exhibit another instance—In the article of *Woollen manufacture*, which makes up a considerable part of the justice of the peace his duty, there is such a number and variety of statutes, that authors are generally overwhelmed with them. To avoid perplexity, the laws are here digested in order, according the natural progress of that business; from the shearing of the sheep, to the exportation of the wool manufactured; under the several heads of winding of the wool by the shearer—laws to prevent its exportation—working of cloth—fulling—measuring—dying—stretching—dressing—exporting'.[64]

It is only once this metaphorical description of the responsibilities of office, and his metaphorical method of proceeding through the regulation of those obligations, that Burn turns to more concrete descriptions of how JPs ought to deal with clarifying their responsibilities. As

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[60] Ibid 334.

[61] Ibid 343.

[62] Burn's book ran to over 30 editions. Alternative and competing manuals were published in the following decades, including William Paley's treatise (n 24), but by the early nineteenth century the genre of treatise was not organised alphabetically but followed the process of conviction. See Chapter Two.

[63] On the role of the Christian pastorate in governmentality, I was here struck by Michel Foucault's remarks about the pastorate in *Security, Territory, Population: Lectures at the Collège de France*, tr Graham Burchell (Picador, 2007),165 where he presciently remarks,

> 'In short, the pastorate does not coincide with politics, pedagogy, or rhetoric. It is something entirely different. It is an art of "governing men," and I think this is where we should look for the origin, the point of formation, of crystallisation, the embryonic point of the governmentality whose entry into politics, at the end of sixteenth and seventeenth and eighteenth centuries, marks the threshold of the modern state'.

Despite working with a different body of texts, and in the context of French government, he reaches a similar view of the same use of metaphor of how politics is to work at this juncture in the European history of its rule. His analysis of this metaphor continues in the lecture at 168-85.

[64] Richard Burn, *The Justice of the Peace and Parish Officer* (2nd ed, 1756), vol i, Preface to the first edition, vi.

a method of statutory interpretation, Burn suggests that '[w]here there is no priority in point of time [in the construction of the statutory provision]; the next method is that of Lord Coke; to frame a definition that which takes in the whole subject and then explains the several parts of such definition in their order'.[65] Here, the method for reading takes the form of a procession through elements of a statutory definition. Burns notes that provisions of this kind generally begin with descriptions of the JPs conduct, '[t]he like method is pursued in treating of *commission of the peace*',[66] and that interpreting a statute involves reading forwards and reflecting back, as '[i]n general, it is provided that one thing shall clear the way for another, and the subsequent paragraphs explain the preceding'.[67] In contrast to this perambulatory model of reading, the book itself is largely ordered alphabetically by topic, such as Apples, Game, and Convictions.[68] As Landau points out, Burn is thinking about the nature of the summary justice conviction, and, at the same time, he is concerned to provide guidance as to the correct exercise of this jurisdiction in the entry on the topic of "Conviction".[69] It is worth outlining his concerns in full:

> The power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter, even for time immemorial, beyond the date of histories and records. Therefore generally nothing shall be presumed in favour of the office of a justice of the peace; but the intendment will be against it. Therefore where a special power is given to a justice of the peace by act of parliament, to convict an offender in a summary manner, without a trial by jury, it must appear that he hath strictly pursued that power; otherwise the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is dispensed withal, yet he must proceed nevertheless according to the course of the common law in trials by juries, and consider himself only as constituted in the place both of judge and jury. Therefore there must be an information or charge against a person; then he must be summoned or have notice of such charge, and have an opportunity to make his defence ; and the evidence against him must be such as the common law approves of, unless the statute specially directs otherwise; then, if the person is found guilty, there must be a conviction, judgment, and execution, all according to the

[65] Ibid.
[66] Ibid vii.
[67] Ibid.
[68] As Bertha Haven Putnam noted of even earlier handbooks, 'the alphabetical digest [w]as the only solution for actual needs': *Proceedings* (n 21) xx.
[69] Her reading of this section is provided at Landau, *Justice of the Peace* (n 6) 343.

> course of the common law, directed and influenced by the special authority given by statute; and in the conclusion, there must be a record of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, for as if he shall be called to account for the fame by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction.[70]

Burn notes the practical workaday problems for the exercise of the 'divers [sic] instances' that fall within the justices' domain of adjudicative responsibility. Against that context, Burn's concern for the novice JP in the performance of their diverse duties is the possibility of official malfeasance brought on by exceeding the 'bounds prescribed to his jurisdiction'.[71] As a consequence, the justice is required to navigate a dispersed arrangement of offences where the Parliament has prescribed 'a more apt and compendious method' of conviction, '[t]hese summary forms of convictions, which are specially directed by act of parliament, are interspersed throughout this book under the titles to which they do respectively belong'.[72]

The question of "form" embraces concerns over the particularity of statutory jurisdiction when contrasted with the specificity of the concerns, persons and actions assembled under its ambit, and the precedent formulation—the technical form provided for the recording of conviction.[73] These various dimensions of formality address the same plurality of concerns about the early-modern summary jurisdiction. In consequence, later in Burn's text, advice is offered in the form of a mnemonic device regarding the obligations that attend to the exercise of this power: 'In summary convictions, the party ought to be heard, and for that purpose ought to be summoned in fact; and if the justice proceed against a person without summoning him, it would be a

[70] Burn (n 64) v.

[71] This is phrased as a warning over the possibility of an information being taken out against a JP for exceeding their responsibility: in other words, the question of jurisdiction holds in place a tension between capacity, instruction, method, conduct, and, an archive of evidence in the event of litigation or appeal.

[72] Ibid 241.

[73] Burn's advice is render summary convictions in a manner that hews closely to the common law in light of judicial interpretation of where 'such matters as have been often controverted in the courts above, occasioned either by the largeness of the penalties, or sometimes by the greatness of the offender; as in cafes of riots, forcible entries, deer stealing, and such like', (Ibid)

misdemeanour for him, for which an information would lie'.[74] This requirement for a particular form of conviction, although borne of JP's fear of themselves being charged with a criminal offence, was nevertheless representative of the consequences of defects in the statutory genre of summary offences that left procedure to the administration of particular JPs. While Part III of this chapter traces some of how the procedure for summary convictions gradually comes to assume the form of a jurisdiction,[75] it is worth noting that this concern was one that took place across the governmental and the juridical dimension of the JP's commission, as 'local government became more than the execution of tasks'.[76] Landau's conclusion, which broadly accords with my own reading, is that

> '[i]t was in the last decade of the eighteenth century that Parliament turned, with regret, to consideration of justices modelled according to specifications differing from those which made the eighteenth century ideal so laudable… New magistrates were needed, magistrates who would constantly and conscientiously administer the criminal law'.[77]

The key words here, are that a paradigm of "constant" and "conscientious" conduct of administration was evolving into a norm of the conduct government.

The defining feature of the office of JP was an alloy of their essential function in eighteenth century governance, to an imperviousness at having their conduct directed from a centralised body.[78] To follow Landau's insight, to investigate the office of JP is to be confronted with their centrality to the operation of English governance while being imbued with a reluctance or an imperviousness to the standardisation or ordering of the conduct.[79] After all, as an office of local government, and possessed of a power of summary conviction, 'the justices' activity is an

[74] Burn (n 64) 91.
[75] Landau points out that the concept of jurisdiction was used to debate and limit powers of administrative and appellate review over the justice's decision-making: *Justice of the Peace* (n 6) 348-9.
[76] Ibid 360.
[77] Ibid 362.
[78] Ibid 6.
[79] This was not an inconsequential consideration, after all, given the extensive administrative jurisdiction of the justices and their 'duty to use his power to preserve the peace, but the law also allowed the justice to use his discretion to determine in whose interest the peace would be kept': Ibid 25.

unusually direct reflection of their motivation. They did what they thought they did because they wanted to do it and thought they should do it'.[80] Despite the centrality of magistrates to contemporary criminal procedure, the historical commission or office is one that is paradoxically both particularly *and* stubbornly filled with judicial amateurs who exercised their commission in idiosyncratic, *a-procedural* ways.

From the earliest grant of jurisdiction, to hold office as a JP was simultaneously 'an object of both practical use and symbolic value'.[81] By the seventeenth century, JPs received their commission from the Lord Chancellor,[82] and as a consequence of this development, the office becomes an index of the change to the distribution of patronage and political authority in early-modern England.[83] The magistracy were responsible for both representing the regime of the Crown and expressing its authority; it was also the justices who 'reported on activity that might indicate treason, and who quelled riot before it inflamed the land'.[84] As such, their political responsibilities, allied with increasing juridical functions, saw the magistracy come to embody a style of patrician governmentality while representing the authority of government in the countryside.[85] Beattie argues that despite an increase in numbers of magistrates taking commissions as an expression of status, fewer took out the writ, and fewer still were active in the role.[86] Of course, the assumption of this office necessitated that candidates for the

[80] Ibid 2.
[81] Ibid 69.
[82] For a debate about the propriety of the Lord Chancellor's office becoming captured by party politics, problematising the issuance of the Justice of the Peace's commissioning writs of *dedimus potestatem.* Ibid 81-2.
[83] Ibid 70.
[84] Ibid 71.
[85] See Francis Dodsworth, *The Security Society: History, Patriarchy, Protection* (Palgrave MacMillan, 2017). Landau (n 6) 359-360. See also Markus D Dubber, *Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press, 2005). For a discussion of the nature of authority of government in the sixteenth century *per se*, see A Hassell Smith, *County and Court: Government and Politics in Norfolk, 1558-1603* (Oxford University Press, 1974).
[86] JM Beattie, *Crime and the Courts in England, 1660-1800* (Princeton University Press, 1986), 60-2 ("*Courts in England*").

commission of the Peace would be required to become involved in adjudicating the affairs of one's neighbours 'in their parlors'.[87] Importantly, this has also been attributed to the increase in the breadth of matters that JPs were obliged to resolve summarily.[88]

Given the unreliability of the Justices in governmental matters, it is perhaps unsurprising that eventually the Parliament turned to professional or stipendiary magistrates.[89] This was first the case in London with the passage of the *Middlesex Justices Act* in 1792. These magistrates were *not* extended 'the informal prerogatives of judicial office'.[90] The magistrates were to be appointed by the Home Office rather than the Lord Chancellor.[91] Prior to the passage of the Act in 1792,

> 'the metropolitan magistracy's reputation became so malodorous that Parliament decided that a salaried magistrate was preferable to the voluntarily unsalaried service of London's current justices, and Parliament made this decision even though it considered voluntary magistrates a bastion of liberty and salaried magistracy an extension of the power of the state'.[92]

In Metropolitan London, these changes in the organisation of the Police and the Magistracy were predicated on the gradually expanding summary procedure for conviction.

[87] Ibid 62; See also Beattie, 'Sir John Fielding' (n 6) 73.
[88] Ibid. See also Blackstone, *Commentaries* IV 279.
[89] 32 Geo III c 53.
[90] Landau concludes her book 'Perhaps the act establishing stipendiary magistracy was the last statement of a century less squeamish than its successors in acknowledge the connection between justice, administration, and political power—a connection it viewed as natural', *Justice of the Peace* (n 6) 362.
[91] Smith, 'Circumventing the Jury' (n 5) 44. See Ruth Paley, 'The Middlesex Justices Act of 1792: Its Origins and Effects' (PhD Thesis, University of Reading, 1983), ch 8 for an historical account of the documentary record, the ongoing relationship between the Home Office and their offices of local government.
[92] Norma Landau, 'The Trading Justice's Trade' in Norma Landau (ed) *Law, Crime and English Society, 1660-1830* (Cambridge University Press, 2002) 46, 64. Landau is here describing the passage of the 32 Geo III c 53.

## III. Expanding the Use of Summary Procedure: Tracing the Antecedents of a Criminal Jurisdiction over Persons and Things

This Part follows shifts in the legislated jurisdiction of Justices of the Peace to summarily determine various classes of cases. While historians such as Peter King point out that criminal cases heard by JPs are statistically atypical and that

> 'the majority of summary offences… were brought by middling men or members of the labouring poor, they rarely resulted in heavy fines or the imprisonment of the offender, and they were essentially civil disputes which were resolved by arbitration or the imposition of a small fine and/or costs'.[93]

King's analysis here only tells us what makes up the statistical bulk of the tasks to which a JP or a magistrate attends, rather than offers a sense of the politics of their role and function in a given society. In order to address this, he goes on to write that

> '[w]hen the propertied brought cases to these courts they did so within both legal frameworks and structures of social expectation which usually operated very much in their favour. Although employees and paupers, as well as masters and overseers, could obtain redress from the local magistrate, the harshest punishments of whipping or imprisonments were reserved for the former group'.[94]

This Part therefore follows this framework of the differentiated availability of punishment or remedy through the procedural devices written into the statutes which form the basis of the summary procedure's legal authority over kinds of persons and things.

Thomas Sweeney points out that the change in procedure was difficult because 'we can say that the majority of staple urban thefts were difficult to bring to court, either because juries were reluctant to convict trifling offences or, more importantly, no summary jurisdiction existed to cover such crimes'.[95] As such, following procedure necessitates tracking both the legislative expression of this statutory arrangement of authority, but also paying attention to the objects and subjects of summary procedure. Developments in this area are marked by a tension between

[93] King, 'Summary Courts' (n 5) 154.
[94] Ibid 156.
[95] Sweeney (n 5) 12.

the Parliament's refusal to grant an express summary jurisdiction over the theft of manmade articles, which otherwise had to be tried according to common law procedure.[96] This saw new offences narrowly drafted both in terms of spatial applicability, and enacted within otherwise innocuous bills. A consequence was that magistrates came to rely on a diverse range of, at times, questionable interpretive strategies to adapt this complicated repertoire of legislative provisions in order to achieve similar ends.[97] Again, to quote Sweeney 'the extension [of powers of summary conviction] was as much a result of magisterial frustration at their inability to convict, when they wished, in the practice of summary justice as it was the considered objective of the Colquhouns and the Benthams'.[98]

The regulation of morality provided a substantial terrain for arguments about the role of judges making decisions in a summary way.[99] This builds on a long history of the powers of the JPs to regulate the affairs of other people, 'almost all of the powers allotted to the single justice directly affected only the least substantial inhabitants of his vicinity'.[100] Radzinowicz's study of the arguments for reform to policing makes the point that throughout the eighteenth century there was significant agitation from various quarters of society arguing for their interpretation of moral and economic advancement to argue for novel summary offences to make regulating any number of different spheres of life an easier proposition.[101] In his analysis, it is clear that not only were the powers of magistrates conscripted into a lively series of debates about public

[96] Ibid 13.
[97] See Ibid ch 3.
[98] Sweeney (n 5) 18.
[99] See Dodsworth (n 85) ch 3. He argues that idleness and the virtues of industry were under threat from new luxuries available to the lower classes
[100] Landau, *Justice of the Peace* (n 6) 26.
[101] A diverse number of examples are cited in Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: Cross-Currents in the Movement for the Reform of the Police* (Steven & Sons, 1956), vol iii. Examples include the regulation of pawnbrokers (69-71; see also below), sex work (193, 358), animal cruelty (198), obscene books and prints (191-2), working on the sabbath (162-3, 167,184-5), the licencing of theatres (191), alehouses (199), disorderly houses (78) and festivals in metropolitan London. On the wide breadth of seventeenth and eighteen century regulatory authority, see also Landau, Norma, *The Justice of the Peace, 1679-1760* (University of California Press, 1984), 23.

morality but also the nature of magisterial or summary jurisdiction was not widely accepted until the first decades of the nineteenth century.[102] These arguments were not exclusively about the regulation of morality. Landau notes that eighteenth century Tories 'denounced' the summary jurisdiction's validity as an example of dangerous and arbitrary rule, 'since the judges delivered judicial verdicts without the benefit of a jury', and she notes that they singled out cases involving customs and excises for criticism, because, 'for evasion of those duties they might be tried before a board of customs commissioners rather than by a jury of one's peers'.[103]

By the early nineteenth century, offences of a character that might be more readily recognised as the province of the more serious consequences that follow conviction at common law were legislated as summary offences.[104] This initially included offences such as kinds of trespass causing damage to property of less than £5.[105] Radzinowicz and Hood state that it was the passage of the Larceny Act of 1827 which 'marked the real beginning of the movement to allow various forms of stealing to be dealt with summarily', [106] although they note this change had no immediate statistical impact on the numbers of prosecutions.[107] In 1828, summary jurisdiction extended to assault and battery.[108] To this end, Section A of this Part of this Chapter will look to developments of summary procedure in the domain of vagrancy offences to regulate categories of person before Section B of this Part turns to look at procedural changes in the regulation of stealing. In both instances, our focus will be on charting the procedural developments in the legislative archive.

[102] See the arguments about the authority of magistrates to both issue warrants and adjudicate cases of animal cruelty and their administrative responsibilities for the licensing of alehouses: (198-9).
[103] Landau, *Justice of the Peace* (n 6) 163.
[104] Cf Douglas Hay, 'Property, Authority and the Criminal Law' in Douglas Hay, Peter Linebaugh, John G Rule, EP Thompson and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Verso Press, revised ed, 2011).
[105] *Wilful and Malicious Trespass Act 1820* (1 Geo 4 c 56)
[106] Radzinowicz and Hood (n 10) 620; 7 & 8 Geo 4 c 29.
[107] Radzinowicz and Hood (n 10) 623.
[108] 9 Geo 4 c 31.

**A. Persons and Procedure: Discipline and Diligence (Vagrancy and Related Moral Offences)**

Although, as discussed above, a summary jurisdiction over the wandering poor and the idle labourer had been on the Statute books since the early days of the commission of the peace, by the eighteenth century it is clear that JPs had responsibility for the clearing of their counties and the authority to punish those people interpreted as Feitors and Vagabonds.[109] The *Justices Commitment Act of 1743* commanded Justices of the Peace to organise, every quarter, a one night search for 'Rogues and Vagabonds',[110] and any person found matching that description was 'to be publickly whipt… or sent to the House of Correction, to remain there until the next General or Quarter-Sessions, or for any less Time, as such Justice or Justices shall think proper'.[111] In terms of procedure, the statute provided instruction as to how to exercise these powers in the following terms:

> thereby required to inform himself or themselves, by the Examination upon Oath of the Person or Persons apprehended, or of any other Person of the Condition and Circumstances of the Person or Persons so apprehended, and of the Parish or Place, where he, she or they were last legally settled; the Substance of which Examination or Examinations shall be put into Writing, and be subscribed or signed by the Person or Persons so examined; and the said Justice or Justices shall likewise sign the same, land transmit it to the next General or Quarter-Sessions of

[109] The category of persons was gradually expanded, but not through a general definition, instead through a rise of particularities.

[110] *Justices Commitment Act 1743* (17 Geo II, c 5), s 6. Note that the definition of vagabonds and rogues by this stage has entered a more discursive mode (in comparison to earlier statutes which facilitated magisterial discretion by allowing for broad judicial interpretation in the absence of similarly detailed non-exhaustive legislated connotations) comprises:

> "all Persons going about as Patent-gatherers or Gatherers of Alms, under Pretences of Loss by Fire, or other Casualty; or going about as Collectors for Prisons, Gaols or Hospitals; all Fencers and Bearwards; all common Players of Interludes; and all Persons who shall for Hire, Gain or Reward, act, represent or perform, or cause to be acted, represented or performed, any Interlude, Tragedy, Comedy, Opera, Play, Farce or other Entertainment of the Stage, or any Part or Parts therein, not being authorized by Law; all Minstrels, Jugglers; all Persons pretending to be Gypsies, or wandring in the Habit or Form of Egyptians, or pretending to have Skill in Physiognomy, Palmestry or like crafty Science, or pretending to tell Fortunes, or using any subtil Craft to deceive and impose on any of his Majesty's Subjects, or playing or betting at any unlawful Games or Plays; and all Persons who run away and leave their Wives or Children, whereby they become chargeable to any Parish or Place; and all Petty Chapmen and Pedlars wandring abroad, not being duly licensed or otherwise authorized by Law; and all Persons wandring abroad, and lodging in Alehouses, Barns, Outhouses, or in the open Air, not giving a good Account of themselves; and all Persons wandring abroad and begging; pretending to be Soldiers, Mariners, Seafaring Men, or pretending to go to Work in Harvest; and all other Persons wandring abroad and begging, shall be deemed Rogues and Vagabonds within the true Intent and Meaning of this Act". (Section 2)

[111] Ibid.

> the Peace to be holden for the same County, Riding, City, Borough, Town Corporate, Division or Liberty, there to be filed and kept on Record"[112]

The majority of vagrancy offences turn on the requirement that people give an account of themselves and their mode of generating a living that satisfies the investigating JP.

JPs also had the power to convict summarily on the oath of an arresting officer 'if any Journeyman, Labourer, Apprentice or Servant, shall game in any House, Out-house, Ground or Apartments thereto belonging, wherein any Liquors shall be sold'.[113] By 1824, the statute books allowed Justices of the Peace to convict summarily for the mere suspicion or reputation as a thief, if the accused was found in public 'with Intent to commit Felony'.[114]

**i. Procedure and the Archived Idle**

The movement from a series of disparate offences to a broader set of policies that increasingly formed the statutory basis of dealing with the poor sees an attendant shift in recordkeeping. The statutes concerned with vagrancy and vagabondage are no different. Over time the requirements to keep records of decisions and the issuance of certificates that enable and facilitate the travel of persons between counties increasingly play a visible administrative role in the procedure for dealing with the poor. From the mid-eighteenth century there is evidence of an explosion in paperwork, certification and record-keeping in order to regulate the movement and apprehension of the poor. Those who carry the paperwork are excluded from Vagrancy.[115] The issuance of receipts to any persons who arrest and bring persons begging to JPs

[112] Ibid.

[113] *Obtaining Money by False Pretences, etc. Act 1757* (30 Geo II, c 24), s 15.

[114] *Vagrancy Act 1824* (5 Geo IV, c 83), s 4. With respect to historicising the rise of preventative policing, see Lawrence, Paul, 'The Vagrancy Act (1824) and the Persistence of Pre-Emptive Policing in England since 1750' (2017) 57 *British Journal of Criminology* 513, p. 517-520.

[115] 17 Geo II, c 5, s 2. Consider the detail required to be granted leave from prosecution for vagrancy provisions

> 'Soldiers wanting Subsistence, having lawful Certificates from their Officers or the Secretary at War, or to Mariners or Seafaring Men licensed by some Testimonial or Writing under the Hand and Seal of some Justice of the Peace, setting down the Time or Place of their Landing or Discharge, and the Place to which such Soldiers or Mariners are to pass, and the Names of the chief Towns or Places through which they are to pass, and limiting the Time of such their Passage, while they continue in the direct Way to the Place to which they are to pass, and during the Time so limited'.

was implemented to ensure that the Overseer of the Poor of the Parish would pay the 5s reward;[116] double if the person is a rogue or a vagabond—so long as an Order under the Hand and Seal of the Justice is presented to the Treasurer of the County.[117]

Now, the process of dealing with convicted vagabonds assumes a staged documentary ritual in a section that outlines the power to punish following a privy search of the County. First, a deposition is taken regarding 'the Condition and Circumstances of the Person or Persons apprehended… and of the Parish or Place, where he or she, or they were last legally settled', which is 'put into Writing, and be subscribed or signed by the Person or Persons so examined, and the Justice or Justices shall sign the same, and transmit it to the next General or Quarter-Sessions'.[118] The person is then 'publickly whipt by the Constable… or … sent to the House of Corrections'.[119] And, following the corporal punishment or confinement the Justices are 'impowered, if they think convenient, by a Pass under Hand and Seal, in the Manner and Form here directed, to cause such Persons to be conveyed to the Place of their last legal Settlement; but if it cannot be found, then the Place of their Birth'.[120] The pass and the deposition are to be entered into the records of the General or Quarter Sessions of the Peace, and 'may be read in any Court of Record in *England, Wales* or the *Town of Berwick upon Tweed*, as Evidence'.[121] If nowhere can be found, then the poor can be pressed into apprenticeship, military service or on the back of a summary conviction (recall, mere suspicion will suffice), forwarded to the Americas.[122]

[116] Ibid s 1.
[117] Ibid s 3.
[118] Ibid s 7.
[119] Ibid.
[120] Ibid. A form, *mutatis mutandis,* is provided thereafter.
[121] Ibid s 8.
[122] Ibid, s 27.

Of course, this is not only an appendage to punishment, but now speaks to a whole economy of the poor and the certificates that attach to their movements.[123] These documents both provide an archive, and also set out obligations for related parties: they provide an accounting structure where the High Constable pays the Petty;[124] they direct the Constables as to the mode of transportation they are to take;[125] the rate of payment for services rendered and regulation of the distance and speed travelled;[126] and both the requirement and procedure for duplicating the certificate on the county border to ensure a chain of custody and proper jurisdiction over the deported.[127] To ensure compliance, a fine of £20 will be levied against any officer that fails to either 'receive any such Persons sent to them, or give a Receipt or Note as before directed'.[128] A fine of £50 is reserved for those that counterfeit the paperwork or 'knowingly permit to be made any alteration' of it.[129]

The above statute expresses a criminal procedure of constabulary scriveners marching the poor to boundaries of the county to exchange paperwork and yet nevertheless represents something of the intersection between Georgian criminal and economic policing procedure. Subsequent articulations of criminal procedure do not follow this same detailed, prescriptive, and procession-oriented concern with receipted letters and passes for passage. The reason why it was detailed is because of the insight it gives us into how a criminal procedure of mobility is

[123] See Ibid s 10 for the regulatory instructions that must be given to the constables that accompany the deported poor as to the mode of transportation and the rate payment for this service. Unsurprisingly, a form is provided thereafter.
[124] Ibid s 17.
[125] Boats to Ireland, the Isle of Man, Jersey, Guernsey or Sicily (Ibid s 14); but only at a rate of 'one Vagrant for every 20 Tons burthen' (Ibid s 15).
[126] Ibid s 16.
[127] Ibid s 11 for a description of the process of handing over passes, collecting receipts. If the terminal recipient of the convict thinks their evidence is false, they can have them carried to the local JP to have them determined an incorrigible rogue and committed to the House of Correction, or have them sent forward to their proper place of residence. However, they cannot send them back from whence they arrived.
[128] Ibid s 18. And if they fail to pay, '[f]orfeitures shall be levied by Distress and Sale of the Officer's Goods'.
[129] Ibid.

articulated without a centralised chancellery or bureaucracy: instead, we have an epistolary model predicated on copying and authenticating letters, receipts and passes to regulate the crossing of the thresholds and boundaries of jurisdiction.

### ii. Inchoate Personhood: Possession and the Entry of Intentionality

The first quarter of the nineteenth century saw the procedure for dealing with vagrancy revised.[130] The pivot in thinking about vagrancy expressed by this legislation is a shift away from the physical requirements of conducting quarterly searches of the county in favour of regulating conduct so as to catch preparatory conduct or possessions.[131] These procedural changes also herald the beginnings of a consideration of the intentionality of the offender, and as such, in the transition to inchoate offences it becomes possible to see the contours of a novel theory of criminal responsibility in the object of personhood that is now being policed.[132] The principal offence in this drafting mode regards the possession of tools for theft or robbery:

> 'every Person having in his or her Custody or Possession any Picklock Key, Crow, Jack, Bit or other Implement, with Intent feloniously to break into any Dwelling House, Warehouse, Coach House, Stable or Outbuilding, or being armed with any Gun, Pistol, Hanger, Cutlass, Bludgeon or other offensive Weapon, or having upon him or her any Instrument, with Intent to commit any felonious Act'.[133]

Likewise, 'every suspected Person or reputed thief' found in public can only be convicted if found 'with intent to commit Felony'.[134] As a prosecutorial shortcut, this enabled justices or magistrates to convict for a felony without needing to go through the courts of common law—because if theft or robbery took place then, logically, the preceding action with intent can also

[130] *Vagrancy Act 1824* (5 Geo IV, c 83) (*"Vagrancy Act 1824"*).
[131] On this point, see Lawrence, Paul, 'The Vagrancy Act (1824) and the Persistence of Pre-Emptive Policing in England since 1750' (2017) 57 *British Journal of Criminology* 513 whose preferred rubric for this change is prevention and pre-emption.
[132] Manifest criminality is here shifting into something akin to *mens rea* and *actus reus*: conviction requreid possession and intent; where the intent becomes the basis for criminality rather than mere possession of an implement capable of breaking into property or potentially being used to threaten or perform violence.
[133] *Vagrancy Act 1824* (n 130) s 4.
[134] Ibid.

be proved. In other words, the inchoate offence can be dealt with summarily using the principal and complete offence as the evidential base for the intention of the accused. This mode of conviction is discussed further, below, in the context of policing the River Thames.

**B. Property and Procedure: From Agricultural Templates to Fungibility**

From the latter part of the sixteenth century, Parliament increasingly legislated for summary conviction for 'certain kinds of property, not actionable at common law as larcenies'.[135] As the use of summary procedures started to gain traction in the eighteenth century, there was no general legislation governing property and its stealing.[136] Instead the statute books developed by way of a broad variety of specific issues that could include specific markets within an economy—for example, the accurate provision of clothes in trade,[137] or to prevent rioting or

[135] Joanna Innes, 'Statute Law and Summary Justice in Early Modern England' (1987) 52(1) *British Society for the Study of Labour History* 34.

[136] Cf. George P Fletcher 'The Metamorphosis of Larceny'(1976) 89(3) *Harvard Law Review* 469, whose thesis is framed in terms of there being an underlying structure of common law larceny, which he reads as oriented around the concepts of 'possessiorial immunity', which separated larceny from other forms of misappropriation where chattels were in the possession of the person that at some later stage, stole them (475-6, 487-91), and "manifest criminality" (476-81), that is, where the actions of the accused disclose their criminality through their resemblance to the act of stealing, that took the prototypical form of 'steal[ing] from an enclosure' coupled with 'peculiar conduct' (see 478 for a discussion of Roman law's translation across continental Europe and western legal thinking).

Here, my concern with the statutory regulation of stolen goods and peculiar behaviour rather than with the common law position apropos of larceny, namely, because the statutory principles are visibly different in the summary jurisdiction legislation which turns on an account of either the quality of one's account of oneself, or the testimony evidence of witnesses. The metamorphosis of larceny, 'which brought every item of property into focus as an interest worth of protection under the criminal law' (519), had already developed although not through 'a revolution in social thought that shaped the nineteenth century sense for the range of problems that could appropriately be solved under the criminal law' (519-20), as much as through the Parliament and its responsiveness to the demands of merchants and the petit bourgeoisies. The jurisprudential labours of the courts of common law provide the doctrinal solution to a problem which had been addressed, albeit in piecemeal fashion, through an alternative procedural route (one that focused on the authority in visibility, judgment of suspicion, by the magistracy) over the preceding decades—the judges were just catching up and filling in the intellectual gaps left through by virtue of proceeding through an ambiguously coded and a-systematic legislative programme.

[137] See *Woollen Manufacture Act 1714* (1 Geo I, St 2, c 15), s 7.

sabotage to protect investments in particular land drainage projects,[138] interfering with the environs enjoyed by game,[139] but more often this power was used in connection with damage to property or stealing.[140] Across the statute books there is clear distinction between summary conviction and punishment, and those offences that are heard and determined 'according to Law'.[141] Facilitating this increase was a relaxation of the evidential standards for conviction, particularly in an agrarian context.[142] For example, JPs were empowered to convict summarily 'on the oath of any credible Witness or Witnesses', where a person 'steal[s] and take[s]s away, or wilfully and maliciously pull[s] up, or destroy[s] any Madder Roots growing or being in any Lands or G[r]ounds belonging to any Person or Persons'.[143] Rather than being adjudicated according to evidence before a jury of one's peers, the statutory instructions apropos of summary *procedure* amount to a description of the evidentiary style and burden: an offence against the statute is predominately determined by either the vision of the Justice or alternatively, a believable 'credible witness' and determined not beyond reasonable doubt, but, particularly in possession cases, according to the "satisfaction" of the particular JP.

[138] *Brandon and Sam's Cut Drain, Drainage Act 1757* (30 Geo II, c 35). An example of this kind of legislation would be using the summary jurisdiction to provide for out of sessions prosecutions to facilitate the draining of the Fenlands.

[139] This extended as far as burning ferns that might interfere with deer breeding or cover: See *Thefts, Robberies Act 1755* (28 Geo II, c 2), s 3.

[140] This included dogs and vegetables: *An Act for preventing the Stealing of Doge 1770* (10 Geo III, c 18)); *Continuance of Acts, etc., 1749* (23 Geo II, c 26), s 9; *Stealing of Vegetables Act 1772* (13 Geo III,c 32).

[141] This phrase is used from around 1766 and is a commonplace by the reign of Victoria to describe the applicability of common law procedures following committal.

[142] Sweeney (n 5). Note, Sweeney's work although detailed apropos of the offences heard summarily, his work does not emphasise shifts in procedure across the period of his study.

[143] *Continuance of Acts Act 1757* (31 Geo II, c 35), s 5. The punishment for a first offence was to compensate the owner of the madder roots for the value of the stolen or damaged goods, committed to a House of Correction or 'whipped by the Constable or other officer' at the discretion of the JP. Subsequent convictions carried a mandatory sentence of three months in a house of correction. Madder Root was used in the making of durable, deep red dyes (as a pigment in painting, and fabrics, and also, co-incidentally, bones) and was used in medicines in the Middle Ages.

### C. Possession and the Problem of Fungible Goods

The availability of summary convictions in cases where the defendant is required to disprove the illegality of things found in their possession begins to appear in Statutes from the 1740s.[144] These powers were quickly expanded to include possession offences following the execution of search warrants for stolen dogs and animal skins.[145] People found in possession of either plants or pieces of wood,[146] where prosecution can after 1766 proceed as a possession offence tried summarily. Under the Act, any person who is found to either

> 'carry or convey away the same; or shall have in his, her, or their Custody, any Kind of Wood, Underwood, Poles, Sticks of Wood, Green Stubs, or young Trees, and shall not give a satisfactory Account how he, she, or they, came by the same, and shall be thereof convicted before any one or more of his said Majesty's Justices of the Peace, on the Oath of one or more credible Witness or Witnesses'.[147]

In contradiction of both the common law rights to a trial by jury and the right to be presumed innocent, here, a single JP was empowered to not only convict on the oath of another person, but the onus for *dis*proving theft falls on the accused to prove that they are the rightful owner of the wood in their possession.[148] However, the statute also provides that an attempt to usurp the authority of the Justices to police the theft of wood by way of 'hinder[ing], or attempt[ing] to prevent, the seizing or securing any Person employed in carrying away any such Timber', are

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[144] Starting with the *Thefts of Cloth* Act, 1741 (15 Geo II, c 27)

[145] An Act for preventing the Stealing of Doge 1770 (10 Geo III, c 18), s 2. This statue was re-enacted in 1845, although here it specifies that the offence in question is a misdemeanour (*An Act for the further Prevention of the Offence of Dog Stealing 1845* (8 & 9 Vict., c 47), s 2) and that skins in question must be dog-skins (see s 3). On the importance of dogs as property in the eighteenth century, albeit in the antipodean colonial context of the recidivist convict island, Van Diemen's Land at the turn of the nineteenth century, see James Boyce, 'A Kangaroo Economy' in *Van Dieman's Land* (Black Inc, 2008) 45.

[146] *Preservation of Timber Trees Act 1766* (6 Geo III, c 48). This piece of legislation is addressed to the policing of the 'many idle and disorderly Persons', that, apparently, engage in the

> 'Practice of plucking or digging up, cutting, spoiling, or destroying, and taking or carrying away divers and sundry Sorts of Roots, Shrubs, and Plants' (s 3), and the 'making of Poles and Walking Sticks… [and,] under the Pretence of getting Firewood, have cut down, boughed, split off, or otherwise damaged or destroyed the Growth of the said Woods' (s 4).

[147] Ibid s 4.

[148] Here punishment for a first offence consists of a fine of not more than forty shillings (Ibid s 4). Although, s 6 provides that because

> 'such Offenders frequently having no Goods, or other Chattels, whereon the same can be levied', a Justice on conviction can, for a first offence 'to the House of Correction for one Month, to hard Labour, and to be once whipped there'.

required to either pay £10 or 'be committed to the House of Correction, to hard Labour, for any Time not exceeding six Calendar Months'.[149] No procedure was provided for conviction.

Problems of possession became more acute in the context of industrial manufacturing, and legislators were prepared to adopt different procedural mechanisms in response to this emerging challenge. An important legal problem generated by new techniques of standardised manufacturing is that both inputs and products can be difficult to distinguish from one another either before their processing or afterwards. In other words, the ownership of basic, fungible, commodities (such as sugar, cotton, or iron) emerges as a distinct evidential problem in a culture beginning to manufacture goods on a hitherto unseen scale.[150] From the 1740s, the summary jurisdiction begins to be used to address this problem. Clothiers manufacturing woollen products provided an early site for the transition of possession offences into the domain of commodities.[151] JPs were granted both inquisitorial authority and a presumption of guilt where the 'said Person or Persons so suspected, and not giving such satisfactory Account, nor producing any such Witness upon Oath to testify as aforesaid, shall be deemed and adjudged as convicted of the said Offence of stealing or taking away the said Cloth'.[152] A right of appeal to the same judges is granted at the next Quarter Sessions should a person 'so suspected and apprehended… find him, her or themselves aggrieved by any Judgment or Determination'.[153]

[149] Ibid s vii.
[150] Smith, 'Presumption of Guilt' (n 5) 138.
[151] The statute notes that the problem being addressed was the need to leave woollen cloth to dry at nighttime, when spaces of manufacturing were not sufficiently secured to prevent access.
[152] *Thefts of Cloth* Act, 1741 (15 Geo II, c 27), s 1. Note that a wider range of punishments were available—including transportation for 7 years, should the JP after a second offence commit the accused for a felony, to be tried in the Assize or the next General Session before a jury.
[153] Ibid s 2.

Although the formulation of a possession offence remains broadly similar, the Act is noticeably more interventionist by widening the facility for search warrants,[154] and granting a power of search and arrest to officers performing policing duties.[155] They had jurisdiction to arrest 'all and every Person or Persons who may reasonably be suspected of having or carrying, or any ways conveying , at any Time after Sun-setting, and before Sun-rising, any Lead, Iron, Copper, Brass, Bell-metal or Solder suspected to be stolen or unlawfully come by'.[156] On charge of possession the accused would be taken before at least two JPs, and if they failed to 'give an Account, to the Satisfaction of any two or more of such Justices, how he, she or they came by the same, that then the said Person or Persons so apprehended shall be deemed and adjudged guilty of a Misdemeanour'.[157]

Patrick Colquhoun was cognisant of 'the problem of securing convictions in cases involving the theft of sugar or other items that lacked "distinctive marks by which they can be identified"',[158] under the common law of simple larceny. A significant hurdle with respect to fungible goods is simply to 'convince a jury that the goods found in the defendant's possession were actually the prosecutor's'.[159] In his *Treatise on Police*, Colquhoun argues that the emerging summary procedure provides a way to assist both police and the prosecutors of stolen goods:

> 'From such *Legislative Regulations* infinite would be the advantages which might reasonably be expected… in all cases, where the evidence against offenders, although perfectly conclusive as

[154] *Stealing of Lead, etc. Act 1756* (29 Geo II, c 30), s 2. '[C]redible persons' could apply for a search warrant in cases where there was 'cause to suspect stolen Lead, Iron, Copper, Brass, Bell-metal or Solder is concealed in any Dwelling-house, Out-house, Yard, Garden or other Place or Places'

[155] Here this decentralised list of officeholders includes: 'every Constable, Headborough or Tithingman, in every County, City, Town Corporate or other Place where they shall be Officers, and every Beadle within his Ward, Parish or District, and every Watchman, during such Time only as he is on his Duty'. This jurisdictional affordance was not to be exercised during the day time; it was to be limited in time to the period 'after Sun-setting, and before Sun-rising', (Ibid s 3).

[156] Ibid.

[157] Ibid.

[158] Archival material from 30 May 1798 quoted in Smith 'Circumventing the Jury' (n 5) 108.

[159] Smith, 'Presumption of Guilt' (n 5) 139.

> to the fact, may be deficient in some points of legal nicety, by putting the *onus probandi* on the offender, and treating it as a minor offence'.[160]

In this paragraph, the argument made for abandoning the presumption of innocence is Colquhoun's confident assertion that evidence can be 'perfectly conclusive as to the fact' and yet let down by the law of proof or evidence. This clearly trivialises the importance of proof. More importantly it also is a logical sleight of hand because Colquhoun's "infinite advantages" accrue not only by 'placing all the burden on suspects to "account" for goods in their possession addressed all of the principle problems of proving larceny',[161] but also by providing persecutors and police with a mechanism to circumvent the common law definition of larceny. In other words, Colquhoun's proposed apparatus of 'possession [offences] not only required suspects to *produce* evidence supporting claims to lawful ownership but also appear to have placed them to persuade the fact-finding magistrate as well'.[162] Colquhoun described his intentions with the Thames River Bill in a similar way, whereby the intention was

> 'To inflict slight Penalties by summary Procedure on circumstantial Evidence, aided by the Examination of the delinquent (as under the Bumboat Act, and stolen-metal act where, on regular Proof, it would be Felony;)'—and to attach upon the Practice of Depredation, in such stages of its progress as are previous, or subsequent to the Felonious Act:--To grant Warrants to search, on Oath of Suspicion at supposed Receivers, and in Default of regular Proof, the Offence be punishable as a Misdemeanour'.[163]

The object of the draft legislation was to remedy defects in proof while re-branding the absence of either sufficient evidence or the failure to prove larceny as either trivial (and backed by evidence of a kind that might be inadmissible, but is nevertheless re-coded as sufficient by Colquhoun) or to the benefit of the accused, where but for the grace of reform, this conduct were capable of 'regular Proof, it would be a Felony' (notwithstanding the proposed changes to the law being the circumvention of common law standards and burden of proof). The audacity

[160] Patrick Colquhoun, *A Treatise on the Commerce and Police of the River Thames* (Mawman, 1800), 279 ("*Commerce and Police*") 272-3.
[161] Smith, 'Presumption of Guilt' (n 5) 160.
[162] Ibid, 168.
[163] Colquhoun, *Commerce and Police* (n 160) 279.

of the argument suggests that an alignment of self-evidence clearly is presumed between Colquhoun and his audience.

If we look at what is specifically proposed by this legislation, the new offences to be punished by the Special Justices of the Thames Police include (1) spillage 'with Intent that the Contents of such Package, or any Part thereof, may be spilled or dropped from such Package';[164] (2) dropping things 'if upon Examination it shall not be made appear, to the Satisfaction of the said Justices, that such letting fall, throwing, or conveying away, or Endeavour to convey away, proceeded either from mere Accident, or from some lawful Cause';[165] and (3) simply being proximate to the 'River, Quays or Warehouses',[166] if 'such Person or Persons is or are a Person or Persons of evil Fame, and a reputed Thief or Thieves, and such Person or Persons shall not be able to give a satisfactory Account of himself or themselves, and of his or their Way of living'.[167] The Act also re-legislates the offence of possession of goods suspected of being stolen if the accused 'do not either give an Account, to the Satisfaction of such Justice or Justices as are therein mentioned, how he came by the same, or else produce the Party or Parties from whom he bought or received the same'.[168] Colquhoun wrote that the aim of such summary procedures was to lower the threshold to prosecution to enable more frequent but less severe punishment, with

> 'the great object of renovating the morals of the Labouring Classes on the River Thames, aided by pecuniary energy, and by powers calculated, more to counteract the Designs of evil-disposed persons more by embarrassing them at all points, than to punish, may be anticipated…'[169]

[164] Passed as *Depredations on the Thames Act 1800* (39 & 40 Geo III, c 87), s 9 (*"Depredations on the Thames Act 1800"*).
[165] Ibid s 8.
[166] Ibid s 7.
[167] Ibid s 7.
[168] Ibid s 18.
[169] Colquhoun, *Commerce and Police* (n 160) 281. The punishments under this legislation were hardly nominal sums, with fines of up to £5 or imprisonment for up to 8 weeks for first offences: *Depredations on the Thames Act 1800* (n 164) s 19.

The ease of proving "possession" offences enables them to seemingly become the prosecutorial technique for Colquhoun to begin his task of using law to renovate the conduct of the "Labouring Classes". The procedural innovation that makes this work is not the provision of evidence of "possession", but instead consists in requiring persons to give an account of themselves and their actions before a Justice of the Peace to the standard of their "satisfaction": it is this reversal of the burden of proof that facilitates policing according to a presumption of guilt.[170]

Part III of this Chapter has followed a series of changes in the summary procedure for conviction for property offences. These changes have involved the gradual introduction of questions regarding the conduct of accused persons to which JPs are required to adjudicate the sufficiency of their ability to account for themselves. These developments are accompanied by other changes to the record keeping, archival and other techniques (for example, search, arrest, and the formulations of evidentiary standards) associated with the increasingly institutional quality of summary decision making. The argument is that gradually, the elements of a jurisdiction organised around summary procedure begin to emerge.[171] The next Part of this Chapter will examine how these techniques of jurisdiction provide procedural form for policing the Docks on the River Thames.

## IV. Policing Rivers and Docks: Summary Jurisdiction and Labour

The first attempt at creating a professional police force in England, with salaried constables, came about through the cooperation of colonial traders, port authorities, insurance agencies, utilitarian reformers and enterprising magistrates. Indeed, the first use of the word police in an

[170] See Smith, 'Presumption of Guilt' (n 5).
[171] Following Farmer, 'Law of the Land' (n 5); Farmer, *Tradition and Legal Order* (n 6); Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016).

English statute described the duties and employees of the Thames River Police.[172] The Thames River Police, with its office in Wapping, was founded by Patrick Colquhoun, in July 1798. Imagined first as an experiment in loss prevention and insurance mitigation, the British Parliament eventually '[took] over the operation of the Marine Police in 1800, despite opposition from the City of London'.[173]

At this time, Patrick Colquhoun was commissioned as a magistrate in London. In addition, he was the first chairman of the first chamber of commerce in the United Kingdom.[174] Colquhoun was also a skilled accountant and authored a significant attempt to tabulate the wealth, income and expenditure of the Empire in almanac form.[175] His business activities included a million acre landholding in New York, and before the revolutionary war Colquhoun was involved in transporting convicts to the Americas.[176] He published a theory of preventative policing.[177] He was a shareholder in Jamaican sugar plantations and cotton plantations in Virginia,[178] and held an executive position in the governance of a canal in Scotland. By way of contrast his employees, who were appointed constables, police surveyors and lumpers, all drew salaries rather than other forms of remuneration from the Police Office. They were neither required to wear, nor outfitted in, uniforms.

[172] Stanley H Palmer, *Police and Protest in England and Ireland 1780-1850* (Cambridge University Press, 1988), 70.
[173] Reynods, *Before the Bobbies*, 76
[174] David G Barrie, 'Patrick Colquhoun, the Scottish Enlightenment and Police Reform in Glasgow in the Late Eighteenth Century' (2008) 12(2) *Crime, History & Societies* 59, 62.
[175] Patrick Colquhoun, *A Treatise on* Colquhoun*, and Resources of the British Empire, in Every Quarter of the World including the East Indies* (1815), 219.
[176] Letter quoted in Michael E Scorgie, 'Patrick Colquhoun: Accountant and Reformer' (1995) 31(1) *Abacus* 93, 96.
[177] Some accounts of the life of Patrick Colquhoun that have been influential in building up this account include: Barrie (n 174); Scorgie (n 176); For a hagiography of Patrick Colquhoun, see Grant David Yates, *A Historical Sketch of the Life and Writings of Patrick Colquhoun, LLD* (G. Smeeton, 1818).
[178] Peter Linebaugh, Police and Plunder <web source> 13 Feb 2013 www.counterpunch.org.

**A. Colquhoun's Police Office**

The River Police represented a marked change, not only in terms of the approach to the apprehension and prosecutorial strategy for attempting to secure the Port of London, but also in the struggle to define the proper limits of the labour and commodity markets of the eighteenth century. Until the late 1790s, the West India Company relied on a strategy of offering 'very high rewards for the detection and conviction of pilferers'.[179] For Reynolds, in her history of policing London, the formation of the Thames River Police comes about in response to 'rising amounts of everyday property crime as a motivating factor for local input and reform'.[180] However, this account pays insufficient attention to the upheaval in understandings of property and labour; indeed definitions of the everyday, the criminal and property are together in contestation. For Michel Foucault, the prescience of Colquhoun's River Police was that they represented a capacity to exercise a style of power capable of intervening in this 'whole network of relations [that] was being formed' through industry and imperialism.[181] Despite ratcheting up the promise of rewards, this strategy for preventing stock loss confronted a store of valuable and fungible commodities adrift in a combination of river congestion, disinterested superintendence of cargo and its stevedores, and inadequate record keeping practices by the Customs Office and its employees.[182] Or, in Colquhoun's words, a 'vast aggregate of floating wealth, exposed to depredation in ten thousand different ways'.[183]

[179] Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: The Clash between Private Initiative and Public Interest in the Enforcement of the Law* (Stevens & Sons, 1956) vol 2, 356.
[180] Reynolds (n 2) 76.
[181] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Vintage Books, 1977), 88. He argued it was Colquhoun's statistical prowess is central to his ability to legitimate (to merchants, their insurers and later the parliament) a new style of prevention predicated on the capacity to demonstrate financial benefits to commercial interests.
[182] Radzinowicz (n 179) 356-7
[183] Colquhoun, *Treatise on Metropolitan Police*, vi.

This is not to suggest that the losses were not significant in absolute terms. Indeed, Colquhoun's somewhat unreliable estimate of the stock loss of the merchants of the West Indies from their imports alone was £232,000 annually.[184] This was a significant portion of his total estimation of £500,000 in loss due to theft across the entire shipping activity of the Port of London.[185] Radzinowicz is correct to note that even on Colquhoun's calculations 'the total amount of pillage was less than one per cent of the value of the whole value exposed to danger'.[186] While undoubtably a large absolute sum, given the volume of shipping in the Port of London, it is useful to place this conflict in a broader economic context where the contestation over the commodification of wage labour—and the legal understanding of property rights in commodities themselves—was still being actively disputed by both the shipping companies and their labourers.[187]

Colquhoun's grievances were communicated in terms of simple and "manifest criminality",[188] and his book is dedicated to the twin aims of 'securing of Commercial Property against the unexampled Depredations to which it has been subject', and also to the 'improv[ment of] the Morals of the Maritime Labourers'.[189] But the moral valence and remunerative practices of lumping and stevedoring were, unsurprisingly, more complicated than this. The issue is perhaps better conceived as a struggle over acceptable remuneration by employers prior to the

[184] Colquhoun, *Commerce and Police* (n 160) 115; According to Radzinowicz, the West Indies merchants had calculated their losses at around £300,000 over the same period as Colquhoun's estimation. The precise records in the archives of Customs House are cited in Radzinowicz (n 179) 39 Fn 39.
[185] Colquhoun, *Commerce and Police* (n 160) 154. See also Spike Sweeting, 'Capitalism. The State and Things: The Port of London, *circa* 1730-1800' (PhD Thesis, University of Warwick, 2014).
[186] Radzinowicz (n 179) 359.
[187] Peter Linebaugh, 'Eighteenth Century Crime, Popular Movements and Social Control' [1972] *Bulletin of the Society for Study of Labour History* 25; Consider this 1765 statement by the West India Merchants expressed their own concerns about the rise in property crimes as a warning to all those that engaged in 'the wicked and felonious practice of stealing Sugars and other Goods, the products of the said Colonies', quoted in Colquhoun, *Commerce and Police* (n 160).
[188] See Fletcher (n 136) 476-81.
[189] Colquhoun, *Commerce and Police* (n 160) dedication.

widespread acceptance of money wages in exchange for labour.[190] As an accounting strategy, Colquhoun recast customary rights to spillages and some pilfering as an efficiency to be realised, rather than a legitimate and proprietary component of the cost of labour.[191] Indeed, in his letters discussing the project of the Marine Police, Colquhoun writes to Jeremy Bentham imputing a shared interest in the regulation of those who labour on ships in the navigable rivers of England.[192] The effect of the framing of the problem and the point of intervention is best understood as part of a broader strategy for legitimating the position that the remuneration of workers no longer involved customary rights or some of the tailings of their labour, but was to be restricted to wages alone.[193] Beattie incisively addresses this particular point

> 'The issue of "theft" is not, however, as simple as it might seem, or as it seemed to merchants, the judiciary or… Patrick Colquhoun. To the merchant this issue was straightforward – and perhaps became increasingly clarified over time: taking his goods was theft. But to the sailors, lightermen, and porters who worked on the river and unloaded the ships, taking some goods was a right and an integral part of their legitimate remuneration…. [t]he merchants with help from the state and the criminal law made an effort to cut down their losses by bringing the labor force under control'.[194]

[190] This point is also made by Douglas Hay in the context of discussing the great enclosure as well as the labour market of the period in question. See 'Crime and Justice in Eighteenth- and Nineteenth-Century England' (1980) 2 *Crime and Justice* 45, 71-2.

[191] An example of Colquhoun's logic on this point is spelled out *apropos* corn, where he writes

> 'An indulgent Master, at first, grants the privilege a few samples or a trifling quantity of foul Corn, on the solicitation of an industrious servant, under the pretence of feeding a pig or a few poultry… The stock of poultry or pigs is increased, and additional quantities of grain become necessary. The indulgence of the Master in a few instances, is, at length, construed into a sanction to appropriate Sweepings of foul Grain. These Sweepings are presently increased by previous concern among Labourers. Corn becomes foul, which might have been preserved in a clean and Merchantable state, because the covetous disposition of the Labourers has increased', (*Commerce and Police* (n 160) 139-40).

[192] Letter 1350, From Colquhoun To Bentham (5 Oct 1798) in *The Correspondence of Jeremy Bentham: Volume 6: January 1798 to December 1801*, JR Dinwiddy ed (Oxford University Press, 1984), 91; this letter also addresses the problem of preventing fungible foodstuffs from being exchanged on the ships owned or operated by the Crown

[193] For a discussion of the ongoing logic of the discretionary policing of supplements to wages that fail to compensate for formerly customary rights, see Jason Ditton, 'Perks, Pilferage, and the Fiddle: The Historical Structure of Indivisible Wages' (1977) 4(1) *Theory & Society* 39.

[194] JM Beattie, *Crime and the Courts* (n 86), 176-77.

Colquhoun's answer to this problem was that 'where Property is exposed, a preventative Police must be resorted to, in order to be secure'.[195] In comparison, the police scheme was originally projected to cost a little more than £5000 per annum.[196] The West Indies committee along with their insurers, were inclined to agree that on the numbers, this was an experiment worth running on their portion of the Thames. The government of the day was prepared to acquiesce to its formation particularly given that the 'the West India gentlemen contributed four-fifths of its financing'.[197] At times the imposition of changes in labour, and the criminalisation of custom, lead to violent clashes between police and labour. John Harriott, one of the original magistrates, recalls an event some months after the office opened, when 'proceeding to examine other prisoners on a charge of felony… when some hundreds of coal-heavers…made a most furious attack on the office'.[198] He writes that he ordered pistols loaded and 'ordered them to fire down on the assailants'.[199] In his account, 'one of them was shot dead: he proved to be one of the ringleaders'.[200] It was only then that Colquhoun 'read the riot act'.[201] Two officers were shot, and one died from their injuries.[202] Harriott's account makes no mention of further casualties from the protesting labourers after further shots were fired into the crowd.

When the Committee of West Indies Merchants reflected on the establishment of the Police Station, their minutes record that they were satisfied with the price of labour, '[t]he Lumping Rates have been ultimately settled on the lowest Terms, for which honest labour can be

[195] Colquhoun, *A Treatise on the Police of the Metropolis.* This conclusion is the product of his deduction that neither private prosecutions nor the military were appropriate to solve the problem generated in its particularity.
[196] Radzinowicz (n 179) 365.
[197] Palmer (n 172) 144.
[198] John Harricott, *Struggles through Life, Exemplified in the Various Travels and Adventures in Europe, Asia, Africa, and America of Lieut. John Harricott* (1808) vol 3, 340-1.
[199] Ibid 341.
[200] Ibid 342.
[201] Ibid.
[202] Ibid.

procured for daily wages'.[203] Taken together there is general support for the position advanced by Foucault, that the political effects of social and economic change see pilfering become a problem ripe for intense policing—while the broader process of stripping workers of their customary property rights and the acquisition of commodities from the colonies stands outside the attention of policing.

The importance of The River Police to this thesis is that they were, from the outset, imagined as a series of procedures. Prior to the instantiation of the Marine Police, Colquhoun, in reflection on the nature of his task to Bentham, commented that 'to *methodize* a New Institution of such magnitude is not easy matter'.[204] The task of organisation was never understood by its architects as a simple expansion of powers of superintendence, but instead was to generate mechanisms for improving the conduct of those tasked with policing the docks. To this end, the River Police are best understood as an intervention in the governmental strategy for the protection of property by coercively reshaping both the conduct of labour and the conduct of the Home Office (in terms of funding a police force) as well as the Port of London (in terms of more heavily regulating stevedores). Both principal authors understood the importance of the project in terms of building an institution with the capacity to intervene in the minutely studied social practices understood as customary to the jobs of dockworkers.

Procedure emerged as a solution in Colquhoun's scheme in two important ways. First, there was the description of the legal procedures through which convictions are to be secured. Second, there was the procedure through which other ends of policing were to be achieved. As argued,

[203] Minutes of a Meeting of the Committee of West India Merchants, excerpted in Colquhoun, *Commerce and Police* (n 160) 619.

[204] Letter 1350, From Colquhoun To Bentham (8 July 1799) in Bentham (n 192) 54 (emphasis added). This collaboration has started to garner some critical attention after the publication of an edited collection of Bentham's writings on preventative policing: Jeremy Bentham, *Writings on Political Economy: Volume III Preventative Police* (Bentham Project, 2018); Michael Quinn, 'Bentham on Preventive Police: The Calendar of Delinquency in Evaluation of Policy and the Police Gazette in Manipulation of Opinion' [2019] *International Criminal Justice Review* 1; D Kim Rossmo and Lucia Summers, 'Bentham and the Philosophical Nature of Preventative Policing' [2018] *International Criminal Justice Review* 1.

this involved the disciplining of a labour force, but also a particularly detailed account of the responsibilities of office that attach to the various supervisory positions described by Colquhoun. Together, a system was developed for the reformed application of the criminal law on the docks and rivers of London.

There has been some debate about the legacy of Patrick Colquhoun and the Thames Police Office. Ruth Paley, for her part, argues that Colquhoun, 'an astute self-publicist' was regarded by the Home Office 'in much the same way as the interminable succession of cranks whose mission in life was to draw up fantastical schemes to eliminate national debt'.[205] While Paley's assessment of his character accords with my own, and she may well be correct about his waning influence within government in the twilight years of his career, the issue here is about the importance of his ideas as jurisprudence. Norma Lauda and Bruce P Smith, despite disagreeing about the relationship between the onus of proof and the procedures of the summary courts, agree that the River Police represented an innovating and lasting demonstration of the efficacy of using summary procedures alongside police in criminal cases that involve chattel property.

**B. Legal Procedures**

To better intervene in the labour market, and secure property, Colquhoun advocated for the extension and intensification of exceptions to the general criminal procedure exercisable by the justices, mayor, aldermen 'and all other Justices having jurisdiction where the Offences may be committed, being within the limits of the River Thames, and the Cities and Counties adjacent

[205] Ruth Paley, '"An Imperfect, Inadequate and Wretched System"? Policing London Before Peel' (1989) 10 *Criminal Justice History* 95, 98. The remarks about his character are apposite, given that his introduction to Bentham was presaged by his sending of a copy of his treatise on policing. Curiously, Bentham's distaste for Colquhoun's open self-promotion also marked the beginning of the end of their relationship. This does not mitigate the influence that Bentham wielded via Colquhoun's then good name in drafting the legislation for the River Police. Put simply, Bentham understood himself as a *persona non-grata* with the staff of the Home Office, yet Colquhoun's attachment to the project was sufficient to see it shepherded through Parliament into law. That his influenced waned in the decades after is of little consequence to the lasting impact of this particular institution.

thereto'.[206] In particular, the changes he advocates are directed towards the regulation of conduct of those who work on or near shipping, and those interfering with property or the police or their investigations.[207]

The legal authority of the Marine Police was grounded in several sources. The first was the the *Middlesex Justices Act 1792*, which provided the general statutory authority for the magistrates, including Colquhoun's commission. In terms of the broader powers utilised by the Marine Police, Colquhoun based his strategy for the legal basis of powers of the Constables and Surveyors on provisions found in a number of existing statutory sources. This involved the second source, the *Stealing of Lead, etc. Act* 1756.[208] This Act granted magistrates the power to convict persons of a misdemeanour if they were unable to 'give an Account, to the[ir] Satisfaction' for any 'Lead, Iron, Copper, Brass, Bell-metal or Solder' in their possession.[209]

The third source of legal powers was what by Colquhoun's time was thought to be 'little more than a dead letter':[210] the *Bumboat Act of 1762*.[211] In addition to its titular function of regulating a class of small boats that would sell goods to workers aboard the larger vessels on the river,[212] the Act also provided statutory powers of search and arrest,[213] and summary punishment of those found in possession or receipt of goods stolen from boats on the river.[214] This Act also facilitated the use of informants through provisions that require the arrest of persons by 'every

[206] Colquhoun, *Commerce and Police* (n 160) 278.
[207] Listed Ibid 279-80.
[208] *An Act for more effectually discouraging and preventing the stealing, and the buying, and receiving of stolen Lead, Iron, Copper, Brass, Bell-metal and Solder, and for more effectually bringing the Offenders to Justice* (29 Geo II, c 30).
[209] See *Stealing of Lead, etc. Act* 1756, (29 Geo II, c 30) s 3.
[210] See Radzinowicz (n 179) 362.
[211] *Bumboat Act of 1762* (2 Geo 3, c 28).
[212] The Act requires that any such small craft that wished to navigate the Thames, between London Bridge and Lower Hope Point display identification numbers that conform with a ledger held at Trinity House (Ibid s 2).
[213] See respectively, Ibid ss 5 and 6
[214] Ibid ss 5, 6, 7, 9

Person' who has 'reasonable Cause to suspect that such Merchandizes, Goods, Stores or Things were stolen, or unlawfully come by, from or out of any Ship or Vessel in the said River'.[215] These powers provided the operational jurisdiction for those performing the various duties of the Marine Police in their first instantiation under the auspice of the West India merchants.[216]

In contrast, the fourth source, the *River Police Act* was designed as a more detailed rendering of the procedures that the Marine Police relied upon—strengthening and expanding the provisions in earlier legislation. From the outset, Bentham and Colquhoun's attempts to reform the basis of statutory authority for preventative policing, accompanied a request to extend the summary powers of the magistrates responsible for oversight of *both* the lumpers and the police. These changes to the operation of the criminal law were designed to 'inflict sight Penalties by summary Procedure on circumstantial Evidence, aided by the Examination of the Delinquent'.[217] Importantly, it is worth considering the nature of the extension of jurisdiction in detail in order to appreciate the varying gravity of the offending contemplated, along with the degree of moral opprobrium it might warrant. My sense is that these changes are better understood as directed toward the reformation of a labour force, and the application of discipline through the threat of punishment and involving conduct that more closely approximate understandings of more traditional forms of larceny. The social understanding of property offences was reconstructed through demands for additional jurisdiction, such as the above. Colquhoun himself understood that procedural reforms needed to be directed to the goal of 'renovating the morals of the Labouring Classes on the River Thames… to counteract the Designs of evil-disposed persons by embarrassing them at all points, [rather] than to punish' them, and this simultaneously preventative and pedagogical approach to policing and prosecution was itself 'an improved

[215] Ibid s 9
[216] See Colquhoun 'Instructions to Marine Surveyors' in *Commerce and Police* (n 160) 630.
[217] Ibid 279.

system of Political Œconomy'.[218] On the other side of the ledger, the Merchants of the West Indies caution their labourers that following the formation of the River Police,

> 'making free with even the smallest quantity of Sugar, or other articles, as, in case of detection, (which will be certain,) nothing can prevent the ignominy of Prosecution for Felony, and the ultimate punishment in case of conviction'.[219]

In other words, the purpose of procedural reform towards a summary jurisdiction, was understood as enabling easier prosecution in order to prevent offending. All the while – and recalling Robert Cover's observation that 'law takes place in a field of pain and death'[220] - threats of execution are levied in order to more readily achieve that aim.

Although the requirements of labour registration remained below the threshold of parliamentary concern, Colquhoun and Bentham's River Police Bill outlined a number of requested reforms to the law of the river.[221] Despite the broader labour market remaining outside of statutory intervention, they request powers to be able to punish conduct summarily for offences such as 'Lumpers convicted of quitting Work unlawfully may be punished as other Labourers under the Act 6 Geo. III cap. 25',[222] and 'Lumpers convicting of neglecting to register their names', and this included negligent oversight where 'Master Lumpers [can be] convicted of neglecting to search Working Lumpers'.[223] Likewise, with some detail, the mere possession of certain items thought to facilitate thefts when aboard ships, were summarily punishable such as 'having Jiggers, Bladders with nozles, &c. concealed for the purpose of drawing off Liquors' or

[218] Ibid 281
[219] Ibid 670, 'A CAUTION' IN the *River Police*, in the absence of attribution, it was probably drafted by Colquhoun
[220] Robert Cover, 'Violence and the Word' (1986) 95(8) *Yale Law Review* 1601.
[221] See Bentham, *Writings on Political Economy* (n 204) pt 1.
[222] Colquhoun, *Commerce and Police* (n 160) 670, 279.
[223] Ibid.

> 'having Goods in their possession, suspected to compose part of the Cargo or Materials of any Ship or Vessel in the River Thames and not giving an account to the satisfaction of the Justice, how they were obtained'.[224]

In addition, Colquhoun also requested several offences concerned with the punishing of conduct that interfered with the availability of evidence to be tried summarily, including 'throwing Goods overboard with pursued, for the purpose of preventing discovery' or broadly 'suppressing Evidence, with a view to defeat Justice'.[225] Lastly, the expansion of judicial powers sought to protect the operations of the River Police by allowing summary convictions for 'refusing to assist the Thames Police Constables, in the execution of their duty', 'obstructing the execution of this Act', or the more particular charge of 'injuring, damaging or destroying the Thames Police Guard Boats'.[226]

Colquhoun and Bentham's proposed extensions of the summary powers of magistrates constitute a recognition of the significant practical advantage that this procedural mechanism could provide when seeking to prevent thefts from the docks; attempting to not only regulate behaviour on the docks, but also to open prosecutorial options when risks were realised. The realised Act formalises the roles of both general Constables and those Constables employed as Police Surveyors as being 'the Preservation of the Peace, and for the Security of Property against felonious and other unlawful Modes of obtaining and receiving the same'.[227] Police Surveyors, although sworn as Constables, had the additional statutory power to inspect 'all Persons to be employed in and about Ships and Vessels lying and being in the said River',[228] and a right of entry onto any ship on the river in order to supervise the labourers and constables aboard.[229]

[224] Ibid 280.
[225] Ibid.
[226] Ibid.
[227] *Depredations on the Thames Act*, 39 & 40 Geo III, s 7 (1800) ("*Depredations on the Thames Act*").
[228] Ibid s 8.
[229] Ibid s 10.

In addition to specific summary offences for negligent handling of goods aboard ships,[230] there were also a series of changes to procedures governing the investigation of unlawfully obtained goods. The first was modified from the *Bumboat Act*, and clarified that when a person is found with 'Goods suspected of having been stolen or otherwise unlawfully come by' has committed a misdemeanour unless they can prove that 'to the satisfaction of such Justice… how he came by the same, or else produce the Party… from whom he bought or received the Same'.[231] If the supplier can be produced it would 'be sufficient to exempt any Person from being adjudged guilty of a Misdemeanour under the said Act'.[232] In addition, the Act also conferred expansive powers of search for those places where magistrates believed goods taken from ships to be present.[233] In particular, this provision enables a style of investigation predicated on the reversal of the onus of proof, whereby the owner of such a place, along with the people present in it, shall be guilty of a misdemeanour if they cannot

> 'immediately, or within some reasonable Time, to be assigned by the said Justices, make it appear, to the Satisfaction of the said Justices, by what lawful Means such Article or Articles came to be deposited or situated in such Place'.[234]

These coercive powers of investigation were supplemented by an additional power to punish those who provide fraudulent paperwork describing the provenance of goods.[235] Alongside these more targeted offences, the Act also conferred a broad catch-all offence, where any person arrested in the vicinity of the docks could be adjudicated summarily to be 'a Rouge and a

[230] Ibid s 14. Coincidently, the punishment for doing this was not only imprisonment, but also the publication of the defendant's 'Name and Description', presumably in a less than in a culture with less than common literacy amongst working people) the aim of this process was less to shame workers, but rather the infinitely more churlish and unfavourable outcome that the aim was to damage the possibility of their obtaining further employment in any of the labouring roles on the docks. In light of disputes about the content of wages, this seems a deterrent for the breakage of goods so that spillage might be collected.
[231] Ibid s 18.
[232] Ibid.
[233] Ibid s 16.
[234] Ibid.
[235] Ibid s 17.

Vagabond' if they failed to 'to give a satisfactory Account of himself or themselves, and of his or their Way of living', before a JP.[236] The specific statutory bases of authority can be used to see the transformation of offences concerned with the unloading of ships and the associated problems that accompany having large numbers of ships in tight proximity on a tidal river. The next section looks at how the River Police were involved in the regulation of stevedoring and lumping labour.

**C. Labour Procedures**

The principal role and duty of the River Police was the organisation of labour for the Committee of West-Indies Merchants. In doing so, Colquhoun also relied on the proceduralisation of labour conditions and responsibilities for each of the roles on the docks. His treatise on the River Police reproduces the description of the role of each of the Master Lumpers, Police Surveyors, Land-Officers, Quay Guards, and Watchmen. Importantly, the higher officeholders, such as the Justices of the Peace are conspicuously exempt from an account of their responsibilities and the methods for their obtainment. Coincidentally, Lumpers appear as a kind of labouring inverse, whereby those that perform the work of unloading the ships are mentioned only as the subjects of instruction, superintendence and direction. Importantly, the River Police govern their staff through the fidelity to an oath that forms the first instruction for each of the various offices envisaged under the scheme. Rather than a breach of contract triggering the termination of employment, the Police staff were held to the legally binding procedure of an oath made before God that provides the mechanism for holding the River Police to the strict observance of their duties alongside the possibility of dismissal should they fail to do so. As a jurisprudential technique, oath-taking provided a mechanism for binding life to law through the ceremonial assumption of the responsibilities particular to the oath taker's role, alongside the requisite

[236] Ibid s 11; These powers weren't new, having been on the statute books since at least 1744 with the passing of *A Bill Intituled, An Act to amend and make more effectual the Laws relating to Rogues, Vagabonds, and other idle and disorderly Persons and to Houses of Correction (1744), 17 George II. c.5,*

standards of care and the level of attention that was required to satisfy their duties. It is only after describing the oath, that Colquhoun then turns to outlining the more detailed accounts of the precise responsibilities of each role, along with the standards of vigilant conduct required for their satisfaction. That responsibilities are shaped by oath rather than contract suggest that a commercial jurisprudence didn't describe the assumption of the minor office-holdings under this scheme. Instead, the ethics and ecclesiastical consequences accompanying an oath were used to bind constables, master lumpers and surveyors to the promise of their role. Particular jobs are functionally differentiated and linked with mediated reporting requirements alongside the requirement that those who take oaths undertake the physical superintendence of the labour force. Those who perform the labour of lumping goods from ships are the object to be directed by this new cadre of vetted superintendents.

In Colquhoun's memoires, he notes that after six months of private operation, plans were drawn up to have the service rendered public through legislation. It was seen as mutually beneficial on the numbers: and because of demonstrable reductions in stock loss, Treasury saw a concomitant increase in revenue from the duties collected at Customs House. The private river police were a success and advantage for the West Indies Merchants, and a source of envy for others, who together agitated for the government to extend the scheme throughout the Port of London.[237]

## V. Conclusion

The emergence of the summary jurisdiction is coeval with transformations in policing. As this chapter has sought to show, procedural innovations have seen powers of summary conviction gradually come to address shared objects, subjects, institutional bases, archives and processes. It is only in the second quarter of the nineteenth century that summary procedure begins to

[237] Palmer (n 172) 145.

have the legislative architecture of a jurisdiction.[238] Indeed, procedure for the 'summary jurisdiction was not homogenised until 1848'.[239]

Before summary procedure was generalised for adults, it was first standardised for all juvenile offenders.[240] Summary procedure first assumed the form of a jurisdiction in 1847 by extending its style of procedure to an entire class of persons, rather than being a collection of offences each with their own rules of proceedings.[241] This piece of legislation held that children of less than 14 years could have their cases heard by two justices of the peace in their Petty Sessions,[242] or before a single Stipendiary Magistrate at a Police Court.[243] This Act also granted magistrates extensive powers to compel appearance of the accused,[244] and witnesses.[245] A more extensive renovation of this summary jurisdiction took place with the passage of three related Acts in 1848.[246] With the passage of this tranche of legislation, its jurisdiction became one defined by procedure rather than by status (in the case of juveniles) or subject matter (as described across the chapter). These changes were only implemented following the experiments in policing that this chapter followed.

The documentation too gradually came to be generalised, with the form of conviction first standardised in 1822.[247] Even though the one hundred or so years of preceding statutes and manuals for JPs had attempted to regularise records of conviction, this statute assigned a

[238] See Farmer, 'Law of the Land' (n 5); Farmer, *Tradition and Legal* (n 8).
[239] JH Baker, 'Criminal Courts and Procedure at Common Law 1550-1800', in JS Cockburn (ed), *Crime in England 1550-1800* (Princeton University Press, 1977) 15, 25. The Act in is question is the Summary Jurisdiction Act 1848 (11 & 12 Vict c 43).
[240] *Juvenile Offenders Act 1847* (10 & 11 Vict c 82) ('*Juvenile Offenders Act*').
[241] Ibid.
[242] Ibid s 1
[243] Ibid s 2.
[244] Ibid s 4, by warrant or by summons.
[245] Ibid s 7.
[246] *Indictable Offences Act 1848* (11 & 12 Vict, c 42); *Summary Jurisdiction Act 1848* (11 & 12 Vict, c 43); *Justices Protection Act 1848* (11 & 12 Vict, c 44).
[247] *Summary Proceedings Act 1822* (3 Geo IV, c 23).

General Form of Conviction.[248] The *Juvenile Offenders Act 1847* required that in addition to keeping records of conviction with the General Quarter Sessions of the Peace,[249] a report of statistic should be forwarded to 'One of Her Majesty's Principal Secretaries of State a monthly Return of Names, Offences, and Punishments mentioned in the Convictions'.[250]

The first attempt at creating a professional preventative police force in England wasn't a public enterprise at all. Instead its salaried constables came about through the cooperation of colonial merchants, port authorities, insurance agencies, utilitarian reformers and enterprising magistrates. Of course, these changes were noticed soon after they occurred. The expansion of summary powers had already seen the number of summary convictions exceed the number of jury trials by a significant margin by the time of Maitland's publicationof a short book on criminal procedure and law enforcement, *Justice and Police*.[251] The aim of this chapter has been to tie together observations of the emergence of this police force with a consideration of the emergence of a jurisdiction over crime defined by summary procedure. The summary jurisdiction and the emergence of policing represent two of the more distinctive changes in the criminal law.

What emerges is a jurisdictional story that comes first from the smattering of statutory provisions that nominally attempt to govern a variety of social phenomena but emphasise increasing intervention in labour and lives of the poor. These changes map onto shifting official and institutional contexts where jurisdiction comes to be exercised as an authority over

[248] Unlike the form of the indictment, there was a statutory bar on further litigation on the form of conviction where the merits of a decision had been made and avenues of appeal had either been exhausted or expired: *Summary Proceedings Act 1822* (3 Geo IV, c 23) s 2.

[249] Here the Act provides a schedule of forms depending on the procedural option taken. The statutory drafting here differs from earlier modes of conveying broadly similar information by distinguishing the action that is required from the procedural form compelling that action. *Juvenile Offenders Act* (n 240) s 9. The Schedule attached to this Act consists of two forms.

[250] *Juvenile Offenders Act* (n 240) s 11.

[251] For example, he cites that in 1883 simple larceny saw 27,000 summary convictions, while in the same year 12,000 persons total were convicted by juries: Maitland (n 1) 128.

investigation and conviction (the discussion of the formation of the River Police above is one, albeit important, example of this change).

My argument here has been that the rise of summary jurisdiction as the procedural option of choice is the accreted outcome of a series of decisions which might have been otherwise about jurisdiction, offending, and the institutions that govern them. As demonstrated across this chapter, the particularity of the social problem to be solved through legal procedure and institutional design gives shape and character to the further application of those procedures and institutions. Here, it is important that the summary procedure and police offices are proposed on the docks to deal with the social formation of urbanisation, labour and property rights and the physical and material properties of the chattels in question: those fungible commodities shipped to the City of London from the colonies. That earlier statutory forms responded first to wood and other agricultural goods, and then the products of industrial manufacturing—iron, brass, linens, and cottons—suggests the consolidation of an understanding of a kind of isomorphism as inherent in the problem to be solved. Finally, there is a continuity of the proposed object of this procedure: namely, the labouring poor. That summary proceedings were the governmental response to a crisis in farm labouring after the depopulation caused by the Black Plague seems remarkably consistent with their application in the Port of London.

# Conclusion

This thesis has addressed the emergence of procedure. It has described, across a number of movements and contexts, how procedure becomes the dominant jurisprudential idiom for describing the conduct of lawful conduct in the context of criminal law. The broader research question, "how did government come to be articulated through a language of procedure?", has been addressed in two principal ways. One is more straightforward than the other, and this answer involved tracing the antecedents of the contemporary reliance on summary procedures along their jurisprudential and institutional trajectories. This question was also approached by attending to the textual and textural detail of *how* criminal procedure emerged. Both strands of this thesis have involved holding onto the sometimes subtle and sometimes hubristic movements in the language of conduct as it pertains to the ordering of lawful authority.

*An Empire of Conduct: On the Jurisprudence of Procedure* has developed a vocabulary and a conceptual rubric for thinking about the project of prescribing forms of conduct as a mechanism for refining, shaping, reforming, and accreting a technical repertoire of procedures for attaching

wrongdoing to law. In other words, this thesis has charted the emergence of a genre of jurisprudence that mediates between the prescribed and the proscribed: between the world of law and the prudential demands of the pragmatic. As a body of know-how, procedure emerged within the context of a number of jurisdictions and projects of empire that preceded and shaped the modern state. Procedure became a project shaped by particular jurists, a combined labour that consisted of some influential, and some idiosyncratic projects, works of scholarship and administration. As such, a history of procedure jurisprudence is run athwart with the conditions that mark its becoming: with a modernity forged through its imperialisms; an active role of the law in the protection of markets; efforts to legitimate the projection of force at home and abroad. The story of criminal procedure is, in its way, one concerned with how the mechanisms of government govern. These innovations have greater longevity as *forms* than as avatars for the figures that innovated them. More specifically: if organising behaviour and the settlement of disputes through a consistent (or, in the phrase of this thesis, isomorphic) procedure seems obvious now, this wasn't always the case.

The conduct of lawful conduct has a history, too.

*An Empire of Conduct* has developed an account of where a modern criminal procedure came from. This is, unavoidably, an imperial story when written from the viewpoint of the antipodes. That this story is unavoidably imperial does not mean that this is a defence of that project: my aim here has been to restore a critical vitality to the study of procedure—one that brings jurists, their jurisprudence, and a style of governmentality into a more honest accounting of their politics and how they conducted themselves and their careers. My argument here is that criminal procedure, the work of criminal law, and the prudence of its jurists needs to be spoken alongside the project of empire and its contributions to the development of modern forms of governance. Criminal procedure, as a body of law, emerges in proximity to a number of reforms in administration. As a style of jurisprudence concerned with reforming the conduct of law,

criminal procedure emerged as an important technique for the organisation and refinement of a series of imperial projects: sometimes serially and at other times, in parallel. This is a project that itself has assumed a fractal quality: it inheres in Jeremy Bentham's weirder flights of fancy and the Stephen family's multi-generational engagement with empire; it burrows its way into the reform of the civil service as it wards off smugglers on the docks of River Thames. Put simply, if nothing else, instituting procedure reveals its plurality of uses as it coagulates toward a unified form, itself a deeply idiosyncratic approach to organising the conduct of conduct. If criminal procedure is addressed to the conduct of political inferiors as a means of re-working how law both maps onto conduct and is itself, conducted, then this intervention takes place within the institutions of domination and to subject populations. It is to this double sense that the title of this thesis responds.

## I. On the Jurisprudence of Criminal Procedure

The contemporary criminal law is an activity and a discourse that takes place largely beyond the confines of the courts of records and proceeds by means other than the jury trial. In most common law jurisdictions, trials adjudicated by one's peers are no longer the procedure through which most convictions are obtained.[252] This raises a challenge for criminal law thinking. The procedures of contemporary criminal law—warrantless surveillance, control orders, plea negotiations, infringement notices, summary courts, etc—should move from the periphery of jurisprudence and closer to its centre. This thesis has worked through a part of this history of procedure thinking. As a genre of law and style of jurisprudence, the challenges of procedure

[252] Two examples illustrate the degree of deviation from this norm. Australia's multiple criminal law jurisdictions, 91% of cases were finalised in the Magistrates Court compared to 3% in higher courts (with the remainder in Children's Courts): Australian Bureau of Statistics, *Criminal Courts, Australia, 2018-19* (Catalogue No 4513.0, 27 February 2020). In the UK, over 95% of cases are determined by the magistracy: 'Criminal Jurisdiction', *Courts and Tribunals Judiciary* (Web Page) <https://www.judiciary.uk/about-the-judiciary/the-justice-system/jurisdictions/criminal-jurisdiction/>.

can be better interpreted by giving attention to the historical forces that have rendered jury trials and supreme court case law an important but minor part of criminal law practice.[253]

A consequence of "criminal law" only becoming intelligible to common lawyers in the middle of the nineteenth century is that any analysis of how this arrangement of law came to be requires an account of the plurality of jurisdictions from which wrongdoing was, in specific and contingent ways, conceptualised, prosecuted and governed. This thesis contributed an argument for why and how an account of criminal law should begin with an idiom of jurisdiction in order to understand the issues of method and anachronism that flow from starting with a presumption of either the State or positive law. Additionally, this enabled a theoretical account of criminal procedure reforms within colonies that could also be interpreted as part of a co-ordinated and centripetal enterprise conducted across empire. This insight speaks to more abstract discussions regarding criminal law, and procedure's various relations (theoretical, jurisprudential, practical and otherwise) to questions of state formation. Criminal law is a product of a kind of modernity: one that emerged already predicated on a distinction between substance and procedure.

The emergence and application of procedure becomes the ascendant method through which to govern the conduct of official life and the public life of offices. This transformation is accompanied by shifts in the understanding of the responsibilities and ethics of officeholding. This change can be characterised as a story of increasing attempts to regulate how public life is conducted by circumscribing the exercise of the discretions that attend to the holding of office. In particular this thesis has held offices of jurists, police, legislators, and justices of the peace in focus. This change enables the language of office to be retained as the content of conduct shifts its emphasis from the cultivation and expression of the occupant's persona to rules externalised

[253] See Pat Carlen, *Magistrate's Justice* (Martin Robertson, 1976); Doreen McBarnet, *Conviction: The Law, the State and the Construction of Justice* (MacMillan, 1981).

and imposed. In other words, hierarchy becomes external to the status attending to offices: instead, relations become more externally managed and political superiority is diffused into the potentiality to issue prescriptions as to proper conduct. Additionally, office is, at the same time, used as a rubric for following how conduct is crystallised.

Across the chapters of the thesis we also see a gradual winnowing out of idiosyncrasy in the writing media of criminal law. This has played out in key genres of legal text: legislation, forms, and records or administrative archives. This thesis has contributed to understanding how, to what end and under what conditions, legislation assumed some conventions of its genre. Although further work remains to be done on this point, procedure legislation provides an index to changes in the ergonomics, or legibility and usefulness of this medium. The revisions to the codes of procedure in British India provide an example of a broader project to write, print and promulgate the law in more ergonomic ways. Its utility as a text of government was, on the one hand, a matter of substantiating the conduct of offices in terms of their responsibilities at law. On the other hand, the Indian procedure codes also index the accretion of techniques to bolster the perceived usefulness of the documents of law. Changes to the typography, conventions of expression, format, use of illustrations, tabulation, and nested formats of structure all sought to make rules easier to understand and obey.

Criminal law jurisprudence was innovated in particular contexts, by specific people. The conditions under which particular discourses emerge includes the biographical. Throughout this thesis, the specific role of persons, their families, careers, ambitions, problems and complicities are actively part of the story. That criminal law jurists were administrators of the British Empire (or, in Bentham's case, dreamed of being so) is an important dimension of the formation of contemporary criminal law that is deserving of greater critical attention. Throughout, procedure bears the scars of trauma while remaining an exercise in a kind of utopianism: it diagrams a model of authority, but this is always only a model. As a reader, it

requires a generous account of their own world forging, an appreciation of irony, and a consideration of how that activity was occasionally translated into action.

*An Empire of Conduct* represents an attempt to develop a plausible account of the transformation of criminal procedure as one part of a suite of broader reforms in the way that government has been administered since the early modern period. The central argument advanced in this thesis is that innovations and their isomorphic application in criminal law represent one important dimension in reforming the conduct of institutional life. This is most visible in the shift in the discourses that accompany the performance and organisation of official or public life. The transformation of criminal procedure has seen the question of conduct, its modes of being and relating, shift from an officeholding ethics to questions of the politics of legislative form.

## II. Implications of this Thesis

This thesis has developed an approach to thinking about procedure as the conduct of lawful conduct. To this end, it offers scholars some theoretical tools for understanding the jurisprudential implications of criminal procedure *as a domain of jurisprudence*. The emergence of procedure, as a substance-agnostic body of rules for the ordering of conduct, was an intellectual pre-condition for the formation of modern criminal law in the extant jurisdictional repertoire of the common law.[254] The successful realisation of changes to an accepted understanding of criminal law and the institutions which make use of procedure as a technique of jurisdiction have always been multi-sited and remain contested. My argument here is only that the most plausible account of these changes requires an account of shifts in the nature of empire (this is at once an intellectual project that embraced universalism, and a form of economic and cultural domination: and while the emphasis shifts, each of the chapters of this

[254] See also Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016).

thesis follow these concerns), legal media technologies (i.e. the changing genre of legislation), and the institutions which are required to utilise these reforms (i.e. the rising prominence of preventative police). These changes became visible when two strictures were employed: the first, reading texts as expressive of jurisdictions rather than from the presumption of the state as a form of political organisation, and second, by looking at the rising use of summary convictions and the changes in rules governing the criminal law work of the lower courts, in England and abroad.

One of the preponderant themes that emerged in this thesis is that durable changes to institutional life and to the conduct of various dimensions of government are steadfastly linked to pedagogy. While Chapter Five notes how the reform of the Indian Civil Service takes the jurist as its model of the professional administrator, Jeremy Bentham (see Chapter One and Chapter Three) and William Blackstone (Chapter Two) are both—from their admittedly vastly different positions of legal and institutional authority—concerned with regularising and reforming legal education as it drifted away from the sole remit of the Inns of Court. While shifts in forms of training were linked to formal labour needs, the ministry of advocates for pedagogical reform exceeded this temporal and immediate mandate: reforms to legal education are throughout linked to the contested politics of their times and play a critical role in indexing modulations in the *officia* of the jurist, jurisprudent, legislator and scholar.

This thesis has located changes in the jurisprudence and law of criminal procedure within the dynamics of the British Empire. The argument advanced here helps to clarify not only the antecedent conditions for the reform of procedure and assists in understanding the relationship between the administration of colonies and the government of empire. This was a story of families, of shipping, and the material problems generated by a mercantile empire. That criminal law was shaped through these dynamics. Its jurists played important, and ongoing, roles in the project of empire which saw their ideas translated into legislative action.

Changes in the domain of conduct are second order changes. They are accompanied by more visible movements in the surface tectonics of institutional life. The assembled public wrongs of William Blackstone represented a jurisdiction without police or public prosecutors, without rules of procedure nor with an organised doctrine of offending. In sum, it is a jurisprudence of wrongdoing organised around principles that bear similarity to the criminal law of the nineteenth century, but this is only insofar as the problems addressed by criminal law predate its artifice. Of the lines of continuity, a language of office and a rubric of felony and misdemeanour are the most steadfast. In broad terms, one of the most striking consequences for thinking with institutional life is the places where it was jurisprudence—and its unfolding grammar of lawful action, read as a guide to conduct—that played an outsized role in offering or inspiring a series of idioms that could be applied to shift the conduct of government. Across the thesis, jurists intervened in the provision of theoretical, and practical, assistance to a number of domains of government: the government of schools, of jurisdictions, of prisons, of labour camps, of docks, and of colonies. To this end, the prudential dimension of the jurists' work in this thesis often proved more important than their formal entanglements with doctrine. This thesis has re-introduced procedure as a fecund and contingent space for evaluating matters of institutional life, addressing law's role in the ordering the authority of government, and for dwelling on the legacies of the conduct of jurisprudence.

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