From Blackstone to Woolmington: On the Development of a Legal Doctrine

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I. THE ISSUE

Thomas Kuhn once suggested to his students:

> When reading the works of an important thinker, look first for the apparent absurdities in the text and ask yourself how a sensible person could have written them. When you find an answer, I continue, when those passages make sense, then you may find that more central passages, ones you previously thought you understood, have changed their meaning.[1]

That advice[2] will be followed throughout this paper with a view to re-examine Blackstone's analysis of the rules allocating the burden of proof in criminal trials. The notion of 'burden of proof' embraces both 'burden of adducing evidence' and 'burden of persuasion',[3] and it is in relation to the latter kind of burden that Blackstone's analysis will be discussed. The function of that burden, which comes into play in situations of factual uncertainty, is to allocate the risk of error between the parties in dispute. As such, it can and should be looked at as expressing the risk-related preferences embedded in the legal system, namely as a distinctively moral issue.

Blackstone approached the risk of error in criminal trials from that very angle.[4] He was explicit in saying that in order to establish that the accused has committed an offence, all reasonable doubt in relation to the facts in issue ought to be eliminated. According to him, it is better for ten guilty persons to escape their conviction and go unpunished than for one innocent person to be unjustly condemned.[5] Blackstone, however, was no less explicit in stating that 'all [the] circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury'.[6]

This and related passages were meant not merely to describe, but also to justify in a systematic way the common law as it stood at that time. As such, they have been profoundly criticised in one of the leading

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contemporary articles on the subject.[7] Blackstone, a principal expositor of the law of his time, was accused of importing into the field of criminal evidence private law notions such as '*omnia praesumuntur pro negante*', '*ei incumbit probatio qui dicit; non qui negat*', and '*reus excipiendo fit actor*'. This importation has, arguably, fortified the view that the burden of persuasion in criminal trials at common law is to be allocated on the basis of an unprincipled syntactical distinction between 'constituents of the crime' on the one hand, and 'defensive issues' on the other. When facts pertinent to constituent elements of the crime were in issue, the principle '*in dubio pro reo*' obtained. In contrast, when defensive issues were to be determined, the risk of error was placed upon the accused, so that he would be convicted in cases of doubt. This distinction is arbitrary since any qualifying condition of any offence can always be substituted with a definition of that offence limited *ab initio*; similarly, any definition of any offence can always be reformulated so as to include all possible defences within that definition.

According to the commonly held view, it was not until 1935, in the celebrated judgment of the House of Lords in *Woolmington v. DPP*,[8] that the law in this area was changed. The facts of that famous case are well known. The accused, Reginald Woolmington, was charged with murdering his wife who had previously left him. He did not deny the fact that it was he who had shot and killed his wife. However, he told the court that this killing had been merely accidental. He explained that at the time of the killing he had tried to induce his wife to return to live with him by threatening to shoot himself. He had gone on to show her his gun, had brought it across his waist, and, accidentally, the gun had somehow gone off and his wife had been killed. At the end of the trial, Swift J. summed up to the jury in the following way:

> The Crown has got to satisfy you that this woman ... died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence ... which alleviate the crime so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident.

The accused was found guilty as charged, but his appeal, reaching the House of Lords, was allowed on the ground of misdirection of the jury. Speaking for the House, Viscount Sankey L.C. held that –

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the

> defence of insanity and subject also to any statutory exception. If, at the end and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[9]

This decision is widely regarded as one which introduced a new fundamental principle into the law of criminal evidence.[10] According to that new principle, the accused should not carry the risk of non-persuasion not only in regard to constituent elements of the crime, but, subject to a few exceptions,[11] also in connection with any defensive issue which he raises. As George Fletcher put it,

> Rejecting this extreme application of Blackstone's analysis, the House of Lords in its *Woolmington* decision took the first step toward a new policy of protecting criminal defendants in cases of doubt on 'exculpatory' issues.[12]

This decision was met with widespread approval. At the same time, Lord Sankey's statement about the 'golden thread' which is 'always to be seen' is considered to be a less convincing part of his celebrated speech. His reluctance to admit to the 'sin' of judicial legislation, as reflected by his insistence upon the relation of continuity between his decision and the legal past, has also been criticised.[13]

II. THE THESIS

In the light of the above, the aim of the present paper is two-fold:

> (1) to show that Blackstone's analysis of the issue can and probably should be viewed differently; and, consequently,
> (2) to question the current perception of the decision in *Woolmington* according to which that decision created a new law.

It will be argued that the decision in *Woolmington* did not deviate from the doctrine of the criminal burden of proof as explained by Blackstone. Blackstone's analysis of that doctrine reflected the perception of criminal culpability prevalent at his time, whilst the application of the same doctrine in *Woolmington* was founded upon the modern legal perception of criminal culpability.

The decision in *Woolmington* constituted a move towards the following allocation of the risk of error in criminal trials. First, in order to justify conviction and punishment, facts related to the issues which determine the defendant's blameworthiness (or its degree) ought to be proved by the prosecution beyond all reasonable doubt. Correspondingly, facts supporting 'justifications', that is, defences that render the defendant's act unblameworthy or less blameworthy, must be disproved by the prosecution at the same level of proof. Defences of this kind have to be distinguished from 'excuses', that is, exculpatory defences and other lenient alleviations of criminal responsibility which are granted to the defendant on personal grounds, as a matter of concession to human frailty, without removing the moral blame from his act. Facts necessary to prove an 'excuse' have normally to be established by the defendant as being more probable than not.[14]

Blackstone's analysis should be viewed as setting forth a more or less similar framework of *evidentiary* principles. The difference between this analysis and the modern law does not lie in their respective approaches to judicial proof. Rather, it lies in their respective moral attitudes which categorise criminal law defences as 'justificatory' or 'excusatory'. This thesis will now be defended.

III. BLACKSTONE REVISITED

Blackstone distinguished between three kinds of defences available to a person charged with the killing of another: 'justification', 'excuse' and 'alleviation'. According to him, a justifiable killing is one that 'has no share of guilt at all'.[15] It may either be 'commendable', that is, one which is both required and justified by an 'absolute command of the law', or 'permissible', when the law permits to repel the force of an attempted capital crime.[16] An excusable homicide can be committed by some misadventure, that is, accidentally, 'where a man, doing a lawful act, without any intention of hurt, unfortunately kills another'. It could also be committed *se defendendo*, that is, as a matter of 'self-preservation', in which case the law intended 'some error or omission' on behalf of the defendant, for example, 'that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed'.[17] This kind of self-defence ought to be distinguished from a justifiable act aimed at hindering the perpetration of one of the capital crimes. Blackstone wrote that –

> In these instances of justifiable homicide, you will observe that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with

> commendation rather than blame. But that is not quite the case in excusable homicide, the very name whereof imports some fault, some error or omission; so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.[18]

In certain cases, a person accused of murder may, according to Blackstone, be entitled to an 'alleviation' which would result in his conviction of manslaughter. The difference between the offence of murder and that of manslaughter is that manslaughter 'arises from the sudden heat of the passions', whilst murder is the result of 'the wickedness of the heart'.[19] Hence, by alleviating the treatment of those accused of homicide who acted in a passionate way and upon provocation, 'the law pays that regard to human frailty, [so] as not to put a hasty and a deliberate act upon the same footing with regard to guilt'.[20] It has to be added that a person killing another by misadventure, that is, in an accidental and therefore 'involuntary' way, would not be excused if his act was unlawful. But he would be convicted of manslaughter rather than murder because in this case, similarly to that of sudden provocation, the killing of another was not premeditated.[21]

The conception of blameworthiness permeating Blackstone's analysis can now be restated. According to that conception, any unjustified killing of a person has to be treated as blameworthy. It could still be excused or, in appropriate cases, alleviated, but none of these concessions to human frailty could render the killing of a person unblameworthy. This explains why the principle '*in dubio pro reo*' was not applied when one of the 'excuses' or 'alleviations' was in issue. This principle was a manifestation of the societal readiness to let ten criminals go free in order to secure that an unblameworthy person would not be convicted.[22] However, the same amount of wrongfully acquitted or leniently misjudged offenders could not be tolerated where these offenders, after being proved to have committed blameworthy acts, relied on either an 'excuse' or 'alleviation'. In such cases, to apply the principle '*in dubio pro reo*' and thus let criminals go unpunished was presumably considered to be socially destructive. It has to be remembered, in addition, that neither 'excuses' nor 'alleviations' were intended to generate conduct-guiding standards and this was yet another possible reason for keeping the amount of mistakenly 'excused' or 'alleviated' criminals to the minimum. But what could possibly explain the deviation from the '*in dubio pro reo*' principle in cases involving 'justifications'?

Blackstone's scheme of defences is reminiscent of the modern distinction between 'excuses' and 'justifications'.[23] However, his analysis of the

impact of that scheme upon the allocation of the risk of non-persuasion in criminal trials appears to be strikingly incoherent. If, as he stated, a person acting in a justified way 'has no share of guilt at all' and is thus no different, from the moral point of view, from an otherwise innocent man, why should such a person carry the risk of error in cases of doubt? Why not treat him in accordance with the general principle of protecting the innocent which was so vividly emphasised by Blackstone? Furthermore, what could have been Blackstone's reason for invoking the distinction between 'justifications', 'excuses' and 'alleviations' in analysing the burden of proof? Did this distinction serve any useful purpose in that context?

Before attempting to answer these questions, it has to be noted that Blackstone's analysis was devoted and presumably restricted to homicide offences. However, this fact alone does not provide a complete solution to the problem of incoherence. Blackstone, following Sir Michael Foster, robustly stated that 'all homicide is presumed to be malicious'.[24] He also emphasised the sanctity of human life which, when taken away by somebody, was presumed to be taken away maliciously.[25] However, this *praesumptio juris tantum* cannot be explained by the mere fact that it was restricted to cases involving homicide. The sanctity of human life *per se* is not yet an answer to the question why 'justifications', 'excuses' and 'alleviations' were to be treated alike in any such cases. Hence, in order to understand Blackstone's evidential approach to justifying conditions, his notion of 'justifiable homicide' needs to be examined more closely.

As was mentioned above, the law at that time could require an execution of a person by virtue of explicit command. In any such case, the homicide was regarded as commendable and therefore justifiable: *quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.* It had, however, to be performed *ex officio* and be formally sanctioned by the judgment of an authorised court.[26] Moreover, the exact terms of the execution of the adjudged criminal had to be strictly complied with. Thus, as Blackstone wrote,

> If an officer beheads one who is adjudged to be hanged, or vice versa, it is murder: for he is merely ministerial, and therefore only justified when he acts under authority and compulsion of the law.[27]

Furthermore, 'if judgment of death be given by a judge not authorised by lawful commission, and execution is done accordingly, the judge is guilty of murder'.[28] Strict compliance with formalities was thus one of the constitutive conditions of a 'justifiable killing'. At that time, the insistence upon formalities, especially in capital cases, was displayed by

the legal system in relation to virtually every item of procedural intricacy, arguably with a view to restricting the extreme severity of punishments.[29] As a result, lawful execution as a 'justifiable killing' could not present any problem of proof. To sustain the justification claim, an official judgment of the court had to be produced. If no such judgment could be shown *with certainty* to have existed at the time of the killing, that killing could not be regarded as 'justified' *as a matter of substantive law*.

All this, however, explains Blackstone's analysis only partially, since in some cases homicide could also be 'justified' by virtue of legal permission rather than command. Blackstone wrote that English law considered the killing taking place in any such case to be 'without any shadow of blame'.[30] Consequently, his treatment of those cases remains problematic insofar as the allocation of the risk of non-persuasion is concerned. Why should a 'justified' person in any of such cases bear an increased risk of erroneous conviction in comparison with any other criminal defendant?

To answer this query, the exact terms of legally 'permissible' and therefore 'justifiable' homicide need to be restated. According to Blackstone, a killing was regarded as 'permissible' only when it was necessitated by the urgent need to repel the force of some capital crime. In cases of killing by virtue of self-defence which was not executed as a resistance to one of the capital crimes, a person charged with unlawful killing could only be 'excused'. What could 'justify' a private application of lethal force by the accused was the atrocious character of the crime repelled by him, such as rape or murder.[31] These two constitutive elements of 'justifiable homicide' – private defence and the resistance to a crime punishable by death – might explain why the accused had to prove the facts supporting that defence. As has already been mentioned, private defence was regarded at that time as a mere 'excuse' which, in itself, was not capable of rendering the act of killing unblameworthy. Hence, the existence of 'excusing' conditions had to be convincingly proved by the accused. What therefore remains to be explained, in order to sustain Blackstone's analysis, is the additional requirement according to which the defendant had to convince the court that he was resisting a capital crime. This requirement can possibly be explained on three grounds, namely, the right to life; the impact of 'justificatory' defences on compensation for killing; and the notion of blameworthiness as it was perceived at that time.

The right to life was zealously protected by the law.[32] Therefore, life could not easily be declared to have been taken away 'justifiably' in cases where justifying circumstances were in doubt. In any such cases, the defendant's deliberations which preceded the killing were deemed to be

somewhat faulty. As a result, although the defendant could be 'excused' for his actions, he could not be 'justified' and fully discharged. As was clarified by Blackstone,

> The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who slays his neighbour without an express warrant from the law to do so, shall in no case be absolutely free from guilt.[33]

Blackstone's analysis should also be linked with the old principle of compensation which infiltrated into criminal proceedings. According to that principle, compensation was payable for all homicides excluding those which could be 'justified'. Consequently, the minutest degree of blame found in a defence executed by the accused was capable of transferring that defence from the category of 'justifications' into the category of 'excuses'. In cases where justifying conditions were in doubt, the right to compensation arising out of homicide could not be held to have been lost. This mixture of primitive tort rules with the rules belonging to the criminal law does not, however, 'eliminate the question of blame as a factor in liability', as, for example, was suggested by Russell.[34] Rather, the blameworthiness of the defendant's actions, as perceived at that time, had affected, amongst other matters, the determination of the right to compensation. Blackstone's analysis must, in addition, be understood in the light of his scheme of moral gradations attributed to human actions. This scheme was based on the idea of free will and the rejection of the idea that voluntary actions which adversely affect others can be considered by the criminal law as morally neutral. Blackstone wrote that –

> the concurrence of the will, when it has its choice either to do or to avoid the fact in question, [is] the only thing that renders human actions *either praiseworthy or culpable*.[35]

According to Blackstone, therefore, it is only an involuntary act that could be regarded as morally neutral, namely as neither blameworthy nor praiseworthy. An act which is voluntary and not merely self-regarding[36] could either be culpable or subject to commendation. A voluntary killing could therefore either be blamed or praised and it could not possibly be praised when it was not convincingly proved to have been a response to some capital crime.

These three reasons may not be altogether convincing, especially when they are looked at through modern lenses. They do not neatly explain away Blackstone's inconsistency, insofar as the allocation of the risk of

error in respect of 'permissible homicide' is concerned. They do, however, show with certainty that the rules allocating that specific risk were treated by Blackstone as *sui generis*. To infer from his analysis of those rules that criminal defendants were to carry the risk of error in respect of *every* defensive issue would therefore be unwarranted.

To sum up, the apparent inconsistencies which can be found in Blackstone's analysis can be explained away by the old perception of criminal culpability in homicide cases. This perception had its impact upon the allocation of the risk of non-persuasion. Looked at through modern lenses, this perception appears as flawed and incoherent, but if one disregards its contemporary moral essence, the following picture would emerge:

> (1) All the facts upon which the blameworthiness of the accused was to be founded had to be established by the prosecution beyond any reasonable doubt;
> (2) Any defence, such as an 'excuse' or 'alleviation', which, not bearing on the accused's blameworthiness, was granted to him as a matter of concession to human frailty, had to be convincingly proved by the accused;
> (3) The principle of protecting the innocent was to apply only to the first category of issues; that is, it protected only those who claimed to be entirely innocent, rather than those pleading for an 'excuse' or 'alleviation' after being proved beyond all reasonable doubt to have acted in a blameworthy fashion;
> (4) Exceptionally, although 'permissible' homicide did not belong to the category of 'excuses', facts capable of rendering an act of homicide 'permissible' were to be established by the accused.

Not everyone would accept this scheme of evidentiary principles, but it certainly cannot be regarded as manifestly immoral, arbitrary or incoherent.[37]

IV. WOOLMINGTON'S CASE: REVOLUTION OR EVOLUTION?

In the light of this understanding of the old law as reflected by Blackstone's analysis, an answer to the question 'Did the Law Lords in *Woolmington* create a new law?' would hinge upon one's perception of law and legal reasoning. In Blackstone's time, the instructions administered to the jury by Swift J. were to be regarded as appropriate, but the jury in *Woolmington* was to deliver its verdict in a different historical period. It is true that no authoritative changes had been implemented into the evidentiary doctrine between these two points in time, but the substantive

law of crime in 1935 was not at all similar to that dealt with by Blackstone and his contemporaries. The substantive law of crime, as it stood in 1935, had already undergone most of the reforms which epitomised its deep moral reorientation towards more comprehensive rules of liability. It had become more liberal in the sense that its conception of 'justification' had become associated more closely with the social tolerableness – rather than commendation or praiseworthiness – of the private conduct. The liberal notion of tolerableness had marked the domain of distinctively private morality, the domain which could no longer be easily allowed to be trespassed by the state. Criminal law, taken as the state's most formidable instrument of coercion, had thus become more restricted in its scope. As a result, the range of issues categorised as 'extrinsic' to blameworthiness had been substantially narrowed and many defences, especially those resting upon lack of *mens rea*, mistake of fact and self-preservation, had become recognised as ones which render the defendant's actions unblameworthy. A rather more complex framework of moral gradations had also emerged, discriminating between different kinds of criminal conduct in accordance with the varying degrees of their social intolerableness.[38]

These profound changes in the moral and political core of the law of crime can, perhaps, best explain Viscount Sankey LC's statement that –

> malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked ... It is not the law of England to say, as was said in the summing-up in the present case: 'if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances ... which alleviate the crime ... or which excuse the homicide altogether'.[39]

This statement, although not as celebrated as that concerning the 'golden thread', is one of major significance. It marks out the issues which are *now* to be regarded as intrinsic to criminal blameworthiness and have therefore to be proved by the prosecution beyond any reasonable doubt.[40] As such, it is importantly related to the scheme of evidentiary principles discernible from Blackstone's analysis. This scheme of risk-allocation had not been replaced in *Woolmington* by another scheme which had been tailored afresh for that and future cases. Rather, it had been *applied* in a way that at least implicitly accounted for the *contemporary* meaning of blameworthiness.

Looked at from this angle, *Woolmington*'s case can serve as a remarkable example of legal hermeneutics, that is, as a decision involving an active dialectic encounter with a legal doctrine aimed at ascertaining its

contemporary significance. This kind of mediation between legal past and legal present, which can be described metaphorically as a 'fusion of horizons', is in order when one's aim is to apply an old legal doctrine to one's present situation.[41] Thus, there was nothing in the doctrine under consideration which ordained that it ought to be applied irrespective of all the changes which took place over the years in the notion of blameworthiness. On the contrary, past judicial applications of that doctrine, as reflected by Blackstone's analysis, were all heavily reliant upon the conventionally prevalent meaning of that notion, which has always been historically situated and in this sense contingent. Since both Blackstone (standing as a reliable authority for past decisions at common law) and the Law Lords in *Woolmington* were situated at entirely different historical points in time, it should not come as a surprise that the meanings ascribed by them to the same legal doctrine were not similar. At the same time, both old authorities and the Law Lords in *Woolmington* operated within the doctrine and not outside of it. Both of them applied those 'standards and practices that have been hammered out in the course of history' and endorsed the concept of 'legal truth' that amounts to what can be argumentatively validated by 'the community of interpreters who open themselves to what tradition "says to us"' *at the time of its application.*[42]

Acceptance of this view of legal evolution would exclude the notion of 'superior legislative intent' which determines for all times all future applications of legal rules and doctrines. Even if such an intent were empirically ascertainable, there would be no guarantee that it was meant to be 'timeless', that is, to apply irrespective of any changes in socio-political conditions and outlooks emerging thereafter. At the same time, legal rules and doctrines laid down in the past should not be disregarded altogether. So long as they remain in force, their contemporary significance would still have authoritative power. As such, it would bind judges and other legal decision-makers. Their task would be to ascertain the contemporary significance of legal rules and doctrines. This would entail, *inter alia*, the search for general moral principles which underlaid legal rules and doctrines in the past and the attribution of contemporary moral meanings to the ideas expressed by those principles. This task is, admittedly, rather complex, and fair-minded people may not always agree as to how it ought to be performed in various cases. The possibility of such interpretive disagreements does not, however, imply that to undertake this task would always amount to embarking upon a utopian project.[43]

The implausibility of the objectivist 'plain fact' vision of law is therefore not a good premise for reaching radically subjectivist conclusions in relation to legal reasoning. To draw such conclusions would ignore the kind of legal reasoning that goes beyond both objectivism and subjectivism.

This kind of reasoning rests upon a belief that mediation between past authoritative decisions and present conditions is, in principle, possible and that this mediation is attainable through the interpretive process within which:

> the judge does not simply 'apply' fixed, determinate laws to particular situations. Rather, the judge must interpret and appropriate precedents and law to each new, particular situation. It is by virtue of such considered judgment that the meaning of the law and the meaning of the particular case are codetermined.[44]

From this perspective, the Law Lords in *Woolmington* were actually ***bound*** to decide as they did. To have decided otherwise would have amounted to disregarding the moral tenets of criminal responsibility as accepted in their own time.[45]

NOTES

1. T. Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change*, Chicago, 1977, p. xii.
2. For its discussion see R. Bernstein, *Beyond Objectivism and Relativism*, Oxford, 1983, pp. 31; 132.
3. This distinction was first analytically set out in J. B. Thayer, 'The Burdens of Proof', (1890–91) 4 *Harvard Law Review* 45.
4. See W. Blackstone, *Commentaries on the Laws of England*, Beacon Press, Boston, 1962, book IV, ch. 14.
5. Blackstone, *352. For the history of this requirement see T. Waldman, Origins of the Legal Doctrine of Reasonable Doubt, (1959) 20 *Journal of the History of Ideas* 299; B. Shapiro, ' "To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600–1850', (1986) 38 *Hastings Law Journal* 153.
6. Blackstone, *201.
7. G. Fletcher, 'Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases', (1968) 77 *Yale Law Journal* 880, 899–907.
8. [1935] AC 462.
9. [1935] AC at pp. 481–2.
10. Fletcher, supra n. 7, at p. 903; J. C. Smith, 'The Presumption of Innocence', (1987) 38 *Northern Ireland Legal Quarterly* 223.
11. First, if an accused relies on the defence of insanity he has to prove it. Second, in a number of cases the burden of persuasion is specifically imposed on the accused by statutory rules. According to the third exception, it is for the accused to prove any 'exception, exemption, proviso, excuse or qualification' to a statutory offence. See R. Cross and C. Tapper, *On Evidence*, 7th edn, London, 1990, pp. 133–43.
12. Fletcher, at p. 903.
13. As Zuckerman wrote concerning Sankey LC's statement,

    > If Viscount Sankey LC had resisted the poetic urge, held back his felicitous phrases and had not made an historical statement, the substance of his conclusion would have been much less vulnerable and much trouble would have been saved.

    A. Zuckerman, 'No Third Exception to the Woolmington Rule', (1987) 103 *Law Quarterly Review* 170, 170–71.

14. To sustain the normative argument that this, indeed, should be the law is beyond the limits of this paper. See A. Stein, 'Criminal Defences and the Burden of Proof', (1991) 28 *Coexistence* 133.

    The proposition that the decision in *Woolmington* was a move towards endorsing the principles stated in the text should not be taken as suggesting that no room has been left for deviations from those principles. For examples and critique of such deviations see Stein, id, at pp. 140ff. See also A. Stein, 'After *Hunt*: The Burden of Proof, Risk of Non-Persuasion and Judicial Pragmatism', (1991) 54 *Modern Law Review* 570.
15. Blackstone, *177.
16. Ibid., *178–81.
17. Ibid, *182; *186.
18. Ibid., *182.
19. Ibid., *190.
20. Ibid., *191.
21. Ibid., *191–93.
22. Ibid., *352.
23. The main sources expressing diverging views about this distinction are listed in Stein, 28 *Coexistence* 133, 144–45, nn. 19–21.
24. Blackstone, *201.
25. 'the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law.' Blackstone, *186.
26. Blackstone, *178–79.
27. Ibid.
28. Ibid.
29. See L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, London, 1948, vol. 1, pp. 98–103.
30. Blackstone, *178.
31. Ibid., *180–82.
32. Ibid., *186. For Blackstone's discussion of the right to life see book I, *125–30.
33. Blackstone, *187.
34. J. W. C. Turner, *Russell On Crime*, 12th edn, London, 1964, vol. 1, pp. 20 et seq.; 436.
35. Ibid., at pp. 20–21.
36. It has to be mentioned in this connection that suicide was not considered by Blackstone as merely self-regarding. See Blackstone, *189–90.
37. Blackstone's scheme of evidentiary principles, as founded upon his distinction between 'justifications', 'excuses' and 'alleviations', had not, of course, mirrored the law with mathematical exactitude, and it is not argued that deviations from that scheme had never taken place. *Cf.* M. Hale, *The History of the Pleas of the Crown*, 1st American Edition, Philadelphia, 1847, vol. 1, pp. 478–92.
38. This ideological transformation is depicted in L. Radzinowicz, *Ideology and Crime*, London, 1966, ch. 1. See also Fletcher.
39. [1935] AC at p. 482.
40. This point seems to be confirmed by judicial decisions delivered after *Woolmington*. See, e.g., *Mancini v. DPP* [1942] AC 1 (the defence of provocation in cases of murder has to be refuted by the prosecution beyond any reasonable doubt) and *Chan Kau v. The Queen* [1955] AC 206 (the same principle applies to self-defence).
41. See Bernstein at pp. 149–50. Practical application of existing legal doctrine as a critical encounter with the legal tradition which involves deliberation and choice is one of the central tenets of the hermeneutical approach to legal reasoning. According to that approach, tradition and application are both integrated in a single process of legal understanding:

    > The interpreter dealing with a traditional text seeks to apply it to himself. But this does not mean that the text is given for him as something universal, that he understands it as such and only afterwards uses it for particular applications. Rather, the interpreter seeks no more than to understand ... what this piece of tradition says, what constitutes the meaning and importance of the text. In order to understand that, he must not seek to disregard himself and his particular hermeneutical situation. He must relate the text to this situation, if he wants to understand at all.

    H. G. Gadamer, *Truth and Method*, London, 1975, p. 289.

    For a general discussion see B. Sherman, 'Hermeneutics in Law', (1988) 51 *M.L.R.* 386; W. N. Eskridge Jr, 'Gadamer / Statutory Interpretation', (1990) 90 *Columbia Law Review* 609.
42. Bernstein at p. 154.
43. *Cf.* R. Dworkin, *Law's Empire*, London, 1986, ch. 2.
44. Bernstein, at pp. 147–8.
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