A N E S S A O N CRIMES AND **PUNISHMENTS**, Translated from the ITALIAN; WITH A COMMENTARY, Attributed to Monf. DE VOLTAIRE. Translated from the French.

In rebus quibuscumque difficilioribus non expectandum, ut quis fimul, & serat, & metat, fed præparatione opus eft, ut per gradus maturescant.

BACON.

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PREFACE

OF THE

TRANSLATOR.

PENAL LAWS, fo confiderable a part of every fyftem of legiflation, and of fo great importance to the happinefs, peace and fecurity of every member of fociety, are ftill fo imperfect, and are attended with fo many unneceffary circumftances of cruelty in all nations, that an attempt to reduce them to the ftandard of reafon muft be interefting to all mankind. It is not furprifing, then, that this little iv PREFACE of the TRANSLATOR.

tle book hath engaged the attention of all ranks of people in every part of Europe. It is now about eighteen months fince the firft publication; in which time it hath paffed no lefs than fix editions in the original language; the third of which was printed within fix months after its firft appearance. It hath been tranflated into French; that tranflation hath alfo been feveral times reprinted, and perhaps no book, on any fubject, was ever received with more avidity, more generally read, or more univerfally applauded.

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THE author is the *Marquis* BEC-CARIA, of *Milan*. Upon confidering the nature of the religion and government under which he lives, the reafons for concealing his name are obvious, FREFACE of the TRANSLATOR. V

obvious. The whole was read, at different times, in a fociety of learned men in that city, and was publifhed at their defire. As to the tranflation, I have preferved the order of the original, except in a paragraph or two, which I have taken the liberty to reftore to the chapters to which they evidently belong, and from which they must have been accidentally detached. The French translator hath gone much farther; he hath not only transposed every chapter, but every paragraph in the whole book. But in this, I conceive, he hath affumed a right which belongs not to any translator, and which cannot be juftified. His difposition may appear more system. atical, but certainly the author hath as undoubted a right to the arrange. ment

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ment of his own ideas, as to the ideas themfelves; and therefore to deftroy that arrangement, is to pervert his meaning, if he had any meaning in his plan, the contrary to which can hardly be fuppofed,

WITH regard to the commentary, attributed to Monf. de Voltaire, my only authority for fuppofing it his, is the voice of the public, which indeed is the only authority we have for most of his works. Let those who are acquainted with the peculiarity of his manner judge for themselves,

THE facts abovementioned would preclude all apology for this translation, if any apology were neceffary, for translating into our language,

PREFACE of the TRANSLATOR. VII guage, a work which from the nature of the fubject must be interesting to every nation; but must be particularly acceptable to the English from the eloquent and forcible manner in which the author pleads the cause of liberty, benevolence and humanity. It may however be objected, that a treatife of this kind is useles in England, where from the excellence of our laws and government, no examples of cruelty or oppression are to be found. But it must also be allowed that much is still wanting to perfect our fystem of legislation : the confinement of debtors, the filth and horror of our prifons, the cruelty of jailors and the extortion of the petty officers of justice, to all which may be added the melancholy

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choly reflection, that the number of criminals put to death in England is much greater than in any other part of Europe, are confiderations which will fufficiently anfwer every objection. These are my only reafons for endeavouring to diffuse the knowledge of the uleful truths contained in this little effay; and I fay, with my author, that if I can be inftrumental in refcuing a fingle victim from the hands of tyranny or ignorance, his transports will fufficiently confole me for the contempt of all mankind.

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IN IRODUCTION.

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INTRODUCTION.

I N every human fociety, there is an effort continually tending to confer on one part the height of power and happinefs, and to reduce the other to the extreme of weakness, and misery. The intent of good laws is to oppose this effort, and to diffuse their influence. univerfally, and equally. But men generally abandon the care of their most important concerns to the uncertain prudence, and discretion of those, whose interest it is to reject the best, and wifest inftitutions; and it is not till they have been led into a thousand mistakes in matters, the most effential to their lives and liberties, and are weary of fuffering, that they can be induced to apply a remedy to the evils, with which they are oppreffed. It is then they begin to conceive, and acknowledge the most palpable truths, which. В

which, from their very fimplicity, commonly escape vulgar minds, incapable of analyfing objects, accustomed to receive impressions without distinction, and to be determined rather by the opinions of others, than by the result of their own examination.

IF we look into hiftory we shall find, that laws, which are, or ought to be, conventions between men in a flate of freedom, have been, for the most part, the work of the paffions of a few, or the confequences of a fortuitous, or temporary neceffity; not dictated by a cool examiner of human nature, who knew how to collect in one point, the actions of a multititude, and had this only end in view, the greatest happiness of the greatest number. Happy are those few nations, who have not waited, till the flow fucceffion of human vicifitudes, should, from the extremity of evil, produce a transition to good; but, by prudent laws, have facilitated the progress from one to the other! And how great are the obligations due

INTRODUCTION.

due from mankind to that philosopher, who from the obscurity of his close?, had the courage to scatter amongs? the multitude, the seeds of useful truths, so long unfruitful!

THE art of printing has diffused the knowledge of those philosophical truths, by which the relations between fovereigns and their fubjects, and between nations, are difcovered. By this knowledge, commerce is animated, and there has fprung up a spirit of emulation, and industry, worthy of rational beings. Thefe are the produce of this enlightened age; but the cruelty of punishments, and the irregularity of proceedings in criminal cafes, fo principal a part of the legiflation, and fo much neglected throughout Europe, has hardly ever been called in queftion. Errors, accumulated through many centuries, have never yet been exposed by afcending to general principles; nor has the force of acknowledged truths been ever opposed to the unbounded licentiousness of ill-directed power, which has conti-B 2 nually

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INTRODUCTION.

nually produced fo many authorized examples of the moft unfeeling barbarity. Surely, the groans of the weak, facrificed to the cruel ignorance, and indolence of the powerful; the barbarous torments lavifhed, and multiplied with ufelefs feverity, for crimes either not proved, or in their nature impoffible; the filth, and horrors of a prifon, increafed by the moft cruel tormentor of the miferable, uncertainty, ought to have roufed the attention of thofe, whofe bufinefs is to direct the opinions of mankind.

THE immortal *Montefquieu* has but flightly touched on this fubject. Truth, which is eternally the fame, has obliged me to follow the fteps of that great man; but the ftudious part of mankind, for whom I write, will eafily diftinguish the fuperstructure from the foundation. I shall be happy, if, with him, I can obtain the fecret thanks of the obscure, and peaceful disciples of reason, and philosophy, and excite that tender emotion, in which fensible minds fympathize with him, who pleads the cause of humanity. A N



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CRIMES and **PUNISHMENTS**.

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CHAP. I.

Of the Origin of Punishments.



* AWS are the conditions, under which men, naturally independent, united themfelves in fociety. Weary of living in a continual state of war, and of enjoying a

liberty, which became of little value, from the uncertainty of its duration, they facrificed one part of it, to enjoy the rest in peace and fecurity. The fum of all thefe Bz

these portions of the liberty of each individual conftituted the fovereignty of a nation; and was deposited in the hands of the fovereign, as the lawful administrator. But it was not fufficient only to eftablish this deposite; it was also necessary to defend it from the usurpation of each individual, who will always endeavour to take away from the mass, not only his own portion, but to encroach on that of others. Some motives, therefore, that strike the fenses, were necessary, to prevent the defpotifm of each individual from plunging fociety into its former chaos. Such motives are the punishments established against the infractors of the laws. I fay, that motives of this kind are necessary; because, shews, that the multitude experience adopt no established principle of conduct; and because, fociety is prevented from approaching to that diffolution, (to which, as well as all other parts of the physical, and moral world, it naturally tends) only by motives, that are the immediate objects of fense, and which being continually prefented to the mind, are fufficient to counterbalance

CRIMES and PUNISHMENTS.

terbalance the effects of the paffions of the individual, which oppose the general good. Neither the power of eloquence, nor the sublimest truths, are sufficient to restrain, for any length of time, those passions, which are excited by the lively impression of present objects.

CHAP, II.

Of the Right to punish.

EVERY punifhment, which does not arife from abfolute neceffity, fays the great *Montefquieu*, is tyrannical. A proposition which may be made more general, thus. Every act of authority of one man over another, for which there is not an abfolute neceffity, is tyrannical. It is upon this then, that the fovereign's right to punish crimes is founded; that is, upon the neceffity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preferved by the fovereign, is facred and valuable.

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An Essay on

LET us confult the human heart, and there we shall find the foundation of the fovereign's right to punish; for no advantage in moral policy can be lasting, which is not founded on the indelible fentiments of the heart of man. Whatever law deviates from this principle will always meet with a resistance, which will destroy it in the end; for the smalless force, continually applied, will overcome the most violent motion communicated to bodies.

No man ever gave up his liberty, merely for the good of the public. Such a chimera exifts only in romances. Every individual wifnes, if poffible, to be exempt from the compacts, that bind the reft of mankind.

THE multiplication of mankind, though flow, being too great for the means, which the earth, in its natural flate, offered to fatisfy neceffities, which every day became more numerous, obliged men to feparate again, and form new focieties. Thefe CRIMES and PUNISHMENTS. 9 These naturally opposed the first, and a state of war was transferred from individuals to nations.

THUS it was neceffity, that forced men to give up a part of their liberty; it is certain then, that every individual would chufe to put into the public flock the fmalleft portion poffible; as much only as was fufficient to engage others to defend it. The aggregate of thefe, the fmalleft portions poffible, forms the right of punifhing: all that extends beyond this is abufe, not juffice.

OBSERVE, that by *juffice* I underftand nothing more, than that bond, which is neceffary to keep the intereft of individuals united; without which, men would return to their original ftate of barbarity. All punishments, which exceed the neceffity of preferving this bond, are in their nature unjust. We should be cautious how we affociate with the word *juftice*, an idea of any thing real, such as a physical power, or a being that actually exists. TO.

ifts. I do not, by any means, fpeak of the justice of God, which is of another kind, and refers immediately to rewards and punishments in a life to come.

CHAP. III.

Confequences of the foregoing Principles.

THE laws only can determine the punishment of crimes; and the authority of making penal laws can only refide with the legiflator, who reprefents the whole fociety, united by the focial compact. No magistrate then, (as he is one of the fociety) can, with justice, inflict on any other member of the fame fociety, punishment, that is not ordained by the laws. But as a punishment, increased beyond the degree fixed by the law, is the just punishment, with the addition of another; it follows, that no magistrate, even under a pretence of zeal, or the public good, should increase the punishment already determined by the laws.

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IF every individual be bound to fociety, fociety is equally bound to him, by a contract, which from its nature, equally binds both parties. This obligation, which defcends from the throne to the cottage, and equally binds the higheft, and loweft of mankind, fignifies nothing more, than that it is the intereft of all, that conventions, which are ufeful to the greateft number, fhould be punctually obferved. The violation of this compact by any individual, is an introduction to anarchy.

THE fovereign, who reprefents the fociety itfelf, can only make general laws, to bind the members; but it belongs not to him to judge whether any individual has violated the focial compact, or incurred the punifhment in confequence. For in this cafe, there are two parties, one reprefented by the fovereign, who infifts upon the violation of the contract, and the other is the perfon accufed, who denies it. It is neceffary then that there fhould be be a third perfon to decide this contest; that is to fay, a judge, or magistrate, from whose determination there should be no appeal; and this determination should confiss of a simple affirmation, or negation of fact.

IF it can only be proved, that the feverity of punifhments, though not immediately contrary to the public good, or to the end for which they were intended, viz. to prevent crimes, be ufelefs; then fuch feverity would be contrary to those beneficent virtues, which are the consequence of enlightened reason, which instructs the fovereign to wish rather to govern men in a state of freedom and happiness, than of flavery. It would also be contrary to justice, and the focial compact.

CHAP.

CHAP. IV.

Of the Interpretation of Laws.

JUDGES, in criminal cafes, have no right to interpret the penal laws, because they are not legislators. They have not received the laws from our anceftors as a domeftic tradition, or as the will of a testator, which his heirs, and executors, are to obey; but they receive them from a fociety actually exifting, or from the fovereign, its reprefentative. Even the authority of the laws is not founded on any pretended obligation, or ancient convention; which muft be null, as it cannot bind those who did not exift at the time of its inftitution : and unjust, as it would reduce men, in the ages following, to a herd of brutes, without any power of judging, or acting. The laws receive their force, and authority from an oath of fidelity, either tacit, or expressed, which living subjects have fworn to their fovereign, in order to restrain the intestine fermentation of

of the private interests of individuals. From hence springs their true and natural authority. Who then is their lawful interpreter? The sovereign, that is, the representative of society, and not the judge, whose office is only to examine, if a man have, or have not committed an action contrary to the laws.

In every criminal caufe the judge fhould reafon fyllogiftically. The major fhould be the general law; the minor, the conformity of the action, or its opposition to the laws; the conclusion, liberty, or punishment. If the judge be obliged by the imperfection of the laws, or chuses, to make any other, or more fyllogisms than this, it will be an introduction to uncertainty.

THERE is nothing more dangerous than the common axiom : the fpirit of the laws is to be confidered. To adopt it is to give way to the torrent of opinions. This may feem a paradox to vulgar minds, which are more ftrongly affected by the fmalleft dif-

CRIMES and PUNISHMENTS. 15 diforder before their eyes, than by the most pernicious, though remote, confequences produced by one false principle adopted by a nation.

Our knowledge is in proportion to the number of our ideas. The more complex these are, the greater is the variety of positions, in which they may be confidered. Every man hath his own particular point of view, and at different times, fees the fame objects in very different lights. The fpirit of the laws will then be the refult of the good, or bad logic of the judge; and this will depend on his good or bad digestion; on the violence of his passions; on the rank, and condition of the accufed, or on his connections with the judge; and on all those little circumstances, which change the appearance of objects in the fluctuating mind of man. Hence we fee the fate of a delinquent changed many times in passing through the different courts of judicature, and his life and liberty, victims to the falle ideas, or ill humour of the judge; who miftakes the vague refult of his own confused reasoning.

reafoning, for the just interpretation of the laws. We fee the fame crimes punished in a different manner at different times in the fame tribunals; the confequence of not having confulted the constant, and invariable voice of the laws, but the erring instability of arbitrary interpretation.

THE diforders, that may arife from a rigorous observance of the letter of penal laws, are not to be compared with those produced by the interpretation of them. The first are temporary inconveniences which will oblige the legiflator to correct the letter of the law, the want of precifeness, and uncertainty of which has occafioned these diforders; and this will put a ftop to the fatal liberty of explaining; the fource of arbitrary and venal declamations. When the code of laws is once fixed, it fhould be observed in the literal fense, and nothing more is left to the judge, than to determine, whether an action be, or be not conformable to the written law. When the rule of right which ought to direct the actions

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CRIMES and PUNISHMENTS. 17 tions of the philosopher, as well as the ignorant, is a matter of controvers, not of fact, the people are flaves to the magistrates. The despotiss of this multitude of tyrants is more insupportable, the less the distance is between the oppressor and the oppressed; more fatal than that of one, for the tyranny of many is not to be shaken off, but by having recourse to that of one alone. It is more cruel, as it meets with more opposition, and the cruelty of a tyrant is not in proportion to his strength, but to the obstacles that oppose him.

THESE are the means, by which fecurity of perfon and property is beft obtained; which is juft, as it is the purpofe of uniting in fociety; and it is ufeful, as each perfon may calculate exactly the inconveniences attending every crime. By thefe means, fubjects will acquire a fpirit of independance and liberty; however it may appear to thofe, who dare to call the weaknefs of fubmitting blindly to their capricious and interefted opinions, by the facred name of virtue.

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THESE principles will difpleafe those, who have made it a rule with themselves, to transmit to their inferiors the tyranny they suffer from their superiors. I should have every thing to sear, if tyrants were to read my book; but tyrants never read.

CHAP. V.

Of the Obscurity of Laws.

IF the power of interpreting laws be an evil, obscurity in them must be another, as the former is the confequence of the latter. This evil will be still greater, if the laws be written in a language unknown to the people; who, being ignorant of the confequences of their own actions, become necessarily dependent on a few, who are interpreters of the laws, which, instead of being public, and general, are thus rendered private, and particular. What must we think of mankind, when we reflect, that fuch is the established cuftom of the greatest part of our polished, and enlighten'd Europe? Crimes will be lefs

CRIMES and PUNISHMENTS. 19 lefs frequent, in proportion as the code of laws is more univerfally read, and underftood; for there is no doubt, but that the eloquence of the paffions is greatly affifted by the ignorance, and uncertainty of punifhments.

HENCE it follows, that without written laws, no fociety will ever acquire a fixed form of government, in which the power is vefted in the whole, and not in any part of the fociety; and in which, the laws are not to be altered, but by the will of the whole, nor corrupted by the force of private intereft. Experience and reafon fhew us, that the probability of human traditions diminishes in proportion as they are distant from their fources. How then can laws refist the inevitable force of time, if there be not a lasting monument of the focial compact?

HENCE, we fee the use of printing, which alone makes the public, and not a few individuals, the guardians and defenders of the laws. It is this art, which, C 2 by

by diffusing literature, has gradually diffipated the gloomy fpirit of cabal and intrigue. To this art it is owing, that the atrocious crimes of our anceftors, who were alternately flaves, and tyrants, are become lefs frequent. Those who are acquainted with the hiftory of the two or three last centuries, may observe, how from the lap of luxury and effeminacy, have fprung the most tender virtues, humanity, benevolence, and toleration of human errors. They may contemplate the effects of, what was fo improperly called, ancient fimplicity, and good faith; humanity groaning under implacable fuperstition; the avarice and ambition of a few, staining, with human blood, the thrones and palaces of kings; fecret treafons, and public maffacres; every noble a tyrant over the people; and the ministers of the gospel of Christ, bathing their hands in blood, in the name of the God of all mercy. We may talk as we pleafe of the corruption and degeneracy of the prefent age, but happily we fee no fuch

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CRIMES and PUNISHMENTS. 21 fuch horrid examples of cruelty and oppreffion.

CHAP. VI.

Of the Proportion between Crimes and Punishments.

It is not only the common interest of mankind, that crimes should not be committed, but that crimes of every kind should be less frequent, in proportion to the evil they produce to society. Therefore, the means made use of by the legislature to prevent crimes, should be more powerful, in proportion as they are destructive of the public safety and happiness, and as the inducements to commit them are stronger. Therefore there ought to be a fixed proportion between crimes and punishments.

It is impoffible to prevent entirely all the diforders which the paffions of mankind caufe in fociety. These diforders increase in proportion to the number of people, and the opposition of private interests. If C_3 we we confult hiftory, we shall find them increasing, in every state, with the extent of dominion. In political arithmetic, it is neceffary to fubstitute a calculation of probabilities, to mathematical exactness. That force, which continually impels us to our own private interest, like gravity, acts inceffantly, unless it meets with an obstacle to oppose it. The effects of this force are the confused series of human actions. Punishments, which I would call political obstacles, prevent the fatal effects of private intereft, without destroying the impelling cause, which is that sensibility infeparable from man. The legislator acts, in this cafe, like a skilful architect. who endeavours to counteract the force of gravity by combining the circumstances which may contribute to the ftrength of his edifice.

THE neceffity of uniting in fociety being granted, together with the conventions, which the opposite interests of individuals must necessarily require, a scale of crimes may be formed, of which the first

CRIMES and PUNISHMENTS. 22 first degree should confist of those, which immediately tend to the diffolution of fociety, and the laft, of the fmalleft poffible injustice done to a private member of that fociety. Between these extremes will be comprehended, all actions contrary to the public good, which are called criminal, and which defcend by infenfible degrees. decreasing from the highest to the lowest. If mathematical calculation could be applied to the obscure and infinite combinations of human actions, there might be a corresponding scale of punishments, defcending from the greatest to the least : but it will be fufficient that the wife legiflator mark the principal divisions, without difturbing the order, left to crimes of the first degree, be assigned punishments of the last. If there were an exact and univerfal fcale of crimes and punishments. we should there have a common measure of the degree of liberty and flavery, humanity and cruelty of different nations.

ANY action, which is not comprehended in the above-mentioned fcale, will C 4 not not be called a crime, or punished as such, except by those who have an interest in the denomination. The uncertainty of the extreme points of this scale, hath produced a system of morality which contradicts the laws; a multitude of laws that contradict each other; and many, which expose the best men to the severest punishments, rendering the ideas of vice and virtue vague, and fluctuating, and even their existence doubtful. Hence that fatal lethargy of political bodies, which terminates in their destruction.

WHOEVER reads, with a philofophic eye, the hiftory of nations, and their laws, will generally find, that the ideas of virtue and vice, of a good or a bad citizen, change with the revolution of ages; not in proportion to the alteration of circumftances, and confequently conformable to the common good; but in proportion to the paffions and errors by which the different law-givers were fucceffively influenced. He will frequently obferve, that the paffions and vices of one age, are
CRIMES and PUNISHMENTS. 25

are the foundation of the morality of the following; that violent paffion, the offfpring of fanatifcifm and enthuliafm, being weakened by time, which reduces all the phenomena of the natural and moral world to an equality, become, by degrees. the prudence of the age, and an useful inftrument in the hands of the powerful, or artful politician. Hence the uncertainty of our notions of honour and virtue; an uncertainty which will ever remain, because they change with the revolutions of time, and names furvive the things they originally fignified; they change with the boundaries of states, which are often the fame both in physical and moral geography.

PLEASURE and pain are the only fprings of action in beings endowed with fenfibility. Even amongft the motives which incite men to acts of religion, the invifible legiflator has ordained rewards and punifhments. From a partial diftribution of thefe, will arife that contradiction, fo little obferved, becaufe fo common, mon; I mean, that of punishing by the laws, the crimes which the laws have occasioned. If an equal punishment be ordained for two crimes that injure society in different degrees, there is nothing to deter men from committing the greater, as often as it is attended with greater advantage.

CHAP. VII.

Of estimating the Degree of Crimes.

THE foregoing reflections authorife me to affert, that crimes are only to be meafured by the injury done to fociety.

THEY err, therefore, who imagine that a crime is greater, or lefs, according to the intention of the perfon by whom it is committed; for this will depend on the actual imprefion of objects on the fenfes, and on the previous difpofition of the mind; both which will vary in different perfons, and even in the fame perfon at different times, according to the fucceffion of ideas, paffions, and circumftances. Upon

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CRIMES and PUNISHMENTS. 27 Upon that fystem, it would be neceffary to form, not only a particular code for every individual, but a new penal law for every crime. Men, often with the best intention, do the greatest injury to fociety, and with the worst, do it the most effential fervices.

OTHERS have estimated crimes rather by the dignity of the person offended, than by their consequences to society. If this were the true standard, the smalless irreverence to the divine Being ought to be punished with infinitely more severity, than the affassimation of a monarch.

IN short, others have imagined, that the greatness of the fin should aggravate the crime. But the fallacy of this opinion will appear on the slightest consideration of the relations between man and man, and between God and man. The relations between man and man, are relations of equality. Necessity alone hath produced, from the opposition of private palfions and interests, the idea of public utility,

utility, which is the foundation of human justice. The other are relations of dependance, between an imperfect creature and his creator, the most perfect of beings, who has referved to himfelf the fole right of being both lawgiver, and judge; for he alone can, without injuftice, be, at the fame time, both one and the other. If he hath decreed eternal punishments for those who disobey his will, shall an infect dare to put himself in the place of divine juffice, or pretend to punish for the Almighty, who is himself all-fufficient; who cannot receive impreffions of pleafure, or pain, and who alone, of all other beings, acts without being acted upon? The degree of fin depends on the malignity of the heart, which is impenetrable to finite beings. How then can the degree of fin ferve as a standard to determine the degree of crimes? If that were admitted, men may punish when God pardons, and pardon when God condemns; and thus act in opposition to the fupreme Being.

CHAP.

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CHAP. VIII.

Of the division of Crimes.

WE have proved, then, that crimes are to be estimated by the injury done to fociety. This is one of those palpable truths, which, though evident to the meaneft capacity, yet, by a combination of circumftances, are only known to a few thinking men in every nation, and in every age. But opinions, worthy only of the defpotifin of Afia, and paffions, armed with power and authority, have, generally by infenfible and fometimes by violent impreffions on the timid credulity of men, effaced those fimple ideas, which perhaps conftituted the first philosophy of infant fociety. Happily the philosophy of the prefent enlightened age feems again to conduct us to the fame principles, and with that degree of certainty, which is obtained by a rational examination, and repeated experience,

adherence to order A SCRUPHLOUS would require, that we should now examine, and diftinguish the different species of crimes, and the modes of punishment; but they are fo variable in their nature, from the different circumstances of ages, and countries, that the detail would be tirefome, and endlefs. It will be fufficient for my purpole, to point out the most general principles, and the most common and dangerous errors, in order to undeceive, as well those, who, from a mistaken zeal for liberty, would introduce anarchy and confusion, as those, who pretend to reduce fociety in general to the regularity of a convent.

Some crimes are immediately deftructive of fociety, or its reprefentative; others attack the private fecurity of the life, property, or honour of individuals; and a third clafs confifts of fuch actions as are contrary to the laws which relate to the general good of the community.

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THE first, which are of the highest degree, as they are most destructive to fociety, are called crimes of Leze-majesty.* Tyranny, and ignorance, which have confounded the clearest terms and ideas, have given this appellation to crimes of a different nature, and confequently have eftablished the fame punishment for each ; and on this occasion, as on a thousand others, men have been facrificed, victims to a word. Every crime, even of the most private nature, injures society; but every crime does not threaten its, immediate destruction. Moral, as well as phyfical actions, have their fphere of activity differently circumscribed, like all the movements of nature, by time and fpace; it is therefore a fophiftical interpretation, the common philosophy of flaves, that would confound the limits of things, eftablifhed by eternal truth.

To these fucceed crimes which are destructive of the security of individuals. This security being the principal end of all * High-treason. all fociety, and to which every citizen hath an undoubted right, it becomes indifpenfably neceffary, that to these crimes the greatest of punishments should be affigned.

THE opinion, that every member of fociety has a right to do any thing, that is not contrary to the laws, without fearing any other inconveniences, than those which are the natural confequences of the action itfelf, is a political dogma, which should be defended by the laws, inculcated by the magistrates, and believed by the people; a facred dogma, without which there can be no lawful fociety; a just recompence for our facrifice of that univerfal liberty of action, common to all fenfible beings, and only limited by our natural powers. By this principle, our minds become free, active, and vigorous; by this alone we are infpired with that virtue which knows no fear, fo different from that pliant prudence, worthy of those only who can bear a precarious existence.

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ATTEMPTS, therefore, against the life, and liberty of a citizen; are crimes of the highest nature. Under this head we comprehend not only assistant on the populace, but beries, committed by the populace, but by grandees, and magistrates; whose example acts with more force, and at a greater distance; destroying the ideas. of justice and duty among the subjects, and substituting that of the right of the strongest, equally dangerous to those who exercise it, and to those who suffer.

C H A P. IX.

Óf Honour.

THERE is a remarkable difference between the civil laws, those jealous guardians of life and property, and the laws of, what is called, *honour*, which particularly respects the opinion of others. Honour is a term, which has been the foundation of many long, and brilliant reafonings, without annexing to it any pre-D cife,

cife, or fixed idea. How miserable is the condition of the human mind, to which the most distant, and least effential matters, the revolutions of the heavenly bodies, are more diffinctly known, than the most interesting truths of morality, which are always confused and fluctuating, as they happen to be driven by the gales of paffion, or received and transmitted by ignorance! But this will ceafe to appear strange, if it be confidered, that as objects, when too near the eye, appear confufed, fo the too great vicinity of the ideas of morality, is the reafon why the fimple ideas, of which they are composed, are eafily confounded; but which must be feparated, before we can inveftigate the phenomena of human fenfibility; and the intelligent observer of human nature will ceafe to be furprifed, that fo many ties, and fuch an apparatus of morality, are neceffary to the fecurity, and happiness of mankind.

HONOUR, then, is one of those complex ideas, which are an aggregate not only

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CRIMES and PUNISHMENTS. 35 only of fimple ones, but of others fo complicated, that in their various modes of affecting the human mind, they fometimes admit, and fometimes exclude part of the elements of which they are compofed; retaining only fome few of the most common, as many algebraic quantities admit one common divifor. To find this common divifor of the different ideas attached to the word honour, it will be neceffary to go back to the original formation of fociety.

THE first laws, and the first magistrates, owed their existence to the necessity of preventing the diforders, which the natural defpotism of individuals would unavoidably produce. This was the object of the establishment of society, and was either in reality, or in appearance, the principal defign of all codes of laws, even the most pernicious. But the more intimate connections of men, and the progress of their knowledge, gave rise to an infinite number of necessities, and mutual acts of friendship, between the members D 2 of 26 .

of fociety. These necessities were not forefeen by the laws, and could not be fatisfied by the actual power of each individual. At this epocha began to be eftablished the defpotism of opinion, as being the only means of obtaining those benefits, which the law could not procure, and of removing those evils, against which the laws were no fecurity. It is opinion, that tormentor of the wife, and the ignorant, that has exalted the appearance of virtue above virtue itself. Hence the efteem of men becomes not only ufeful, but neceffary, to every one, to prevent his finking below the common level. The ambitious man grafps at it, as being neceffary to his defigns; the vain man fues for it, as a testimony of his merit; the honest man demands it, as his due; and most men confider it as neceffary to their existence.

HONOUR, being produced after the formation of fociety, could not be a part of the common deposite, and therefore, whilst we act under its influence, we return, for that instant, to a state of nature, and withdraw ourselves from CRIMES and PUNISHMENTS. 37 from the laws, which, in this cafe, are infufficient for our protection.

HENCE it follows, that in extreme political liberty, and in abfolute defpotifin, all ideas of honour difappear, or are confounded with others. In the first case, reputation becomes useless from the defpotifm of the laws; and in the second, the defpotifm of one man, anulling all civil existence, reduces the rest to a precarious, and temporary performality. Honour then, is one of the fundamental principles of those monarchies, which are a limited defpotifm, and in these, like revolutions in defpotic states, it is a momentary return to a state of nature, and original equality.

CHAP. X.

Of Duelling.

FROM the neceffity of the efteem of others, have arifen fingle combats, and they have been eftablished by the anarchy of the laws. They are thought to have D 3 been been unknown to the ancients; perhaps becaufe they did not affemble in their temples, in their theatres, or with their friends, fufpicioufly armed with fwords; and, perhaps, becaufe fingle combats were a common fpectacle, exhibited to the people by gladiators, who were flaves, and whom freemen difdained to imitate.

In vain have the laws endeavoured to abolifh this cuftom, by punifhing the offenders with death. A man of honour, deprived of the efteem of others, forefees that he must be reduced, either to a folitary existence, insupportable to a focial creature, or become the object of perpetual infult; confiderations sufficient to overcome the fear of death.

WHAT is the reafon, that duels are not fo frequent among the common people, as amongft the great? Not only becaufe they do not wear fwords, but becaufe to men of that clafs, reputation is of lefs importance, than it is to those of a higher rank,

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CRIMES and PUNISHMENTS. 39 rank, who commonly regard each other with diffruft and jealoufy.

IT may not be without its use to repeat here, what has been mentioned by other writers; viz. that the best method of preventing this crime is to punish the aggression, that is, the person who gave occasion to the duel, and to acquit him, who, without any fault on his fide, is obliged to defend that, which is not sufficiently secured to him by the laws.

CHAP. XI.

Of Crimes, which disturb the public. Tranquility.

ANOTHER class of crimes are those which difturb the public tranquility and the quiet of the citizens; fuch as tumults and riots in the public fireets, which are intended for commerce and the paffage of the inhabitants; the difcourfes of fanatics, which roufe the paffions of the curious multitude, and gain ftrength from D 4 the An Essay on

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the number of their hearers, who, though deaf to calm and folid reafoning, are always affected by obfcure and mysterious enthusiafm.

THE illumination of the ftreets, during the night, at the public expence; guards, flationed in different quarters of the city; the plain and moral difcourfes of religion, referved for the filence and tranquility of churches, and protected by authority; and harangues in support of the interest of the public, delivered only at the general meetings of the nation, in parliament, or where the fovereign refides; are all means to prevent the dangerous effects of the mifguided paffions of the people. These should be the principal objects of the vigilance of a magistrate, and which the French call Police; but if this magiftrate should act in an arbitrary manner, and not in conformity to the code of laws. which ought to be in the hands of every member of the community, he opens a door to tyranny, which always furrounds the confines of political liberty.

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I Do not know of any exception to this general axiom, that Every member of fociety fhould know when he is criminal, and when innocent. If cenfors, and, in general, arbitrary magistrates, be neceffary in any government, it proceeds from fome fault in the conftitution. The uncertainty of crimes hath facrificed more victims to fecret tyranny, than have ever fuffered by public and folemn cruelty.

WHAT are, in general, the proper punifhments for crimes? Is the punifhment of death really *u/eful*, or neceffary for the fafety, or good order of fociety? Are tortures and torments confiftent with *juftice*, or do they answer the *end* proposed by the laws? Which is the best method of preventing crimes? Are the fame punifhments equally useful at all times?, What influence have they on manners? These problems should be folved with that geometrical precision, which the miss of fophistry, the feduction of eloquence, and the timidity of doubt are unable to resist. IF I have no other merit than that of having first prefented to my country, with a greater degree of evidence, what other nations have written, and are beginning to practife, I shall account myself fortunate; but if, by supporting the rights of mankind and of invincible truth, I shall contribute to fave from the agonies of death one unfortunate victim of tyranny, or of ignorance, equally stal; his blessing and tears of transport, will be a sufficient consolution to me for the contempt of all mankind.

CHAP. XII.

Of the Intent of Punishments.

FROM the foregoing confiderations it is evident, that the intent of punifhments, is not to torment a fenfible being, nor to undo a crime already committed. Is it poffible that torments, and ufelefs cruelty, the inftrument of furious fanaticifm, or of impotency of tyrants, can be authorized by a political body? which, fo far from being CRIMES and PUNISHMENTS. 43 ing influenced by paffion, fhould be the cool moderator of the paffions of individuals. Can the groans of a tortured wretch recall the time paft, or reverse the crime he has committed?

THE end of punishment, therefore, is no other, than to prevent the criminal from doing further injury to fociety, and to prevent others from committing the like offence. Such punishments, therefore, and fuch a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impressions on the minds of others, with the least torthent to the body of the criminal.

CHAP. XIII.

Of the Credibility of Witneffes.

To determine exactly the credibility of a witnefs, and the force of evidence, is an important point in every good legiflation. Every man of common fenfe, that is, every one, whofe ideas have fome connexion nexion with each other, and whole fenfations are conformable to those of other men, may be a witnefs; but the credibility of his evidence will be in proportion as he is interested in declaring or concealing the truth. Hence it appears, how frivolous is the reafoning of those, who reject the testimony of women, on account of their weaknefs; how puerile it is. not to admit the evidence of those who are under sentence of death, because they are dead in law; and how irrational, to exclude perfons branded with infamy: for in all these cases they ought to be credited, when they have no interest in giving falfe testimony.

THE credibility of a witnefs, then, fhould only diminish in proportion to the hatred, friendship, or connexions, subsisting between him and the delinquent. One witness is not sufficient, for whils the accused denies what the other affirms, truth remains suspended, and the right that every one has to be believed innocent, turns the balance in his favour. CRIMES and PUNISHMENTS. 45

THÉ credibility of a witness is the lefs, as the atrociousness of the crime is greater, from the improbability of its having been committed; as in cafes of witchcraft, and acts of wanton cruelty. The writers on penal laws have adopted a contrary principle, viz. that the credibility of a witnefs is greater, as the crime is more atrocious. Behold their inhuman maxim, dictated by the most cruel imbecility. In atrocissimis, leviores conjecturæ sufficiunt, & licet judici jura transgredi. Let us translate this sentence, that mankind may fee one of the many unreafonable principles to which they are ignorantly fubject. In the most atrocious crimes the flightest conjectures are sufficient, and the judge is allowed to exceed the limits of the law. The abfurd practices of legislators are often the effect of timidity, which is a principal fource of the contradictions of The legiflators, (or rather mankind. lawyers, whofe opinions, when alive, were interested and venal, but which after their death become of decifive authority, and are

are the fovereign arbiters of the lives and fortunes of men) terrified by the condemnation of fome innocent perfon, have burthened the law with pompous and ufelefs formalities, the ferupulous obfervance of which will place anarchical impunity on the throne of juffice; at other times, perplexed by atrocious crimes of difficult proof, they imagined themfelves under a neceffity of fuperceding the very formalities established by themfelves; and thus, at one time, with despotic impatience, and at another with feminine timidity, they transform their folemn judgments into a game of hazard.

But to return. In the cafe of witchcraft, it is much more probable, that a number of men should be deceived, than that any person should exercise a power which God hath refused to every created being. In like manner, in cases of wanton cruelty, the presumption is always against the accuser, for no man is cruel without some interest, without some motive of fear or hate. There are no spontaneous

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CRIMES and PUNISHMENTS. 47 taneous or fuperfluous fentiments in the heart of man; they are all the refult of impreflions on the fenfes.

THE credibility of a witnels may also be diminished, by his being a member of a private society, whose customs and principles of conduct are either not known, or are different from those of the public. Such a man has not only his own passions, but those of the society of which he is a member.

FINALLY, the credibility of a witnefs is null, when the queftion relates to the words of a criminal; for the tone of voice, the gefture, all that precedes, accompanies and follows the different ideas which men annex to the fame words, may fo alter and modify a man's difcourfe, that it is almost impossible to repeat them precifely in the manner in which they were spoken. Befides, violent and uncommon actions, fuch as real crimes, leave a trace in the multitude of circumstances that attend them, and in their effects; but words words remain only in the memory of the hearers, who are commonly negligent or prejudiced. It is infinitely eafier then to found an acculation on the words, than on the acculations of a man; for in these, the number of circumstances, urged against the acculed, afford him variety of means of justification.

CHAP. XIV.

Of Evidence and the Proofs of a Crime; and of the Form of Judgment.

THE following general theorem is of great use in determining the certainty of a fact. When the proofs of a crime are dependant on each other, that is, when the evidence of each witness, taken separately, proves nothing; or when all the proofs are dependant upon one, the number of proofs neither increase nor diminish the probability of the fact; for the force of the whole is no greater than the force of that on which they depend: and if this fails, they all fall to the ground. When CRIMES and PUNISHMENTS. 49 When the proofs are independent on each other, the probability of the fact increases in proportion to the number of proofs; for the falshood of one does not diminish the veracity of another.

IT may feem extraordinary, that I fpeak of probability with regard to crimes, which, to deferve a punifhment, muft be certain. But this paradox will vanifh, when it is confidered, that, ftrictly fpeaking, moral certainty is only probability; but which is called a certainty, becaufe every man in his fenfes affents to it from an habit produced by the neceffity of acting, and which is anterior to all fpeculation. That certainty which is neceffary to decide, that the accufed is guilty, is the very fame which determines every man in the moft important tranfactions of his life.

THE proofs of a crime may be divided into two classes, perfect and imperfect. I call those perfect which exclude the posfibility of innocence; imperfect, those E which which do not exclude this poffibility. Of the first, one only is fufficient for condemnation; of the second, as many are required as form a perfect proof: that is to say, that though each of these, separately taken, does not exclude the possibility of innocence, it is nevertheless excluded by their union. It should be also observed, that the imperfect proofs, of which the accused, if innocent, might clear himself, and does not, become perfect.

BUT it is much easier to feel this moral certainty of proofs, than to define it ex-For this reason, I think it an actly. excellent law which establishes affistants to the principal judge, and those chosen by lot; for that ignorance, which judges by its feelings, is lefs fubject to error, than the knowledge of the laws, which judges by opinion. Where the laws are clear and precise, the office of the judge is merely to afcertain the fact. If, in examining the proofs of a crime, acutenefs and dexterity be required; if clearnefs and precifion be neceffary in fumming up

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CRIMES and PUNISHMENTS. 51 up the refult; to judge of the refult itfelf, nothing is wanting but plain and ordinary good fenfe, a lefs fallacious guide than the knowledge of a judge, accuftomed to find guilty, and to reduce all things to an artificial fystem, borrowed from - his studies. Happy the nation, where the knowledge of the law is not a fcience!

IT is an admirable law which ordains. that every man shall be tried by his peers; for when life, liberty and fortune are in question, the fentiments, which a difference of rank and fortune infpire, should be filent; that fuperiority with which the fortunate look upon the unfortunate, and that envy, with which the inferior regard their fuperiors, fhould have no in-But when the crime is an offluence. fence against a fellow subject, one half of the judges should be peers to the accused, and the other, peers to the perfon offended. So that all private interest, which, in fpite of ourfelves, modifies the appearance of objects, even in the eyes of the E 2 moft

most equitable, is counteracted, and nothing remains to turn aside the direction of truth and the laws. It is also just, that the accused should have the liberty of excluding a certain number of his judges. Where this liberty is enjoyed for a long time, without any instance to the contrary, the criminal seems to condemn himsfelf.

ALL trials should be public, that opinion, which is the best, or, perhaps, the only cement of fociety, may curb the authority of the powerful, and the paffions of the judge; and that the people may fay, "We are protected by the laws; we " are not flaves :" a fentiment which infpires courage, and which is the best tribute to.a fovereign, who knows his real interest. I shall not enter into particulars. There may be fome perfons who expects that I should fay all that can be faid upon this fubject; to fuch, what I have already written must be unintelligible. ٠,

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CHAP. XV.

Of secret Accusations.

SECRET acculations are a manifeft abute, but confecrated by cuftom in many nations, where, from the weaknefs of the government, they are neceffary. This cuftom makes men false and treacherous. Whoever fufpects another to be an informer, beholds in him an enemy; and, from thence, mankind are accustomed to difguise their real fentiments; and from the habit of concealing them from others, they at last even hide them from themfelves. Unhappy are those, who have arrived at this point! Without any certain and fixed principles to guide them, they fluctuate in the vaft fea of opinion, and are bufied only in efcaping the monfters which furround them; to those, the prefent is always embittered by the uncertainty of the future; deprived of the pleafures of tranquility and fecurity, fome fleeting moments of happiness, scattered thin]y E 3

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thinly through their wretched lives, confole them for the mifery of exifting. Shall we, amongft fuch men, find intrepid foldiers, to defend their king and country? Amongst fuch men, shall we find incorruptible magistrates, who, with the fpirit of freedom and patriotic eloquence, will fupport and explain the true intereft of their fovereign; who, with the tributes, offer up at the throne the love and bleffing of the people, and thus beftow on the palaces of the great and the humble cottage, peace and fecurity; and to the industrious a prospect of bettering their lot, that useful ferment and vital principle of states?

WHO can defend himfelf from calumny, armed with that impenetrable fhield of tyranny, fecrecy? What a miferable government must that be, where the fovereign fuspects an enemy in every fubject; and, to fecure the tranquility of the public, is obliged to facrifice the repose of every individual!

By what arguments is it pretended. that fecret accusations may be justified? The public fafety, fay they, and the fecurity and maintenance of the established form of government. But what a strange conftitution is that, where the government, which hath in its favour not only power, but opinion, still more efficacious, yet fears its own fubjects? The indemnity of the informer. Do not the laws defend him fufficiently; and are there fubjects more powerful than the laws? The neceffity of protecting the informer from infamy. Then fecret calumny is authorized, and punished only when public. The nature of the crime. If actions, indifferent in themselves, or even useful to the public, were called crimes, both the acculation and the trial could never be too fecret. But can there be any crime, committed against the public, which ought not to be publicly punished? I respect all governments; and I fpeak not of any one in particular. Such may fometimes be the nature of circumstances, that when abufes E4

abuses are inherent in the constitution, it may be imagined, that to rectify them would be to deftroy the conftitution itself. But were I to dictate new laws in a remote corner of the universe, the good of pofterity, ever prefent to my mind, would hold back my trembling hand, and prevent me from authorizing secret accufations.

PUBLIC acculations, fays Montesquieu, are more conformable to the nature of a republic, where zeal for the public good is the principal passion of a citizen, than of a monarchy, in which, as this fentiment is very feeble, from the nature of the government, the best establishment is that of commissioners, who, in the name of the public, accuse the infractors of the laws. But in all governments, as well in a republic as in a monarchy, the punishment, due to the crime of which one accufes another, ought to be inflicted on the informer.

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C H A P, XVI.

Of Torture.

THE torture of a criminal, during the courfe of his trial, is a cruelty confecrated by cuftom in most nations. It is used with an intent either to make him confess his crime, or explain some contradictions, into which he had been led during his examination; or discover his accomplices; or for some kind of metaphysical and incomprehensible purgation of infamy; or, finally, in order to discover other crimes, of which he is not accused, but of which he may be guilty.

No man can be judged a criminal until he be found guilty; nor can fociety take from him the public protection, until it have been proved that he has violated the conditions on which it was granted. What right, then, but that of power, can authorize the punifhment of a citizen, fo long as there remains any doubt of his guilt? 'This

The dilemma is frequent. Either he is guilty, or not guilty. If guilty, he should only fuffer the punishment ordained by the laws, and torture becomes ufelefs, as his confession is unnecessary. If he be not guilty, you torture the innocent; for in the eye of the law, every man is innocent, whofe crime has not been proved. Be+ fides, it is confounding all relations, to expect that a man should be both the accufer and accufed; and that pain fhould be the test of truth, as if truth resided in the muscles and fibres of a wretch in torture. By this method, the robust will escape, and the feeble be condemned. These are the inconveniences of this pretended teft of truth, worthy only of a cannibal; and which the Romans, in many refpects, barbarous, and whofe favage virtue has been too much admired, referved for the flaves alone.

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WHAT is the political intention of punifhments? To terrify, and be an example to others. Is this intention anfwered, by thus privately torturing the guilty and the

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CRIMES and PUNISHMENTS. 59 the innocent? It is doubtlefs of importance, that no crime should remain unpunished; but it is useles to make a public example of the author of a crime hid in darknefs. A crime already committed, and for which there can be no remedy, can only be punished by a political fociety, with an intention, that no hopes of impunity should induce others to commit the fame. If it be true, that the number of those, who from fear or virtue refpect the laws, is greater than of those by whom they are violated, the rifk of torturing an innocent perfon is greater, as there is a greater probability, that, cæteris paribus, an individual hath observed, than that he hath infringed the laws.

THERE is another ridiculous motive for torture, namely, to purge a man from infamy. Ought fuch an abuse to be tolerated in the eighteenth century? Can pain, which is a sensation, have any connexion with a moral sensition, a matter of opinion? Perhaps the rack may be considered as a refiner's furnace.

IT is not difficult to trace this fenfeles law to its origin; for an abfurdity, adopt-ed by a whole nation, must have fome affinity with other ideas, eftablished and refpected by the fame nation. This cuftom feems to be the offspring of religion, by which mankind, in all nations and in all ages, are fo generally influenced. We are taught by our infallible church, that those flains of fin, contracted through human frailty, and which have not deferved the eternal anger of the Almighty, are to be purged away, in another life, by an incomprehensible fire. Now infamy is a stain, and if the punishments and fire of purgatory can take away all spiritual stains, why should not the pain of torture take away those of a civil nature ? I imagine, that the confession of a criminal, which, in some tribunals is required, as being effential to his condemnation, has a fimilar origin, and has been taken from the mysterious tribunal of penitence, where the confession of fins is a necessary part of the facrament. Thus have men abused the
CRIMES and PUNISHMENTS. 61

the unerring light of revelation; and in the times of tractable ignorance, having no other, they naturally had recourfe to it on every occasion, making the most remote and absurd applications. Moreover, infamy is a fentiment regulated neither by the laws nor by reason, but intirely by opinion. But torture renders the victim infamous, and therefore cannot take infamy away.

ANOTHER intention of torture is, to oblige the fuppofed criminal to reconcile the contradictions into which he may have fallen, during his examination; as if the dread of punifhment, the uncertainty of his fate, the folemnity of the court, the majefty of the judge, and the ignorance of the accufed, were not abundantly fufficient to account for contradictions, which are fo common to men, even in a flate of tranquility; and which must neceffarily be multiplied by the perturbation of the mind of a man, entirely engaged in the thoughts of faving himfelf from imminent danger,

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THIS infamous teft of truth is a remain# ing monument of that antient and favage legislation, in which trials by fire, by boiling water, or the uncertainty of combats, were called Judgments of God; as if the links of that eternal chain, whose beginning is in the breast of the first caufe of all things, could ever be difunited by the inftitutions of men. The only difference between torture, and trials by fire and boiling water, is, that the event of the first depends on the will of the accused; and of the second, on a fact entirely physical and external: but this difference is apparent only, not real. A man on the rack, in the convultions of torture, has it as little in his power to declare the truth, as in former times, to prevent without fraud the effects of fire or of boiling water.

EVERY act of the will is invariably in proportion to the force of the impression on our senses. The impression of pain, then, may increase to such a degree, that occupying CRIMES and PUNISHMENTS. 63 occupying the mind entirely, it will compell the fufferer to use the shortest method of freeing himself from torment. His answer, therefore, will be an effect, as . necessary as that of fire or boiling water; and he will accuse himself of crimes of which he is innocent. So that the very means employed to distinguish the innocent from the guilty, will most effectually destroy all difference between them.

IT would be fuperfluous to confirm these reflections by examples of innocent perfons, who, from the agony of torture, have confessed themselves guilty: innumerable instances may be found in all nations, and in every age. How amazing, that mankind have always neglected to draw the natural conclusion! Lives there a man who, if he have carried his thoughts ever so little beyond the necessities of life, when he reflects on such cruelty, is not tempted to fly from society, and return to his natural state of independance? THE refult of torture, then, is a matter of calculation, and depends on the conftitution, which differs in every individual, and is in proportion to his ftrength and fenfibility; fo that to difcover truth by this method is a problem, which may be better folved by a mathematician than a judge, and may be thus ftated. The force of the muscles, and the fensibility of the nerves of an innocent perfon being given, it is required to find the degree of pain neceffary to make him confess himself guilty of a given crime.

THE examination of the accufed is intended to find out the truth; but if this be difcovered, with fo much difficulty, in the air, gefture and countenance of a man at eafe, how can it appear in a countenance difforted by the convultions of torture. Every violent action deftroys those fmall alterations in the features, which fometimes difclose the fentiments of the heart.

THESE

THESE truths were known to the Roman legislators, amongst whom, as I have already observed, flaves only, who were not confidered as citizens, were tortured. They are known to the English, a nation in which the progress of fcience, superiority in commerce, riches and power, its natural confequences, together with the numerous examples of virtue and courage, leave no doubt of the excellence of its laws. They have been acknowledged in Sweden, where torture has been abolished. They are known to one of the wifeft monarchs in Europe, who, having feated philosophy on the throne, by his beneficent legislation, has made his fubjects free, though dependant on the laws; the only freedom that reafonable men can defire in the prefent state of things. In fhort, torture has not been thought neceffary in the laws of armies, composed chiefly of the dregs of mankind, where its use should seem most necessary. Strange phenomenon! that a fet of men, hardened by flaughter, and familiar with blood, F fhould

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should teach humanity to the sons or peace.

IT appears also, that these truths were known, though imperfectly, even to those by whom torture has been most frequently practifed; for a confession made during torture is null, if it be not afterwards confirmed by an oath; which if the criminal refuses, he is tortured again. Some civilians, and fome nations, permit this infamous petitio principii to be only three times repeated, and others leave it to the difcretion of the judge; therefore of two men equally innocent, or equally guilty, the most robust and resolute will be acquitted, and the weakeft and most pufilanimous will be condemned, in confequence of the following excellent method of reasoning. I, the judge, must find some one guilty. Thou, who art a strong fellow, hast been able to refist the force of torment; therefore I acquit thee. Thou, being weaker, hast yielded to it; I therefore condemn thee. I am fensible, that the confession, which was extorted from thee, has no weight; but if thou

CRIMES and PUNISHMENTS. 67 thou doft not confirm by oath what thou haft already confeffed, I will have thee tormented again.

A VERY strange, but necessary, confequence of the use of torture, is that the case of the innocent is worse than that of the guilty. With regard to the first, either he confess the crime, which he has not committed, and is condemned; or he is acquitted, and has suffered a punishment he did not deserve. On the contrary, the person, who is really guilty, has the most favourable fide of the question; for if he supports the torture with firmness and refolution, he is acquitted, and has gained, having exchanged a greater punishment for a less.

THE law, by which torture is authorized, fays, Men be infenfible to pain. Nature has indeed given you an irrefiftible felf-love, and an unalienable right of felf-prefervation; but I create in you a contrary fentiment, an heroical hatred of yourfelves. I command you to accufe yourfelves, and to F 2 declare 68 An Essay on declare the truth, midst the tearing of your flesh and the dislocation of your bones.

TORTURE is used to discover, whether the criminal be guilty of other crimes befides those of which he is accused; which is equivalent to the following reasoning. Thou art guilty of one crime, therefore it is possible that thou mayst have committed a thousand others; but the affair being doubtful, I must try it by my criterion of truth. The laws order thee to be tormented, because thou art guilty, because thou mayst be guilty, and because I chuse thou shouldst be guilty.

TORTURE is used to make the criminal difcover his accomplices; but if it has been demonstrated that it is not a proper means of difcovering truth, how can it ferve to difcover the accomplices, which is one of the truths required. Will not the man who accuses himfelf, yet more readily accuse others? Besides, is it just to torment one man for the crime of another? May not the accomplices be found out by the examination of the witness, CRIMES and PUNISHMENTS. 69 or of the criminal; from the evidence, or from the nature of the crime itfelf; in fhort, by all the means that have been ufed to prove the guilt of the prifoner? The accomplices commonly fly, when their comrade is taken. The uncertainty of their fate condemns them to perpetual exile, and frees fociety from the danger of further injury; whilft the punifhment of the criminal, by deterring others, anfwers the purpofe for which it was ordained.

CHAP. XVII.

Of pecuniary Punishments.

THERE was a time when all punifhments were pecuniary. The crimes of the fubjects were the inheritance of the prince. An injury done to fociety was a favour to the crown; and the fovereign and magistrates, those guardians of the public fecurity, were interested in the violation of the laws. Crimes were tried, at that time, in a court of Exchequer, and the cause became a civil fuit between the person ac- F_3 cused cufed and the crown. The magistrate then had other powers than were neceffary for the public welfare, and the criminal fuffered other punishments than the neceffity of example required. The judge was rather a collector for the crown, an agent for the treafury, than a protector and minister of the laws. But. according to this fystem, for a man to confess himself guilty, was to acknowledge himfelf a debtor to the crown; which was, and is at prefent (the effects continuing after the caufes have ceafed) the intent of all criminal caufes. Thus. the criminal who refuses to confess his crime, though convicted by the most undoubted proofs, will fuffer a less punishment than if he had confessed : and he will not be put to the torture to oblige him to confess other crimes which he might have committed, as he has not confeffed the principal. But the confession being once obtained, the judge becomes mafter of his body, and torments him with a fludied formality, in order to squeeze out of him all the profit poffible. Confession, then

CRIMES and PUNISHMENTS. 71 then is allowed to be a convincing proof, efpecially when obtained by the force of torture; at the fame time that an extrajudicial confession, when a man is at ease and under no apprehension, is not fufficient for his condemnation.

ALL enquiries, which may ferve to clear up the fact, but which may weaken the pretensions of the crown, are excluded. It was not from compation to the criminal, or from confiderations of humanity, that torments were fometimes spared, but out of fear of loing those rights which at prefent appear chimerical and inconceivable. The judge becomes an enemy to the accufed, to a wretch, a prey to the horrors of a dungeon, to torture, to death, and an uncertain futurity, more terrible than all; he inquires not into the truth of the fact, but the nature of the crime; he lays fnares to make him convict himfelf; he fears, left he fhould not fucceed in finding him guilty, and left that infallibility, which every man arrogates to himfelf, should be called in question. It is in the **F**4 power

power of the magistrate to determine, what evidence is fufficient to fend a man to prifon; that he may be proved innocent, he must first be supposed guilty. This is what is called an offenfive profecution; and fuch are all criminal proceedings, in the eighteenth century, in all parts of our polished Europe. The true profecution, for information; that is, an impartial enquiry into the fact, that which reafon prefcribes, which military laws adopt, and which Afiatic defpotifm allows in fuits of one fubject against another, is very little practifed in any courts of justice. What a labyrinth of abfurdities! Abfurdities, which will appear incredible to happier The philosopher only will be posterity. able to read, in the nature of man, the poflibility of there ever having been fuch a system,

CHAP XVIII,

Of Oaths,

THERE is a palpable contradiction between the laws and the natural fentiments of

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of mankind, in the cafe of oaths, which are administred to a criminal to make him fpeak the truth, when the contrary is his greatest interest. As if a man could think himfelf obliged to contribute to his own destruction; and as if, when interest fpeaks, religion was not generally filent: religion, which in all ages hath, of all other things, been most commonly abused; and indeed, upon what motive fhould it be respected by the wicked, when it has been thus violated by those who were effeemed the wifeft of men? The motives which religion oppofes to the fear of impending evil, and the love of life, are too weak, as they are too diftant, to make any impreffion on the fenfes. The affairs of the other world are regulated by laws entirely different from those by which human affairs are directed; why then should we endeavour to compromise matters between them? Why should a man be reduced to the terrible alternative, either of offending God, or of contributing to his own immediate destruction? The laws which require an oath in fuch a cafe, leave him only the choice.

choice of becoming a bad christian, or a martyr. For this reason, oaths become, by degrees, a mere formality, and all fentiments of religion, perhaps the only motive of honefty in the greatest part of mankind, are deftroyed. Experience proves their inutility: I appeal to every judge, whether he has ever known that an oath alone has brought truth from the lips of a criminal; and reason tells us. it must be so; for all laws are useles, and, in consequence, destructive, which contradict the natural feelings of mankind. Such laws are like a dike, oppofed directly to the course of a torrent; it is either immediately overwhelmed, or, by a whirlpool formed by itfelf, it is gradually undermined and deftroyed.

CHAP. XIX.

Of the Advantage of immediate Punishment.

THE more immediately, after the commiffion of a crime, a punifhment is inflicted, the more just and useful it will be.

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It will be more just, because it be. spares the criminal the cruel and superfluous torment of uncertainty, which increafes in proportion to the ftrength of his imagination and the fense of his weaknefs; and becaufe the privation of liberty, being a punifhment, ought to be inflicted before condemnation, but for as fhort a time as poffible. Imprisonment, I fay, being only the means of fecuring the perfon of the accused, until he be tried, condemned, or acquitted, ought not only to be of as fhort duration, but attended with as little feverity as poffible. The time should be determined by the neceffary preparation for the trial, and the right of priority in the oldeft prifoners. The confinement ought not to be clofer than is requifite to prevent his flight, or his concealing the proofs of the crime: and the trial should be conducted with all poffible expedition. Can there be a more cruel contrast than that between the indolence of a judge, and the painful anxiety of the accufed; the comforts and pleafures of an infenfible magistrate, and the filth and mifery

mifery of the prifoner? In general, as I have before obferved, The degree of the punishment, and the consequences of a crime, ought to be so contrived, as to have the greatest possible effect on other's, with the least possible pain to the delinquent. If there be any fociety in which this is not a fundamental principle, it is an unlawful fociety; for mankind, by their union, originally intended to subject themselves to the least evils possible.

An immediate punifhment is more ufeful; becaufe the fmaller the interval of time between the punifhment and the crime, the ftronger and more lafting will be the affociation of the two ideas of *Crime* and *Punifhment*; fo that they may be confidered, one as the caufe, and the other as the unavoidable and neceffary effect. It is demonstrated, that the affociation of ideas is the cement which unites the fabric of the human intellect; without which, pleafure and pain would be fimple and ineffectual fenfations. The vulgar, that is, all men, who have no general

CRIMES and PUNISHMENTS. 77 ral ideas, or univerfal principles, act in confequence of the moft immediate and familiar affociations; but the more remote and complex only prefent themfelves to the minds of those who are passionately attached to a fingle object; or to those of greater understanding, who have acquired an habit of rapidly comparing together a number of objects, and of forming a conclusion; and the result, that is, the action in confequence, by these means, becomes less dangerous and uncertain.

It is, then, of the greatest importance, that the punishment should fucceed the crime as immediately as possible, if we intend, that, in the rude minds of the multitude, the feducing picture of the advantage arising from the crime, should instantly awake the attendant idea of punishment. Delaying the punishment ferves only to separate these two ideas; and thus affects the minds of the spectators rather as being a terrible soft, than the necessary consequence of a crime; the horror of which should contribute to heighten the idea of the punishment.

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THERE is another excellent method of ftrengthening this important connexion between the ideas of crime and punifhment; that is, to make the punifhment as analogous as possible to the nature of the crime; in order that the punifhment may lead the mind to confider the crime in a different point of view, from that, in which it was placed by the flattering idea of promifed advantages.

CRIMES of less importance are commonly punished, either in the obscurity of a prifon, or the criminal is transported, to give, by his flavery, an example to focieties which he never offended : an example absolutely useles, because distant from the place where the crime was committed. Men do not, in general, commit great crimes deliberately, but rather in a fudden guft of paffion; and they commonly look on the punifhment due to a great crime as remote and improbable. The public punishment, therefore, of finall crimes, will make a greater impreffion, and, by detering men from the finaller, will effectually prevent the greater,

CHAP.

CHAP. XX.

Of Acts of Violence.

Some crimes relate to perfon, others to property. The first ought to be punished corporally. The great and rich should by no means have it in their power to fet a price on the fecurity of the weak and indigent; for then, riches, which, under the protection of the laws, are the reward of industry, would become the aliment of tyranny. Liberty is at an end, whenever the laws permit, that, in certain cafes, a man may cease to be a perfon, and become a thing. Then will the powerful employ their address, to felect from the various combinations of civil fociety, all that is in their own favour. This is that magic art which transforms subjects into beafts of burthen, and which, in the hands of the ftrong, is the chain that binds the weak and incautious. Thus it is, that in fome governments, where there is all the appearance of liberty, tyranny lies concealed, and infinuates itfelf into fome neglected corner of the conftitution, where where it gathers strength infensibly. Mankind generally oppose, with resolution, the affaults of barefaced and open tyranny; but difregard, the little infect that gnaws through the dike, and opens a fure, though fecret, passage to inundation.

C H A P. XXI.

Of the Punishment of the Nobles.

WHAT punishments, shall be ordained. for the nobles, whofe privileges make fo great a part of the laws of nations? I do not mean to inquire whether the hereditary distinction between nobles and commoners be useful in any government, or necessary in a monarchy; or whether it be true, that they form an intermediate power. of use in moderating the excesses of both extremes; or whether they be not rather flaves to their own body, and to others. confining within a very fmall circle the natural effects and hopes of industry, like those little fruitful spots, scattered here and there in the fandy defarts of Arabia; or whether it be true, that a fubordination

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tion of rank and condition is inevitable, or ufeful in fociety; and if fo, whether this fubordination fhould not rather fubfift between individuals, than particular bodies; whether it fhould not rather circulate through the whole body politic, than be confined to one part; and rather than be perpetual, fhould it not be inceffantly produced and deftroyed. Be thefe as they may, I affert that the punifhment of a nobleman fhould in no wife differ from that of the loweft member of fociety.

EVERY lawful diffinction, either in honours or riches, fuppofes previous equality, founded on the laws, on which all the members of fociety are confidered as being equally dependant. We fhould fuppofe that men, in renouncing their natural defpotifm, faid, the wifest and most industrious among us shall obtain the greatest bonours, and his dignity shall descend to his posterity. The fortunate, and happy, may hope for greater honours, but let him not therefore be less afraid, than others, of violating those conditions, on which he is exalted. It is true indeed that no fuch de-

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crees were ever made in a general diet of mankind, but they exift in the invariable relations of things: nor do they deftroy the advantages, which are fuppofed to be produced by the clafs of nobles, but prevent the inconveniences; and they make the laws refpectable by deftroying all hopes of impunity.

IT may be objected, that the fame punishment inflicted on a nobleman and a plebeian, becomes really different from the difference of their education, and from the infamy it reflects on an illustrious family; but I answer, that punishments are to be effimated, not by the fenfibility of the criminal, but by the injury done to fociety; which injury is augmented by the high rank of the offender. The precise equality of a punishment can never be more than external, as it is in proportion to the degree of fenfibility, which differs in every individual. The infamy of an innocent family may be eafily obliterated by fome public demonftration of favour from the fovereign; and

CRIMES and PUNISHMENTS. 83 and forms have always more influence than reason on the gazing multitude.

CHAP. XXII.

Of Robbery.

THE punishment of robbery, not accompanied with violence, should be pecuniary. He who endeavours to enrich himfelf with the property of another, should be deprived of part of his own. But this crime, alas! is commonly the effect of mifery and defpair; the crime of that unhappy part of mankind, to whom the right of exclusive property (a terrible, and perhaps unneceffary right) has left but a bare existence. Besides, as pecuniary punishments may increase the number of robbers, by increasing the number of poor, and may deprive an innocent family of fubfistence, the most proper punishment will be that kind of flavery, which alone can be called juft; that is, which makes the fociety, for a time, absolute master of the person, and G 2 la84 An Essay on labour of the criminal, in order to oblige him to repair, by this dependance, the unjust despotism he usurped over the property of another, and his violation of the social compact.

WHEN robbery is attended with violence, corporal punishment should be added to flavery. Many writers have shewn the evident disorder which must arife from not diftinguishing the punishment due to robbery with violence, and that due to theft, or robbery committed with dexterity, abfurdly making a fum of money equivalent to a man's life. But it can never be superfluous to repeat again and again, those truths of which mankind have not profited; for political machines preferve their motion much longer than others, and receive a new impulse with more difficulty. These crimes are in their nature absolutely different, and this axiom is as certain in politics, as in mathematics, that between qualities of different natures, there can be no fimilitude.

CHAP.

C H A P. XXIII.

Of Infamy, confidered as a Punifoment.

THOSE injuries, which affect the honour, that is, that just portion of esteem, which every citizen has a right to expect from others, should be punished with infamy. Infamy is a mark of the public disapprobation, which deprives the object of all confideration in the eyes of his fellow citizens, of the confidence of his country, and of that fraternity which exifts between members of the fame fociety. This is not always in the power of the laws. It is necessary that the infamy inflicted by the laws should be the fame with that which refults from the relations of things, from universal morality, or from that particular fystem, adopted by the nation, and the laws, which governs the opinion of the vulgar. If, on the contrary, one be different from the other, either the laws will no longer be respected, or the received notions of G₃ mo-

morality and probity will vanish, in spight of the declamations of moralists, which are always too weak to result the force of example. If we declare those actions infamous, which are in themfelves indifferent, we lessen the infamy of those which are really infamous.

THE punishment of infamy should not be too frequent, for the power of opinion grows weaker by repetition; nor should it be inflicted on a number of persons at the fame time, for the infamy of many resolves itself into the infamy of none.

Painful and corporal punifhments fhould never be applied to fanaticifm; for being founded on pride, it glories in perfecution. Infamy and ridicule only fhould be employed against fanatics: if the first, their pride will be over-balanced by the pride of the people; and we may judge of the power of the second, if we consider that even truth is obliged to summon all her force, when attacked by error armed with ridicule. Thus by opposing one passion

CRIMES and PUNISHMENTS. 87 paffion to another, and opinion to opinion, a wife legiflator puts an end to the admiration of the populace, occasioned by a false principle, the original absurdity of which is veiled by some well-deduced confequences.

THIS is the method to avoid confounding the immutable relations of things, or oppofing nature, whofe actions not being limited by time, but operating inceffantly, overturn and deftroy all those vain regulations, which contradict her laws. It is not only in the fine arts, that the imitation of nature is the fundamental principle; it is the fame in found policy, which is no other than the art of uniting, and directing to the fame end, the natural and immutable fentiments of mankind.

CHAP. XXIV. Of Idlenefs.

A WISE government will not fuffer, in the midft of labour and induftry, that G_4 kind kind of political idleness, which is confounded, by rigid declaimers, with the leifure attending riches acquired by induftry, which is of use to an increasing fociety, when confined within proper I call those politically idle, who limits. neither contribute to the good of fociety by their labour, nor their riches; who continually accumulate, but never fpend; who are reverenced by the vulgar with flupid admiration, and regarded by the wife with difdain; who, being victims to a monastic life, and deprived of all incitement to that activity which is necessary to preferve, or increase its comforts, devote all their vigour to paffions of the ftrongeft kind, the paffions of opinion. I call not him idle, who enjoys the fruits of the virtues, or vices of his anceftors, and in exchange for his pleafures, fupports the industrious poor. It is not then the narrow virtue of auftere moralists, but the laws, that should determine, what species of idleness deserves punishment.

CHAP,

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C H A P. XXV.

Of Banishment, and Confiscation.

HE who diffurbs the public tranquillity, who does not obey the laws, who violates the conditions on which men mutually fupport and defend each other, ought to be excluded from fociety, that is, banifhed.

IT feems, as if banifhment fhould be the punifhment of thofe, who being accufed of an atrocious crime, are probably, but not certainly, guilty. For this purpofe would be required a law, the leaft arbitrary, and the most precise possible; which should condemn to banishment, those who have reduced the community to the fatal alternative, either of fearing or punishing them unjustly; still, however, leaving them the facred right of proving their innocence. The reasons ought to be stronger for banishing a citizen, than a stranger, and for the first accufation, 'go

cufation, than for one who hath been often accufed.

SHOULD the perfon, who is excluded for ever from fociety, be deprived of his property? This question may be confidered in different lights. The confiscation of effects, added to banifhment, is a greater punishment, than, banishment alone; there ought then to be fome cafes, in which, according to the crime, either the whole fortune should be confiscated. or part only, or none at all. The whole should be forfeited, when the law, which ordains banishment, declares at the same time, that all connections, or relations between the fociety and the criminal, are annihilated. In this cafe, the citizen dies; the man only remains, and with respect to a political body, the death of the citizen should have the fame confequences with the death of the man. It feems to follow then, that in this cafe, the effects of the criminal should devolve to his lawful heirs. But it is not on account of this refinement that I difapprove of confifcations. If fome have infifted, that

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that they were a reftraint to vengeance, and the violence of particulars, they have not reflected, that though punifhments be productive of good, they are not, on that account, more juft; to be juft, they must be necessary. Even an useful injustice can never be allowed by a legislator, who means to guard against watchful tyranny; which, under the flattering pretext of momentary advantages, would establish permanent principles of deftruction, and to procure the ease of a few in a high station, would draw tears from thousands of the poor.

THE law which ordains confifcations, fets a price on the head of the fubject, with the guilty punifhes the innocent, and by reducing them to indigence and defpair, tempts them to become criminal. Can there be a more melancholy fpectacle, than a whole family, overwhelmed with infamy and mifery, from the crime of their chief ? a crime, which if it had been poffible, they were reftrained from preventing, by that fubmiffion

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fion which the laws themselves have ordained.

CHAP. XXVI.

Of the Spirit of Family in States.

IT is remarkable, that many fatal acts of injustice have been authorised and approved, even by the wifeft and most experienced men, in the freest republics. This has been owing to their having confidered the state, rather as a society of families, than of men. Let us suppose a nation composed of an hundred thoufand men, divided into twenty thousand families of five perfons each, including the head or master of the family, its reprefentative. If it be an affociation of families, there will be twenty thousand men, and eighty thousand flaves; if of men, there will be an hundred thousand citizens, and not one flave. In the first cafe, we behold a republic, and twenty thousand little monarchies, of which the heads are the fovereigns; in the fecond, the fpirit of liberty will not only breathe in

CRIMES and PUNISHMENTS. 93 in every public place of the city, and in the affemblies of the nation, but in private houses, where men find the greatest part of their happiness, or misery. As laws and cuftoms are always the effect of the habitual fentiments of the members of a republic, if the fociety be an affociation of the heads of families, the spirit of monarchy will gradually make its way into the republic itfelf, as its effects will only be reftrained by the oppofite interests of each, and not by an universal spirit of liberty and equality. The private fpirit of family is a spirit of minuteness, and confined to little concerns. Public spirit, on the contrary, is influenced by general principles, and from facts deduces general rules of utility to the greatest number.

IN a republic of families, the children remain under the authority of the father, as long as he lives, and are obliged to wait until his death for an existence dependant on the laws alone. Accustomed to kneel and tremble in their tender years, when their natural sentiments were lefs lefs reftrained by that caution, obtained by experience, which is called moderation, how fhould they refift those obstacles, which vice always opposes to virtue, in the languor and decline of age, when the despair of reaping the fruits is alone fufficient to damp the vigour of their refolutions?

In a republic, where every man is a citizen, family fubordination is not the effect of compulsion, but of contract; and the sons difengaged from the natural dependance, which the weakness of infancy and the necessity of education required, become free members of society, but remain subject to the head of the family, for their own advantage, as in the great society.

IN a republic of families, the young people, that is the moft numerous, and moft ufeful part of the nation, are at the diferetion of their fathers: in a republic of men, they are attached to their parents by no other obligation, than that facred and inviolable one of mutual affiftance,

CRIMES and PUNISHMENTS. 95 fiftance, and of gratitude for the benefits they have received; a fentiment, deftroyed not fo much by the wickedness of the human heart, as by a mistaken subjection, prescribed by the laws.

THESE contradictions between the laws of families, and the fundamental laws of a state, is the fource of many others between public and private morality, which produce a perpetual conflict in the mind. Domeftic morality infpires fubmiffion, and fear: the other, courage, and liberty. That instructs a man to confine his beneficence to a fmall number of perfons, not of his own choice; this, to extend it to all mankind; that commands a continual facrifice of himfelf to a vain idol, called the good of the family, which is often no real good to any one of those who compose it; this, teaches him to confider his own advantage without offending the laws, or excites him to facrifice himfelf for the good of his country, by rewarding him beforehand with the fanaticifm it infpires. Such contradictions are the reafon, that men neglect the the purfuit of virtue, which they can hardly diftinguish midft the obscurity and confusion of natural and moral objects. How frequently are men, upon a retrospection of their actions, astonished to find themselves dishonest?

In proportion to the increase of fociety, each member becomes a fmaller part of the whole; and the republican fpirit diminishes in the same proportion, if neglected by the laws. Political focieties, like the human body, have their limits circumfcribed, which they cannot exceed without diffurbing their æconomy. It feems as if the greatness of a state ought to be inverfely as the fenfibility and activity of the individuals; if on the contrary, population, and activity increase in the fame proportion, the laws will with difficulty prevent the crimes arifing from the good they have produced. An overgrown republic can only be faved from defpotifm, by fubdividing it into a number of confederate republics. But how is this practicable ? By a defpotic dictator, who

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CRIMES and PUNISHMENTS. 97 who, with the courage of Sylla, has as much genius for building up, as that Roman had for pulling down. If he be an ambitious man, his reward will be immortal glory; if a philofopher, the bleffings of his fellow-citizens will fufficiently confole him for the lofs of authority, though he fhould not be infenfible to their ingratitude.

In proportion as the fentiments, which unite us to the ftate, grow weaker, thofe which attach us to the objects which more immediately furround us, grow ftronger; therefore, in the most despotic government, friendships are more durable, and domestic virtues, (which are always of the lowest class) are the most common, or the only virtues existing. Hence it appears how confined have been the views of the greatest number of legislators.

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CHAP. XXVII.

Of the Mildness of Punishments.

THE course of my ideas has carried me away from my fubject, to the elucidation of which I now return. Crimes are more effectually prevented by the certainty, than the *feverity* of punishment. Hence in a magistrate, the neceffity of vigilance, and in a judge, of implacability, which that it may become an uleful virtue, should be joined to a mild legislation. The certainty of a fmall punifhment will make a stronger impression, than the fear of one more fevere, if attended with the hopes of escaping; for it is the nature of mankind to be terrified at the approach of the fmallest inevitable evil, whilst hope, the best gift of heaven, hath the power of difpelling the apprehenfion of a greater; especially if supported by examples of impunity, which weakness, or avarice too frequently afford.

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IF punifhments be very fevere, men are naturally led to the perpetration of other crimes, to avoid the punifhment due to the firft. The countries and times most notorious for feverity of punishments, were always those in which the most bloody and inhuman actions and the most atrocious crimes were committed; for the hand of the legislator and the affassin were directed by the fame spirit of ferocity; which, on the throne, dictated laws of iron to flaves and savages and, in private, instigated the subject to facrifice one tyrant, to make room for another.

In proportion as punifhments become more cruch, the minds of men, as a fluid rifes to the fame height with that which furrounds it, grow hardened and infenfible; and the force of the paffions ftill continuing, in the fpace of an hundred years, the *wheel* terrifies no more than formerly the *prifon*. That a punifhment may produce the effect required, it is fufficient that the *evil* H 2 it occasions should exceed the good expected from the crime, including in the calculation the certainty of the punishment, and the privation of the expected advantage. All feverity beyond this is superfluous, and therefore tyrannical.

MEN regulate their conduct by the repeated imprefion of evils they know, and not by those with which they are unacquainted. Let us, for example, suppose two nations, in one of which the greatest punishment is *perpetual flavery*, and in the other *the wheel*. I fay, that both will inspire the same degree of terror; and that there can be no reasons for encreasing the punishments of the first, which are not equally valid for augmenting those of the fecond to more lasting and more ingenious modes of tormenting; and so on to the most exquisite refinements of a science too well known to tyrants.

THERE are yet two other confequences of cruel punifhments, which counter-act the purpole of their inftitution, which was

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CRIMES and PUNISHMENTS. TOT was, to prevent crimes. The first arifes from the impoffibility of establishing an exact proportion between the crime and punishment, for though ingenious cruelty hath greatly multiplied the variety of torments, yet the human frame can fuffer only to a certain degree, beyond which it is impoffible to proceed, be the enormity of the crime ever fo great. The fecond confequence is impunity. Human nature is limited no lefs in evil than in good. Exceffive barbarity can never be more than temporary; it being impoffible that it should be supported by a permanent fystem of legislation; for if the laws be too cruel they must be altered, or anarchy and impunity will fucceed,

Is it poffible, without fhuddering with horror, to read in hiftory of the barbarous and ufelefs torments that were coolly invented and executed by men who were called fages? Who does not tremble at the thoughts of thoufands of wretches, whom their mifery, either caufed or tolerated by the laws, which favoured the H $_3$ few few and outraged the many, had forced in defpair to return to a ftate of nature; or accufed of impoffible crimes, the fabric of ignorance and fuperfitition; or guilty only of having been faithful to their own principles; who, I fay, can, without horror, think of their being torn to pieces with flow and ftudied barbarity, by men endowed with the fame paffions and the fame feelings? A delightful fpectacle to a fanatic multitude !

CHAP. XXVIII.

Of the Punishment of Death.

THE useless profusion of punishments, which has never made men better, induces me to enquire, whether the punishment of *death* be really just or useful in a wellgoverned state? What *right*, I ask, have men to cut the throats of their fellowcreatures? Certainly not that on which the fovereignty and laws are founded. The laws, as I have said before, are only the fum of the smallest portions of the private

CRIMES and PUNISHMENTS. 102 private liberty of each individual, and reprefent the general will, which is the ag-Did gregate of that of each individual. any one ever give to others the right of taking away his life ? Is it poffible, that in the smallest portions of the liberty of each, facrificed to the good of the public, can be contained the greateft of all good, life? If it were fo, how shall it be reconciled to the maxim which tells us. that a man has no right to kill himfelf? Which he certainly must have, if he could give it away to another.

But the punifhment of death is not authorifed by any right; for I have demonftrated that no fuch right exifts. It is therefore a war of a whole nation againft a citizen, whofe deftruction they confider as neceffary, or ufeful to the general good. But if I can further demonstrate, that it is neither neceffary nor ufeful, I shall have gained the caufe of humanity.

THE death of a citizen cannot be neceffary, but in one cafe. When, though H 4 deprived deprived of his liberty, he has fuch power and connexions as may endanger the fecurity of the nation; when his existence may produce a dangerous revolution in the established form of government. But even in this cafe, it can only be neceffary, when a nation is on the verge of recovering or lofing its liberty; or in times of absolute anarchy, when the diforders themselves hold the place of laws. But in a reign of tranquility; in a form of government approved by the united wifhes of the nation; in a flate well fortified from enemies without, and fupported by ftrength within, and opinion, perhaps more efficacious; where all power is lodged in the hands of the true fovereign; where riches can purchase pleasures and not authority, there can be no neceffity for taking away the life of a fubject.

IF the experience of all ages be not fufficient to prove, that the punifhment of death has never prevented determined men from injuring fociety; if the example of the Romans; if twenty years reign of Elizabeth,

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CRIMES and PUNISHMENTS. 105 Elizabeth, empress of Russia, in which she gave the fathers of their country an example more illustrious than many conquests bought with blood; if, I fay, all this be not sufficient to persuade mankind, who always suspect the voice of reason, and who chuse rather to be led by authority, let us consult human nature in proof of my affertion.

IT is not the intenfenels of the pain that has the greatest effect on the mind, but its continuance; for our fenfibility is more eafily and more powerfully affected by weak but repeated impreffions, than by a violent, but momentary, impulse. The power of habit is universal over every fenfible being. As it is by that we learn to fpeak, to walk, and to fatisfy our neceffities, fo the ideas of morality are stamped on our minds by repeated impreffions. The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others, than the continued example of a man deprived of his liberty, condemned, as a beaft

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beaft of burthen, to repair, by his labour, the injury he has done to fociety. If I commit fuch a crime, fays the fpectator to himfelf, I shall be reduced to that miserable condition for the rest of my life. A much more powerful preventive than the fear of death, which men always behold in distant obscurity.

THE terrors of death make fo flight an imprefion, that it has not force enough to withftand the forgetfulnefs natural to mankind, even in the most effential things; especially when affisted by the passions. Violent impressions surprize us, but their effect is momentary; they are fit to produce those revolutions which instantly transform a common man into a Lacedemonian or a Persian; but in a free and quiet government they ought to be rather frequent than strong.

THE execution of a criminal is, to the multitude, a fpectacle, which in fome excites compassion mixed with indignation. These fentiments occupy the mind CRIMES and PUNISHMENTS. 107 mind much more than that falutary terror which the laws endeavour to infpire; but in the contemplation of continued fuffering, terror is the only, or at leaft the predominant fenfation. The feverity of a punifhment fhould be juft fufficient to excite compafiion in the fpectators, as it is intended more for them than for the criminal.

A PUNISHMENT, to be just, should have only that degree of feverity which is fufficient to deter others. Now there is no man, who upon the least reflection, would put in competition the total and perpetual lofs of his liberty, with the greatest advantages he could poffibly obtain in confequence of a crime. Perpetual flavery, then, has in it all that is neceffary to deter the most hardened and determined, as much as the punishment of death. I fay it has more. There are many who can look upon death with intrepidity and firmnefs; fome through fanaticism, and others through vanity, which attends us even to the grave; others from from a desperate resolution, either to get rid of their misery, or cease to live: but fanaticism and vanity forsake the criminal in flavery, in chains and fetters, in an iron cage; and despair seems rather the beginning than the end of their misery. The mind, by collecting itself and uniting all its force, can, for a moment repel association of the second second second forts are insufficient to result perpetual wretchedness.

IN all nations, where death is used as a punifhment, every example supposes a new crime committed. Whereas in perpetual flavery, every criminal affords a frequent and lasting example; and if it be neceffary that men should often be witnesses of the power of the laws, criminals should often be put to death; but this supposes a frequency of crimes; and from hence this punishment will cease to have its effect, so that it must be useful and useless at the same time.

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CRIMES and PUNISHMENTS. 100 I SHALL be told, that perpetual flavery is as painful a punishment as death, and therefore as cruel. I answer, that if all the miserable moments in the life of 2 flave were collected into one point, it would be a more cruel punishment than any other; but these are scattered through his whole life, whilft the pain of death exerts all its force in a moment. There is alfo another advantage in the punishment of flavery, which is, that it is more terrible to the fpectator than to the fufferer himfelf; for the spectator confiders the fum of all his wretched moments. whilft the fufferer, by the mifery of the prefent, is prevented from thinking of the future. All evils are increased by the imagination, and the fufferer finds refources and confolations, of which the fpectators are ignorant; who judge by their own fenfibility of what paffes in a mind, by habit grown callous to miffortune.

LET us, for a moment, attend to the reasoning of a robber or affaffin, who is deterred

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deterred from violating the laws by the gibbet or the wheel. I am fenfible, that to develop the fentiments of one's own heart, is an art which education only can teach? but although a villain may not be able to give a clear account of his principles, they neverthelefs influence his conduct. He reasons thus. "What are " thefe laws, that I am bound to respect, " which make fo great a difference be-" tween me and the rich man? He re-" fuses me the farthing I ask of him, and " excuses himfelf by bidding me have " recourse to labour, with which he is " unacquainted. Who made thefe laws? " The rich and the great, who never " deigned to vifit the miferable hut of the " poor; who have never feen him divid-" ing a piece of mouldy bread, amidst the " cries of his famished children and the " tears of his wife. Let us break those " ties, fatal to the greatest part of man-" kind, and only useful to a few indolent " tyrants. Let us attack injustice at its " fource. I will return to my natural " state of independance. I shall live free " and

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" and happy on the fruits of my courage " and induftry. A day of pain and re-" pentance may come, but it will be " fhort; and for an hour of grief I fhall " enjoy years of pleafure and liberty. " King of a fmall number, as determined " as myfelf, I will correct the miftakes " of fortune; and I fhall fee those tyrants " grow pale and tremble at the fight of " him, whom, with infulting pride, they " would not fuffer to rank with their " dogs and horfes."

RELIGION then prefents itfelf to the mind of this lawlefs villain, and promifing him almost a certainty of eternal happiness upon the easy terms of repentance, contributes much to lessen the horror of the last scene of the tragedy.

BUT he who forefees, that he must pass a great number of years, even his whole life, in pain and flavery; a flave to those laws by which he was protected; in fight of his fellow citizens, with whom he lives in freedom and society; makes an useful comparison comparison between those evils, the uncertainty of his fucces, and the shortness of the time in which he shall enjoy the fruits of his transgression. The example of those wretches continually before his eyes, makes a much greater impression on him than a punishment, which, instead of correcting, makes him more obdurate.

THE punishment of death is pernicious to fociety, from the example of barbarity it affords. If the paffions, or the neceffity of war, have taught men to fhed the blood of their fellow-creatures, the laws, which are intended to moderate the ferocity of mankind, should not increase it by examples of barbarity, the more horrible, as this punifhment is ufually attended with formal pageantry. Is it not abfurd, that the laws, which deteft and punish homicide, should, in order to prevent murder, publicly commit murder themfelves? What are the true and most useful laws? Those compacts and conditions which all would propose and observe, in those moments when private interest is filent, or combined

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CRIMES and PUNISHMENTS. 113 bined with that of the public. What are the patural fentiments of every perfor concerning the punishment of death? We may read them in the contempt and indignation with which every one looks on the executioner, who is neverthelefs an innocent executor of the public will; a good citizen, who contributes to the advantage of fociety; the inftrument of the general fecurity within, as good foldiers are without. What then is the origin of this contradiction ? Why is this fentiment of mankind indelible, to the scandal of reason? It is, that in a fecret corner of the mind, in which the original impressions of nature are still preserved, men discover a fentiment which tells them, that their lives are not lawfully in the power of any one, but of that neceffity only, which with its iron fcepter rules the univerfe.

WHAT must men think, when they fee wife magistrates and grave ministers of justice, with indifference and tranquility, dragging a criminal to death, and whilst a wretch trembles with agony, expecting I the 114

the fatal stroke, the judge, who has condemned him, with the coldeft infenfibility, and perhaps with no fmall gratification from the exertion of his authority, quits his tribunal to enjoy the comforts and pleasures of life? They will fay, " Ah ! those cruel formalities of justice are " a cloak to tyranny, they are a fecret " language, a folemn veil, intended to con-" ceal the fword by which we are facri-" ficed to the infatiable idol of defpotifm. " Murder, which they would reprefent " to us as an horrible crime, we fee " practifed by them without repugnance, " or remorce. Let us follow their ex-" ample. A violent death appeared ter-" rible in their descriptions, but we fee " that it is the affair of a moment. Tt. " will be still less terrible to him, who " not expecting it, efcapes almost all the " pain." Such is the fatal, though abfurd reasoning of men who are disposed to commit crimes; on whom, the abuse of religion has more influence than religion itfelf.

IF

CRIMES and PUNISHMENTS. IIS IF it be objected, that almost all nations in all ages have punished certain crimes with death, I answer, that the force of these examples vanishes, when oppofed to truth, against which prefcrip-s tion is urged in vain. The history of mankind is an immense fea of errors, in which a few obfcure truths may here and there be found.

But human facrifices have also been common in almost all nations. That fome focieties only, either few in number, or for a very fhort time, abstained from the punishment of death, is rather favourable to my argument, for fuch is the fate of great truths, that their duration is only as a flash of lightning in the long and dark night of error. The happy time is not yet arrived, when truth, as falshood has been hitherto, shall be the portion of the greatest number.

I AM fenfible that the voice of one philosopher is too weak to be heard amidst the clamours of a multitude, blindly 116

ly influenced by cuftom; but there is a fmall number of fages, feattered on the face of the earth, who will echo to me from the bottom of their hearts; and if thefe truths fhould haply force their way to the thrones of princes, be it known to them, that they come attended with the fecret wifnes of all mankind; and tell the fovereign who deigns them a gracious reception, that his fame fhall outfhine the glory of conquerors, and that equitable pofterity will exalt his peaceful trophies above thofe of a Titus, an Antoninus or a Trajan.

How happy were mankind, if laws were now to be first formed; now that we fee on the thrones of Europe, benevolent monarchs, friends to the virtues of peace, to the arts and sciences, fathers of their people, though crown'd yet citizens; the increase of whose authority augments the happiness of their subjects, by destroying that intermediate despotism, which intercepts the prayers of the people, to the

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the throne. If these humane princes have fuffered the old laws to subsist, it is doubtless, because they are detered by the numberless obstacles, which oppose the subversion of errors established by the fanction of many ages; and therefore every wise citizen will wish for the increase of their authority.

CHAP. XXIX.

Of Imprisonment.

THAT a magistrate, the executor of the laws, should have a power to imprifon a citizen, to deprive the man he hates of his liberty upon frivolous pretences, and to leave his friend unpunished, notwithstanding the strongest proofs of his guilt, is an error, as common, as it is contrary to the end of society, which is personal security,

Imprifonment is a punifhment, which differs from all others in this particular, I 3 that

that it neceffarily precedes conviction; but this difference does not deftroy a circumftance, which is effential, and common to it with all other punishments, viz. that it should never be inflicted, but when ordained by the law. The law should therefore determine the crime, the prefumption, and the evidence fufficient to fubject the accused to imprisonment and examination. Public report, his flight, his extrajudicial confession, that of an accomplice, menaces, and his conftant enmity with the perfon injured, the circumstances of the crime, and fuch other evidence, may be fufficient to justify the imprisonment of a citizen. But the nature of this evidence should be determined by the laws, and not by the magistrates, whose decrees are always contrary to political liberty, when they are not particular applications of a general maxim of the public code. When punishments become less fevere, and prifons lefs horrible; when compaffion and humanity shall penetrate the iron gates of dungeons, and direct the obdurate and in-

CRIMES and PUNISHMENTS. IIQ inexorable ministers of justice, the laws may then be fatisfied with weaker evidence for imprisonment.

A perfon accufed, imprisoned, tried and acquitted, ought not to be branded with any degree of infamy. Among the Romans, we fee that many, accufed of very great crimes and afterwards declared innocent, were refpected by the people and honoured with employments in the flate. But why is the fate of an innocent perfon fo different in this age? It is, becaufe the prefent fystem of penal laws prefents to our minds an idea of power rather than of justice. It is, becaufe the accufed and convicted are thrown indifcriminately into the fame prison; because imprisonment is rather a punishment, than a means of fecuring the perfon of the accufed; and becaufe the interior power, which defends the laws, and the exterior, which defends the throne and kingdom are feparate, when they should be united. If the first were (under the common authority of the laws) comcombined with the right of judging, but not however immediately dependant on the magistrate, the pomp that attends a military corps, would take off the infamy; which, like all popular opinions, is more attached to the manner and form, than to the thing itfelf; as may be feen in military imprisonment, which, in the common opinion, is not fo difgraceful as the civil. But the barbarity and ferocity of our ancestors, the hunters of the north, still substit among the people, in our customs and our laws, which are always feveral ages behind the actual refinements of a nation.

CHAP. XXX.

Of Profecution and Prescription.

THE proofs of the crime being obtained, and the certainty of it determined, it is neceffary to allow the criminal, time and means for his justification; but a time fo short, as not to diminish that promptitude of punishment, which, as we

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we have shewn, is one of the most powerful means of preventing crimes. A miftaken humanity may object to the shortness of the time, but the force of the objection will vanish, if we consider that the danger of the innocent increases with the defects of the legislation.

THE time for inquiry and for justification should be fixed by the laws, and not by the judge, who, in that cafe, would become legislator. With regard to atrocious crimes, which are long remembered, when they are once proved, if the criminal have fled, no time should be allowed; but in lefs confiderable and more obscure crimes, a time should be fixed, after which the delinquent should be no longer uncertain of his fate. For in the latter cafe, the length of time, in which the crime is almost forgotten, prevents the example of impunity, and allows the criminal to amend, and become a better member of fociety.

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GENERAL principles will here be fufficient, it being impossible to fix precifely the limits of time for any given legislation, or for any fociety in any particular circumstance. I shall only add, that in a nation willing to prove the utility of moderate punishment, laws, which, according to the nature of the crime, increase or diminish the time of enquiry and justification, considering the imprifonment or the voluntary exile of the criminal as a part of the punishment, will form an easy division of a small number of mild punishments for a great number of crimes.

BUT, it must be observed, the time for inquiry and justification should not increase in direct proportion to the atrociousness of crimes; for the probability of such crimes having been committed, is inversely as their atrociousness. Therefore the time for inquiry, ought in some cases to be diminissed, and that for justification increased, & vice versa. This may CRIMES and PUNISHMENTS. 123 may appear to contradict what I have faid above, namely, that equal punishments may be decreed for unequal crimes, by confidering the time allowed the criminal, or the prifon as a punishment.

In order to explain this idea, I shall divide crimes into two classes. The first comprehends homicide, and all greater crimes; the fecond, crimes of an inferior degree. This diffinction is founded in human nature. The prefervation of life is a natural right; the prefervation of property is a right of fociety. The motives that induce men to shake off the natural fentiment of compassion, which must be destroyed before great crimes can be committed, are much lefs in number than those, by which from the natural defire of being happy, they are infligated to violate a right, which is not founded in the heart of man, but is the work of fociety. The different degrees of probability in these two classes, requires that they should be regulated on different prin_ ciples. In the greatest crimes, as they are

are lefs frequent, and the probability of the innocence of the accufed being greater, the time allowed him for his juftification fhould be greater, and the time of inquiry lefs. For by haftening the definitive fentence, the flattering hopes of impunity are deftroyed, which are more dangerous, as the crime is more atrocious. On the contrary, in crimes of lefs importance, the probability of the innocence being lefs, the time of inquiry fhould be greater, and that of juftification lefs, as impunity is not fo dangerous.

BUT this division of crimes into two classes should not be admitted, if the confequences of impunity were in proportion to the probability of the crime. It should be confidered, that a person accused, whose guilt or innocence is not determined for want of proofs, may be again imprisoned for the same crime, and be subject to a new trial, if fresh evidence arises, within the time fixed.

THIS

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CRIMES and PUNISHMENTS. 123 THIS is in my opinion the beft method of providing, at the fame time, for the fecurity and liberty of the fubject, without favouring one at the expence of the other; which may eafily happen, fince. both thefe bleffings, the inalienable and equal patrimony of every citizen, are liable to be invaded, the one by open or difguifed defpotifm, and the other by tumultuous and popular anarchy.

CHAP. XXXI.

Of Crimes of difficult Proof.

WITH the foregoing principles in view, it will appear aftonifhing, that reafon hardly ever prefided at the formation of the laws of nations; that the weakeft and most equivocal evidence, and even conjectures have been thought fufficient proof for crimes the most atrocious, (and therefore most improbable) the most obscure, and chimerical; as if it were the interest of the laws and the judge not to inquire into the truth, but to prove the

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the crime; as if there were not a greater rifk of condemning an innocent perfon, when the probability of his guilt is lefs.

THE generality of men want that vigour of mind, and refolution which are as neceffary for great crimes, as for great virtues, and which at the fame time produce both the one and the other in those nations, which are supported by the activity of their government, and a paffion for the public good. For in those which fubfift by their greatness or power, or by the goodnefs of their laws, the paffions being in a weaker degree, feem calculated rather to maintain than to improve the form of government. This naturally leads us to an important conclusion, viz. that great crimes do not always produce the deftruction of a nation.

THERE are fome crimes, which, though frequent in fociety, are of difficult proof, a circumftance admitted, as equal to the probability of the innocence of the accused. But as the frequency of these

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Î 27 . CRIMES and PUNISHMENTS. thefe crimes is not owing to their impunity, fo much as to other causes, the danger of their paffing unpunished is of lefs importance, and therefore the time of examination, and prefcription may be equally diminished. These principles are different from those commonly received; for it is in crimes, which are proved with the greatest difficulty, fuch as adultery, and fodomy, that prefumptions, half proofs, &c. are admitted; as if a man could be half innocent, and half guilty; that is half punishable and half absolvable. It is in these cases that torture should exercise its cruel power on the perfon of the accufed, the witneffes, and even his whole family, as, with unfeeling indifference, fome Civilians have taught, who pretend to dictate laws to nations.

ADULTERY is a crime, which, politically confidered, owes its existence to two causes, viz. pernicious laws, and the powerful attraction between the sexes. This attraction is similar in many circumstances to gravity, the spring of motion in the

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the univerfe. Like this, it is diminished by distance; one regulates the motions of the body, the other of the foul. But they differ in one respect; the force of gravity decreases in proportion to the obstacles that oppose it; the other gathers strength and vigour as the obstacles increase.

IF I were fpeaking to nations guided only by the laws of nature, I would tell them, that there is a confiderable difference between adultery and all other crimes. Adultery proceeds from an abufe of that necessity, which is constant and universal in human nature; a necessity anterior to the formation of fociety, and indeed the founder of fociety itfelf; whereas, all other crimes tend to the deftruction of fociety, and arife from momentary passions, and not from a natural neceffity. It is the opinion of those, who have studied history and mankind, that this necessity is constantly in the same degree in the fame climate. If this be true, useles,

CRIMES and PUNISHMENTS. 129 ufelefs, or rather pernicious muft all laws and cuftoms be, which tend to diminifh the fum total of the effects of this paffion. Such laws would only burden one part of fociety with the additional neceffities of the other; but, on the contrary, wife are the laws, which, following the natural course of the river, divide the ftream into a number of equal branches, preventing thus both fterility and inundation.

CONJUGAL fidelity is always greater in proportion as marriages are more numerous, and lefs difficult. But when the interest or pride of families, or paternal authority, not the inclination of the parties, unite the fexes, gallantry foon breaks the steer fleader ties, in spite of common moralists, who exclaim against the effect, whilst they pardon the cause. But these reflections are useles to those, who, living in the true religion, act from sublimer motives, which correct the eternal laws of nature.

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THE act of adultery is a crime fo inftantaneous, fo mysterious, and fo concealed by the veil which the laws themfelves have woven; a veil neceffary indeed, but fo transparent, as to heighten rather than conceal the charms of the object; the opportunities are so frequent, and the danger of discovery so easily avoided, that it were much easier for the laws to prevent this crime, than to punish it when committed.

To every crime, which, from its nature, must frequently remain unpunished, the punishment is an incentive. Such is the nature of the human mind, that difficulties, if not infurmountable, nor too great for our natural indolence, embellish the object, and fpur us on to the purfuit. They are fo many barriers that confine the imagination to the object, and oblige us to confider it in every point of view. In this agitation, the mind naturally inclines and fixes itself to the most agreeable part, studiously avoiding every idea that might create difguft.

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THE crime of fodomy, fo feverely punished by the laws, and for the proof of which are employed tortures, which often triumph over innocence itself, has its fource much lefs in the paffions of man in a free and independant state, than in fociety and a flave. It is much lefs the effect of a fatiety in pleafures, than of that education. which, in order to make men ufeful to others, begins by making them useless to themselves. In those public feminaries, where ardent youth are carefully excluded from all commerce with the other fex, as the vigour of nature blooms, it is confumed in a manner not only useless to mankind, but which accelerates the approach of old age.

THE murder of baftard-children is, in like manner, the effect of a cruel dilemma, in which a woman finds herfelf who has been feduced through weaknefs, or overcome by force. The alternative is, either her own infamy, or the death of a being, who is incapable of feeling the lofs K z of 132

of life. How can the avoid preferring the laft to the inevitable mifery of herfelf and her unhappy infant? The beft method of preventing this crime, would be effectually to protect the weak woman from that tyranny, which exaggerates all vices that cannot be concealed under the cloak of virtue.

I DO not pretend to leffen that just abhorrence which these crimes deserve, but to discover the sources from whence they spring; and I think I may draw the following conclusion: That the punishment of a crime cannot be just, (that is necessary) if the laws have not endeavoured to prevent that crime by the best means which times and circumstances would allow.

C H A P. XXXII.

Of Suicide.

SUICIDE is a crime, which feems not to admit of punishment, properly speaking; for it cannot be inflicted but on the
CRIMES and PUNISHMENTS. 122 the innocent, or upon an infenfible dead body. In the first case, it is unjust and tyrannical, for political liberty supposes all punishments entirely personal; in the fecond, it has the fame effect, by way of example, as the fcourging a ftatue. Mankind love life too well; the objects that furround them; the feducing phantom of pleafure and hope, that fweeteft error of mortals, which makes men fwallow fuch large draughts of evil, mingled. with a very few drops of good, allure them too ftrongly, to apprehend that this crime will ever be common from its unavoidable impunity. The laws are obeyed through fear of punishment, but death deftroys all fenfibility. What motive then can reftrain the desperate hand of fuicide?

HE who kills himfelf does a lefs injury to fociety, than he who quits his country for ever; for the other leaves his property behind him, but this carries with him at leaft a part of his fubftance. Befides, as the ftrength of a fociety confifts in the K₃ number 134 An Essay on number of citizens, he who quits one nation to refide in another, becomes a double lofs. This then is the queftion : whether it be advantageous to fociety, that its members fhould enjoy the unlimited privilege of migration?

EVERY law that is not armed with force, or which, from circumftances, muft be ineffectual, fhould not be promulgated. Opinion, which reigns over the minds of men, obeys the flow and indirect impreffions of the legiflator, but refifts them when violently and directly applied; and ufelefs laws communicate their infignificance to the most falutary, which are regarded more as obstacles to be furmounted, than as fafeguards of the public good. But further, our perceptions being limited, by inforcing the observance of laws which are evidently useles, we destroy the influence of the most falutary.

FROM this principle, a wife difpenfer of public happiness may draw some useful confequences, the explanation of which would

CRIMES and PUNISHMENTS. 125 would carry me too far from my fubject, which is to prove the inutility of making the nation a prison. Such a law is vain, because unless inacceffible rocks, or impaffable feas, divide the country from all others, how will it be poffible to fecure every point of the circumference, or how will you guard the guards themfelves? Befides. this crime once committed. cannot be punished; and to punish it beforehand, would be to punish the intention and not the action; the will, which is entirely out of the power of human laws. To punish the absent by confiscating his effects, befides the facility of collution, which would inevitably be the cafe, and which, without tyranny, could not be prevented, would put a ftop to all commerce with other nations. To punish the criminal when he returns, would be to prevent him from repairing the evil he had already done to fociety, by making his absence perpetual. Besides any prohibition would increase the defire of removing, and would infallibly prevent ftrangers from fettling in the country.

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WHAT must we think of a government which has no means, but fear, to keep its subjects in their own country; to which, by the first impressions of their infancy, they are fo strongly attached. The most certain method of keeping men at home, is, to make them happy; and it is the interest of every state to turn the balance, not only of commerce, but of felicity in favour of its fubjects. The pleafures of luxury are not the principal fources of this happinefs; though, by preventing the too great accumulation of wealth in a few hands, they become a neceffary remedy against the too great inequality of individuals, which always increafes with the progrefs of fociety.

WHEN the populoufnefs of a country does not increase in proportion to its extent, luxury favours despotis, for where men are most dispersed, there is least industry; and where there is least industry, the dependance of the poor upon the luxury of the rich is greatest, and the union of

CRIMES and PUNISHMENTS. 127 of the oppressed against the oppresser is least to be feared. In such circumstances, rich and powerful men more eafily command diffinction, refpect and fervice, by which they are raifed to a greater height above the poor; for men are more independant the lefs they are observed, and are least observed when most numerous. On the contrary, when the number of people is too great in proportion to the extent of a country, luxury is a check to defpotifm; because it is a spur to industry, and because the labour of the poor affords fo many pleafures to the rich, that they difregard the luxury of oftentation, which would remind the people of their dependance. Hence we fee, that in vaft and depopulated states, the luxury of ostentation prevails over that of convenience; but in countries more populous, the luxury of convenience tends constantly to diminish the luxury of oftentation.

THE pleafures of luxury have this inconvenience, that though they employ a great number of hands, yet they are only enjoyed enjoyed by a few, whilft the reft, who do not partake of them, feel the want more fenfibly, on comparing their ftate with that of others. Security and liberty, reftrained by the laws, are the bafis of happinefs, and when attended by thefe, the pleafures of luxury favour population, without which they become the inftruments of tyranny. As the most noble and generous animals fly to folitude and inacceffible deferts, and abandon the fertile plains to man, their greatest enemy; fo men reject pleasure itself, when offered by the hand of tyranny.

BUT to return. If it be demonstrated, that the laws which imprison men in their own country are vain and unjust, it will be equally true of those which punish fuicide, for that can only be punished after death, which is in the power of God alone; but it is no crime, with regard to man, because the punishment falls on an innocent family. If it be objected, that the consideration of such a punishment may prevent the crime; I answer, that he

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CRIMES and PUNISHMENTS. 139 he who can calmly renounce the pleafure of existence; who is so weary of life, as to brave the idea of eternal misery, will never be influenced by the more distant, and less powerful confiderations of family and children.

CHAP. XXXIII.

Of Smuggling.

SMUGGLING is a real offence against the fovereign and the nation; but the punishment should not brand the offender with infamy, becaufe this crime is not infamous in the public opinion. By inflicting infamous punishments, for crimes that are not reputed fo, we deftroy that idea where it may be useful. If the fame punishment be decreed for killing a pheafant as for killing a man, or for forgery, all difference between those crimes will shortly vanish. It is thus that moral fentiments are destroyed in the heart of man; fentiments, the work of many ages and of much bloodshed; sentiments, that are 6

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fo flowly, and with fo much difficulty produced, and for the eftablifhment of which fuch fublime motives, and fuch an apparatus of ceremonies were thought neceffary.

THIS crime is owing to the laws themfelves; for the higher the duties, the greater is the advantage, and, confequently, the temptation; which temptation is increafed by the facility of perpetration, when the circumference that is guarded is of great extent, and the merchandife prohibited is fmall in bulk. The feizure and lofs of the goods attempted to be fmuggled, together with those that are found along with them, is just; but it would be better to leffen the duty, because men risque only in proportion to the advantage expected.

THIS crime being a theft of what belongs to the prince, and, confequently, to the nation, why is it not attended with infamy? I anfwer, that crimes, which men confider as productive of no bad confequences

CRIMES and PUNISHMENTS. 141 fequences to themselves, do not interest them fufficiently to excite their indignation. The generality of mankind, upon whom remote confequences make no impreffion, do not fee the evil that may refult from the practice of fmuggling, efpecially if they reap from it any prefent advantage. They only perceive the lofs fuftained by the prince. They are not then interested in refusing their esteem to the fmuggler, as to one who has committed a theft or a forgery, or other crimes, by which they themfelves may fuffer; from this evident principle, that a fenfible being only interests himself in those evils, with which he is acquainted.

SHALL this crime then, committed by one who has nothing to lofe, go unpunifhed? No. There are certain fpecies of fmuggling, which fo particularly affect the revenue, a part of government fo effential, and managed with fo much difficulty, that they deferve imprifonment, or even flavery; but yet of fuch a nature as to be proportioned to the crime. For example, ample, it would be highly unjust that a fmuggler of tobacco should suffer the fame punishment with a robber, or assofin; but it would be most conformable to the nature of the offence, that the produce of his labour should be applied to the use of the crown, which he intended to defraud.

CHAP. XXXIV.

Of Bankrupts.

THE neceffity of good faith in contracts, and the fupport of commerce, oblige the legiflature to secure, for the creditors, the perfons of bankrupts. It is, however, neceffary to diftinguish between the fraudulent and the honess bankrupt. The fraudulent bankrupt should be punished in the fame manner with him who adulterates the coin; for to falsify a piece of coin, which is a pledge of the mutual obligations between citizens, is not a greater crime than to violate the obligations themselves. But the bankrupt who, after CRIMES and PUNISHMENTS. 143

ter a strict examination, has proved before proper judges, that either the fraud, or losses of others, or misfortunes unavoidable by human prudence, have ftript him of his substance; upon what barbarous pretence is he thrown into prifon. and thus deprived of the only remaining good, the melancholy enjoyment of mere liberty? Why is he ranked with criminals, and in defpair compelled to repent of his honefty? Confcious of his innocence, he lived eafy and happy under the protection of those laws, which, it is true, he violated, but not intentionally. Laws, dictated by the avarice of the rich, and accepted by the poor, feduced by that univerfal and flattering hope which makes men believe, that all unlucky accidents are the lot of others, and the most fortunate only their fhare. Mankind, when influenced by the first impressions, love cruel laws, although, being fubject to them themfelves, it is the interest of every perfon that they fhould be as mild as poffible; but the fear of being injured is always

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ways more prevalent than the intention of injuring others.

BUT to return to the honeft bankrupt. Let his debt, if you will, not be confidered as cancelled, 'till the payment of the whole; let him be refufed the liberty of leaving the country without leave of his creditors, or of carrying into another nation that induftry, which, under a penalty, he fhould be obliged to employ for their benefit; but what pretence can juftify the depriving an innocent, though unfortunate man of his liberty, without the leaft utility to his creditors?

But fay they, the hardfhips of confinement will induce him to difcover his fraudulent transactions; an event, that can hardly be supposed, after a rigorous examination of his conduct and affairs. But if they are not difcovered, he will escape unpunissed. It is, I think, a maxim of government, that the importance of the political inconveniences, arifing from the impunity of a crime, are directly CRIMES and PUNISHMENTS. 145 directly as the injury to the publick, and inversely as the difficulty of proof.

IT will be neceffary to diffinguish fraud attended with aggravating circumstances from fimple fraud, and that from perfect innocence. For the first, let there be ordained the fame punishment as for forgery; for the fecond, a lefs punishment but with the lofs of liberty; and if perfectly honeft, let the bankrupt himfelf chuse the method of re-establishing himself and of fatisfying his creditors; or if he fhould appear not to have been ftrictly honeft, let that be determined by his credi-But these distinctions should be fixtors ed by the laws, which alone are impartial, and not by the arbitrary and dangerous prudence of judges*.

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* It may be alledged that the intereft of commerce and property fhould be fecured; but commerce and property are not the end of the focial compact, but the means of obtaining that end; and to expose all the members of fociety to cruel laws, to preferve them from evils, neceffarily occafioned by the infinite combinations which refult from the actual ftate of political focieties,

WITH what ease might a fagacious legiflator prevent the greatest part of fraudulent bankruptcies, and remedy the misfortunes that befall the honeft and induftrious ! A publick register of all contracts, with the liberty of confulting it allowed to every citizen; a publick fund formed by a contribution of the opulent merchants for the timely affiftance of unfortunate induftry, were establishments that could produce no real inconveniences, and many advantages. But unhappily, the most fimple, the easiest, yet the wifest laws, that wait only for the nod of the legislator, to diffuse through nations, wealth, power, and felicity;

focieties, would be to make the end fubfervient to the means, a paralogifm in all fciences, and particularly in politicks. In the former editions of this work, I myfelf fell into this error, when I faid that the honeft bankrupt fhould be kept in cuftody, as a pledge for his debts, or employed, as a flave, to work for his creditors. I am afhamed of having adopted fo cruel an opinion. I have been accufed of impiety; I did not deferve it. I have been accufed of fedition; I deferved it as little. But I infulted all the rights of humanity, and was never reproached.

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CRIMES and PUNISHMENTS. 147 felicity; laws, which would be regarded by future generations with eternal gratitude, are either unknown, or rejected. A reftlefs, and trifling fpirit, the timid prudence of the prefent moment, a diftruft and averfion to the most useful novelties, possible the minds of those who are impowered to regulate the actions of mankind.

CHAP. XXXV.

Of Sanctuaries.

ARE fanctuaries just? Is a convention, between nations mutually to give up their criminals, useful ?

In the whole extent of a political flate, there fhould be no place independent of the laws. Their power fhould follow every fubject, as the fhadow follows the body. Sanctuaries, and impunity differ only in degree, and as the effect of punifhments depends more on their certainty, than their greatnefs, men are more ftrongly L 2 invited invited to crimes by fanctuaries, than they are deterred by punifhment. To increase the number of fanctuaries, is to erect fo many little fovereignties; for, where the laws have no power, new bodies will be formed in opposition to the publick good, and a spiritestablished contrary to that of the state. History informs us, that from the use of fanctuaries have arisen the greatest revolutions in kingdoms, and in opinions.

Some have pretended that in whatever country a crime, that is an action contrary to the laws of fociety, be committed, the criminal may be justly punished for it in any other; as if the character of fubject were indelible, or fynonymous with, or worfe than that of flave; as if a man could live in one country, and be fubject to the laws of another, or be accountable for his actions to two Sovereigns, or two codes of laws, often contradictory. There are also who think, that an act of cruelty committed, for example, at Constantinople may be punished at Paris; for this ab-Aracted reason, that he who offends humanity

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CRIMES and PUNISHMENTS. 140 manity, should have enemies in all mankind, and be the object of universal execration; as if judges were to be the knights errant of human nature in general / rather than guardians of particular conventions between men. The place of punishment can certainly be no other, than that where the crime was committed; for the neceffity of punishing an individual for the general good fubfifts there, and there only. A villain, if he has not broke through the conventions of a fociety, of which by my fupposition he was not a member, may be feared, and by force banished and excluded from that fociety; but ought not to be formally punished by the laws, which were only intended to maintain the focial compact, and not to punish the intrinfick malignity of actions.

WHETHER it be useful that nations should mutually deliver up their criminals? Altho the certainty of their being no part of the earth where crimes are not punish ed, may be a means of preventing them, I shall I fhall not pretend to determine this queftion, until laws more conformable to the neceffities, and rights of humanity, and until milder punifhments, and the abolition of the arbitrary power of opinion, fhall afford fecurity to virtue and innocence when opprefied; and until tyranny fhall be confined to the plains of Afia, and Europeacknowledge the univerfal empire of reafon, by which the interefts of fovereigns, and fubjects, are beft united.

C H A P. XXXVI.

Of Rewards for apprehending, or killing Criminals.

LET us now inquire, whether it be advantageous to fociety, to fet a price on the head of a criminal, and fo to make of every citizen an executioner. If the offender hath taken refuge in another state, the fovereign encourages his subjects to commit a crime, and to expose themselves to a just punishment; he insults that nation,

CRIMES and PUNISHMENTS. IÇI tion, and authorizes the fubjects to commit on their neighbours fimilar ufurpations. If the criminal still remain in his own country, to fet a price upon his head, is the strongest proof of the weaknefs of the government. He who has ftrength to defend himfelf, will not purchafe the affiftance of another. Besides fuch an edict confounds all the ideas of virtue, and morality, already too wavering in the mind of man. At one time treachery is punished by the laws, at another encouraged. With one hand the legislator strengthens the ties of kindred, and friendship, and with the other, rewards the violation of both. Always in contradiction with himself, now he invites the fuspecting minds of men to mutual confidence, and now he plants diftrust in every heart. To prevent one crime, he gives birth to a thousand. Such are the expedients of weak nations, whole laws are like temporary repairs to a tottering fabrick. On the contrary, as a nation becomes more enlightened, honefty and mutual confidence become more necessary, and L 4

nd are daily tending to unite with found policy. Artifice, cabal, and obfcure and indirect actions are more eafily difcovered, and the interest of the whole is better secured against the passions of the individual.

EVEN the times of ignorance, when private virtue was encouraged by publick morality, may afford inftruction and example to more enlightened ages. But laws which reward treafon, excite clandeftine war, and mutual diftruft, and oppofe that neceffary union of morality and policy, which is the foundation of happines, and universal peace.

CHAP. XXXVII,

Of Attempts, Accomplices, and Pardon,

THE laws do not punish the intention; nevertheles, an attempt, which manifest the intention of committing a crime, deserves a punishment; though less, perhaps, than if the crime were actually perpetrated

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CRIMES and PUNISHMENTS. 153 petrated. The importance of preventing even attempts to commit a crime fufficiently authorifes a punifhment; but, as there may be an interval of time between the attempt and the execution, it is proper to referve the greater punifhment for the actual commiffion, that even after the attempt there may be a motive for defifting.

In like manner, with regard to the accomplices, they ought not to fuffer fo fevere a punishment as the immediate perpetrator of the crime. But this for a different reason. When a number of men unite, and run a common rifk, the greater the danger, the more they endeavour to distribute it equally. Now, if the principals be punished more feverely than the acceffaries, it will prevent the danger from being equally divided, and will increase the difficulty of finding a perfon to execute the crime, as his danger is greater by the difference of the punishment. There can be but one exception to this rule; and that is, when the principal receives a reward

a reward from the accomplices. In that cafe, as the difference of the danger is compenfated, the punifhment fhould be equal. These reflections may appear too refined to those who do not confider, that it is of great importance, that the laws should leave the affociates as few means as possible of agreeing among themselves.

In fome tribunals a pardon is offered to an accomplice in a great crime, if he discover his affociates. This expedient has its advantages and difadvantages. The difadvantages are, that the law authorifes treachery, which is detefted even by the villains themfelves; and introduces crimes of cowardice, which are much more pernicious to a nation than crimes of courage. Courage is not common, and only wants a benevolent power to direct it to the public good. Cowardice, on the contrary, is a frequent, felf-interested and contagious evil, which can never be improved into a virtue. Befides, the tribunal, which has recourse to this method, betrays its fallibility, and the laws their weaknefs, bý

CRIMES and PUNISHMENTS. 155 by imploring the affiftance of those by whom they are violated.

THE advantages are, that it prevents great crimes, the effects of which being public, and the perpetrators concealed, terrify the people. It also contributes to prove, that he who violates the laws. which are public conventions, will alfo violate private compacts. It appears to me, that a general law, promifing a reward to every accomplice who difcovers his affociates, would be better than a fpecial declaration in every particular cafe: because it would prevent the union of those villains, as it would inspire a mutual diftruft, and each would be afraid of expofing himfelf alone to danger. The accomplice, however, should be pardoned, on condition of transportation. . . But it is in vain, that I torment myfelf with endeavouring to extinguish the remorfe I feel in attempting to induce the facred laws, the monument of public confidence, the foundation of human morality, to authorife diffimulation and perfidy.

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fidy. But what an example does it offer to a nation, to fee the interpreters of the laws break their promife of pardon, and on the ftrength of learned fubtleties, and to the fcandal of public faith, drag him to punifhment who hath accepted of their invitation! Such examples are not uncommon, and this is the reafon, that political fociety is regarded as a complex machine, the fprings of which are moved at pleafure by the most dextrous or most powerful.

CHAP. XXXVIII,

Of suggestive Interrogations.

THE laws forbid *fuggeflive interrogations*; that is, according to the civilians, queftions, which, with regard to the circumftances of the crime, are *fpecial* when they fhould be *general*; or, in other words, those queftions, which having an immediate reference to the crime, fuggest to the criminal an immediate answer. Interrogations, terrogations, according to the law, ought to lead to the fact indirectly and obliquely, but never directly or immediately. The intent of this injunction is either, that they should not suggest to the accused an immediate answer that might acquit him, or that they think it contrary to nature that a man should accuse himself. But whatever be the motive, the laws have fallen into a palpable contradiction, in condemning fuggestive interrogations, whilft they authorife torture, Can there be an interrogation more fuggeftive than pain? Torture will fuggeft to a robuft villain an obstinate filence, that he may exchange a greater punishment for a lefs; and to a feeble man confession, to relieve him from the prefent pain, which affects him more than the apprehension of the future. If a fpecial interrogation be contrary to the right of nature, as it obliges a man to accufe himfelf, torture will certainly do it more effectually. But men are influenced more by the names than the nature of things.

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HE, who obstinately refuses to answer the interrogatories, deferves a punishment, which should be fixed by the laws, and that of the severest kind; that criminals should not, by their silence, evade the example which they owe the public. But this punishment is not necessary when the guilt of the criminal is indisputable, because in that case interrogation is useles, as is likewise his confession, when there are, without it, proofs sufficient. This last case is most common, for experience shews, that in the greatest number of criminal profecutions, the culprit pleads not guilty.

CHAP. XXXIX.

Of a particular Kind of Grimes.

THE reader will perceive that I have omitted speaking of a certain class of crimes which has covered Europe with blood, and raised up those horrid piles, from from whence, midft clouds of whirling Imoke, the groans of human victims, the crackling of their bones, and the frying of their still panting bowels, were a pleafing fpectacle, and agreeable harmony to the fanatic multitude. But men of understanding will perceive, that the age and country in which I live will not permit me to enquire into the nature of this It were too tedious, and foreign crime. to my fubject, to prove the necessity of a perfect uniformity of opinions in a state, contrary to the examples of many nations; to prove that opinions, which differ from one another only in fome fubtile and obfcure diffinctions, beyond the reach of human capacity may neverthelefs difturb the public tranquility, unlefs one only religion be established by authority; and that fome opinions, by being contrasted and opposed to each other, in their collision ftrike out the truth ; whilft others, feeble in themselves, require the support of power and authority. It would, I fay, carry me too far, were I to prove, that how

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how odious foever is the empire of force over the opinions of mankind, from whom it only obtains diffimulation, followed by contempt; and, although it may feem contrary to the fpirit of humanity and brotherly love, commanded us by reafon, and authority, which we more refpect, it is neverthelefs neceffary and indifpenfible. We are to believe, that all these paradoxes are folved beyond a doubt, and are conformable to the true interests of mankind, if practifed by a lawful authority. I write only of crimes which violate the laws of nature and the focial contract, and not of fins, even the temporal punishments of which must be determined from other principles, than those of a limited human philofophy.

CHAP. XL.

Of false Ideas of Utility.

A PRINCIPAL fource of errors and injustice, are false ideas of utility. For example; that legislator has false ideas of utility,

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utility, who confiders particular more than general conveniences; who had rather command the fentiments of mankind, than excite them, and dares fay to reafon, "Be thou a flave;" who would facrifice a thoufand real advantages, to the fear of an imaginary or trifling inconvenience; who would deprive men of the ufe of fire, for fear of their being burnt, and of water, for fear of their being drown'd; and who knows of no means of preventing evil but by deftroying it.

THE laws of this nature, are those which forbid to wear arms, difarming those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most facred laws of humanity, and the most important of the code, will respect the less confiderable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? Does not the execution of this law deprive the subject of that personal liberty, so dear to M mankind 162

mankind and to the wife legiflator; and does it not fubject the innocent to all the difagreeable circumftances that fhould onby fall on the guilty? It certainly makes the fituation of the affaulted worfe, and of the affailants better, and rather encourages than prevents murder, as it requires lefs courage to attack armed than unarmed perfons.

It is a falfe idea of utility, that would give to a multitude of fenfible beings, that fymmetry and order, which inanimate matter is alone capable of receiving; to neglect the prefent, which are the only motives that act with force and conftancy on the multitude, for the more diftant, whofe imprefions are weak and transitory, unlefs increafed by that ftrength of imagination, fo very uncommon among mankind. Finally, that is a falfe idea of utility, which, faerificing things to names, feparates the public good from that of individuals.

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THERE is this difference between a state of fociety and a state of nature, that a favage does no more mifchief to another than is neceffary to procure fome benefit to himfelf; but a man in fociety is fometimes tempted, from a fault in the laws. to injure another, without any profpect of advantage. The tyrant infpires his vaffals with fear and fervility, which rebound upon him with double force, and are the caufe of his torment. Fear, the more private and domeftic it is, the lefs dangerous is it to him who makes it the inftrument of his happines; but the more it is public, and the greater number of people it affects, the greater is the probability that fome mad, defperate, or defigning perfon will feduce others to his party, by flattering expectations; and this will be the more eafily accomplished, as the danger of the enterprife will be divided amongst a greater number, because the value the unhappy fet upon their existence is lefs, as their mifery is greater.

CHAP.

CHAP. XLI.

Of the Means of preventing Crimes.

IT is better to prevent crimes, than to punish them. This is the fundamental principle of good legislation, which is the art of conducting men to the maximum of happiness, and to the minimum of milery, if we may apply this mathematical expreffion to the good and evil of life. But the means hitherto employed for that purpose, are generally inadequate, or contrary to the end proposed. It is imposfible to reduce the tumultuous activity of mankind to abfolute regularity; for, midft the various and opposite attractions of pleasure and pain, human laws are not Sufficient entirely to prevent diforders in fociety. Such, however is the chimera of weak men, when invested with authority. To prohibit a number of indifferent actions, is not to prevent the crimes which they may produce, but to create new ones; it is to change at will the ideas of

CRIMES and PUNISHMENTS. 160 of virtue and vice, which, at other times, we are told, are eternal and immutable. To what a fituation should we be reduced. if every thing were to be forbidden that might poffibly lead to a crime? We must be deprived of the use of our senses. For one motive that induces a man to commit a real crime, there are a thousand which excite hims to those indifferent actions, which are called crimes by bad laws. If. then, the probability that a crime will be committed be in proportion to the number of motives, to extend the fphere of crimes will be to increase that probability. The generality of laws are only exclusive privileges; the tribute of all to the advantage of a few.

WOULD you prevent crimes? Let the laws be clear and fimple; let the entire force of the nation be united in their defence; let them be intended rather to favour every individual, than any particular claffes of men; let the laws be feared, and the laws only. The fear of the laws is falutary, but the fear of men is a fruit-M 3 ful

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ful and fatal fource of crimes. Men enflaved, are more voluptuous, more debauched, and more cruel than those who are in a flate of freedom. These fludy the fciences, the interest of nations, have great objects before their eyes, and imitate them; but those, whose views are confined to the present moment, endeavour, 'midst the distraction of riot, and debauchery, to forget their fituation; accustomed to the uncertainty of all events, for the laws determine none, the confequences of their crimes become problematical, which gives an additional force to the ftrength of their passions.

IN a nation, indolent from the nature of the climate, the uncertainty of the laws confirms and increafes men's indolence and flupidity. In a voluptuous, but active nation, this uncertainty occasions a multiplicity of cabals and intrigues, which spread distruss and intrigues, which spread distruss and diffidence through the hearts of all, and diffimulation and treachery are the foundation of their prudence. In a brave and powerful

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CRIMES and PUNISHMENTS. 167 ful nation, this uncertainty of the laws is at last destroyed, after many oscillations from liberty to flavery, and from flavery to liberty again.

CHAP. XLII.

Of the Sciences.

Would you prevent crimes? Let liberty be attended with knowledge. As knowledge extends, the difadvantages which attend it diminish, and the advantages increase. A daring impostor, who is always a man of fome genius, is adored by the ignorant populace, and defpifed by men of understanding. Knowledge facilitates the comparison of objects, by fhewing them in different points of view. When the clouds of ignorance are difpelled by the radiance of knowledge, authority trembles, but the force of the laws remains immovable. Men of enlightened understanding must necessarily approve those useful conventions, which are the foundation of public fafety; they compare, with M 4

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with the higheft fatisfaction, the inconfiderable portion of liberty of which they are deprived, with the fum total facrificed by others for their fecurity; obferving that they have only given up the pernicious liberty of injuring their fellow creatures, they blefs the throne, and the laws upon which it is eftablished.

IT is falfe that the fciences have always been prejudicial to mankind. When they were fo, the evil was inevitable. The multiplication of the human fpecies on the face of the earth introduced war, the rudiments of arts, and the first laws; which were temporary compacts arifing from neceffity, and perishing with it. This was the first philosophy, and its few elements were just, as indolence and want of fagacity, in the early inhabitants of the world, preferved them from error.

BUT neceffities increasing with the number of mankind, stronger and more lasting impressions were necessary to prevent their frequent relapses into a state of barbarity,
CRIMES and PUNISHMENTS. 169

barbarity, which became every day more fatal. The first religious errors, which peopled the earth with falle divinities, and created a world of invisible beings to govern the visible creation, were of the utmost fervice to mankind. The greatest benefactors to humanity were those who dared to deceive, and lead pliant ignorance to the foot of the altar. By prefenting to the minds of the yulgar, things out of the reach of their fenses, which fled as they purfued, and always eluded their grafp; which, as they never comprehended, they never defpised, their different paffions were united, and attached to a fingle object. This was the first transition of all nations from their favage state. Such was the neceffary, and perhaps the only bond of all focieties at their first formation. I fpeak not of the chofen · people of God, to whom the most extraordinary miracles, and the most fignal favours, fupplied the place of human policy. But as it is the nature of error to fubdivide itfelf ad infinitum, fo the pretended knowledge, which fprung from it, tranfformed ί.

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formed mankind into a blind fanatic multitude, jarring and deftroying each other in the labyrinth in which they were inclofed: hence it is not wonderful, that fome fenfible and philofophic minds fhould regret the ancient state of barbarity. This was the first epocha, in which knowledge, or rather opinions, were fatal.

THE fecond may be found in the difficult and terrible paffage from error to truth, from darkness to light. The violent shock between a mass of errors, useful to the few and powerful, and the truths fo important to the many and the weak, with the fermentation of paffions, excited on that occafion, were productive of infinite evils to unhappy mortals. In the ftudy of hiftory, whole principal periods, after certain intervals, much refemble each other, we frequently find, in the neceffary paffage from the obfcurity of ignorance to the light of philosophy, and from tyranny to liberty, its natural confequence, one generation facrificed to the happiness of the next. But when this flame

CRIMES and PUNISHMENTS. 171 flame is extinguished, and the world delivered from its evils, truth, after a very flow progress, fits down with monarchs on the throne, and is worschipped in the affemblies of nations. Shall we then believe, that light diffused among the people is more destructive than darkness, and that the knowledge of the relations of things can ever be fatal to mankind?

IGNORANCE may indeed be lefs fatal than a fmall degree of knowledge, becaufe this adds, to the evils of ignorance, the inevitable errors of a confined view of things on this fide the bounds of truth; but a man of enlightened understanding, appointed guardian of the laws, is the greatest bleffing that a sovereign can bestow on a nation. Such a man is accuftomed to behold truth, and not to fear it; unacquainted with the greatest part of those imaginary and infatiable necessities, which fo often put virtue to the proof, and accuftomed to contemplate mankind from the most elevated point of view, he confiders the nation as his family, and his

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his fellow citizens as brothers; the diftance between the great and the vulgar appears to him the lefs, as the number of mankind he has in view is greater.

THE philosopher has necessities and interests unknown to the vulgar, and the chief of these is not to belie in public the principles he taught in obscurity, and the habit of loving virtue for its own sake. A few such philosophers would constitute the happiness of a nation; which, however would be but of short duration, unless, by good laws, the number were so increased, as to lessen the probability of an improper choice.

CHAP. XLIII.

Of. Magistrates.

Another method of preventing crimes is, to make the observance of the laws, and not their violation, the interest of the magistrate.

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THE greater the number of those who conftitute the tribunal, the lefs is the danger of corruption; because the attempt will be more difficult, and the power and temptation of each individual will be proportionably lefs. If the fovereign, by pomp and the austerity of edicts, and by refusing to hear the complaints of the oppressed, accustom his subjects to respect the magistrates more than the laws, the magistrates will gain indeed, but it will be at the expense of public and private security.

CHAP. XLIV.

Of Rewards.

YET another method of preventing crimes is, to reward virtue. Upon this subject the laws of all nations are filent. If the rewards, proposed by academies for the discovery of useful truths, have increased our knowledge, and multiplied good books, is it not probable, that rewards, distributed by the beneficent hand of

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of a fovereign, would also multiply virtuous actions. The coin of honour is inexhaustible, and is abundantly fruitful in the hands of a prince who distributes it wifely.

C H A P. XLV.

Of Education.

FINALLY, the most certain method of preventing crimes is, to perfect the fystem of education. But this is an object too vast, and exceeds my plan; an object, if I may venture to declare it, which is so intimately connected with the nature of government, that it will always remain a barren spot, cultivated only by a few wise men.

A GREAT man, who is perfecuted by that world he hath enlightened, and to whom we are indebted for many important truths, hath most amply detailed the principal maxims of useful education. This chiefly confists in prefenting to the mind CRIMES and PUNISHMENTS. 175 mind a fmall number of felect objects; in fubftituting the originals for the copies, both of phyfical and moral phænomena; in leading the pupil to virtue by the eafy road of fentiment, and in withholding him from evil by the infallible power of neceffary inconveniencies, rather than by command, which only obtains a counterfeit and momentary obedience.

C H A P. XLVI.

Of Pardons.

As punifhments become more mild, clemency and pardon are lefs neceffary. Happy the nation in which they will be confidered as dangerous! Clemency, which has often been deemed a fufficient fubfitute for every other virtue in fovereigns, fhould be excluded in a perfect legiflation, where punifhments are mild, and the proceedings in criminal cafes regular and expeditious. This truth will feem cruel to those who live in countries, where, from the abfurdity of the laws, and and the feverity of punifhments, pardons, and the clemency of the prince, are neceffary. It is indeed one of the nobleft prerogatives of the throne, but, at the fame time, a tacit difapprobation of the laws. Clemency is a virtue which betongs to the legiflator, and not to the executor of the laws; a virtue which ought to fhine in the code, and not in private judgment. To fhew mankind, that crimes are fometimes pardoned, and that punishment is not the necessary confequence, is to nourish the flattering hope of impunity, and is the caufe of their confidering every punifhment inflicted as an act of injustice and oppression. The prince, in pardoning, gives up the public fecurity in favour of an individual, and, by his ill-judged benevolence, proclaims a public act of impunity. Let, then, the executors of the laws be inexorable, but let the legislator be tender, indulgent and humane. He is a wife architect, who erects his edifice on the foundation of felf-love, and contrives, that the interest of the public shall be the intereft CRIMES and PUNISHMENTS. 177 intereft of each individual; who is not obliged by particular laws, and irregular proceedings, to feparate the public good from that of individuals, and erect the image of public felicity on the bafis of fear. and diftruft; but like a wife philofopher, he will permit his brethren to enjoy, in quiet, that fmall portion of happinefs, which the immenfe fyftem, eftablifhed by the first caufe, permits them to taste on this earth, which is but a point in the univerfe.

A SMALL crime is fometimes pardoned, if the perfon offended chufes to forgive the offender. This may be an act of good-nature and humanity, but it is contrary to the good of the public. For, although a private citizen may difpenfe with fatisfaction for the injury he has received, he cannot remove the neceffity of example. The right of punifhing belongs not to any individual in particular, but to fociety in general, or the fovereign. He may renounce his own portion of this right, but cannot give up that of others.

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CHAP.

CHAP. XLVII.

Conclusion.

I CONCLUDE with this reflection, that the feverity of punifhments ought to be in proportion to the ftate of the nation. Among a people hardly yet emerged from barbarity, they fhould be most fevere, as ftrong impressions are required; but in proportion as the minds of men become fostened by their intercourse in fociety, the feverity of punishments should be diminission if it be intended, that the neceffary relation between the object and the fensation should be maintained.

From what I have written refults the following general theorem, of confiderable utility, though not conformable to cuftom, the common legiflator of nations.

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That a punishment may not be an act of violence, of one, or of many against a private member of society, it should be publish immediate and necessary; the least possible in the case given; proportioned to the crime, and determined by the laws.

FINIS.

A COMMENTARY

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COMMENTARY

On the Book of

CRIMES and PUNISHMENTS.

CHAP. I.

The Occasion of this Commentary.

H AVING read, with infinite fatiffaction, the little book on Crimes and Punifhments, which in morality, as in medicine, may be compared to one of those few remedies, capable of alleviating our fufferings; I flattered myself that it would be a means of softening the remains of barbarism in the laws of many nations; I hoped for some reformation in mankind, when I was informed, that, within a few miles of my abode, they had just hanged a girl of eighteen, beautiful, well made, accomplished, and of a very reputable family.

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SHE was culpable of having fuffered herfelf to be got with child, and alfo, of having abandoned her infant. This unfortunate girl, flying from her father's houfe, is taken in labour, and without affiftance, is delivered of her burthen, by the fide of a wood. Shame, which in the fex is a powerful paffion, gave her ftrength to return home, and to conceal her fituation. She left her child exposed; it is found the next morning; the mother is difcovered, condemned, and executed.

THE first fault of this unhappy victim, ought to have been concealed by the family, or rather claims the protection of the laws, because it was incumbent on her seducer to repair the injury he had done; because weakness hath a right to indulgence; because concealing her pregnancy may endanger her life; because declaring her condition destroys her reputation, and because the difficulty of providing for her infant is a great additional missfortune.

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HER fecond fault is more criminal. She abandons the fruit of her weaknefs, and exposes it to perifh.

Bur, because a child is dead, is it abfolutely neceffary to kill the mother ? She did not kill the child. She flattered herfelf, that fome paffenger would have compaffion on the innocent babe. It is even poffible that the might intend to return and provide for it; a fentiment fo natural in the breaft of a mother, that it ought to be presumed. The law, in the country of which I am speaking, is, indeed, pofitively against her. But is it not an unjust, inhuman and pernicious law? Unjust, because it makes no distinction between her who murders, and her who abandons her infant; inhuman, because it punishes with death a too great defire of concealing a weakness; pernicious, because it deprives the state of a fruitful subject, in a country that wants inhabitants.

CHARITY hath not yet established, in that nation, houses of reception for exposed A 2 infants. infants. Where charity is wanting, the law is always cruel. It were much better to prevent, than to think only of punifhing these frequent misfortunes. The proper object of jurisprudence is, to hinder the commission of crimes, rather than condemn to death a weak woman, when it is evident, that her trangression was unattended with malice, and that she hath already been severely punished by the pangs of her own heart.

INSURE, as far as poffible, a refource to those who shall be tempted to do evil, and you will have less to punish.

CHAP. II.

Of Punishments.

THIS misfortune, and this very hard law, with which I was fo fenfibly affected, prompted me to caft my eyes on the criminal code of nations. The humane author of the Effay on Crimes and Punishments, had but too much cause to complain, that the latter frequently exceed CRIMES and PUNISHMENTS.

ceed the former, and are fometimes detrimental to the flate they were intended to ferve.

THOSE ingenious punifhments, the *ne* plus ultra of the human mind endeavouring to render death horrible, feem rather the inventions of tyranny than of justice.

THE punishment of the wheel was first introduced in Germany, in the times of anarchy, when those who usurped the regal power, refolved to terrify, with unheard of torments, those who should difpute their authority. In England, they ripped open the belly of a man guilty of high treason; tore out his heart, dashed it in his face, and then threw it into the fire. And wherein did this high treason frequently confist? In having been, during a civil war, faithful to an unfortunate king; or in having fpoken freely on the doubtful right of the conqueror. At length, their manners were loftened; they continue to tear out the heart, but not till after the death of the offender. The apparatus is dreadful; but the A 3

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the death is mild, if death can ever be mild.

C H A P. III.

On the Punishment of Hereticks.

THE denunciation of death to those who, in certain dogmas, differed from the established church, was peculiarly the act of tyranny. No christian emperor, before the tyrant Maximus, ever thought of condemning a man to punishment merely for points of controverfy. It is true, indeed, that two Spanish bishops pursued to death the Priscilianists under Maximus ; but it is also true, that this tyrant was willing to gratify the reigning party with the blood of hereticks. Barbarity and justice were to him indifferent. Iealous of Theodofius, a Spaniard like himfelf, he endeayoured to deprive him of the empire of the East, as he had already obtained that of the Weft. Theodofius was hated for his cruelties; but he had found the means of gaining to his party the heads of the church. Maximus was willing to difplay the fame zeal, and to attach the Spanish bishops to his faction. He flattered

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ed both the old and the new religion; he was as treacherous as inhuman, as indeed were all those who at that time, either pretended to, or obtained empire. That valt part of the world was then governed like Algiers at prefent. Emperors were created and dethroned by the military power, and were often chosen from among nations that were reputed barbarous. Theodofius opposed to his competitor other barbarians from Scythia. He filled the army with Goths, and furprized Alaric the conqueror of Rome. In this horrible confusion, each endeavoured to ftrengthen his party by every means in his power.

MAXIMUS having caufed the Emperor Gratian, the colleague of Theodofius, to be affaffinated at Lyons, meditated the deftruction of Valentinian the fecond, who, during his infancy, had been named fucceffor to Gratian. He affembled at Treves a powerful army, composed of Gauls and Germans. He caufed troops to be levied in Spain, when two Spanish bishops, A 4 Idacio

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Idacio and Ithacus, or Itacius, both men of credit, came and demanded of him the blood of Prifcilian and all his adherents, who were of opinion, that fouls were emanations from God; that the Trinity did not contain three hypoftafes; and moreover, they carried their facrilege fo far as to fast on fundays. Maximus, half pagan and half christian, foon perceived the enormity of these crimes. The holy bithops Idacio and Itacius, obtained leave to torture Priscilian and his accomplices before they were put to death. Thev were both prefent, that things might be done according to order, and they returned bleffing God, and numbering Maximus the defender of the faith, among the faints. But Maximus being afterwards defeated by Theodofius, and affaffinated at the feet of his conqueror, had not the good fortune to be canonized.

IT is proper to observe, that Saint Martin, bishop of Tours, who was really a good man, solicited the pardon of Priscilian; but being himself accused of *i*. herefy,

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herefy by the bishops, he returned to Tours for fear of the torture at Treves..

As to Priscilian, he had the consolution, after he was hanged, of being honoured by his sect, as a martyr. His feast was celebrated, and would be celebrated still, if there were any Priscilianists remaining.

THIS example made the entire church tremble; but it was foon after imitated and furpaffed. Priscilianists had been put to death by the fword, the halter, and by lapidation. A young lady of quality, fufpected to have fasted on a funday, was, at Bourdeaux, only stoned to death. These punishments appeared too mild; it was proved that God required that hereticks should be roafted alive. The peremptory argument, in support of this opinion, was, that God punishes them in that manner in the next world, and that every prince, or his reprefentative, even down to a petty constable, is the image of God in this fublunary world.

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On this principle it was that, all over Europe, they burnt witches and forcerers, who were manifeftly under the empire of the devil; and alfo heterodox chriftians, which were deemed ftill more criminal and dangerous.

IT is not certainly known, what was the crime of those priests, who were burnt at Orleans in the presence of king Robert and his wife Constantia, in the year 1022. How indeed should it be known? there being, at that time, but a small number of clerks and monks that could write. All we certainly know is, that Robert and his wife feasted their eyes with this abominable spectacle. One of the sectaries had been confessor to her majesty, who thought she could not better repair the missortune of having confessed to a heretick, than by seeing him devoured by the flames.

CUSTOM becomes law: from that period to the prefent time, a space of more than seven hundred years, the church hath

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hath continued to burn those that are guilty, or supposed guilty, of an error in opinion.

CHAP. IV.

On the Extirpation of Herefy.

T feems necessary to diffinguish an herefy of opinion from faction. From the first ages of Christianity opinions have been different. The Christians of Alexandria were, in many points, of a different opinion from those of Antioch. The Achaians differed from the Afiatics. This diverfity of opinion exifted from the beginning, and probably will continue for ever. Jefus Chrift, who could have united all the faithful in the fame fentiments, did it not; and therefore we may conclude that it was not his defign; but that he chofe rather to exercise all his churches in acts of indulgence and charity, by permitting different fystems, yet all agreeing to acknowledge him their lord and mafter. These feveral sects, so long as they were tolerated by the emperors, or concealed from

from their fight, had it not in their power to perfecute each other, being equally fubject to the Roman magistrates : they could only difpute. If they were perfecuted, they equally claimed the privilege of nature : " Suffer us, they faid, to adore our God in peace, and do not refuse us the liberty you grant to the Jews:" Every fect may now urge the fame argument to their oppreffors. They may fay to those who grant privileges to the Jews : "Treat us as you treat the fons of Jacob; let us, like them, pray to God according to our confcience. Our opinion will no more injure you state, than Judaism. You tolerate the enemies of Jesus Christ ; tolerate us who adore him, and who differ from you only in theological fubtilities. Do not deprive yourfelves of uleful fubjects ; useful in your manufactures, your marine, and the cultivation of your lands. Of what importance is it, that their Creed be fomewhat different from yours? You want their labour, and not their Catechifm."

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FACTION is quite a different thing. It always happens, that a perfecuted fect degenerates into faction. The oppressed naturally unite and animate each other; and are generally more industrious in strengthening their party, than their perfecutors in their extermination. They must either deftroy or be deftroyed. So it happened after the perfecution excited in 304, by Galerius, in the two last years of Dioclesian. The Christians, having been favoured by that emperor during eighteen years, were become too numerous and too rich to be exterminated. They joined Chlorus; they fought for his fon Constantine, and a total revolution of the empire was the confequence.

SMALL events may be compared with great, when they are produced by the fame spirit. Revolutions of a similar kind happened in Holland, in Scotland, and in Switzerland. When Ferdinand and Isabella drove the Jews out of Spain, where they were established, not only before the reigning family, but before the Moors, the Goths, Goths, or even the Carthaginians; if the Jews had been as warlike as they were rich, they might eafily, in conjunction with the Arabs, have effected a revolution.

IN fhort, no fect ever changed the gonernment, unlefs excited by defpair. Mahomed himfelf fucceeded only becaufe he was driven from Mecca, and a reward offered for his head.

WOULD you prevent a fect from overturning the flate, imitate the prefent wife conduct of England, of Germany, of Holland; use toleration. The only methods, in policy, to be taken with a new sect, are, to put to death the chief and all his adherents, men, women, and children, without sparing one individual; or to tolerate them, when numerous. The first method is that of a monster; the second, of a wise man.

CHAIN your fubjects to the ftate by their interest. Let the Quaker and the Turk find their advantage in living under your

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your laws. Religion is of God to man; the civil law is of you to your people.

CHAP. V.

Of Profanation.

LEWIS IX. king of France, who for his virtues was numbered among the faints, made a law against blasphemers. He condemned them to a new punishment; their tongues were pierced with a hot iron. It was a kind of retaliation : the finning member fuffering the punishment. But it was fomewhat difficult to determine, what was blafphemy. Exprefiions frequently escape from a man in a paffion, from joy, or even in conversation, which are merely expletives, fuch as the fela and the vah of the Hebrews, the pol and the ædepol of the Latins, as also per Deos immortales, an expression frequently used, without the least intention of fwearing by the immortal Gods.

THE words which are called oaths and blafphemy, are commonly vague terms that that may be varioully interpreted.' The law by which they are punished, seems to be founded on that of the Jews which fays, Thou shalt not take the name of the Lord thy God in vain. The best commentators are of opinion, that this commandment relates to perjury; and there is the more reason to believe them right, as the word shave, which is translated in vain, properly fignifies perjury. Now, what analogy can there be between perjury and Cabo de dios, Cadedis, Sanghlen, Ventreblen, Corpo di dio, &c.?

IT was customary with the Jews to fwear by the life of God, as the Lord liveth: the phrase was common; so that it was lying in the name of God, that was forbidden.

PHILIP AUGUSTUS, in 1181, condemned the nobility, who should pronounce the words which are softened in the terms *Tetebleu*, ventrebleu; corbleu, fangbleu, to pay a fine, and the plebeians to be drowned. The first part of this law seems feems puerile, the latter abominable. It was an outrage to nature, to drown one man for a crime for which another paid a few pence of the money of those times. So that this law, like many other, remained unexecuted, especially when the king was excommunicated, and his kingdom interdicted by pope Celeftine III.

SAINT LEWIS, transported with zeal, ordered indiferiminately, that whosoever should pronounce these indecent words, should have his tongue bored, or his upper lip cut off. A citizen of Paris, having suffered this punishment, complained to Pope Innocent IV. This Pontiff remonstrated to the king that the punishment was too great for the crime, which however had no effect upon his majesty. Happy had it been for mankind, if the popes had never affected any other superiority over kings.

THE Ordinance of Lewis XIV. fays, "Those who shall be convicted of having sworn by, or blasphemed the holy name of B God, God, of his moft holy mother, or of his faints, fhall, for the firft offence, pay a fine; for the fecond, third, and fourth, a double, triple, and quadruple fine; for the fifth, fhall be put in the flocks; for the fixth, fhall ftand in the pillory, and lofe his upper lip; for the feventh, fhall have his tongue cut out."

THIS law appears to be humane and just, as it inflicts a cruel punishment only on a fevenfold repetition, which can hardly be prefumed.

BUT with regard to more atrocious profanations, which are called facrilege, the criminal ordinance mentions only robbing of churches; it takes no notice of public impieties, perhaps becaufe they were not fuppofed to happen, or were too difficult to fpecify. They are left therefore to the difcretion of the judge; and yet nothing ought to be left to difcretion.

IN fuch extraordinary cafes, how is the judge to act? He should consider the age of CRIMES and PUNISHMENTS. xix

of the offender, the nature and degree of his offence, and particularly the neceffity of a public example. Pro qualitate perfonce, quoque rei conditione & temporis & ætatis & fexus, vel clementius hatuendum. If the law does not expressly fay that fuch a crime shall be punished with death, what judge shall think himself authorized to prohounce that sentence? If the law be silent; if nevertheless a punishment be required, the judge ought certainly, without hesitation, to decree the least severe, because he is a man.

SACRILEGIOUS profanations are never committed, excépt by young debauchees. Would you punish them as severely as if they had murdered a brother? Their youth pleads in their favour. They are not suffered to dispose of their possession, because they are supposed to want maturity of judgment, sufficient to foresee the consequences of an imprudent transaction. Is it not therefore natural to suppose, that they are incapable of foreseeing the consequences of their impiety?

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WOULD you treat a wild young man, who, in his phrenzy, had profaned a facred image, without stealing it, with the fame rigour that you punished a Brinvilliers, who poisoned his father and his whole family?

THERE is no law against the unhappy youth, and you are determined to make one that shall condemn him to the feverest punishment! He deserved chastisement; but did he deserve such excruciating torture, and the most horrible death?

BUT he had offended God! True, most grievously. Imitate God in your proceedings against him. If he be penitent, God forgives him. Impose a penance, and let him be pardoned.

YOUR illustrious *Montefquieu* hath faid: It is our duty to honour the Deity, and not to revenge him. Let us weigh these words. They do not mean, that we should neglect the maintenance of publick decorum;

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rum; but, as the judicious author of the preceding Effay obferves, that it is abfurd for an infect to pretend to revenge the fupreme Being. A village magistrate, or the magistrate of a city, is neither a Mofes nor a Joshua,

CHAP. VI.

Of the Indulgence of the Romans in Matters of Religion.

THE amazing contrast between the Roman laws, and the barbarous inftitutions by which they were fucceeded, hath often been the fubject of conversation among the speculative part of mankind.

DOUBTLESS the Roman fenate held the fupreme God in as great veneration as we; and profeffed as must esteem for their fecondary deities as we for our faints. Ab Jove principium was their common formule. Pliny in his panegyrick on the good Trajan attest, that the Romans never omitted to begin their difcourfe, and affairs, by invoking the Deity. Cicero and B 3 Livy Livy tell us the fame thing. No people were more religious; but they were too wife, and too great, to defcend to the punifhment of idle language or philofophick opinions: they were incapable of inflicting barbarous punifhments on those who, with Cicero, himself an augur, had no faith in auguries; or on those who, like Cæsar, afferted in full senate, that the gods do not punish men after death.

IT hath often been remarked, that the fenate permitted the chorus in the Troad to fing: There is nothing after death, and death itfelf is nothing. You afk, what becomes of the dead? they are where they were ere they were born.*

WAS ever profanation more flagrant than this? From Ennius to Aufonius all is profanation, notwithftanding the respect for divine worship. Why were these things disregarded by the senate? because they did not, in any wise, affect the government of the state; because they disturbed

* Post mortem nihil est, mors ipsaque nihil, &c. SENECA.

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diffurbed no inftitution, nor religious ceremony. The *police* of the Romans was neverthelefs excellent; they were neverthelefs abfolute mafters of the beft part of the world, till the reign of Theodofius the fecond.

It was a maxim of the Romans, Dearum offensæ, Diis curæ, Offences against the Gods concern the Gods only. The fenate, by the wifest institution, being at the head of religion, were under no apprehensions, that a convocation of priests should force them to revenge the priesthood under a pretext of revenging heaven. They never said, let us tear the impious assure, less we ourselves be deemed impious; let us shew the priesthood, by our cruelty, that we are no less religious than they.

BUT our religion is more holy than that of the Romans, and confequently impiety is a greater crime. Granted. God will punish it. The part of man is, to punish that which is criminal in the publick dif-...B 4 order order which the impiety hath occafioned. But if in the act of impiety the delinquent hath not even stolen a handkerchief; if the ceremonies of religion have been in no wife disturbed, shall we, as I faid before, punish the impiety as we would punish parricide? The Marshal d'Ancre had caufed a white cock to be killed when the moon was at full: ought we therefore to burn the Marshal d'Ancre ?

Est modus in rebus, sunt certi denique fines ; Nec scutica dignum horribili sectere flagello.

CHAP. VII.

On the Crime of Preaching; and of Anthony.

A CALVINIST teacher, who, in certain provinces, preaches to his flock, if he be detected, is punished with death; and those who have given him a supper or a bed, are sent to the gallies for life.

IN other countries, if a Jefuit be caught preaching, he is hanged. Is it to avenge God that this Calvinist and this Jefuit
fuit are put to death? Have both parties built upon the following Evangelical law? If be neglect to bear the church, let him be unto thee as an heathen man and a publican. But the Evangelist does not order that this heathen and this publican should be hanged.

OR have they built on this paffage in Deuteronomy *: If among you a prophet arife; and that which he hath faid come to pafs; and he fayeth unto you, let us follow ftrange Gods; and if thy brother, or thy fon, or thy wife, or the friend of thy heart, fay unto thee, come, let us follow strange Gods; let them be straightways killed, strike thou first, and all the people after thee. But neither this Jesuit nor the Calvinist faid unto you, come, let us follow strange Gods.

THE counfellor Dubourg, the monk Jehan Chauvin, named Calvin, the Spanish physician Servetus, the Calabrian Gentilis, all worshipped the fame God : and yet, the prefident Minard caused counfellor

* Chap. xiii.

lor Dubourg to be burnt; and Dubourg's friends caufed prefident Minard to be affaffinated; Jehan Calvin caufed the phyfician Servetus to be roafted; and had likewife the confolation to be a principal means of bringing the Calabrian Gentilis to the block; and the fucceffors of Jehan Calvin burnt Anthony. Was it reafon, or piety, or juffice, that committed thefe murders?

THIS hiftory of Anthony is one of the most fingular which the annals of phrenfy hath preferved. I read the following account in a very curious manufcript; it is in part related by Jacob Spon.

ANTHONY was born at Brieu in Lorrain, of catholic parents, and he was educated by the Jefuits at Pont-a-Mouffon. The preacher Féri engaged him in the proteftant religion at Metz. Having returned to Nancy he was profecuted as a heretick, and, had he not been faved by a friend, would certainly have been hanged. He fled for refuge to Sedan, where, being taken for a papift, he narrowly escaped affaffination.

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SEEING by what ftrange fatality his life was not in fafety either among papifts or proteftants, he went to Venice and turned Jew. He was politively perfuaded, even to the laft moments of his life, that the religion of the Jews was the only true religion; for that if it was once true it must always be fo. The Jews did not circumcife him, for fear of offending the ftate; but he was no lefs internally a Jew. He now went to Geneva, where, concealing his faith, he became a preacher, was prefident of the college, and finally what is called a minister.

THE perpetual combat in his breaft between the religion of Calvin, which he was obliged to preach, and that of Mofes, which was the only religion he believed, produced a long illnefs. He became melancholy, and at laft quite mad, crying aloud, that he was a Jew. The minifters of the gofpel came to vifit him, and endeavoured to bring him to himfelf; but he anfwered, "that he adored none but " the God of Ifrael; that it was impof-"fible

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" fible for God to change; that God " could never have given a law, and in-" fcribed it with his own hand, with an " intention that it should be abolished." He fpoke against Christianity, and afterwards retracted all he had faid, and even wrote his confession of faith, to escape punishment; but the unhappy persuasion of his heart would not permit him to fign it. The council of the city affembled the clergy, to confult what was to be done with the unfortunate Anthony. The minority of these clergy were of opinion, that they should have compassion on him, and rather endeavour to cure his difeafe, than punish him. The majority determined that he should be burnt, and he was burnt. This transaction is of the year 1632*. A hundred years of reason and virtue are fcarce fufficient to expiate fuch a deed.

* Spon. p. 500. Guy Vances.

CHAP.

CHAP. VIII.

The History of Simon Morin.

THE tragical end of Simon Morin is not lefs horrible than that of poor Anthony. It was midft the feafting, pleafures and gallantry of a brilliant court; it was even in the times of the greateft licentioufnefs, that this unfortunate madman was burnt at Paris, in the year 1663. Imagining that he had feen visions, he carried his folly fo far as to believe that he was fent from God, and that he was incorporated with Jefus Chrift.

THE Parliament very wifely condemned him to be confined in a mad-houfe. What was very remarkable, there happened to be confined in the fame madhoufe another fool who called himfelf God the Father. Simon Morin was fo ftruck with the folly of his companion that he acknowledged his own, and appeared, for a time, to have recovered his fenfes. He declared his repentance, and

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and unfortunately for himfelf obtained his liberty.

SOMETIME after he relapfed into his former nonfenfe, and began to dogmatize. His unhappy deftiny brought him acquainted with St. Sorlin Defmarets, who for fome months was his friend, but who afterwards, from jealoufy, became his moft cruel perfecutor.

THIS Defmarets was no lefs a vifionary than Morin. His first follies indeed were innocent. He printed the Tragi-Comedies of Erigone and Mirame with a tranflation of the Pfalms; the Romance of Ariane and the Poem of Clovis, with the office of the holy Virgin turned into verfe. He likewife published dithyrambic poems, enriched with invectives against Homer and Virgil. From this kind of follies he proceeded to others of a more ferious nature. He attacked Port Royal, and after confeffing that he had perverted fome women to atheifm, he commenced prophet. He pretended that God had given

given him, with his own hand, the key to the treasure of the Apocalypse, that with this key he would reform the whole world, and that he should command an army of an hundred and forty thousand men against the Jansenists.

NOTHING could have been more reafonable and more juft, than to have confined him in the fame place with Simon Morin : but can it be believed, that he found credit with the Jefuit Annat, the king's confeffor ? whom he perfuaded, that this poor Simon Morin would eftablifh a fect almost as dangerous as the Janfenists themfelves. In short, carrying his infamy so far as to turn informer, he obtained an order to feize the perfon of his rival. Shall I tell it ? Simon Morin was condemned to be burnt alive !

In conducting him to the ftake, there was found, in one of his ftockings, a paper in which he begged forgiveness of God for all his errors. This ought to have saved him; but no: the sentence was confirmed,

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firmed, and he was executed without mercy.

SUCH deeds are enough to make a man's hair briftle with horror. Yet, where is the country that hath not beheld fuch fhocking fpectacles? Mankind univerfally forget that they are brothers, and perfecute each other even to death. Let us confole ourfelves with the hope, that fuch dreadful times are paffed, never more to return.

CHAP. IX.

Of Witches.

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I N the year 1748, in the bishoprick of Wurtsburg, an old woman was convicted of witchcraft and burnt. This was an extraordinary phenomenon in the present century. But how incredible it seems, that a people, who boasted of their reformation, and of having trampled fuperstition under their feet, and who flattered themselves that they had brought their reason to perfection; is it not wonderful, I fay, that such a people should have believed in witchcraft; should have burnt CRIMES and PUNISHMENTS. XXXIII burnt old women accufed of this crime, and that above a hundred years after the pretended reformation of their reafon?

IN the year 1652, a country woman, named Michelle Chaudron, of the little territory of Geneva, met the Devil in her way from the city. The Devil gave her a kifs, received her homage, and imprinted on her upper lip, and on her right breaft, the mark which he is wont to beftow upon his favourites. This feal of the Devil is a little fign upon the fkin, which renders it infenfible, as we are affured by all the demonographical civilians of thofe times.

THE Devil ordered Michelle Chaudron to bewitch two young girls. She obeyed her mafter punctually. The parents of the two girls accufed her of dealing with the Devil. The girls being confronted with the criminal, declared, that they felt a continual prickling in fome parts of their bodies, and that they were poffeffed. Phyficians were called, at leaft men that C paffed paffed for Phyficians in those days. They vifited the girls. They faught for the feal of the Devil on the body of Michelle, which feal is called, in the verbal process, the Satanical mark. Into one of these marks they plunged a long needle, which was already no fmall torture. Blood iffued from the wound, and Michelle testified by her cries that the part was not infenfible. The judges not finding sufficient proof that Michelle Chaudron was a witch, ordered her to be tortured, which infallibly produced the proof they wanted. The poor wretch, overcome by torment, confess'd, at last, every thing they defired.

THE phyficians faught again for the Satanical mark, and found it in a little black fpot on one of her thighs. Into this they plunged their needle. The poor creature, exhaufted and almost expiring with the pain of the torture, was infensible to the needle, and did not cry out. She was instantly condemned to be burnt; but the world beginning at this time to be a little more CRIMES and PUNISHMENTS. XXXV more civilized, she was previously strangled.

AT this period, every tribunal in Europe refounded with fuch judgments, and fire and faggot were univerfally employed againft witchcraft as well as herefy. The Turks were reproached with having amongst them neither forcerers, witches, nor demoniacs; and the want of the latter was confidered as an infallible proof of the falfity of their religion.

A ZEALOUS friend to the publick welfare, to humanity, and to true religion, in one of his writings in favour of innocence, informs us, that there have been above a hundred thousand witches condemned to die by Christian tribunals. If, to these lawful massacres, we add the much superior number of hereticks facrificed, our part of the globe will appear one vast scaffold covered with executioners and victims, and surrounded by judges, guards and spectators.

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CHAP. X.

On the Punishment of Death.

T T hath long fince been observed, that a man after he is hanged is good for nothing, and that punishments invented for the good of fociety, ought to be useful to fociety. It is evident, that a fcore of ftout robbers, condemned for life to fome publick work, would ferve the ftate in their punishment, and that hanging them is a benefit to nobody but the executioner. Thieves, in England, are feldom punished with death, but are transported to the colonies. This is also practifed in Ruffia, where not one criminal was executed during the whole reign of the autocratical Elizabeth. Catherine II. who hath fucceeded her, with much more genius, follows her example: yet crimes are not multiplied by this humanity; and it generally happens that the criminals fent to Siberia, in time become honeft people. The fame is observed in the English colonies. We are aftonished at the change, and yet nothing.

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thing can be more natural. The condemned are forced to continual labour for a livelihood. The opportunities of vice are wanting. They marry and multiply. Oblige men to work, and you certainly make them honeft. It is well known, that atrocious crimes are not committed in the country, unlefs when there is too much holiday, and confequently too much idlenefs, and confequently too much debauchery.

THE Romans never condemned a citizen to death, unlefs for crimes which concerned the fafety of the ftate. These our mafters, our first legislators, were careful of the blood of their fellow citizens; but we are extravagant with the blood of ours.

THE queftion hath been frequently debated, whether a judge ought to have the power to punish with death, when the punishment is undetermined by the law? This question was folemnly agitated in the prefence of the Emperor Henry VII, who C 3 decreed

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decreed * that no judge should have such a power.

THERE are fome criminal cafes which are either fo new, fo complicated, and fo unaccountable, as to have escaped the provision of the laws, and which therefore, in fome countries, are left to the difcretion of the judge. But for one case in which the laws permit the death of a criminal whom they have not condemned, there are a thousand wherein humanity should fave whom the laws have condemned to fuffer.

THE fword of justice is in our hands, but we ought rather to blunt than to sharpen its edge. It remains within its sheath in the prefence of kings, to inform us that it ought feldom to be drawn.

THERE have been fome judges who were paffionately fond of fpilling human blood; fuch was Jefferies in England, and fuch in France was the man whom they called *Coupe-tête*. Nature never intended

Bodin de Republica, lib. 3. c. 5.

CRIMES and PUNISHMENTS. XXXXX tended fuch men for magistrates, but for executioners.

CHAP. XI.

On Death Warrants.

MUST we go to the end of the world, muft we have recourfe to the laws of China, to learn how frugal we ought to be of human blood? It is now more than four thoufand years that the tribunals of that empire have exifted; and it is alfo more than four thoufand years that the meaneft fubject, at the extremity of the Empire, hath not been executed, without first transmitting his case to the Emperor, who causes it to be thrice examined by one of his tribunals; after which he figns the death warrant, alters the fentence, or entirely acquits.

BUT it is unneceffary to travel fo far for examples of this nature; Europe will abundantly fupply us. In England, no criminal is put to death, whose deathwarrant is not figned by the king. It is C 4 also also practifed in Germany and in most parts of the north. Such likewife was formerly the cuftom in France, and such it ought to be in all polished nations. A fentence, at a diftance from the throne, may be dictated by cabal, prejudice or ignorance. Such little intrigues are unknown to monarchs, who are continually furrounded by great objects. The members of the supreme council are more enlightened, less liable to prejudice, and better qualified than a provincial judge, to determine whether the state require severe punishments. In short, when inferior courts have judged according to the letter of the law, which poffibly may be rigorous, the council mitigates the fentence according to the true fpirit of all laws, which teaches, never to facrifice a man, but in evident neceffity.

CHAP. XII, On Torture.

A L L mankind being exposed to the attempts of violence or perfidy, detest the crimes of which they may possibly be the the victims : all defire that the principal offender and his accomplices may be punished; nevertheless,' there is a natural compassion in the human heart, which makes all men deteft the cruelty of torturing the accused in order to extort confesfion. The law has not condemned them. and yet, though uncertain of their crime, you inflict a punishment more horrible than that which they are to fuffer when their guilt is confirmed. " Poffibly thou " mayft be innocent; but I will torture " thee that I may be fatisfied : not that I " intend to make thee any recompence for " the thousand deaths which I have made " thee fuffer, in lieu of that which is pre-" paring for thee." Who does not fhudder at the idea ? St. Augustin opposed fuch cruelty. The Romans tortured their flaves only; and Quintilian, recollecting that they were men, reproved the Romans for fuch want of humanity.

IF there were but one nation in the world which had abolished the use of torture; if in that nation crimes were no more frequent

quent than in others; and if that nation be more enlightened and more flourishing fince the abolition, its example furely were fufficient for the reft of the world. England alone might inftruct all other nations in this particular; but England is not the only nation. Torture hath been abolished in other countries, and with fuccefs; the question therefore is decided. Shall not a people, who pique themfelves on their politeness, pride themselves also on their humanity? Shall they obstinately perfist in their inhumanity, merely because it is an ancient cuftom? Referve at least fuch Cruelty for the punishment of those hardened wretches, who shall have affaffinated the father of a family, or the father of his country; but that a young perfon, who commits a fault which leaves no traces behind it, should suffer equally with a parricide; is not this an useles piece of barbarity?

I AM ashamed of having faid any thing on this subject, after what hath been already faid by the author of the Essay on Crimes and Punishments. I ought to have been

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been fatisfied with wifhing, that mankind may read with attention the work of that friend to humanity.

CHAP. XIII.

Of certain sanguinary Tribunals.

I S it credible, that there formerly exist-ed a supreme tribunal more horrible than the Inquifition, and that this tribunal was established by Charlemagne? It was the judgment of Westphalia, otherwife called the Vhemic Court. The feverity, or rather cruelty of this Court. went fo far as to punish with death, every Saxon who broke his fast during Lent. The fame law was also established in Franche-Comté, in the beginning of the seventeeth century. In the archives of a little place called St. Claude, fituated in a remote corner of the most mountainous part of the county of Burgundy, are preferved the particulars of the fentence and verbal process of execution of a poor gentleman named Claude Guillon, who was beheaded on the 28th of July 1629. Being reduced ťò to the utmost poverty, and urged by the most intolerable hunger, he eat, on a fish day, a morfel of horfe flesh, which had been killed in a neighbouring field. This was his crime. He was found guilty of facrilege. Had he been a rich man, and had spent two hundred crowns in a supper of fea fish, suffering the poor to die of hunger, he would have been confidered as a perfon fulfilling every duty. The following is a copy of his fentence. "Hav-" ing feen all the papers of the process, " and heard the opinions of the Doctors " learned in the Law, we declare the faid " Claude Guillon to be truly attainted and " convicted of having taken away part of " the flefh of a horfe, killed in the mea-" dow of that town; of having caufed the " faid flesh to be dreffed, and of eating the " fame on faturday the 31ft of March, &c."

What infamous Doctors must these have been, who gave their opinions on this occafion? Was it among the Topinambous, among the Hottentots, that these or things happened? The Vhemick Court was

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was yet more horrible. Delegates from this court were fecretly fpread over all Germany, taking informations unknown to the accused, who were condemned without being heard; and frequently, in want of an executioner, the youngest judge performed the office himfelf.* It was requisite, in order to be fafe from the affaffination of this Court, to procure letters of exemption from the emperor; and even these were sometimes ineffectual. This Chamber of affaffins was not entirely abolished till the reign of Maximilian I. It ought to have been diffolved in the blood of its members. The Venetian Council of Ten was, in comparison with this, a court of mercy.

WHAT shall we think of such horrid proceedings? Is it sufficient to bewail humanity? There were some cases that cried aloud for vengeance.

* See the excellent abridgment of the Chronological hiftory and laws of Germany, an. 803.

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C H A P. XIV.

On the difference between political and natural Laws.

I CALL natural Laws, those which nature dictates in all ages, to all men, for the maintenance of that justice which she (fay what they will of her) hath implanted in our hearts. Thest, violence, homicide, ingratitude to beneficent parents, perjury against innocence, confpiracies against ones country, are crimes that are univerfally and justly punished, though with more or less feverity.

I CALL *political* Laws, those that are made in compliance with present necessity, whether it be to give stability to the government, or to prevent misfortune. For example: being apprehensive that the enemy may receive intelligence from the inhabitants of the city, you shut the gates, and forbid any one to pass the ramparts on pain of death.

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OR, fearful of a new fect of people, who publickly difclaim all obedience to their fovereign, and fecretly confult of means to diveft themfelves of that obedience; who preach, that all men are equal, and that obedience is due to God alone; who, accufing the reigning fect of fuperftition, mean to deftroy that which is confecrated by the ftate; you denounce death againft those who, in publickly dogmatizing in favour of this fect, may inftigate the people to revolt.

OR, two ambitious princes contend for a crown: the ftrongest gains the prize, and punishes with death the partizans of the weaker. The judges become the instruments of vengeance of the new sovereign, and the supports of his authority.

WHEN Richard the third, the murderer of his two nephews, was acknowledged king of England, the jury found Sir William Collinburn guilty of having written to a friend of the Duke of Richmond, who was at that time raifing an army, and who

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who afterwards reigned by the name of Henry VII. They found two ridiculous lines of Sir William's writing, which were fufficient to condemn him to a horrible death. Hiftory abounds with fuch examples of juffice.

THE right of reprifal is alfo a law adopted by nations. For example, your enemy has hanged one of your brave captains, for having defended an old ruined caftle against a whole army. One of *his* captains falls into your hands; he is a worthy man, and you esteem him; nevertheless you hang him by way of reprisal. You say it is the law: that is to say, because your enemy has been guilty of an enormous crime, you must be guilty of another.

THESE political fanguinary laws exift but for a time; they are temporary, becaufe they are not founded in truth. They refemble the neceffity which, in cafes of extreme famine, obliges people to eat each other: they ceafe to eat men as foon as bread is to be had.

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CHAP. XV.

On the Crime of High Treason. On Titus . Oates, and on the Death of Augustin de Thou.

HIGH Treafon is an offence committed against the fecurity of the commonwealth, or of the king its reprefentative. It is confidered as parricide, and therefore ought not to be extended to offences which bear no analogy to that crime. In making it High Treafon to commit a theft in any house belonging to the state, or even to speak feditious words, you leffen the horror which the crime of high treason ought to inspire.

In our ideas of great crimes, there fhould be nothing arbitrary. If a theft from, or imprecation against, a father be confidered as parricide, you break the bond of filial piety; the fon will then regard his parent as a terrible monster. Every exaggeration in a law tends to its destruction.

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IN common crimes, the laws of England are favourable to the accufed ? but in cafes of high treafon, they are againft him. The Jefuit Titus Oates, being legally interrogated in the Houfe of Commons, and having, upon his oath, declared that he had related the *whole* truth, yet afterwards accufed the fecretary of the Duke of York, and feveral others, of high treafon, and his information was admitted. He likewife fwore before the King's Council, that he had not feen the fecretary, and afterwards, that he had. Notwithstanding thefe illegalities and contradictions, the fecretary was executed.

THE fame Titus Oates and another witnefs depofed, that fifty Jefuits had confpired to affaffinate Charles II. and that they had feen commissions, figned by father Oliva, general of the Jefuits, for the officers that were to command an army of rebels. This evidence was fufficient to authorize the tearing out the hearts of feveral people, and dashing them in their faces.

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faces. But, ferioufly, can two witneffes be thought fufficient to convict a man whom they have a mind to deftroy? At least one would imagine they ought not to be notorious villains; neither ought that, which they depose, to be improbable.

LET us suppose that two of the most upright magistrates in the kingdom were to accuse a man of having conspired with the Mufti, to circumcife the whole Council of State, the Parliament, the Archbishop and the Sorbonne: in vain these two magistrates might fwear, that they had feen the letters of the Mufti: it would naturally be fuppofed that they were wrong in their heads. It was equally ridiculous to imagine that the general of the Jefuits should raife an army in England, as that the Mufti intended to circumcife the court of France. But unhappily, Titus Oates was believed; that there might remain no species of atrocious folly, which hath not entered into the heart of man.

THE laws of England do not confider D 2 as

as guilty of confpiracy, those who are privy to it, and do not inform. They fuppose the informer as infamous as the confpirator is culpable. In France, if any one be privy to a confpiracy and does not reveal it, he is punished with death. Lewis XI. against whom conspiracies were frequent, made this law; a law, which a Lewis XII. or a Henry IV. could never have imagined. It not only obliges an honeft man to divulge a crime which, by his refolution and advice, he might poffibly prevent; but it renders him liable to be punished as a calumniator, it being easy for the accused to manage their affairs in such a manner as to elude conviction.

THIS was exactly the cafe of the truly respectable Augustin de Thou, counfellor of state, and son of the only good historian of which France can boast; equal to Guicciardini in point of abilities, and perhaps superior in point of impartiality.

THIS confpiracy was against Cardinal de Richelieu, rather than against Lewis XIII.

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XIII. The defign was not to betray France to an enemy; for the king's brother, who was the principal author of the plot, could never intend to betray a kingdom to which he was the prefumptive heir, there being only between him and the crown, a dying brother, and two children in the cradle.

DE THOU was neither guilty in the fight of God, nor man. One of the agents of the king's brother, of the Duke of Bouillon, fovereign prince of Sedan, and of the grand Equerry d'Effiat St. Mars, had communicated their intention to de Thou, who immediately went to St. Mars, and endeavoured to diffuade him from the enterprize. If he had informed againft him, he had no proof, and must inevitably have fallen a facrifice to the resentment of the presumptive heir, of a fovereign prince, of the king's favourite, and to publick execution. In fhort, he would have been punished as a malignant calumniator.

THE chancellor Seguier was convinced D 3 of of this in confronting de Thou with the grand Equerry, when de Thou afked the latter the following queftion. "Do you not remember, Sir, that there never paffed a day, in which I did not endeavour to diffuade you from the attempt ?". St. Mars acknowledged it to be true. So that de Thou deferved a recompence, rather than death, from a tribunal of Equity. He certainly deferved to have been faved by cardinal Richelieu; but humanity was not his virtue. There is in this cafe fomething more than fummum jus fumma injuria. In the fentence of this worthy man we read, " for having had knowledge and participation of the faid confpiracy." It does not fay, for not having revealed. So that his crime was, his having been informed of a crime; and he was punished for having had ears and eyes.

ALL that we can fay in extenuation of this feverity, is that it was not the act of justice herfelf, but of a delegated power. The *letter* of the law was positive; but I appeal not only to the lawyers, but to all man-

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mankind, whether the *fpirit* of the law was not perverted? It is a melancholy abfurdity, that a fmall number of people fhould condemn as criminal, a man judged innocent by a whole nation, and worthy their efteem!

CHAP. XVI.

On religious Confession.

JAURIGNY and Balthazar Gerard, who affaffinated William I. prince of Orange; Clement, the Dominican, Chatel, Ravaillac, and all the other parricides of those times, went to confession before they committed their crimes. Fanaticism, in that deplorable age, was carried to such excess, that confession was an additional engagement to the perpetration of villany; an engagement deemed facred, because confession is a facrament.

STRADA himfelf fays, that Jaurigny non ante facinus aggredi fustinuit quam expiatam necis animam apud Dominicanum sacerdotem cœlesti pane sirmaverit.

IT appears in the interrogatory of Ravaillac, that coming from the *Feuillants*, D 4 and and going towards the Jesuits college, he addreffed himself to the Jesuit d'Aubigny; that after talking to him of several apparitions which he had seen, he shewed him a knife, on the blade of which was engraved a heart and a cross; and that he said, this heart fignifies, that the heart of the king should be induced to make war against the Huguenots. If this d'Aubigny had informed the king of these words, and described the man, the best of kings might possibly have escaped affaffination.

ON the 20th of August, 1610, three months after the death of Henry IV. whose wounds were yet bleeding in the hearts of his subjects, the Advocate-general Servin, of illustrious memory, required that the Jesuits should be obliged to sign the sour following articles.

I. THAT the Council is fuperior to the Pope.

II. THAT the Pope cannot deprive the King of any of his rights, by excommunication,

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III. That the Ecclefiaftics are, like other people, entirely fubject to the king.

IV. That a prieft who, by confession, is apprized of a confpiracy against the king or the state, should reveal it to the magistrates.

ON the 22d, the Parliament published an arret, forbidding the Jesuits to instruct youth, until they had figned those four articles. But the court of Rome was at that time so powerful, and that of France so weak, that the arret was disregarded.

IT is worth notice, that this court of Rome, which would not fuffer confession to be revealed when the life of a fovereign was concerned, obliged the confessions to inform the Inquisition in case any female should accuse another priest of having feduced or attempted to seduce her. Paul IV, Pius IV, Clement VIII, and Gregory XV, ordered this revelation. It was a dangerous share both for the confessior and the

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the penitent. It was converting a facrament into a register of accusations and facrilege; for by the antient canons, and particularly by the Lateran council, under Innocent III. every confession who reveals confession, of whatsoever nature it may be, shall be interdicted and imprisoned for life.

THUS we fee four different Popes, in the fixteenth and feventeenth centuries, ordering the revelation of a fin of impurity, and forbidding it in cafes of parricide. A woman confeffes, or fuppofes in her confeffion to a Carmelite, that a Cordelier attempted to feduce her; the Carmelite muft impeach the Cordelier. A fanatical affaffin, believing that he fhall ferve God by killing his prince, confults his confeffor on this cafe of confcience; the confeffor is guilty of facrilege if he fave the life of his fovereign.

THIS horrible abfurdity is one of the unhappy confequences of the continual oppofition, which hath fubfifted for fo many ages, between the Ecclefiaftical and Civil Civil Law. Mankind have in a thoufand inftances been fulpended between the crimes of facrilege and high treason, and the diftinctions of right and wrong have been buried in a chaos, from which they are not yet emerged.

CONFESSION of fins hath been authorized in all times and in all nations. The antients accufed themfelves in the myfteries of Orpheus, of Ifis, of Ceres, of Samothrace. The Jews confeffed their fins on the day of folemn expiation, and ftill continue the fame practice. Each penitent chufes his confeffor, who becomes his penitent in turn, and each receives from his companion thirty-nine lafhes whilft he is repeating, three times, the formule of confeffion, which confifts only in thirteen words, and which confequently muft be general.

NONE of these confessions were particular, and confequently could never serve for a pretence to those secret confultations, under the shadow of which fanatical peninents nents think to fin with impunity; a pernicious practice, by which a falutary inftitution is corrupted. Confession, which was intended as a curb to iniquity, hath frequently, in times of confusion and feduction, become an incentive to wickedness. Probably it was for this reason, that fo many Christian states have abolished a holy institution, which appeared to be as dangerous as useful.

CHAP. XVII.

Of false Money.

THE crime of coining falle money is deemed high treafon in the fecond degree, and juftly. To rob all the people is to be a traitor to the ftate. But it is afked, whether a merchant, who imports ingots of Gold from America, and privately converts them into good money, be guilty of high treafon, and merit death ? which is the punifhment annexed to this crime in almost all countries. Neverthelefs he has robbed nobody; on the contrary,

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trary, he has done fervice to the flate by increasing the currency. But he hath defrauded the king of the small profit upon the coin. He hath indeed coined good money; but he hath led others into the temptation of coining bad. Yet death is a fevere punishment. I knew a lawyer who was of opinion, that such a criminal should be condemned, as a useful hand, to work in the royal mint, with irons to his legs.

CHAP. XVIII.

On Domestic Theft.

I N countries where a trifling domeftic theft, or breach of truft, is punished with death, is not the disproportioned punishment dangerous to society? Is it not even an encouragement to larceny? If in this case a master prosecutes his servant, and the unhappy wretch suffer death, the whole neighbourhood holds the master in abhorrence: they perceive that the law is contrary to nature, and consequently that it is a bad law.

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WHAT is the refult ? Mafters, to avoid opprobrium, content themfelves with difcharging the thief, who afterwards fteals from another, and gradually becomes familiar with difhonefty. The punifhment being the fame for a finall theft as for a greater, he will naturally fteal as much as he can, and at laft will not foruple to turn affaffin to prevent detection.

IF, on the contrary, the punifhment be proportioned to the crime; if those who are guilty of a breach of trust be condemned to labour for the publick, the master will not hesitate to bring the offender to justice, and the crime will be less frequent: so true it is, that rigorous laws are often productive of crimes.

CHAP. XIX. On Suicide.

THE celebrated Du Verger de Hauranne, Abbé de St. Cyran, one of the founders of Port Royal, in the year 1608, wrote a treatife on fuicide, which is become one of the fcarcest books in Europe. "The "The Decalogue," fays that author, "forbids us to commit murder; in which precept felf-murder feems no lefs to be underftood, than the murder of another: if, therefore, there be cafes in which it is lawful to kill another, there may be cafes alfo wherein fuicide may be allowed. But a man ought not to attempt his own life, till after having confulted his reafon. Publick authority, which is the reprefentative of God, may difpofe of our lives. The reafon of man may alfo reprefent that of the Deity, it being a ray of the eternal light."

ST. CYRAN extends this argument to a great length, which after all is a mere fophifm. But when he comes to exemplify, he is not quite fo eafily answered. "A man may kill himself, fays he, for the good of his prince, for the good of his country, or for the good of his parents."

IT does not appear, that we could with justice condemn a Codrus, or a Curtius. What prince would dare to punish the family of a man who had facrificed himself for

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for his fervice? Or rather, is there any prince who would dare not to reward them. St. Thomas, before St. Cyran, faid the fame thing. But there was no need of either of Thomas, of Bonaventure, nor of Hauranne, to inform us, that a man who dies for his country deferves our praife.

ST. CYRAN concludes, that it is lawful to do for ones own fake. that which is praife-worthy if done for another. The arguments of Plutarch, of Seneca, of Montaigne, and a hundred others, are well known. I do not pretend to apologize for an action which the laws have condemned: but I do not recollect. that either the Old or New Testament, forbid a man to relinquish his life, when it is no longer supportable. By the Roman laws, fuicide was not forbidden; on the contrary, in a law of Mark Anthony, which was never repealed, we find it thus written. " If your brother or your father, being convicted of no crime, hath put himfelf to death, either to avoid pain, or being weary of life, or from defpair or madnefs, his Will shall neverCRIMES and PUNISHMENTS. lxv neverthelefs be valid, or his heirs inherit according to law."

NOTWITHSTANDING this humane law of our antient masters, we ordain, that a ftake shall be driven through the corps of the offender, and his memory becomes infamous. We do all in our power to difhonour his family. We punish a fon for having loft a father, and a widow becaufe fhe is deprived of her hufband. We even confifcate the effects of the deceafed, and rob the living of that which is justly their due. This cuftom, with many others, is derived from our Canon law, which denies Christian burial to those who are guilty of fuicide, concluding thence, that it is not lawful to inherit on earth from one who hath himself no inheritance in heaven. The Canon law affures us, that Judas committed a greater crime in hanging himself, than in betraying Jesus Christ.

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CHAP. XX.

On a certain Species of Mutilation.

W E find, in the Pandect, a law of Adrian, which denounces death to the phyficians who fhould make a eunuch, either by castration or by bruising the *testes*. By the fame law, the possession of those who suffered castration were confiscated. Origen ought certainly to have been punissed, who submitted to this operation, from the rigid interpretation of that pasfage in St. Matthew, which fays, There be eunuchs, which have made themselves eunuchs for the kingdom of heaven's sake.

THINGS changed in the reigns of fucceeding Emperors, who adopted the luxury of Afia; efpecially in the lower empire of Conftantinople, where eunuchs became patriarchs and generals of armies.

In these our own times, it is the custom at Rome to castrate young children, to render them worthy of being musicians to his Holiness; fo that Castrato, and Musico del Papa, Papa, are fynonimous. It is not long fince you might have feen at Naples, written in great letters over the doors of certain barbers, Qui fi castrano maravigliosamente i puti: here boys are castrated in the best manner.

CHAP. XXI.

On Confiscation.

I T is a maxim received at the bar, that he who forfeits his life forfeits his effects; a maxim which prevails in those countries where cuftom ferves inftead of law. Sa that, as we have already observed, the children of one who puts an end to his own life, are condemned to perifh with hunger, equally with those of an affaffin. Thus in every cafe, a whole family is punished for the crime of an individual. Thus when the father of a family is condemned to the gallies for life, by an arbitrary fentence, whether it be for having harboured a preacher, or for hearing his fermon in a cavern or a defert, his wife and children are reduced to beg their bread.

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THAT law which confifts in depriving an orphan of fupport, and in giving to one man the poffeffions of another, was unknown in the times of the Roman republick. It was first introduced by Sylla, in his proferiptions, whose example one would scarce have thought worthy imitation. Nor indeed was this law adopted by Cæsar, by Trajan, or by Antoninus, whose name is still pronounced with respect by all nations; and under Justinian, confiscation took place only in case of high treason.

IT feems that in the times of feudal anarchy, princes and lords not being very rich, fought to encreafe their revenue by the condemnation of their fubjects. Their laws being arbitrary, and the Roman jurifprudence unknown, cuftoms either cruel or ridiculous prevailed. But now that the power of princes is founded on immenfe and certain revenues, there can be no need to fwell their treafuries with the inconfiderable wreck of an unfortunate family. CRIMES and PUNISHMENTS. lxix

In countries where the Roman law is established, confiscation is not admitted, except within the jurisdiction of the parliament of Toulouse. It was formerly the law at Calais, but was abolished by the English, whilst that city was in their posfession. It is strange, that the inhabitants of the capital should be subject to a severer law than the people in the country : but laws, like the cottages in a village, were generally established by accident, and without attention to the regularity of a general plan.

WHO would believe that, in the year 1673, in the most brilliant period of the kingdom of France, the Advocate-general, Omer Talon, did in full parliament, express himself, on the subject of a young lady named Canillac, in the following words.

"GOD fays, in the 13th chapter of "Deuteronomy, If thou comeft into a city "where idolatry reigneth, thou fhalt fure-"ly fmite the inhabitants of that city with E 3 "the " the edge of the fword, deftroying it utter-" ly and all that is therein. And thou " fhalt gather all the fpoil thereof into the " midft of the ftreet, and fhalt burn with " fire the city, and all the fpoil thereof, for " the Lord thy God; and it fhall be an heap " for ever; and there fhall cleave nought " of the curfed thing to thine hand."

" In like manner, in the crime of high treafon, the children were deprived of their inheritance, which became forfeited to the king. Naboth being profecuted quia maledixerat regi, king Ahab took poffeffion of his effects. David being informed that Mephibosheth had rebelled, gave all his posseffions to Ziba who brought him the news: tua fint omnia quæ fuerunt Mephibosbeth."

THE question in dispute was, who should inherit the paternal estate of Mlle. de Canillac, which having been confiscated, was abandoned by the king to a lord of the Treasury, and asterwards bequeathed by him to the testatrix. In this cause concerning cerning a girl of Auvergne it was, that an Advocate-general referred to Ahab, king of a part of Palestine, who confiscated the vineyard of Naboth, after affaffinating the owner with the fword of justice : an action fo abominable, as to have paffed into a proverb, intended to infpire mankind with detestation for such acts of tyranny. There was certainly no analogy between the vinevard of Naboth and the inheritance of Mlle. de Canillac; nor hath the murder and confilcation of the pofferfions of Mephibosheth, the grandson of Saul, and son of Jonathan, the friend and protector of David, the least affinity with the Will of this lady.

IT was with fuch pedantry, with fuch foolifh quotations foreign to the fubject, with fuch ignorance of the first principles of human nature, with fuch prejudices ill conceived and ill applied, that laws have been explained and executed, by men who acquired reputation in their sphere. I leave to the reader that, which to tell him were superfluous.

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CHAP. XXII.

On Criminal Procedure, and other Forms.

I F, in France, it fhould ever happen that the laws of humanity foften fome of our rigorous cuftoms, without facilitating the commiffion of crimes, we may hope for reformation in those legal proceedings, wherein our legislators feem to have been influenced by too much feverity. Our criminal procedure appears in many inflances to point only at the deftruction of the accused. It is the only law which is uniform throughout the whole kingdom; a law which ought certainly to be no less favourable to the innocent, than terrible to the guilty.

IN England a man may recover damages for falfe imprifonment. In France, on the contrary, an innocent perfon, who has had the misfortune to be thrown into a dungeon and tortured almost to death, has no confolation, no damages to hope for, no action against any one; and to add to his misfor-

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misfortune, he has for ever loft his reputation. Why? Becaufe his joints have been diflocated; a circumftance which ought rather to infpire compaffion and refpect. The difcovery of crimes, fay they,' requires feverity: it is a war of human juftice against iniquity. But there is generofity and compaffion even in war. The brave are ever compaffionate; and shall the law delight in barbarity?

LET us compare the criminal procedure of the Romans with ours. With them, the evidence were heard publickly in prefence of the accused, who might answer or interrogate them, or employ counsel. This procedure was open and noble; it breathed Roman magnanimity.

WITH us, all is conducted in fecret. A fingle judge, only attended by his clerk, hears each witnefs feparately. This cuftom, eftablished by Francis I. was confirmed by the commissioners who were employed to digest the ordinance of Lewis XIV. in 1670; which confirmation was entirely owing ing to a miftake. They imagined, in reading the Code de Testibus, that the words, testing intrare judicii fecretum, fignified that the witness were examined in private; but fecretum means here the chamber of the judge. Intrare fecretum, if intended to fignify private interrogation, would be false Latin. This part of our law therefore is founded on a folecism.

THE evidence in these cases are commonly the dregs of the people, whom the judge may, in fuch private examination, make fay whatfoever he pleafes. They are examined a fecond time, but still privately; and if after this re-examination, they retract from their deposition, or vary in any material circumstance, they are punished as false evidence. So that if a fimple honeft fellow, recollecting that he has faid too much, that he mifunderstood the judge, or the judge him, revoke his deposition from a principle of justice, he is punished as a reprobate. The natural confequence of this is, that men will confirm a false testimony, rather than expose themCRIMES and PUNISHMENTS. IXXV themfelves, for their honefty, to certain punishment.

THE law feems to oblige the magistrate to be the enemy of the accused, rather than his judge; it being left in the power of the magistrate to confront the evidence with the accused, or not, as he shall think proper. Amazing! that so necessary a part of the procedure should be left undetermined.

A MAN being suspected of a crime, knowing that he is denied the benefit of counsel, flies his country; a step to which he is encouraged by every maxim of the law. But he may be condemned in his absence, whether the crime be proved or Strange laws! If a man be charged not. with owing a fum of money, before he can be condemned to pay the demand, it is required that the debt be proved; but if his life be in question, he may be condemned, by default, without any proof of the crime. Is money then of more importance than life? O ye judges and legiflators!

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flators ! Confult the pious Antoninus, and the good Trajan : they fuffered not the abfent to be condemned.

Do your laws then allow the privilege of counfel to an extortioner, or a fraudulent bankrupt, and refufe it to one who may poffibly be a very honeft and honourable man? If there ever were an inftance of innocence being juftified by means of counfel, the law, which deprives the accufed of that benefit, is evidently unjuft.

THE parliament of Toulouse hath a very fingular custom relative to the validity of evidence. In other places demiproofs are admitted, which is a palpable absurdity, there being no such thing as demi-truth; but at Toulouse, they admit of quarters and eighths of a proof. For instance, an hear-say may be considered as a quarter, and another hear-say, more vague than the former, as an eighth : so that eight hear-say, which in fact are no other than the echo of a groundles report, conCRIMES and PUNISHMENTS. Ixxvii conftitute a full proof. Upon this principle it was, that poor Calas was condemned to the wheel.

C H A P. XXIII.

The Idea of Reformation.

MAGISTRATES are in themfelves fo refpectable, that the inhabitants of the only country in which they are venal, fincerely pray to be delivered from this cuftom : they wish that the civilian may by his merit establish that justice, which in his writings he hath fo nobly defended. We may then possibly hope to see a regular and uniform system of laws.

SHALL the law of the provinces be always at variance with the law in the capital? Shall a man be right in Britanny, and wrong in Languedoc? Nay, there are as many laws as there are towns; and even in the fame parliament, the maxims of one

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one chamber are not the maxims of another.

WHAT aftonishing contrariety in the laws of one kingdom ! In Paris a man, who has been an inhabitant during one year and a-day, is reputed a citizen. In *Franche-Comté* a freeman who, during a year and a day, inhabits a house in mortmain, becomes a flave; his collateral heirs are excluded from inheriting his foreign acquisitions, and even his children are deprived of their inheritance, if they have been a year absent from the house in which the father died. This province is called *Franche*, but where is their freedom?

WERE we to attempt to draw a line between civil authority and ecclefiaftical cuftoms, what endlefs difputes would enfue? In fhort, to what fide foever we turn our eyes, we are prefented with a confufed fcene of contradictions, uncertainty, hardfhips and arbitrary power. In the prefent CRIMES and PUNISHMENTS. Ixxix

prefent age, we feem univerfally aiming at perfection; let us not therefore neglect to perfect the laws, on which our lives and fortunes depend.

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