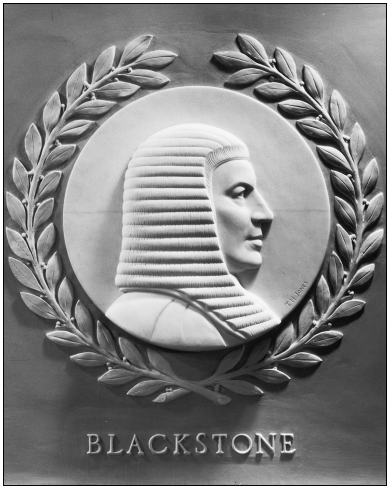
CHAPTER ONE

A JOURNAL OF LAW BOOKS



William Blackstone

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Chapter One

Robert C. Berring, Editor

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Chapter One operates on the same terms as the *Journal of Law*. Please write to us *Chapter One* at rberring@law.berkeley.edu, and visit us at www.journaloflaw.us. ISSN 2157-9067 (print) and 2157-9075 (online). Image of William Blackstone courtesy of the Architect of the United States Capitol. It is one of the 23 marble relief portraits over the doors of the chamber of the House of Representatives. As the Architect explains, the portraits "depict historical figures noted for their work in establishing the principles that underlie American law. They were installed when the chamber was remodeled in 1949-1950. . . . The subjects of the reliefs were chosen by scholars from the University of Pennsylvania and the Columbia Historical Society of Washington, D.C., in consultation with authoritative staff members of the Library of Congress. The selection was approved by a special committee of five Members of the House of Representatives and the Architect of the Capitol." *See* www.aoc.gov/capitol-hill/relief-portrait-plaques-lawgivers/sir-william-blackstone.

THE ULTIMATE OLDIE BUT GOODIE

WILLIAM BLACKSTONE'S *COMMENTARIES ON THE LAW OF ENGLAND*

Robert C. Berring[†]

There is no denying the success of the book; and so far there has been little question about its influence, especially in the United States. But what was great about this urbane account of the common law system?[1]

While serving as Deputy Director of the Harvard Law Library in 1978, I was asked by Dean Albert Sacks to take on a special project. A wealthy alumnus was on the verge of making a substantial gift, but he would do so only if someone tracked the changes made by William Blackstone to his *Commentaries on the Laws of England* in the editions published during his life. I was given a research assistant and a chance to impress the Dean. No more incentive was needed.

As with most American lawyers, Blackstone's *Commentaries* was familiar to me. Familiar in the same manner as Joyce's *Ulysses* or Proust's *Remembrance of Things Past*: books that I knew were important and which I had never seriously attempted to read. Discovery awaited me.

[†] Walter Perry Johnson Professor of Law, Berkeley Law School, Boalt Hall. Thanks to Roxanne Livingston for making the excerpt readable.

[1] Milsom, "The Nature of Blackstone's Achievement," 1 Oxford Journal of Law 2 (1980). Appropriately enough, this article is a printing of Professor Milsom's delivery of the annual Blackstone Lecture at Pembroke College.

As a logical beginning to the project I read the first edition of the *Commentaries*. To my surprise the text was not just readable, it was fun. Once I had mastered the art of reading the f's as s's and plowing through the alternative spellings (Blackstone's spelling anticipated Twitter that way) I enjoyed it. In a sense this is as it should be. The *Commentaries* are the record of lectures that Blackstone gave to the landed gentleman students at Oxford. The students were not to be specialists, they were to be landowners, gentlemen, and nobility, all of whom would need some expertise in the law to handle matters once back home. While knowledge of the law might be beyond the ken of the common person, those with privilege bore special responsibility. Understanding the basics of the legal system was part and parcel of civic duty. As Blackstone put it:

> But those upon whom nature and fortune has bestowed more abilities and greater leisure cannot be so easily excused. These advantages are not given them not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge of the law.[2]

Blackstone was a popularizer. The lectures were not part of the accepted academic program. Roman Civil Law was the proper object of scholarly endeavor. The Common Law of England was beneath academic study. Such a division between the law as viewed by legal scholars and the law as practiced in real life is not unfamiliar to the 21st-century observer. In the real world of 18th-century England, Common Law governed day-to-day life. Much like the difference between the articles that appear in the *Harvard Law Review* and the operation of the local courts today, the divide between theory and practice was wide and deep. Blackstone's genius lay in planting the Common Law in an academic setting. Since his lectures were offered as a voluntary option for students, they had to earn their way on the merits. The lectures had to attract attendees by quality and they did so.

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[2] 1 Blackstone *Commentaries on the Law of England* 7 (1765).

Much has been written about how the *Commentaries* came to have such influence in the United States.[3] The most important point is that the *Commentaries* not only supplied answers to legal questions, it also created a basic structure for how to think about legal issues. Blackstone created categories and put the great messy cake of the English Common Law into a comprehensible system. He taught his readers how to conceptualize legal questions. Bringing order out of chaos, putting a structure in place that allows one to think about questions in an orderly manner is pivotal to the law. Categorization is destiny. Once we begin to think of questions in a certain structural form, it is very hard to escape it. What begins as a useful paradigm for explaining phenomena morphs into a dogmatic reality. The *Commentaries* began as a noble attempt to make the Common Law comprehensible, as time passed it became an oracle: not a summary of the law but the law itself. United States lawyers still deal with the world in the terms introduced by the *Commentaries*.

For lawyers in the newly developing United States, the *Commentaries* were a godsend. In the days before the West Publishing Company, Westlaw, and Lexis, legal materials in the United States were difficult to come by. The *Commentaries*, usually in an abridged or American edition, was the only source of law for many lawyers. As Daniel Boorstin puts it:

> For generations of American lawyers, from Kent to Lincoln, the Commentaries were at once law school and law library. In view of the scarcity of law books in the early years of the Republic, and the limitations of life on the frontier, it is not surprising that Blackstone's convenient work became the bible of American lawyers.[4]

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[3] Boorstin, *The Mysterious Science of the Law* (Harvard U. Press 1941), remains my favorite book on the importance of Blackstone. It is dated but remains a literate, incisive treatment of the *Commentaries*' place in intellectual history. Professor Wilfrid Prest's *William Blackstone: Law and Letters in the 18th Century* is the definitive biography. A volume of essays on Blackstone is currently being compiled by Professor Prest, with publication scheduled for fall, 2014.

[4] Boorstin, pp. 1-2.

Soon the *Commentaries* morphed into the equivalent of a primary source. As Professor Jessie Allen of the University of Pittsburgh Law School points out in her introductory essay (pages 195-205 below), it is a primary source that is chock full of contradictions and even a few howlers, but once an authority is crowned, it is crowned.

Ergo you should consider giving the *Commentaries* a try. To tempt you to sample the pleasures of the *Commentaries*, we have transcribed the first ten pages of Chapter One. Working from the text of the first edition, the 18th-century printing convention of using f's in place of initial s's has been converted to the modern form. (It is not hard to accomplish said conversion in one's head, but we want to make it as inviting as possible). Observe the rhythm of the text and the acuity of the observations. It still reads well. Do not be discouraged by the obsequious first paragraph, such opening statements of humility were de rigeur at the time. The text grows fascinating quickly. We consciously stuck to the first edition. Many American lawyers used American editions produced by Judge Cooley or by St. George Tucker and there are numerous appealing variants, but we decided to honor the rule of "in for a dime, in for a dollar." This is the straight stuff.

To put the *Commentaries* into perspective, Professor Allen has written an introduction for us. She knows whereof she speaks. Since 2008 she has blogged about the *Commentaries* in *Blackstone Weekly*, writing insightful reflections as she works through the first edition. If you are at all interested in the *Commentaries*, check this blog.[5] In her introduction, Professor Allen points out the frequency with which the *Commentaries* continue to be cited by United States courts. She sketches out both the glory and the internal contradictions in the *Commentaries*. Analyzing a work like this one after much of what was new and exciting when it first appeared has now become commonplace, is no easy task. With a felicitous style, Professor Allen pulls off the trick. Her short piece provides valuable insight into the very soul of the *Commentaries*.

[5] blackstoneweekly.wordpress.com/about/.

If the reader is encouraged to read more, the choices of where to turn are many. If one wishes the straight stuff, the University of Chicago Press produced a wonderful facsimile of the first edition that is still in print in paperback. The inimitable HeinOnline has a fine facsimile of the first edition. The Yale Law Library's Avalon Project provides a more readable version. In any form it is a good read, much more artful than the typical opinion from the Supreme Court of the United States. There are many abridgements and edited editions, a raft of them designed especially for the United States market. There is even a humorous edition.[6] The range of choices is bountiful. In any case, give it a try. If you enjoy literature written in the grand old style you will be in for a treat. In any case, you will learn some law as well as some very odd English history. Besides, after you read it, then you can tell colleagues that you did. ❶

[6] Catherine Spicer Ellis compiled a definitive list of the editions of the Commentaries in her 1938 work *The William Blackstone Collection in the Yale Law Library: A Bibliographic Catalog*, Yale Law Library Publications, No. 6. Ms. Ellis records the holdings of the massive Yale collection of the editions of the *Commentaries*, and she sought out those Yale did not possess. The book is written in a graceful style and deserves its fame among bibliographers.

INTRODUCTION

LAW AND ARTIFICE IN BLACKSTONE'S *COMMENTARIES*

Jessie Allen[†]

Looking out the window of a moving train brings a special kind of delight. It has something to do with the way obvious disorder appears orderly, almost planned. All of the chaos and decay of daily life is there, but the speed, the station stops, the chosen destination, organize the landscape. Running past the back yards, everything – from the rusted cars to the kids on swings to the bubble tags and winter vines spreading across empty brick warehouses – appears knit together in the continuity of the passage. The joy that I experience from this train-transected world has something in common with William Blackstone's joyful vision of the common law. Blackstone's *Commentaries* presents an unapologetically inconsistent legal system, variously rooted in morality, habit, political expediency, and, above all, ingenious human creation. It's a glorious conglomeration barely held together by its ostensible consonance with liberal rights, evanescently organized by the force of Blackstone's own intelligence whipping by. If you like trains, read Blackstone.

Of course there are other reasons. You might read the *Commentaries* to see why the justices of the twenty-first-century United States Supreme Court are citing Blackstone's eighteenth-century treatise

[†] Assistant Professor, University of Pittsburgh School of Law. Author of *Blackstone Weekly*, a blog that is a must read for anyone interested in the *Commentaries*. blackstoneweekly.wordpress.com/about/.

now as frequently as ever. That is quite frequently indeed – in about one of every 12 decisions.[1] It might not be a bad idea for the rest of us to know something about the text the Court treats as legal gospel – the "preeminent legal authority" of the American founders.[2] If the Court reads Blackstone devoutly, much can be gained by reading his work critically. As Duncan Kennedy showed, Blackstone's apologetic project offers a marvelously transparent example of how the Anglo-American legal system pulls doctrinal wool over political ideology.[3] You might also read the *Commentaries* out of simple curiosity. Although most American lawyers know *of* Blackstone, very few these days know what is actually in his encyclopedic work. As a result, references to the *Commentaries* stir vague feelings of anxiety in legal readers who wonder if they ought to be better acquainted with this foundational text. Read Blackstone's *Commentaries*, and relax!

But most of all, read Blackstone for the ride – the ride through a legal landscape that mixes natural law with deliberate legal fiction, legal faith with political skepticism. The *Commentaries* occasionally pauses to identify authority for law variously in transcendent reason, immutable nature, ancient origins, sovereign power, and proven social benefits. Mostly, though, the work flaunts the legal system's artifice and pliability, and insists that legitimate, and legitimately good, results can be achieved without resorting to blind faith, natural necessity, or scientific proof.

PROPERTY AND POSITIVISM

Blackstone is often categorized as a natural law thinker, but reading the *Commentaries* troubles that description. *Volume I* begins by identifying certain "absolute" rights as the foundation of English law. These rights are "such as would belong to . . . persons merely in a state of nature, and which every man is intitled to enjoy whether out

[1] Jessie Allen, Reading Blackstone in the Twenty-First Century and the Twenty-First Century Through Blackstone, in *Re-interpreting Blackstone's Commentaries*, ed. Wilfrid Prest (Hart forthcoming 2014).

[2] *District of Columbia* v. *Heller* 554 U.S. 570, 593-94 (2008).

[3] Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 *Buffalo L. Rev.* 209 (1979).

of society or in it."[4] That certainly sounds like natural law – and like the modern concept of universal human rights. Within a few pages, though, the picture gets more complicated. Whereas the rights of security and liberty are "inherent by nature in every individual" and "strictly natural," the origin of property rights is more equivocal. Blackstone is only willing to say that "private property is probably founded in nature."[5] This hedging is particularly odd given Blackstone's identification with an absolutist view of private property.[6]

And speaking of property, you might be surprised by what Blackstone includes in those foundational rights – and what he does not. On the plus side, count income transfers from rich to poor. Blackstone explains that the absolute right of security that protects a man's life and limb "also furnishes him with every thing necessary for their support." Accordingly, "there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the community by means of the several statutes enacted for the relief of the poor."[7] Whoa! This kind of welfare entitlement is just the sort of 'affirmative' right that is today excluded from liberal rights theory in general and, in particular, from the rights guaranteed by the U.S. Constitution. On the minus side, according to Blackstone, private property does not necessarily include any right to inherit property from one's ancestors or to pass property on to anyone after death. So while Blackstone calls property a "primary" right, and ranks it with the natural rights of life (security) and liberty, he apparently believes that even the most basic structures of property rights are open to change.

Nor is property the only issue. The *Commentaries* are surprisingly full of explicit rejections of the natural law idea that unjust law is not really law at all. For instance, here is Blackstone on the hereditary right of kings:

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[4] *Commentaries*, I, 119.

[5] *Id.* at 134.

[6] See, e.g., William N. Eskridge, Jr., Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling between Facts and Norms, 57 *St. Louis L. Rev.* 865, 880 (2013).

[7] *Commentaries*, I, 127.

> I therefore rather chuse to consider this great political measure, upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience: because that might imply a right of dissenting or revolting from it, in case we should think it unjust, oppressive, or inexpedient.[8]

Can't get much more positivist than that!

I suspect that Blackstone's positivist strain has sometimes been overlooked because we tend to view him in opposition to his famous contemporary critic, the arch-positivist Jeremy Bentham. Bentham's attack on Blackstone was so frontal (among other things, he called the *Commentaries* "vicious,"[9]) that it is hard to see the two on the same side of any jurisprudential question. But the *Commentaries* is a checkerboard of natural law and positivist perspectives. Indeed, Bentham criticized Blackstone's logical inconsistency as much as his reliance on natural rights.

BLACKSTONE, RIGHTS AND INHERITANCE

Certainly the legal rights Blackstone views as "entirely derived from society" are not mere technicalities.[10] Blackstone calls the legal doctrine of descent for purposes of inheritance "a point of the highest importance . . . indeed the principal object of the laws of real property in England," but in his view there is nothing natural about it[11]: The right of inheritance "is certainly a wise and effectual, but clearly a political, establishment."[12] Moreover, sounding practically post-modern, Blackstone critiques the assumption that a legal right as central and longstanding as inheritance must be somehow

[8] *Id.*, 205.

[9] "Correct, elegant, unembarrassed, ornamented, the *style* is such, as could scarce fail to recommend a work still more vicious in point of *matter* to the multitude of readers." Jeremy Bentham, *The Fragment on Government* 116 (1776).

[10] *Commentaries*, I, 134.

[11] *Commentaries*, II, 201.

[12] *Id.* at 11.

"natural," observing that "we often mistake for nature what we find established by long and inveterate custom."[13]

It is not just natural *law* that Blackstone rejects as the basis for a right to inherit property – but also natural fact. Surely a natural explanation for the law of descent would be an easy sell. Blackstone wrote a century before Darwin and Mendel, but he wrote in a world well acquainted, indeed, obsessed, with family connections and deep knowledge of how traits were passed down through generations. The English of Blackstone's time were experienced breeders – of horses, roses, pigeons, and, on the other side of the Atlantic, slaves. And the doctrine of descent is the core structure, not only for inheritance but for all possible property acquisitions, in a system where purchases are figured as aberrant – mutations "whereby the legal course of descents is broken and altered."[14] If there ever was a legal culture ripe for a natural explanation of inheritance rules, it would seem to be eighteenth-century Britain.

Yet Blackstone largely rejects biological relation as a justification for the laws of descent. Of course the legal structure of inheritance "depends not a little on the nature of kindred," or, "consanguinity," defined as "the connexion or relation of persons descended from the same stock or common ancestor."[15] But Blackstone points out that kinship for the purposes of inheritance is calculated differently in different cultures – comparing the English system to Hebrew, Greek, Roman, and Danish law. What's more, he conjectures that the idea of blood relations as a basis for inheritance might be the *effect*, rather than the cause, of our practice of giving property to surviving family members. Perhaps, he suggests, the social practice of family inheritance is due less to kinship than to proximity and expedience. After all, "[a] man's children or nearest relations are usually about him on his death-bed" and so are likely to be the next occupants.[16] Indeed, Blackstone points out, proximity and expedience could ground a right of inheritance for servants, and apparently

[13] *Id.*
[14] *Id.* at 201.
[15] Id. at 202.
[16] *Id.* at 11.

did so in another highly regarded culture: "For we find the old patriarch Abraham expressly declaring, that 'since God had given him no seed, his steward Eliezer, one born in his house, was his heir."[17]

There are also indications that Blackstone finds the existing English laws of inheritance neither ideal nor disinterested. Over and over he points out the anomaly of excluding half-brothers from lines of inheritance. He even suggests wryly that the basic preference for male heirs might have a tinge of self interest: "sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred."[18] Wait, did Blackstone just say that the laws of inheritance favor men because men make the laws?

BLACKSTONE BACK STORY: POLITICS AND POETRY

Not that Blackstone was a flaming radical or champion of women's rights. He was a Tory barrister, academic, judge, and member of parliament who thought that the combination of monarchy and British common law was far more likely than democratic revolution to bring about a good society. The first volume of the *Commentaries* was published just a decade before the Declaration of Independence, and Blackstone (who voted to maintain the Stamp Act[19]) took a dim view of the whole American project, noting, for example, that the "American plantations" were obtained in part by "driving out the natives (with what natural justice I shall not at present enquire)."[20] For Blackstone, constitutional monarchy was the ideal form of government, steering between a "slavish and dreadful" sovereignty based on the "wild and absurd" doctrine of kings' divine right and a democratically elected government, which might look good on paper, but which "in practice will be ever productive of tumult, contention, and anarchy."[21]

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[17] *Id.* at 12, citing *Genesis* 15.3.
[18] *Id.* at 213.
[19] Albert Alschuler, Rediscovering Blackstone, 145 *Penn. L. Rev* 1, 15 (1996).
[20] *Commentaries* I, 105.
[21] *Id.* at 211.

Blackstone's faith in the ability of conservative English law and politics to both protect individual rights and promote social mobility may have been based in part on his own experience. Sir William Blackstone was not born on an aristocratic estate, but in London. His father was a shopkeeper who sold silk wholesale and also stocked notions – thread, lace, belts – for his retail customers.[22] Blackstone's mother was a member of the landed gentry, but her family's estate apparently had been purchased just two years before her birth.[23] Given this background, the young Blackstone likely would not have perceived English class divisions as discrete and impermeable. Indeed, Wilfrid Prest points out that Blackstone's parents' union "exemplifies the complex web of overlapping interactions between commercial, landed, and professional worlds" that characterized the society in which Blackstone grew up.[24] In that environment, through a combination of good luck, family support, hard work, and extraordinary talent, this child of London's merchant class obtained a gentleman's Oxford education, became a "sir," knew George III as his patron, and sat as a judge on the King's Bench. No wonder, then, that Blackstone looked favorably on the hierarchical structures through which he rose, and considered rank necessary "in order to reward such as are eminent for their services to the public."[25]

Along with his appreciation of hierarchy, Blackstone's affinity for legal fictions is generally put down to his conservative politics, but I wonder if it may have something to do with another aspect of his character. Before he was a lawyer, Blackstone was a poet. As a twelve-year-old he composed a poem in honor of one of his teachers, and while still at Oxford he published a book of poetry. A poem in that volume describes a wistful parting from "the gay queen of fancy and of art," in order to enter the "dry" and "discordant" practice of law. But its author did not forsake literary appreciation or production. The young lawyer Blackstone produced a set of critical notes on Shakespeare's plays, a project to which he returned at the

[22] Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* 15 (Oxford 2008).
[23] Id. at 16.
[24] Id. at 17.
[25] *Commentaries*, I, 153.

end of his life, and which was published in 1780, a few months after Blackstone died.[26] Kathryn Temple has suggested that Blackstone's poetry is linked to the *Commentaries* through the aesthetic and emotional quality of Blackstone's experience of law.[27] It seems to me that Blackstone's positive delight in the nicety of legal forms may be related to his experience of the role of form in verbal creation.[28] "The form is the electric current that the writer taps into," says Lewis Menand.[29] Doctrine is the form of common law, and legal fictions are the most elaborately formal of doctrines.

LEGAL ART, FICTION AND DECEPTION

Certainly, Blackstone has no fear of legal artifice. He never flinches from pointing out the many features of his beloved common law that have simply been made up. Consider, as an example, one of the great legal fictions of all time, the "*feudum* novum to hold *ut feudum antiquum*," a sort of pretend ancestral estate. As I understand it, the way this worked was that you bought your land and/or house yourself, but it was treated in law as if it had been in the family for generations and been passed down to you, "with all the qualities annexed of a feud derived from [your] ancestors."[30] A principal result of this scheme is that when you died, if you had neglected to will the place to someone and had no offspring, instead of being claimed by the state the land would be passed through a complicated network of "collateral" relations to some cousin many times removed on the (pretend) theory that it was going to a descendant of the same (pretend) ancestor who gave it to you. So when you bought a new estate to hold "*ut feudum antiquum*," part of what you

[26] Prest, *William Blackstone*, at 289-290.
[27] Kathryn Temple, What's Old is New Again: Blackstone's Theory of Happiness Comes to America, 55 *The Eighteenth Century* 155 (Spring 2014).
[28] I have argued elsewhere that for Blackstone, the "nicety" of common law is an alternative to the violence of natural rights. Jessie Allen, In Praise of Artifice, Blackstone Weekly, May 5, 2013. https://blackstoneweekly.wordpress.com/2013/05/05/in-praise-of-artifice/.
[29] Lewis Menand, A Critic at Large, "Practical Cat,"*The New Yorker* September 19, 2011 p. 76.
[30] *Commentaries* II, 221.

bought was fiction. Although everyone knew very well that you bought the place yourself, the law acted *as if* the property descended to you from ancient forbears and thus could be inherited by a cousin who was descended from the land's "first *imaginary* purchaser." [31]

You can really see how this stuff drove Bentham nuts. It is one thing to justify a rule of inheritance on the basis of history, as opposed to future utility. There's a certain common sense justice in giving a house to the relatives of the guy who acquired it in the first place. But according to Blackstone what the law is actually saying is that we are just going to *pretend* to do that.

What could be the point of inventing fake ancestral manors, when all we are *really* doing is deciding to let a wider group of descendants inherit the land? Why this cockamamie game of make believe in which we all agree to act as if the house you just bought was actually passed down to you from an ancestor so far back in the tangled branches of your family tree that his identity can no longer be discerned? Why would you do that?

Of course this kind of causal question is unanswerable. Still, it seems worth pointing out one effect of the formal, fictional, pretend approach to property law: In the midst of all this pretending, a certain materiality emerges. The only way to actualize a make-believe vision is to act it out, to embody it somehow. Truth has the privilege of transcending the physical, but fiction depends on form – it has to have a body – a performance, a telling, a writing – otherwise it doesn't exist. And in this way the fictional, formalized legal system Blackstone expounds makes a certain connection with material reality, and expresses a kind of affinity with the real property it creates and regulates. It is a law of blood and bodies, of clots of earth and particular words uttered or inscribed at particular times to turn inheritable estates into life interests and back again. In contrast, the critiques and alternatives to all this artifice – rational rules and calculations of economic costs and benefits, and later realist complaints about the fraudulence of doctrine – are quite disembodied. This leaves critics of Blackstonian formalism in a strange place, arguing

[31] *Id*.

for a more transparent approach to law that winds up obscuring the constructive, and constructed, quality of the legal system they propose. There's a different kind of pretending in utilitarian instrumentalism. With its relentless focus on social science and policy objectives, the modern realist approach tends to cover up the invented nature of legal institutions and the need for those institutions to carry out their goals through recognizably legal words and acts.

It reminds me of a *New York Times* article I read about a homeless girl from Brooklyn, who goes on a school field trip to the Mayor's residence, and is most impressed by how clean everything is.[32] The girl's reaction at first seemed to me to highlight how impossible it is to wrap one's head around the nature of political power when one is focused on the literal nitty gritty of extremely challenging life circumstances. Can't really think too much about the legitimacy and structure of the mayor's administration when you're so blown away by his housekeeping. But now it strikes me that the girl was on to something about power. What extraordinary levels of surveillance and control must be necessary to produce those pristine surfaces! The absence of dust is a sign of absolute dominion. What could be a better indication, in fact, of the Mayor's sovereignty than this ability to beat back entropy, to banish microscopic material, from the ceiling down to the cracks in the floorboards.

The legal fictions Blackstone chronicles and applauds are, like the immaculate surfaces in the Mayor's mansion, evidence of the power to make and remake the world as one desires it. The fiction of an ancestral estate may distract us from real political and economic motives. Justifying inheritance doctrine with a story about ancestral estates avoids the kind of social policy argument that might expose how inheritance keeps real property concentrated in a closed circle of private hands. Blackstone himself explains that the idea of transferring a pretend ancestral estate "was invented to let in the collateral relations of the grantee to the inheritance."[33]But every artifice that conceals also reveals, at least to the extent that we recognize it

[32] Andrea Elliott, A Future Resting on a Fragile Foundation, *New York Times* A1, Dec. 10, 2013.

[33] *Commentaries*, II, 221.

as artifice, as Blackstone certainly does. Legal fictions call attention to the fact of law's artificial construction and law's ability to invent as well as respond to the rights it regulates. The use of an elaborate fiction to shift the course of inherited property reveals that the law of inheritance is artificial – constructed – and can be altered, not only to accommodate some change 'out there' in the world, but to create one. By claiming an objective basis for legal rules, policy justifications obscure the fabricated aspect of the social structures that seem to call for legal change and the creative role of law in those structures in the first place. Legal fictions reveal the truth that law is a great fabrication, not some necessary reflection of the way things are – or should be.

As Blackstone observes, "we are apt to conceive at first view" that inheritance, "has nature on it's side." We are so accustomed to the meaning of what it is to "own" a house that we treat the parameters of ownership like some naturally determined object or event, a boulder, say, or a sunset. But recognizing legal fictions changes that view. You cannot understand the *feudum ut novumm* to hold *ut antiquum* without understanding that the law of property is as man made as the houses it governs. The obvious artifice reminds us that property itself is a legal invention – and that law not only regulates the world but makes it.

THE LAST STOP: CONCLUSION

Bentham was right that Blackstone is inconsistent. He combined a fundamental faith in absolute rights with a realistic appreciation of the way legal practitioners build and rebuild those rights. It is exactly the inconsistency of Blackstone's approach – his appeal to myriad sources and justifications and the combination of natural justice with legal artifice – that makes the *Commentaries* so compelling, so occasionally laughable, and so familiar. The antithesis of Bentham's vision of rational, transparent legal code, Blackstone's common law is a flawed, heterodox, pieced-together thing, a hurly burly of conflicting motives and methods – a law not larger than, but every bit as large, complex, and contradictory as life. ❶

COMMENTARIES ON THE LAWS OF ENGLAND

INTRODUCTION. SECTION THE FIRST. ON THE STUDY OF LAW.

William Blackstone[†]

MR. VICE-CHANCELLOR, AND GENTLEMEN OF THE UNIVERSITY,

THE general expectation of so numerous and respectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehensions in him who has the honour to be placed in it. He must be sensible how much will depend upon his conduct in the infancy of a study, which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect that, if either his plan of instruction be crude and injudicious, or the execution of it lame and superficial, it will cast a damp upon the farther progress of this most useful and most rational branch of learning; and may defeat for a time the public-spirited design of our wise and munificent benefactor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas of perfection.

[†] Read in Oxford at the opening of the Vincrian lectures; 25 Oct. 1758.

And yet the candour he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university, (an honour to be ever remembered with the deepest and most affectionate gratitude) these testimonies of your public judgment must entirely supersede his own, and forbid him to believe himself totally insufficient for the labour at least of this employment. One thing he will venture to hope for and it certainly shall be his constant aim, by diligence and attention to atone for his other defects; esteeming, that the best return, which he can possibly make for your favourable opinion of his capacity, will be his unwearied endeavours in some little degree to deserve it.

THE science thus committed to his charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country: a species of knowlege, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowlege in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

NOR have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their

own municipal law. In the mean time it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

FAR be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of it's rules, and the usual equity of it's decisions; nor is better convinced of it's use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the praetor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

WITHOUT detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowlege of the laws of that society, in which we live, is the proper accomplishment of every gentleman and scholar; and highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero informs us, the very boys were obliged to learn the twelve tables by heart, as a carmen necessarium or indispensable lesson, to imprint on their tender minds an early knowlege of the laws and constitutions of their country.

BUT as the long and universal neglect of this study, with us in England, seems in some degree to call in question the truth of this evident position, it shall therefore be the business of this introductory discourse, in the first place to demonstrate the utility of some general acquintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life. Some con-

jectures will then be offered with regard to the causes of neglecting this useful study: to which will be subjoined a few reflexions on the peculiar propriety of reviving it in our own universities.

AND, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution. This liberty, rightly understood, consists in the power of doing whatever the laws permit; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those, on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this more clearly, it may not be amiss to descend to a few particulars.

LET us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke[d] as a strange absurdity. It is their landed property, with it's long and voluminous train of descents and conveyances, settlements, entail, and inject of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few principles is some check and guard

upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

AGAIN, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence, to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

BUT to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they are frequently to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

BUT it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing

petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, (under which must be included the knowledge) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

YET farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember it's nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may lift under party banners; may grant or with-hold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old ! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments !

INDEED it is really amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself born a legislator. Yet Tully was of

a different opinion: "It is necessary," says he, for a senator to be thoroughly acquainted with "the constitution"; and this, he declares, is a knowlege of the "most extensive nature; a matter of science, of diligence, of "reflexion; without which no senator can possibly be fit for his "office."

THE mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worth the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's symmetry has been destroyed, it's proportions distorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other, courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as Sir Edward Coke expresses it) with provisoes and additions, and many "times on a sudden penned or corrected by men of none or very "little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if, he subjoins, acts of parliament were "after the old fashion penned, by such only as perfectly knew "what the common law was before the making of any act of "parliament concerning that matter, as also how far former statutes had provided remedy for former mischiefs, and "defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by "construction of law, between insensible and disagreeing words, "sentences, and provisoes, as they now do." And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute

book is swelled to ten times a larger bulk; unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowlege of the common law. ❶