

INTRODUCTION

LAW AND ARTIFICE IN BLACKSTONE'S COMMENTARIES

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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

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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:

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 it¹¹: 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 Act¹⁹) 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

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 novum* 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