

Book Reviews

Law's Architect

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Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century*. Oxford: Oxford University Press, 2008. Pp. 355.

This fine biography of Sir William Blackstone displays both Wilfrid Prest's command of English legal history and his ability to tell the dancer from the dance. For more than two centuries now—even perhaps, in the Georgian England whose law he defined—Blackstone the jurist has been obscured by Blackstone the law-book. Behind the lucidity and balance of Blackstone's *Commentaries*, Prest reveals the pompous, energetic man who penned them: an orphan, a scholar, a forceful academic politician, a shrewd estate manager, and, finally, when his ship came in, a thoughtful and progressive judge. Prest has also overcome the temptation to dwell on his subject's times rather than his life. To our continuing discussion of Blackstone, this book restores the human element.

"If a lawyer today were to encompass the whole of our legal system in a single book," the young Daniel Boorstin wrote,

and if that book were to become the principal document by which our law was translated to another continent, he would be doing for twentieth century America what Sir William Blackstone did for eighteenth-century England. . . . Since the first volume of Blackstone's *Commentaries on the Laws of England* appeared in 1765, this work has thus filled a place unique in the history of law in the English-speaking world. It is the most important and the most influential systematic statement of the principles of the common law.¹

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1. DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S*

Edmund Burke observed, on the eve of that war which dissolved the political bands that had connected Britain with her rebellious colonies, that “they have sold nearly as many copies of Blackstone’s *Commentaries* in America as in England.”² In the Yale law library, as Boorstin observed, one finds Blackstone discussed in student notes from the first American law school, Tapping Reeve’s establishment in Litchfield, Connecticut—notes that “were carried west to Ohio to comprise the law library of the frontier practitioner.”³ Even further west, Abraham Lincoln would recommend that anyone reading law begin by reading Blackstone.⁴ In another region, in a later century, the South depicted in Harper Lee’s *To Kill A Mockingbird*, the English judge’s work would do honorable service in the household of Atticus Finch. It was from the Bible and the *Commentaries* that Calpurnia, housekeeper and cook and nurse and governess, taught her own son Zeebo to read.⁵ If Blackstone provided an idealized portrait of English law, it has been one that well comports with American ideals of learning, accomplishment, and justice.

The measure of this biography is how effortlessly it bridges what might have seemed an insurmountable gulf, the distance between the Midwestern prairie or the Alabama backcountry and the smoke and clamor of a foreign metropolis. For William Blackstone was a Cockney in the true sense of the term, born in July 1723 in London, within the sound of the bells of St. Mary-le-Bow, Cheapside. He was born posthumously, amid the depression that followed the collapse of the South Sea Bubble, to a mother who was determined, forcefully and grimly, to carry on the family silk-drafter business. It was the boy’s uncles, Mary Blackstone’s brothers, one a surgeon at St. Bartholomew’s Hospital, the other a teacher at Winchester, who pointed her third-born son toward ancient institutions and country estates. Her family obtained for William a scholarship at the Charterhouse, and may have helped steer him to Oxford and Pembroke College.

Blackstone matriculated at Pembroke College when he was fifteen, “swearing allegiance to King George II, and subscribing to the 39 articles of the Church of England, on 12 December 1738” (p. 27). Early on, he

COMMENTARIES SHOWING HOW BLACKSTONE, EMPLOYING EIGHTEENTH-CENTURY IDEAS OF SCIENCE, RELIGION, HISTORY, AESTHETICS, AND PHILOSOPHY, MADE OF THE LAW AT ONCE A CONSERVATIVE AND A MYSTERIOUS SCIENCE 3 (1941).

2. WILFRID PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY* 292 (2008). Further references to the work under review are given parenthetically in the text.

3. Boorstin, *supra* note 1, at 4.

4. Lincoln made this recommendation in separate letters to John T. Thornton, 2 December 1858, and J.M. Brockman, 25 September 1860 (“Begin with Blackstone’s *Commentaries*, and after reading it carefully through, say twice, take up Chitty’s *Pleading*, *Greenleaf’s Evidence*, & *Story’s Equity &c.* in succession. Work, work, work, is the main thing”). *COLLECTED WORKS OF ABRAHAM LINCOLN* 485 (Roy P. Basler ed., 1953); *ABRAHAM LINCOLN: SPEECHES AND WRITINGS: 1859-1865*, at 180 (Don Fehrenbacher ed., 1989).

5. HARPER LEE, *TO KILL A MOCKINGBIRD*, Part Two, Chapter 12. (“They were the only books I had,” Calpurnia recalls. “Your granddaddy said Mr. Blackstone wrote fine English.”)

began preparing to take a degree in civil law. He studied the common law as well; in 1741 he was admitted to the Middle Temple (but, college records suggest, remained in residence at Pembroke). In November 1743 he was elected a fellow of the College of All Souls of the Faithful Departed in Oxford, a position that allowed him latitude to continue his legal studies. He was called to the bar in November 1746. After qualifying as a barrister, Blackstone seems to have found little work in London. Any disappointment seems to have been minor. He had already informed his uncle that he had mastered Littleton's *Tenures*, and he seemed more interested in surveying the entire landscape of the law than in occupying a space in Westminster Hall.

I don't love to march into an unknown Country, without securing every Post behind me: and it is a greater Slur upon a General to leave a slight Place untaken, than one more hard of Access. Besides, in my apprehension (and I should be glad to know your Opinion of the matter) the Learning out of use is as necessary to a Beginner as that of every Day's Practise. There seem in the modern Law to be so many references to the antient Tenures and Services, that a Man who would understand the Reasons, the Grounds, and Original of what is Law at this Day must look back to what it was formerly; otherwise his Learning will be both confused and superficial.⁶

Without haste, perhaps without real regret, he withdrew to Oxfordshire. In the market town of Wallingford, he took up the post of recorder. In Oxford proper, the chancellor's court exercised a small but serious jurisdiction over debt proceedings and scholars who violated university rules; here Blackstone served as assessor.⁷ At All Souls there were cases and controversies to be disputed. Under the terms of the medieval foundation by which Bishop Chichele had established the college, descendants of the Chichele family, "the bishop's kin," were entitled to preference in fellowship appointments. Against such applications, as with each generation the number of potential founders' kin increased while their connection to the founder grew increasingly attenuated, All Souls fought with a desperate tenacity. In such actions Blackstone showed a litigator's tirelessness and resource. He did not always prevail, but the endeavor gave him the subject for one of his earliest works: *Essay on Collateral Consanguinity, Its Limits, Extent and Duration* (Pp. 85-90).

As well as defending All Souls in such proceedings, Blackstone served as the manager of the college's estates, a role in which the young don seems to have been extraordinarily effective. The college historian of All

6. Pp. 66-67, quoting THE LETTERS OF SIR WILLIAM BLACKSTONE 1744-1780, at 3-4 (W. Prest ed., 2006) (Blackstone to Seymour Richmond, 28 January 1746).

7. A contemporary wrote that Blackstone's "predilection for the occupations of the University" might have "account[ed] for, if it did not occasion, the slow progress he made in his profession." Page 52, quoting 67 MONTHLY REV. 7 (July 1782).

Souls has spoken of “his ascendancy in college affairs, which lasted two and twenty years”(p. 91). Across the closing years of the 1740s, Blackstone busied himself in supervising the completion of the college’s magnificent Codrington Library. Out of his position as steward of All Souls, a post that he held for eleven years, came his first substantial work: a handbook on the medieval system of charge-and-discharge in which the college’s bookkeeping was done, “a sort of Maze, I confess, yet not without a Plan” (p. 84). His effort to increase the rental income upon which All Souls survived gave him an early opportunity to boast. He had, he wrote, “compared all the Leases, then subsisting, with the Rental, and . . . corrected a great many Mistakes; most of them to the disadvantage of the College . . . some of them of near Seventy Years standing”⁸ (Pp. 83-84).

The idea of lecturing on the common law may have come to Blackstone as early as 1752. He had already served as the All Souls college lecturer in law, reading lectures on Saturdays and overseeing disputations on Wednesdays. He may have thought to revive the medieval tradition of university classroom teaching (moribund in the English universities of his day), or he may have thought to emulate a series of lectures on the law then being initiated at Gray’s Inn. Other concerns may have been as immediate. It has been noted sardonically:

The fact that in 1752 Charles Viner, a benefactor already in his seventy-fifth year, had completed plans to foster the study of common law at Oxford, where it had been completely neglected; that the core of his scheme was the endowment of a well-paid Professorship to be held, on attractive conditions, by a qualified civilian who was also a barrister-at-law, and that within a year William Blackstone, an able and ambitious young [doctor of civil law] and barrister . . . should present himself to lecture on his own initiative on precisely this neglected topic, is on the face of it a somewhat surprising series of coincidences.⁹

On the evening of Tuesday, November 6, 1753, Blackstone began lecturing on the common law. Very likely he spoke in the dining hall at All Souls. By July 1754, the end of the academic year, he had presented 65 lectures. Those who heard him, his first biographer wrote, were “a very crowded Class of young Men of the first Families, Characters, and

8. The handbook on the college’s “domestic Oeconomy” was published near the end of the Victorian era, as a DISSERTATION ON THE ACCOUNTS OF ALL SOULS COLLEGE, OXFORD: PRESENTED TO THE ROXBURGHE CLUB BY SIR WILLIAM ANSON (London: J.B. Nichols, 1898). Blackstone’s review of the copyhold tenures held by the college’s tenants is memorialized in *A Rental of the Manors of Edgeware & Kingsbury with its Members in the County of Middx Shewing The Names, Abutments, Rents & Qualities of the several estates held by Copy of Court Roll*. Pp. 82-83.

9. Page 111, quoting L.S. Sutherland, “Blackstone and the Legal Chairs at Oxford,” in EVIDENCE IN LITERARY SCHOLARSHIP: ESSAYS IN MEMORY OF JOHN MARSHALL OSBORNE, 229-240 (R. Wellek & A. Ribeiro eds., 1979).

Hopes.”¹⁰ He had completed what he had advertised what he would do: “lay down a general and comprehensive plan of the laws of England; to deduce their history; to enforce and illustrate their leading Rules and fundamental Principles; and to compare them with the Law of Nature and other Nations.” He had brought his nation’s laws out of the seventeenth century. He had translated, tamed, and ordered the wilderness of single instances—reduced the unruly common law to a principled system.¹¹ He had worked out the fundamental structure of what would become the *Commentaries*, even many of the eloquent phrases that would make those works so memorable. “The laws of his country are the first science of an Englishman of rank and fortune, who is called to be a magistrate, and may hope to be a legislator,” Edward Gibbon would write of this accomplishment.¹² And he had completed this project, Blackstone may have considered, not without gratification, all in the weeks before he passed his thirty-first birthday.

Prest highlights two great services that Blackstone performed for his university. The first was to uncover, at the Oxford University Press, a financial morass of disturbing magnitude. It was reported that he had found a deficiency of £20,000 in the press accounts, “not a farthing of which could be produced or accounted for, it having (as is generally imagined) been spent in feasting &c” (p. 148). Through the threat of exposing the full extent of the malefaction, he bullied the vice-chancellor into accepting his demands for change. Swiftly, then, in a single month’s time, he pushed through bookkeeping reforms, recovered misappropriated revenues, and won the appointment of “a Person properly versed in both Branches of the printing business, as well casework as presswork to be their warehousekeeper and overseer.” (p. 147) Blackstone’s campaign has been gratefully remembered by a historian of the press as “the most ruthless single-handed reform in eighteenth-century Oxford.”¹³ To that memorable springtime, in March 1758, may be traced the institution that

10. Page 114, quoting James Clitherow, “Preface, Containing Memoirs of His Life,” in Blackstone’s *REPORTS OF CASES DETERMINED IN THE SEVERAL COURTS OF WESTMINSTER-HALL, FROM 1746 TO 1749* [Blackstone’s Reports] (J. Clitherow ed., 1781).

11. Pp. 113-14. Blackstone’s achievement in the *Commentaries*, S.F.C. Milsom suggested in his memorable Selden Society lecture, was

to progress beyond procedure, beyond rules about how law-suits should be conducted, and to develop substantive rules purporting to regulate in some detail how people should behave, to analyze the relationships of life into a comprehensible system of rights and duties. . . . So compelling was the result that we cannot imagine how things were ever otherwise. We think as though such books had always somehow existed: it is just that they were not written.

S.F.C. Milsom, *The Nature of Blackstone’s Achievement*, in SELDEN SOCIETY LECTURE 4 (1981).

12. EDWARD GIBBON, *THE AUTOBIOGRAPHY OF EDWARD GIBBON* 61 (1930). Gibbon praised Blackstone’s work: “The Vinerian professorship . . . was coldly entertained by the graver doctors, who complained (I have heard the complaint) that it would take the young people from their books: but Mr. Viner’s benefaction is not unprofitable, since it has at least produced the excellent commentaries of Sir William Blackstone.” *Id.*

13. I. G. PHILIP, *WILLIAM BLACKSTONE AND THE REFORM OF THE OXFORD UNIVERSITY PRESS IN THE EIGHTEENTH CENTURY* 94-95 (1955).

printed this volume.

The other great victory that Blackstone won for Oxford was a triumph over a long-dead churchman. In 1636 Archbishop William Laud had promulgated a set of statutes to govern Oxford university proceedings.¹⁴ Charles I had confirmed these with letters patent, and the university – not for nothing would Oxford prove itself a royalist citadel – had acclaimed this “Laudian Code” as its “eternal laws” (p. 173). Blackstone’s achievement was to demolish the idea that the Laudian Code was sempiternal and immutable.

He did this in a protracted debate, fought out over more than a year, from March 1759 through July 1760. The Oxford university convocation, the governing body of the university, was clarifying its membership requirements, and answering the related question of whether a university member forfeited his right to vote in university elections by accepting the freedom of the city of Oxford. However academic and Augustan the outward trappings of the matter, the central themes were radical and fundamental. The issue was whether the university had the authority to govern itself. Blackstone attacked the received idea that the Laudian statutes could not be changed (or, if they were to be changed, could only be changed if the university obtained a new issue of letters patent). On this point, Blackstone argued that while King Charles’ letters patent had confirmed Archbishop Laud’s statutes, this had not repealed all former university statutes. The fact that certain statutes were “royal statutes” (which indeed could not be altered without the consent of the crown) did not mean that all other university statutes were equally immutable. Except for the distinct set of royal statutes, the provisions that governed the university were provisions that the university could alter, on its own authority. The question was framed in terms of university suffrage – but if Convocation could redefine the suffrage, it could change other rules governing university life.

The central tenet of Blackstone’s argument is of crucial importance here. This is “the inherent right of all corporations to govern their domestic affairs, and hence their inability to make fundamental laws restricting the legislative powers of their successors, just as no parliament can effectively prevent its legislation being repealed by a future parliament.” As Prest observes, this “foreshadow[s] the emphasis on parliamentary sovereignty in the first book of the *Commentaries*” (p. 173). Blackstone clearly saw the issue in all its breadth. As early as 1757, three years before, he had outlined these concerns in manuscript essay, which he revised and titled “Considerations on the power of the University to make,

14. See HUGH TREVOR-ROPER, ARCHBISHOP LAUD 271-94 (rev. ed. 1962). The “reform” of Oxford University marked Laud’s greatest success at enmiring the Privy Council in the petty grievances of academic politics.

alter or repeal Statutes, without royal license.”¹⁵ This victory obtained, Blackstone and his allies did not press for further changes, but their victory altered the constitutional balance of the university. “Had [this] undertaking not succeeded,” Prest notes, “academic conservatives would have had a much stronger constitutional and political case for resisting the reforms which in the later years of the eighteenth century began to create the foundations of Oxford’s modern system of undergraduate education” (p. 173).

The young Blackstone wrote poetry.¹⁶ The mature Blackstone was an indefatigable wordsmith, a scholar who wrote fluently and eloquently and understood the importance of keeping his name in print. If he saved the Oxford University Press, this may have been because he had already involved himself so deeply in the business of the printing-house. His *Analysis of the Laws of England* had been printed for him at the Oxford University Press in 1756; by 1759 this had sold out three editions, each of a thousand copies. In 1759, as well, amid the maneuvering to reform the power of the Oxford convocation, Blackstone found time to see through the press two major works, his notable *Treatise on the Law of Descents in Fee Simple* and *The Great Charter and the Charter of the Forest*.

It was at the Oxford University Press that Blackstone’s greatest work would be printed. The first edition of the first volume of his *Commentaries on the Laws of England* was published in mid-November 1765, its strikingly elegant pages printed from a typeface that the press had originally purchased for an edition of Cicero. Addressing “the rights of persons,” the volume swept broadly across the social landscape, covering kings, parliaments, the common people, royal revenues, masters and servants, husbands and wives. Very possibly, Prest suggests, these topics had been swept together to draw readers’ interest. “The enormous success of the first book of the *Commentaries* owed something to its subject matter: jurisprudence and public law in relation to government and politics, not the drier, more technical private law topics in the second and third volumes” (p. 220). Reviews were favorable, and in less than two years there appeared the second volume, “Of the Rights of Things.” Of this, Sir William Holdsworth pronounced, “The first twenty-three chapters contain the best short account that has ever been written of the law of real property.”¹⁷

In the first two books of the *Commentaries*, substantive law dominated

15. Bodl. MS Top. Oxon. C. 209, fo. 27-28, cited at p. 173.

16. As with most lawyer-poets, a predilection for clarity and convention anchored Blackstone’s work at one end of a spectrum at the other terminus of which can be glimpsed the flaring fancy and brilliance of Wallace Stevens. He reworked classical idylls and his couplets were embellished with latinate phrases, and if some small acclaim greeted his “The Lawyer to His Muse,” the English language can be reckoned to have profited when Blackstone abandoned verse for prose.

17. SIR WILLIAM HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 243 (Cambridge University Press 1938). Sir William gives no indication of irony in describing a work of twenty-three chapters on the land-law as short.

over procedure. With such discussion, the common law entered the modern age: the old order had definitely broken up when a common lawyer, rather than discussing what writ properly lay, discussed parties' rights and powers. The third volume of the *Commentaries*, however, seemed to begin with a regression. Blackstone defined private wrongs as "the infringement or privation of the private or civil rights belonging to individuals, considered as individuals." In this volume, he announced, "to investigate [this] species of wrongs, with their legal remedy, will be our employment."¹⁸ Blackstone was venturing the suggestion that unless a remedy were available, no right was meaningful. He also appeared to be stepping backward, abandoning a topical approach to law in favor of one bound up with the institutions that supplied remedies. Yet there was good reason, in an area where law was being made, to emphasize the procedures by which a judicial decision could be obtained. As Thomas Barnes has commented,

Georgian England was an age distinguished by prideful men [and] excessive concern with honor . . . It was an age of fast horses, careening carriages, drunken foul-mouths, atrocious fires, a gutter press, considerable unrest in growing towns and declining countrysides, bad food and worse drink, even "lighted squibs" at Milborne Port [situs of *Scott v. Shepherd*, of which more later], of quacks, frauds, whores, and mountebanks – in short, an age well supplied with tortfeasors. Blackstone would not dismiss his young charges ignorant of the forms of action precisely in the one area in which the courts were busy and the law growing. . . . "Private wrongs" was more than a device for ordering subject matter – it was a social commentary on the cruel world into which Blackstone's students would be launched.¹⁹

In the fourth volume of the *Commentaries*, published in 1769, Blackstone discussed the Protestant dissenters of England under the heading of "Offenses Against Religion." Rightly provoked by this, Joseph Priestley fired back a pamphlet objecting to Blackstone's "groundless rancor and unmerited abuse." To this pamphlet Blackstone responded, the only occasion on which he answered in print a criticism of the *Commentaries*.

Blackstone was not only a believing Christian, but also a loyal communicant of the Church of England. The influence of his personal religion should not be underestimated. When John Wesley preached in Oxford, Blackstone noted disdainfully that "Wesley the Methodist . . .

18. 3 WILLIAM BLACKSTONE, COMMENTARIES *2-3. Blackstone had earlier appeared to take a more abstract view of jurisprudence by defining law as a "rule of civil conduct, commanding what is right, and prohibiting what is wrong." 1 COMMENTARIES *118.

19. Thomas Barnes, *Introduction*, to 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 20-21 (Gryphon Editions, Legal Classics Library 1983).

informed us first that there was not one Christian among the Heads of Houses . . . and that Gluttony, Pride, Avarice, Luxury Sensuality & Drunkenness were the general Characteristicks of all Fellows of Colleges.”²⁰ And yet, toward Priestley, Blackstone’s response was different. He apologized, noting that he had himself been impressed by Priestley’s recent book, the *History of Electricity*, and acknowledged that Priestley had grounds for his indignation, “some expressions of my own (not sufficiently attended to, when the work was revised for the press)” (p. 250). More importantly, in the wake of this disputation, Blackstone revised the text of the *Commentaries*, conceding that “serious, sober-minded Dissenters” might claim exception from the penal laws.²¹

Blackstone’s politics were Tory. He served two years in the House of Commons (1761-1770), elected by pocket boroughs in the county of Wiltshire. His parliamentary service was active but undistinguished. As he himself knew, he was not a fluent speaker. When he defended the Commons’ authority to determine who should be admitted as a Member (which meant, defending the government’s determination to exclude Whig firebrand John Wilkes), he was visibly discomfited when his *Commentaries* were cited against him.²² His two most effective patrons were Lord North and George III. As early as 1759, Blackstone had been invited to read his lectures before the young Prince of Wales. He did not carry out this command performance, but he supplied the prince with copies of his works, including – this must have been calculated – two lectures on royal revenues. It has always been rumored that the king himself had a hand in making Blackstone a judge. Prest supports this gossip with a shrewd observation, that the judge who retired, opening a place for Blackstone on the Common Pleas bench, did so upon the receipt of a royal pension, a rarely granted favor.

20. Page 57. The Church of England, in Blackstone’s day, emphasized dispassionate professions of faith, enforced conformity, and material gratification. It was a church that might comfort the afflicted but made little effort to afflict the comfortable. From his undergraduate days, Blackstone’s personal library was heavily weighted with religious books from this mainstream: James Ussher, Isaac Barrow, and Grotius’s *De Veritate Religionis Christianae*. Also represented among Blackstone’s reading was Charles Leslie, a high-church defender of orthodoxy, royal divine right, and episcopal power. Leslie’s *Short and Easie Method with the Deists*, which Blackstone owned, together with Leslie’s *A Short Method with the Jews*, may have been among the tracts that Daniel Defoe parodied in his *Shortest Way with the Dissenters*, with its straight-faced, modest proposal for jailing and hanging Nonconformist congregations.

21. So seriously did Blackstone take his religion that he was willing to reframe his arguments when he was taken to task for them. By contrast, when Jeremy Bentham mocked his work, Blackstone showed an Olympian restraint, writing elliptically in the preface to the next edition of the *Commentaries* that “where he thought such objections [to his work] unfounded, he hath left and shall leave the book to defend itself: being fully of opinion, that if his principles be false, and his doctrines unwarrantable, no apology from himself can make them right; if founded in truth and rectitude, no censure from others can make them wrong.” (p. 296).

22. As a legislator, Blackstone’s most notable interest was turnpikes. During the session of 1761-62, he sat on at least 16 committees concerned with highways and turnpike commissioners’ powers. The political interest was to some extent personal; turnpike bonds would make up much of the £10,000 in mortgages and securities contained in Blackstone’s estate.

It was as a teacher and jurist that Blackstone made his mark. His work as a lawyer and judge was less remarkable – solid, competent, cautious, but lacking the audacity and magisterial brilliance of Lord Mansfield. The areas in which his expertise was recognized were copyright, publishing, and booksellers.²³ His most famous judicial opinion was delivered in the case of *Perrin v. Blake*, in which an Exchequer Chamber proceeding overruled Lord Mansfield and the court of King’s Bench. In *Perrin*, where the intention of the testator seemed clear but the language of the will had failed to effectuate this intent, Mansfield had turned a blind eye to established precedent and pushed through King’s Bench a decision that contravened the Rule in Shelley’s Case. If Mansfield were pressing for justice in a single instance, however, Blackstone and a solid majority of the other judges preferred to preserve established legal convention, “those criteria which the law has established for the certainty and quiet of property.”²⁴ In his other best-known decision, *Scott v. Shepherd*, Blackstone argued unsuccessfully for preserving the distinction between traditional forms of action. The defendant had thrown a lighted firework squib inside a crowded marketplace, where it was tossed around between two other parties before it exploded, putting out Scott’s eye. Three of four judges held that trespass lay. Blackstone dissented, maintaining that only an action on the case could be brought. He believed that Shepherd’s actions had not directly and immediately caused Scott’s injury, because the firework had been caught and thrown again by the bystanders: “where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case.” It was of the utmost necessity that courts “keep up the boundaries of actions, otherwise we shall introduce the utmost confusion.”²⁵

As a judge, whatever his predilection in private life for passing blunt judgments, Blackstone showed himself more cautious than zealous. William Scott, Lord Stowell, later stated that “more new trials were granted in causes which came before him on circuit than were granted on the decisions of any other judge. . . . The reason was that being extremely diffident of his opinion, he never supported it with much warmth or

23. See *Tonson v. Collins*, 1 Blackstone’s Reports 321 (1761), *Millar v. Taylor*, 4 Burrow 2303 (K.B. 1769) (cases on copyright); *Baskett v. Cunningham*, 1 Blackstone’s Reports 370 (1762) (involving the printing of annotated statutes). When the House of Lords considered the later case of *Donaldson v. Becket*, 4 Burrow 2408 (1774), Blackstone submitted judicial advice. Blackstone also sparred both for and against the Chevalier d’Eon, a cross-dressing French spy and diplomatist. From his office practice, Blackstone knew first-hand the difficulties surrounding landed estates. He was the man of business chosen in 1760 to settle the debts and marriage-settlement obligations of the third earl of Abingdon, which involved him in seven years of surveying properties, selling acreage, and remitting sums to the Continent to pay the traveling expenses of the young fourth earl.

24. Page 268; see W. Blackstone, *An Argument in the Exchequer Chamber on Giving Judgement in the Case of Perrin and Another Against Blake*, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 513-78 (F. Hargrave ed., 1787).

25. *Scott v. Shepherd*, 1 Blackstone’s Reports 894-98 (1773), discussed at p. 270.

pertinacity in the court above, if a new trial was moved for” (p. 263). Prest disagrees; he finds that, in fact, there was little diffidence, even little deference, in Blackstone’s judicial work. He could be very precise in ruling as to whether an action properly lay, and was often willing to present “miniature lectures” on the topic before the court, “the writ of habeas corpus, the power of the Exchequer, the doctrine of coverture, or the geographical limits of the East Indies” (p. 263). He did not hesitate to condemn prisoners when armed robbery or attempted rape was clearly proven. At the same time, however, he understood that the law had to be shaped—had to respond to the pressures of history. When the American Revolution prevented further transportation of reprieved felons to North America, Blackstone spent much energy drafting what became the Penitentiary Act of 1779, a milestone reform, one of England’s first serious efforts to provide a criminal sanction other than hanging or exile.

Blackstone was a portly man, which somehow seems to frame other aspects of his character. His brother-in-law wrote:

Being himself strict in the Exercise of every public and private Duty, he expected the same Attention to both in others; and, when disappointed in his Expectation was apt to animadvert with some Degree of Severity, on those who, in his Estimate of Duty, seemed to deserve it. This rigid Sense of Obligation, added to a certain Irritability of Temper, derived from Nature, and encreased in his latter Years by a strong nervous Affection, together with his Countenance and Figure, conveyed an Idea of Sternness.²⁶

He was priggish by custom, sometimes bad-tempered, congenial only with company he knew well, fonder of books than of people. On the Oxford assize circuit, visiting Salisbury, the judge’s social awkwardness was exposed. A hostess recalled that

Your Friend Sr Wm Blackstone was highly pleased with the Books; his brother Naires is musical, so while Sr Wm was deeply engaged in a Book they with mutual consent left the room to repair to the music, and I [was] left to guard Sr Wm. He did not hear them go; some minutes after he took his Eye off the Book, and when he saw only me in the room he started, and asked what was gone of all the company and begd to [be] conducted to them.²⁷

26. Page 274, quoting James Clitherow, “Preface, Containing Memoirs of His Life,” from Blackstone’s Reports, *supra* note 10.

27. Page 284, quoting 1 A SERIES OF THE LETTERS OF THE FIRST EARL OF MALMESBURY, HIS FAMILY AND FRIENDS 234-235 (J. Harris ed. 1870)(recollection of Elizabeth Harris).

The Blackstone family was concerned to squelch the assertion that Sir William had written the *Commentaries* “with a bottle of port before him.” That rumor is by no means extinguished by certain facts at which Prest cocks an eyebrow, most notably the substantial collection of fortified wines that survived to be recorded in Blackstone’s widow’s estate, “some 21 dozen [bottles of] Madeira, and 19 dozen Mountain (Malaga or Muscat) wine . . . 2 dozen of claret, 14 of cider, 4 of sherry, and nine

Blackstone's bookishness could be formidable. If, in a single courtroom argument, he quoted Livy, Cicero, Grotius, Montesquieu, Camden, Hume, Smollett, and the eminent Netherlandish civilian Cornelius Bynkershoek, he had the learning to back it up. The library that Blackstone maintained, as Prest reconstructs it, possibly numbered nearly seven thousand volumes – omitting the manuscripts, incunabula, and antiquarian volumes that he bequeathed to All Souls, and the lawbooks that he bequeathed to the eldest of his sons who should apply himself to the law. (Blackstone's son James would follow him as Vinerian Professor.)

Jeremy Bentham scoffed, that Blackstone's "grand concern is always orthodoxy," and that Blackstone was "a bigoted or corrupt defender of the works of power."²⁸ Daniel Boorstin articulated the point at greater length: Blackstone's work "employed the assumptions prevalent in its day about science, religion, philosophy, history, art, and reason, to give the legal system and the values embodied in it an appearance of rationality and acceptability." The *Commentaries* represented

the product of a man who believed in certain moral and social values, and who employed all the ideas he found around him, to convince himself that English law, embodying those values, was entitled to reverence and support. . . . Whether Blackstone was proving an institution to be rationally defensible because he believed it to be morally good, or whether he believed it to be morally good because it was rationally defensible, is seldom to be discovered from the document itself.²⁹

Wisely, Prest resists such generalizations. The governing metaphor that he offers for Blackstone's enterprise is one that Blackstone himself preferred, the vision of law as architecture.³⁰ In what may be his most celebrated passage, Blackstone likened the common law to one of the feudal piles that dominated his nation's countryside:

Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The

bottles of brandy," together with "over 36 dozen bottles of port" (pp. 85, 210).

28. See, respectively, 1 J. BENTHAM, *THE WHITE BULL* lxxxiii (1774) (trans. of Voltaire's *Le Taureau Blanc*); J. BENTHAM, *A FRAGMENT ON GOVERNMENT* 398 (1776), cited at pp. 293, 295.

29. Boorstin, *supra* note 1, at xvii, 188. More recently, Duncan Kennedy has denigrated the *Commentaries* as "a vast explication of the single notion that the conflict of right with right was illusory, and the same was therefore true of the conflict of right with power," part of a broader conservative apology for a jurisprudential vision of law as a system that successfully mediates the conflict between civil society and the governing political state, when in fact it is merely defending "hierarchical structures of power, welfare, and access to enlightenment that are illegitimate." See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205, 211-212, 217, 382 (1979).

30. Prest cautions that the comparison of the legal system to a physical structure was "the stock analogy for jurisprudence in the eighteenth century." Pp. 67-68, quoting Peter Stein, *Elegance in the Law*, in *THE CHARACTER AND INFLUENCE OF ROMAN CIVIL LAW: HISTORICAL ESSAYS* 15 (P. Stein ed., 1988).

moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.³¹

He had congratulated himself upon mapping out the plan to the maze of the bookkeeping system at All Souls. In an undergraduate blank-verse project, *The Pantheon*, he had written of religion in terms of gothic arches, obelisks, columns, and domes. At All Souls, during the late 1740s, in the same years which saw his threefold immersion in the law—in the slough of copyhold, the intensity of litigation, and the arcanities of the Inns of Court—he had prepared, for a never-published treatise on architecture, tables of architectural orders that clearly prefigure the tables in which he categorized estates in land. (Prest reproduces copies of both the manuscript and the printed syllabus of Blackstone's first lectures, making the point plain.) During those years, he had studied law and pondered architecture almost in the shadow of the rising dome of the Radcliffe Library, and made time for his legal endeavors among the numberless tasks in which completion of the Codrington Library had involved him: settling carpenters' disputes, retaining joiners to make the bookcases, commissioning busts and statues, and finally devising a new cataloguing system, one that improved on the Bodleian's.³²

To deal closely with the facts of Blackstone's career has a way of bringing into focus certain subtle connections. The author of the *Commentaries* held toward Britain's rebellious American colonies precisely the attitude to be expected from a man who owed his judicial appointment to Lord North and King George. In 1779, when the issue still hung in the balance, Blackstone "rejoice[d] at the fair Prospect of Success in America"—partisan sentiments which Thomas Jefferson reciprocated, perhaps more archly, when he complained to James Madison that "the honeyed Mansfieldism of Blackstone" had ruined the rising generation of law students.³³ Yet when Blackstone explained what made the common

31. 3 COMMENTARIES *268.

32. In the last years of his life, Blackstone oversaw the rebuilding of St. Peter's Church in Wallingford, which had been ruined during the last months of the English Civil War. This was a full-scale refurbishment that saw the structure outfitted with "paved floors, stuccoed walls, near full-length glazed windows, coffered ceiling, classically-proportioned plaster mouldings, and plain low pews," all "according to Mr. Taylor's plan . . . produced by Mr. Blackstone" (p. 282). The judge rests at the east end of St. Peter's, in a family vault which he purchased the license to construct.

33. Page 292; 16 THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 155, 156 (Albert Ellery Bergh ed., 1907) (Jefferson to James Madison, 17 February 1826). Before the Revolution, Jefferson considered,

Coke Littleton was the universal elementary book of law students, and a sounder Whig never wrote But when his black-letter text, and uncouth but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the students' hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toriyism.

Id.

law valid, he suggested that the custom on which it was based “carrie[d] this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.”³⁴ Jefferson and Madison might have recognized this as the consent of the governed. In similar vein, whatever derision Bentham heaped upon Blackstone, Bentham could hardly have insisted so energetically that Parliament reform the law by enacting legislation, had Blackstone not maintained so forcefully that Parliament could enact whatever laws it chose.³⁵

Completing this biography has been no small task. As Prest observes, there is no central Blackstone archive: he probably never assembled a critical mass of family muniments, some of his personal papers may have been burned, and his library was ultimately sold at auction. His response to criticism was usually to hold himself aloof. The rule-books maintained by the clerks of King’s Bench almost certainly do not reflect the entirety of his practice at the bar. His law-office practice, a very considerable number of legal opinions and letters, can only be located in the scattered archives of his various clients. He published verse under his brother-in-law’s name and offered under a pseudonym a long and perceptive series of footnotes to Edmund Malone’s great commentary on Shakespeare.³⁶ His letters reflect a man of wit, even of self-deprecating good humor, but his oblique personal references have long since become opaque.³⁷

In discussing Blackstone’s character, Prest strikes a judicious balance. The irascibility of the man, he acknowledges, is amply demonstrated, as is the unctuousness and eagerness with which Blackstone offered his services to well-placed politicians. “The anxious quest for preferment on which [Blackstone] embarked in the 1760s, while scarcely atypical of his time, is hardly a pretty or an inspiring sight. But at least it betrays more humanity than might be suggested by monumental images of a bewigged and titled judge, in which the person is overshadowed by the trappings of office” (p. 310).

Blackstone’s forte was plainly not philosophy. Indeed, notwithstanding his multifarious, academic, bibliographical, historical, literary and scholarly interests, it was primarily as a practical man of business and an organizer, someone who delighted

34. 1 COMMENTARIES *74.

35. For Bentham’s horror of judge-made law, see HOLDSWORTH, SOME MAKERS OF ENGLISH LAW, *supra* note 17, at 173.

36. Prest notes that Blackstone is credited with being the first critic to identify in print the bawdy pun lurking within Malvolio’s comments on Olivia’s handwriting (“These be her very C’s, her U’s, and her T’s, and thus makes she her great P’s”). The judge observed, “I am afraid some very coarse and vulgar Appellations are meant to be alluded to by these capital Letters” (p. 291). See *further* WILLIAM SHAKESPEARE, TWELFTH NIGHT act 2, sc. 5.

37. Blackstone wrote that he considered “traveling fifty Miles in a Postchaise” to be the equivalent of exercise (p. 209). It is now impossible to identify clearly to which young lady he dedicated his youthful poem “To Miss *** with Pamela,” let alone the muse who inspired “To Miss *****”

in bringing order out of chaos, an expositor and a writer of great clarity and power, that he made his mark. He cannot exactly be said to have created an intellectual discipline, let alone to have been an original thinker armed with a single great idea. But he was a great educational innovator, who can be credited with founding the common law as an academic subject, as well as propounding an ecumenical model of liberal education in words which have hardly lost their meaning or relevance: "For sciences are of a sociable disposition, and flourish best in the neighborhood of each other. Nor is there any branch of learning, but may be helped and improved by assistances drawn from other arts."³⁸

Too long we have regarded Blackstone's work as a part of the Augustan cultural landscape, a vision of the law as something clipped, restrained, and domesticated. But whereas on the one hand the preference of Sir William Blackstone for harmony and equipoise must be considered manifest, as is illustrated both by his orderly categorization of the legal science's multifarious topics and by the dignified and balanced courses in which his sentences unfold, so on the other hand must this estimable jurispudent be remembered as a vigorous administrator, antiquary, bibliophile, critic, historian, legislator, penal reformer, poet, and politician. The style is by no means the entire man. Prest makes it clear that we have done Blackstone scant justice by confusing him with Capability Brown and Robert Adam. This study views Blackstone in the busy streets and bustling printing-houses that he knew, the England of Johnson and Fielding. In these pages there is very little of the aesthete or the apologist—very much, by contrast, of the architect and the builder. The William Blackstone who appears in these pages is a man to be taken on his own forceful terms.

38. Page 310, *quoting* 1 COMMENTARIES *33.

