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and his *Commentaries*

Biography, Law, History

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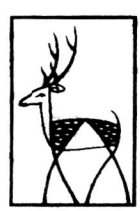

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BLACKSTONE AND HIS *COMMENTARIES*

One of the most celebrated works in the Anglo-American legal tradition, William Blackstone's *Commentaries on the Laws of England* (1765–69) has recently begun to attract renewed interest from legal and other scholars. The *Commentaries* no longer dominate legal education as they once did, especially in North America during the century after their first publication. But they continue to be regularly cited in the judgments of superior courts of review on both sides of the Atlantic, and elsewhere throughout the common law world. They also provide constitutional, cultural, intellectual and legal historians with a remarkably comprehensive account of the role of law, lawyers and the courts in the imperial superpower that was England on the cusp of the industrial revolution.

The life and character of Blackstone himself, the nature and sources of his jurisprudence as expounded in the *Commentaries*, and the impact of his great book, both within and beyond his native shores, are the main themes of this collection. Individual essays treat Blackstone's early architectural treatises and their relationship to the *Commentaries*; his idiosyncratic book collecting; his views of the role of judges, interpretation of statutes, the law of marriage, the status of wives, natural law, property law and the legalities of colonisation, and the varied reception of the *Commentaries* in America and continental Europe. Blackstone's bibliography and iconography also receive attention. Combining the work of both eminent and emerging scholars, this interdisciplinary venture sheds welcome new light on a legal classic and its continued influence.

Preface

One of the most celebrated works in the Anglo-American legal tradition, William Blackstone's *Commentaries on the Laws of England* (1765–69), is currently attracting renewed attention. Of course the *Commentaries* no longer dominate legal education and studies as once they did, espcially in North America during the century after their first publication. But Blackstone continues to be regularly cited in courts on both sides of the Atlantic, and elsewhere throughout the common law world. His *Commentaries* provide constitutional, cultural, intellectual and legal historians with a remarkably comprehensive account of the roles of law, lawyers and the courts in the imperial superpower that was England on the cusp of the industrial revolution. But they also retain some contemporary relevance, and not only for their literary qualities; indeed the sustained impact of Blackstone's work, long after its first publication, is a further reason why the author and his book can still repay further study.

This volume had its origins in a symposium on 'William Blackstone: Life, Thought, Influence' held over two hot Adelaide days in December 2007. That Antipodean setting was in one respect highly ironic, since the metropolitan capital of South Australia is the outcome of a nineteenth-century venture in systematic colonisation specifically endorsed by Jeremy Bentham, Blackstone's former student and life-long critic. Yet the diversity and quality of the papers presented, and the liveliness of discussion, could leave no doubt that both the *Commentaries on the Laws of England* and their author continue to hold the attention of scholars from many parts of the world.

Most of the following essays were presented in draft on that occasion, and subsequently revised for publication. Ian Doolittle, John Emerson and myself were participants, but wrote our contributions after the event, while those by John Baker and Mary Sokol were kindly prepared in response to specific editorial requests. The four parts into which this book is divided (not very rigorously or exclusively) broadly follow the plan of the symposium, with the addition of the final coda on sources. Needless to say, the aim has not been to provide an encyclopaedic coverage, but rather to touch upon some main themes: the life and character of Blackstone himself, the nature and sources of his jurisprudence as expounded in the *Commentaries*, and the influence of his great book, both within and beyond his native shores.

It is a pleasure to acknowledge subventions from research funds provided by the University of Adelaide's Faculty of the Humanities and Social Sciences and the Faculty of the Professions, which made it possible to hold

the Blackstone symposium and also assisted in the protracted process of converting conference papers into book chapters. Numerous friends and colleagues generously supported the enterprise in various ways; I am especially grateful for the expert advice of all those who acted as anonymous referees. In the final stages of putting the book together, Cecile Storey played a crucial role as copyeditor. The office staff of the School of History and Politics and the Law School gave invaluable support throughout. While a particular debt of gratitude is owed to Mary Sokol and John Baker for their willingness to contribute at relatively short notice, I should like to thank all my fellow-contributors, as well as the superbly efficient production team from Hart Publishing, for their generally patient and prompt responses to editorial demands and importunities.

Wilfrid Prest

Contributors

Thalia Anthony lectures in law at the University of Sydney.

Norma Aubertin-Potter is Librarian-in-Charge of the Codrington Library, All Souls College, Oxford.

JH Baker, Downing Professor of the Laws of England at the University of Cambridge, is Literary Director of the Selden Society.

Morris Cohen, Professor Emeritus and Professorial Lecturer in Law, is the former Librarian of Yale Law School.

Horst Dippel is Professor of British and American Studies at the University of Kassel.

Ian Doolittle, formerly a Junior Research Fellow at Christ Church, Oxford, is a partner in the law firm Trowers & Hamlins LLP in London.

John Emerson holds a Visiting Research Fellowship in the Law School, University of Adelaide.

Nicole Graham is Senior Lecturer in the Faculty of Law, University of Technology, Sydney.

Michael Hoeflich is John H and John M Kane Distinguished Professor in the Law School, University of Kansas.

John Langbein is Sterling Professor of Law and Legal History at Yale Law School.

Carol Matthews teaches in the School of History and Politics at the University of Adelaide.

John V Orth holds the William Rand Kenan Jr Chair of Law at the University of North Carolina, Chapel Hill.

Wilfrid Prest is Professor Emeritus and Visiting Research Fellow in the Law School and School of History and Politics, University of Adelaide.

Mary Sokol holds an Honorary Research Fellowship in the Bentham Project at University College London.

Tim Stretton teaches history at St Mary's University, Halifax, Nova Scotia.

Abbreviations

Bentham, *Correspondence*	*The Correspondence of Jeremy Bentham*, ed TL Sprigge and others (London, 1968–2006).
Clitherow, 'Memoirs'	J. Clitherow, 'Preface, Containing Memoirs of his Life', from [W. Blackstone], *Reports of Cases Determined in the Several Courts of Westminster-Hall, from 1746 to 1779*, ed J Clitherow (London, 1781) volume I pp i–xxi
Commentaries	W Blackstone, *Commentaries on the Laws of England* (Oxford, 1765–69; facsimile edition Chicago IL, 1979)
Doolittle, *Blackstone*	I Doolittle, *William Blackstone A Biography* (Haslemere, 2001)
Eller	CS Eller, *The William Blackstone Collection in the Yale Law Library: A Bibliographical Catalogue* (New Haven CT, 1938)
ER	English Reports
HEL	WS Holdsworth, *History of English Law* (London, 1922–66)
HUO	*The History of the University of Oxford*, ed T Aston. Volume V: *The Eighteenth Century*, ed LS Sutherland and LG Mitchell (Oxford, 1986)
Letters	*The Letters of Sir William Blackstone 1734–1780*, ed W Prest (London, 2006)
ODNB	*Oxford Dictionary of National Biography*, ed HCG Matthew and B Harrison (Oxford, 2004)
Prest, *Blackstone*	W Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford, 2008)
Reports	W Blackstone, *Reports of Cases Determined in the Several Courts of Westminster-Hall, from 1746 to 1779*, ed J Clitherow (London, 1781)
TNA	The National Archives, London (incorporating the Public Record Office)
UCL	Bentham manuscripts, University College London (cited by box and folio number)

Illustrations

Chapter 2, Figure 1 'Analysis of this Abridgement' from 'An Abridgement of Architecture' (1743), MS 89022, Special Collections, Getty Research Library

Chapter 2, Figure 2 Text from chs 26–7 ('Of Staircases and Stairs' and 'Of Chimneys') from 'An Abridgement of Abridgement of Architecture' (1743), 40–1

Chapter 2, Figure 3 Text from chs 8–9 ('Of the Orders in general' and 'Of the Tuscan Order') from 'Elements of Architecture' (1747), Codrington MS 333, 36

Chapter 2, Figure 4 Table VIII, showing Ionic column and entablature, from 'Elements of Architecture' (1747)

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1. William Blackstone by Tilly Kettle (*c*1766), Bodleian Library, Oxford
2. William Blackstone(?) by Charles Dixon (*c* 1760), Harvard Law School Library
3. Sir William Blackstone by Thomas Gainsborough (1774), Tate Britain, London
4. Engravings by John Hall after Gainsborough showing their degeneration in later editions of the *Commentaries*
5. Sir William Blackstone, marble statue by John Bacon (1784), Codrington Library, All Souls College, Oxford
6. Sir William Blackstone, bronze statue by Paul W Bartlett (1924–5), Constitution Ave and 3rd St NW, Washington DC. Photograph by Terry J Adams, National Park Service

   Sir William Blackstone after Paul W Bartlett (1928), Royal Courts of Justice, London
7. Stained-glass window, James Powell and Sons (1891), for All Souls College, Oxford; now Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia
8. Stained-glass window from The Great Hall, University of Sydney – The Eighteenth Century, with William Blackstone, centre, Clayton and Bell (1857–8). Copy provided by the University of Sydney Archives from McKenzie, B (1989), *Stained Glass and Stone*, University of Sydney Monographs, No 5. Photograph by Raymond de Berquelle

Contents

I Life

THE MAIN FACTS of Blackstone's life are soon summarised. Born in London in 1723, the posthumous younger son of a near-bankrupt City shopkeeper, William Blackstone was educated at the Charterhouse School under the care of his mother (who also died when he was 12) and a maternal uncle. Winning a scholarship to Pembroke College, Oxford, he was elected a fellow of All Souls College in his 21st year. After graduating BCL in 1745 he began to study the common law in London, being called to the bar at the Middle Temple shortly thereafter, while still maintaining numerous commitments in and around Oxford. Having failed for political reasons to win a professorship in civil (or Roman) law, in 1753 he abandoned Westminster Hall, and launched a private lecture course in Oxford on England's common law and constitution. A leading and increasingly divisive figure in university politics, as well as a scholar and man of letters, he was elected (not without controversy) to the newly endowed Vinerian Chair in English Law in 1758, returning to the London bar shortly afterwards. His marriage in 1761 voided his fellowship, but he maintained a presence in Oxford for the next five years with the sinecure headship of New Inn Hall and his professorial lectures. He also served as a busy back-bench MP, pursued an expanding legal practice and angled for professional promotion, while fathering a growing family. In 1765 he published the first volume of his Oxford lectures, with the remaining three volumes of *Commentaries on the Laws of England* appearing over the next four years. After a change of ministry early in 1770 he was at last promoted to the judicial bench and knighted. A capable and conscientious judge, albeit increasingly obese and testy, Sir William Blackstone died in February 1770 at the relatively early age of 56.

The four following essays supplement this bare outline with further context and additional perspectives. My own looks at previous attempts to write Blackstone's life and the problems they have encountered, points to ways in which readings of his *Commentaries* may be influenced by the view taken of that life, and suggests further reasons why Blackstone's career may interest a broad range of scholars. Carol Matthews then reveals some important links between Blackstone's architectural activities and writings, of which she has made a special study, and the form and content of the *Commentaries*. In her contribution, Norma Potter traces the lineaments of Blackstone's close friendship with his older All Souls colleague Benjamin Buckler, thereby increasing our appreciation of a decidedly non-legal dimension to his life. Finally, Ian Doolittle augments

his own pioneering biographical investigations with a finely detailed essay exploring the intellectual and psychological motivations behind Blackstone's remarkably extensive collection of the printed works of William Prynne, the seventeenth-century Puritan lawyer, polemicist and antiquary. Our subject's life story was indeed more complex and multi-layered than at first glance might appear.

1

Blackstone and Biography

WILFRID PREST

TOWARDS THE END of the last century a group of historians and literary scholars fortunate enough to be spending an academic year at the National Humanities Center in North Carolina met for informal lunch hour discussions of the biographer's art and craft. My own contribution reflected the experience of working over the previous few months on a memoir of Sir William Blackstone, commissioned for and eventually published in what became the *Oxford Dictionary of National Biography*. After the usual throat-clearing preliminaries, I pronounced Blackstone anything but an ideal biographical subject. Not only was there a serious lack of source material, in the form of personal, professional or family papers, but the very nature of Dr Blackstone's life 'seems at first—or even second—glance, neither particularly colourful nor eventful'.[1]

Heedless of my own caveat, I now find myself responsible for a free-standing life of the author of the *Commentaries on the Laws of England*.[2] If nothing else, such recklessness may qualify me to attempt a brief overview of previous attempts to write Blackstone's life, to look at how understandings of that life may affect readings of the book which was its greatest achievement, and finally to consider Blackstone's other claims to the attention of posterity.

1 BIOGRAPHICAL PERSPECTIVES ON BLACKSTONE

In 1999 it was still the case that 'the only published book-length studies of Blackstone's life are somewhat unsophisticated labours of love by two American lawyers, D. A. Lockmiller and L. C. Warden'.[3] The inadequacies

[1] W Prest, 'The Great Commentator: Sir William Blackstone and the Laws of England' (unpublished ts, 21 January 1999) 1.

[2] Prest, *Blackstone*.

[3] Prest, 'The Great Commentator' (n 1) 1. DA Lockmiller, *Sir William Blackstone* (Chapel Hill NC, 1938); L Warden, *The Life of Blackstone* (Charlottesville VA, 1938).

of both these works had been succinctly arraigned by the English medievalist Theodore Plucknett shortly after their near-simultaneous appearance in 1938. Plucknett's astringent review went on to assert that

> the only way to make [Blackstone's] life vivid and significant would be to treat it as part of the eighteenth-century scene and to make Blackstone intelligible as a man by tracing with lavish detail his penetration into those two very select microcosms, the legal profession and the academic world of eighteenth-century England. Blackstone would then appear to us as he did to his contemporaries, with his position fixed by his birth, his learning, his friends, his politics, and finally by his offices and his fortune.[4]

Yet 40 years would pass before Plucknett's prescription began to be acted upon, and then by a scholar who disclaimed any intention of contributing to legal knowledge. In the early 1970s Professor Dame Lucy Sutherland, the eminent Australian-born and South African-educated historian of Hanoverian Britain, began her last major scholarly project, as editor of the eighteenth-century volume for a new official history of the University of Oxford. It is scarcely surprising that Sutherland became interested in Blackstone, given his status as Oxford's 'most powerful and enterprising individual' (to quote her own words), during the middle years of that century.[5] From this perspective at least, Blackstone's life story was anything but run-of-the-mill, and far from lacking in action or drama.

Sutherland managed to write only a brief, if penetrating, essay, which clarified the circumstances surrounding Blackstone's failure to gain election to the Regius Chair of Civil Law in 1753, followed by a chapter on his successful challenge to the binding force of the university's seventeenth-century Laudian statutes. This latter was published posthumously in the volume of *The History of the University of Oxford* which became her memorial. Blackstone also featured prominently in the other three chapters contributed by Sutherland to the same work, and his Oxford years were explored in a Bodleian Library temporary exhibition to mark the bicentenary of his death for which she helped prepare catalogue notes.[6] Under her guidance, and assisted by her findings, a postdoctoral research fellow was also encouraged to embark upon 'a project . . . to write a full-length biography of Blackstone'. The first-fruits appeared as three articles shortly after Sutherland's death, but Ian Doolittle then left Oxford for London, where he became a practising solicitor. Not until 2001 did his biography

[4] TFT Plucknett in (1939) 52 *Harvard Law Review* 721.

[5] LS Sutherland, 'William Blackstone and the Legal Chairs at Oxford' in R Welleck and A Ribiero (ed), *Evidence in Literary Scholarship: Essays in Memory of James Marshall Osborn* (Oxford, 1979) 229–40, 230.

[6] *Ibid*; LS Sutherland, 'The Laudian Statutes in the Eighteenth Century', in *HUO* 191–203. *Blackstone and Oxford: An Exhibition held at the Bodleian Library, Oxford* (Oxford, 1980).

appear in print.[7] Although relatively brief and focused on Blackstone's public career, this self-published monograph would provide an indispensable starting point for all subsequent investigation of Blackstone's life, not least my own.

In explaining why 'Blackstone has received less than his due attention from biographers', Sutherland herself first cited the failure to provide 'an adequate memoir' by way of a foreword to the edition of his *Reports* published posthumously in 1781. Due to the illness and death of his old Oxford friend Benjamin Buckler, that responsibility fell to James Clitherow. This much younger man, a former All Souls colleague whose sister had married Blackstone, became in succession his brother-in-law's trustee, executor and editor, but proved, as Sutherland put it, 'a singularly unenterprising biographer'.[8] Clitherow certainly professed great reluctance, claiming that only the absence of Buckler's 'abler pen' had forced his hand: 'rather than Injustice should be done to a Character he so much esteemed, by an incorrect or injurious Narrative, He has ventured, though totally unused to writing for the public Eye, to undertake the Task himself'. Notwithstanding this show of (possibly quite genuine) modesty, Clitherow was in no doubt that he possessed 'ample Materials for the Purpose', thanks to an 'intimate Acquaintance' with his subject over more than three decades, the input of friends who had known him even longer, and 'a short Abstract of every Circumstance of Consequence in his Life, written by himself with his accustomed Accuracy'.[9] While corroborative evidence is lacking, there seems no reason to doubt that Blackstone did indeed compose an autobiographical memoir, which now survives only as incorporated in Clitherow's text.

Given the circumstances and timing of its publication, the nature of Clitherow's sources and his personal loyalties, the tone and content of that introductory 'Memoirs of [Blackstone's] Life' could hardly have been anything but sympathetic, not to say eulogistic. Despite his emphatic declaration of intention to provide a 'faithful and impartial Account', as distinct from a 'professed Panegyric', Clitherow saw no conflict between the claims of truth-telling and the 'Tribute due to the Memory of so respectable a Person'.[10] The lack of any other substantial contemporary life, as also of a Blackstone archive from which alternative perspectives might have been derived, therefore makes it unsurprising that, in the words

[7] I Doolittle, 'William Blackstone and the Radcliffe Camera, 1753' (1982) 11 *Bodleian Library Record* 47–50; 'Jeremy Bentham and Blackstone's Lectures' (1982) 6 *Bentham Newsletter*, 23–5; 'Sir William Blackstone and His *Commentaries on the Laws of England* (1765–69): A Biographical Approach' (1983) 3 *Oxford Journal of Legal Studies* 99–112; Doolittle, *Blackstone*.

[8] Sutherland, 'William Blackstone' (n 5) 229.

[9] Clitherow, 'Memoirs' i–ii.

[10] *Ibid* xix, xx, xxiv.

of the assiduous Victorian judicial biographer Edward Foss, Clitherow's version 'detailing all the incidents of his career . . . from its fairness and impartiality has formed the groundwork of every future memoir'.[11]

Foss's judgement was doubtless too kind, in that Clitherow certainly presented a selective perspective on his subject. This is apparent throughout his text, especially in his final summing up of Blackstone's 'Character' (despite his proclaimed intention 'to do Justice to the Merit of such a Character, without incurring the Imputation of Flattery'), but also in his persistent playing down of the extent and significance of Blackstone's lifelong literary (as opposed to legal) interests. But while scarcely unbiased or wholly objective, Clitherow did not attempt to exclude from his account all material which might lend support to other less favourable points of view. This is apparent from an earlier and notably more ambiguous testament to the authority of his 'Memoirs'. Published in the year after Blackstone's *Reports* with Clitherow's introductory biographical sketch first appeared in print, *The Biographical History of Sir William Blackstone* is essentially a scissors-and-paste compilation of extracts from Clitherow, with an excessively diffuse and rambling editorial commentary. Professedly the work of an anonymous and quite possibly fictitious 'Gentleman of Lincoln's Inn', this speculative literary venture was issued under the imprint of a bookseller-printer who specialised in 'popular and ephemeral literature'.[12] Yet although largely derivative in content, *The Biographical History* provided substantial hints of an alternative and markedly less sympathetic view of its subject, by way of anecdotal glosses to Clitherow's somewhat defensive insistence on Blackstone's fundamental benevolence, notwithstanding his intimidating physical presence, bad temper, and 'rigid Sense of Obligation'. Clitherow was probably seeking to counter the suggestion made in Jeremy Bentham's anonymously published *Fragment on Government* (1776), that the logical confusion and moral complacency which he detected in Blackstone's *Commentaries* were directly linked to their author's failings of character and intellect.[13] Bentham and his followers never provided a full-scale biographical riposte to Clitherow's portrayal of his brother-in-law. However, the muddled reactionary at whom they sneered can scarcely have seemed a more interesting biographical subject than the conscientious, hard-working worthy whose various achievements had been memorialised at some length by Clitherow.

Moving beyond or behind these essentially flat and stylised two-dimensional portraits, whether of virtuous public figure or obscurantist conservative, would require the mobilisation of more and different kinds of

[11] E Foss, *The Judges of England* (London, 1848–64) vol 8, p 250.

[12] HR Plomer et al, *A Dictionary of Printers and Booksellers . . . from 1726 to 1775* (Oxford, 1932) 25.

[13] J Bentham, *A Fragment on Government*, ed R Harrison (Cambridge, 1988) 3–4.