

BLACKSTONE'S SCIENCE OF LEGISLATION *

DAVID LIEBERMAN

(Part I)

IN 1795, Dugald Stewart, the professor of moral philosophy at the University of Edinburgh and reigning Athenian of the North, observed in a famous estimate of the career of Adam Smith that 'the most celebrated works produced in the different countries of Europe during the last thirty years' had 'aimed at the improvement of society' by 'enlightening the policy of actual legislators'. Among such celebrated productions, Stewart included the publications of Francois Quesnay, Anne-Robert Jacques Turgot, Pedro Campomanes, and Cesare Beccaria and, above all, the writings of Smith himself, whose *Wealth of Nations* 'unquestionably' represented 'the most comprehensive and perfect work that has yet appeared on the general principles of any branch of legislation'.¹ One of the more striking achievements of recent scholarship on eighteenth-century social thought has been to make sense of this description of Smith's *Inquiry* and to enable us better to appreciate why Smith chose to describe his system of political economy as a contribution to the 'science of a legislator'.² In a cultural setting in which, as J.G.A. Pocock has put it, 'jurisprudence' was 'the social science of the eighteenth century', law and legislation further featured, in J.H. Burns's formula, as 'the great applied science among the sciences of man'.³ Moralists and jurists of the period, echoing earlier political conventions, may readily have acknowledged with Rousseau that 'it would take gods to give men laws'. Nevertheless, even in Rousseau's programme for perfecting 'the conditions of civil association' — 'men being taken as they are and laws as they might be' — a mortal 'legislator' appeared plainly 'necessary'.⁴ The special challenge for 'his enlightened age', proclaimed Beccaria, was to ensure that lawmaking ceased to be 'the work of the passions of a few or the consequences of a fortuitous or temporary necessity'.⁵ And this in turn suggested, as Claude Helvétius instructed his fellow *philosophes*, that, if philosophers were to 'be of use to the world', they must conduct their inquiries 'from the same point of view as the legislator'.⁶

Stewart's characterization of 'the most celebrated works' produced by Smith and his contemporaries also supplies a useful introduction to another theme. This regards Stewart's inability to find an English author to rank among the famous Continental and Scottish contributors to the recent quest for legislative principles. The omission in fact proved short-lived, for early in the nineteenth century Stewart encountered a distinctive voice of English legislative science

* This article is reprinted from *The Journal of British Studies* with the kind permission of the author and publisher.

in the figure of Jeremy Bentham, whose *Defence of Usury* and Panopticon scheme earned Stewart's endorsement as substantial instances of enlightened law reform.⁷

Stewart's eventual enlistment of Bentham to the modern, European-wide pursuit of legislative theory and law reform can be taken as an unusually early version of what later in the nineteenth century became, and has ever since remained, an orthodox interpretation of Benthamism as the definitive and innovative embodiment of law reform in England. Bentham, Sir Henry Maine explained, 'was the first Englishman to see how the legislative powers of the State . . . could be used to rearrange and reconstruct civil jurisprudence'.⁸ In stark comparison, the period before Bentham was, in F.W. Maitland's judgment, 'a time of self-complacency . . . for the law, which knew itself to be the perfection of reason',⁹ James Bruce likewise remarked on the 'genial optimism' of pre-Benthamic times that 'took the law as it stood to be the best possible', an attitude that received authoritative expression in the writings of Bentham's great adversary, William Blackstone, who found 'little to criticize and nothing to require amendment in rules and a procedure which half a century later few ventured to justify'.¹⁰ Blackstone, Maine concurred, was 'always a faithful index of the average opinions of his day'.¹¹ Bentham and his school were quite different. Bentham himself 'was in truth neither a jurist nor a moralist, [and] theorise[d] not on law but on legislation', and Maine in the famous historical judgment knew of no 'single law reform effected since Bentham's day which [could] not be traced to his influence'.¹²

Given these confident judgments and striking contrasts, it becomes surprising to find Blackstone himself invoking 'the science of legislation' as early as the ninth page of the first volume of the four-volume *Commentaries on the Laws of England* and there heralding the subject as 'the noblest and most difficult of any'.¹³ Equally unexpected is it to discover Blackstone in the *Commentaries* declaring his remarks specifically addressed to 'such as are, or may hereafter become, legislators'.¹⁴ And as surprising still is it to find Blackstone, no less than his best-known critic Bentham, eagerly presenting his intellectual labours in law as a contribution to the busy age 'in which knowledge is rapidly advancing towards perfection'.¹⁵ Thus Blackstone defended his position as the first teacher of English law at an English university by insisting that, if his subject had previously been excluded from university education, this was the legacy of 'monastic prejudice' that only 'a deplorable narrowness of mind' could wish to see perpetuated. 'To the praise of this age', Blackstone rejoiced, 'a more generous way of thinking begins now universally to prevail', and he could therefore 'safely affirm' that no subject 'how *unusual* soever' was 'improper to be *taught* in this place, which is proper for a gentleman to *learn*'. Moreover,

since law was 'a science' that distinguished 'the criterions of right and wrong', that employed the 'noblest faculties of the soul', and that exerted the 'cardinal virtues of the heart', it proved a 'matter of astonishment and concern' that it was ever 'deemed unnecessary to be studied in a university'. 'If it were not before an object of academical knowledge', the *Commentaries* boldly proclaimed, 'it was high time to make it one.'¹⁶

* * *

Few features of the *Commentaries* have suffered such unfortunate neglect as Blackstone's stated aim that his work should furnish guidance in legislative theory. In what follows here, the chief concern is to chart the nature and content of this regularly overlooked Blackstonean 'science of legislation'. This approach to the *Commentaries* serves to highlight the more practical and polemical aspects of Blackstone's celebrated law book. And these programmatic objectives, it is further suggested, illuminate some of the most distinctive features of Blackstone's novel career in English legal science and provide an opportunity for reconsidering his relation to the legal theory and legal developments of eighteenth-century England.¹⁷

As ever in treating Sir William Blackstone, it is useful to begin with the obvious: the *Commentaries on the Laws of England* was the unrivaled legal classic of eighteenth-century England, a composition that overshadowed all other contemporary legal writing and at times even overshadowed its author. According to the testimony of Lord Ellenborough, one of Blackstone's nineteenth-century successors on the bench: 'Blackstone . . . was comparatively an ignorant man, he was merely a fellow of All Souls College . . . His true and solid knowledge was acquired afterwards . . . It might be said of him, at the time he was composing this book, that it was not so much of his learning that made the book, as it was the book that made him learned'.¹⁸ Ellenborough might have added, it was the book that made him famous. On its success, Blackstone, who had earlier failed to triumph either at the London bar or in his candidacy for the Oxford chair of civil law, secured royal patronage, entered Parliament, and finally received judicial appointment.

Blackstone's great law book was based on a course of Oxford lectures he began delivering in 1753. This was an educational innovation, and Blackstone designed the lectures to provide 'a general map of the law' in England for the future lawyer and educated layman. Between 1765 and 1769, this map was published as the four-volume *Commentaries on the Laws of England*. Eight editions quickly followed before Blackstone's death in 1780. Between 1783 and 1849, the *Commentaries*, by then acknowledged 'an essential part of every gentleman's library', went through another fifteen editions.¹⁹ In the mid-

nineteenth century, the work received extensive revision at the hands of H.J. Stephen and, in this form, continued to be republished through to the twentieth century.²⁰ 'It has been said', one of Blackstone's nineteenth-century editors reported, 'that this work . . . is the most valuable which has ever been furnished to the public by the labour of any individual.'²¹

As S.F.C. Milsom has recently pointed out, many of the most important and innovative features of the *Commentaries* can be seen to reflect the special demands of Blackstone's situation in 'addressing laymen' and seeking to give them 'an overall view' of the legal system 'from the outside'.²² There was first the sheer literary grace and accomplishment of the work. 'The *Commentaries*', in A.V. Dicey's phrase, 'live by their style'.²³ Equally dramatic was Blackstone's peerless achievement in presenting the law as an ordered and rational body of knowledge. Whereas the legal texts of 'our ancient writers', Blackstone observed, displayed a 'very immethodical arrangement', his special 'endeavour' in the *Commentaries* was 'to examine' the law's 'solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts to demonstrate the elegant proportion of the whole'.²⁴

Blackstone now rarely earns notice for his methodological novelty or sophistication. With regard to issues of legal analysis and organization, scholars have tended to follow Bentham in treating Blackstone's arrangement of England's law as 'a sink that . . . will swallow any garbage that is thrown into it'.²⁵ Nonetheless, Blackstone himself showed an unusual degree of confidence and self-consciousness over his conceptualization and arrangement of the English legal system and was eager to highlight just these features of his enterprise. He defended his decision in the *Commentaries* to include much 'obsolete and abstruse learning' — such as 'prosecuting any real action for land by writ of *entry*, *assise*, *formedon*, writ of *right*, or otherwise' — for the sake of exhibition 'the whole fabric [of English law] together', without which it was 'impossible to form any clear idea of the meaning and connection of those disjointed parts, which still form a considerable branch of the modern law'.²⁶ In his outline preview of the *Commentaries*, the *Analysis of the Laws of England*, he critically considered the previous attempts at 'reducing our Laws to a System', starting with an appreciative notice of 'Glanvil and Bracton, Britton and the author of Fleta' and then moving on to rebuke the efforts of Anthony Fitzherbert and Robert Brooke, criticize the approaches of Francis Bacon, Edward Coke, and John Cowell, praise the example of Henry Finch, and finally identify Matthew Hale's own *Analysis* as 'the most natural and scientific' of 'all the schemes hitherto made public for digesting the Laws of England' and Blackstone's chosen model. The brief survey not only recorded

the first of Blackstone's several profound debts to Hale's jurisprudence but also made plain his sensitivity to the failings of his predecessors in constructing a rational arrangement of English Law. This was one of the very few areas of legal letters in which Blackstone chose to present himself as the author of 'a Method in many respects totally new'.²⁷

For many of his contemporaries, moreover, the *Commentaries's* presentation and conceptualization of the system of law in England proved a revelation, as Blackstone was found to have furnished reason and erudition where confusion and technicality hitherto obtained. A forbidding and arcane body of knowledge, previously the exclusive domain of a professional caste, had been reduced to first principles, elegantly presented, and rendered comprehensible for a polite audience. Lord Chief Justice Mansfield, when asked to recommend reading for a future lawyer, confidently cited 'Mr. Blackstone's *Commentaries*' — 'There [he] will find analytical reasoning diffused in a pleasing and perspicuous style. There he may imbibe imperceptibly the first principles on which our excellent laws are founded, and THERE he may become acquainted with an uncouth crabbed author, Coke upon Littleton, who has disappointed many a Tyro, but who cannot fail to please in modern dress.'²⁸ In similar spirit, Sir William Meredith extolled Blackstone's unprecedented achievement, 'Proud am I to repeat my Admiration of your *Commentaries* . . . which have introduced to our acquaintance a system that was most important for every man to know; yet, till you brought it from Darkness into Light, had been as carefully secreted from common understandings, as the Mysteries of Religion ever were'.²⁹

Blackstone, of course, did not attract only admirers. Within his lifetime in England, at least three distinct lines of criticism emerged against his work. First were the Dissenting ministers, Drs. Joseph Priestley and Philip Furneaux, who immediately following its publication attacked the *Commentaries's* apparent defence of the restraints against Dissenters sanctioned by the Toleration Act. Second were the Wilkites, who railed against the Commentator for his legal defence of the anti-Wilkite actions of the House of Commons in 1769. The third, and now best known, was Bentham, who began a lifelong pursuit of the *Commentaries* in 1776 with the anonymously presented *Fragment on Government*. Bentham never lacked for complaints against the *Commentaries*. Still, he was clear that the 'grand and fundamental' blemish of the work was its 'antipathy to reformation'.³⁰ The *Commentaries* all too often revealed the sentiments of a 'tranquil copyist and indiscriminate apologist' who laboured under a crippling 'hydrophobia of innovation'.³¹ For Blackstone, Bentham caustically charged, 'every thing' was 'as it should be'.³² Although Bentham was Blackstone's most severe critic on this score, he was by no means alone

in resisting the *Commentaries*' apparent readiness to defend the shortcomings of the English system. Edward Gibbon — whose 'first serious production' in English was a 'copious and critical abstract' of the *Commentaries* — perhaps put the point most gently in observing that Blackstone approached the defects of England's legal system 'with the becoming tenderness of a pious son who would wish to conceal the infirmities of his parent'.³³

* * *

Blackstone organized his prestigious 'map' of English law into four parts, each comprising one volume of the *Commentaries*. Book 1, 'Of the Rights of Persons', discussed civil rights and constitutional matters. Book 2, 'Of the Rights of Things', dealt with property law. Book 3, 'Of Private Wrongs', summarized the law of civil offences. Book 4, 'Of Public Wrongs', treated penal law. Although the substance of the *Commentaries* was devoted to the laws of England, Blackstone only embarked on this discussion after providing an account 'Of the Nature of Laws in general'. This section set out the formal legal theory on which the detailed treatment of English law was based.

Blackstone defined all law as a 'rule of action, which is prescribed by some superior, and which the inferior is bound to obey'.³⁴ The law of nature was identified with God's will: 'when He created man, and endued him with free will', God 'laid down certain immutable laws of human nature' that 'regulated and restrained' that free will and 'gave [man] also the faculty of reason to discover the purport of those laws'.³⁵ 'This law of nature, being coeval with mankind and dictated by God himself,' in turn provided the ethical foundation for all other law. 'It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.'³⁶ Blackstone then completed this presentation by formally defining 'municipal law' — the law established in a particular civil community — as 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong'.³⁷

Treating the law of nature as a source of English law was strictly conventional, and the discussion bespoke Blackstone's concern to furnish England's law with the appropriate philosophical apparatus, which in this setting demanded a discussion of 'what we call ethics or natural law'.³⁸ The account invoked standard eighteenth-century sources: Hugo Grotius, Samuel von Pufendorf, Jean Barbeyrac, and Locke; and its presence in the *Commentaries* again evinced the special requirements created by the audience Blackstone sought to secure for his work. As he explained at the outset of a chapter-length exploration of the natural rights to property, such 'enquiries, it must be owned, would be

useless and even troublesome in common life' and might be altogether omitted 'when law is to be considered' solely as 'a matter of practice'. However, when law was treated 'as a rational science,' then it was never 'improper or useless to examine more deeply the rudiments and grounds' of 'positive constitutions,' and this meant an investigation of how positive rules had 'foundation in nature or in natural law'.³⁹

A substantial amount of interpretative energy has been discharged to show that Blackstone's natural law doctrines occupied a relatively marginal position in his jurisprudence or were even inconsistent with his understanding of the nature of law specific to England.⁴⁰ The details of these arguments need not cause delay here, but it is worth noticing the importance of this ethical discussion for an essential and pervasive political theme of the *Commentaries*. 'The idea and practice of this political or civil liberty,' Blackstone claimed, 'flourish in their highest vigour in these kingdoms, where it falls little short of perfection'.⁴¹ Civil liberty was the single most important attribute that glorified and distinguished the system of law in England, and the manner in which 'this inestimable blessing' was secured and perfected formed a connective theme of the *Commentaries*, the repeated point of homage in Blackstone's treatment of customary law, constitutional arrangements, legal process, and English legal history.

There was, to be sure, no novelty in Blackstone's praise of English law for its protection of civil liberty, much less in his finding conditions 'very different' among 'the modern constitutions of other states'.⁴² What, though, needs emphasis is that the primacy of liberty as a political value was established for Blackstone by the divinely sanctioned laws and rights of nature. Civil liberty, such as that which England enjoyed in such magnificent solitude, was 'no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public'. The core of natural liberty was constituted by the 'absolute rights of man', which, like the law of nature itself, were 'one of the gifts of God to man at his creation, when he endued him with the faculty of free will'. When man entered into society, he gave up the 'power of acting as one thinks fit' subject solely to 'the law of nature' and obtained thereby civil security and the 'advantages of mutual commerce'. But whatever the diverse and manifest benefits of organized social life, the divinely ordained condition of natural liberty established that 'the principal aim of society' remained 'to protect individuals in the enjoyment of those absolute rights [of nature], which were vested in them by the immutable laws of nature'.⁴³ These ethical doctrines in turn indicated that, when Blackstone proudly invoked Montesquieu's conclusion 'that the English is the only nation in the world where political or civil liberty is the direct end of its constitution',

he celebrated the English system in a particularly ambitious and momentous fashion.⁴⁴ By the 'immutable laws of nature', the political peculiarity of the English system was elevated to nothing less than the realization of the 'principal aim' of all organized civil association.

Nonetheless, it was not on account of its natural jurisprudence that Blackstone secured the reputation of his heralded 'map' of law. Rather, it was the unmatched lucidity and clarity of his exposition of England's often arcane and highly technical legal inheritance. This inheritance was primarily constituted by the common law, and nowhere was Blackstone more eloquent than in his celebration of the kingdom's customary legal practices. According to the *Commentaries*, England's *lex non scripta* was principally composed of the ancient customs of the realm 'used time out of mind, or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary'.⁴⁵ Blackstone further equipped common law with a fairly precise historical identity, associating it with the Saxon laws collected by Alfred and later consolidated by Edgar and Edward the Confessor,⁴⁶ and, throughout the *Commentaries*, he carefully blended his presentation of the substance of his law with an account of its 'rise, progress, and gradual improvements'.⁴⁷

In presenting his legal history, Blackstone was prompt to exploit the advantages he enjoyed over his predecessors. In the seventeenth century, the actual historical identity of English law remained in fierce dispute.⁴⁸ Blackstone, however, blithely invoked the legacy of 1688 to avoid such difficulties. When treating, for example, the historical character of England's first contract between king and subject, he pragmatically observed that 'whatever doubts' were hitherto brought to the subject 'by weak and scrupulous minds', these 'must now entirely cease, especially with regard to every prince who hath reigned since the year 1688'.⁴⁹ In addition to the valuable security found in the Glorious Revolution, Blackstone drew further advantage and stimulus from the increasingly sophisticated models of legal history produced by his contemporaries and exemplified in the works of Montesquieu, Daines Barrington, and Lord Kames. As Kames in particular instructed, all legal systems demanded historical examination, for law only became 'a rational study' when it was 'traced historically'.⁵⁰ Kames's methodological declaration clearly obtained for the study of English law. 'The obsolete doctrines of our laws', explained the *Commentaries*, 'are frequently the foundation upon which what remains is erected', so that it was altogether 'impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, without having recourse to the ancient'.⁵¹

The heroic theme of Blackstone's legal history was that of the perfection of civil liberty, the long trajectory of development through which the kingdom made stable its delicate constitutional balance, entrenched the subjects' political

securities, liberated itself from the oppressive features of the Norman feudal system, and successfully adapted its historic legal remedies to serve the purposes of commerce and property exchange.⁵² For Blackstone, as for his acknowledged teachers in legal history, Matthew Hale and John Selden, the common law's historical character accordingly centred less on its ancient identity than on its unbroken line of development.⁵³ 'Nothing', Blackstone warned, was 'more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom', and nothing more easy than to 'mistake for nature what we find established by long and inveterate custom'.⁵⁴ Many parts of the common law were recognizably modern, and the law had undergone a process of continual change and amendment.⁵⁵ 'Traditional laws in general', like England's *lex non scripta*, 'suffer by degrees insensible variations in practice', and, although it was 'impossible to define the precise period in which that alteration accrued', nevertheless 'we plainly discern the alteration of the law from what it was five hundred years ago'.⁵⁶ And precisely because common law had been changed and altered through time by various hands, it was 'now fraught with the accumulated wisdom of ages'⁵⁷ and thereby attained a level of excellence unavailable in less historically informed systems of lawmaking.

Although the law's history and development so ensured the singular merits and appropriateness of common law for the English polity, this alone did not exhaust or settle its grounds of legitimacy. England's *leges non scriptae* comprised those customs that received 'the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom'.⁵⁸ This formula in part indicated that the issue of whether a particular practice was an authentic custom could be stated as a question of whether it had been 'used time out of mind'. But not every customary practice was by reason of its historical status a part of the common law, and the issue of which customs enjoyed 'the force of law' also turned on the question of legal legitimacy in general. This was made clearest when Blackstone turned to the process by which it became known which customs had in fact been received as common law in England. This occurred through the practice of the courts, where the common law judges served as the 'living oracles of the law' and where their decisions furnished 'the principal and most authoritative evidence' of which customs formed 'a part of the common law'. The '*opinion of the judge*', however, was not 'the same thing' as '*the law*' itself, and history was not the sole criterion by which judges ruled on the composition of common law. Thus, when the judges discovered a previous judicial opinion of the law to be 'contrary to reason, much more if it be contrary to the divine law', they declared 'not that such a sentence was *bad law*, but that it was *not law*, that is, that it is not the

established custom of the realm'. And since a determination 'contrary to reason' was 'not law', 'our lawyers are with justice so copious in their encomiums on the reason of the common law that they tell us that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law'.⁵⁹

All these doctrines reassuringly confirmed the ethical integrity of a customary system of law whose 'fundamental maxims and rules', Blackstone concluded, 'have been and every day are improving'.⁶⁰ In England, however, improvement had been purchased at a notorious price in the form of the multitude of legal fictions and technicalities developed by the courts in the process of adapting the historic rules of common law to altered social circumstances. As Blackstone appreciated, fictions rendered the law burdensomely complex, left the mechanics of litigation incomprehensible to the laymen, and were a frequent object of common ridicule. To take the most infamous arena of common law technicality, 'the necessary shifts and contrivances used in conveyancing', observed one of Blackstone's first successors at Oxford, were 'frequent and popular matters of complaint'.⁶¹ Daines Barrington, a distinguished legal antiquarian of Blackstone's era, even questioned whether most professional conveyancers or attorneys fully understood the relevant common law rules in this area and concluded from the frequency of frustration within the mechanics of real property law that the Hanoverian 'testator might as well have continued to have had no such power' as was first granted him under the Henrician statute of wills.⁶² Certainly the early-nineteenth-century critic of English legal forms found no difficulty in making purposeful nonsense of the standard common law conveyance:

If a man would, according to law, give to another an orange, instead of saying, I give you that orange, the phrase would run thus, 'I give you all and singular my estate and interest, right, title, claim, demand of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectively, as I . . . am now entitled to bite, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp and pips, anything hereinbefore or hereinafter, or any other deed or deeds, instrument or instruments, of what nature or kind soever, to the contrary in any wise notwithstanding'.⁶³

Yet, notwithstanding acknowledged complaints and more caustic ridicule, Blackstone still defended legal fictions as an unavoidable feature of England's legal inheritance and insisted that they actually furthered the capacity of the courts to achieve justice.⁶⁴ These arguments figured in one of the most elegant passages of the *Commentaries*, where Blackstone concluded his presentation of the system of civil remedies, an extremely laboured area of law that demanded nearly three-hundred pages to expound. He directly conceded that this body of law was 'apt at our first acquaintance to breed a confusion of ideas'.⁶⁵ But

the 'intricacy of our legal process' that produced the appearance of confusion was 'one of those troublesome, but not dangerous evils, which have their root in the frame of our constitution'. When the 'influence of foreign trade and domestic tranquility' led to the decay of England's 'military tenures', the common law judges 'quickly perceived' that the 'old feudal actions' were 'ill suited' to the succeeding 'commercial mode of property' that required 'a more speedy decision of right, to facilitate exchange and alienation'. But instead of 'soliciting any great legislative revolution in the old established forms', they 'endeavoured by a series of minute contrivances' to adapt the existing legal actions 'to all the most useful purposes of remedial justice'. These contrivances became 'known and understood', and the 'only difficulty' remaining 'arises from their fictions and circuities'. But once the necessary historical exposition was supplied, 'that labyrinth is easily pervaded': 'Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The 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.'⁶⁶

There was, of course, one more principal source of law in England: the statute law, created by the sovereign will of the king-in-Parliament. In setting out the nature of its constitutional authority, Blackstone assembled a weighty statement of the Parliament's power to create law. 'It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is here entrusted by the constitution of these kingdoms.'⁶⁷ As Bentham observed, the 'vehemence . . . of this passage is remarkable. He ransacks the language: he piles up . . . the most tremendous epithets he can find.'⁶⁸ Blackstone's great 'piling up of epithets', it appears, followed directly from his understanding of the nature of sovereignty. All sovereign power was legislative ('sovereignty and legislature' indeed being 'convertible terms');⁶⁹ all governments had to contain a sovereign power, and such sovereign authority had to constitute 'that absolute despotic power which must in all Governments reside somewhere'. Given this conception, it was obvious that if sovereignty existed in England, as it had to, then it was held by the king-in-Parliament. Blackstone, moreover, believed this conception easily vindicated by the legislative record of the recent past. Parliament had demonstrated its supreme power by changing the succession to the throne, by altering the established religion of the realm, and by even changing the constitution itself,

'as was done by the Act of Union and the several statutes for triennial and septennial elections'. 'In short,' Parliament could 'do everything that is not naturally impossible, and, therefore, some have not scrupled to call its power . . . the omnipotence of parliament', though Blackstone himself confessed to finding the phrase 'rather too bold'.⁷⁰

Because of Blackstone's demonstrable concern throughout the *Commentaries* to resist any radical interpretations of the English constitutional experience, it has been natural for scholars to concentrate on those features of his treatment of parliamentary government designed to resist the doctrines of 'Mr. Locke and other theoretical writers . . . that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them"'.⁷¹ And because, in result, he supplied such an extensive formulation of parliament any legislative supremacy, the *Commentaries* have served English constitutional historians as an important authority for documenting the point at which parliamentary sovereignty came to be unambiguously identified with legislative omnipotence.⁷² Unfortunately, these features of the *Commentaries* have encouraged a tendency to restrict discussion of Blackstone's ideas on legislation to his much-cited pronouncements on Parliament's constitutional power. However, to explore Blackstone's theory of legislation, rather than his notion of legislative sovereignty, it is necessary to leave his formal constitutional doctrines and turn instead to his more detailed treatment of the contribution of parliamentary lawmaking to the system of law in England.

(To be continued)

References

1. Dugald Stewart, *Account of the Life and Writings of Adam Smith, LL.D.*, reprinted in Adam Smith, *Essays on Philosophical Subjects*, ed. W.P.D. Wightman and J.C. Bryce (Oxford, 1980), p.311.
2. On Adam Smith and Scotland, see esp. Knud Haakonssen, *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (Cambridge, 1981); Donald Winch, 'Science and the Legislator: Adam Smith and After', *Economic Journal* 113 (1983): 501-20; J.H. Burns, 'Scottish Philosophy and the Science of Legislation', *Royal Society of Edinburgh Occasional Papers*, 2-6 (1985): 11-19. Burns illuminates the wider intellectual stage in 'The Fabric of Felicity: The Legislator and the Human Condition'; reprinted in *The Study of Politics: A Collection of Inaugural Lectures*, ed. Peter King (London, 1977), pp.207-24.
3. J.G.A. Pocock, 'Virtues, Rights and Manners', in his *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge, 1985), p.49; and Burns, 'Scottish Philosophy and the Science of Legislation', p.12.

4. Jean-Jacques Rousseau, *The Social Contract*, trans. G.D.H. Cole (London, 1955), pp.32,3,31.
5. Cesare Beccaria, *An Essay of Crimes and Punishments* (London, 1770), pp.2-3.
6. Claude Adrien Helvétius, *De l'esprit: or Essay on the Mind and its several faculties* (London, 1759), p.81.
7. The context and implications of Stewart's limited endorsement of Bentham's legislative theory is valuably treated by Donald Winch, 'The Cause of Good Government: Philosophic Whigs versus Philosophic Radicals', in *That Noble Science of Politics: A Study of Nineteenth-Century Intellectual History*, by Stefan Collini, Donald Winch, and John Burrow (Cambridge, 1983), pp.94-95.
8. Henry Maine, *Popular Government* (1885), introduction by George W. Cary (Indianapolis, 1976), p.169.
9. F.W. Maitland, 'History of English Laws' (1902), *Selected Historical Essays*, ed. Helen M. Cam (Cambridge, 1957), p.113.
10. James Bryce, *Studies in History and Jurisprudence*, 2 vols. (Oxford, 1901), 2:615.
11. Henry Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861), reprint of the Beacon Paperback edition, introduction by Raymond Firth (Gloucester, Mass., 1970), p.244.
12. Henry Maine, *Lectures on the Early History of Institutions* (1875), 7th ed. (London, 1905), pp.400, 397.
13. William Blackstone, *Commentaries on the Laws of England*, ed. Joseph Chitty, 4 vols. (London, 1826), 1:9; hereafter cited as *Comm.* with volume and page number following.
14. *Comm.*, 4:11.
15. Jeremy Bentham, *A Comment on the Commentaries*, and *A Fragment on Government*, both ed. J.H. Burns and H.L.A. Hart (London, 1977), p.393.
16. *Comm.*, 1:26-27.
17. Both Blackstone and his contemporaries receive fuller examination in David Lieberman's monograph. *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge University Press, 1988), in press, from which much of the following discussion is drawn.
18. Lord Ellenborough, in Cobbett's *Parliamentary Debates* (London, 1812), 23:1083; cited in Gareth Jones, ed., *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England* (London, 1973), p.xxvii.
19. William Blackstone, *Commentaries on the Laws of England*, ed. Edward Christian, 4 vols. (London, 1803), 1:x (editorial advertisement).
20. For details on the first eight editions of the *Commentaries*, see William Hammond, ed., *Blackstone's Commentaries on the Laws of England*, 4 vols. (San Francisco, 1890); for the nineteenth-century editions, see A.V. Dicey, 'Blackstone's *Commentaries*', *Cambridge Law Journal* 4 (1932): 286-307.
21. *Comm.*, 1:vii (editorial preface).
22. S.F.C. Milsom 'The Nature of Blackstone's Achievement', *Oxford Journal of Legal Studies* 1 (1981): 3.
23. Dicey, p.294.
24. *Comm.* (n.13 above), 3:265-66; 4:443.
25. Bentham, *A Fragment on Government* (n.15 above), p.416. For more recent rehearsals of this theme, see Daniel J. Boorstin, *The Mysterious Science of Law (An Essay on Blackstone's 'Commentaries' . . .)* (Cambridge, Mass., 1941), p.189; and Duncan Kennedy, 'The Structure of Blackstone's *Commentaries*', *Buffalo Law Review* 5 (1979): 211.
26. *Comm.*, 3:196.
27. William Blackstone, *An Analysis of the Laws of England* (London, 1756), pp. v-viii. More generally on the problem of rational arrangement in English legal writing, see A.W.B. Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature', *University of Chicago Law Review* 48 (1981), esp.636-41, 655; also see Milsom. The seventeenth-century models are reviewed in Barbara J. Shapiro, 'Law and Science in Seventeenth-Century England', *Stanford Law Review* 21 (1969): 727-66; Wilfred Prest provides an exemplary discussion of one important effort in 'The Dialectical Origins of Finch's *Law*', *Cambridge Law Journal* 36 (1977): 326-52. Some of the most challenging of current treatments of Blackstone's methods have linked the

Commentaries to the tradition of civilian institutional treatises, see esp. John W. Cairns, 'Blackstone, an English Institutionist: Legal Literature and the Rise of the National State', *Oxford Journal of Legal Studies* 4 (1984): 318-60 (which details the differences between Hale and Blackstone at pp.347-50); Michael Lobban, 'Blackstone and the Science of Law', *Historical Journal* 30 (1987): 311-35.

28. Cited in John Holliday, *The Life of William, late Earl of Mansfield* (London, 1797), pp.89-90.

29. William Meredith, *Letter to Dr. Blackstone by the Author of the Question Stated, to which is prefixed Dr. Blackstone's Letter to Sir William Meredith* (London, 1770), p.2. For other, like-minded contemporary evaluations, see Thomas Bever, *A Discourse on the Study of Jurisprudence and the Civil Law; Being an Introduction to a Course of Lectures* (Oxford, 1766), pp.35-36; Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contracts*, trans. and introduction and notes by William David Evans, 2 vols. (London, 1806), editorial introduction, 1:75.

30. Bentham, *A Fragment on Government*, p.394.

31. Bentham, *A Comment on the Commentaries* (n.15 above), pp.180,202.

32. Bentham *A Fragment on Government*, p.400.

33. See Edward Gibbon's *Autobiography*, ed. M.M. Reese (London, 1971), p.94; William Holdsworth, *A History of English Law*, 16 vols. (London, 1922-66), 12:727.

34. *Comm.* (n.13 above), 1:38.

35. *Ibid.*, pp.39-40.

36. *Ibid.*, p.41.

37. *Ibid.*, p.44.

38. *Ibid.*, p.41.

39. *Ibid.*, 2:2.

40. For the argument that Blackstone's natural law doctrines are contradicted by his account of parliamentary sovereignty, see Frederick Pollock, 'A Plea for Historical Interpretation', *Law Quarterly Review* 39 (1923): 165; C.K. Allen, *Law in the Making*, 5th ed. (London, 1951), pp.427-28; Earnest Baker, *Essays on Government*, 2nd ed. (Oxford, 1951), p.129; A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed. (London, 1939), pp.41-42, 64. For the general claim that natural law theory was relatively unimportant to the *Commentaries*, see Earnest Baker, *Traditions of Civility* (Cambridge, 1948), pp.308-12. These issues receive more sympathetic treatment in John N. Finnis, 'Blackstone's Theoretical Intentions,' *Natural Law Forum* 12 (1967): 163-83, Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (Stanford, Calif., 1970), pp.9-22, and Lobban (n.27 above).

41. *Comm.*, 1:122-23.

42. *Ibid.*, p.123.

43. *Ibid.*, pp.119-22.

44. *Ibid.*, p.145.

45. *Ibid.*, p.67.

46. *Ibid.*, pp.64-67, and see 4:408-14.

47. See *Comm.* (n. 13 above), vol.4, chap.33, where Blackstone offered a summary of English legal history. The novelty and sophistication of Blackstone's legal history has been recently canvassed in an important study by Robert Willman, 'Blackstone and the "Theoretical Perfection" of English Law in the Reign of Charles II', *Historical Journal* 26 (1983): 39-70, though since challenged in parts by John W. Cairns, 'Blackstone, the Ancient Constitution and the Feudal Law', *Historical Journal* 28 (1985): 711-17.

48. See J.G.A. Pocock's classic examination of this theme in *The Ancient Constitution and the Feudal Law* (Cambridge, 1957).

49. *Comm.*, 1:233.

50. Henry Home, Lord Kames, *Historical Law Tracts*, 2 vol. (Edinburgh, 1758), 1:v.

51. *Comm.*, 2:44.

52. See esp. *ibid.*, 4:415-40.

53. On the contributions of Hale and Selden to this historical understanding of common law, see Pocock, *The Ancient Constitution and the Feudal Law*, chap. 7; Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979), pp.83-84, 133-39. Blackstone cited Hale's *History of the Common Law of England* (London, 1713 [posthumous]), ed. Charles M. Gray (Chicago, 1971), throughout his chapter-length summary of English legal development, *Comm.*, 4:407-43, and acknowledged Selden at *Comm.*, 1:64.

- 54. *Comm.*, 1:67, 2:11.
- 55. See, e.g., his discussion of copyholds, *ibid.*, 2:147-50.
- 56. *Ibid.*, 4:409.
- 57. *Ibid.*, p.442.
- 58. *Ibid.*, 1:64.
- 59. *Ibid.*, 1:69-71. The structure of this conception of common law as received customary practice is explored by A.W.B. Simpson in 'The Common Law and Legal Theory', in *Oxford Essays in Jurisprudence*, ed. Simpson, 2d ser. (Oxford, 1973), and by Gerald J. Postema in *Bentham and the Common Law Tradition* (Oxford, 1986), pp.3-38. I am much indebted to these two important discussions.
- 60. *Comm.* (n. 13 above), 4:442.
- 61. Richard Wooddeson, *Elements of Jurisprudence* (London, 1783), p.106.
- 62. Daines Barrington, *Observations on the More Ancient Statutes . . . with an Appendix Being a Proposal for New Modelling the Statutes* (1766; 3d ed., London, 1769), pp.446-47.
- 63. Arthur Symonds, *The Mechanics of Law Making* (London, 1835), pp.74-75.
- 64. See, e.g., his discussion of ejectments at *Comm.*, 3:205-6.
- 65. *Ibid.*, p.265.
- 66. *Ibid.*, pp.267-68. See also 2:288-89 and 3:329, where Blackstone again emphasized the need for law to accommodate swift property exchange in a commercial society.
- 67. *Ibid.*, 1:160.
- 68. Bentham, *A Fragment on Government* (n.15 above), p.480. Bentham was not alone among contemporary readers in thinking that Blackstone formulated a misleadingly broad statement of parliament's legislative powers: see, e.g., James Sedgwick, *Remarks Critical and Miscellaneous on the Commentaries of Sir William Blackstone* (London, 1800), p.126.
- 69. *Comm.*, 1:46.
- 70. *Ibid.*, p.161. Blackstone further explained that this conception of sovereign legislative authority entailed a restrictive reading of the controversial common law doctrine associated with Coke that 'acts of parliament contrary to reason are void.' See his discussion of the common law rules for the construction of statutes at p.91.