



---

January 1959

## Blackstone, Quasi-Jurisprudent

Joseph W. McKnight

---

### Recommended Citation

Joseph W. McKnight, *Blackstone, Quasi-Jurisprudent*, 13 Sw L.J. 399 (1959)  
<https://scholar.smu.edu/smulr/vol13/iss4/1>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## BLACKSTONE, QUASI-JURISPRUDENT

by

*Joseph W. McKnight\**

## I. INTRODUCTION

BLACKSTONE was a scholarly politician with a marked literary bent. In a way he was rather like Cicero. Both wrote extensively but, at least in the area of philosophy, the ideas of neither were particularly marked with invention.<sup>1</sup> But otherwise Blackstone did not in the slightest resemble Cicero, the McCarthyesque politician, of whom Blackstone apparently disapproved.<sup>2</sup> As a Revolutionary Whig (1688 brand) Blackstone was a man of moderate political views; he might be described as a conservative progressive, even possibly, when Dissenters and Roman Catholics were concerned.<sup>3</sup> As a politician he seems to rationalize that English institutions of the day existed for the public good,<sup>4</sup> and he is a master at systematizing inconsistencies.<sup>5</sup> While his learning has been much exaggerated by some of his admirers, it was certainly extensive,<sup>6</sup> and though it may be very much doubted

\* B.A., University of Texas; B.A., B.C.L., M.A., Oxford University; LL.M., Columbia University; Associate Professor of Law, Southern Methodist University.

The author expresses his appreciation to Professor Harry W. Jones of Columbia University School of Law for his helpful advice and criticism.

<sup>1</sup> See pp. 406-07 *infra*. But, as Dicey remarks, the Commentaries as a whole was a work of tremendous originality and it was recognized as such by its earliest readers. Dicey, Blackstone's Commentaries, 44 *The National Review* 653 (1909), reprinted in 4 *Camb. L.J.* 286 (1932). It is this reprint that is elsewhere referred to in this Article.

<sup>2</sup> See 1 Blackstone, Commentaries 61 (9th ed. 1783); Douglas (Glenbervie), *The Biographical History of Sir William Blackstone*, 75-77 (1782). The edition of the Commentaries here cited is the one on which Blackstone was working at the time of his death. The author is indebted to C. E. Stevens, Esq., Fellow, Lecturer in Classics and sometime Vice-President of Magdalen College, Oxford, for the apt description of the similarity of techniques of Senators Cicero and McCarthy.

<sup>3</sup> For a rebuttal of Bentham's charges of utter standpatness, see 12 Holdsworth, *A History of English Law*, 728-29 (1938). But as Dicey points out, his apologetics for the established regime of things could sometimes verge on absurdity—at times, on whimsicality. Dicey, *supra* note 1, at 292.

<sup>4</sup> 1 Blackstone, Commentaries 50-51. Of public institutions of the time, they probably were the best.

<sup>5</sup> In speaking of natural liberty Blackstone commends the Act for Buying in Woollen, 30 Car. 2 c. 3 (1678), "which prescribes a thing seemingly as indifferent [as] . . . a dress for the dead, who are all ordered to be buried in woollen . . . [as] a law consistent with public liberty; for it encourages the staple [i.e., wool] trade, on which in great measure depends the universal good of the nation." 1 Blackstone, Commentaries 126. See also p. 402 *infra*.

<sup>6</sup> See Holdsworth, *op. cit. supra* note 3, at 718.

that he ever deliberately misstated facts,<sup>7</sup> his logic can often be questioned.<sup>8</sup>

Blackstone's advocacy was said to have been something less than sparkling in the way of eloquence,<sup>9</sup> but this failing could not be guessed from a reading of the *Commentaries* where "the purity and elegance of his style," as Kent described it, is most marked. Even his severest contemporary detractors—Bentham, Gibbon, and Priestly among them—have remarked on the beauty of his prose. The source of the *Commentaries* was a series of lectures Blackstone delivered to students—at six guineas a head—between 1753 and 1766.<sup>10</sup> The purpose of these lectures and the published counterpart<sup>11</sup> was "to teach English law to laymen. He did not pretend, otherwise than incidentally, to teach jurisprudence . . . [and] he would have been surprised indeed had he been called a philosopher."<sup>12</sup> He sought to give college boys some knowledge of the law under which they lived;<sup>13</sup> these boys were between fifteen and eighteen years of age.<sup>14</sup> To us his Latin quotations may sometimes seem pedantic, and his examples relating to the doings of Titius and Caius seem stilted. His case for the perfection of the common law is often too strongly stated<sup>15</sup> and his logic

<sup>7</sup> For example, Blackstone says that the Saxons used the writs of entry to recover land. 3 Blackstone, *Commentaries* 184. While this is palpable nonsense, Blackstone cited authority for the statement, thus indicating his belief in its correctness.

<sup>8</sup> See, e.g., Maine, *Ancient Law* 152 (8th ed. 1880), with respect to the inability of the half-blood to inherit and Blackstone's explanation of this state of the law. See also Boorstin, *The Mysterious Science of the Law* 123-24 (2d ed. 1958).

<sup>9</sup> Douglas, *op. cit.* supra note 2, at 72.

<sup>10</sup> See Holdsworth, *op. cit.* supra note 3, at 720. Blackstone was appointed the first Vinerian Professor of English Law at Oxford University in 1758. His first Vinerian lecture, a discourse on the study of law, was delivered on October 25, 1758. Fifoot notes that the manuscript of Blackstone's lectures in All Soul's College, Oxford, indicates that Blackstone departed from them considerably in writing the *Commentaries*, which unlike the lectures were much influenced by Lord Mansfield's early judgments. Fifoot, *History and Sources of the Common Law* 367 note, 407 note (1949); Fifoot, *Lord Mansfield* 26, 84, 127-28, 141 (1936).

<sup>11</sup> The first volume appeared in 1765.

<sup>12</sup> Hanbury, *Blackstone in Retrospect*, 66 *Law Q. Rev.* 318, 321 (1950).

<sup>13</sup> The advertisement for his first series of lectures, reprinted in Dicey, supra note 1, at 298-99, reads in part as follows: "This course is calculated not only for the Use of such Gentlemen of the University, as are more immediately designed for the Profession of the Common Law, but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Polity of their own Country." For an account of the continuing debate on teaching law to undergraduates, see Freund, *Law and the Universities*, 1953 *Wash. U.L.Q.* 367; Berman, *On the Teaching of Law in the Liberal Arts Curriculum* (1956).

<sup>14</sup> Bentham was subjected to Blackstone's lectures in 1763, presumably in Michaelmas term. At that time he was fifteen years old.

<sup>15</sup> For example, Blackstone defended the curious laws relating to the theft of domesticated wild animals by stating: "It is also as much felony by common law to steal such of them [i.e., domesticated wild animals] as are fit for food, as it is to steal tame animals: but not so if they are only kept for the pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds; because their value is not intrinsic, but depending only on the caprice of the owner." 2 Blackstone, *Commentaries* 393.

is sometimes at cross purposes.<sup>16</sup> His compulsion to classify and order is often too pronounced and his notions of jurisprudence<sup>17</sup> and civil government<sup>18</sup> are oversimplified, garbled, and overly pious. But it must be borne in mind that he was addressing classically-trained schoolboys, and in his own time it was said that he made legal study so pleasant and agreeable that students constantly turned from theology to study law.<sup>19</sup>

The *Commentaries*, which ran through eight English editions and several more American ones in his lifetime, probably sold far better than Blackstone could have expected. Before the Revolution one thousand English sets at ten pounds a set were sold in America and many more American editions sold at the bargain price of three pounds a set.<sup>20</sup> In fact, before the war broke out almost as many sets were sold in the American colonies as in England. The work had an enormous effect in America not because of the "social consistency" of Blackstone's thinking,<sup>21</sup> but because it was the only general treatise available in a land where well-trained lawyers were almost non-existent. It is fair to add that in both England and America the work revolutionized legal education.<sup>22</sup>

The work was cited in court in Blackstone's lifetime,<sup>23</sup> though never by Blackstone himself, either as an advocate or a judge. The simplicity and breadth of Blackstone's exposition perhaps influenced the practice in early American courts to argue from general principles rather than narrow precedents,<sup>24</sup> and it is said that during the period from 1789 to 1915, the authority of the *Commentaries* was cited ten thousand times in reported American cases.<sup>25</sup>

As a person, Blackstone was stiff, stuffy, and pompous from child-

---

<sup>16</sup> See Blackstone's remarks about the "absolute right" of property and the exercise of the right of eminent domain. 1 Blackstone, *Commentaries* 138-39.

<sup>17</sup> See pp. 402-06 *infra*.

<sup>18</sup> See 1 Blackstone, *Commentaries* 50-51, and text accompanying note 4 *supra*.

<sup>19</sup> Lockmiller, *Sir William Blackstone 168 (1938)*. This contemporary reaction is interesting in the light of Bentham's furious response to Blackstone's lectures.

<sup>20</sup> *Id.* at 170. The first edition had sold in England for four guineas. Later editions sold there for as little as thirty shillings. *Id.* at 156.

<sup>21</sup> See Boorstin, *op. cit. supra* note 8, at 190, where this aspect of Blackstone's approach is analyzed. In the preface to the new edition which is merely a reprint of the earlier one, the author says that he would modify his Conclusion, from which the quotation in the text is taken, were he to rewrite the book.

<sup>22</sup> In England, the revolution was the introduction of English law as a subject for undergraduate university study. In America Blackstone furnished a comprehensive treatise with which the whole of English law could be studied, whereas the American lawyer had previously learned his profession chiefly by apprenticeship. The existence of the *Commentaries* may have prompted the teaching of law in American universities as well.

<sup>23</sup> For points of law, not jurisprudence. Douglas, *op. cit. supra* note 2, at 109-10.

<sup>24</sup> Goebel, *The Common Law and the Constitution*, in Chief Justice John Marshall, a reappraisal 101, 108 (Jones ed. 1956).

<sup>25</sup> Lockmiller, *op. cit. supra* note 19, at 181.

hood and as a professor and judge he felt it his duty to become more so.<sup>26</sup> His manner—as much as what he had to say—may have been responsible for driving Bentham at fifteen to his initial reaction of *repulsion* which led to his founding the later English school of jurisprudence.<sup>27</sup>

## II. BLACKSTONE'S THEORY OF LAW

As tradition demanded that a writer of a students' general treatise should define his subject and give it an ethical basis, Blackstone commenced his treatise with a definition of "the nature of laws in general" and an explanation of the source of law and its moral functions. But whereas most philosophers commence their philosophical works with a discourse on their theory of knowledge, Blackstone did not do so. Indeed, he seems to have been unequipped with any general theory of knowledge, except that he seems to presuppose that man possesses God-given reason.<sup>28</sup>

It is difficult to describe Blackstone's jurisprudential writing because it is so contradictory, muddled, and disorderly.<sup>29</sup> Blackstone seems to have taken for granted that the natural law definition of law was *the* definition, though he embellished and distorted that definition to a point that his views are at times heretical. In fact his hybrid definition of law was self-contradictory. Law, he said, "is a rule of civil conduct, prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong."<sup>30</sup> This is a masterpiece of fence-straddling. Blackstone made seeming sense of two basically incompatible ideas: the Hobbesian idea of law based on power and the conventional natural law doctrine of law as reason with a moral content.<sup>31</sup> The disparity of Blackstone's definition with

<sup>26</sup> Douglas, *op. cit.* supra note 2, at 86.

<sup>27</sup> Sir Henry Maine is quoted by Blackstone's biographer in the Dictionary of National Biography as saying that Blackstone's discussion of the nature of laws in general "may all be said to have made Bentham and Austin into jurists by virtue of sheer repulsion."

<sup>28</sup> 1 Blackstone, Commentaries 39-42.

<sup>29</sup> Gibbon's first serious writing in English was a critical abstract of the Commentaries. He did not abstract the chapter "On the Nature of Laws in General," however. "I have entirely omitted a metaphysical enquiry upon the nature of Laws in General, eternal and positive laws, and a number of sublime terms, which I admire as much as I can without understanding them." Holdsworth, *op. cit.* supra note 3, at 751-53. For another near-contemporary adverse comment, see Sedgwick, Remarks, Critical and Miscellaneous, on The Commentaries of Sir William Blackstone 1-11 (2d ed. 1807).

<sup>30</sup> 1 Blackstone, Commentaries 44.

<sup>31</sup> In English jurisprudence the latter view had been principally associated with Coke. A nice analysis of Blackstone's hybrid definition is found in Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 836-38 (1935). At page 838 Cohen makes this critical observation: "Perhaps the chief usefulness of the Blackstonian theory is the gag it places upon legal criticism. Obviously, if the law is something that commands what is right and prohibits what is wrong, it is impossible to argue about the goodness or

that of pure natural law can be best demonstrated by putting Blackstone's definition in juxtaposition to that of Thomas Aquinas, *viz.*, that law is "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."<sup>32</sup>

Blackstone expressed the traditional view that natural law was universal, God-given, and perfect,<sup>33</sup> and though he asserted that human law might be contrary to it, that situation never seems to have cropped up in English law, with the possible exception of the late survival of the principle of slavery which he glosses over very neatly.<sup>34</sup> By definition law was essentially natural reason, a timeless web merging the ideal and the actual—a combination of reason and nature, of enlightenment and Natural Providence. But here one encounters another contradiction in Blackstone's thinking. English law was the *perfection* of ideas conceived by the ancient Saxons in primitive conditions and capable of automatic and inevitable *perfectability* by natural processes.<sup>35</sup> (Legislative improvement was occasionally admitted but not advised.)

Law was a *rule*—or set of rules—*of action*<sup>36</sup> devised by God and man for the protection of society. The perpetual law—the law of

---

badness of any law, and any definition that deters people from criticism of the law is very useful to legal apologists for the existing order of society."

<sup>32</sup> Summa Theologica, I-II, Question 90, Art. 4, in Bigoniari, ed., *The Political Ideas of St. Thomas Aquinas* 9 (1957).

<sup>33</sup> 1 Blackstone, Commentaries 38-42. Boorstin, *op. cit. supra* note 8, at 60, makes this observation of Blackstone's natural law heresy: "As one could discover what the laws of England were by examining the laws of nature, so one could discover the laws of nature from looking at the laws of England." I have been unable to find any clear statements in the Commentaries to this effect.

<sup>34</sup> 1 Blackstone, Commentaries 423-25. See also 1 Blackstone, Commentaries 127 and 2 Blackstone, Commentaries 402. Blackstone is somewhat equivocal as to slavery. Though the Commentaries speak out loudly against slavery (1 Blackstone, Commentaries 423), Blackstone finally says that a slave entering England became a free man, although he is still bound to perform "perpetual service" for his master—as a sort of apprentice for life. 1 Blackstone, Commentaries 424-25. In 1 Blackstone, Commentaries 127, Blackstone says that "the master's right to his [the slave's] service may *possibly* still continue." Blackstone protested to Granville Sharp for quoting from Book 1, Chapter 1, to show that Blackstone stood decisively behind Sharp's position. Letter, William Blackstone to Granville Sharp, February 20, 1769, MS copy on file in the New York Historical Society Library. Sharp had sent Blackstone the manuscript of his forthcoming book against slavery for criticism. There Blackstone also points out that since the status of a slave in England was then *sub judice*, he could not make a positive statement on the point. But it is a little curious that once the matter was finally settled by Lord Mansfield in *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), Blackstone made no reference to this case in the later editions of his work. For Lord Mansfield's own ambivalence on the issue of slavery see Fifoot, *Lord Mansfield* 41-42 (1936).

In the light of what he says in the Commentaries, it is rather surprising to read what Blackstone went on to say in the letter above referred to. Though he states that the matter of villenage was "totally distinct from that of Negro Slaving," he proceeds to say that "as villenage was allowed by the common law, it cannot be argued that a state of Servitude is absolutely unknown to and inconsistent therewith."

<sup>35</sup> Some similar notions concerning the ancient tribal law and its significance are encountered in Savigny.

<sup>36</sup> 1 Blackstone, Commentaries 38.

Nature—was devised by God,<sup>37</sup> but according to God's *will*, rather than His *reason*,<sup>38</sup> Blackstone says heretically.<sup>39</sup> It is known in part by reason and in part by revelation and is binding on all mankind. Its three basic (and, in Bentham's view, meaningless<sup>40</sup>) principles<sup>41</sup> were (1) to live uprightly, (2) to harm no one, and (3) to give everyone his due. Man's reason supplied the embellishments for these principles. Human law that transgressed natural law, however, was not law and must be disobeyed.<sup>42</sup> But on the following page Blackstone lays down his hybrid definition of law which, with the Hobbesian element he introduces, could scarcely be disobeyed.<sup>43</sup> This definition, then, cannot pass as natural law doctrine unless intended as a definition of human law and then it is inaccurate, except as an ideal, in the light of what Blackstone says elsewhere. Finally, he finds that law favors the pursuit of happiness by man,<sup>44</sup> but (and this seems pure heresy) the basis for obligation is penalty.<sup>45</sup>

Blackstone often fails to picture English law in the traditional terms of natural law, but rather he describes two sorts of human law in conflict—the ancient, simple (and imaginary<sup>46</sup>) Anglo-Saxon system, which he somehow equated to natural law in a rough sense,<sup>47</sup> and the later glosses of the Normans and their successors.<sup>48</sup> The aim of English law, then, as Blackstone saw it, was to *return* the Englishman to the ideal primitive state<sup>49</sup> long since departed from, at least in part.<sup>50</sup>

In the laws of other nations Blackstone found analogies to show the universality of certain principles of English law, but he rarely used the positive provisions of the law of Nature to defend English legal institutions. He does assert that "the legislation and course of

<sup>37</sup> Id. at 39-40.

<sup>38</sup> Ibid.

<sup>39</sup> See the note on page 40 of Sharswood's edition of the Commentaries (1900). Compare Blackstone's statement with the orthodox definition of natural law of Thomas Aquinas at pp. 402-03 *supra*. For a brief study of Aquinas's definition see Davitt, *St. Thomas Aquinas and the Natural Law*, in *Origins of the Natural Law Tradition* 26 (Harding ed. 1954).

<sup>40</sup> Bentham, *a Comment on the Commentaries* 39-40 (1928).

<sup>41</sup> Derived from Justinian's *Inst.* 1.1.3.

<sup>42</sup> 1 Blackstone, *Commentaries* 43.

<sup>43</sup> Id. at 44.

<sup>44</sup> Id. at 40.

<sup>45</sup> Id. at 56-57.

<sup>46</sup> But not to Blackstone. Temperamentally the antiquarian, Blackstone frequently overstressed the lore of the past and sometimes manufactured it. But to him it was very real.

<sup>47</sup> 1 Blackstone, *Commentaries* 66-67.

<sup>48</sup> Bentham's criticism of Blackstone's standpatness with respect to procedure is unfair. Blackstone thought that it often consisted of excrescences of later—i.e., post-Saxon—times. See, e.g., 3 Blackstone, *Commentaries* 305-306.

<sup>49</sup> As described in 1 Blackstone, *Commentaries* 39-40, 43.

<sup>50</sup> A trace of the ancient myth of the laws of Edward the Confessor, allegedly set aside by the Conqueror, can be seen here.

laws in England<sup>51</sup> were peculiarly adapted for the protection of individuals in the enjoyment 'of those absolute rights which were invested in them by the immutable laws of nature'<sup>52</sup> and which might 'be summed up in one general appellation and denominated the natural liberty of mankind'.<sup>53</sup> Some have argued that this is the only respect in which Blackstone *really* equated English law with the law of Nature.<sup>54</sup> But he does purport to test English law by a pseudo-natural law device of his own design. It is this device, as Professor Hart thinks, that aroused Bentham's "remarkable tirade of invective against Blackstone's references . . . to the law of nature."<sup>55</sup>

Blackstone's testing device rests on the principle of natural law that is his own distinctive contribution. Following the traditional pattern, Blackstone asserts that there are areas not governed by natural law (breaches of which would be *malum in se* if it existed), and these areas are governed only by human law, whose breach is merely *malum prohibitum*.<sup>56</sup> At first glance this looks guileless and catholic enough, but it seems that in Blackstone's view all the rules of English law, at least all those he chooses to test, fall into the latter category. Then, in fact, in Blackstone's view (as formulated by Professor Hart) "the law of nature consists almost wholly of gaps: . . . a net through which virtually everything must fall."<sup>57</sup> Then Blackstone formulates his test for any rule of English law: Is it in the area of natural or human law? Human. Then it is in accordance with natural law, since not "contradicted" by it. *Q.E.D.*<sup>58</sup> An essential part of this area of Blackstone's "ramshackle"<sup>59</sup> thought is his insistence on the distinction between acts that are *malum in se* and those that are simply *malum prohibitum*, against which conscience did not operate. This view toward the purely penal law and the legal consequences with respect to its breach had considerable currency in the eighteenth cen-

<sup>51</sup> 1 Blackstone, Commentaries 127.

<sup>52</sup> *Id.* at 124.

<sup>53</sup> *Id.* at 125. This and the analysis of the "gap" theory of natural law are derived from Hart, Blackstone's Use of the Law of Nature, *Butterworth's So. African L. Rev.* 169 (1956).

<sup>54</sup> *Ibid.*; Jones, Historical Introduction to the Theory of Law 90 (1940); Graveson, The Restless Spirit of English Law, in *Jeremy Bentham and the Law* 101, 104 (1948). Blackstone does say, however, that actions for money had and received "do not arise from the determination of any court, or the positive direction of any statute, but from natural reason, and the just construction of law." 3 Blackstone, Commentaries 162. His text, at 163, incorporates a quotation of Lord Mansfield's judgment in *Moses v. Macferlan*, 2 *Burr.* 1005, 1012, 97 *Eng. Rep.* 676, 680 (1760).

<sup>55</sup> Hart, *supra* note 53, at 169-70.

<sup>56</sup> 1 Blackstone, Commentaries 57-58. Cf. Dabin on the "morally indifferent act." Dabin, General Theory of Law in *The Legal Philosophies of Lask, Radbruch & Dabin* 456-59 (Wilk trans. 1950).

<sup>57</sup> Hart, *supra* note 53, at 174.

<sup>58</sup> *Id.* at 171-72.

<sup>59</sup> Dunning, *A History of Political Theories from Rousseau to Spencer* 75 (1926).



ture but would probably be condemned by many natural lawyers today.<sup>60</sup>

### III. THE SOURCES OF BLACKSTONE'S JURISPRUDENTIAL IDEAS

If there is conflict and muddle in Blackstone's jurisprudential ideas, it is of some interest to determine from whence he extracted them. For what he says of the substantive law of England he must have relied heavily on his professional experience and his antiquarian researches; but his theories of jurisprudence are fairly clearly drawn in large measure at first and second hand from continental writers. His political science theories are derived, apart from classical sources, from Montesquieu and Locke.<sup>61</sup> As Bentham so cogently points out<sup>62</sup> he both rejects and accepts the social compact theory, rejecting it in fact but, with the reality of the Glorious Revolution so near at hand, accepting it in theory. Thus, as is the case in his jurisprudential writing, Blackstone is an on-the-one-hand-*this-on-the-other-hand-that* commentator on political science. In the area of the law of nations his ideas greatly reflect those of Puffendorf and Grotius.<sup>63</sup>

As for the source of his jurisprudential ideas, opinions vary. Of the second section of his introduction to the *Commentaries* entitled "Of the Nature of Laws in General" Bentham says that it is "the characteristic part of our Author's work, and that which was most his own. The rest was little more than compilation."<sup>64</sup> However, Sir Henry Maine asserts that this section is lifted ("transcribed . . . textually") from Burlamaqui<sup>65</sup> and one of Blackstone's biographers<sup>66</sup> reasserts this notion of direct copying ("the very words being sometimes reproduced") and identifies the source as Part 1, Chapter 8 of Burlamaqui's *Principles of the Law of Nature*, 1748 edition, translated by Nugent. He twits Blackstone for not admitting his source and Bentham, in turn, for having failed to detect it.<sup>67</sup> Bentham did, in

<sup>60</sup> See Davitt, *The Nature of Law* 226-27 (1951).

<sup>61</sup> See Heatly, Fox, Montesquieu and Blackstone, 35 *Law Q. Rev.* 339 (1919). See 3 Blackstone, *Commentaries* 160 for a reference to the social compact with regard to implied contracts.

<sup>62</sup> Bentham, *A Fragment on Government* 135-36 (Montague ed. 1891).

<sup>63</sup> See, e.g., 1 Blackstone, *Commentaries* 43 where Blackstone cites Puffendorf.

<sup>64</sup> Bentham, *op. cit. supra* note 62, at 96.

<sup>65</sup> Maine, *Ancient Law* 114 (8th ed. 1880).

<sup>66</sup> Gerald P. Moriarty in the *Dictionary of National Biography*.

<sup>67</sup> This would have cut Bentham deeply, for Burlamaqui's biographer in the *Encyclopedia Britannica* (11th ed.) characterizes Burlamaqui as a "rational utilitarian." To this Hanbury's observations on Bentham may be added: "Much of his criticism of Blackstone recoils on the critic, for Bentham's idea of utility was essentially natural law under another name: Paton (*Textbook of Jurisprudence*, 93) put it well thus, 'For all Bentham's scorn of natural law, his standard of utility is typical of much natural law writing, and the actual term *utilitas* was used in the Middle Ages.' Again Maine is unanswerable when he calls the assumptions un-

fact, assert that Blackstone might have described his law of Nature as "these conciets of Grotius, Puffendorf, Woolaston, Burlamaqui and my own."<sup>68</sup> Holdsworth<sup>69</sup> asserts that Blackstone's ultimate source was Grotius whose ideas were transmitted to Blackstone by Burlamaqui. Nevertheless, the principle reason why Blackstone failed to admit his textual cribbing from Burlamaqui and Bentham failed to deduce it<sup>70</sup> is that the "word for word" attribution<sup>71</sup> is untrue. There are indeed some similarities: (1) Nugent's Burlamaqui's Chapter 8 is entitled "Of Law in General"; (2) like Blackstone,<sup>72</sup> Nugent's Burlamaqui identifies the attributes of the Creator as infinite power, wisdom, and goodness; and (3) there are a few other instances of close similarity.<sup>73</sup> But these similarities, however striking, can prove little more than that Blackstone had Nugent's Burlamaqui at his elbow along with the works of other writers mentioned, particularly Locke and Montesquieu.

Blackstone clearly did not transcribe Burlamaqui though he may have borrowed some of his ideas. Burlamaqui is much more the conventional natural law jurist than Blackstone, whose views may be said to be a *pastiche* of natural law and his own inventions, among others. Although it says something for the lucidity of Blackstone's prose that those passages on jurisprudence which are confused or even silly are so easily found and exposed. As a natural lawyer, then, Blackstone was clearly something of a maverick.

#### IV. NATURAL LAW IN BLACKSTONE'S ADVOCACY

Though Blackstone may not have been an eloquent advocate,<sup>74</sup> in the years in which he was most active in preparing, writing, and re-writing the *Commentaries*, he argued a number of cases of land-mark importance and sometimes had primary resort to arguments of reason, justice, and universal law.

In his own reports for the period before he became a judge (1746-1769) are twenty-eight cases in which he took a part. The most sig-

derlying the Roman idea of natural law 'the ancient counterpart of Benthamism.' (Ancient Law, Pollock's ed. 84). Cf. Essay by Friedmann and Ayer in *Jeremy Bentham and the Law*, 233 at 245." Hanbury, *supra* note 12, at 319.

<sup>68</sup> Bentham, *A Comment on the Commentaries* 44 (1928).

<sup>69</sup> Holdsworth, *op. cit. supra* note 3, at 733, citing Glasson, *J Histoire de Droit et des Institutions de L'Angleterre*, 398-99.

<sup>70</sup> At least in his writing published in the nineteenth century.

<sup>71</sup> See note 69, *supra*.

<sup>72</sup> 1 Blackstone, *Commentaries* 40.

<sup>73</sup> E.g., compare 1 Blackstone, *Commentaries* 44 (middle) with Nugent's Burlamaqui 78 (top); compare 1 Blackstone, *Commentaries* 44, 45 (bottom), 46 (bottom) with Nugent's Burlamaqui 78 (bottom); compare 1 Blackstone, *Commentaries* 49 with Nugent's Burlamaqui 80 (bottom).

<sup>74</sup> Douglas, *op. cit. supra* note 2, at 72.

nificant ones as regards arguments based to some extent on natural law (nine of the twenty-eight) took place before 1765, when Blackstone was preparing and delivering his lectures from which the *Commentaries* evolved.

When Blackstone used natural law arguments, he seems to have tailored them carefully to suit the bench before whom he appeared. That his delivery was not of the highest quality may be quite true, but that he was convincing to Lord Mansfield and his court can scarcely be doubted. In 1760 he appeared before that court for the successful defendant in *Robinson v. Bland*.<sup>75</sup> The facts of the case are well known. In France, a gambling debt had been incurred and a loan made for the purpose of gaming, and these two debts were subsequently sued on in England. Under most circumstances there operative, such debts were recoverable in France. Blackstone made a very lucid argument based on the principles of natural justice.<sup>76</sup> These principles had to be made subject to certain curbs in English law in order for the argument to be successful. His argument shows a nice balance of natural justice, logic, and history and seems to have appealed to Lord Mansfield, who, after asking for further argument at the term following that in which the really crucial arguments were made, rendered judgement for the defendant,<sup>77</sup> with the concurrence of the other members of the bench who were present.

In 1761, in *Tonson v. Collins*,<sup>78</sup> a copyright case, he based his principal argument on reason,<sup>79</sup> quoting Locke on the acquisition of property by invention, but he also argued universal law<sup>80</sup> and natural justice.<sup>81</sup> In this case he successfully argued public convenience and natural liberty as a guide to statutory interpretation, but two years later he was equally successful in his argument for literal statutory construction before the same court.<sup>82</sup> Finally in *Triquet v. Bath*<sup>83</sup> he successfully argued the *jus gentium* with respect to diplomatic immunity in what is a leading case to this day.<sup>84</sup>

Perhaps, as a shrewd advocate, Blackstone merely fitted his arguments to the known views of the strongwilled Lord Mansfield, who presided over the Court of Kings Bench, but in so doing he put into

<sup>75</sup> 1 W. Bl. 234 & 256, at 238, 96 Eng. Rep. 129 & 141, at 131 (K.B. 1760).

<sup>76</sup> Id. 237-46, 130-34.

<sup>77</sup> Id. at 258-61, 141-43.

<sup>78</sup> 1 W. Bl. 321, 96 Eng. Rep. 180 (1761).

<sup>79</sup> Ibid.

<sup>80</sup> Id. at 322, 180.

<sup>81</sup> Id. at 323, 181.

<sup>82</sup> *Stephen v. Coster*, 1 W. Bl. 424, 96 Eng. Rep. 241 (1762).

<sup>83</sup> 1 W. Bl. 471, 96 Eng. Rep. 273 (1764).

<sup>84</sup> A companion case decided by Blackstone as a judge can be found in *Rafel v. Verelst*, 2 W. Bl. 983, 96 Eng. Rep. 579 (K.B. 1775).

practice the theoretical notions of his *Commentaries* and, in effect, demonstrated their practical value to the student, regardless of their jumbled exposition in the treatise.

#### V. THE NATURAL LAW OF THE JUDICIAL BLACKSTONE

The judicial Blackstone does not show a very strong cast of natural law influence. Though Blackstone was certainly aware of what Mansfield was doing in the way of building the commercial law<sup>85</sup> and Mansfield's alleged departures from the common law,<sup>86</sup> Blackstone was content to apply the law as he found it. Though he characterized the Court of Common Pleas as being guided by the motto *aequitas augusti*,<sup>87</sup> he had no enthusiasm for unbridled equity,<sup>88</sup> in which feeling he was certainly joined by Bentham.<sup>89</sup>

It is curious that Blackstone failed to report *Perrin v. Blake* on appeal,<sup>90</sup> where he rendered one of his most controversial, though inconclusive, judgements. He certainly failed to go as far as Mansfield in cutting the ground entirely out from under the Rule in Shelley's Case, but he took the side that is generally regarded as that of the angels in giving the Rule a liberal construction.<sup>91</sup> Although he took the basic view favored by reason, the antiquarian Blackstone dared not shake the fabric of English real property law too much and, in effect, sat on the fence. For all this liberality—in the eighteenth century sense—however, he was severely taken to task by Hargrave.

Elsewhere Blackstone was not nearly so hidebound as has generally been supposed when justice and tradition were in conflict,<sup>92</sup> and some degree of deference to justice *in abstracto* found its way into his

<sup>85</sup> 2 Blackstone, *Commentaries* 460.

<sup>86</sup> Douglas, *op. cit. supra* note 2, at 123-24, citing a well-known public letter criticizing Mansfield in 1770, of which Blackstone could scarcely have been unaware.

<sup>87</sup> "Equity of the highest." *Id.* at 121.

<sup>88</sup> 4 Blackstone, *Commentaries* 442; Douglas, *op. cit. supra* note 2, at 121-23; 1 Blackstone, *Commentaries* 62. For an account of the Mansfieldian-Blackstonian view of English equity, see Holdsworth, *Blackstone's Treatment of Equity*, 43 *Harv. L. Rev.* 1 (1929). See also Hanbury, *Blackstone as a Judge*, 3 *Am. J. Leg. Hist.* 1, 6, 17, 25 (1959).

<sup>89</sup> Bentham, *op. cit. supra* note 62, at 96.

<sup>90</sup> 4 *Burr.* 2579, 98 *Eng. Rep.* 355 (K.B., 1770), *rev'd.* (Ex. Ch., 1772). For Blackstone's judgment see 1 Hargrave, *Law Tracts* 487 (1787). A report of the King's Bench decision in *Perrin v. Blake* may be found in 1 *W. Bl.* 672, 96 *Eng. Rep.* 392 (K.B., 1769). For other references to the case, see *Hodgson v. Ambrose*, 1 *Doug.* 337, 343 note, 99 *Eng. Rep.* 216, 220 (K.B., 1780) and Hanbury, *op. cit. supra* note 88, at 17-18.

<sup>91</sup> Blackstone appears to have taken the position that the Rule should allow descendants to take by purchase when the settlor's intentions to that effect are clear. 1 Hargrave, *op. cit. supra* note 90, at 503. That Spurr, *Sir William Blackstone's Influence on the Rule in Shelley's Case*, 17 *Case and Comment* 284-87 (1910), may be a bit garbled is perhaps accounted for by the conflicting accounts of *Perrin v. Blake* in 1 *W. Bl.* 672-73, 4 *Burr.* 2479, and 1 Hargrave, *op. cit. supra* note 90, at 487, 493, which is the best report of the case, though the vote of Smyth, B. is not there recorded.

<sup>92</sup> See, e.g., *Sparrow v. Cooper*, 2 *W. Bl.* 1316, 96 *Eng. Rep.* 769 (K.B., 1779).

judgements.<sup>93</sup> But though Blackstone, J., was not always happy with the authorities, he lacked Lord Mansfield's courage to defy them in the interest of justice. Here specious reasoning did not readily come to his aid.<sup>94</sup> However, he spoke as a practical man with an insight into contemporary commercial problems when he brushed aside technical arguments in favor of those that made the lot of the foreign merchant easier.<sup>95</sup> Although Blackstone sometimes alluded to reason and justice on the bench, such references seem to be almost wholly rhetorical as when he states in the *Commentaries*, in speaking of his theory of precedent, that decisions "contrary to reason" are not law.<sup>96</sup> This passage of the *Commentaries* was preserved throughout Blackstone's judgeship.<sup>97</sup>

As compared to his brother judges Blackstone was certainly one of the least hidebound of the lot and should generally be classed as a moderate in judicial attitude. It is true that he rarely dissented, but in the cases he reports, his dissents (in a very undissent-prone court) are more frequent than those of his brothers. Indeed, he is taken to task by his contemporary biographer, Douglas,<sup>98</sup> for his liberality toward the exclusion of Founder's Kin at All Souls College and his low opinion of Cicero<sup>99</sup> and by Hargrave for his liberal approach to the Rule in Shelley's Case. He regarded himself as a moderate<sup>100</sup> and he clarified his position by saying that "amid the rage of contending parties, a man of moderation, must expect to meet with no quarter, from any side."<sup>101</sup>

## VI. CONCLUSION

From his utterances as a barrister and judge one would conclude that Blackstone's natural law ideas were not the guiding principles of his legal life, though they may have influenced some of his arguments as a barrister, especially those he made during the time that he was writing and delivering his lectures. But it should be added that he did not repudiate any of his natural law philosophy in later

<sup>93</sup> See *Pound v. Milbank*, 2 W. Bl. 853, 96 Eng. Rep. 502 (K.B., 1772); *Hitchin v. Campbell*, 2 W. Bl. 827, 96 Eng. Rep. 487 (K.B., 1772); *Parson v. Lloyd* 2 W. Bl. 845, 96 Eng. Rep. 498 (1772).

<sup>94</sup> See, e.g., *Collier v. Gaillard*, 2 W. Bl. 1063, 96 Eng. Rep. 625 (K.B., 1776). A slightly whitewashed version of this case appears in Hanbury, *supra* note 88 at 8-9.

<sup>95</sup> *Melchart v. Halfey*, 2 W. Bl. 741, 96 Eng. Rep. 434 (K.B., 1771).

<sup>96</sup> See Boorstin, *supra* note 8, at 196 and Allen's reading of this passage there discussed.

<sup>97</sup> For a thorough study of Blackstone's judicial career, see Hanbury, *supra* note 88.

<sup>98</sup> Douglas *op. cit.* *supra* note 2, at 73-75.

<sup>99</sup> *Id.* at 75-76.

<sup>100</sup> *Id.* at 85.

<sup>101</sup> In his answer to Priestley's Pamphlet. Slightly different wording is found in Riddell, *Some of Blackstone's Critics*, 2 Temple L.Q. 111-12 (1928).

editions of his work, and if the logic was sometimes woolly, Blackstone either did not recognize this or did not think the errors sufficiently important to revise that part of his work. Taking the *Commentaries* as a whole, some have expressed the view that Blackstone's introductory statements in the jurisprudential vein merely amount to "a piece of decoration making for the beauty of the edifice, but forming no part of its structure and certainly no part of its foundation."<sup>102</sup> But even if Blackstone's natural law was merely conventional rhetoric to act as an ethical base for his empirical system, it can be scarcely doubted that it contributed to molding the minds of the generations of lawyers and judges in America where the *Commentaries* was so slavishly studied and cited.

---

<sup>102</sup> Hart, *supra* note 53, at 169. Bentham even doubted its decorative value unless rendered into verse. "Verse is what his oracles like those of the ancient sages, would have shew'd best in. . . . 'By all means . . . turn it into verse.' 'Into verse? Why so?' says the Author. 'Why, because, then it will be verse . . . and now it's nothing'." Bentham, *A Comment on the Commentaries* 35-36 note (1928).