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REDISCOVERING BLACKSTONE

ALBERT W. ALSCHULER†

A law school casebook declares that until the turn of the twentieth century American law “had been dominated by the belief that a single, correct legal solution could be reached in every case by the application of rules of logic to a set of natural and self-evident principles.”¹ This view of American law before the twentieth century has gained considerable currency among lawyers, law teachers, law students, social scientists and popular writers.² One purpose of this

† Wilson-Dickinson Professor, The University of Chicago Law School. I am grateful for the comments of Penelope Bryan, Ruth Chang, Ross Guberman, Paul Heald, Richard Helmholz, Gareth Jones, Dan Kahan, Daniel Klerman, John Langbein, David Lieberman, Wiktor Osiatynski and Richard Ross, and for the research support of the Leonard Sorkin Faculty Fund and the Sonnenshein Fund at the University of Chicago Law School.

¹ JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* 1 (3d ed. 1994).

² See, e.g., G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputation*, 70 N.Y.U. L. REV. 576, 580 (1995) (referring to a pre-twentieth-century “jurisprudential orthodoxy that legal principles were not created by the judges who applied them but existed in some disembodied, timeless state, external to their

Article is to respond to the myth and to urge an end to the whipping of an imaginary deductive-formalist bogeyman alleged to haunt all pre-twentieth-century law. The skeptical jurisprudence of the twentieth century has rested on defaming the thought that preceded it. This Article begins to set the record straight.

A second purpose of the Article is to teach what every lawyer ought to know about William Blackstone, the author of the most influential law book in Anglo-American history—a work that almost no one reads today and that is widely believed to rest on a silly, ponderous, formal, conceptual, outdated, deductive, mechanistic, naive and hopelessly unrealistic jurisprudence.

Part I of this Article examines the influence of Blackstone's work in America and the extent to which his *Commentaries* should be regarded as the baseline, or shared starting-point, of American legal thought. Partly because the *Commentaries* were more accessible to Americans than were other published sources of law, "[a]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone's *Commentaries*]." ³ Even lawyers of the founding generation, however, subjected Blackstone's work to sharp criticism. Blackstone's reception in America reveals that Americans were determined to make their own law (not to find it or deduce it) and that they recognized the law's need for continual growth and adaptation to meet changing needs.

Part II focuses on the *Commentaries*' concept of natural law. Natural law, in Blackstone's view, did not dictate answers to all or most legal questions. It simply indicated the essential needs of human beings and demanded that people respect the essential needs of others. Many legal systems could fulfill its requirements, the most basic of which was that "man should pursue his own 'true and

interpreters"); Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 21 (1995) ("The legal formalist believes that . . . [j]udges can and must find existing law that will decide cases in a determinate way. . . . [J]udicial opinions about policy and fairness have no proper place in the decisional process if the Rule of Law is to be respected. This has been the orthodox jurisprudence of the bench and the bar, at least until recent times."); MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 12 (1949) ("Anti-formalists like Holmes, Dewey, Veblen, and Beard called upon social scientists in all domains, asked them to unite, and urged that they had nothing to lose but their deductive chains.").

³ ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 11 (1984).

substantial happiness."⁴ Natural law stated fundamental and

⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *41 [hereinafter BLACKSTONE, *Commentaries*]; cf. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41 (University of Chicago Press 1979) (1765) [hereinafter Chicago ed.] ("[M]an should pursue his own happiness.").

In 1979, the University of Chicago Press published a paperback edition of Blackstone's *Commentaries*. This edition made the work more accessible and also, by disregarding a system that lawyers had used for centuries to cite it, made citation of the *Commentaries* much more difficult.

From 1793, the date of the twelfth edition of the *Commentaries*, until the University of Chicago Press edition in 1979, every edition of the *Commentaries* used a uniform system of pagination based on the tenth edition, which was published in 1787. Whatever the subsequent edition's own pagination, it noted the pagination of the tenth edition either in brackets or in the margin, and when lawyers, courts and scholars cited Blackstone, they almost invariably cited the relevant "star pages." In other words, the practice for almost two centuries was to cite with an asterisk the appropriate pages of the tenth edition. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 107 (16th ed. 1996). Although libraries and lawyers' shelves contained many editions of Blackstone, the "star page system" made references to Blackstone accessible to almost everyone.

The inventor of the star page system, however, was a poor scholar. He wrote in 1793, "[T]he pages of the former editions are preserved in the margin." Frederick Pollock, Note, 22 LAW Q. REV. 356, 356 (1906) (quoting Edward Christian, *Advertisement* to 1 WILLIAM BLACKSTONE, COMMENTARIES ix (12th ed. 1793)). In fact, the pages of the tenth edition, the pages "preserved in the margin," did not correspond to those of earlier editions. Sir Frederick Pollock observed in 1906, "Not much inconvenience can arise at this day from the singular carelessness of the publishers of 1793, as the great majority of the copies of Blackstone in working use must be of later date." *Id.* Pollock failed to anticipate the singular carelessness of the University of Chicago Press, which, without advertence to the difficulty that Pollock noted, has now placed an edition whose pagination does not correspond to the star page system in the hands of more than 5000 readers.

Each of the four volumes of the University of Chicago Press edition of the *Commentaries* includes an introduction by a distinguished historian, but none of the four is listed as the editor-in-chief of the project. None of the four claimed responsibility for, or explained, the decision to publish a facsimile copy of Blackstone's first edition rather than either the last edition published during Blackstone's lifetime (the eighth), a measure that would have given Blackstone the benefit of his own corrections, or the tenth, the edition that until 1979 was generally cited. Moreover, none of the historians noted that the pagination of the University of Chicago Press edition did not correspond to the pagination of the star page editions.

Because some page numbers are the same in the University of Chicago Press and the star page editions (especially the early pages of each volume), this omission has caused considerable confusion and duplication of effort, at least for me. The need for an accessible but more carefully prepared edition of the *Commentaries* is evident.

In this Article, citations are to the traditional star pages with supplementary citations to pages of the University of Chicago Press edition in brackets when the pagination differs.

I have modernized spelling and punctuation in passages from Blackstone and other works published before 1850.

enduring human goals and responsibilities; it was not a body of axioms for everyday judicial decisionmaking.

Part III examines Blackstone's vision of rights, especially his concept of property rights. Blackstone recognized that natural rights could appropriately be limited in civilized societies for the "general advantage of the public."⁵ Moreover, he regarded many systems of property ownership, including collective ownership of the means of production, as consistent with natural law. Blackstone favored private property only because he believed that private ownership encouraged greater production. He recognized that Parliament could properly restrict property rights to promote the public good, and he insisted that the poor had a natural right to receive from the wealthy sufficient goods to supply the necessities of life.

Part IV considers the view commonly attributed to Blackstone that the proper role of judges is to find law rather than make it. This part argues that the Supreme Court and countless academic commentators have mischaracterized Blackstone's position.

Finally, Part V focuses on the claim that Blackstone and other Enlightenment liberals championed individualism to the detriment of the community. It contends that Blackstone saw individualism and community as reciprocal rather than opposing values and that Blackstone's regard for individual liberty did not diminish his regard for community, sharing and citizenship.

I. SIR WILLIAM BLACKSTONE AND THE SHAPING OF AMERICAN LAW

In 1753, William Blackstone delivered the first series of lectures on English law ever presented at an English university. Having recently been denied appointment to a professorship of civil (or Roman) law, he organized a private course at Oxford on English law,⁶ a subject which he recognized had "generally been reputed (however unjustly) of a dry and unfruitful nature."⁷

Charles Viner later left the proceeds of his own abridgment of English law to Oxford. In 1758, two years after Viner's death, Blackstone became the first Vinerian Professor of the English Common Law.⁸ He inaugurated his professorship by arguing against

⁵ 1 BLACKSTONE, *Commentaries* *125.

⁶ See LEWIS C. WARDEN, *THE LIFE OF BLACKSTONE* 140-48 (1938).

⁷ 1 BLACKSTONE, *Commentaries* *3.

⁸ See WARDEN, *supra* note 6, at 158-59.

the traditional view that the Roman legal system was the only one worthy of university study.⁹ Before leaving his professorship eight years later, Blackstone began to publish his lectures. The four volumes of his *Commentaries* appeared between 1765 and 1769.¹⁰

One thousand copies of the English edition of Blackstone were sold in the American Colonies before the first American edition appeared in 1772.¹¹ This edition supplied another 1400 sets at a substantially lower price;¹² and one year before the Declaration of Independence, Edmund Burke remarked in Parliament that nearly as many copies of the *Commentaries* had been sold on the American as on the English side of the Atlantic.¹³

One advance subscriber to the American edition was Thomas Marshall, a successful frontiersman on the edge of Virginia's Blue Ridge Mountains.¹⁴ Marshall apparently purchased the set for the education of his eldest son. He and his wife Mary had decided that this seventeen-year-old would pursue a legal career, and after four years of service in the Revolutionary War (service that included the encampment at Valley Forge and numerous bloody battles), John Marshall did.¹⁵ By the time he turned twenty-seven, Marshall had read the *Commentaries* four times.¹⁶ He eventually became Chief Justice of the United States and perhaps America's greatest jurist.¹⁷

⁹ See 1 BLACKSTONE, *Commentaries* *3-37. Since the medieval period, the legal profession in England had conducted the professional training of lawyers in the Inns of Court. See SIR WILLIAM HOLDSWORTH, 2 A HISTORY OF ENGLISH LAW 506-12 (3d ed. 1923). Blackstone did not challenge this tradition of training lawyers outside the universities. His argument concerned the education of undergraduate gentlemen between the ages of fifteen and eighteen. See Joseph W. McKnight, *Blackstone, Quasi-Jurisprudent*, 13 SW. L.J. 399, 400 (1959).

Blackstone's goal of promoting study of the common law may partly explain his apology for aspects of this law that now seem archaic. For criticism of Blackstone's romantic view of the common law and of the ideology of the *Commentaries*, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

¹⁰ See DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 133-34 (1938).

¹¹ See *id.* at 170.

¹² See *id.*; see also McKnight, *supra* note 9, at 401.

¹³ See 2 EDMUND BURKE, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), in THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 99, 125 (rev. ed., Boston, Little Brown 1865). Burke concluded that the study of law was one of the circumstances that had engendered "a fierce spirit of liberty" among the colonists. *Id.* at 127.

¹⁴ See 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 55-56 (1919).

¹⁵ See *id.* at 56, 117, 173.

¹⁶ See Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 757 (1976).

¹⁷ Marshall's opinions cited the *Commentaries* frequently. See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 657, 659, 663, 673, 674, 682,

Other subscribers to the first American edition included such prominent lawyers as James Wilson, John Jay, Nathaniel Greene and John Adams.¹⁸

When the Revolution halted classes at Yale, a displaced college student read Blackstone on his own.¹⁹ Like John Marshall, this student, James Kent, became a noted jurist.²⁰ In his *Memoirs*, Kent said of the *Commentaries*, "[T]he work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer."²¹

More than sixty-five years after the publication of the *Commentaries*, a man driving west in a covered wagon lightened his load by selling a barrel of goods to a village store clerk. "I did not want it," Abraham Lincoln explained, "but to oblige him I bought it, and paid him half a dollar for it." Among the goods in the barrel, Lincoln discovered Blackstone's *Commentaries*.

This, at least, is Carl Sandburg's version of Lincoln's first encounter with the *Commentaries*.²² Chroniclers less credulous of traditional stories have reported that Lincoln purchased a set at a Springfield auction.²³ However Lincoln acquired the *Commentaries*, he wrote a letter twenty-five years later advising a young man to "c[o]me to the law" just as he had, by reading law books "for himself without an instructor."²⁴ Blackstone was still at the top of Lincoln's reading list.

According to Sandburg, a lawyer-friend told Lincoln that Blackstone's *Commentaries* was the first book a prospective lawyer should

701 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137, 144 (1810); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 165, 168 (1803).

¹⁸ See 1 BEVERIDGE, *supra* note 14, at 56 n.2 (listing the names of subscribers to the first American edition). Beveridge omitted from his list the name of John Jay, one of the authors of *The Federalist Papers* and the first Chief Justice of the United States. Jay's name appears, however, on a list prepared by George W. Wickersham. See Presentation of Blackstone Memorial (July 20, 1924), in 10 A.B.A. J. 571, 576 (1924) [hereinafter Presentation of Blackstone Memorial]. Wickersham noted that the original subscribers were "by no means . . . confined to lawyers. [They] include[d] farmers, merchants, cabinetmakers, cordwainers, military men, tavern-keepers, and others . . ." *Id.*

¹⁹ See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 554 (1993).

²⁰ See *id.* at 548.

²¹ MEMOIRS AND LETTERS OF JAMES KENT 18 (William Kent ed., Da Capo Press 1970) (1898).

²² See 1 CARL SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS 163 (1926).

²³ See DAVID HERBERT DONALD, LINCOLN 53 (1995); BENJAMIN P. THOMAS, ABRAHAM LINCOLN 43 (1952).

²⁴ Letter from Abraham Lincoln to James T. Thornton (Dec. 2, 1858), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 485 (Roy P. Basler ed., 1946).

read.²⁵ Sandburg pictured Lincoln reading Blackstone's declaration that no laws are valid unless they conform to the law of nature or of God while lying "on the flat of his back on the grocery-store counter, or under the shade of a tree with his feet up the side of the tree."²⁶ Perhaps in such a position, Lincoln encountered Blackstone's statements that slavery could not exist in England; that the existence of slavery anywhere in the world was "repugnant to reason, and the principles of natural law";²⁷ and that the "spirit of liberty is so deeply . . . rooted even in our very soil, that a slave or a negro, the moment he lands in England . . . becomes a freeman."²⁸

Before 1900, almost every American lawyer read at least part of Blackstone.²⁹ Daniel Boorstin has observed, "In the history of American institutions, no other book—except the Bible—has played so great a role"³⁰ As Mary Ann Glendon has noted, "Blackstone's work was much more fully absorbed into legal thinking here than in England, where legal resources were both more diverse and more readily available."³¹ Describing Blackstone's treatise as "*the law book*" during America's formative period, Glendon added, "It would be hard to exaggerate the degree of esteem in which . . . the *Commentaries* were held."³²

Blackstone's influence in both England and America was enhanced by his graceful prose³³ and fortuitous timing. The

²⁵ See SANDBURG, *supra* note 22, at 163.

²⁶ *Id.* at 164.

²⁷ 1 BLACKSTONE, *Commentaries* *423 [Chicago ed. 411].

²⁸ 1 *id.* at *127 [Chicago ed. 123 (using slightly more elaborate language)].

²⁹ See LOCKMILLER, *supra* note 10, at 176. Lockmiller estimated that reported American cases between 1789 and 1915 cited Blackstone's *Commentaries* 10,000 times. See *id.* at 181.

Before being denied admission to the Wisconsin bar in 1875 on the ground that the admission of women would be not only a "departure[] from the order of nature" but also "treason against it," In re Goodell, 39 Wis. 232, 245 (1875), Lavinia Goodell wrote, "I enjoy my Blackstone and Kent even more than anticipated, only feel lonesome having no one to talk them over with." Catherine B. Cleary, *Lavinia Goodell, First Woman Lawyer in Wisconsin*, 74 WIS. MAG. HIST. 243, 249 (1991) (quoting Maria Goodell Frost, *Life of Lavinia Goodell* 102 (n.d.) (unpublished manuscript, on file with the Hutchins Library, Berea College, Berea, Ky)).

³⁰ DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* iii (1958). Boorstin commented, "In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." *Id.* at 3.

³¹ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 23 (1991) (noting that published reports of American decisions did not exist in the decades surrounding the Revolution and that reports of English decisions frequently were unavailable as well).

³² *Id.*

³³ Blackstone was a poet (as was his American editor, St. George Tucker, see *infra*

Commentaries were published at the same time that other treatises on national law appeared throughout Europe,³⁴ and they gave clarity and structure to an increasingly disorderly English law.³⁵ An

text accompanying notes 54-78). He was also a classical scholar and an author of critical notes on Shakespeare. See W.S. Holdsworth, *Some Aspects of Blackstone and His Commentaries*, 4 CAMBRIDGE L.J. 261, 263 (1932).

Consider as literature the following passage from Blackstone's defense of the propriety of studying English law:

[T]hat a science which distinguishes the criteria of right and wrong; which teaches to establish the one and prevent, punish, or redress the other; which employs in its theory the noblest faculties of the soul and exerts in its practice the cardinal virtues of the heart; a science which is universal in its use and extent, accommodated to each individual yet comprehending the whole community; that a science like this should have ever been deemed unnecessary to be studied in a university is a matter of astonishment and concern.

1 BLACKSTONE, *Commentaries* *27.

³⁴ John W. Cairns described the characteristics of these works:

[T]hey are often (though by no means always) in the vernacular; they are frequently linked to the introduction of university education in the national law; they are influenced in organization by Justinian's *Institutes*; they attempt to be comprehensive; they deal with a national law; and they are often fairly elementary in nature.

John W. Cairns, *Blackstone, An English Institutist: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318, 327 (1984).

³⁵ The most notable aspect of the structure of Blackstone's *Commentaries* was simply that the book had a structure. The common law had grown in a haphazard fashion through the issuance of royal writs, and the system of civil pleading of Blackstone's era depended on finding an appropriate writ and pleading it. The common law had no more structure than the writ system gave it, and the ad hoc character of English law, evident in such works as Charles Viner's *Abridgment*, was the principal reason why Roman law was thought more suitable for university study. Before the appearance of the *Commentaries*, an author declared: "It has been thought impracticable to bring the laws of England into a method and therefore a prejudice has been taken up against the study of our laws . . . as if there was no way to attain to the knowledge of them but by a tedious wandering about . . ." THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND i (2d ed. 1721), quoted in S.F.C. Milsom, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUD. 1, 8 (1981). Blackstone himself complained in language that he may have thought too uncharitable to Viner, the founder of his professorship, that "FitzHerbert and Brook and the subsequent authors of abridgments have chosen a method the least adapted of any to convey the rudiments of a science—namely, that of the alphabet." WILLIAM BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND v (2d ed., Oxford, Clarendon Press 1757).

In this situation, Blackstone did something that no earlier English commentator had done—something that the historian Herbert Hovenkamp has called "truly radical" and "revolutionary." Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 665 n.84 (1983). Except in his chapters on pleading and procedure, Blackstone essentially ignored the writ system. Borrowing from Roman and other sources, he described the common law "as based on a structure of rights." *Id.* Hovenkamp explained that "one result of Blackstone's new classification scheme was

unsigned review in 1767, possibly written by Edmund Burke, emphasized Blackstone's achievement: "Mr. Blackstone . . . has entirely cleared the law of England from the rubbish in which it was buried and now shows it to the public in a clear, concise, and intelligible form."³⁶ Surveys of national law like Blackstone's soon gave way to specialized treatises,³⁷ leaving Blackstone's *Commentaries* the unrivaled masterpiece of a vanished genre.

In America, Blackstone's favorable reception was dampened in some quarters by his political opposition to the claims of American colonists,³⁸ his denial that Americans enjoyed the common law rights of British subjects,³⁹ his view that freedom of the press consisted only of freedom from prior censorship,⁴⁰ and his apologies for the Crown, the established church and other resented English institutions. Blackstone's reception was also qualified by the determination of Americans to create their own law.

Prior to American independence, James Wilson challenged Blackstone's views of Parliamentary supremacy and of the rights of American colonists.⁴¹ Following the Revolution, Wilson proclaimed that, although Blackstone's work "possessed uncommon merit" and "deserves to be much admired," Blackstone could not be considered "a zealous friend of republicanism."⁴² Unlike modern critics who

a general reaction to the writ system in nineteenth century America." *Id.*; see also Kennedy, *supra* note 9, at 231-33.

³⁶ 1767 ANNUAL REGISTER 286, 287 (8th ed., London, I. Maiden 1809) (a journal edited by Burke), *quoted in* A.V. Dicey, *Blackstone's Commentaries*, 4 CAMBRIDGE L.J. 286, 286 (1932) (originally published in 54 NAT'L REV. 645, 653 (1909)).

³⁷ See A.W.B. SIMPSON, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 273, 274, 293 (1987); Langbein, *supra* note 19, at 585-93.

³⁸ See *infra* text accompanying notes 84-85.

³⁹ See 1 BLACKSTONE, *Commentaries* *108 [Chicago ed. 105] (maintaining that the common law did not extend to conquered territory that already had its own law and describing America as such a territory).

⁴⁰ See 4 *id.* at *151-53.

⁴¹ See Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 648-49 (1932-33) (describing Wilson's 1774 address, Considerations on the Nature and Extent of the Legislative Authority of the British Parliament, *available in* 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 199-246 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804) [hereinafter THE WORKS OF JAMES WILSON]).

In 1769, Dr. Joseph Priestly disputed Blackstone's views concerning the criminality of religious dissent. In 1772, Priestly's criticism appeared in a separately printed appendix to the first American edition of the *Commentaries*. See Waterman, *supra*, at 646. Priestly's later accomplishments included discovering oxygen and teaching Jeremy Bentham that "the greatest happiness of the greatest number is the foundation of morals and legislation." 10 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 142 (London, Simpkin, Marshall, & Co. 1843).

⁴² 1 THE WORKS OF JAMES WILSON, *supra* note 41, at 21-22, *quoted in* Waterman,

fault Blackstone's belief in natural law, Wilson maintained that Blackstone had failed adequately to recognize the natural law foundations of the rights of British subjects.⁴³ As one of the first Justices of the Supreme Court,⁴⁴ Wilson carried his criticism of Blackstone to the pages of the United States Reports. In 1793, in *Chisholm v. Georgia*,⁴⁵ Wilson cited Blackstone's declaration that the King cannot be sued in any court as proof that Blackstone was "if not the introducer at least the great supporter" of "a plan of systematic despotism."⁴⁶

Thomas Jefferson's criticism of Blackstone, like Wilson's, was in one respect the obverse of modern criticism. Modern critics generally view Blackstone as an arch conservative, attributing to him the view that judges find rather than make law.⁴⁷ One of these critics has suggested that the *Commentaries* were written in reaction to the activism of eighteenth-century English judges, particularly that of Lord Chief Justice Mansfield.⁴⁸ Jefferson, however, regarded Blackstone as a Mansfield disciple; he regretted that "the honied Mansfieldism of Blackstone" had replaced Coke's "black-letter text" as the student's hornbook.⁴⁹

In 1812, while describing Blackstone's *Commentaries* as "the most elegant and best digested of our law catalogue," Jefferson protested "canoniz[ation]" of the book: "A student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book, he is the master of the whole body of law."⁵⁰

supra note 41, at 650.

⁴³ See Waterman, *supra* note 41, at 650-51.

⁴⁴ Wilson was also a signer of the Declaration of Independence, a member of the Continental Congress, a member of the Constitutional Convention and the first professor of law at what became the University of Pennsylvania.

⁴⁵ 2 U.S. (2 Dall.) 419 (1793).

⁴⁶ *Id.* at 458. For further eighteenth-century American criticism of Blackstone, see Nathaniel Chipman, *Sketches of the Principles of Government*, in *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 19, 21-30 (Perry Miller ed., 1962).

⁴⁷ See *infra* Part IV.

⁴⁸ See *infra* text accompanying notes 222-32 (discussing the views of Grant Gilmore).

⁴⁹ 12 *THE WORKS OF THOMAS JEFFERSON* 456 (Paul Leicester Ford ed., 1905), *quoted in* Waterman, *supra* note 41, at 635. Jefferson complained that Mansfield had rendered the law "more incertain [sic] under pretense of rendering it more reasonable." 4 *THE WORKS OF THOMAS JEFFERSON* 479 (1904), *quoted in* Waterman, *supra* note 41, at 644 n.87. He proposed banning the citation in American courts of all English decisions following Mansfield's accession to the bench. See Waterman, *supra* note 41, at 642-43 (citing 2 *THE WRITINGS OF THOMAS JEFFERSON* 487 (H.A. Washington ed., 1861)). Jefferson's view may have been colored by Mansfield's extrajudicial role as a principal architect of Britain's colonial policy.

⁵⁰ 6 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 49, at 65-66, *quoted in*

Jefferson voiced stronger criticism two years later:

Blackstone and Hume . . . are making Tories of those young Americans whose native feelings of independence do not place them above the wily sophistries of a Hume or a Blackstone. These two books . . . have done more towards the suppression of the liberties of man than all the millions of men in arms of Bonaparte I fear nothing for our liberty from the assaults of force, but I have seen and felt much and fear more from English books, English prejudices, English manners⁵¹

The same year that Jefferson proclaimed Blackstone's book more dangerous than Napoleon's armies, he described the *Commentaries* as "lucid in arrangement. . . correct in its manner, classical in style, and rightfully taking its place by the side of Justinian's Institutes."⁵² He also placed the *Commentaries* on a list of readings for law students, describing the work as "the inimitable Commentaries of Blackstone" and "the last perfect digest of both branches of law," common law and chancery.⁵³

The author whose work best exemplified Blackstone's reception in America was probably also the author whose work most shaped this reception. St. George Tucker, who had been Professor of Law at the College of William and Mary in Virginia since 1790, could not find a publisher for his American edition of the *Commentaries* in 1794.⁵⁴ When Tucker's work finally was published in 1803, however, it became "an instant success" and soon was regarded as "the definitive edition of Blackstone available in America."⁵⁵

Tucker declared, "On the appearance of the *Commentaries*, the laws of England, from a rude chaos, instantly assumed the semblance

Waterman, *supra* note 41, at 634.

⁵¹ 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 49, at 335, quoted in Waterman, *supra* note 41, at 634-35.

⁵² 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 49, at 291, quoted in Waterman, *supra* note 41, at 636-37.

⁵³ 11 THE WORKS OF THOMAS JEFFERSON, *supra* note 49, at 423 n.1, quoted in Waterman, *supra* note 41, at 636. Jefferson's list was a revision of one prepared "near 50 years ago," and perhaps its lavish description of the *Commentaries* was copied from the original list rather than written by Jefferson himself. If the original list truly had been 50 years old, however (rather than nearly so), it would have been older than the first published volume of the *Commentaries*. Moreover, the 1814 list recommended St. George Tucker's edition of Blackstone, and Tucker's edition was not published until 1803.

⁵⁴ See Craig Evan Klafter, *The Americanization of Blackstone's Commentaries*, in ESSAYS ON ENGLISH LAW AND THE AMERICAN EXPERIENCE 42, 60-61 (Elisabeth A. Cawthon & David E. Narrett eds., 1994).

⁵⁵ *Id.*

of a regular system.”⁵⁶ He added that Blackstone’s work was “a model of methodical elegance and legal perspicuity, a work in which the author . . . united the various talents of the philosopher, the antiquarian, the historian, the jurist, the logician and the classic[ist]”⁵⁷ Nevertheless, as Robert M. Cover observed, Tucker’s *Blackstone* “was not only a publication of the *Blackstone* text but also an engagement of it in combat.”⁵⁸

According to Tucker, the revolution that Blackstone had wrought in the study of law had its downside, particularly in the United States.⁵⁹ American lawyers with little choice but to take Blackstone as their guide exhibited “a total want of information respecting the laws of *their own country*.”⁶⁰ To remedy this defect, Tucker added more than one thousand footnotes to Blackstone’s text to set forth American law.⁶¹ More important, Tucker wrote lengthy appendices to each of Blackstone’s volumes in which he offered literate, knowledgeable, thoughtful, passionate, probing and opinionated commentary on the *Commentaries*. Tucker’s appendices also discussed American laws “which neither form a part of, nor even bear any relation to, the laws of England.”⁶² They provided 810 pages of impressive and engaging scholarship, an illustration of legal writing at its best.⁶³

Tucker developed his principal theme, the distinctiveness of American law, partly by reciting ways in which the American colonies had altered English law prior to the Revolution. He noted, for example, changed inheritance laws in Massachusetts, the establishment of slavery in the South (“a measure not to be reconciled either to the principles of the law of nature nor even to the most arbitrary

⁵⁶ 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA iii (St. George Tucker ed., Philadelphia, Birch & Small 1803) [hereinafter TUCKER’S BLACKSTONE].

⁵⁷ 1 *id.* at vi.

⁵⁸ Robert M. Cover, Book Review, 70 COLUM. L. REV. 1475, 1477 (1970).

⁵⁹ See 1 TUCKER’S BLACKSTONE, *supra* note 56, at iv-v.

⁶⁰ 1 *id.* at v.

⁶¹ See Cover, *supra* note 58, at 1475-76. Tucker’s notes and comments focused primarily but not exclusively on the law of his own state, Virginia, and on federal law. See *id.* at 1476.

⁶² 1 TUCKER’S BLACKSTONE, *supra* note 56, at vii.

⁶³ Tucker’s work is today substantially more readable than that of most other early nineteenth century American legal writers, Joseph Story and James Kent included. Tucker did not, however, attempt the comprehensive surveys of American law that Story and Kent later accomplished.

establishments in the English government at that period"⁶⁴), the broad guarantees of religious freedom in Rhode Island and Pennsylvania, and statutes protecting creditors from fraudulent conveyances in Virginia.

According to Tucker, some American colonies had been settled by people who sought to return to England with "immense riches or a comfortable subsistence at least."⁶⁵ These colonies conformed "as near as possible . . . to all the institutions of the mother country."⁶⁶ Other colonies, however, had been settled by people who had "quit their native country as a prison, . . . preferring . . . an asylum in the howling wilderness."⁶⁷ These settlers rejected laws "inimical to th[e] principles which prompted them to migrate."⁶⁸ Tucker concluded: "[I]t would require the talents of an Alfred^[69] to harmonize and digest into one system such opposite, discordant, and conflicting municipal institutions as composed the codes of the several colonies at the period of the revolution"⁷⁰ American independence, moreover, brought a "revolution not only in the principles of our government but in the laws which relate to property and in a variety of other [laws] equally . . . irreconcilable to the principles contained in the *Commentaries*."⁷¹ Tucker applauded many American departures from English law,⁷² but he criticized others. He particularly detested his own state's laws approving and supporting slavery. Tucker was unable to explain how "the condition of that unfortunate race of men whom the unhappy policy of our forefathers has reduced to that degraded condition is reconcilable to the principles of a free

⁶⁴ 1 TUCKER'S BLACKSTONE, *supra* note 56, at app. 388.

⁶⁵ 1 *id.* at app. 391.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* Although all of the colonies were forbidden to enact laws derogatory of English law unless their charters authorized them to do so, the application of this principle was "as various as [the colonies'] respective soils, climates and productions." 1 *id.* at app. 393.

⁶⁹ The first king recognized as the sovereign of all England. In selecting his laws, Alfred drew on the Bible, the penitentials of the Church, and the best laws of earlier tribal kings. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 3 (1990).

⁷⁰ 1 TUCKER'S BLACKSTONE, *supra* note 56, at app. 405.

⁷¹ 1 *id.* at iv-v.

⁷² For example, Tucker praised the First Amendment to the United States Constitution, viewing it as a clear repudiation of Blackstone's approval of seditious libel prosecutions. See 2 TUCKER'S BLACKSTONE, *supra* note 56, at app. 18. Tucker wrote, "Liberty of speech . . . consists in the absolute and uncontrollable right of speaking, writing, and publishing our opinions concerning any subject" 2 *id.* at app. 11. He declared this freedom to be as "unlimited as the human mind." 2 *id.* at app. 17.

republic."⁷³ He proposed a plan of gradual emancipation "to wipe off that stigma from our nation and government."⁷⁴

In a striking evolutionary metaphor, Tucker observed that a community's law might begin as a seedling oak, advance with civilization, and put forth "innumerable branches till it covers the earth with an extensive shade."⁷⁵ Every year might be "the parent of new branches or the destroyer of old ones."⁷⁶ Nevertheless,

a superficial observation of its exterior alone [will not] suffice; the roots may be decayed, the trunk hollow, and the monarch of the forest ready to fall with its own rottenness and weight at the moment that its enormous bulk, extensive branches, and luxuriant foliage would seem to promise a millennial duration.⁷⁷

Tucker recognized the need for constant growth, constant pruning and occasional uprooting in a forest of evolving law. He viewed Blackstone's *Commentaries* as an appropriate baseline for studying the law of a new nation, a work worthy of respect but not of unquestioning deference.⁷⁸

Although Blackstone was noted for his *Commentaries* during his lifetime, he was otherwise an undistinguished lawyer, politician and judge.⁷⁹ He abandoned his law practice for an academic life partly

⁷³ 1 *id.* at xi.

⁷⁴ 1 *id.* at xii. Tucker commented that "in this enlightened age when philanthropy is supposed to have been more generally diffused through the civilized nations of the earth than at any former period and in this country, where the blessings of liberty have been so lately and so dearly purchased," the conflict between "our avowed principles and our daily practice" was evident. *Id.* He added:

While America has been the land of promise to Europeans and their descendants, it has been the vale of death to millions of the wretched sons of Africa. . . . While we were offering up vows at the shrine of liberty, . . . we were imposing on our fellow men who differ in complexion from us a slavery ten thousand times more cruel than the utmost extremity of those grievances and oppressions of which we complained.

2 *id.* at app. 31 (emphasis omitted) (part of the introduction to Tucker's 54-page appendix on slavery). Tucker earlier had published his work on slavery in pamphlet form. See ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA (Philadelphia, Mathew Carey 1796).

⁷⁵ 2 TUCKER'S BLACKSTONE, *supra* note 56, at xv.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Compare James Wilson's statement that Blackstone "deserves to be much admired but . . . ought not to be implicitly followed." 1 THE WORKS OF JAMES WILSON, *supra* note 41, at 21-22, quoted in Waterman, *supra* note 41, at 650.

⁷⁹ See Stanley N. Katz, *Introduction* to 1 BLACKSTONE, *Commentaries*, at iii, iii-v (Chicago ed. 1979)

"because the profits from his profession were less than his expenses."⁸⁰ As a judge, his rulings on circuit were set aside more frequently than those of any other judge of the courts in London.⁸¹ One of his political opponents declared that the respect due his writings was matched by the contempt due his character.⁸² A more recent detractor insisted that "Blackstone was stiff, stuffy, and pompous from childhood and as a professor and judge he felt it his duty to become more so."⁸³

As a Member of Parliament from 1761 to 1770, Blackstone exhibited little sympathy for the grievances of American colonists. He voted to maintain the Stamp Act⁸⁴ and to deny John Wilkes, a fiery critic of British colonial policy, his seat in the House of Commons.⁸⁵ Through his *Commentaries*, however, Blackstone taught American Revolutionaries their rights,⁸⁶ helped inspire the Declaration of Independence,⁸⁷ influenced the deliberations of the Constitutional Convention,⁸⁸ articulated a sense of providence like the one that touched Abraham Lincoln,⁸⁹ and instructed the children,

⁸⁰ Julian S. Waterman, *Mansfield and Blackstone's Commentaries*, 1 U. CHI. L. REV. 549, 550 (1933-34).

⁸¹ See Gareth Jones, *Introduction to THE SOVEREIGNTY OF THE LAW* ix, xxi (Gareth Jones ed., 1973) (quoting SIR JAMES PRIOR, *LIFE OF EDMUND MALONE* 431-32 (London 1860)).

⁸² See Letter from Junius to the Printer of the Public Advertiser (June 6, 1769), in 2 THE LETTERS OF JUNIUS 268 (John Wade ed., London, George Bell & Sons, 1894).

⁸³ McKnight, *supra* note 9, at 401-02.

⁸⁴ See Katz, *supra* note 79, at iv.

⁸⁵ The story of Blackstone's support of Wilkes' exclusion and of the criticism that Blackstone incurred for disregarding the law of Parliamentary qualifications set forth in his *Commentaries* is told in Charles McCamic, *The First Edition of Blackstone's Commentaries*, 33 W. VA. L.Q. 287 (1926-27).

⁸⁶ This, despite Blackstone's own denial that Americans enjoyed the common law rights of British subjects. See *supra* text accompanying note 39.

⁸⁷ Sixteen subscribers to the initial American edition of the *Commentaries* later signed the Declaration of Independence. See Nolan, *supra* note 16, at 743.

⁸⁸ The *Commentaries* were cited expressly at one point during the convention. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448-49 (Max Farrand ed. 1911). Moreover, "[s]uch words and phrases in the Constitution as 'due process,' 'crimes and misdemeanors,' 'treason,' 'felonies,' 'ex post facto laws,' 'criminal prosecutions,' 'judicial power,' 'legislative power,' 'legal rights and liabilities,' 'remedies,' 'levying war' and many others were used in the sense in which Blackstone had employed them." Presentation of Blackstone Memorial, *supra* note 18, at 578.

⁸⁹ The concluding words of the *Commentaries* describe "the liberty of Britain" as "the best birthright and noblest inheritance of mankind." 4 BLACKSTONE, *Commentaries* *436. They declare that the protection of this liberty is an obligation owed "to [the] ancestors who transmitted" it and to the "posterity who will claim" it. *Id.*; cf. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery of Gettysburg (Nov. 19, 1863), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS, *supra* note 24, at 734.

grandchildren, great grandchildren and great-great grandchildren of his initial American readers on the virtues of the English common law.

One-hundred-fifty years after publication of the *Commentaries*, Senator Albert Beveridge said that the work sang with "the poetry of law."⁹⁰ The United States Supreme Court still cites the *Commentaries* approximately ten times each year. It recently has done so on subjects as diverse as "the right to die,"⁹¹ the validity of a state's requiring a minor to notify her parents before obtaining an abortion,⁹² the permissibility of allowing a juvenile witness to testify from outside the courtroom by means of closed-circuit television,⁹³ the power of a federal court to stop the execution of a state prisoner who has submitted new evidence of his innocence,⁹⁴ the propriety of imposing special punishment for racially motivated hate crimes,⁹⁵ the legitimacy of exercising peremptory challenges to exclude jurors on the basis of sex,⁹⁶ and the constitutionality of mandatory drug testing for high school athletes.⁹⁷

The Supreme Court, lower courts and scholars invoke the *Commentaries* today mostly as a source of history. The esteem in which Blackstone's jurisprudence was once held has apparently vanished.⁹⁸ Scholars view the *Commentaries* as an illustration of the

⁹⁰ 1 Beveridge, *supra* note 14, at 56.

⁹¹ *Cruzan v. Director*, 497 U.S. 261, 294 (1990).

⁹² *See Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990).

⁹³ *See Maryland v. Craig*, 497 U.S. 836, 847 (1990).

⁹⁴ *See Herrera v. Collins*, 506 U.S. 390, 412 (1993).

⁹⁵ *See Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993).

⁹⁶ *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994) (quoting *United States v. De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc)).

⁹⁷ *See Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391 (1995).

⁹⁸ Insofar as American critics such as James Wilson, *see supra* text accompanying note 43, and St. George Tucker faulted Blackstone's jurisprudence, they argued that he was too much a positivist, insufficiently attuned to "natural, inherent, and unalienable rights." TUCKER'S BLACKSTONE, *supra* note 56, at vii; Cover, *supra* note 58, at 1485 ("Tucker was even more enamored of the notion of natural rights than was Blackstone.").

In this respect, American critics differed from Blackstone's most vituperative eighteenth-century English critic, Jeremy Bentham. Bentham at age 16 (or perhaps younger) had attended Blackstone's lectures, paying six guineas for the privilege. *See* J.H. Burns & H.L.A. Hart, *Introduction* to JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES and A FRAGMENT ON GOVERNMENT xix-xxi (J.H. Burns & H.L.A. Hart eds., Athlone Press 1977) (reporting Bentham's recollection many years after the event that he was 16 when he attended the lectures; university records suggest that he was younger); Dicey, *supra* note 36, at 290.

Bentham viewed Blackstone's discussion of the law of nature as an "excursion into the land of fancy" and as "theological grimgribber." BENTHAM, *supra*, at 10. He

formal vision of law that Oliver Wendell Holmes and the legal realists condemned. Indeed, the *Commentaries* appear to be the most perfect illustration of this outmoded vision that scholars can find (apart, perhaps, from the writings of a few late nineteenth-century scholars like Christopher Columbus Langdell⁹⁹).

Holmes's biographer Liva Baker has written:

American legal scholarship . . . was ripe for the kind of corrective surgery Holmes was about to perform. The traditions of the natural law—the law of nature transmitted by divine will—as explicated by Blackstone and Kent, its roots running deep into the soil of ancient Greece and Rome, had outlived its usefulness. Its immutable principles comforted. Its abstract and logical nature satisfied. Its simplicity, certainty, and reasonableness continued to be appealing. But its inertia kept it from dealing with the disorder and changefulness and all the other complexities of nineteenth-century life. The traditionalists “discovered” law which was deduced from the unchanging nature of things That the law's development might have been progressive was not generally recognized.¹⁰⁰

Some pages later, Baker offered this serenade to Holmes's achievement:

[Holmes' work] shook the little world of lawyers and judges who had been raised on Blackstone's theory that the law, given by God Himself, was immutable and eternal and judges had only to discover its contents. It took some years for them to come around to the view that the law was flexible, responsive to changing social and economic climates, and amenable to empirical methods of analysis.

But Holmes had . . . broken new intellectual trails, using history to guide him. He had given the law a vitality it never before had possessed. He had wrested legal history from the aridity of syllogism and abstraction and placed it in the context of human experience, demonstrating that the corpus of the law was neither

asked, “What is there to be learned from these speculations? Nothing. What is there to be understood in them? Nothing. What is to be concluded from them? Nothing.” *Id.* at 11. He proposed that the poet Blackstone turn his chapter on natural law into verse and offered this reason: “Why, because then it will be verse . . . and now it's nothing.” *Id.* at 11 & n.b.

⁹⁹ For arguments that the current disparagement of Langdell is unfair, see WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980). But see Robert W. Gordon, *The Case for (and Against) Harvard*, 93 MICH. L. REV. 1231 (1995).

¹⁰⁰ LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 249 (1991).

ukase from God nor derived from Nature, but, like the little toe and the structure of the horse, was a constantly evolving thing, a response to the continually developing social and economic environment.¹⁰¹

Today's disparaging view of Blackstone's jurisprudence rests on four related propositions.¹⁰² First, Blackstone, like other proponents of natural law, is thought to have envisioned law as a "brooding omnipresence"¹⁰³ from which judges could deduce timeless answers to every legal question. Second, Blackstone is seen by some critics as a rights-zealot and, especially, as a property-rights zealot.¹⁰⁴ Third, Blackstone has been treated by the Supreme Court and by others as history's "foremost exponent of the declaratory theory" that judges find law and never make it.¹⁰⁵ And fourth, some critics believe that the *Commentaries* exalted the individual to the detriment of the community.

All four propositions are unfair—crude parodies of Blackstone's thought. Before abandoning (and often deriding) the jurisprudential baseline of American law, critics should have a better-than-comic-book understanding of what this baseline was. Misperceptions of Blackstone's view of natural law have reinforced the other misperceptions. Endorsing a concept of natural rights has been thought to be incompatible with a vision of rights that permits growth and adjustment, and believing in transcendent principles of justice has been thought to imply that judges should do no more than find and

¹⁰¹ *Id.* at 257-58. Even the description of St. George Tucker's work, *see supra* text accompanying notes 54-78, suggests the silliness of Baker's view of American law before Holmes.

¹⁰² A further criticism of Blackstone (though not of his jurisprudence) is that his praise of the common law was excessive. This criticism is largely justified, but Blackstone did sense the artificiality of the two features of the common law that appear most arcane today. He wrote, "Some branches of the law, as the formal process of civil suits and the subtle distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding . . ." 1 BLACKSTONE, *Commentaries* *36. Blackstone argued that study of the common law should become part of every undergraduate's education, but he said that study of the system of civil pleading and of estates in land could be left "to such gentlemen as intend to pursue the profession." *Id.*

¹⁰³ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Although Holmes used the phrase "brooding omnipresence" to deflate grand concepts of the common law, the phrase has proven a nice device for ridiculing the idea of natural law as well.

¹⁰⁴ See BOORSTIN, *supra* note 30, at 166; GLENDON, *supra* note 31, at 23.

¹⁰⁵ See *Linkletter v. Walker*, 381 U.S. 618, 623 n.7 (1965).

apply these principles. This Article's exploration of Blackstone's legal thought begins with his concept of natural law.¹⁰⁶

II. THE NATURE OF LAWS IN GENERAL

Lawyers have long been captivated by *Reader's Digest* science.¹⁰⁷ Darwinian metaphors dominated the thought of Oliver Wendell Holmes;¹⁰⁸ Jerome Frank described legal institutions in Freudian terms;¹⁰⁹ legal writers today invoke the uncertainty principle¹¹⁰

¹⁰⁶ Although Duncan Kennedy's depiction of Blackstone as a "scullery maid" engaged in "drudge work" may be overdrawn, see Kennedy, *supra* note 9, at 353-54, most of Blackstone's jurisprudence was unoriginal. Precisely because Blackstone was a synthesizer and popularizer, however, and because no other figure so influenced American lawyers and political figures during the Revolutionary period and the nation's first century, Blackstone seems an ideal exemplar of Enlightenment and early American legal thought.

Some writers have treated Blackstone's discussion of natural law as superfluous and ornamental, a concession to the conventions of his age. See, e.g., McKnight, *supra* note 9, at 411 (characterizing Blackstone's discussion of natural law as "merely conventional rhetoric"); H.L.A. Hart, *Blackstone's Use of the Law of Nature*, 1956 BUTTERWORTH'S S. AFR. L. REV. 169. One scholar wrote disparagingly of Blackstone's "lip-service to natural law." Frederick Pollock, *A Plea for Historical Interpretation*, 39 LAW Q. REV. 163, 165 (1923). Another described Blackstone's invocation of natural law as a "pious afterthought." CARLETON KEMP ALLEN, *LAW IN THE MAKING* 427-28 (5th ed. 1951). For convincing replies, see DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 31-55 (Cambridge U. Press, 1989); Nigel E. Simmonds, *Reason, History and Privilege: Blackstone's Debt to Natural Law*, in ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 200, 202 (1988); John M. Finniss, Note, *Blackstone's Theoretical Intentions*, 12 NAT. L. F. 163 (1967).

Confusion may have arisen from the fact that Blackstone, a champion of Parliamentary supremacy, did not share Sir Edward Coke's view that judges could legitimately disregard legislation that they considered inconsistent with reason or with the law of nature. See, e.g., 1 BLACKSTONE, *Commentaries* *160-61 [Chicago ed. 156-57]. If Parliament were to defy the law of nature (a prospect that Blackstone thought almost inconceivable), the only remedy would lie in the streets rather than in the courts. Cf. 4 *id.* at *82 ("[I]n cases of national oppression the nation has very justifiably risen as one man to vindicate the original contract . . . between the king and his people."); Simmonds, *supra* at 207.

¹⁰⁷ See John Veilleux, *The Scientific Model in Law*, 75 GEO. L.J. 1967 (1987).

¹⁰⁸ See, e.g., Oliver Wendell Holmes, *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583-84 (1873) ("The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest. . . . [I]t is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that . . ."); *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (stating that "the natural outcome of a dominant opinion" must ordinarily prevail).

¹⁰⁹ See JEROME FRANK, *COURTS ON TRIAL* 404 (Princeton Univ. Press ed. 1950) (1949); JEROME FRANK, *LAW AND THE MODERN MIND* 244-45 (1930).

¹¹⁰ See, e.g., Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986

(some of them apparently imagining that *only* observer effects matter¹¹¹); and just as William Blackstone and other lawyers prior to the time of Thomas Kuhn insisted that law is a science,¹¹² legal scholars after Kuhn have spoken of scientific revolutions and paradigm shifts.¹¹³

Sir Isaac Newton, who died when William Blackstone was a child, revolutionized popular images of science.¹¹⁴ Following the *Commentaries*' introduction on why the laws of England merited university study, Blackstone offered the most jurisprudential of his chapters, a chapter entitled "The Nature of Laws in General." This chapter used a Newtonian metaphor to introduce the concept of natural law.¹¹⁵

DUKE L.J. 1; Louis Michael Seidman, *Baby M and the Problem of Unstable Preferences*, 76 GEO. L.J. 1829 (1988); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989). See generally Elise Porter, Note, *The Player and the Dice: Physics and Critical Legal Theory*, 52 OHIO ST. L.J. 1571 (1991).

¹¹¹ See, e.g., Morton J. Horwitz, *The Doctrine of Objective Causation*, in THE POLITICS OF LAW 360, 371 n.10 (David Kairys ed., rev. ed. 1990) (noting Heisenberg's enunciation of the uncertainty principle in 1927 and declaring that "[i]t is important to see that the collapse of causation in the natural sciences was occurring at virtually the same time as *Palsgraf* was decided"); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

¹¹² For one of many examples, see 2 BLACKSTONE, *Commentaries* *2 ("[L]aw is to be considered not only as a matter of practice but also as a rational science."). Like other writers before and after him, Blackstone may have regarded the systematic study of *any* subject as a science.

¹¹³ The scientific revolutions and paradigm shifts sought by lawyers often lie shapeless beyond the horizon. For an example, see ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY 261, 266-68 (1976) (calling for "a metaphysics we do not yet possess").

¹¹⁴ See GALE E. CHRISTIANSON, IN THE PRESENCE OF THE CREATOR: ISAAC NEWTON AND HIS TIMES 319-20, 351-52 (1984). Pope offered this epitaph in about 1731, four years after Newton's death:

NATURE and Nature's laws lay hid in Night:
God said, Let NEWTON be! and all was Light.

ALEXANDER POPE, THE COMPLETE POETICAL WORKS 135 (Henry W. Boynton ed., 1903).

¹¹⁵ Newtonian physics are thought to have colored Blackstone's concept of English constitutional law as well as his concept of natural law. The *Commentaries*' depiction of the English constitution emphasized order, balance and the separation of powers. See, e.g., 1 BLACKSTONE, *Commentaries* *50-52. Blackstone wrote that the king, the lords spiritual and temporal, and the House of Commons "form a mutual check upon each other" and "[l]ike three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either acting by itself would have done but at the same time in a direction partaking of each and formed out of all." 1 *id.* at *154-55.

Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics or mechanics as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior and which the inferior is bound to obey.

Thus when the supreme being formed the universe and created matter out of nothing, he impressed certain principles upon that matter from which it can never depart and without which it would cease to be. When he put that matter into motion, he established certain laws of motion to which all moveable bodies must conform. And to descend from the greatest operations to the smallest, when a workman forms a clock . . . he establishes at his own pleasure certain arbitrary laws for its direction—as that the hand shall describe a given space in a given time—to which law . . . the work [must] conform so long [as] it . . . answers the end of its formation.

. . . .

. . . But laws in their more confined sense . . . which it is our present business to consider . . . denote the rules, not of action in general, but of *human* action or conduct

. . . [Man] should in all points conform to his maker's will.

This will of his maker is called the law of nature. For as God, when he created matter and endowed it with a principle of mobility, established certain rules for the perpetual direction of that motion, so when he created man and endowed him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature . . . and gave him also the faculty of reason to discover the purport of those laws.

. . . These are the eternal, immutable laws of good and evil Such among others are these principles: that we should live honestly, should hurt nobody, and should render to everyone his due, to which three general precepts Justinian has reduced the whole doctrine of law.¹¹⁶

¹¹⁶ 1 *id.* at *38-40 (footnote omitted).

Voltaire also linked Newtonian physics and natural law: “[I]t would be very singular that all nature all the planets should obey eternal laws and that there should be a little animal five feet high who, in contempt of these laws, could act as he

Since at least the thirteenth century, scholars have noted that the term "natural law" has many meanings.¹¹⁷ Some writers have used the phrase to refer to the objectivism about morality associated with many religious faiths; they indicate that natural law comes from the top down. Other writers have treated moral truths as truths about human nature, suggesting that natural law proceeds from the bottom up. Rather than choose between these visions, Blackstone endorsed both. The study of God and the study of human nature led to the same understanding.¹¹⁸

Blackstone observed that God, "a being of infinite power," might "have prescribed [for humanity] whatever laws he pleased," however "unjust or severe."¹¹⁹ As "a being of infinite wisdom," however, God had "inseparably interwoven the laws of eternal justice with the happiness of each individual."¹²⁰ Happiness could be attained only by observing the law of nature, and obedience to this law could not fail to produce human happiness.¹²¹ Emphasizing the close "connection of justice and human felicity," Blackstone declared that the Creator

has not perplexed the law of nature with a multitude of abstracted rules and precepts . . . as some have vainly surmised but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own happiness." This is the foundation of what we call ethics or natural law.¹²²

pleased, solely according to his caprice." VOLTAIRE, *The Ignorant Philosopher*, in THE BEST KNOWN WORKS OF VOLTAIRE 358, 364 (Literary Classics n.d.). Among Enlightenment writers, Voltaire is appropriately regarded as a skeptic, but like David Hume, Thomas Jefferson and other eighteenth-century skeptics, he might pass as a true believer today. Far from scoffing at claims of moral realism, Voltaire wrote that "one morality" is inscribed "in the hearts of all men." VOLTAIRE, PHILOSOPHICAL DICTIONARY 322 (Theodore Besterman trans., Penguin Books 1972) (1764).

¹¹⁷ See ODON LOTTIN, *LE DROIT NATUREL CHEZ SAINT THOMAS D'AQUIN ET SES PRÉDÉCESSEURS* 23 (2d ed. 1931) (quoting JOHANNES TEUTONICUS, *GLOSSA ORDINARIA* D.I.c.7).

¹¹⁸ More than 200 years before Blackstone, John Calvin wrote, "Nearly all the wisdom we possess, that is to say, true and sound wisdom, consists of two parts: the knowledge of God and of ourselves. But, while joined by many bonds, which one precedes and brings forth the other is not easy to discern." 1 JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 35 (Ford Lewis Battles trans., Westminster Press 1960) (1559 ed.).

¹¹⁹ 1 BLACKSTONE, *Commentaries* *40.

¹²⁰ *Id.*

¹²¹ See *id.*

¹²² 1 *id.* at *40-41.

According to Blackstone, the test of whether an action comported with natural law was whether it "tends to man's real happiness . . . or, on the other hand . . . is destructive of man's real happiness."¹²³ Like Socrates, Blackstone saw justice both as an end in itself and as a means to an end—the attainment of human happiness.¹²⁴ The law of nature accorded with both external and internal criteria of value.¹²⁵ Its principles were the same whether one proceeded top down or bottom up.

Apparently reluctant to incorporate all of John Locke's principal natural rights—life, liberty and property—in the Declaration of Independence, Thomas Jefferson substituted the phrase "Life, Liberty and the pursuit of Happiness." Jefferson's phrasing was apparently influenced by Scottish Enlightenment writers who viewed property not as a natural right but as a right created by society.¹²⁶ Although Blackstone, echoing Locke, declared that rights to personal security, liberty and property were accorded by "the immutable laws [of nature],"¹²⁷ Blackstone's understanding of property rights differed from Locke's and closely resembled that of the Scottish Enlightenment.¹²⁸ The nature of property rights sharply divided

¹²³ 1 *id.* at *41.

¹²⁴ In Plato's *The Republic*, Socrates explained that justice is unlike medical treatment (which is a means to an end) or an amusing game (which has no end beyond itself). Justice is a good of the highest order—an end and a means, a good to be valued for itself and for its consequences. See PLATO'S *THE REPUBLIC* 44-45 (B. Jowett trans., Vintage Books 1960).

¹²⁵ Blackstone noted that if human reason were always clear and perfect, the criterion of "real happiness" would be a sufficient guide to the laws of nature. "[I]n compassion to the frailty, the imperfection, and the blindness of human reason," however, Providence had supplemented reason with "an immediate and direct revelation" of divine law in scriptures. 1 BLACKSTONE, *Commentaries* *41-42.

¹²⁶ See GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 217, 229-39 (1978). Although this view of property rights was not limited to writers of the Scottish Enlightenment, it was especially prominent in the works of Lord Kames, Francis Hutcheson, Adam Ferguson, Adam Smith and David Hume. See *id.*; WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT (Istvan Hont & Michael Ignatieff eds., 1983) [hereinafter WEALTH AND VIRTUE]. On the dominant role of Scottish thinkers in Jefferson's education, see WILLS, *supra*, at 167, 177-80 (emphasizing particularly the influence of the Scottish physician William Small, a teacher at the College of William and Mary who Jefferson said "probably fixed the destinies of my life").

¹²⁷ See *infra* text accompanying notes 162-64.

¹²⁸ See Frederick G. Whelan, *Property as Artifice: Hume and Blackstone, in NOMOS XXII: PROPERTY* 101, 101 (J. Roland Pennock & John W. Chapman eds., 1980) ("Hume and Blackstone are fundamentally similar in their manner of conceptualizing and justifying the institution [of property] . . . and in this they stand in marked contrast to Locke."); see also *infra* text accompanying notes 175-90.

thinkers of Jefferson's and Blackstone's era, but the link between natural law and human happiness was a common theme of almost all of them.¹²⁹ The same link had been a theme of Greek philosophers two thousand years before.¹³⁰

When Blackstone and his predecessors spoke of "real happiness," they clearly were not referring to a psychological state of euphoria. Bernard Williams noted that the Greek word *eudaimonia* "is usually translated 'happiness,' but what it refers to . . . is not the same as modern conceptions of happiness. For one thing, it makes sense now to say that you are happy one day, unhappy another, but *eudaimonia* was a matter of the shape of one's whole life."¹³¹ Philosophers such as Socrates and Aristotle sought to address "the desirable state of one's soul." Williams thought the term "well-being" a more suitable rendition of their concept.¹³²

Because the law of nature was divine, Blackstone saw this law as "superior in obligation to any other. 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 . . ."¹³³ Contrary to the perceptions of modern critics, however, Blackstone did not believe that judges or legislators

¹²⁹ See, e.g., 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. 2, ch. 21, § 51, at 217 (London, A. Churchill & A. Manship 1721) (describing "the pursuit of happiness" as "our greatest good" and the "necessity of . . . pursuing true happiness" as "the foundation of our liberty"); DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS sec. 9, pt. 2, at 188 (London, A. Millar 1751) ("The sole trouble [nature] demands is that of just calculation and a steady preference of the greater happiness."); Alexander Pope, *An Essay on Man*, Epistle IV, ll. 309-10 (1732), in 2 THE WORKS OF ALEXANDER POPE 451 (London, John Murray 1871) ("Know then this truth, enough for man to know, 'Virtue alone is happiness below.'"); WILLIAM PALEY, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 43 (Boston, 9th Am. ed. 1818) (1785) ("[Virtue is] the doing good to mankind, in obedience to the will of God, and for the sake of everlasting happiness."); *id.* at 50 ("[W]hat promotes the public happiness or the happiness on the whole is agreeable to the fitness of things, to nature, to reason, and to truth . . ."); *id.* at 55 ("The method of coming at the will of God concerning any action by the light of nature is to inquire into the 'tendency of the action to promote or diminish the general happiness.'"); FRANCIS HUTCHESON, AN ESSAY ON THE NATURE AND CONDUCT OF THE PASSIONS AND AFFECTIONS 208 (London, J. Darby & T. Browne 1728); FRANCIS HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY 118-20 (Glasgow, Robert Foulis 1747). See generally Herbert Lawrence Ganter, *Jefferson's "Pursuit of Happiness" and Some Forgotten Men* (pt. 2), 16 WM. & MARY C. Q. HIST. MAG. 558, 563 (1936) (linking human happiness to natural law as "commonplace in the writings of some of the most influential authors of that day").

¹³⁰ See BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 30-53 (1985).

¹³¹ *Id.* at 34.

¹³² *Id.*

¹³³ 1 BLACKSTONE, *Commentaries* *41.

could use the principles of natural law to derive appropriate answers to all or even most legal questions. Most positive law concerned the "great number of indifferent points in which both the divine law and the natural leave a man at his own liberty but which are found necessary for the benefit of society to be restrained within certain limits."¹³⁴ As Blackstone observed, God was not concerned with whether English law forbade or permitted the export of wool.¹³⁵

Blackstone's view that natural law did not dictate answers to all or most legal questions corresponded to the view of ancient philosophers. Aristotle wrote, "Of political justice, part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent."¹³⁶ The Romans recognized the central distinction between natural and positive law by dividing their law into the *jus naturale* and the *jus civile*.¹³⁷

Blackstone distinguished acts that were *mala in se* (contrary to natural law) from those that were *mala prohibita* (appropriately forbidden although not inherently wrongful).¹³⁸ He distinguished rights and duties imposed by natural law from rights and duties imposed only by positive law. He wrote that "things in themselves indifferent . . . become either right or wrong, just or unjust, duties or misdemeanors according as the municipal legislator sees proper for promoting the welfare of the society and more effectually carrying on the purposes of civil life."¹³⁹

Blackstone's first illustration of this principle indicated the limited scope that he accorded natural law: "[O]ur own common law has declared that the goods of the wife do instantly upon marriage become the property and right of the husband . . . yet that right . . . has no foundation in nature but [is] merely created by the law for the purposes of civil society."¹⁴⁰ Defenders of patriarchal institutions are likely to view these institutions as grounded on fundamental

¹³⁴ 1 *id.* at *42.

¹³⁵ See 1 *id.* at *43.

¹³⁶ ARISTOTLE, *ETHICA NICHOMACHEA* bk. V, § 7, 1 (W.D. Ross trans., Clarendon Press 1925).

¹³⁷ THE INSTITUTES OF JUSTINIAN 1.2.1 (J.B. Moyle trans., Oxford 5th ed. 1913) (1883) ("The laws of every people . . . are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations.").

¹³⁸ See 1 BLACKSTONE, *Commentaries* *54.

¹³⁹ 1 *id.* at *55.

¹⁴⁰ *Id.*

differences between the sexes.¹⁴¹ In addition, Blackstone thought the Bible a divine revelation of natural law,¹⁴² and St. Paul's Letter to the Ephesians declared that "the husband is the head of the wife, even as Christ is the head of the Church."¹⁴³ Blackstone, however, declined to characterize a husband's power over his wife's goods as anything more than a convenient, pragmatic, alterable legal arrangement—an arrangement having "no foundation in nature."

Blackstone noted the tendency to "mistake for nature what we find established by long and inveterate custom."¹⁴⁴ He wrote, for example, that people might "conceive at first view" that the natural right to property included a right to inherited property.¹⁴⁵ Blackstone insisted, however, that all inheritance rules were "creatures of the civil or municipal laws."¹⁴⁶ Laws allowing bequests of property might be "wise and effectual,"¹⁴⁷ but there was "certainly . . . no injustice done to individuals whatever be the path of descent marked out by the municipal law."¹⁴⁸

Blackstone not only saw natural law as limited to a few core principles but also recognized that civil authorities might appropriately determine the boundaries of these principles differently in different places and at different times.¹⁴⁹ Robbery, for example, was contrary to natural law, but Blackstone said that it must be left to the legislature to determine when a claim of right would be a defense to this crime—when, for example, "the seizing [of] another's cattle shall amount to the crime of robbery and [when] it shall be a justifiable action as when a landlord takes them by way of distress for rent."¹⁵⁰

¹⁴¹ See, for example, the description of *In re Goodell*, *supra* note 29.

¹⁴² See *supra* note 125.

¹⁴³ *Ephesians* 5:23 (King James). The preceding verse admonished, "Wives, submit yourselves unto your own husbands, as unto the Lord."

¹⁴⁴ 2 BLACKSTONE, *Commentaries* *11.

¹⁴⁵ *Id.*

¹⁴⁶ 2 *id.* at *12.

¹⁴⁷ 2 *id.* at *11.

¹⁴⁸ 2 *id.* at *211. Indeed, Blackstone maintained that "the permanent right of property vested in the ancestor himself was no *natural* but merely a *civil* right." 2 *id.* at *11. For an explanation of Blackstone's conclusion that even a person's claim to property earned during his lifetime was not a natural right, see *infra* text accompanying notes 175-90.

¹⁴⁹ In Blackstone's words, "[S]ometimes where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong as the laws of the land shall direct." 1 BLACKSTONE, *Commentaries* *55.

¹⁵⁰ *Id.*

Far from believing that natural justice yielded a correct answer to every question of law, Blackstone was a relativist on many issues. He noted that no law varied "more than the right of inheritance under different national establishments" and that diverse inheritance rules persisted even within England.¹⁵¹ Yet Blackstone was untroubled by this variation and saw no violation of the principles of natural law in any of the myriad rules of inheritance.¹⁵²

Blackstone's introductory lecture emphasized that by urging study of the common law, he implied no criticism of the civil law. No one, he said, was more persuaded of the excellence of that law than he,¹⁵³ and he regretted the failure of students of each system to allow "the opposite system that real merit which is abundantly to be found in each."¹⁵⁴ Blackstone regarded both major European legal systems, the common law and the civil law, as notable human achievements. Despite their important differences, both could respect the basic principles of human decency that comprised the natural law.¹⁵⁵

Blackstone in fact relished the study of foreign law. He drew illustrations not only from well known Roman, Continental and canon-law texts but also from the law "which prevailed in Mexico and Peru before they were discovered by the Spaniards,"¹⁵⁶ from Jewish law, from the maxims of "the Goths and the Swedes,"¹⁵⁷ from the laws of ancient Egypt, from "the present laws of the Tartars,"¹⁵⁸ from views currently prevalent "in the duchy of Brabant,"¹⁵⁹ from practices in Venice, Florence, and Portugal and from countless other foreign sources.¹⁶⁰ Like Montesquieu, Blackstone saw climate as an especially important determinant of social institutions. He attributed polygamy, drunkenness and even the jury system in part to geographic circumstances.¹⁶¹

¹⁵¹ 2 *id.* at *12-13.

¹⁵² See *supra* text accompanying notes 145-48.

¹⁵³ See 1 BLACKSTONE, *Commentaries* *5.

¹⁵⁴ 1 *id.* at *19.

¹⁵⁵ See 1 *id.* at *18-20.

¹⁵⁶ BOORSTIN, *supra* note 30, at 43 (quoting 3 BLACKSTONE, *Commentaries* *31).

¹⁵⁷ *Id.* (quoting 1 BLACKSTONE, *Commentaries* *260).

¹⁵⁸ *Id.* at 44 (quoting 2 BLACKSTONE, *Commentaries* *83).

¹⁵⁹ *Id.* (quoting 2 BLACKSTONE, *Commentaries* *428).

¹⁶⁰ See *id.* at 43-44; H.G. Hanbury, *Blackstone in Retrospect*, 66 LAW Q. REV. 318, 325 (1950).

¹⁶¹ See BOORSTIN, *supra* note 30, at 208 n.104.

III. RIGHTS

Blackstone wrote that individuals possess three "absolute rights, . . . vested in them by the immutable laws of nature."¹⁶² These were the rights of personal security ("a person's . . . enjoyment of his life, his limbs, his body, his health, and his reputation"¹⁶³), personal liberty, and private property.¹⁶⁴

When Blackstone called rights absolute, however, he used the word in an odd, attenuated sense. The *Commentaries* distinguished between "absolute" rights, which people possessed prior to the formation of civil society, and "social" or "relative" rights, which existed only in society. For the most part, the purpose of "relative" rights (including the right of access to the courts, the right to petition for the redress of grievances and the right to bear arms) was to preserve or implement "absolute" rights in organized communities. Blackstone did not, however, view rights within political communities as "absolute" in the sense that they were unqualified or unrestricted.

For one thing, a voluntary act of wrongdoing could forfeit an absolute right. The "absolute" right to life was therefore compatible with capital punishment.¹⁶⁵ More important, "absolute" rights were absolute only in a state of nature (which, remarkably, Blackstone recognized had never existed¹⁶⁶):

[E]very man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a purchase Political . . . liberty . . . is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.¹⁶⁷

Rights that vanish whenever "necessary and expedient for the general advantage of the public" seem far from "absolute," but those were the only rights that Blackstone recognized outside an imaginary state of nature. Blackstone wrote of his second "absolute" right:

Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of . . . removing one's person to whatsoever place one's own inclination may direct without imprisonment or

¹⁶² 1 BLACKSTONE, *Commentaries* *124 [Chicago ed. 120].

¹⁶³ 1 *id.* at *128 [Chicago ed. 125].

¹⁶⁴ See 1 *id.* at *128-38 [Chicago ed. 125-134].

¹⁶⁵ See 1 *id.* at *133 [Chicago ed. 129].

¹⁶⁶ See *infra* text accompanying notes 246-48.

¹⁶⁷ 1 BLACKSTONE, *Commentaries* *125 [Chicago ed. 121] (footnote omitted).

restraint *unless by due course of law*. . . . [I]t is a right strictly natural [and] the laws of England have never abridged it *without sufficient cause*. . . .¹⁶⁸

He wrote of the third:

The third *absolute* right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution *save only by the laws of the land*. The original of private property is probably founded in nature, . . . but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man are entirely derived from society and are some of those civil advantages in exchange for which every individual has resigned a part of his natural liberty.¹⁶⁹

Blackstone's view was in fact that in organized communities "all property is derived from society."¹⁷⁰ Only this circumstance explained why a person forfeited her goods to the state upon conviction of a crime. Like other members of society, this person had sacrificed her natural right to property by associating with others in a community:

If therefore a member of any national community violates the fundamental contract of his association by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract, and the state may very justly resume that portion of property or any part of it which the laws have before assigned him.¹⁷¹

Blackstone's concept of rights may seem artificial, confused or even ephemeral. On the one hand, he said that human laws are invalid whenever they are contrary to the law of nature. On the

¹⁶⁸ 1 *id.* at *134 [Chicago ed. 130] (emphasis added).

¹⁶⁹ 1 *id.* at *138 [Chicago ed. 134] (emphasis added). Although Locke insisted more forcefully than Blackstone that the right to private property was grounded in natural law, he too recognized that "in governments the laws regulate the right of property." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 50, at 302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹⁷⁰ 1 BLACKSTONE, *Commentaries* *299 [Chicago ed. 289].

¹⁷¹ *Id.* Blackstone noted that few property owners pause to consider the nature of their rights:

We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why [any of these transfers should confer property rights].

2 *id.* at *2.

other, he said that human laws can appropriately restrict natural rights. Blackstone, moreover, grounded the authority of government to limit natural rights on the transparent fiction that everyone in society had bargained away a portion of her rights by entering into an imaginary contract.

Nevertheless, the concept of natural rights apparently had meaning for Blackstone in two situations. First, these rights indicated the essential nature and needs of human beings. Even if they were not truly unalterable, their preservation remained the central purpose of civil society. Blackstone praised the law of England for upholding natural rights as much as it had.¹⁷² Second, natural rights were retained in civil society until the appropriate authorities restricted them "for the general advantage of the public."¹⁷³ When human law limited natural rights for corrupt, arbitrary or otherwise inadequate reasons, this law was not binding.¹⁷⁴

Blackstone sometimes wrote of property rights in rapturous tones,¹⁷⁵ yet even when he did, he insisted upon the government's

¹⁷² Referring to "relative" as well as "absolute" rights, Blackstone wrote:

[A]ll these rights and liberties it is our birthright to enjoy entire unless where the laws of our country have laid them under necessary restraints—restraints in themselves so gentle and moderate . . . that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do and are restrained from nothing but what would be pernicious either to ourselves or our fellow citizens.

1 *id.* at *144 [Chicago ed. 140].

¹⁷³ See *supra* text accompanying note 167.

¹⁷⁴ See LOCKE, *supra* note 169, § 131, at 353 ("[T]he power of the society or legislature constituted by them can never be supposed to extend farther than the common good.") (emphasis omitted); *id.* §§ 135-36, at 357-58 (because no human being in a state of nature possessed "arbitrary power over the life, liberty, or possession of another," human beings could not delegate such arbitrary power to government; a legislature must "dispense justice and decide . . . rights . . . by promulgated standing laws and known authorized judges"). As Edward S. Corwin observed, "Locke foreshadow[ed] some of the most fundamental propositions of American constitutional law: Law must be general; it must afford equal protection to all; it may not validly operate retroactively; it must be enforced through the courts—legislative power does not include judicial power." EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 68 (1955) (emphasis omitted).

¹⁷⁵ Blackstone's most frequently quoted paean to property is:

There is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property or that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.

power to limit these rights for the benefit of the community.¹⁷⁶ Although Mary Ann Glendon has declared that in Blackstone's "apostrophe to property, we find no ifs, ands, or buts,"¹⁷⁷ Blackstone's ifs, ands and buts seem almost to swallow the right. Consider these examples of rhapsodizing rights while qualifying them significantly:

So great . . . is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public, but the law permits no man or set of men to do this without consent of the owner of the land. . . . In this and similar cases *the legislature alone* can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner but

2 BLACKSTONE, *Commentaries* *2. As Frederick G. Whelan has observed, this statement is misleading when quoted out of context, as it almost invariably is. See Whelan, *supra* note 128, at 118. Blackstone, in fact, noted many situations in which landowners of his era had no right to exclude others from their property. For example, anyone was entitled to enter private property to destroy "ravenous beasts of prey" like badgers and foxes, and the poor were entitled to enter agricultural land to glean leavings following a harvest. 3 BLACKSTONE, *Commentaries* *212-13.

Robert C. Ellickson, after quoting Blackstone out of context, see Ellickson's *Property in Land*, 102 YALE L.J. 1315, 1317 (1993), used the term "Blackstonian" to denote

a pristine package of private entitlements in land that involves:

[1] ownership by a single individual . . .

[2] in perpetuity

[3] of a territory demarcated horizontally by boundaries drawn upon the land, and extending from there vertically downward to the depths of the earth and upwards to the heavens

[4] with absolute rights to exclude would-be entrants

[5] with absolute privileges to use and abuse the land, and

[6] with absolute powers to transfer the whole (or any part carved out by use, space, or time) by sale, gift, devise, descent, or otherwise.

Id. at 1362-63. Ellickson did recognize that his usage was "most uncharitable to Blackstone, who would have admitted that his [statement] was hyperbolic." *Id.* at 1362 n.237. Other prominent writers have omitted this qualification. See, e.g., MARGARET JANE RADIN, REINTERPRETING PROPERTY 131 (1993).

¹⁷⁶ See Whelan, *supra* note 128, at 118-20; Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67, 69 (1985) ("[When Blackstone] calls property an 'absolute' right, he does not mean that government—or at least the legislature—is without power to remold the historically conditioned and socially recognized rights of the individual in property.").

¹⁷⁷ GLENDON, *supra* note 31, at 23. Daniel Boorstin maintained that Blackstone saw property as "a liberty which was truly absolute, a right subordinate to none, and inviolable. When we consider property, we are . . . approaching the high altar of Blackstone's legal theology." BOORSTIN, *supra* note 30, at 166.

by giving him a full indemnification and equivalent for the injury thereby sustained. . . .

....

Nor is this the only instance in which the law of the land has postponed even public necessity to the *sacred and inviolable* rights of private property. For no subject of England can be constrained to pay any aids or taxes even for the defense of the realm or the support of government but such as are imposed by his own consent or that of his representatives in parliament.¹⁷⁸

Blackstone offered an historical account of the development of private property, one that attributed an individual's right to property to pragmatic concerns rather than to the law of nature.¹⁷⁹ According to Blackstone, the right to property grew out of humanity's God-given dominion over the things of the earth. In that sense, property had a natural foundation. Moreover, the "general notions of property" set forth in the Bible at one time might have been "sufficient to answer all the purposes of human life."¹⁸⁰

As society developed, however, the undifferentiated "communion of goods"¹⁸¹ suggested by Biblical accounts of property ownership failed to provide adequate incentives for production. Blackstone maintained that a person would not construct a dwelling or sew a suit of clothes "if as soon as he walked out of his tent or pulled off his garment, the next stranger who came by would have a right to inhabit the one and to wear the other."¹⁸²

Similarly, the common ownership of large tracts of land might have been suitable as long as hunter-gatherers could exhaust the resources of one parcel and move on to the next. Nevertheless:

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit without encroaching upon former occupants; and by constantly occupying the same individual

¹⁷⁸ 1 BLACKSTONE, *Commentaries* *139-40 [Chicago ed. 135] (emphasis added).

¹⁷⁹ See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 20 (1981); Hovenkamp, *supra* note 35, at 662-64.

¹⁸⁰ 2 BLACKSTONE, *Commentaries* *3.

¹⁸¹ *Id.*

¹⁸² 2 *id.* at *4. Blackstone's view of the development of property rights was not original. Similar accounts can be found a century or more earlier in the writings of Samuel Pufendorf and Hugo Grotius and even, in some respects, in the still earlier work of Thomas Aquinas. See Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations: An Introductory Essay*, in *WEALTH AND VIRTUE*, *supra* note 126, at 1, 26-33 (outlining Aquinas', Grotius' and Pufendorf's conceptions of the sources of property rights); see also THOMAS A. HORNE, *PROPERTY RIGHTS AND POVERTY: POLITICAL ARGUMENT IN BRITAIN, 1605-1834*, at 9-40 (1990).

spot, the fruits of the earth were consumed and its spontaneous produce destroyed without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage, but who would be at the pains of tilling it if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not therefore a separate property in lands as well as moveables been vested in some individuals, the world must have continued a forest¹⁸³

Blackstone wrote, "Necessity begat property; and in order to ensure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants—states, government, laws, punishments" ¹⁸⁴ Blackstone's account of

¹⁸³ 2 BLACKSTONE, *Commentaries* *7; cf. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1248 (1968) ("As the human population has increased, the commons has had to be abandoned in one aspect after another."); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

Blackstone's view of the development of land ownership (portraying a general progression from common access to private ownership during periods of cultivation to private ownership more or less in fee) corresponds to modern anthropological findings. Compare 2 BLACKSTONE, *Commentaries* *2-10 with Ellickson, *supra* note 175, at 1365-71, 1398. Some theorists dispute Blackstone's claim that private ownership enhances productivity. See, e.g., Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 3 (J. Roland Pennock & John W. Chapman eds., 1982) ("[N]ot even a presumptive preference for the rudiments of private property . . . is obtainable by economic reason from empirically verified premises."). History, however, appears to validate Blackstone's economic claim.

Robert Ellickson notes, for example, that in the Jamestown and Plymouth colonies and later in Salt Lake City, "settlers started with group ownership of land, but after a period began parcelling out plots to individuals and households, a move that improved agricultural productivity." Ellickson, *supra* note 175, at 1341. In Jamestown's early years, settlers threatened with famine and starvation were found shirking agricultural responsibilities while at "their daily and usuall workes, bowling in the streetes." *Id.* at 1337 (quoting RALPH HAMOR, A TRUE DISCOURSE OF THE PRESENT STATE OF VIRGINIA 26 (Va. State Library 1957) (1615)). The Hutterite colonies of the United States and the kibbutzim of Israel are enduring and productive communes, see *id.* at 1346-48, but their success is attributable to "a culture of watchfulness" that sacrifices "liberty, privacy, and self-determination." *Id.* at 1352. Departures from these communes have been frequent. See, e.g., *id.* at 1361. Most American religious communes of the nineteenth century and most communes of the Woodstock era "fizzled out" within a few years. *Id.* at 1359. "Unwashed dishes were the paradigmatic problem for Woodstock Era communes, which typically had difficulty organizing work tasks." *Id.* at 1349 n.158. In short, the common ownership of land often has exhibited the instability that Blackstone depicted. See *id.* at 1335-62 (reviewing the histories of various communal societies).

¹⁸⁴ 2 BLACKSTONE, *Commentaries* *8. Not all of Blackstone's contemporaries were

the development of private property reveals the basis of his judgment that "all property is derived from society."¹⁸⁵ In Blackstone's quasi-historical tale, society had abandoned collective ownership of the means of production and had turned to private ownership because, like the leaders of Eastern European nations in the late twentieth century, it had concluded that collective ownership did not work.

In Blackstone's view, society had created the right to private property to encourage greater production, and society might qualify and limit that right in order to promote other objectives. One qualification, moreover, was required by a natural right predating society. Blackstone saw the redistribution of wealth to the poor as an incident of the natural right to life:

The law not only regards life and member and protects every man in the enjoyment of them but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community¹⁸⁶

so upbeat about this development. Jean-Jacques Rousseau declared:

The first person who, having fenced off a plot of ground, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared by someone who, uprooting the stakes or filling in the ditch, had shouted to his fellow-men: Beware of listening to this impostor; you are lost if you forget that the fruits belong to all and the earth to no one!

JEAN-JACQUES ROUSSEAU, *Discourse on the Origins and Foundations of Inequality Among Men*, in *THE FIRST AND SECOND DISCOURSES* 141-42 (Roger D. Masters ed. & Judith R. Masters trans., 1964) (1754).

¹⁸⁵ 1 BLACKSTONE, *Commentaries* *299 [Chicago ed. 289].

¹⁸⁶ 1 *id.* at *127. Blackstone complained that "Justinian's collection" had violated this principle by rejecting some edicts of the Emperor Constantine. These edicts had required members of the public to care for children whose parents were unable to do so. See 1 *id.* at *127-28. Blackstone recognized, moreover, that in England the mechanism that implemented the natural duties of the wealthy and the natural rights of the poor was "tax-financed public assistance." Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 46 (1986); see also 4 BLACKSTONE, *Commentaries* *32.

Blackstone also recognized the creation of property in things that have "only a mental existence." 2 *id.* at *20. For example, a creditor's share of the national debt was a "new species of property" that could be transferred although it existed "only in name, in paper, in public faith" 1 *id.* at *316.

Like John Locke,¹⁸⁷ Adam Smith¹⁸⁸ and other Enlightenment thinkers,¹⁸⁹ Blackstone should not be mistaken for a twentieth-

¹⁸⁷ Locke's view of the rights of the poor was similar to Blackstone's:

God has not left one man so to the mercy of another that he may starve him if he please. God, the Lord and Father of all, has given no one of his children such a property in . . . the things of this world but that he has given his needy brother a right to the surplusage of his goods so that it cannot justly be denied him when his pressing wants call for it. . . . As justice gives every man a title to the product of his honest industry . . . so charity gives every man a title to so much out of another's plenty as will keep him from extreme want where he has no means to subsist otherwise, and a man can no more justly make use of another's necessity to force him to become his vassal by withholding that relief God requires him to afford . . . than he that has more strength can seize upon a weaker . . . and with a dagger at his throat offer him death or slavery.

LOCKE, *supra* note 169, § 42, at 170 (emphasis omitted).

As Thomas Grey noted, not only Locke but also Hugo Grotius and Samuel Pufendorf had taken the same position before Blackstone. In the "conflict between property and subsistence," the consensus for centuries had been that "every person has a right to have basic material needs met, a right that in cases of necessity operates as a lien upon the property of others." Grey, *supra* note 186, at 46 (citing HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 193 (Francis W. Kelsey trans., 1925)); 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM* 301-06 (C.H. Oldfather and W.T. Oldfather trans., 1934) (photo. reprint 1995) (1688)); see also EMMERICH DE VATTTEL, *THE LAW OF NATIONS* lix (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson 1852) (1758) (describing one's obligation to "do for the others everything which their necessities require and which he can perform without neglecting the duty that he owes to himself" and calling this obligation "a law which all men must observe in order to live in a manner consonant to their nature and conformable to the views of their common Creator—a law which our own safety, our happiness, our dearest interests ought to render sacred to every one of us"); WILLIAM PALEY, *PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 143 (9th Am. ed., Boston, West & Richardson 1818) (1787) (describing the duty "to bestow relief upon the poor" as "founded in the law of nature"), *microprinted on* American Antiquarian Society, Early American Imprints, 2d Series, No 45200 (Readex Microprint). The position of Enlightenment writers on the natural rights of the poor and the natural duties of the wealthy also was the common position of medieval writers, including Aquinas. See BRIAN TIERNEY, *MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND* 37-38 (1959) ("[T]he canonists . . . believed that the poor had a *right* to be supported from the superfluous wealth of the community."); Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations: An Introductory Essay*, in *WEALTH AND VIRTUE*, *supra* note 126, at 1, 26-27 (discussing Aquinas' views). See generally HORNE, *supra* note 182, at 39-40; STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 37 (1995) ("Spinoza's assertion that 'the care of the poor is incumbent on the whole of society' was echoed by every major liberal theorist."); Luke 3:11 (King James) ("He that hath two coats, let him impart to him that hath none, and he that hath meat, let him do likewise.").

¹⁸⁸ See Peter Stein, *Adam Smith's Jurisprudence—Between Morality and Economics*, 64 CORNELL L. REV. 621, 622, 624 (1979).

¹⁸⁹ See Stephen Holmes, *The Secret History of Self-Interest*, in *BEYOND SELF-INTEREST* 267, 268 (Jane J. Mansbridge ed., 1990) (describing "the incredible finesse with which

century libertarian.¹⁹⁰ Blackstone recognized positive as well as negative rights, and although he did call a few rights "absolute," he plainly did not mean this word in the way that modern readers are likely to understand it. To view the author of the *Commentaries* as a natural rights zealot is as unjustified as it is commonplace.

IV. THE ROLE OF JUDGES

In 1961, the United States Supreme Court held in *Mapp v. Ohio* that state courts are required to exclude from criminal trials any evidence seized in violation of the Constitution.¹⁹¹ In 1965, in *Linkletter v. Walker*, the Court declared that it would apply the rule of *Mapp* only prospectively; defendants who had been "finally" convicted on the basis of unlawfully seized evidence prior to the Court's 1961 ruling were entitled to no relief.¹⁹² A reader of the *Linkletter* opinion might have concluded that the issue before the Court was whether it would admit an obvious truth—that it had "made" new law in *Mapp* and had not "discovered" old law. At long last, the Court had decided to be honest.

A reader of the Court's opinion also might have concluded that a long-dead formalist would have opposed the Court's result. William Blackstone, the Court wrote, "is always cited as the foremost exponent of the declaratory theory" that judges find law rather than make it.¹⁹³ The Court offered the historical judgment that "[t]he Blackstonian view ruled English jurisprudence and cast its shadow over our own."¹⁹⁴ Quoting the *Commentaries*, it wrote, "Blackstone

Smith and his contemporaries analyzed the human psyche" and lamenting "the pitiful impoverishment that befell . . . when Marxism and liberal economics conspired to assert the supremacy of interest").

¹⁹⁰ See *infra* notes 236-79 and accompanying text.

¹⁹¹ See 367 U.S. 643, 656-57 (1961).

¹⁹² See 381 U.S. 618, 636-40 (1965).

¹⁹³ *Id.* at 623 & n.7. Scholars have repeatedly attributed the "declaratory theory" to Blackstone. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1758-59 (1991) (concluding, after attributing the declaratory theory to Blackstone, "It would be only a slight exaggeration to say that there are no more Blackstonians"); Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 58-60 (1965); Russell L. Weaver, *Retroactive Regulatory Interpretations: An Analysis of Judicial Responses*, 61 NOTRE DAME L. REV. 167, 172-74 (1986).

¹⁹⁴ *Linkletter*, 381 U.S. at 624.

stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'¹⁹⁵

The Court omitted language that appeared in the *Commentaries* immediately after the language it quoted:

Yet this rule admits of exception where the former determination is most evidently contrary to reason, much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law* . . .¹⁹⁶

This passage presented the "declaratory theory" with a wink and a nod. Blackstone's language appeared to treat the "declaratory theory" as a fiction designed to indicate continuity with the past even when innovation had plainly occurred.¹⁹⁷ Even more clearly, the passage offered the "declaratory theory" only as a description of judicial practice and not as a statement of Blackstone's own position on the legitimate role of judges. The passage declared that a judge's duty to adhere to old law was subject to "exception"; judges disregarded old law when it was "most evidently contrary to reason," when it was "contrary to the divine law," and when it was "manifestly absurd or unjust."

Contrary to the images that dominate popular views of legal history inside and outside the legal profession, Justice Holmes and the legal realists did not invent the notion that law and legal institutions evolve and adapt to new circumstances.¹⁹⁸ This article has noted Blackstone's view that the right to private property in land developed historically as a result of the transformation from a hunting-gathering to an agricultural society.¹⁹⁹ When Blackstone focused on more recent English history, he suggested not only that the common law had changed over time but also that the law's diverse historical sources had given it strength:

¹⁹⁵ *Id.* at 622-23 (quoting 1 BLACKSTONE, *Commentaries* *69).

¹⁹⁶ 1 BLACKSTONE, *Commentaries* *69-70.

¹⁹⁷ Consider Blackstone's use of the word "pretend," and suppose that he had altered the placement of this word just slightly: "Even in such cases, the subsequent judges pretend not to make a new law but to vindicate the old one from misrepresentation."

¹⁹⁸ See, for example, the description of St. George Tucker's edition of Blackstone's *Commentaries*, in the text, *supra*, accompanying notes 54-78.

¹⁹⁹ See *supra* text accompanying notes 179-85.

Our ancient lawyers . . . insist . . . [that our] customs are as old as the primitive Britons . . . This may the case as to some, but in general . . . this assertion must be understood with many grains of allowance and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another. . . . [T]he Romans, the Picts, the Saxons, the Danes, and the Normans . . . must have insensibly introduced and incorporated many of their own customs with those that were before established, thereby in all probability improving the texture and wisdom of the whole by the accumulated wisdom of diverse particular countries. Our laws, saith Lord Bacon, are mixed as our language; and as our language is so much the richer, the laws are the more complete.

And indeed our antiquarians and first historians do all positively assure us that our body of laws is of this compounded nature.²⁰⁰

Blackstone began his treatment of every subject in the *Commentaries* with an historical introduction,²⁰¹ and he explained every crime by describing the stages of its growth.²⁰² He titled his final chapter "Of the Rise, Progress, and Gradual Improvements of the Laws of England."²⁰³ Daniel Boorstin devoted a chapter of his book on the *Commentaries* to Blackstone's many claims of evolution in English law in response to changing needs.²⁰⁴ Adding to the claims described in the chapter's text, Boorstin recited forty-five more in a footnote.²⁰⁵

²⁰⁰ 1 BLACKSTONE, *Commentaries* *64. Earlier works recognizing the diverse historical sources of English law include ROBERT WISEMAN, *THE LAW OF LAWS* 180 (London, R. Royston 1664) ("[T]he laws of this Nation are but a mixture and a composition" derived from the laws of the Romans, Saxons, Danes and Normans) and THOMAS WOOD, *A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW* iv-xii (3d ed., London, Richard Sare 1721) ("All this together make up our *Common Law*. . . . For the whole is a composition of the *Feudal*, *Civil*, and *Canon Laws*, and its *Definitions*, *Divisions*, and *Maxims* are drawn out of one of those three Laws.").

²⁰¹ See BOORSTIN, *supra* note 30, at 36.

²⁰² See *id.* at 37. Explaining why he searched so "highly into the antiquities of our English jurisprudence," Blackstone wrote:

[S]urely no industrious student will imagine his time misemployed when he is led to consider that the obsolete doctrines of our laws are frequently the foundation upon which what remains is erected and that it is impracticable to comprehend many rules of the modern law in a scholarlike scientific manner without having recourse to the ancient.

2 BLACKSTONE, *Commentaries* *44. Sir William Holdsworth called the *Commentaries* "the best history of English law which had yet appeared." 12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 725 (1938).

²⁰³ 4 BLACKSTONE, *Commentaries* *407-43 [Chicago ed. 400-36].

²⁰⁴ See BOORSTIN, *supra* note 30, at 62-84.

²⁰⁵ See *id.* at 213 n.65. Blackstone noted the role of legal fictions in the

Although the *Commentaries* for the most part cheered English law,²⁰⁶ the work's final paragraph declared, "Nor have its faults been concealed from view, for faults it has, lest we should be tempted to think it of more than human structure."²⁰⁷ Blackstone noted that the rules of special pleading had "been frequently perverted to the purposes of chicane and delay."²⁰⁸ He observed that part of the law of forfeiture had originated "in the blind days of popery" for the purpose of purchasing religious masses for the dead; this arcane law had developed from a "humane superstition."²⁰⁹

Although the least attractive aspect of the *Commentaries* may be the book's fulminations against Catholicism, Blackstone agreed with Montesquieu that, judged on their face, England's "laws against the papists" did "all the hurt that [could] possibly be done in cold blood."²¹⁰ These laws would be "difficult to excuse" if "exerted to their utmost rigor."²¹¹

Just as Oliver Wendell Holmes noted that legal doctrines, like "the clavicule in the cat," sometimes survive "long after the use they

development of law. He wrote, "[T]hese fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful" 3 BLACKSTONE, *Commentaries* *43. Among the propositions that Blackstone viewed as fictions was the central claim of feudal land law that "the king is the universal lord and original proprietor of all lands in his kingdom." 2 *id.* at *51. He also noted that "the mercy of juries will often make them strain a point and bring in larceny to be under the value of twelvepence when it is really of much greater value." This nullification of the death penalty for theft through "pious perjury" did "not at all excuse our common law . . . from the imputation of severity but rather strongly confesses the charge." 4 *id.* at *238 [Chicago ed. 239].

²⁰⁶ In 1881, a judicial opinion described Blackstone as "the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of laws." *In re Goodman's Trusts*, 17 Ch. D. 266, 296 (1881) (Eng.).

²⁰⁷ 4 BLACKSTONE, *Commentaries* *443 [Chicago ed. 436].

²⁰⁸ 3 *id.* at *305-06.

²⁰⁹ 1 *id.* at *300 [Chicago ed. 290]; see also *United States v. United States Coin & Currency*, 401 U.S. 715, 720-21 (1971) (Harlan, J.) (modifying Blackstone's language and perhaps transforming his meaning: "Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism.") (footnote omitted). The law to which Blackstone referred required the forfeiture of personal property. Revenue-hungry American legislatures recently have extended this archaic law to require the forfeiture of real estate as well. See, e.g., 18 U.S.C. § 1963(b)(1) (1994) (RICO forfeiture); 21 U.S.C. § 853(b)(1) (1994) (CCE forfeiture); FL. STAT. ANN. §§ 895.05(1)(a), (2)(a) (West 1994); see also *Bennis v. Michigan*, 116 S. Ct. 994, 1001 (1996) (upholding the forfeiture of a wife's interest in a jointly owned automobile after her husband had sex with a prostitute in the vehicle).

²¹⁰ 4 BLACKSTONE, *Commentaries* *57 [Chicago ed. 56].

²¹¹ *Id.* [Chicago ed. 56-57].

once served is at an end and the reason for them has been forgotten,"²¹² Blackstone complained that the defects of English law often were attributable to "too scrupulous an adherence to some rules of the ancient common law when the reasons have ceased upon which those rules were founded."²¹³ For example, Blackstone observed that the use of wax seals to solemnize documents had begun because most Normans were illiterate and unable to write their own names—"which custom continued when learning had made its way among them though the reason for doing it had ceased."²¹⁴ Blackstone urged many law reforms—notably, creating a system for recording wills and deeds,²¹⁵ expanding the right to counsel,²¹⁶ restricting the death penalty,²¹⁷ abolishing the doctrine that the bloodline of a felon is corrupted,²¹⁸ and reforming England's game laws,²¹⁹ inheritance laws²²⁰ and poor laws.²²¹

²¹² OLIVER WENDELL HOLMES, *THE COMMON LAW* 31 (Mark DeWolfe Howe ed., 1963).

²¹³ 4 BLACKSTONE, *Commentaries* *3.

²¹⁴ 2 *id.* at *306.

²¹⁵ See 2 *id.* at *342-43.

²¹⁶ See 4 *id.* at *355-56 [Chicago ed. 349-50].

²¹⁷ Blackstone wrote:

It is a melancholy truth that among the variety of actions which men are daily liable to commit no less than 160 have been declared by act of Parliament to be felonies without benefit of clergy or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths and either acquit the guilty or mitigate the nature of the offense; and judges, through compassion, will respite one half of the convicts and recommend them to the royal mercy. . . . [I]f unexpectedly the hand of justice overtakes [the hardened offender], he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws which long impunity has taught him to condemn.

4 *id.* at *18-19.

Noting that Elizabeth and Catherine II of Russia had never inflicted capital punishment in any case and that Catherine had proposed its formal abolition, Blackstone asked, "Was the vast territory of all the Russias worse regulated under the late empress Elizabeth than under her more sanguinary predecessors? Is it now under Catherine II less civilized, less social, less secure?" 4 *id.* at *10. In language that might caution the architects of late twentieth-century crime legislation, the *Commentaries* noted that "under the [Roman] emperors severe punishments were revived; and then the empire fell." 4 *id.* at *17.

²¹⁸ See 2 *id.* at *256.

²¹⁹ See 4 *id.* at *416 [Chicago ed. 409]; see also 4 *id.* at *173-75. Blackstone's criticism of the game laws undoubtedly incurred the displeasure of the English gentry who "were to regard [these laws] as sacred for many years after Blackstone's death." Hanbury, *supra* note 160, at 344.

²²⁰ See 2 BLACKSTONE, *Commentaries* *233.

²²¹ See 1 *id.* at *365 [Chicago ed. 353].

Grant Gilmore attributed to Blackstone the view that the common law had reached a state at which it needed no further development.²²² Even apart from Blackstone's advocacy of specific reforms, however, the odds seem strongly against this hypothesis. Blackstone was a friend, political crony and judicial (and Parliamentary) associate of the most activist judge in English history, Lord Mansfield, Chief Justice of the Court of King's Bench.²²³ Mansfield, before his accession to the bench, recommended Blackstone for the professorship of Roman law that Oxford denied him,²²⁴ and he then urged Blackstone to deliver the private lectures that formed the basis of the *Commentaries*.²²⁵ Blackstone substantially revised his initial lectures before publication to take account of Mansfield's rulings and to reiterate some of Mansfield's controversial views.²²⁶ In 1766, Blackstone reported that Mansfield had "done him the honor to mark out a few of the many errors in Book One" of the *Commentaries*,²²⁷ and shortly thereafter, Mansfield unstintingly praised Blackstone's work.²²⁸

Blackstone also criticized the conflicting rules of law and equity: "[T]here cannot be a greater solecism than that in two sovereign independent courts established in the same country, exercising concurrent jurisdiction . . . over the same subject-matter, there should exist . . . two different rules of property clashing with or contradicting each other." 3 *id.* at *441.

²²² Gilmore wrote:

Blackstone's celebration of the common law of England glorified the past: without quite knowing what we were about, he said, we have somehow achieved the perfection of reason. Let us preserve, unchanged, the estate which we have been lucky enough to inherit. Let us avoid any attempt at reform—either legislative or judicial

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 5 (1977); see also STEPHEN YEAZELL ET AL., *CIVIL PROCEDURE* 366 (3d ed. 1992) ("Blackstone . . . suggested that English law had attained a state of balanced perfection that made any change dangerous."); Kennedy, *supra* note 9, at 371.

²²³ One of Mansfield's promoters declared that he had done "more for the jurisprudence of this country than any legislator or judge or author who has ever made the improvement of it his object." 2 JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 566 (Boston, John Murray 1850), *quoted in* LIEBERMAN, *supra* note 106, at 88. A detractor protested that Mansfield had "made it the study and practice of his life to undermine and alter the whole system of jurisprudence in the Court of King's Bench." JUNIUS, *Letter to the Printer of the Public Advertiser* (Oct. 5, 1771), *in* THE LETTERS OF JUNIUS 249, 254 (C.W. Everett ed., 1927).

²²⁴ See Waterman, *supra* note 80, at 550.

²²⁵ See Holdsworth, *supra* note 33, at 262.

²²⁶ See W.S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 11 (1929).

²²⁷ Waterman, *supra* note 80, at 551.

²²⁸ When asked in about 1767, what books he would recommend to a young man studying for the bar, Mansfield replied:

Gilmore saw the *Commentaries* as a conservative reaction to the activism of eighteenth-century English judges,²²⁹ and to some extent he may have been right. Although Mansfield's judgments were reversed no more than a half-dozen times during his thirty-two years on the bench,²³⁰ Blackstone himself delivered an opinion on appeal in one of the cases rejecting a Mansfield innovation.²³¹ In judging the extent of Blackstone's adherence to the "declaratory theory," however, the practices of his times are relevant. In Gilmore's words: "As anyone who has the slightest familiarity with late eighteenth-century case law knows, the judges were quite consciously aware of what they were doing: they were making law, new law, with a sort of joyous frenzy."²³²

Till of late I could never with any satisfaction to myself answer such a question; but since the publication of Mr. Blackstone's *Commentaries*, I can never be at a loss. There your son will find analytical reasoning, diffused in a pleasing and perspicuous style. There he may inhale 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 disgusted and disheartened many a Tyro, but who cannot fail to please in the modern attire in which he is now decked out.

Dicey, *supra* note 36, at 287 (emphasis omitted).

²²⁹ See GILMORE, *supra* note 222, at 5. Thomas Jefferson, by contrast, disparaged Blackstone's "Mansfieldism." See *supra* text accompanying notes 48-49.

²³⁰ Telephone Interview with James Oldham, author of *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* (1992) (Nov. 17, 1994); cf. Waterman, *supra* note 80, at 556 n.52 (stating that Mansfield was reversed in only two cases).

²³¹ See *Perrin v. Blake*, 98 Eng. Rep. 355 (K.B. 1770). Blackstone himself, however, does not appear to have rejected Mansfield's claim that a testator could defeat the Rule in Shelley's Case by making his intention clear. Blackstone merely disagreed with Mansfield's conclusion that the testator's intent had been adequately shown on the facts of the case. See *id.* at 357.

Shortly before his appointment to the bench, Blackstone appeared as counsel in another case that led to the reversal of a Mansfield judgment on appeal. In *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769), Mansfield and other members of his divided court accepted Blackstone's argument that the common law afforded authors a perpetual copyright that continued even after an express statutory copyright had expired. See *id.* at 202. The House of Lords rejected Mansfield's and Blackstone's position. See LIEBERMAN, *supra* note 106, at 97-98.

²³² GILMORE, *supra* note 222, at 6-7. During the eighteenth century, a judge could declare in an opinion, "Many of the old cases are strange and absurd. So also are some of the modern ones." *Id.* at 7 (quoting the concurring opinion of Justice Willmot in *Pillans v. Van Mierop*, 3 Burr. 1663, 1671, 97 Eng. Rep. 1035 (K.B. 1765)).

Edmund Burke, writing of "the growing melioration of the law," urged that "its liberality keep pace with the demands of justice and the actual concerns of the world." Edmund Burke, *Report from the Committee of the House of Commons Appointed to Inspect the Lords' Journals in Relation to Their Proceeding on the Trial of Warren Hastings, Esquire* (1794), in 11 *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 83 (Boston,

Blackstone's respect for adhering to past decisions unless "the former determination is most evidently contrary to reason"²³³ stemmed in part from his recognition that courts are not the only sources of legal reform. He wrote:

Remedial statutes are those which are made to supply such defects . . . in the common law as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned judges, or from any other cause whatsoever.²³⁴

He added:

There are three points to be considered in the construction of all remedial statutes—the old law, the mischief, and the remedy: That is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy.²³⁵

Although Blackstone may have viewed legislatures rather than courts as the principal source of legal innovation, he did not deny the need for innovation. The claim that Blackstone regarded law as fixed for all time, unchangeable and merely awaiting discovery, is a calumny.

Little Brown, 9th ed. 1884). He declared:

[A]s commerce with its advantages and its necessities opened a communication more largely with other countries, as the law of nature and nations . . . came to be cultivated . . . , as new views and combinations of things were opened, the antique rigor and overdone severity [of the common law] gave way to the accommodation of human concerns for which rules were made and not human concerns to bend to them.

Id. at 76-77, quoted in LIEBERMAN, *supra* note 106, at 93.

²³³ 1 BLACKSTONE, *Commentaries* *69.

²³⁴ 1 *id.* at *86.

²³⁵ 1 *id.* at *87. Blackstone noted that judicial decrees might contradict one another "either because succeeding judges may not be apprised of the prior adjudication, or because they may think differently from their predecessors, or because the same arguments did not occur formerly as at present, or . . . because of the natural imbecility and imperfection that attends all human proceedings." 3 *id.* at *327-28. In this situation, he said, "the legislature . . . may, and frequently does, intervene . . . and . . . determines by a declaratory statute how the law shall be held for the future." 1 *id.* at *328.

V. THE VIRTUES OF COMMUNITY

Blackstone, like every other Enlightenment thinker (and like most post-Enlightenment thinkers too), is classified today as a "liberal."²³⁶ Liberals are disfavored by scholars who write such things as: "[T]he political doctrine of liberalism does not acknowledge communal values";²³⁷ or "Th[e] notion of the political community as a common project is alien to the modern liberal individualist world";²³⁸ or "Communitarian thinkers reject liberalism as reflecting an impoverished vision of the self, one that discounts our participation in common traditions and practices and ignores the fulfillment that individuals can achieve through citizenship."²³⁹ These scholars criticize liberalism for treating individuals as "epistemologically prior" to the community.²⁴⁰

Enlightenment theorists celebrated the growth of personal liberty that had flowed from the breakup of feudalism (a system that for centuries had employed rhetoric about community and common traditions to romanticize what Blackstone, with only slight exaggeration, described as a system of slavery²⁴¹). As Blackstone's work

²³⁶ See, e.g., Kennedy, *supra* note 9, at 216-17 ("[Liberalism] became, through works like Blackstone's *Commentaries*, a mode of legal thought."). Although Kennedy painted Blackstone as a liberal, he also portrayed him as a transitional figure straddling liberalism and feudalism. Blackstone sometimes invoked liberal premises to rationalize inegalitarian institutions, laws and practices of which other Enlightenment writers disapproved (and that in fact were waning at the time of Blackstone's lectures). See, e.g., *id.* at 293, 307, 350, 353. That Blackstone sought to explain and justify a legal system less liberal than ours is unmistakable. Why this fact reveals the inadequacy of our customary ways of thinking about law, as Kennedy repeatedly indicated that it did, is unclear.

²³⁷ ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 76 (1975).

²³⁸ ALASDAIR MACINTYRE, *AFTER VIRTUE* 156 (2d ed. 1984).

²³⁹ Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 682 (1988).

²⁴⁰ MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 133 (1982); see also MACINTYRE, *supra* note 238, at 236, 250; MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 151 (1990); UNGER, *supra* note 237, at 81; Robin West, *The Supreme Court 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 75-76 (1990) ("[L]iberal legalis[m] demands nothing of the citizen beyond self-regarding behavior.").

²⁴¹ Compare 4 BLACKSTONE, *Commentaries* *411, 418 (stating that during the feudal period, apart from the clergy, the nobility and a small commercial class, the entire population "groaned" under "absolute . . . slavery"), and 4 *id.* at *412 ("The ultimate property of all lands . . . [was] vested in the king or by him granted out to his . . . favorites who, by a gradual progression of slavery, were absolute vassals to the crown and . . . absolute tyrants to the commons."), and 2 *id.* at *76 ("A slavery so complicated and so extensive as this, called aloud for a remedy . . ."), with ALBERT BORGMANN, *CROSSING THE POSTMODERN DIVIDE* 21 (1992) ("The achievement of the Middle Ages rests like a shadow of reproach on modernity . . . Chivalry and courtesy, community

illustrates, however, these theorists' regard for liberty did not diminish their regard for the virtues of community, sharing and citizenship.²⁴² If, as Duncan Kennedy has argued, the principal mission of the *Commentaries* was to mediate what Kennedy described as the "fundamental contradiction"—the tension between a person's desire for association with others and his fear of the power that others may gain over him²⁴³—Blackstone's book did an admirable job of mediating.²⁴⁴

and celebration, authority and craft are the residual forms of medieval excellence that are being dissolved before our eyes."), and KARL POLANYI, *THE GREAT TRANSFORMATION* 186 (1957) (describing how the transition from feudalism to capitalism was "bought at the price of great harm to the substance of society").

²⁴² See STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 190-200, 206-31 (1993); see also JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 36 (Patrick Romanell ed., 2d ed., Bobbs-Merrill 1955) (1689) ("The public good is the rule and measure of all lawmaking.").

²⁴³ See Kennedy, *supra* note 9, at 216-17.

²⁴⁴ Kennedy insisted that Blackstone's attempt to "mediate" the "fundamental contradiction" failed, and he often seemed to ridicule any possibility of successful mediation. For example, Kennedy asserted without explanation that an attempt to address the fundamental contradiction by balancing conflicting values was "clearly false," and that any notion of "identifying tasks that supposedly must be performed in any social organization" and then examining how well a particular organization performed those tasks was "even more patently untrue." *Id.* at 214.

When Kennedy criticized particular passages of Blackstone, he sometimes made Blackstone's concepts appear vacuous by ignoring earlier passages in which Blackstone had explained and justified them. For example, Kennedy described a seemingly innocuous passage in which Blackstone opposed the use of "force or fraud" to deprive a person of "rightful possession" as "presenting all the elements of the liberal mode of mediating the fundamental contradiction in private law." *Id.* at 364-65. Kennedy observed that someone using force or fraud to obtain possession might be "a landless peasant seizing a small part of the estate of a large landowner after many years of working as a sharecropper." *Id.* at 365. He argued that the term "rightful possession" was question-begging and could not ground an argument unless Blackstone truly had derived a right to possession from natural law. See *id.* This criticism ignored Blackstone's elaboration of the reasons for society's development of *some* concept of "rightful possession" (a concept that every society has found useful at least for personal items), reasons that Blackstone grounded on instrumental concerns rather than on the principles of natural law. See *supra* text accompanying notes 178-86.

One object of Kennedy's extraordinarily dense article was to show that the structure or organization of the *Commentaries* was a device for "vindicat[ing] the common law against the charge that it was inconsistent with the enlightened political thought of [Blackstone's] day, and especially with emerging liberalism." Kennedy, *supra* note 9, at 234. As Kennedy emphasized, some of Blackstone's organization seems strange today. For example, Blackstone set forth the law of property under the heading "the rights of things." Yet Blackstone borrowed a large part of his organization from Matthew Hale and from Dionysius Gothofredus, a writer who antedated Hale by 100 years. Hale and Gothofredus took much of their organization from Roman sources. In adopting the organization that Kennedy criticized (in particular, the distinctions between rights and wrongs and between persons and

Writers today typically treat individualism and community as opposing values (though arrayed, perhaps, on a spectrum). Blackstone and other Enlightenment writers, however, tended to see individualism and community as reciprocal rather than opposing values.²⁴⁵ They believed that human beings would not have much regard for a community that had little regard for them. Only a sense of the worth and entitlement of every person could ensure the loyalty and dedication of members of a community. Enlightenment writers expressed their sense of the reciprocal relationship between the individual and the community partly by telling a story of social contract.

Robin West has observed that although this story of an original contract did not purport to be history, it was not fantasy. It was a phenomenological account of the experience of life in political communities.²⁴⁶ William Blackstone offered a similar observation when he told the story.

Like Aristotle, who called *homo sapiens* a political animal and the least self-sufficient of creatures,²⁴⁷ Blackstone thought it very unlikely "that there ever was a time when there was no such thing as

things), presumably neither Hale, Gothofredus nor the Romans were attempting to vindicate the English common law against liberalism. See Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795 (1988); Cairns, *supra* note 34, at 350-52.

In the end, Kennedy's principal contention seemed to be that, despite the various "modes of apology" that Western thought has employed, the fundamental contradiction has not vanished. People still experience a desire for association with others and a fear of this association. Kennedy wrote, "To *some* extent, we are the victims of our own reification The task of criticism is to demystify our thinking by confronting us with the fact that the contradiction is an historical artifact. It is no more immortal than is the society that created and sustains it." Kennedy, *supra* note 9, at 221. One may applaud Kennedy's search for a world in which almost every fear of others will be banished and almost every desire for association with others will be fulfilled. Until he figures out how to get there, however, I plan to go on mediating and to keep Blackstone's *Commentaries* on my bookshelf.

²⁴⁵ Cf. Ronald Dworkin, *Foundations of Liberal Equality*, in 11 THE TANNER LECTURES ON HUMAN VALUES 3, 7 (Grethe B. Peterson ed., 1990) (arguing that the "heart or essence" of liberalism is its insistence that "liberty, equality, and community are not three distinct and often conflicting political virtues . . . but complementary aspects of a single political vision, so that we cannot secure or even understand any one of these three political ideals independently of the others").

²⁴⁶ See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 64 (1988). West called the Enlightenment story of deliverance from a state of nature "a synthesis of umpteen thousands of personal, subjective, everyday, *male* experiences." *Id.* (emphasis added). She argued that this story neglected altogether women's experience of living in society.

²⁴⁷ ARISTOTLE, THE POLITICS OF ARISTOTLE bk. 1, ch. 2, 1253a, at 5-6 (Ernest Barker trans., 1946).

society." The "notion of any actually existing unconnected state of nature," he said, "is too wild to be seriously admitted, and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind." No one should imagine that "individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor."²⁴⁸

For Blackstone, however, as for West, the story was not entirely a myth:

[T]his is what we mean by the original contract of society, which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied in the very act of associating together—namely, that the whole should protect all its parts and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual member and that . . . each individual should submit to the laws of the community . . .²⁴⁹

Blackstone wrote that natural law imposed basic duties to God, to oneself and to one's neighbor and that municipal law added further duties of citizenship—duties of contributing to "the subsistence and peace of the society."²⁵⁰ In Blackstone's view, the principal aim of society was "to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities."²⁵¹ Blackstone spoke of "the real interest of the community,"²⁵² "the general advantage of the public,"²⁵³ "the universal good of the nation,"²⁵⁴ and "the benefit of the people."²⁵⁵ Although Blackstone emphasized individual rights, he insisted that every individual in a well-functioning community should sense the same obligation to others that he would sense if he had entered into a formal contract with them. Blackstone would have approved James Madison's declaration that rights not only could co-exist with community but also could foster it: "Equal

²⁴⁸ 1 BLACKSTONE, *Commentaries* *47.

²⁴⁹ 1 *id.* at *47-48.

²⁵⁰ 1 *id.* at *45.

²⁵¹ 1 *id.* at *124 [Chicago ed. 120].

²⁵² 1 *id.* at *48.

²⁵³ 1 *id.* at *125 [Chicago ed. 121].

²⁵⁴ 1 *id.* at *126 [Chicago ed. 121].

²⁵⁵ 1 *id.* at *245 [Chicago ed. 239].

laws protecting equal rights . . . [are] the best guarantee of loyalty and love of country."²⁵⁶

Blackstone wrote that each individual should remain "master of his own conduct except in those points wherein the public good requires some direction or restraint."²⁵⁷ This statement expressed the libertarian principle in its mildest possible form. Blackstone's formulation, permitting a limitation of choice whenever the public good required "some direction or restraint," suggested no more than a presumption in favor of liberty (if indeed this formulation was not vacuous).²⁵⁸ Blackstone's illustrations of this principle, moreover, confirmed his willingness to restrict individual choice for the sake of doubtful public gains.

On the one hand, Blackstone considered a governmental dress code incompatible with personal freedom:

Thus the statute of King Edward IV which forbade the fine gentlemen of those times . . . to wear pikes upon their shoes or boots of more than two inches in length was a law that savoured of oppression, because, however ridiculous the fashion then in use might appear, the restraining [of] it by pecuniary penalties could serve no purpose of common utility.²⁵⁹

On the other hand, almost any sort of "common utility" justified a restriction of choice. Even a dress code for corpses could be appropriate if its object was economic betterment: "[T]he statute of King Charles II which prescribes . . . a dress for the dead, who are all ordered to be buried in woolen is a law consistent with public liberty, for it encourages the staple trade on which in great measure depends the universal good of the nation."²⁶⁰

²⁵⁶ Letter from James Madison to Jacob De La Motta (Aug. 1820), in *THE FORGING OF AMERICAN FEDERALISM: SELECT WRITINGS OF JAMES MADISON* 310, 311 (Saul K. Padover ed., 1953).

²⁵⁷ 1 BLACKSTONE, *Commentaries* *126 [Chicago ed. 122]. Recall Blackstone's similar statement that positive law could appropriately restrain natural liberty "so far . . . [and] no farther" than "is necessary and expedient for the general advantage of the public." 1 *id.* at *125 [Chicago ed. 121]; see also *supra* text accompanying note 167.

²⁵⁸ Compare John Stuart Mill's stronger statement in JOHN STUART MILL, *ON LIBERTY* 10-11 (David Spitz ed., 1975) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.").

²⁵⁹ 1 BLACKSTONE, *Commentaries* *122. One might have thought shoes with three- or four-inch pikes potentially hazardous to health. Blackstone, however, who was somewhat closer to the time of pike-wearing gentlemen than we are, described the statute only as an attempt to regulate fashion.

²⁶⁰ *Id.*

Over the protests of libertarians and others, modern governments sometimes have subsidized businesses considered vital to their national economies. Governments rarely have done it, however, by requiring everyone to wear the favored businesses' products through all eternity.²⁶¹

Blackstone reiterated his narrow view of the libertarian principle in a chapter on *Offenses Against God and Religion*: "[P]rivate vices . . . are not, cannot be, the object of any municipal law *any farther than as by their evil example or other pernicious effects they may prejudice the community . . .*"²⁶² The *Commentaries* accordingly declared that public but not private drunkenness could appropriately be made a crime,²⁶³ and although Blackstone insisted that "all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom,"²⁶⁴ he favored an established church. Less a champion of religious liberty than were other writers of his era, he defended the English establishment on secular, communitarian grounds: "[T]he preservation of christianity as a national religion is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state . . ."²⁶⁵

Perhaps Blackstone's statement of the libertarian principle, casting only a slight presumption in favor of choice and permitting any public benefit to overcome it, afforded more priority to the individual than some communitarian critics of liberalism would like. Nevertheless, some of us find it difficult to fathom an objection to self-determination "except in those points wherein the public good requires some direction or restraint."²⁶⁶

²⁶¹ Prescribing a dress for the dead seems plainly inconsistent with John Stuart Mill's statement of the libertarian principle. See *supra* note 258.

²⁶² 4 BLACKSTONE, *Commentaries* *41 (emphasis added).

²⁶³ 4 *id.* at *41-42.

²⁶⁴ 4 *id.* at *53.

²⁶⁵ 4 *id.* at *43; cf. JOHN LOCKE, A LETTER CONCERNING TOLERATION 26-28 (James Tully ed., 1983) (stating that government has no authority whatever in matters of religion).

²⁶⁶ See *supra* text accompanying note 257. Communitarians typically speak of community in reverent terms and of liberalism, individualism and rights disapprovingly. These writers do not reveal how much they would subordinate individual identity or what rights they would restrict. Stephen Holmes has called their bluff:

Does moral revulsion at "radical separation" among citizens require making divorce and emigration illegal? What does a commitment to "solidarity" or "consensus" imply about the authority of majorities over dissident minorities? Should children of Jehovah's Witnesses be compelled to submit to the community-binding powers of the Pledge of Allegiance? Should nonconformists be legally ostracized or "weeded out?" Would communitarians

Scholars who see rights and community in conflict with each other apparently envision a right as something that self-interested individuals get or demand—not as something that public-spirited citizens honor and respect.²⁶⁷ These scholars appear to think more about insisting on one's own rights than about honoring the rights of others.²⁶⁸ To Enlightenment theorists, however, a right differed from an interest; the word implied justice, reciprocity, equality, generality and duty.²⁶⁹ Blackstone expressed the egalitarianism of

advocate making *incivisme* into a punishable crime, as it was in France during the Terror? Although they presumably would not, they are reluctant to say so openly, perhaps to avoid being observed defending civil liberties and individual rights.

HOLMES, *supra* note 242, at 178; *see also id.* at 225 (expressing doubt that restricting rights and "allowing the police to abuse the citizenry at will" would "maximize communal involvement").

²⁶⁷ *See, e.g.,* ROSALIND P. PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM 7 (1984) ("Rights are by definition claims staked within a given order of things. They are demands for access for oneself, or for 'no admittance' to others . . .").

²⁶⁸ *Cf. GLENDON, supra* note 31, at 14 ("Our rights talk . . . [i]n its silence concerning responsibilities . . . seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations.").

²⁶⁹ The current sense of tension between rights and community may proceed partly from the salience of a particular sort of rights claim—the claim to autonomy that libertarians assert when they decry "victimless" crime. Nonlibertarians often maintain that transactions between willing buyers and willing sellers of such goods and services as drugs, pornography, sex, babies, body parts, surrogate child-bearing and games of chance do have victims. The debate between libertarians and their opponents sometimes centers on the suitability of the term "victimless."

The term "victimless crime," however, can be given a narrow and technical definition—one that identifies a practical difficulty that arises whenever government criminalizes transactions between consenting parties. In Herbert Packer's words, victimless crimes are "those in which there is no immediately identifiable victim to lodge a complaint." HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 267 (1968). As Packer recognized, even noncontroversial crimes such as bribery can qualify as victimless under this definition. *See id.* To make a crime "victimless," it is enough that its asserted victims are diffuse.

Discussions of victimless crime sometimes focus on whether questions of morality and "the good life" should be left to each individual or should instead be resolved by a political collectivity. In the ponderous and obscure but conventional language of the academy, the issue is whether "the right is prior to the good." *Cf. JOHN RAWLS, A THEORY OF JUSTICE* 31-32, 446-52 (1971) (introducing this terminology while recognizing that it may not correspond to ordinary English usage). In these debates, the perceived choice between individual rights and community values sometimes seems inescapable.

Nevertheless, many modern communitarians do not seem eager to entrust to others the decision whether they should have abortions, smoke dope, or drink wine; they simply wish to feel closer to other members of their communities. *See, e.g.,* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 14 (1984) ("I think,

his age when he wrote, "the meanest individual is [to be] protected from the insults and oppression of the greatest."²⁷⁰

Mocking Blackstone's liberal piety is not difficult. One can invoke the jibe about sleeping under bridges,²⁷¹ recall that a slaveowner named Jefferson was the author of the proclamation that all men are created equal,²⁷² and note that even if many authors of the American Revolution saw slavery as incompatible with their ideals, they were oblivious to the fact that a gender-specific declaration of the equality of *men* would appear perverse or ironic a few centuries later. That the Enlightenment ideals of the founders have provided an ever-clearer basis for criticizing some of their beliefs and practices may, however, be testimony to the power of those ideals. As George Anastaplo has noted, the implications of a principle are likely to become clearer as the principle becomes ingrained; the barons who forced King John to promulgate the Magna Carta probably had no sense at all that commoners would someday invoke the great charter's principles.²⁷³ In any event, the Enlightenment

in fact, that the intersubjective zap of the moment came from that the group was together in saying that we are all separate.").

Perhaps the sentiments of these communitarians do not reflect an unrealistic desire to have things both ways. If the close bonding of a community can occur even when strong libertarian claims are accepted, the perceived tension between rights and community may prove ephemeral even when this tension seems most intense. And setting aside the problem of "victimless" crime, the assertion that rights are incompatible with communitarianism seems not just exaggerated but backwards. As virtually all Enlightenment writers emphasized, the right to security—enforceable against both private individuals and the state—is the cornerstone of civilized communities. See HOLMES, *supra* note 242, at 4; HOLMES, *supra* note 187, at 245-46.

²⁷⁰ 1 BLACKSTONE, *Commentaries* *6; cf. LOCKE, *supra* note 169, § 142, at 363 (stating that morality demands "one rule for rich and poor, for the favorite at court and the country man at plough"); ADAM SMITH, *THE WEALTH OF NATIONS* 576 (Edwin Cannan ed., Random House 1937) (1776) (praising "that equal and impartial administration of justice which renders the rights of the meanest British subject respectable to the greatest"); HOLMES, *supra* note 187, at 27 ("The prohibition on self-exemption has always been . . . one of [liberalism's] core norms. This norm—the injunction to play by rules which apply equally to all—was most systematically expounded by Kant, but it is unambiguously advanced in the works of all liberal theorists.") (emphasis omitted); *Deuteronomy* 1:17 (King James) ("Ye shall not respect persons in judgment; but ye shall hear the small as well as the great.").

²⁷¹ "[T]he majestic equality of the laws . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." ANATOLE FRANCE, *The Red Lily*, in 5 *THE WORKS OF ANATOLE FRANCE* 91 (Winifred Stephens trans., 1924).

²⁷² I envision Jefferson returning to his room in Philadelphia and saying to a dark-skinned man, "We have done a bold and wonderful thing. Our Declaration proclaims, 'All men are created equal.' Now, Jim, pack my bags."

²⁷³ See George Anastaplo, *On Freedom: Explorations*, 17 OKLA. CITY U. L. REV. 465,

concept of rights was not merely compatible with communitarianism; it was itself an expression of the communitarian ideals of duty, reciprocity and equality.

Indeed, the Enlightenment theme that most clearly extended communitarian sentiment beyond local and national boundaries was human rights.²⁷⁴ The concept of universal rights recognized the fellowship of human beings and, far from negating communitarian conviction, rested on what Jonathan Edwards called in 1755 "benevolence to being in general."²⁷⁵

Blackstone's theme was not the song of unrestrained self-interest that hard-of-hearing listeners have attributed to him. He wrote of the "real happiness" of human beings—a happiness that, in his view, depended on acting in accordance with being in general and on honoring a few core principles of decency. Blackstone believed that people were not infinitely malleable, that they possessed an essential nature, that they were free to accept this nature or reject it, that acting in accordance with this nature could promote their sense of well-being, and that this nature demanded respect for the equal worth and equal entitlement of their fellow human beings.

This song inspired the American Revolution and still inspires much of the world.²⁷⁶ Perhaps it no longer inspires us, but it was

561 (1992).

²⁷⁴ See HOLMES, *supra* note 187, at 39 ("As a universalistic or cosmopolitan doctrine, liberalism is wholly unable to draw territorial boundaries or separate insiders from outsiders in a principled way.")

²⁷⁵ JONATHAN EDWARDS, *THE NATURE OF TRUE VIRTUE* 3 (Univ. of Mich. Press 1960) (1765). When Edwards wrote that "[t]rue virtue most essentially consists in *benevolence to being in general*," of course he included benevolence toward all of creation and not simply toward human beings.

²⁷⁶ For example, in 1989 it inspired both the students who erected a Statue of Liberty in Tiananmen Square and the patriots of Czechoslovakia described by Vaclav Havel:

Everywhere in the world, people were surprised how these malleable, humiliated, cynical citizens of Czechoslovakia, who seemingly believed in nothing, found the tremendous strength within a few weeks to cast off the totalitarian system, in an entirely peaceful and dignified manner. We ourselves are surprised at it.

And we ask: Where did young people who had never known another system get their longing for truth, their love of freedom, their political imagination, their civic courage and civic responsibility? How did their parents, precisely the generation thought to have been lost, join them? How is it possible that so many people immediately understood what to do and that none of them needed any advice or instructions?

Havel's Vision: Excerpts From Speech by the Czech President, N.Y. TIMES, Jan. 2, 1990, at A13.

not a song of isolation and self-interest. Although William Blackstone was an eighteenth-century conservative, the political right of the eighteenth century was not our political right. Compared with the radical libertarians and radical communitarians of today, virtually all Enlightenment thinkers seem moderate and sensible.

None of these figures, for example, appears to have advanced the remarkable proposition that the key to fostering a sense of community lies in abandoning or restricting the rights and the sense of worth of individuals. Asking whether a society should afford primacy to the individual or to the collective makes sense only so long as one focuses on numbers (should one cheer for one or for one-thousand?) while ignoring elementary, perhaps even "essential," concepts of human psychology. As Blackstone and other Enlightenment theorists emphasized, the correlation between an individual's sense of worth, self-esteem and entitlement and her sense of attachment to others is positive, not negative.²⁷⁷ Cornel West, writing of the effects of today's racial subordination and poverty, has spoken of the "numbing detachment from others" of people who find little to value in their own lives.²⁷⁸ Affording fewer rights to the disempowered and to the rest of us cannot promote community. Affording more meaningful rights might.²⁷⁹

Nelson Mandela told the United States Congress that he could not have read the Declaration of Independence without joining the struggle for life, liberty and the pursuit of happiness in South Africa—and that he could not have read of George Washington, Abraham Lincoln, Thomas Jefferson, John Brown, Sojourner Truth, Frederick Douglass, W.E.B. DuBois, Marcus Garvey and Martin Luther King, Jr., without being inspired to act as they had. See John Kifner, *Mandela Invokes Struggles of U.S., Rousing Congress*, N.Y. TIMES, June 27, 1990, at A11.

²⁷⁷ Amitai Etzioni has written:

The individual and the community make each other and require each other. . . . The I's need a We to be. . . .

While it is possible to think abstractly about individuals apart from a community, if individuals were actually without community they would have very few of the attributes commonly associated with the notion of an individual person. Such individuals typically are mentally unstable, impulsive, prone to suicide, and otherwise mentally and psychosomatically ill. . . . The insights and findings of psychologists and sociologists indicate that individuals who are bonded . . . into cohesive groups and communities are much more able to make sensible choices, to render judgment, and be free.

AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* 9-10 (1988) (emphasis and citations omitted); see also JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 9 (1995) ("Civil society is a realm that is neither individualist nor collectivist. It partakes of both the 'I' and the 'we.'").

²⁷⁸ CORNEL WEST, *RACE MATTERS* 14 (1993).

²⁷⁹ Many Enlightenment theorists considered the right to education a special key

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Nothing in William Blackstone's writings (nor, as far as I can tell, in the writings of anyone else) proposed "deducing" anything at all from the principles of natural law.²⁸⁰ Blackstone's writings offered no hint that answers to questions of the law of pleading, negotiable instruments and land tenures could be discovered in the sky or coaxed from the mind of God. Blackstone recognized that human beings make law and that law must adapt to changing circumstances. He was untroubled that law might vary from place to place and from time to time. Although he extolled individual rights, he believed that legislatures might limit these rights to advance the common good. He valued both the individual and the community. In short, apart from the fact that the author of the *Commentaries* was a shameless booster of English law, none of the terrible things that people have been saying about him seem true. Were it not for Blackstone's claim that the happiness of human beings depends upon observing a few core principles of justice, he might almost pass for a twentieth-century lawyer or scholar.

Perhaps Blackstone's description of natural law was merely a pleasing fiction, but a resurgence of legal and philosophical writing about moral realism has made natural law respectable again.²⁸¹

both to equality of opportunity and to the growth of communitarian sentiment. See, e.g., SMITH, *supra* note 270, at 740 (stating that an educated people can better recognize and resist "the interested complaints of faction and sedition").

²⁸⁰ See LIEBERMAN, *supra* note 106, at 45.

²⁸¹ See, e.g., Symposium, *Natural Law*, 4 S. CAL. INTERDISC. L.J. 455 (1995) (including articles by Schuyler M. Moore, R. George Wright, Thomas B. McAfee, Charles R. Kesler, Steven D. Smith, Ronald R. Garet, Michael H. Hoffheimer, Lino A. Graglia and Harry V. Jaffa); Symposium, *Natural Law*, 90 MICH. L. REV. 2203 (1992) (including articles by Heidi M. Hurd; Mark V. Tushnet; David Luban, Alan Strudler and David Wasserman; Philip Soper; and Michael S. Moore); Symposium, *Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992) (including articles by Walter Berns, Raoul Berger, Stephen Macedo, Calvin R. Massey, Thomas B. McAfee and Suzanna Sherry); *Natural Law Symposium*, 38 CLEV. ST. L. REV. 1 (1990) (including articles by John Finnis, David Barnhizer, David Luban, John Makdisi, David F. Forte, Jeremy Shearmur, Mark Tushnet, Randy E. Barnett, Lynne Henderson, Lewis A. Kornhauser and Patrick J. Kelley); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* (1987).

Michael Moore is probably the most prominent proponent of moral realism among legal academics. His articles, *Moral Reality*, 1982 WIS. L. REV. 1061, and *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992), offer careful, thoughtful, systematic and, I think, compelling responses to the arguments offered by those who see values as inherently subjective and who claim that arguments in support of value choices cannot be correct or incorrect. Moreover, the moral realist position is currently the subject of substantially greater attention and more serious discussion among

Perhaps the image of returning is appropriate.²⁸² A child's trust in her parents is likely to give way to adolescent rejection; and when the child becomes an adult, her adolescent rejection is likely to give way to a new and wiser appreciation of her parents' virtues. In the same way, lawyers of the coming century may develop a new, more mature appreciation of their natural law heritage—a heritage that twentieth-century intellectuals have mostly dismissed as "transcendental nonsense."²⁸³ If, in the next century, the iconoclasm and skepticism of Oliver Wendell Holmes, Jr., Karl Llewellyn, Jerome Frank, Richard Posner, Duncan Kennedy and other twentieth-century legal writers yields to a new idealism, a new spirituality and a new eudaemonics,²⁸⁴ the unrecognized goal of our century's jurisprudential journey may have been one noted by T.S. Eliot:

And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.²⁸⁵

philosophers than among legal scholars. See generally ROBERT L. ARRINGTON, RATIONALISM, REALISM, AND RELATIVISM: PERSPECTIVES IN CONTEMPORARY MORAL EPISTEMOLOGY 182-91 (1989); DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989); ESSAYS ON MORAL REALISM (Geoffrey Sayre-McCord ed., 1988); ALAN GEWIRTH, REASON AND MORALITY (1978); ALAN GILBERT, DEMOCRATIC INDIVIDUALITY (1990); Peter Railton, *Naturalism and Prescriptivity*, in FOUNDATIONS OF MORAL AND POLITICAL PHILOSOPHY 151 (Ellen Frankel Paul et al. eds., 1990); Nicholas L. Sturgeon, *Moral Explanations*, in MORALITY, REASON AND TRUTH 49 (David Copp & David Zimmerman eds., 1984); David O. Brink, *Externalist Moral Realism*, 24 S. J. PHIL. 23 (Supp. 1986); David O. Brink, *Moral Realism and the Skeptical Arguments from Disagreement and Queerness*, 62 AUSTRALASIAN J. PHIL. 111 (1984); William G. Lycan, *Moral Facts and Moral Knowledge*, 24 S. J. PHIL. 79 (Supp. 1986); Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986); Richard Werner, *Ethical Realism*, 93 ETHICS 653 (1983); Richard Werner, *Ethical Realism Defended*, 95 ETHICS 292 (1985).

²⁸² As suggested by my friend Abner Greene.

²⁸³ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

²⁸⁴ Among the diverse writers whose work seems to point in this direction are Stephen Carter, Paul Heald, Heidi Hurd, Phillip Johnson, Michael McConnell, Michael Moore, Robert Nagel, Martha Nussbaum, Michael Perry and Margaret Radin. All of these writers, even those who would never join Locke and Blackstone in speaking seriously about God, speak seriously about what it means to be human.

²⁸⁵ T.S. ELIOT, *Little Gidding*, in FOUR QUARTETS (1942), reprinted in THE COMPLETE POEMS AND PLAYS 1909-1950, at 145 (1952).

