

# Blackstone, Bleckley, and the Value of Rhetoric

by Stephan Landsman\*

William Blackstone's *Commentaries on the Laws of England* (the "Commentaries") has been described as "the most important legal treatise ever written in the English language."<sup>1</sup> It served as the leading source of information and guidance concerning the common law from the time of its publication in 1765-1769, until the waning years of the nineteenth century. The *Commentaries* was wildly popular in America<sup>2</sup> and is generally agreed to have had a substantial influence on American legal and political development.<sup>3</sup>

Blackstone's work was authoritative, clear, and accessible. It became the fundamental primer for aspiring lawyers in the United States, especially those who were self-taught.<sup>4</sup> Great advocates, including Daniel Webster and Abraham Lincoln, were said to have closely studied the *Commentaries*,<sup>5</sup> and a host of American judges including Marshall, Kent, and Story acknowledged their debt to the treatise.<sup>6</sup>

Logan Bleckley began serious legal study in 1844 when he was given a two volume set of the *Commentaries*. Two years later, at the age of eigh-

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1. Katz, *Introduction to Book I* iii, in 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69), reprinted by University of Chicago Press (1979). See D. BOORSTIN, THE MYSTERIOUS SCIENCE OF LAW iii (1941) ("In the history of American institutions, no other book—except the Bible—has played so great a role . . ."); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979).

2. See Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U.L. REV. 731, 737 (1000 sets of the English edition sold in America by 1771 and a further 1500 sets sold in the first of a series of domestic editions).

3. *Id.* D. BOORSTIN, *supra* note 1, at 3; Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 630-34 (1933).

4. See Nolan, *supra* note 2, at 761-67; D. BOORSTIN, *supra* note 1, at 4.

5. See Jones, *Introduction* ii-iii in W. BLACKSTONE, THE SOVEREIGNTY OF THE LAW (G. Jones ed. 1973).

6. See Nolan, *supra* note 2, at 756.

teen, Judge Bleckley was admitted to the Georgia Bar.<sup>7</sup> Like many another American autodidact, Bleckley found in the *Commentaries* a far clearer and more useful source of information than anything else available.<sup>8</sup> It should come as no great surprise that there are echoes of Blackstone's philosophy and style in Bleckley's work.

Adulation and reliance notwithstanding, the *Commentaries* had its faults. Not long after Blackstone published the treatise, Jeremy Bentham produced a scathing and brilliant attack from which Blackstone's reputation never fully recovered.<sup>9</sup> Bentham suggested, with substantial justification, that the work was permeated by an "antipathy to reformation,"<sup>10</sup> as well as a desire to justify virtually every arcane and illogical mechanism to be found in the common law. Such estimable critics as Thomas Jefferson<sup>11</sup> and Joseph Priestly<sup>12</sup> identified other problems with the treatise.

Many modern scholars have also been critical of Blackstone. They have depicted him as an apologist always ready to defend the legal system.<sup>13</sup> The basis for these charges is neatly illustrated in one of Blackstone's most famous metaphors, that of comparing the common law to a Gothic castle "erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of convenience, are cheerful and commodious, though their approaches are winding and difficult."<sup>14</sup> In this comparison can be seen an altogether uncritical and complacent vision of a thoroughly outmoded procedural structure.<sup>15</sup> Contemporary observers have been quick to point out how inhospitable this approach was to any sort of change.<sup>16</sup>

Modern commentators have also censured Blackstone for his naive approach to history. He was inclined to resort to "legend and nonsense" in explaining the historical origins of various aspects of the common law.<sup>17</sup>

7. Report of Committee Appointed to Prepare a Memorial of the Ex-Chief Justice, read by J. R. Lamar, of Augusta, in REPORT OF THE TWENTY-FIFTH ANNUAL SESSION OF THE GEORGIA BAR ASSOCIATION 81-82 (1908) [hereinafter TWENTY-FIFTH ANNUAL SESSION].

8. See Nolan, *supra* note 2, at 764-67.

9. See J. BENTHAM, A FRAGMENT ON GOVERNMENT (1776) (W. Harrison ed. 1967).

10. *Id.* at 4.

11. See Waterman, *supra* note 3, at 634-46 (conservative philosophy of treatise fostered legal profession's "slide into toryism" and led to undermining of liberty).

12. *Id.* at 629 (challenging Blackstone's views concerning religious nonconformists).

13. See, e.g., Kennedy, *supra* note 1.

14. 3 W. BLACKSTONE, *supra* note 1, at 268.

15. See Langbein, *Introduction to Book III* in 3 W. BLACKSTONE, *supra* note 1, at v.

16. See Kennedy, *supra* note 1, at 211; D. BOORSTIN, *supra* note 1, at 12.

17. Langbein, *supra* note 15, at v; see Jones, *supra* note 5, at xxxvi ("his devotion to Anglo-Saxon England led him to occasional absurdities").

Of even greater significance was his belief in the Whiggish notion that history ineluctably progressed toward the perfection of liberty.<sup>18</sup> This faith in a benign legal evolution reinforced Blackstone's complacent willingness to endorse the common law as he found it.

Logan Bleckley appears to have shared some of these attitudes. In his speech, *Truth at the Bar*,<sup>19</sup> Judge Bleckley displayed both the apologist's willingness to accept uncritically the underlying postulates of the system of his day, and the Whig's predisposition to discover in legal developments a steady march toward perfection. Bleckley described the law as having a theoretically perfect mechanism for the achievement of proper results, expressed in the formula "ignorance, procedure, knowledge, justice."<sup>20</sup> It should be noted, however, that Bleckley was not willing to take the next step with Blackstone and endorse all the particularized procedures of his day. Rather, he found at least some of them "false and obsolete" and in need of repair.<sup>21</sup> Still, the Whig confidence in progress seemed to infuse the judge's speech.

Judge Bleckley was at his most uncritical when analyzing the role of the lawyer in the system of adjudication. He envisioned the courts as relying upon a classically adversarial scheme which pitted advocates representing two selfish interests against each other in a contest to be decided by a neutral arbiter.<sup>22</sup> While this description fairly captured the essence of the process,<sup>23</sup> it glossed over the hard questions about the pursuit of truth posed by such an arrangement.<sup>24</sup> It might be reasonable to say, as Judge Bleckley did, that:

So long as truth and justice are open to legal doubt, though they may be certain to the individual mind of counsel, he may urge their want of standing in Court; and he has no business with their standing outside, not even in his own mind. All the weak places in hostile evidence should be diligently searched for, found out and exposed.<sup>25</sup>

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18. See Katz, *supra* note 1, at viii; Green, *Introduction to Book IV* in 4 W. BLACKSTONE, *supra* note 1, at xi-xii.

19. Bleckley, *Truth at the Bar An Address Delivered Before the Georgia Bar Association August 27, 1886*, in REPORTS OF THE FIRST, SECOND, THIRD ANNUAL MEETINGS OF THE GEORGIA BAR ASSOCIATION 107 (1908), reprinted in 41 MERCER L. REV. 517 (1990) [hereinafter THIRD ANNUAL MEETING].

20. THIRD ANNUAL MEETING, *supra* note 19, at 112.

21. *Id.* at 120.

22. *Id.* at 114.

23. See S. LANDSMAN, ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2-5 (1988).

24. *Id.* at 2-3, 26-30 (discussing adverse impact of adversarial procedure on discovery of material truth).

25. See THIRD ANNUAL MEETINGS, *supra* note 19, at 117.

Yet it is hard to reconcile such notions of wholehearted advocacy with the judge's repeated insistence on the importance of the search for truth, condemnation of "feigned" passion, emphasis on the "pacific" nature of litigation, and rejection of all "artifice" or "subterfuge."<sup>26</sup>

It may not be impossible to advance both of these sets of propositions, but Judge Bleckley's presentation eludes the difficulties that lurk just below the surface. The rhetorical coupling of opposites gives the speech the appearance of supporting virtually any action counsel might choose to take. It is no wonder Bleckley's remarks were so widely applauded within the bar.<sup>27</sup> The speech, however, neither recognized nor addressed the difficult questions like those faced by counsel when called upon to impeach an honest but vulnerable witness<sup>28</sup> or to press a case after being confidentially informed of its meritlessness.<sup>29</sup>

Such questions have no easy answer. They are among the most difficult faced by advocates. Like Blackstone before him Bleckley assumed an unrealistic clarity and harmony in the system. This assumption made most of the hard problems seem to disappear. While popular, such an approach is unsatisfactory. The dilemmas posed by the lawyer's relation to truth are difficult and need to be understood as such if they are to be even frankly addressed, let alone resolved.

Many modern commentators would conclude their analysis at this point, having discovered in Bleckley's work little more than an apology for a seriously flawed system. Indeed, many have done just that with respect to Bleckley's intellectual forbear, Blackstone. Dismissal is, however, unwarranted. While Bleckley's apologetic and Whiggish approach deserves criticism, the deeper values championed need to be appraised. Bleckley and Blackstone shared a vision of the overarching value of the rule of law. Each emphasized the power of procedure not simply as a technical device but as a means of achieving justice. The deepest concern of both men was the defense of individual liberty. This grand vision, albeit couched in antiquated rhetoric, contains a critically important message. As E. P. Thompson pointed out:

The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within that very

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26. *Id.* at 108.

27. See TWENTY-FIFTH ANNUAL SESSION, *supra* note 7, at 80-81.

28. See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

29. See D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973); *Nix v. Whiteside*, 106 S. Ct. 988 (1986).

rhetoric that a radical critique of the practice of the society is developed

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From Blackstone's and Bleckley's rhetoric could be built a powerful critique of self-serving or lawless behavior within the legal system. It could be wielded as a weapon by those who sought to resist oppression. A fine example may be found in the great advocate Erskine's defense of Thomas Paine when the radical agitator was tried *in absentia* in the 1790s. Erskine bottomed his argument on passages from Blackstone.<sup>31</sup> Similarly, in the 1770s, when Parliament attempted to oust the political maverick John Wilkes from his seat, it was Blackstone's words that were the cornerstone of the defense.<sup>32</sup> Words like those of Blackstone and Bleckley stand as a beacon to the bar. They may not resolve the hard questions but they disclose aspirations well worth articulating in a world all too often ruled by cynical manipulation.

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30. E. THOMPSON, *WHIGS AND HUNTERS* 265 (1975).

31. E. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 96 n.2 (1980).

32. See Jones, *supra* note 5, at xx. These words were successfully used against Blackstone himself when he spearheaded the drive against Wilkes.

