

Blackstone's History of English Law

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There is, of course, no Blackstone's History of English Law. His *Commentaries*¹ however, include the fullest treatment of the subject, not only down to Blackstone's time, but until the works of Maitland and his progeny in the intellectual world we still inhabit. The *Commentaries* are first of all an elementary presentation of the law as it stood in the middle of the 18th century. Although the elementariness may not be obvious to a modern reader, the book is consciously founded on the belief that it is possible and desirable to disclose the essentials of a legal system.² Beyond aspiring to mere intelligibility, by stating rules and regulations clearly, Blackstone thought that the law could be explained to make sense. That it should do so to educated laymen, from whose liberal arts he found law as excluded as it tends to be from lay education today, was of the highest importance to Blackstone. It was equally important that the law should make real sense to practitioners, whom Blackstone found too often pettifogging in the toils of a system on which they had no grasp.³

The way in which the *Commentaries* are a history is by no means incidental. At least by intent, they are at the opposite pole from books with history "thrown in." Making sense of English law was centrally seeing where it came from, though it was also, for Blackstone, a matter of looking beyond positive institutions ("constitutions" in his language) to principles. (The elementary expositor's task as a theorist was to place the man-made law of civil society in a setting of higher law and to explain its function, and then to define and justify the character of the English branch.)⁴ Blackstone was intensely interested in "Why?", and "Why?" was a rich interrogative for him. On one side, it signaled a search to understand historically, to various ends. Sometimes historical understanding was necessary in order to forgive, or to accept what is open to criticism but perilous to alter; sometimes it permitted celebration, or reinforced the national and professional patriotism that Blackstone was for some tasted too full of; it also served to oppose complacency with awareness that reform of the law had a way to go on the road it had encouragingly covered miles of. Yet "Why?" was not only a "plain historical" question for Blackstone. Justification and criticism of legal institutions went alongside his historical accounting for them. There are ways in which history and philosophy pulled against each other in his thought, but other ways in which a mutuality obtained between them. His combination of history and theory is hardly reproducible in English legal literature, before Blackstone or after him.

The *Commentaries* were not the first history of English law. Blackstone used earlier monographic and antiquarian work, mostly from the 17th century. The lesson of that work informed his. It separated him from the earliest manifestations of serious interest in the legal past and self-defining attitudes toward the past. That is to say, one of Blackstone's generation was bound to see history very differently from the common law's profound admirers *circa* 1600, whom Lord Coke was the intellectual leader. A deficient sense of change, or at least ways of relating to vicissitude foreign to modern ideas of historical thinking, characterized the Cokean mentality;⁵ Blackstone was far removed from that. The great gain of subsequent 17th century scholarship, as compared with the first legal historians, was an appreciation of the feudal, and hence European, stamp on key features of English law, especially real property. In this essay, I shall look particularly at how Blackstone handled feudalism. It was his leading theme as a historian.

The first history of English law roughly so-called, and comprehensive enough to deserve the title, was written by Sir Matthew Hale somewhat after the middle of the 17th century.⁶ Hale's book was a source for Blackstone, a direct one for some judgments. It must have encouraged the idea that English law had a history amenable to being treated as a whole and to being dominated by the intellect—that is, to being organized in patterns and referred to general questions about how legal history happens and what history means for jurisprudence. Hale performed an important pioneering experiment with those possibilities. By that language, I do not suggest that his work was like a first try in the laboratory with an ultimately fruitful hunch, an experiment too crude to advance the fructification of the insight very far, though honorably mentioned in the histories of science. In his terms, Hale achieved a powerful version of the history of English law. His terms included an old-fashioned common law jurisprudence inherited from Coke laden with weak history and inadequate conceptions of historical process. Hale found that jurisprudence under attack and in need of modernization if its essential values were to survive, which was an objective of the greatest importance to him. His context included the mid-17th century revolution, in which Hale had an ambiguous personal role, and in which legal history was used and abused for polemics of various stripes. After the revolution, came a reaction, whose extreme side Hale, as a judge and public figure, felt a need to resist, and whose moderate side needed his services. Yet, despite its accomplishment in the author's context, Hale's history is thin and dry compared to Blackstone's, and in relation to modern expectations. (It is also unfinished, possibly because Hale had said all he needed to.)

At the end of the *Commentaries*, Blackstone appended a chapter which does not fit the analytic scheme of the whole (a somewhat Procrustean outline). Called "The Rise, Progress, and Improvements of the Laws of England," the appendix amounts to a summary of the history scattered throughout the work.⁷ Adding this chapter testifies to Blackstone's awareness of how historical a book he had produced. It may also indicate a certain apprehension lest, without gathering the history in one place, he seems not to have written the history of English law as whole, but only to have employed history to explain particulars and to decorate a law book with antiquarian learning. The appended summary has the value and the pitfalls of any author's express restatement of his own emphasis. One should not lean too heavily on it in formulating the shape of Blackstone's full, "decentralized" account. But the "Rise" is (besides the place to start from towards an appreciation of Blackstone the historian) the passage which in a sense challenges Hale—not unconsciously, I think. There Hale is cited much more than elsewhere in the *Commentaries*; he is the model there—appropriated from, used with approval for much in his general historical patterning, but also transcended, as he is by the detailed history in Blackstone's four long regular divisions. In an epitomizing chapter, Blackstone said more than Hale did in his whole book about substantive law. He included modern history to great purpose, while Hale, in a meaningful gesture one might call dramatic, left out the period since 1300. Blackstone gives much more of the satisfaction we expect from historians. He tells us what to think, shows us a way of imagining the past, and puts Good thing/Bad Thing labels on it. Hale seems to stop at warning his reader against certain follies and cautioning him against thinking too much. He showed a basic pattern for seeing order in the legal past and suggested some jurisprudential postulates that history tends to justify. Beyond that, his message was skeptical: more history than we

are ever likely to hold in the grip of certainly would be required to overthrow the groundwork of jurisprudence.

Blackstone enjoyed no great advantage over Hale in Accumulated positive knowledge. Literary exuberance, with skill and the grace of a “good period,” made him one of the masters of 18th century prose. Style no doubt accounts for part of his surface superiority as a historian. Indeed, the success of his project to bring the common law to the common reader, and the uniqueness of that achievement among legal writers, merit him a niche in the pantheon beside Gibbon, a Johnson, or a Hume. Yet the fundamental difference between Blackstone’s history of English law and Hale’s is situational. It does not really make for Blackstone’s superiority.

Hale wrote at a time when, for one with his values—values shared by Blackstone after him as by Coke before—it was important to locate the common law’s strength in its gift for true, linear change.⁸ He sought to identify certain stabilities of structure that at once permitted change and would themselves resist two forces apt to undermine the element of certainty requisite for a workable legal system and an orderly society. One force was rationalistic criticism of established law. The other consisted of historical notions too confidently embraced and too easily used to take legitimacy from essentials and confer it on the partisan pleader’s favorite scheme. Blackstone would have agreed with Hale’s principles in the abstract. The difference is that he wrote a century after the events that Hale wrote in the wake of, and lived through. Blackstone’s sense of blessedness in living on the safe side of a great divide can come through as smugness; that appearance can veil, not only his aspect as a critic of the law, but his difference from earlier writers in the tradition of praising the common law and the English way of government and of demonstrating the perils of alteration.

The top of Blackstone’s “great divide” was 1688—the good revolution, contrasting with the one that shaped Hale by contradictory pressures. (For the “Puritan Revolution,” Blackstone had hardly an express word but censure, none of the historian’s sympathy for constructive evils.)⁹ But if England got over the mountain in 1688, she was walking comfortable on the high ridges for a good generation before. The Restoration was in many ways more important for the specific purposes of Blackstone’s legal history than the Glorious Revolution. The main ascent to economic and legal modernization was won before the political order was brought into conformity. (A better ear for constructive evils than Blackstone’s canons of political rectitude and reasonable behavior would allow him might have given the mid-17th century decades of chaos and fanaticism more credit.) For Blackstone, English law’s capacity for change was vindicated by success, and though the progressive path had been gradual, it had added up to, and in the end taken, a qualitative leap. What was fetter-like in the medieval inheritance had been overcome; what was left of it, what had settled into the prescriptive structure that must be treated as fixed, was mostly neutralized as any real obstacle to the potentialities of modern life—to continued progress in prosperity, enlightenment, and the improvement of legal and political institutions themselves. In these circumstances, one could play the historian freely. One could imagine the past concretely, speculate beyond the hard evidence, see large dramatic patterns in a story that had turned out well. For the past was distanced. A trouble-maker so conservative as to assert the literal claims of antiquity, to balk at all change for want of precedent and stand utterly awestruck before his ancestors’ marvelous legal creation, would have been an eccentric by the temperate light of George II’s setting

sun and George III's rising. So would Hale's other enemy—a radical apt to confuse unwarranted opposition to the present happiness with struggle against oppressions long *passé*.

Moreover, while Hale saw in theory a threat to legal and political institutions, because those institutions sometimes fail to find in disembodied reason the justification they deserve in practical experience, Blackstone thought he had abundant theory on his side. Without doing much history beyond verifiable fact and some spare lineaments of meaning, Hale embraced the historical principle, as skeptics of theory tend to. Blackstone could write history more generously because it was apparent to reason that history had gone where it ought to, leaving little more than fossils of Form's slow emergence from Matter. (The Ideal Constitution, that is to say, had been realized in Great Britain out of a history in which it was foreshadowed and resisted.) As a theorist, Blackstone was a syncretist. He was given to saying that doctrines "go too far" just where they start to be significant. But he was an able syncretist. He combined into a defense of fundamental English structures some Hobbes, some Locke, some Continental natural law teaching, and, with the instinct of a conscious modernist, such 18th century accretions as Montesquieu's original approach to law and society. A dash of proto-utilitarianism helped take the starch out of any principle that might "go too far" in the direction of dogma. These layers rested on top of the basic stratum, the Greek idea that a mixed polity is best—an idea long before appropriated by the English, but never so classically applied.¹⁰ In the upshot, Blackstone's opinions came down to the "left" of Hale in most respects, for he romanticized the remotest English past and the centuries of strife to recover that birthright. A good deal of "radical Whig" though is discernible behind his contented face.¹¹ His views fell to Hale's "right," in one sense, because he accepted Hobbesian sovereignty, which to Hale was a philosophic conceit without warrant as a proposition of law. Blackstone added the un-Hobbesian proviso that in whom sovereignty resides is anything but indifferent, for the mixed sovereign, of King, Lord, and Commons, was as much a theoretical imperative as sovereignty itself. Needless to say, reincarnation in the 19th century might have stunned Blackstone's optimism. A more dangerous past would have seemed reborn into a present less sure of its triumph over historic adversity. Doubt would have been abroad as to whether the true political theory was for practical purposes now known, confirmed, if it needed to be, by the history of England between 1660 and 1760. My suggestion is that Blackstone's moment, between the turmoil of the 17th century and the changes of the 19th, was conducive to legal history, perhaps by *not* being quite what we think of as a historicizing moment.

In what follows, I shall try to describe the shape Blackstone gave to English legal history in some major respects and to suggest some explanations for its taking such shape in his hands. There are more historical judgments in Blackstone worth pursuing than I shall pursue. On the other hand, emphasizing Blackstone's concentration on history and how he brought disparate objects into a well-composed and striking historical picture should not leave an overemphatic impression. Blackstone did not always ask historical questions when he should have, did not always resist giving a feebly plausible rationale for legal phenomena whose oddity invites historical explanation.¹² I do, however, think that the accent belongs on Blackstone's relatively consistent historical-mindedness. In some cases, he may have failed to see change and overlooked vestiges of the past in

present anomalies because blind spots here and there were necessary to the coherence of his picture as a whole. I shall not “grade” Blackstone for the correctness of his historical inferences and constructions in the light of knowledge now acquired. Of course he was sometimes wrong, sometimes outlandish in his reading of particular evidence. Some of his large-scale imaginings must seem to our eyes like antiquated costume no sensible person would inflict on the natural frame. My concern is for what Blackstone thought and why, perhaps, he thought it. In any event, settled truth in detail is often elusive in legal history; and it is a subtle task to discriminate the valid from the dated in Blackstone’s generalizations. Proper scrutiny of his sources and his specific steps from materials to conclusions is beyond my scope; such an investigation would be eminently worthwhile. It is important to remember that he *had* sources and was constrained by them. I may sound a bit as if Blackstone “made up” his historical picture, as if predisposition and “spectacles” determined what he saw. The sense in which that is not true is important, as well as the sense in which it is nor so very misleading. An analogous point can be made about Blackstone’s presentation of the law of his day: That picture was of course heavily constrained by what the law was, with allowance for the difficulty at any time of restating the law through a fog of loose ends and formulating in general language what has and has not been decided in concrete cases. At the same time, Blackstone’s shaping intellect should have its due. He had a strong drive to “make sense” of the law and to find in what it was what it ought to be. In an “as if” spirit, it can be profitable to talk about Blackstone’s law almost as if it were his invention, and so with his history.

Let us begin with the Norman Conquest, the chief prize for which 17th century polemical history contended. Blackstone subscribed to the position, which Hale had developed exhaustively, that the Conquest was not a conquest.¹³ That is more a legal point than an historical one. The meaning is that William I never held the realm by right of conquest, nor by wrong (as a mere disseisor, tortfeasor or wanton aggressor). He was not entitled by his victory to work his will, and he did not do so by force, as if not ruled by law. He did not gain an absolute kingship to please the 17th century royalists, nor gratify the radicals by casting the English in chains. Rather, he gained the throne in a trial by battle against a holder whose claim was less plausible than his own. His actions thereafter conformed substantially to existing English law. Yet, while Blackstone shared Hale’s doctrine, he departed from his emphasis. Hale did not attribute great institutional change to the Conquest; for Blackstone, it was the most momentous break in English history. The change was accomplished legally by the letter, though with the help of trickery and judicial sharp practice. One may criticize, as Blackstone did, the morality of William’s proceedings, and their correctness by sound canons of jurisprudence, without quite denying the authority of the results. The heart of the alteration, though it was not the only evil William I did, nor unconnected with others, was the introduction of feudalism.

That, however, was not a simple substitution of one system for a radically different one. William probably got away with it, in part, for that reason. The means were initially legislative. Parliament (whose pre-Conquest existence Blackstone unoriginally, but reflectively, maintains)¹⁴ was induced to pass a statute adopting basic military feudalism. That is, nearly all large landholders were made liable to the king for personal service with quotas of knights. Their tenures were recast as holdings by such

service of chivalry, and the same system was reduplicated downward, so that tenants of major lords held of them on analogous terms. The element of deceit in this transaction was that William imported mercenaries at a time of danger and so created the impression that the choice was between that obviously inferior method of defense and the feudal system. However, Blackstone did not pretend to see fraud and nothing else. To the merits of the feudal arrangement under contemporary conditions he gave due credit. The eyes of the English were open to the main point of what they assented to, and it was substantially they who agreed. (Blackstone appears to have overestimated the number of natives who survived the Conquest and its immediate aftermath at the level of society that would participate in Parliament and feudal lordship.)

Trouble began for the English after the “statute,” when, by interpretation, they were held to have taken on more than they bargained for. The interpreting was done by “Norman jurists,” who (to the extent that their mischief depended on formal structures) succeeded in centralizing and monopolizing jurisdiction in the king’s court. The “Norman jurists,” were a good deal worse than mere Normans, with a mere natural tendency to impose on England rules and institutions they were familiar with at home. Rather, they were French and Italian ecclesiastics, minds subtilized and corrupted by the direct (if slightly anachronistic) influence of Aristotelian scholasticism. The imprint of this mentality was to be left in intricacies and elaborate fictions far down the path of medieval law (not always for the practical worse, though the intellectual style offended Blackstone’s taste).¹⁵ Immediately, the jurists’ task was to read into English feudalism burdens not intended by the parliamentarians who adopted it. In the abstract, their doctrine ascribed to the king a paramount proprietary interest in all the land in the country, and likewise to lords in land held of them. That is, the king and lords were conceived, in a sense not previously true, as ultimate “owners” of the tenements owing them service. At the practical level, the jurists construed the so-called “incidents” of feudal tenure into a scheme meant only to subject the landowner to a new service-duty. Blackstone was melodramatic enough about the “slavery” this feudalism-as-interpreted came to. Indeed, he achieved the tonality of 17th century “Norman Yoke” Levellers,¹⁶ even though he rejected their theory of the Conquest as such. In seeing English history as the winning back of “Anglo-Saxon liberties,” he chimed in with a more politically diverse and optimistic chorus, those who felt that the Conquest was a setback, but who no longer felt its chains. For Blackstone, however, the shackles were not really thrown off until the abolition of military tenure in Charles II’s reign. The old-favorite liberating climax, Magna Carta, while it was done complex justice by Blackstone, was in some ways cut down to the “feudal document” of semi-modern textbooks.¹⁷

One is entitled to ask what was so very terrible in Blackstone’s eyes about escheats, reliefs, wardships and other feudal incidents. His aspersions on those institutions did not fade into a vague notion of a ground-down populace. Indeed, post-Conquest feudalism was given credit for improving the lot of the masses—that is, for mitigating the mere slavery of the days of Anglo-Saxon liberty into medieval villeinage.¹⁸ Blackstone was talking about oppression of the upper orders. Moreover, he saw full-fledged feudalism as oppressive in itself, as opposed to merely abusable, though it was rendered worse by abuse. Granting a smell of deceit and dubious construction about the enactment of the new system, what was so very objectionable about it as a distribution of interests between immediate owner and superior lord?

A partial answer to the question is that latter-day feudalism (from the 14th century to the abolition of the system) may have been economically disadvantageous, and may have been perceived to be by Blackstone, perhaps to an exaggerated degree. Blackstone was not explicit to that effect, but he provided some hints, as well as an appropriate context of value judgments and historical perspective. The general economic vice of the feudal incidents was that the lord's income from them varied with casualty, in consequence of which it was harder to put a value on the tenant's interest. For practical purposes, in the "latter days," this point almost entirely concerned wardship. The other incidents, insofar as they were not obsolete, survived as no more than trivial taxes. Effectively, though not quite crisply, Blackstone acknowledged that wardship was the only serious residue of feudalism left for Charles II to expel.¹⁹ (Feudal wardship meant that if the tenant died leaving a minor heir, the lord was entitled to the land during the minority, not as a trustee for the heir, but as taker of all profits. The lord was also entitled to custody of the heir's "body," which meant practically the right to any profits from arranging his marriage.) To what extent the uncertainties of this system were economically inhibiting is not easy to estimate. They would have no direct net effect on the merchantability of land or on purchase price, since when A sold to B the lord's interest in frequent deaths and baby heirs simply shifted to B. But the power to raise money on the security of land, for investment inside and outside agriculture and for family purposes, ought in principle to be diminished: A lender could foresee a stream of annual income to the owners of Blackacre of £1,000, say, *provided* no holders in the time the lender was interested in died with minor heirs, in which event the stream would be cut off for indeterminate periods, depending on the ages of minors coming into the property. He might be reluctant to lend to landowners subject to feudal wardship relative to those who are not (*socage* tenants), or disposed to overcharge for the uninsurable risk. Wardship would also deter investment by landlords in agricultural improvement, owing to the chance that the benefit would accrue to a stranger; although eventually the increased income would come back to the family, the time in which the investment would pay for itself was less predictable. The danger that a feudal guardian would fail to maintain improvements, or at least to persist in a course of improvement, must also be reckoned with. (Guardians were supposed to take only the current income and to rerun an estate equal in value to what they received, but full enforcement of this duty could hardly be relied on, especially since in practice the guardian was almost always the Crown.) Although one cannot be sure that Blackstone had the effects I suggest in mind, the possibility is strong in view of the patterns of economic and legal history he made out. He was impressed by the growth of economic activity since 1660, and superior tapping of landed wealth as a source of capital was part of that. Modern mortgage law (centrally the equity of redemption, which rendered direct borrowing on the security of land as acceptable risk and hence routine) was probably the main breakthrough in "legal technology." However, clearing away feudal wardship may have been a significant step in a larger reorganization.²⁰

By a technical path, we have approached one of Blackstone's *Leitmotifs*. Commerce never had a happier champion.²¹ A sense of scale in material history separated Blackstone from the common law's earlier antiquaries and celebrants. He was sharply aware of the magnitude of England's commercial development over the last century. Almost with shock, he noted that the royal navy under Queen Elizabeth—and hers a

“maritime reign”—consisted of thirty-three ships.²² Antecedents and obstructions to a commercial and maritime destiny were sought out in the past: King Edgar’s foundation of the navy was prophetic, however far his 10th century flotilla may have been from the square-riggers off Gibraltar that naval power must have conjured up in Blackstone’s imagination. Among other obstructions, it is fair to count legal institutions that retarded tapping the value of land and integrating of the agricultural sector into a progressive economic system. Some of the mysticism disappears from “Anglo-Saxon liberty” if part of the point is simply that pre-Conquest land law, as Blackstone reconstructed it, would have stood less in the way of progress, when cooperative forces were subjoined, than the law that succeeded it. As a signpost, at least, the abolition of feudal tenure after the Civil War deserved emphasis.

While the teleology of commercial destiny distorts, like all teleology, it expressed for Blackstone much more than naïve presentism and patriotism. His historical perspective was freighted with value and with social theory. Montesquieu’s independent influence on Blackstone is hard to weigh exactly. It certainly encouraged his belief in the special magic of the British constitution and helped shape the vocabulary in which he presented it. For Blackstone, as for Montesquieu, there was a strong association between political liberty and commerce: Security against arbitrary government, distribution of sovereignty among different orders of society, separation of powers, and commercial vigor formed a package, with the lines of causality running mutually.²³

Relatively practical considerations, linked to a progressive sense of history with an economic emphasis, do not, however, exhaust the explanation of Blackstone’s drastic judgment on post-Conquest feudalism. As a further explanation, I would suggest that it was informed by his extreme solicitude for vested interests. The degree of that solicitude is striking, though it is unsurprising in itself.²⁴ A good example, off our immediate track, is Blackstone’s treatment of an 18th century problem—slavery. He rejected all theories to the effect that imposing or contracting into slavery can sometimes be justified under moral, or natural, law. He also rejected the ancient position that the universality of slavery argues a *sub modo* justifiability, despite its unnaturalness. Then (with some hesitation, be it said) he turned around and held that a slave acquired under foreign law and brought into England, while not a slave on “free soil,” was nevertheless bound to serve his erstwhile owner for life.²⁵ The implicit premise of the liberating part of the proposition would seem to be that English courts could not recognize foreign law contrary to the law of nature (whereas by Blackstonean jurisprudence they could certainly *not* overturn an English statute as contrary to the same).²⁶ But then, the rest of the proposition says, the slave owner’s interest should be translated into the closest approximation that is not incompatible with natural law. The slave should be treated as if he had unconstrainedly made a labor contract for term of life, the last thing he is likely to have done. The result is outrageous, save by assuming that English law does and should lean over backwards to avoid deprivation of property, regardless of the justice of its acquisition.²⁷

One could revert to the last theme above and note the utility of such practice for the capitalization of expectations. Or one may look to another quarter and observe that English practice was to avoid deprivation of property so far as possible, even though the legal power to deprive existed, and even when there was *ex hypothesi* sufficient reason

of social utility. In other words, Parliament always compensated takings of specific property, though it was not, and could not be, subject to a legal duty to do so, such as that imposed by the United States Constitution.²⁸ Parliament could not be so subject because it was the sovereign: Blackstone taught the analytic necessity of legal systems' ending in a *legibus solutus* point. That was very much a necessity for *legal* systems. In marked contrast to Thomas Hobbes, Blackstone was not ungenerous to the moral prerogatives of private conscience, and he was generous indeed to the collective title of the community to find right ways outside the law, when the limited capacities of law were exhausted. But absolute power remained a necessity, and in consequence, it was with the *spirit* of English law, with a kind of honor or sportingness, that property was ultimately safe. Parliament did compensate me when it took my pasture for a highway, though there was no legal sense in which it had to. In the example above, slave owner beneficiaries of vicious foreign law were given a closer specific equivalent of what was taken from them in England than monetary compensation would have been. On the political level, which this context illuminates, the supreme touch of craftsmanship in 1688 was to avoid *depriving* James II and his heirs of their property in the throne at all. By formally adjudging that the king had abandoned it so as to bind his heirs, the community limited the use of its moral title to go outside the law to the narrowest possible scope. The justice of William's and Mary's acquisition was put beyond cavil, at least as much as the most scrupulously compensated taking, or the most cautiously circumscribed assertion of natural right and good sense over wicked or foolish human law, as in the slave owner's case.

Extreme delicacy toward vested interests was basic to Blackstone's legal theory.²⁹ He believed that property existed by right of nature, or theoretically prior to the civil state. The state was formed partly to secure existing property, but partly to add value to the property people were imagined as already having. The latter good was effected by making property transferable at the death of the present holder, whether by will or hereditary succession, and by making it more reliably transferable *inter vivos*. By Blackstone's doctrine, natural property was acquirable only by occupation and losable only by abandonment. Death being *ipso facto* abandonment, all natural property was life property. The only way to convey my natural life interest would be to abandon it in the exclusive presence of the intended alienee, hoping no stranger was hiding behind a tree to rush in and perform the first act of reoccupation. To overcome the limitations of natural conveyancing, and to confer the economic benefits of intergenerational property, it was necessary to have a sovereign state. Only a full sovereign could have authority to rescind the natural law of occupation and abandonment in favor of a system that would identify who was entitled to land and goods by other criteria than asking whether the holder occupied (without abandoning) the thing in dispute before an antagonistic claimant. A sovereign state was by definition in a position to take away preexisting property. Its not doing so, its not presuming on the power required to improve on natural property so as to betray the other objective of securing it, was critically important.

Even so, however correct or "sporting" historic states were on that fundamental score, they could not avoid a deprivatory role altogether. This was the central ambiguity in Blackstone's system. It can be formulated in general terms as a tension between utility—which was the reason for having "civil property" at all,

but which could also justify treating the rights of “civil property” as less than absolute—and the category of rights—of which natural rights were the paradigm case and civil rights the man-made copy. States must be judged, not by the counsels of perfection, but by the scrupulosity and success of their efforts to balance utility and rights, or the skill with which they mitigated and compensated depriving people of rights for the common interest’s sake. In the immediate terms of the theory of property, the point to observe is that occupation and abandonment did not make for a system of non-property, but *one* system of property. One system of property could not be discarded for another without at least destroying opportunities accruing under the old one. Any discomfort this causes can be assuaged by distinguishing opportunity from vested interest. As it were, “We may have deprived you of a way of acquiring property you had before, but notice how careful we have been to protect the property you actually had, while notably enhancing its value.”³⁰ If this fails to stop the mouth of one who professes willingness to take his chances with the natural system—a redistributionist, perhaps, who notices the tendency of perpetual property to favor accumulation—it may be necessary to look to the finer points of compensation.

In gross, the very act of forming a civil society was a compensated taking. For loss of opportunities under the natural order, I have received all I strictly “had” under that order with safer title, plus an enormous increment in the form of powers of disposition. I am scarcely more favored, though hardly less, when for my pasture Parliament gives me not only my share of a highway, but the present market value of my land as well. (The highway and all its developmental fruits have only to cover for appreciation, for lost opportunity.) In detail, it is possible to see more exquisite ways in which deprivation has been minimized and paid for in England. Blackstone’s examination of these is important for his assessment of English law, both on the positive side and on the critical.

For one type of argument, Blackstone in effect accepted what the 16th century theorist Christopher St. German called the “secondary” law of nature.³¹ That was the paradoxical idea that certain rules which could not obtain in the governmentless state of nature were still natural. These rules had a preferential claim to be applied when their application became possible under civil government. (The claim was preferential, rather than categorical, in the sense that it need not prevail against all conflicting considerations of social utility.) Man-made law that fulfilled nature by permitting the implementation of natural rights that lay inert in the pre-civil condition must be especially good compensation for relinquishment of other natural rights. For example, one of the basic objectives of human property law was to make *post mortem* succession possible. Thereby, it enabled implementation of the natural imperative that parents provide for their children. In detail, however, systems could be more or less careful to see that their law insured that effect. In Blackstone’s accounting, English law scored fairly high for closeness to nature on this scale, though it did not get perfect marks. Feudalism bore some of the blame for its falling short (another count against wardship); history had on the whole moved toward a better approximation.

Primogeniture is an example of Blackstone’s willingness to *criticize* English institutions in terms of “secondary natural” justice, even when such institutions were too ingrained to change. Earlier apologists for the common law tended to defend primogeniture as either good or indifferent. It left Blackstone uneasy; to the extent

that he accepted its unfairness to younger children with equal natural claims on parental care, it was on grounds of offsetting social utility. The free devisability of real estate in modern law (since the statute of Wills of 1540) ended primogeniture as an effective institution, while putting it in the ancestor's power to ignore the bonds of nature altogether. Blackstone was not sure that the better modern law was entirely good. Its demerits were somewhat reinforced by testamentary freedom in the disposal of personal property, the importance of which commerce had magnified, though on that side developments in the law of intestacy had done something to rectify the balance in nature's favor.³²

Another test for the scrupulosity of man-made law was its willingness to preserve the prior law of occupancy so far as possible—that is, to recognize title by occupation when someone had in fact gained possession of something previously belonging to no one. In a sense too general to receive particular comment, it is worth noting that English law was in line with nature, for title ultimately rested on possession. In a concrete application of the standard, Blackstone used it to criticize a strand of English law. He approved of what he believed was the original Anglo-Saxon decision: to do away with the right of occupancy as such by vesting title to vacant land and most abandoned moveables in the king, and by giving the owners of land the exclusive right to hunt on their property. As to the latter point: The major problematic class of things that do not admit of permanent property, but only of occupation—wild beasts—was in a sense left as it stood in nature, but the opportunity to acquire wild animals by catching or killing them was subordinated to the landholder's right not to be trespassed on by pursuers of the natural right to chase the unowned. The arrangement as a whole sufficiently offset any deprivation, for in addition to avoiding the squabbles bound to occur when ownership can be gained by taking, it gave the king some endowment, thus diminishing taxes, and strengthened, at least by clarifying, the rights of landownership. At the Conquest, however, the king pressed his title to non-appropriated things to the previously omitted case of wild beasts, erecting the Forest Laws to enforce by tyrannous means what was at best an unscrupulous invasion of the landowner's quasi-property. While much "Anglo-Saxon liberty" was won back in English history, the record on wild beasts was dismal. The old Norman Forest Law was long dead, but the modern Game Laws were its spiritual descendant. The little that could be said for the former was more than could be advanced to defend the Game Laws, which Blackstone regarded as a disgrace to his enlightened age.³³

While England had not managed the transition from nature to civil society perfectly, she had done well on the whole—with one glaring exception. The Forest Law, a prime symbol of "enslavement" at the Conquest, brings us back to our original question: What was so profoundly wrong with feudalism? My suggestion is that more was wrong with its adoption than the foxy politics that got the feudalizing "statute" passed and the subtle construction that stretched it beyond the makers' intent. The transaction was a gross deviation from English generosity and honor. It was a perfectly legal act, not unjustified if it had been a slight negative alteration of the landowner's interest for the sake of a considerable common gain in military efficiency, but, as it turned out, a drastic change in the meaning and value of property. Even if Anglo-Saxon law had been intrinsically

inferior, like nature's property law to man's, and even if the naive parliamentarians had known what they were doing, the shame of using sovereign power to defeat vested interests would still have hung over the Conqueror's reign. Even if Parliament had meant badly, the Norman jurists would have had a duty to save vested interests by favorable construction. But their hearts were not English. Such sins against the national genius may be expected to echo through the centuries, to obstruct destiny.

What exactly the English landowner was deprived of at the Conquest we must soon ask. First, let us look at a final charge against feudalism. Blackstone considered its effects unfortunate partly because it had a history prior to its introduction into England, and because it had an underlying, "primitive" theory, which obtruded even when the practical law had moved beyond it. The inheritance and conceptual scheme of feudalism, even apart from the cooperative influence of the "Norman juristic" mind, caused the law to be weirdly complicated and riddled with fictions, to speak a language strange to the natural ear and foreign to the straight-talking Saxon (like the barbarous Law French in which the law was literally discussed, and which Blackstone saw as a badge of slavery with all the indignation of a 17th century Leveller.)³⁴ Toward this intricate fabric, Blackstone's attitude was both embarrassed and conservative. Because it was a richly interconnected fabric, he was afraid of any direct and comprehensive attempt to reform it. He was skeptical of most legislative law-reform, fearful of unintended consequences, and of uncertainty more costly than some bad rules and an awkward vocabulary. Yet it is easy for reformers and rationalists to misperceive the context of Blackstone's conservative attitudes. His belief that the law was stuck with a feudal heritage was counterbalanced by the belief that its ill effects had been largely cured. His complacency toward the fictions of modern law (at which Bentham took particular offense) can be explained by his perception of their function—as liberators from real antiquity and ancient unrealities. The fictions had been invented by the judges to register unmistakable changes in conditions of society and habits of thinking, and they were therefore both within the judicial role and superior to legislative forethought. In a telling image (with immediate reference to civil procedure), Blackstone compared the law to an old castle now fitted out as a comfortable modern habitation, but with the moat and ramparts left standing. Only when it was possible to say, "There would be no point in tearing down the ruins," did Blackstone permit himself to feel it would also be a shame. As a master elucidator of the old learning, Blackstone could scarcely avoid twinges of affection for it, but he was far from the Cokean faith that the tracery of the common law represented the artificial perfection of reason.³⁵

As for feudalism's underground effects: In the beginning, on the Continent, feudal institutions were a law of conquest. The system was imposed by military victors in a physical and moral position (in the moral aspect, unlike William the Conqueror's) to impose what they pleased. It was designed to secure conquests in hostile territory. Yet feudalism was not the necessary way to organize conquered land, nor was it fully explicable by its efficiency among possible means. Rather, it was the racial way, the way of the "Northern peoples." These were Germans essentially (Caesar and Tacitus were often cited to trace feudal and related practices back to the homeland), except that

Blackstone's conception of the "Northern barbarian" was too generous to be strictly ethnic: the Celts, and even the Huns, are swept in. While these Northerners were also, somewhat paradoxically, "peer-group minded," in arms they were remarkably subject to their general. He was the conqueror; what was conquered was his to distribute. Racial habit (though the method made sense enough to impress Roman Emperors and to spread through the parts of the ravaged Western Empire that were not directly overrun by the invaders) dictated erection of the "pure" feudal defensive system. The general gave out fiefs to his officers, subject to military service. Towards meeting their quotas, the officers conferred smaller fiefs on their subordinates. This was a practical system set up by conquering generals in a commanding position. Consequently, fiefs were precarious. Since they were given to reliable soldiers and leaders in consideration of personal ability, they were not hereditary; they could not be alienated without the lord's consent; they were forfeitable to the lord if the vassal failed to do his service or misbehaved in other ways so as to cast doubt on his fitness. Indeed (though this was subject to the competing racial habit of consulting the peers, or vassals on the same rung of the ladder, in the affairs of the country or the fief), the overlord was so literally the "owner" of the land which he dispensed on temporary terms, and his power was so great, that fiefs were close to "life-estates terminable at will," and as a result lords were able to exact more than services bargained for plus the benefit of conditions explicit in their grants.³⁶

Later, Continental feudalism began to depart from its archetype. Blackstone was vague about chronology, but he clearly thought that the feudalism brought into England at the Conquest had already undergone extensive change, particularly by fiefs' becoming hereditary *de facto*, though not in principle. The original model, however, and the gradual, clumsy steps by which it had been modified, left a strong stamp on the imported system and on its subsequent development as English land law. The deplorable incidents were the obvious illustration of this effect.³⁷ Fiefs were not originally heritable; when they became so by stages, they did not become simply so; rather, lords were able to charge for the privilege of succeeding one's ancestor; reliefs were the result. Although economically unfortunate and insulting to family feeling, wardship made perfect sense when one imagined lords grudgingly accepting inheritance, but interested in a yield of service from the land during minorities and having a satisfactory tenant when the boy grew up. If a vassal must go because he was a felon (a serious criminal, originally a "bad vassal" in a more inclusive sense), of course his land returned to the lord whence it came, though it would be more elegant from the point of view of legal theory if criminal forfeitures went to the state. Another effect, this far from deplorable, was on conveyancing. The common law mode—"livery and seisin," the requirement that land be conveyed by an open and notorious act of symbolic handing-over on or in clear sight of the property—was connected with the absence of free alienation under early feudalism. When alienation was by the lord's favor only, it took place in his court, in the presence of his vassals; at that time, it was conceived as an act of surrender to the lord and regrant by him; although it ceased to have that form, the expectation of notoriety survived.³⁸

There were also subtler effects left by an obsolete form of feudalism and the manner of its obsolescence. These finer points interested Blackstone especially and occasioned some of his greatest expository *tours de force*. It was in its remoter reverberations that feudalism lived on in the 18th century. Military tenure was happily

dead; the virtual death of “livery and seisin” was less happy, but modern conveyancing had its merits, and it was significantly liberated from the vice of secrecy by the Statute of Frauds, another glory of Charles II’s reign.³⁹ By contrast, it remained law, for example, that a father could not be his son’s heir, and that my third cousin would have my land in some circumstances to the exclusion of my half-brother. Blackstone conceded that such rules offended reason. They were the main locus of his fear that deliberate change would bring unintended wreckage, and of his hope that understanding feudalism might reconcile modern people to its results.

I cannot here do full justice to Blackstone’s elaborate account of the rules stated above and related ones. The general point is that the primeval non-heritability of fiefs entailed fictitious ways of getting around it, and the fictions spun off their own oddities. Naturally enough, newly acquired fiefs held out against heritability longer than those that had *de facto* been transmitted from ancestor to heir through numerous generations. Later, if one wanted to grant a new fief and make it heritable, it was necessary to pretend that the fief was an old one. This pretense (sometimes with the help of premises not wholly reducible to the ideas and practical needs of feudalism) engendered various complications. The following is a simplified explanation of the two examples above: While a fief granted to me in my lifetime could perfectly well pass to my father if I predeceased him, an old fief could not. The reason is that the fief must have come to him before it came to me (assuming some further doctrine on propinquity of relationship and lines of descent). A new fief making-believe it is an inheritance, the common case once heritability was generally recognized, must be under the same rule as a true old fief, wherefore, in the upshot, no real estate can pass from child to parent. As for the second example: There would have been no reason to keep my half-brother by my father’s second wife out of a fief inherited by me from my father. There was, however, a reason (again with some assumptions about eligible bloodlines) to exclude him if I inherited the land in question from my mother. If what I had was infected by fictitious heritability, as even real old inheritances came to be, there would be no way of telling whether the half-brother belonged to the right line. Consequently, there was no choice but to go by the odds; the half-brother with a fifty-fifty chance of belonging to the paternal line yielded to the sure thing, such as a grandson of my father’s sister.⁴⁰

When all was said about the barbarous beginnings that made these sleights necessary, the oppressive features of feudalism, and the spidery scholastic mind, the devices remained footsteps on the road to progress, ways around the past. In a sense, they were continuous with the modern fictions. Blackstone tended to favor explanation by device, by the workings of the legal mind, sometimes in preference to straighter feudal explanations. (For example, one might note that rules excluding naturally eligible heirs, such as the father and half-brother above, improved the lord’s chance for an escheat, since the remote kin the rules tended to favor might fail to turn up or to establish their claim.) That is not to say that Blackstone’s explanations were wrong, only that his inclinations were related to the progressive pattern he saw. Even the medieval lawyers, despite their warped mentality, contributed to progressive disentanglement from the feudal meshes, albeit by creating intellectual ones; their successors, continuing the good work, might smile at the mystification they were still obliged to indulge in. For medieval history, the path of improvement pretty well terminated, as Hale had taught, in Edward I’s reign. By then, given the persistence of military tenure as such and its growing inexcusability as it

became fiscalized, the law settled around hereditary landholding subject to firm and well-known rules, around basically free alienation, definition of the incidents of feudalism with containment of their worst excesses, and a smooth-running legal system to insure *sum cuique*.⁴¹ The story started with the Conquest, to which we must now return, in order to examine more closely the nature of the change it wrought and the liberties it bereft the English of.

The English were not deprived of allodial landownership pure and simple—that is, a system under which, save for land in the hands of temporary lessees, the soil belongs to a multitude of owners, instead of being held of a lord, and ultimately of the king as superlord. It would be surprising if the Anglo-Saxons had had an allodial system, for they were after all “Northern people.” Blackstone says explicitly that what they had, in accordance with racial type, was feudalism, but of a less rigorous sort than that introduced after the Conquest.⁴² Negatively the central meaning is clear and so therefore is the practical gravity of the deprivation: the incidents were not a feature of Anglo-Saxon feudalism. A further negative point is that land was not encumbered by military service. The duty to serve in the militia, however precisely defined or limited by class or wealth, was personal. It was not conceived as due because one held land, or as a condition of holding it, though loss of land or other property could of course have been a punishment for breach of public duty. Beyond these negations, it is hard to reconstruct how Blackstone visualized the Anglo-Saxon system, and hard to be sure how he accounted for its character, including the absence of incidents, given its source in common with Continental feudalism.

Blackstone adopted from Hale a generalized skepticism about our capacity to know early institutional history and to sort out the mingled influences on a country visited by several successive invasions. But Blackstone’s eagerness to explain and ability to imagine urged him on despite uncertainty, in contrast to the austere skeptical Hale. He said enough about Anglo-Saxon England to tantalize, without gathering up the loose ends. Had England simply evolved farther than the Continent from a “pure” feudal start? Had she done so sensibly, instead of by legalism and fiction, since she lacked “Norman jurists” and enjoyed a popular, participatory judicial system, with scope for the lay mind and “natural equity”? Had England covered, between 500 and 1066, about the legal-historical distance between 1066 and 1660, but by a straighter path?

An advantage of the hypothesis implied in the questions above is that England would have had a comprehensively tenurial land law as of the Conquest, only with the incidents faded away and with military services commuted into rents. An advantage of that position, in turn, is its accord with a point Blackstone insisted on at length: *Socage* tenure, where the service was non-military, and the incidents were at least much milder, was a survival from Anglo-Saxon times.⁴³ The *socage* tenants of the middle ages were landowners exempted from the feudalizing “statute,” some out of favor, others because their holdings were too small to be of any use in the military system. They were a privileged class of tenants (not the humble peasant proprietors some of Blackstone’s authorities said they were), but tenants all the same, links in tenurial chains culminating in the king’s signory over his entire realm. It is also on the side of the hypothesis that it gives weight to judicial arrangements that Blackstone valued highly as means to the rapid and efficient civilizing of feudalism. Those included the jury itself, the

primeval method of trial in Britain, according to Blackstone. Although in a cautious way, Blackstone was aware, and approving, of the jury's power to transcend its nominal fact-finding function and shape or obstruct the law.⁴⁴ The English were only partially deprived of their procedural heritage at the Conquest, and perhaps not in a flatly expropriatory manner. The jury, of course, survived. Even so, the tools for cutting back feudalism or other oppressive law were blunted, compared with the days of liberty.

An alternative theory might suggest that Anglo-Saxon landowning was very extensively tenurialized, but not at the top. On this construction, the major aristocrats would have held allods with numerous tenements depending on them. The king would have had no seigniorial interest in land other than his own demesnes and the tenements carved out of them. This theory has a certain constitutional virtue, for it reduces what the king held outside his demesnes to his public authority, cuts down the opportunities that were uniquely his in a totally tenurial system (because he alone was always lord and never tenant), and trims the balance between monarchy and aristocracy. A proper balance between those two elements, as between each and the popular *tertium quid*, was critical for English liberty and stability, in Blackstone's view, and his solicitude for aristocracy was considerable. (There was no contradiction in Blackstone's thought, as there was none in Montesquieu's, between a privileged hereditary order of large landowners and a commercial spirit. Their coexistence was the formula of liberty.) The Anglo-Saxon prototype of the "constitution of liberty" was no proto-democracy. Perhaps, in its different way, it was as finely tuned a balance between the king and the aristocracy as 18th century England almost was,⁴⁵ after a long spell of too much monarchy—feudal monarchy yielding to Tudor despotism, yielding to Stuart prerogative and anarchic revolution. The hypothesis of "imperfect tenurialization" also fits with Blackstone's outrage at the Norman-feudal idea, as he represented it, that the king in a sense "owned the country." (Had the feudalism "statute" been correctly interpreted, the king's paramount proprietorship would have been taken as a mere fiction—as a way of saying that my estate was encumbered with a duty of military service for the king's benefit, not "really meaning" that he had an interest in my land.) If Anglo-Saxon feudalism had evolved from the pure original, it would seem that a real seigniorial interest in the land and title to escheats in the king as lord would have been recognized, even though he had lost entitlement to incidents and to military service in virtue of lordship.

Blackstone cannot be pinned down to one of the constructs above or to any alternative, for he did not pretend to articulate a full historical picture before the Conquest. He was similarly elusive about factors in early history other than feudalism and Germanic folkways. For example, did Anglo-Saxon feudalism either evolve quickly away from its primitive type or fail of full-scale establishment at the time of the invasions because of Celtic and Roman influence? Since the Celts counted as "Northerners" too, there is nothing to exclude the fantasy that before the Saxons arrived, feudalism had once already devolved to a respectable version in Britain. Whereas on the Continent the barbarians imposed "rigorous" feudalism on their direct conquests and gave the destitute subjects of the broken Empire no choice but to organize the same way in self-defense, the situation in Britain can be imagined as different. Feudalism had perhaps been experienced and reformed long before the Germanic form of it took rude possession of a Gaul so thoroughly Romanized that all

memory of a distant Celtic feudalism was lost. In addition to putting the Britons in contact with commerce and civilization in ways that never touched the German homeland, the Romans might have contributed to reform of a still recognizably “Northern” society without turning it into a completely Latin one. The Saxon barbarians were perhaps quick to learn from people whose habits and institutions were neither like their own nor too drastically different.

By such means they might have been spared much of the time and pain of evolution.

To the specifically Roman contribution, Blackstone may have given a good deal of tacit credit. The *Commentaries* are full of comparisons between English and Roman law. These are various in their intent—neutral comparativism, traditional demonstrations that the common law is better than the civil, intimations of the substantial measure of agreement among all civilized systems of law.⁴⁶ Blackstone was emphatically glad that English law was not supplanted by revived Roman law in the middle ages, when, in his opinion, there was a danger.⁴⁷ But in its early historical place, in Roman Britain, he may have thought that Roman law had a large and constructive influence. One strong example encourages this generalization. Among the achievements of Charles II’s watershed reign was the Statute of Distributions. Roughly, the act cleared up a badly distorted law of intestacy by seeing that estates were sensibly distributed among surviving relatives. In a lengthy excursus, Blackstone tried to show that the scheme of the Distributions Act amounted in detail to a restoration of the ancient law. Who should turn out to be the author of the ancient law but the famous juriconsult Papinian, who saw service at York in the reigns of Severus and Caracalla. Moreover, what Papinian bequeathed to England was the Roman law just slightly modified for the better.⁴⁸ It may not be amiss to observe again that law which is nicely respectful of family claims is obedient to nature—in contrast alike to feudalism’s subservience to the needs of war and the interest of warlords, to the state of nature’s impotence to transmit property intergenerationally, and to the medieval Church’s rapacity to take dead men’s goods for itself, together with as much of the property of the living as it could dupe from them.⁴⁹

The last allusion above, to the medieval Church, points to an important ingredient of Blackstone’s legal history, the religious.⁵⁰ Owing more, perhaps, to proper manners than to personal ardor, he gave spiritual enslavement due precedence over physical. The centuries of feudal bondage had bigotry and superstition as their counterpart and their reinforcement, and the Reformation was a greater burst of light than even the abolition of tenure by knight-service. By the expectations Blackstone saw fulfilled in history, legal reform could not linger too long behind religious reformation. On the other hand, reformed Christianity could not achieve maturity until the excesses of monarchism that made the English Reformation possible were pruned back, together with the Protestant enthusiasm that upset the balance of the constitution in the mid-17th century. For religion, too, Charles II’s reign was a landmark, 1688 the wrap-up. Blackstone’s attitudes were of course no more than the union of three conventionalities—Protestant, Anglican, and “reasonable Christian”—, but the conventionalities were carefully fitted into his secular edifice.

Blackstone was an instinctive believer in “the spirit of the age”—that is, in the coherence of contemporary phenomena on disparate levels. Feudalism looked the more slavish to Blackstone because it went along with a threefold religious thralldom. To the Protestant, medieval Christianity had turned a gospel of liberation into a knot of compulsions, the bondage of “works.” The religious liberal will be more aggrieved by authoritarian institutions holding down free thought and by priestly power propagating nonsense to sustain a profitable racket; he will see the Reformation’s discovery of Christian liberty as a useful first step toward political freedom, and toward a version of Christianity with which a man of sense can be comfortable. To a lawyerly Anglican, the medieval Roman Church had no legitimate authority in England. Blackstone made use of all three perspectives, the liberal Anglican unmistakably his own.

The Norman Conquest marked, and cooperated with, a deeper foreign conquest, for Rome’s usurpation was ungrounded in right, and it never grew into title. The most basic Anglican proposition—the king’s supremacy over the Church, which can be generalized to national, or communal, independence in the spiritual aspect as well as the temporal—was part of the Anglo-Saxon heritage. Besides collaborating politically with rising papal pretensions and importing clerics friendly to them into England, William I dealt an especially fateful blow to Anglo-Saxon ecclesiastical liberty by erecting separate Church courts. Blackstone was not so romantic as to advocate full restoration of the past: The harmless ecclesiastical courts of 1760 were given credit for doing their specialized job, mostly testamentary business, well enough.⁵¹ The original English fusion of spiritual and temporal jurisdiction was, however, central to Blackstone’s conception of the ideal church, for it implied lay participation in the practical operations of ecclesiastical government and procedural uniformity, including trial by jury,⁵² whether the cause was spiritual or temporal. The profoundest stratum of the Anglican vision was vivid for Blackstone. In that vision, the ideal church was not just negatively free from foreign domination and nominally under the king. It was conformed to a particular national community and to local ones within the larger whole. Such a church was a vehicle of genuine religion because it was not too alien from the institutions and habits of everyday life or too much the preserve of a clerical caste. Despite, perhaps, the appearance, or the danger, of being too conformed to this world, it had the immeasurable virtue of fitting the spiritual capacities of living people, conditioned and limited as they were by the historic environment in which their lives were led. Although Blackstone was not naive about the complexity of Christian history, nor, with his sense of progress and his feeling for the economic factor, about the many-sidedness of cultural change, he left the impression that the church of the primitive Saxons could hardly have missed the essential point of Protestantism, nor have failed of reasonableness by the standards of the 18th century.

Save for an overlay of Augustan attitudes, and those not really repugnant to the sensibility of 17th century Erastians, there was little in Blackstone’s picture of religious history that a Coke, a Selden, or a Hale would have quarreled with. Blackstone’s difference from those predecessors is that he used the familiar patriotic refrains of English church history to give shape to his legal history. The final shape was more fully articulated and more affirmative of modern times than earlier pictures. He was the first historian of English law to put the Middle Ages in a transcended past.

NOTES

1. Published in four parts between 1765 and 1769. There are innumerable editions, practically any of which can be used for Blackstone's own text, disregarding the editors' notes and amendments (to which no attention is paid in this essay). Pagination is standard. References are simplified in the form, e.g., C. III, 37 = Blackstone's Commentaries, Bk. III, p. 37. There are an Introduction and four Books, to which volume numbers in various editions do not necessarily correspond. While the analytic meaning of Blackstone's division requires discussion to be fully intelligible, the books correspond in a rough way to: (1) personal rights and constitutional law; (2) property; (3) civil procedure and torts; (4) criminal law. The Books are divided into chapters, which I cite here only when there is some special point in doing so. Because of the particular historical themes dealt with here—feudalism, property, private law—I omit the substance of Bk. IV. Ch.33 of Bk. IV, however, is the historical summary discussed below in the text. Since that chapter reviews Blackstone's historical opinions in less than forty pages, I do not cite particular places within it in the notes, but only the more scattered passages of historical import in the body of Bks. I-III. There is a considerable secondary literature on Blackstone. Since this article is very much an interpretive essay and "reading," I shall not attempt, except for an occasional point, to deal with ways in which my views agree or disagree with statements that have been made about Blackstone on matters other than his historical picture. Although Blackstone has not gone unnoticed as an historian (e.g., W.S. Holdsworth, *The Historians of Anglo-American Law*, New York, 1928, 54 ff), his construction of history has not, I believe, had as extensive treatment as it is given here.

2. Whether an elementary treatment of a complex legal system is intellectually possible, and what such a treatment would mean, is a question worth asking. Better to ask the question than to assume that an elementary version of *anything* is producible. What is the nature of the gap between what the practitioner-expert knows and what the layman can be sensibly taught? The question tends to arise with respect to law in a special form because of the practical character of the subject and the propensity of the legal profession to be something of a priestcraft. It is of interest to note that whether English law admits of a lay-elementary version is discussed in the first "intellectual" book about English law (Fortescue, *DeLaudibus Legum Angliae*, later 15th century—mod. ed. by S.B. Chrimes, Oxford, 1942, Ch. 8), where the question is resolved in favor of the possibility of non-professional instruction. Except by the occasional implication, I do not in this essay deal with what elementariness meant to Blackstone and how he would have defended its possibility; that question would be worth pursuing.

3. For Blackstone's aspirations for his book and his conception of the gap it would fill—including his view of the contemporary profession and of the place of law in lay education—see his inaugural lecture, which is printed as Introduction, Sect. 1, at the start of the *Commentaries*—i.e., his introduction to the series of lectures at Oxford that became the *Commentaries*.

4. I cannot digress to defend this statement, only suggest that it points to the “philosophic” interest that is recurrent in Blackstone: What is positive law for, given that it is not the only kind of law? What may it legitimately regulate, seeing that it lacks total moral freedom to do as it likes, or as its legislators choose, or its beneficiaries may benefit from? How clearly does English law serve the functions and observe the limits incumbent on positive law? Blackstone’s having no wholly satisfactory answer to these questions perhaps tends to argue that they were the issues that bothered him.

5. For the Cokean mentality and its 17th century critics, see J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, 1957) and some mild dissent from Pocock on my part in my introduction to Hale, cited below.

6. *History of the Common Law of England*. There is no serious discrepancy between that title and “History of English Law,” for the kinds of law with a history in England that do not count as common law (ecclesiastical law, Admiralty law) were at least accounted for (essentially by subsumption under the common law, via the accepted doctrine that those laws had force by the common law’s sufferance). Equity was curiously neglected by Hale, in contrast to Blackstone. Hale’s *History* was published posthumously and cannot be dated precisely. There is a modern reprint with an Introduction by myself (Chicago, 1971). The remarks on Hale in the text below, subject to some differences of context, are anticipated in that Introduction; see the bibliographical note thereto for other works by Hale from which his ideas can be gathered.

7. C. IV, Ch. 33.

8. The contrasting “cyclical change” was characteristic of Coke, who tended to see patterns of departure from and restoration of an order that was there before, indeed primarily. As will appear below, there are elements of the “cyclical” in Blackstone, but they can be overstressed. I believe they are by Paul Lucas, *Essays in the Margin of Blackstone’s Commentaries* (Ph.D. dissertation, Princeton, 1962—University Microfilms), especially p. 258. In the abstract, Hale was the most “linear” of the three, but Blackstone had a far stronger sense of change in the environment of the law and its content as conditioned by external forces.

9. “Clarendonian” would describe Blackstone’s position. (The “noble historian” is acknowledged—C. I, 315-16; C. II, 345.) Charles I was certainly at fault (though not always when he was thought to be), but he made satisfaction in the early and legally regular period of the Long Parliament—C. I, 315-16, 404; C. II, 69. The revolutionary phase violated all the principles of constitutional balance and its fruits make that clear—C. I, 154, 208, 262, 318 ff. (introduction of the excise, a dubious fruit in Blackstone’s view). Merit was conceded to some legal reforms but grudgingly—C. I, 418 (the Navigation Acts, of which Blackstone strongly approved, were credited, but Blackstone went out of his way to impute narrow motives and lack of real originality to the Long Parliament); C. III, 322 (closest approach to generosity). Blackstone’s most remarkable lapse was failure to note, and to inquire into the reasons for, the Long Parliament’s anticipation of the abolition of feudal tenure.

For 1688 by contrast, see the extensive analysis at C. I, 211ff., also C. I, 233, 245. The importance of the 1660-1688 period will come out from examples in the text.

10. The passages in which the ingredients of Blackstone's theoretical *mélange* can best be seen are Introd., Sects. 2-3 and C. I, Chs. 1-8, though of course such general notions crop up in scattered places. On the "dash of proto-utilitarianism": Bentham's famous attack on him perhaps causes Blackstone to be thought of as the opposite of a utilitarian. Fair enough, if believers in natural law and utilitarians are flatly dichotomized. But the utilitarian element in Blackstone is evident. The question about it is whether it is coherently related to other elements. In one explicit passage of high generality—Introd., 40-41—Blackstone seems in effect to say that the utilitarian solution to any moral question is the same as the natural law solution. That could be as good as a rejection of natural law, by rendering it nugatory. However, I doubt that that was Blackstone's meaning. The form in which the point is made (God so pitied sinful and stupid man that he made it possible to lead a moral life in ignorance of the moral law, just by pursuing long-run utility) perhaps suggests the alternative: utilitarian solutions approximate ones drawn directly from moral law and are a pragmatic substitute, but properly moral solutions are a real possibility, and their perfect reproducibility by utilitarian solutions is not guaranteed. I shall indicate in the text below how I think Blackstone handled utility on the level of social philosophy. The point there, might be summarized by saying that Blackstone's confusion was his strength: like a syncretist, he wanted both the natural law tradition and utilitarianism to be true, and was somewhat torn as to which is true, but by being inclusive and uncertain he may have seen a quite defensible point—that societies are to be judged by the way they balance the claims of utility and those of rights, neither being capable of ousting the other and no abstract formula of accommodation being derivable.

11. For "radical Whig" ideology, Caroline Robbins, *The 18th Century Commonwealthman* (Cambridge, Mass., 1959); J.G.A. Pocock, *The Machiavellian Moment*, Pt. 3 (Princeton, 1975).

12. For example, Blackstone seems to me to have been insensitive to history with respect to some features of procedural law. E.g., C. III, 294, and cf. 107. (Modern English law was usually indifferent to whether events were tried where they occurred, and in consequence foreign events were triable. This was a hard-won feature, involving alteration over time of major assumptions about jury trial. Blackstone took the law for granted and discussed the virtues of local and non-local trial in the abstract.) C. III, 341 ff. (Wager of Law tagged historically as a Germanic institution and correctly said to have virtually vanished from modern law, but still rationalized, rather than related to deep societal changes.) It is in the procedural context, especially with reference to trial by jury, that Blackstone in a sense most needed to find an abiding element. As it were, and as the text below suggests, in order for jury trial to have been improved and "fulfilled" over history, it must have consistently meant *somewhat* the same thing at all times. See C. III, Chs. 22 and 23 generally—on trial methods and the jury.

13. Hale, *History*, Ch. 5. The passages in Blackstone on his interpretation of the Conquest and his view of the proceedings following William's winning of the throne are C. I, Ch.

3, especially 198-99; C. II, 47 ff., 242.

14. There was much discussion of this question in the 17th century. Blackstone handled it in a gingerly way. Since it is true enough that the Anglo-Saxons and Anglo-Normans had consultative practices that can be equated with Parliament in a way, the real point of contention was whether there was any equivalent of Commons representation, as opposed to a body of *witan* or (later) barons corresponding to the Lords. Blackstone fudged the question enough to show that he knew perfectly well that there was no primeval House of Commons. He took refuge in the true proposition that something remotely of the sort could be traced back as far as Magna Carta (lesser landholders summoned collectively for consultation about scutages and aids—Art. 14 of the original charter)—and tacit refuge, perhaps, in the attitude that 17th century demands for literal prescriptive warrant were excessive, as if 1215 weren't long enough ago to satisfy anyone. C. I, 146-49.

My language in the text is not meant as comic exaggeration. From the critical passage (C. II, 47 ff.), it is clear that Blackstone did imagine a perfectly explicit legislative act by a Parliament-like assembly. In fact, with some tentativeness, Blackstone thought that the text of the “statute” was probably the surviving text (quoted) of the so-called Salisbury Oath (a misinterpretation, since the point of that oath was to secure the allegiance to the King of all landowners and important men whether or not they were his direct tenants). On the side of qualification, Blackstone admitted a note of tentativeness into his language generally, acknowledging that the reconstruction of these remote events was speculative. More important, he conceded that feudalism in the full sense insinuated itself to a considerable degree before it was generalized by legislation (by the king's granting out forfeitures on feudal terms and other Norman acquirers' of land doing the same thing with portions of their estates).

It may clear the air here to say a word about the “truth” and what the mix of reality and fantasy in Blackstone's version was. However, the complexity and continuing obscurity of the full truth is the main point to be made about it. Of course, the “statute” was imaginary. It is to Blackstone's credit that he did not make the switch to proper feudalism a drastic change of systems in the most basic terms. That accords with the strand of modern historiography that emphasizes the high degree of feudalization in Anglo-Saxon society. Exactly how somewhat different feudal institutions from those known in Anglo-Saxon England, and a certain “tightening” of the system, became as universal as they did in short order is less than clear, or recoverable. Blackstone's combination of insinuation followed by a universalizing “statute” is not so bad, provided the latter is taken (contrary to Blackstone) as a sort of myth for undeliberate, “customary” application of Norman-feudal rules and expectations to some situations where they may not have been imposed directly (on the occasion of a grant, as the terms thereof). The most jejune of traditional pictures—William holding the whole country in his hands and giving it out on feudal terms—was emphatically not Blackstone's.

15. C. II, 51-52, for the main point: the “statute” was interpreted against its intent. The “Norman jurists” turn up in many places, and their association with the scholastic mind is insisted on. E.g., C. II, 58, 76, 360; C. III, 62, 321-22. Cf. Note 49 below. While the false interpretation of feudalism was their most important contribution, they were connected

with many other evils: a generally cobwebby, “unmanly” medieval mind that spread its influence into the law, tricky legal maneuvers for the benefit of the Church. While Blackstone was cavalier in treating the middle ages as all one and all perverted, he deserves credit for calling attention to the relations between medieval intellectual style outside the law and the thought patterns of lawyers. It is possible to transvalue his Augustan prejudices and see in the medieval intellectual disciplines a resource for the development of a critical, professional legal tradition in medieval. England.

16. See Christopher Hill, “The Norman Yoke,” in *Puritanism and Revolution* (Paperback ed., New York, 1964).

17. General assessment of Magna Carta: C. II, 52, 77. Particular provisions of the charter outside its feudal core are treated with due respect at various places. It is a curious feature of Blackstone’s history that he thought Henry I’s coronation charter a much more extensive reform than Magna Carta—a complete, though ephemeral, repeal of the bad “incidental” side of feudalism, though retaining the central principle, whereas Magna Carta only corrected abuses and excesses of “incidental” feudalism, so, indeed, as to give it a new lease on life.

18. C. II, 92.

19. I take the passage at C. II, 76-77, where the 16th century writer, Sir Thomas Smith, is quoted on the evils of wardship, as a virtual acknowledgment that the gravamen of the charge against feudalism lay on that institution. It is, I think, historically obvious that that was the case. Blackstone was aware that agitation for the abolition of military service had long preceded its accomplishment. (He refers *ibid.* to the unsuccessful Great Contract of 1610.)

20. My tentativeness as to whether economic history would really have been much different if feudal tenure had not been abolished is owing to the complexity of the subject in full color and to the slimness of our understanding of the conjunction of law and economics in the early modern period. My basic suspicion is that Blackstone committed the common error of overestimating law (or “legal technology”). He saw an increment of trade and prosperity and assumed that getting rid of outworn and oft-complained-of legal institutions must have had a great deal to do with better times (compounding the error by failing to see that modern mortgage law, which he neglects, was a more important contributor than doing away with feudalism). It is perhaps the part of good sense to suspect that tapping landed wealth as a source of capital was mainly a function of increased demand and opportunity for capital. Streamlining legal institutions to fit the market may often be, not a matter of removing an intractable obstacle, but of making it easier to do what is being done anyway. In other words, one can often contract around inefficient law without incurring exorbitant transaction costs. The variables are so many (different types of mortgage and credit law, opportunities for using trusts, the difficulty and cost of simply enfranchising—i.e., converting to *socage*—land deleteriously affected by feudal liabilities) that I cannot begin to say whether a remnant of feudalism would have significantly affected economic behavior in the period after 1660 (or did very much

affect it before). What I am concerned to suggest is that Blackstone probably thought it a significant roadblock.

21. There are innumerable ways in which Blackstone's text testifies to his championship of commerce and his awareness of economic change and "scale." E.g.: C. I, 250-61 (a certain receptivity to commerce was built into English—and "Northern"—law even when it was plagued by feudalism); C. I, 273-78 (brings out that receptivity via discussion of the King's longstanding prerogative to regulate commerce—that regulating means expediting, rather than constraining, accords with Blackstone's strong mercantilist assumptions, for which see C. I, 418, on the Navigation Acts or C. I, 427-28, where there is more defense than criticism of the restrictive apprenticeship system); C. II, 384-85 (shift of wealth from real to personal property in modern times and its effect on the law); C. II, 454 ff. (on usury—a reflection of Blackstone's capacity, not unsophisticated for his times, for economic analysis—conservative in some ways, but basically appreciative of the imperatives of a commercial society); for similar sensitivity to the impact of economics on law and morality, see his discussion of paper credit, C. II, 466-68, of bankruptcy, C. II, 471 ff., of taxes and the national debt, C. I, 308 ff.; C. III, 56 (commercial development as the basis for modern equity—and for the modernization of the common law, C. III, 267); C. III, 326 (strong passage on the link between commerce and liberty).

22. C. I, 418.

23. Montesquieu is frequently cited, almost always with approval. Bks. 11 and 23 of the *Spirit of the Laws* are certainly close to Blackstone's ideas. The only serious point, I believe, on which Blackstone took Montesquieu to task was for the somewhat predictably world-weary remark that English liberties would some day perish, like those of the Spartans and the Romans. The Frenchman's mistake was failure to appreciate the preservative powers of trial by jury. (C. III, 379)

24. That Blackstone's respect for vested interests was a bit beyond the common run of conservatives, or of lawyers, struck me first by way of a more technical example than that in the text, viz., his opposition to converting entails into fee simples by statute. The reason some people favored that or the equivalent was that since the 15th century entails had in effect been convertible into fee simples by a rigmarole of feigned litigation called a common recovery. (By means of the recovery, people with interests under entails had long since been done out of what the law gave them. Blackstone was visibly nervous about defending this hopelessly entrenched violation of vested interests—C. II, 116, 271; C. III, 176.) Blackstone favored getting rid of the common recovery as such, but only by permitting the tenant in tail to convey a fee simple by deed in term time, i.e., at the times of year when a common recovery could be had. The reason for this model, or parody, of enlightened conservatism is that persons with future interests in entailed land, although violated for centuries and for practical purposes holders of interests which the present tenant could destroy freely, had a remote chance of coming into the land if the tenant should die between terms without having got around to disentailing. So exiguous an interest was still worthy of respect. (C. II, 361)

25. C.1, 423-24 principally. Also C. II, 402.

26. See especially Introd., 91. The point is of course the central implication of “Hobbesian sovereignty.” Blackstone was explicit, a bit painfully because of the thin and aberrant strand of legal authority to the effect that a statute can be void as “unreasonable” in the sense “contrary to fundamental moral standards.” He was forced to save the phenomena by conceding the courts considerable freedom to escape immoral statutes by interpretation. How consistent that is with “Hobbesian sovereignty” or with Hobbes is not obvious either way.

27. It refines the point to note that Blackstone ascribed “property” in a servant’s labor to the master (C. I, 429)—so that the slaveholder in England, while deprived of property in the slave’s body, kept a substantial part of the property he had, as opposed to being given the equivalent of “benefit of a contract” in lieu of “property.” The ascription of property in a servant’s labor translated into certain legal powers in a master (some of them advantageous to the servant) which would not belong to a mere beneficiary of a contract for personal services. That is, the language of “prosperity” applied to master and servant was a manner of speaking. Manners of speaking, however, are informative about social feel, in this case the unreadiness of Blackstone’s age quite to get over the hump from status to contract in thinking about inferior servants.

28. For the practice of compensating specific takings of property, C. I, 139. For the points of theory following in the text, the following are especially valuable passages: C. I, 160-62; C. I, 211 ff. (the elaborate defense of 1688). Blackstone’s belief in basic “Hobbesian sovereignty” is documented at numerous places. The passage cited (C. I, 161) makes the distinction between legal and moral absolutism clear. (Appropriately, it is a passage agreeing with Locke for purposes of general political theory, while holding out for the alleged implicitness of unquestionable sovereignty in the idea of law.) Following Hobbes, the doctrine is extended from positive law to all law via the “command theory”: natural law comes from God commanding as sovereign over all—Introd., 38ff.

Confusion about the relation of such writers as Blackstone to Hobbes can be dispelled by remembering that Hobbes was first of all a moralist, who argued that the individual conscience is to a very high (though not quite absolute) degree estopped to dispute the commands of civil authority. Whether “analytic” absolutism such as Blackstone’s (or Austin’s) makes sense is questionable. (Why should statutes be sacred cows in the eyes of the law if they are not *really* sacred?), but Blackstone entertained such absolutism without the full Hobbesian implications. Perhaps, however, Blackstone’s affinity with Hobbes hits the deepest note, for both held that the ends which require a state cannot be fulfilled without creating a Leviathan capable of threatening those very ends, and ultimately posing insuperable dilemmas.

29. This paragraph amounts to an interpretive summary of the crucial C. II, Ch. 1, “Of

Property in General.” I proceed beyond my textual brief, attempting to link the general theory of that chapter with the importance of vested interests and compensation in Blackstone’s set of practical attitudes.

30. The argument purports to work out Blackstone’s implications, or say what he would have said. He did, however, make use of the distinction between “opportunity” and “property proper,” following Pufendorf—C. II, 412 (defending civil termination of the natural right to gain property in wild animals by occupation, for which see below).

31. *Doctor and Student*, Dialogue I, Ch. 5. Blackstone did not, I believe, use the term, and there is no reason to see direct influence of St. German. I mention the Tudor theorist because the idea of a “secondary” law is explicitly developed in his analysis, exclusively among English jurisprudential writers, so far as I know. Unlike Blackstone, St. German hesitated to hold property natural; the secondary law prescribed some rules about property once it had come into existence by human choice. At C. II, 210, Blackstone directly adapted St. German’s idea to his different theory on the naturalness of property—land passes to children in the absence of a will, which “seems founded on a principle of natural reason,” “whenever a right of property transmissible to representatives is admitted,” i.e., after “human choice” has made the move from life-property by occupation to intergenerational property.

Since Hobbes has a certain background presence in this essay, it may be worth noting that a basic component of his theory amounts to a generalization of the “secondary law of nature”: *All* natural law is inert in the state of nature, waiting for actualization by civil society; once civil society exists there are natural law solutions to problems, though they have no title to prevail against sovereign command (which is not unlike “preferential” vs. “categorical” in the text).

32. On primogeniture specifically, C. II, 56-57, 214, 374. The most important passage on familial rights and the law in general is C. III, 446 ff.

33. C. II, 410 ff., for Forest and Game laws. At C. II, 259, Blackstone justified as in conformity with nature the one technical English institution in which occupancy survived. (If Jones was tenant for the life of Smith, and Jones died before Smith, the first person to occupy the land was entitled as long as Smith lives.) C. II, 400-401, for the general abrogation (and a few further faint survivals) of occupancy in England.

34. C. III, 317-19. Interestingly, the strong words against Law French are followed by a defense of the use of Latin as legal language for some purposes—Medieval Latin expressly included, contrary to any expectations one might have of classical nicety on Blackstone’s part.

35. The image of the modernized castle is at C. III, 268, at the end of the most important general passage on the intricacy of the law, starting at 265—for which see also C. III, 325-26. The limits of legislation are significantly commented on in the passage from 265 and also in remarks on particular statutes—e.g., C. II, 339, 360, 375-

76. On fictions, C. III, 43, for a general defense in the context of fictitious extension of the jurisdiction of the King's Bench; C. III, 107, on fictitious venue, where Blackstone got in the point that civil lawyers who were critical of undermining Admiralty jurisdiction by that type of fiction apparently forgot that fiction was as vital to the development of Roman law as of English; C. III, 152, on fictitious extension of Trover; C. III, 200ff. for fictitious extension of Ejectment; C. III, 267, for the point that some fictions were precisely ways around feudal institutions.

36. The picture of original or "pure" Continental feudalism is largely brought together in C. II, Ch. 4, "Of the Feudal System," though details are developed throughout the discussion of real property in C. II. The "Northern way" appears to account for numerous institutions besides feudalism in a direct or narrow sense. E.g., C. I, 147 (consultative assemblies as a Northern trait), 233-34 (limited monarchy as Northern), 260 (common ground of Northern law in the treatment of traders and strangers), 268 (basis in comparative Germanic law for regarding crimes as offenses against the king), 435 (polygamy is un-Northern—here, specific attribution of Northern ways to the climate, following Montesquieu), 456 (Northern law's vigilance about widows' feigning pregnancy at the husband's death to make out that there is a lineal heir—but the English expression of this, influenced by Roman law, was milder than some Germanic law); C. II, 83-84 (pre-feudal Germanic land law compared with that of the Tartars), 92 (Norman preference for villeinage over slavery compared with the Spartans—i.e., a similarly war-centered people), 413 (Northern passion for hunting and its legal consequences—cf. Game laws—documented by the laws of "Genghis Khan" as well as by Caesar); C. III, 25 (Northern law hostile to non-personal appearance in lawsuits—mitigated in England, but the principle not lost), 278 (pan-Germanic basis for the law ofessoins), 337-341 (for trial by battle and wager of law). "Peer-group mindedness" as a feature of feudalism and a Northern characteristic can be seen at, e.g., C. I, 33, 35; C. II, 315-16, but most significantly throughout the discussion of trial by jury—C. III, Chs. 22 and 23.

37. The fundamental discussion of the incidents, their "pure" feudal roots and subsequent survival and adaptation, is in C. II, Chs. 5 and 6.

38. C. II, 311-16—feudal basis of livery (but accompanied by comparative-law demonstration that similar institutions—notoriety requirement, symbolic transfers—have had widespread incidence in other cultures). Cf. C. II, 342—picture of Anglo-Saxon conveyancing (like feudal, in the presence of an assembly, but the county court rather than the feudal peers; in addition, a recording system with some affinities to land registration). Cf. also C. II, 366-57—particularly intelligent observation by Blackstone that modern copyhold conveyancing represents the survival of an "open court" method probably universal in earlier times.

39. Modern conveyancing was based on the Statute of Uses—extensively discussed at C. II, 328ff. C. II, 376, for the Statute of Frauds in this context.

40. For the rule that land will not "ascend" (to parents), C. II, 210ff., and for the

exclusion of the half-blood, 227ff.—both passages in C. II, Ch. 14, on descent of land, which is necessary as a whole for the context of those particular rules and which provides further illustration of the general point.

41. For Hale's extravagant estimate of the finality of Edward I's reign, *History*, Ch. 7. At C. II, 76, especially, Blackstone has very hard words for "fiscal feudalism"—i.e., the system's persistence as a means for raising money (almost entirely royal revenue) when it had ceased to be a military system in the sense of a way of raising men "in kind." Blackstone's treatment of the medieval history of the judicial system against the background of the Conquest and feudalism needs fuller separate discussion than is possible here. For that subject, including the culmination of medieval development under Edward I, see principally C. III, Chs. 3 and 4.

42. C. II, 47-48 for the basic point that the Saxons had a form of feudalism. For confirmation of that point and ways in which Anglo-Saxon land law was nevertheless different from post-Conquest, e.g., C. II, 83-85, 90, 92 (manorial side of the medieval system, substantially Saxon), 101, 109, 129, 212-213, 269, 373, 423. Anglo-Saxon institutions beyond those directly connected with land tenure—some preserved, some superseded after the Conquest—should also be kept in mind; the picture of a world in some ways feudal, but not dominated by feudalism, needs to be seen as a whole, as does the post-Conquest world where feudalism did not account for everything, but tended to shape everything. E.g., C. I, 164, 262-63, 339ff. (elective sheriffs and the democratic vein in the constitution), 365, 408-10 (the army); C. III, 33ff. (courts), 50, 184, 265, 344, 349-50 (jury), 384-85.

43. C. II, 79ff. One must observe with regret that Blackstone's vigorously argued theory on *socage* was a lost cause, as against the peasant-proprietors school.

44. The proposition in this sentence requires defense in a separate essay. Trial by jury is mainly discussed, and defended, in C. III, Ch. 23, but remarks elsewhere, and above all context, need to be considered to get at Blackstone's ideas of how the jury does, and why it should, contribute to the making of law, as opposed to finding facts, which Blackstone of course thought it did accurately, though his views on that were not naive.

45. "almost was": Blackstone did not claim that the post-1688 constitution had achieved perfect equilibrium. See especially C.I, 334-37, a judicious summarizing passage on the degree to which the constitution was "in balance" in Blackstone's time, which points to the particular sources of some imbalance (such as modern taxation and public finance). Blackstone's most serious worry was the modern military system (C. I, Ch. 13).

46. It is instructive to divide Blackstone's references to Roman law between (a) those that are neutral, indicative of Roman-English similarity, or favorable to Roman law (and hence in the time-honored tradition of treating the *jus civile* as close to ideal law) and (b) those that are critical (in the tradition, descending from Fortescue—Note 2 above—of exalting English law above its great competitor). On the favorable, or at least neutral, side, e.g.: C. I, 250 (similarity between the Roman Imperial and English royal offices),

414-15 (criticism of the Mutiny Act for departing from standards of justice embraced by Roman law) , 434 (English debt to Roman law on marriage) , 438 (a Roman legal technique for discouraging licentiousness) ; C. II, 36 (rights of way) , 63 (aids—a touch of feudalism in Roman clientage) , 311 (conveyancing), 384-85 (dependence of English law on Roman for the law of personal property—better law than the feudalism-encumbered law of real property), 390 (property in domestic animals), 404-5 (accessions—i.e., property in natural materials transformed by skill and labor), 412 (wild animals): C. III, 25 (parallel Roman-English development, from not permitting attorneys to permitting them), 315 (parallel between Roman and English ways of separating trial of legal and of factual issues), 321-22 (adaptation of the Greek language to Roman law, analogous to “Law Latin” in English), 337 (Roman rejection of barbarian trial by battle), 366 (similar principles on burden of proof in English and Roman law). On the critical side, e.g.: C. I, 238-39 (unreasonableness of Roman Imperial absolutism vs. limited monarchy—represented as an embarrassment to the Roman lawyers themselves), 261 (discouragement of commerce by Roman law) , 447-48 (Roman law goes *too far* in protecting children’s natural right to parental support), 452 (Roman *patria potestas* is excessive), 458 (Roman law too hard on bastards), 461 (guardianship—with a certain indication that Blackstone is embarrassed by old-fashioned English “triumphing” over Roman law), 469 and 479 (English improvement, on the whole, on Roman law of corporations); C. II, 235 (English law on descents “much more rational” than Roman agnatic law); C. III, 209. (English law superior for giving landowners an absolute right not to be trespassed on), 328 (criticism of Roman law as more prolix and doubt-ridden than English), 336 (Roman law’s overreliance on trial by witnesses vs. trial by jury *and other* methods of the more flexible English system), 341-42 (English wager of law mitigates excesses of that procedure better than the Roman equivalent), 361-66 (English adaptation of and departure from the Roman principle that the parties should choose their judges—not directly critical of Roman law, but English practice probably represented as the happier embodiment of the principle), 373 (criticism of civil law trial on privately administered interrogatories vs. English open trial—but *ancient* Roman law was more like the English), 392 (English new trials superior to the civil law appeals system), 423 (civil law, and even ancient Roman, slower than English in fact, though on paper it should be quicker).

47. C. I, 39 (plan of civilians and canonists to extirpate the common law, foiled by the development of the Inns of Court—in other words, a competitive English professional tradition).

48. C. II, 519-20, but the chapter—C. II, Ch. 32—is necessary for context, testamentary and intestate law.

49. Last note (C. II, Ch. 32) and C. III, 95ff. for ecclesiastical rapacity (for both jurisdiction and goods) with regard to decedents’ estates. Material rapacity may have been the motive for other pretenses of the Roman Church discussed in the text and notes below. Some other particular instances of greed or racketeering: C. II, 66-67 (feudalism, among its other vices, gave the Pope a model for treating himself as the lord or “real owner” of ecclesiastical property, whence First Fruits, on the analogy of secular primer

seisin—also C. II, 23, for the Pope’s endeavor to feudalize the Church); C. II, 27, 28 (monasteries by “sanctimonious pretenses” diverted tithes from their proper and legal role, which is to support the secular clergy); C. II, 268 ff. (monks and clever ecclesiastics—cf. the “Norman jurists,” Note 15 above—enjoyed considerable success in evading the Mortmain acts and their antecedents, to the end of accumulating property illegally); C. II, 272, 328ff, and C. III, 52 ff. (for the considerable role of material ecclesiastical interests in the early development of equity and the law of uses).

50. The main passages on the ecclesiastical side of the theme “medieval bondage, modern liberation,” on which the points in the text are largely based, are: C. III, 61ff. (ecclesiastical courts) and 86 ff. (jurisdiction of those courts—also 112-13 for control of their jurisdiction by common law courts). Also important is C. I, 278 ff. (on the king’s Supreme Headship of the Church, where Blackstone in effect adopted the Cokean position—see 5 Coke’s Reports, 1 ff.—that the Reformation was a restoration of rights documentable as existing before and never lapsed so as to destroy them legally. C. I, 379 adds a detail on the same point.) Matrimonial jurisdiction (C. III, 92-93—also C. I, 435) deserves special attention for showing how, to one of Blackstone’s mentality, Catholic doctrine’s “enslavement of conscience” cooperated with mere clerical greed for jurisdiction and income. There are miscellaneous illustrations of Blackstone’s participation in standard anti-Popish prejudice—e.g., C. I, 273 (anti-commercial bias of Catholicism, 359, 449.)

52. It is all but explicit at C. III, 99, that ecclesiastical cases were once tried by jury along with the secular ones entertained by the same tribunals, later ceasing to be because it was in the Pope’s interest to exclude the laity and flattering to his vanity to ape the law of the Roman Emperors. Interestingly, however, Blackstone regretted the separation of the ecclesiastical courts from the secular, and the thorough Romanization of the former, partly because it prevented a fruitful *interplay* of law from Roman sources and native English law. Presumably recognition of the merits of jury trial in ecclesiastical cases as well as temporal ones would have been offset by benign Roman influence on “Northern” institutions. (Cf. text above on Roman contributions to the total development of English law. They would have been larger if the polarizing effect of independent ecclesiastical courts had been avoided.)