

Articles

JUSTICE BLACKSTONE’S COMMON LAW ORTHODOXY

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INTRODUCTION

On Monday, January 28, 1771, four justices who would eventually serve together for nine years presided for the first time as a group over the English Court of Common Pleas. Wearing black robes trimmed in white ermine and long white full-bottomed wigs, they took their seats behind the individual podiums that comprised the bench.¹ At the center sat the newly-

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¹ On the date, see 3 Wils. 148, 95 Eng. Rep. 982. On judicial attire, see J.H. Baker, *A History of English Judges’ Robes*, 12 *COSTUME* 27, 32 (1978). Unlike King’s Bench and Chancery, which were still located inside Westminster Hall, as they had been since the Middle Ages, after 1732 the Court of Common Pleas moved to a room just outside the Hall to the west. In 1740, it received its own new courtroom. See DORIAN GERHOLD, *WESTMINSTER HALL: NINE HUNDRED YEARS OF HISTORY* 44 (1999); MARK HERBER, *LEGAL LONDON* 9 (1990). On the bench of Common Pleas, see the c. 1808 aquatint engraving by the English caricaturist, Thomas Rowlandson (1756–1827), which is the earliest known image of Common Pleas after it moved outside Westminster Hall. RUDOLPH ACKERMANN ET AL., 1 *THE MICROCOSM OF LONDON, OR LONDON IN MINIATURE* plate before 203 (1904).

appointed Chief Justice, William de Grey, a man of learning and excellent political connections, whose career trajectory had pointed him almost inexorably toward this moment.² To his right sat Henry Gould, the most senior puisne, or associate, justice. With eight years on Common Pleas, and almost two before that as a baron of the Exchequer, Gould was the sole member of the Court with significant judicial experience.³ At one end, George Nares took his place as a new judge. “[B]red an att[orne]y, called to the bar,” he was the quintessential common lawyer and the only one of the four justices who had practiced at the Common Pleas bar.⁴

Finally, to the Chief Justice’s left sat William Blackstone, the first person to lecture on the common law at an English university, the author of the first comprehensive and readable summary of English law, and—although this has gone largely unremarked—the first law professor to serve as a judge on a common law court. Blackstone had joined the bench the previous February after a successful career not as a barrister, like the other members of the Court, but as an academic. In 1769, only shortly before his appointment, he had published the last of the four volumes of the *Commentaries on the Laws of England*, a milestone in the history of English legal literature, and the work that ensured its author’s lasting fame in both England and America.

The outsized reputation of the *Commentaries* has caused the rest of Blackstone’s legal writing to go mostly unnoticed. Consequently, nearly all the scholarship about Blackstone’s views on law has relied solely on a work he originally drafted when he was no older than thirty and had spent only seven unsuccessful years at the bar. Yet the *Commentaries* ought not to be assumed to reflect Blackstone’s views. In the lectures that formed the basis of the *Commentaries*, Blackstone had other masters to serve besides his own personal beliefs. For example, when he began to teach privately in 1753, he relied on students to pay to attend.⁵ Displeasing this audience with scathing critiques of the common law, which the English people generally

² Little is known for certain about the seating arrangement of the judges. It appears that the chief justice sat at one of the center seats with the senior *puisne* next to him, probably on his right. See 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 45 (1992); I. Espinasse, *My Contemporaries: From the Note-Book of a Retired Barrister*, 6 *FRASER’S MAGAZINE* 220, 223 (1832). On William de Grey, see Gordon Goodwin, rev. M.J. Mercer, *Grey, William de, first Baron Walsingham (1719–1781)*, in 23 *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* 897 (H.C.G. Matthew & Brian Harrison eds., 2004).

³ See Stuart Handley, *Gould, Sir Henry (1710–1794)*, in 23 *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY*, *supra* note 2, at 71.

⁴ Bray Family Papers, Surrey History Centre G52/8/10/1, s.v. George Nares (recollections by the solicitor, William Bray, of leading people of his time, in alphabetical order by last name of person, no page numbers).

⁵ See WILFRID PREST, *WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY* 112 (2008).

viewed as akin to holy, was not in his economic interest.⁶ Once he became an official university professor in 1758, Blackstone still occupied a somewhat precarious position, for the very existence of his course on English law was not uncontroversial. He was caught between the legal profession, which had a long (if not always successful) history of internal education, and the University, in which law had for centuries meant Roman or canon law.⁷ Even though his income was guaranteed, he now had two additional constituencies to please. In his inaugural lecture as the Vinerian Professor, he strove to reassure the university community of his respect for Roman law⁸ and to persuade the legal community that his course would complement rather than compete with its own system of training.⁹ Given his delicate situation, it is not clear that Professor Blackstone would have felt free to express positions that conflicted with or criticized the law as it was.¹⁰ Thus, although it is entirely possible that the views of law that Blackstone put forth in his *Commentaries* reflected his own beliefs, scholars cannot take for granted that they did.

Fortunately, it is not necessary to rely on the *Commentaries* alone. The mature, experienced Blackstone also left a trail of hundreds of additional pages detailing his legal theories in his letters, arguments as counsel, opinions of counsel, and judicial decisions, most of which have gone unexamined.¹¹ This additional material suggests that Justice Blackstone did not

⁶ See 12 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 729–30 (1938) (on general attitudes toward English law); PREST, *supra* note 5, at 114–15 (describing Blackstone's course).

⁷ See 1 WILLIAM BLACKSTONE, COMMENTARIES *16, *18, *23–26 (discussing in his inaugural Vinerian lecture the historical means of teaching law in England).

⁸ See *id.* at *5 (“Far be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of it's [sic] rules, and the usual equity of it's [sic] decisions; nor is better convinced of it's [sic] use as well as ornament to the scholar, the divine, the statesmen, and even the common lawyer.”).

⁹ See *id.* at *27–34. In particular, see *id.* at *31 (Blackstone arguing that “I think it is past dispute that those gentlemen, who resort to the inns of court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether any thing can be more hazardous or discouraging than the usual entrance on the study of the law.”).

¹⁰ Although critics have long accused Blackstone of being a defender of the status quo, he did not, in fact, defend English law uncritically. See PREST, *supra* note 5, at 307–09; 12 HOLDSWORTH, *supra* note 6, at 727–30.

¹¹ The sole study devoted to Blackstone's judicial opinions is Harold G. Hanbury, *Blackstone as a Judge*, 3 AM. J. LEGAL HIST. 1 (1959). Hanbury's article concerns only the substantive legal doctrine Blackstone discussed in a handful of cases, and it relies exclusively on Blackstone's own versions of the opinions. Others who have commented briefly and largely without support on Blackstone's judicial tenure include: 8 EDWARD FOSS, THE JUDGES OF ENGLAND 249 (London, John Murray 1864); 12 HOLDSWORTH, *supra* note 6, at 707; Joseph W. McKnight, *Blackstone, Quasi-Jurisprudent*, 13 SW. L.J. 399, 409–10 (1959); William Blake Odgers, *Sir William Blackstone*, 28 YALE L.J. 542, 551 (1919). A new biography of Blackstone devotes two chapters to a very thorough social and administrative—but

leave Professor Blackstone at the courtroom door. While the *Commentaries* expressed a vision of the English law that lawyers and judges widely accepted—a view that, because it was broadly held, will be called the “common law orthodoxy”¹²—most practitioners became pragmatic enough during their time at the bar to set aside the loftier or more unrealistic aspects of this ideal vision when a case required it. By contrast, Blackstone, who had spent most of his formative professional years expounding this theoretical view of the law from the lectern rather than perfecting his lawyering skills at the bar, was anything but a pragmatist on the bench. Unlike men who had spent decades in practice, Blackstone permitted the principles of the common law orthodoxy to determine his decisionmaking and did not discard the theories he had taught when they became inconvenient.¹³ Sitting in an age when Lord Mansfield had freed judges to loosen the hold of traditional views of law, Blackstone’s professorial devotion to the common law orthodoxy at times made him an outlier on his own court, and ended up guaranteeing that while his name would live on through the *Commentaries*, his judicial decisions would be mostly forgotten.

Part I defines and describes the common law orthodoxy and its expression in the *Commentaries*. The Paper then turns in Part II to Blackstone’s early view of law and work at the bar to show his lack of socialization into the common lawyers’ pragmatic ethos. Part III examines the jurisprudential principles conveyed in Blackstone’s judicial opinions and compares his approach to that of his brethren. Contrasting Blackstone and the other judges’ attitudes toward decisionmaking, authority, precedent, and discretion reveals the differences between the Court’s experienced lawyers and its law professor.

I. COMMON LAW ORTHODOXY

The common law orthodoxy was a collection of shared beliefs about the nature of the English law and how judges decided cases.¹⁴ The concept is not original, and its principles are presented here at a high level of ab-

not legal or doctrinal—study of Blackstone’s time on the bench. See PREST, *supra* note 5, at 259–302 (2008).

¹² This term comes from DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 3 (1989). Lieberman uses the term to refer to the jurisprudence of Lord Mansfield and the King’s Bench in the second half of the eighteenth century. As will be made obvious below, I disagree with this characterization and believe that Mansfield represented the opposite of the common law orthodoxy. See also Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 2), 3 OXFORD U. COMMW. L.J. 1, 6, 12 (2003) (referring to “orthodox common law jurisprudence” and to “common law orthodoxy,” but using the former term to refer to the pragmatic view of law rather than the theoretical rule of law).

¹³ See Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 1), 2 OXFORD U. COMMW. L.J. 155, 155 (2002) (“[T]he categories in which [jurists] think about their practice shape that practice.”).

¹⁴ See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 140 (2008) (“[T]he common law posture was ancient, and it continued to unite the common law judges.”).

straction to permit the term to gloss over historical differences among legal thinkers and focus on the points of agreement.¹⁵ Since Blackstone's judicial opinions reflect an adherence to these highly abstract concepts, they suggest how rigidly theoretical Blackstone's beliefs were. His understanding of how the law worked sounded lovely in a classroom discussion of jurisprudential matters, but in practice his insistence on such ideals made him an inflexible, if consistent, judge.

Though one could not find a clearer statement of the various principles of the common law orthodoxy than Blackstone's *Commentaries*, the ideas took hold well before Blackstone began to lecture. Law students could imbibe this belief system from works like Edward Coke's *Institutes*, Matthew Hale's *History of the Common Law*, and Geoffrey Gilbert's *History and Practice of Civil Actions*.¹⁶ These and other books described a common law that began with the premise that the law existed before any attempts to express it.¹⁷ The job of a judge was to find that existing law and make it known. He did this by searching the authoritative sources: either case reports or those ancient, canonical works of "intrinsic authority"¹⁸ that provided evidence of the existence of the law.¹⁹ Judges were, in theory, mere mouthpieces, "depositor[ies] of the laws" who expressed the law but did not themselves make it.²⁰

Importantly, therefore, the judge had a limited role to play in the legal system. After he searched the sources and found the applicable rule to answer the question before him, he then, based on this evidence, gave

not [his] determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice.²¹

¹⁵ See Postema, *supra* note 13, at 165.

¹⁶ EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* (W.S. Hein Co. 1986) (1628) [hereinafter *INSTITUTES*]; GEOFFREY GILBERT, *THE HISTORY AND PRACTICE OF CIVIL ACTIONS, PARTICULARLY IN THE COURT OF COMMON PLEAS* (Dublin, James Moore 1792) (1737); MATTHEW HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* (1713).

¹⁷ See HAMBURGER, *supra* note 14, at 166, 174.

¹⁸ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *72.

¹⁹ *Id.* at *69, *72–73. See also 1 *THE SELECTED WRITINGS OF SIR EDWARD COKE* 156 (Steve Sheppard ed., 2003) ("The reporting of particular Cases or Examples is the most perspicuous course of teaching, the right rule and reason of the Law . . .").

²⁰ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *69. See also MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND AND AN ANALYSIS OF THE CIVIL PART OF THE LAW* 90 (London, Henry Butterworth 1820) (arguing that judicial opinions "have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is . . . and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons").

²¹ 3 WILLIAM BLACKSTONE, *COMMENTARIES* *396.

The judge was to decide in accordance with the law and not to substitute his discretion in place of the “known laws and customs of the land.”²² In Coke’s words, the judge was to measure a case “by the golden and straight metwand of the law, and not . . . the incertain and crooked cord of discretion.”²³

By avoiding discretion, the law would remain appropriately certain. According to Hale,

[i]t is one of the thinges of greatest moment in the profession of the Com[m]on Law to keepe as neare as may be to the Certainty of the Law and the Consonance of it to it Selfe, that one age and one Tribunall may Speake the Same thinges and Carry on the Same thred of the Law in one Uniforme Rule as neare as is possible; for otherwise that w[hi]ch all places and ages have Contended for in Laws[,] namely Certainty and to avoid Arbitrariness and that Extravagance that would fall out, if the reasons of Judges and advocates were not kept in their traces[,] wold in halfe an age be lost.²⁴

To thus ensure certainty, the judge was obligated by his oath to obey the precedent set in the authoritative sources.²⁵ In writing that once a case was decided, “what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments,”²⁶ Blackstone was expressing a relatively new and stronger understanding of the binding nature of precedent.²⁷ Although he allowed that an earlier opinion need not be followed if it was “manifestly absurd or unjust”—not because it was bad law, but because it was not law, he hastened to add—a rule could not be ignored simply because it would lead to an inequitable outcome.²⁸ As was stated in a report published in 1677, “[w]here the Law is known, and clear, though it be unequitable and inconvenient, the Judges must determine as the Law is, without regarding the unequitableness or inconveniency.”²⁹

²² 1 *id.* at *69.

²³ 4 INSTITUTES, *supra* note 16, at 40–41. See also HAMBURGER, *supra* note 14, at 138–40.

²⁴ Matthew Hale, *Criticisms on Hobbes’s Dialogue of the Common Laws*, in 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 506 (2d ed. 1937).

²⁵ See 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (the judge is “sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land”).

²⁶ *Id.*

²⁷ See 12 HOLDSWORTH, *supra* note 6, at 149; see also LIEBERMAN, *supra* note 12, at 86–87 (discussing two theories of precedent in the eighteenth century, Blackstone’s being the more rigorous). For the seventeenth-century view of precedent, see Postema, *supra* note 12, at 12–13.

²⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *70 (“For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*; but that it was *not law* . . .”).

²⁹ Dixon v. Harrison, (1670) Vaughan 36, 37, 124 Eng. Rep. 958, 959 (C.P.). This statement is not part of the opinion. It is therefore likely to be an editorial addition rather than Vaughan’s opinion. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 199 (4th ed. 2002).

Some jurists added one additional step and held that since the law was certain, it could also be sorted and systematized. Blackstone certainly believed this. He taught that law was a science, which in the parlance of the time meant that it could be turned into a system.³⁰ But in treating law as a science, he was merely picking up on an older tradition embodied by Francis Bacon, Matthew Hale, and Geoffrey Gilbert, all of whom believed that the law could be reduced “into distributions and heads according to an analytical method.”³¹

Such, at least, was the theory. Judges were to find and follow the law without permitting the exercise of their own discretion. By this means, the law would remain certain, and some jurists believed that this certain law could be organized into a system. But if this was the theory, it was not the practice. Sitting on top of these foundational principles was the reality of common law reason, a concept born of long experience in the courtroom.³² The practicing common lawyer or judge was a pragmatist, “focused on practical problem-solving” rather than theory.³³ He learned to solve problems “not through study of abstract principles or elements of a systematic body of knowledge, but through long years of immersion in the particularity of law.”³⁴ By contrast, creating and maintaining a system meant concentrating on generalizations and smoothing out inconsistencies in a law that had mastered neither abstraction nor uniformity.³⁵ The practitioner knew that the law was messy and did not lend itself to systematization. This practitioner’s wisdom never emerged in Justice Blackstone’s approach to law. He had spent few years in the courtroom and many in the classroom, where he cultivated a theoretical rather than a pragmatic conception of law.³⁶ Once on the bench, his conception did not change.

³⁰ See 1 WILLIAM BLACKSTONE, COMMENTARIES *27 (discussing law as a science); Barbara J. Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727, 729 (1969) (discussing science as a method of systematizing knowledge); see also 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (“[W]hen law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.”).

³¹ HALE, *supra* note 20, at A2 (first page of preface to the *Analysis*); see also BAKER, *supra* note 29, at 189-91, 218; GILBERT BURNET ET AL., THE LIFE AND DEATH OF SIR MATTHEW HALE, KT., LORD CHIEF JUSTICE OF ENGLAND 68 (London, W. Nicholson 1805) (expressing belief that the common law could be made rational); Shapiro, *supra* note 30, at 736-37, 747-49.

³² See HAMBURGER, *supra* note 14, at 140-41 (“If the common law notion of judicial duty sometimes differed from the realities, this was because it was an ideal. . . . Coke and other common lawyers, however, understood that they drew their ideals in sharper lines than could always be attained in life . . .”).

³³ Postema, *supra* note 12, at 3.

³⁴ *Id.* at 4; see also 1, COKE, INSTITUTES, *supra* note 16, at 97b (describing the common law as “an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man’s natural reason”).

³⁵ See Postema, *supra* note 12, at 5-6, 10.

³⁶ *Cf. id.* at 9 (“The philosopher and theologian are not suited for this task [of being an English judge], . . . for it is not an enterprise of discovery, through exercise of abstract reason, of general practic-

II. THE DEVELOPMENT OF BLACKSTONE'S VIEWS OF LAW

Perhaps Blackstone so admired the common law orthodoxy because his lectures and *Commentaries* had managed to make the law fit with the theoretical ideal, and his ability to create this synthesis had won him widespread approbation. While many leading English lawyers had advocated for a systematic explanation of the law, none before Blackstone had succeeded in writing one. It may be difficult at this remove to fully comprehend what a masterful achievement this was.³⁷ Here was a man who had been at the bar for about seven years, during which he had seen little business. He had instead spent a fair amount of his time deeply involved in Oxford politics, the administration of All Soul's College (where he held a fellowship), and the representation of All Soul's in a lawsuit in the Archbishop's court, (a court that did not use the common law). In short, he had done just about everything except diligently pursue his legal career in London.³⁸

In the year or so before he began to teach the English law privately at Oxford in October 1753, Blackstone culled through hundreds of books and drafted the lectures that formed the basis of the *Commentaries*.³⁹ In this short period, he created a synthesis of the law so enduring that it has remained in print and the object of discussion for almost 250 years. But to do this, he had to turn his back on the usual English lawyer's way of looking at the law.⁴⁰ Rather than remedies and procedure, he focused on substance. In

al principles, but rather an enterprise of judging particular cases through a grasp of concrete relations and arrangements woven into the fabric of common life." See also DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 122–27 (1941) (on Blackstone's highly theoretical approach to law); LIEBERMAN, *supra* note 12, at 73 ("Blackstone's conservative confidence in the enduring wisdom of the common law reflected a failure to face squarely the problem of how suitable this law was for a society remarkably unlike the one in which it had originated.").

³⁷ See S.F.C. Milsom, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUD. 1, 4 (1981) ("[W]hat he did was immensely difficult, . . . it was a turning-point in the development of Anglo-American law . . .").

³⁸ See PREST, *supra* note 5, at 73–105 (reviewing Blackstone's primarily nonlegal activities during the late 1740s and early 1750s); see also 67 MONTHLY REV., July 1782, at 7 ("[H]is predilection for the occupations of the University . . . may likewise account for, if it did not occasion, the slow progress he made in his profession . . .").

³⁹ It is unclear how long Blackstone worked on his *Commentaries*. He announced his intentions to return to Oxford to Roger Newdigate in July 1753. Letter from William Blackstone to Sir Roger Newdigate (July 3, 1753), in *THE LETTERS OF SIR WILLIAM BLACKSTONE, 1744–1780*, at 29 (W.R. Prest ed., 2006). However, James Clitherow, in explaining why Blackstone's *Reports* have a gap beginning in 1750, says that "[t]he Reason of this, most probably, is, that during that Period he resided chiefly at Oxford, and had much of his Time taken up in composing his Lectures, which he began to read in 1753, and in preparing for which he had been for some Years before principally employed." James Clitherow, *Preface* to 1 WILLIAM BLACKSTONE, *REPORTS OF CASES DETERMINED IN THE SEVERAL COURTS OF WESTMINSTER-HALL FROM 1746–1779*, at xxix (1781) [hereinafter, Clitherow, *Preface*]. See also PREST, *supra* note 5, at 117–18 (speculating that Blackstone may have written his lectures in about one year).

⁴⁰ See MICHAEL LOBBAN, *THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760–1850*, at 47–48 (1991).

place of case-by-case building up of holdings ready to be changed and adapted to the next set of facts, he offered a beautifully written overview describing the law as a coherent system, built upon clear principles and rules and concerned with what the law was rather than the disorderly reality of how it worked in practice.⁴¹ In place of the practitioner's ant's-eye view of law, Blackstone took the principles of the common law orthodoxy and translated them into a means of organizing the whole of the English law.⁴² Indeed, more experience in the practice of law may have proven an impediment rather than an asset. Some ignorance of the complexities of the legal system, coupled with a great deal of knowledge obtained from the cold, permanent pages of books instead, may have made the law appear cleaner and easier to reduce to a straightforward outline.

Blackstone came early to the conviction that the law was a system that could be discovered, sorted into neat boxes, and explained. In January 1746, only about ten days after he began to read the law seriously, the twenty-two-year-old Blackstone wrote a letter to his uncle, the lawyer Seymour Richard, explaining that he thought of the law as a house.⁴³ In the time of the esteemed commentator on the common law, Sir Thomas Littleton (d. 1481), during what Blackstone believed to have been the heyday of the common law, this house had been architecturally coherent; but over time it had acquired accretions of conflicting architectural styles and uneven workmanship.⁴⁴ These accretions consisted mostly of the "various contradictory Statutes" that left the house, though still recognizable as the same edifice, "a huge, irregular Pile, with many noble Apartments, though awkwardly put together, & some of them of no visible Use at present."⁴⁵ The apparent lack of symmetry did not destroy the original edifice, however. It

⁴¹ See BOORSTIN, *supra* note 36, at 20–22; see also 1 WILLIAM BLACKSTONE, COMMENTARIES *32 ("If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* ["so the law is written"] is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice."). For praise of the beauty of Blackstone's style, see, for example, JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT xli (London, P. Elmsly and E. Brooke 1776); WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 3–4 (London, J. Nichols 1781).

⁴² He believed, in fact, that this was the value the law professor—who could take a broader view—had to offer the profession. See 1 WILLIAM BLACKSTONE, COMMENTARIES *30–31.

⁴³ Letter from William Blackstone to Seymour Richmond (Jan. 28, 1746), in THE LETTERS OF SIR WILLIAM BLACKSTONE *supra* note 39, at 4. Blackstone used this architectural metaphor repeatedly in the *Commentaries*. See Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 YALE J.L. & HUMAN. 103, 119–21 (2003).

⁴⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES *425–28.

⁴⁵ Letter from William Blackstone to Seymour Richmond (Jan. 28, 1746), in THE LETTERS OF SIR WILLIAM BLACKSTONE, *supra* note 39, at 4.

merely made the logic of its underlying floor plan more difficult to discover.⁴⁶

This letter is the earliest known record of Blackstone's assurance that the law could be organized. He repeated the sentiment even more boldly sometime during the next two years, when he was reported to have said to a friend that "I have made myself pretty well master of [the law]" because "I have reduced it to a system; so that I have only to read new acts of Parliament, and the different authors who have written on our laws."⁴⁷ Decades later on the bench, he would continue to exhibit this confidence that law could be identified, known, and mastered.

Despite the phenomenal knowledge of the black letter law that he displayed in his teaching, Blackstone was never a particularly successful lawyer. He had been called to the bar in November 1746, but after a few notoriously hapless years of practice, he abandoned his Westminster practice and, in 1753, fled back to the safety of academia.⁴⁸ His initial failure was not entirely his own fault, as England appears to have been in the middle of a litigation recession and all young barristers were struggling to find work.⁴⁹ But Blackstone also suffered from poor advocacy skills and a dislike of practice that he never seems to have lost.⁵⁰ As he explained to his friend and patron, Roger Newdigate, in 1753:

My Temper, Constitution, Inclinations, & a Thing called Principle, have long quarreled with active Life, at least the active Life of Westminster Hall, & have assured me I am not made to rise in it. Besides there are certain Qualifications for being a public Speaker, in which I am very sensible of my own Deficiency⁵¹

On the other hand, those inclinations, and his adherence to principle, made him an ideal person to teach the English law. In October 1753, he began to lecture privately at Oxford, and from 1758 to 1766 he served as the inaugural Vinerian Professor. He turned his lectures into the *Commentaries*, which he eventually published between 1765 and 1769.

⁴⁶ *Id.*

⁴⁷ RICHARD GRAVES, *THE TRIFLERS* 54 (1805) (internal quotation marks omitted).

⁴⁸ His brother-in-law and first biographer affirmed that he "made his Way very slowly, and acquired little Notice and little Practice." Clitherow, *Preface*, *supra* note 39, at vii. See also PREST, *supra* note 5, at 71–72, 105 (noting that Blackstone failed "to gain more than the occasional brief at the Westminster bar" during his first foray into practice).

⁴⁹ See DAVID LEMMINGS, *PROFESSORS OF THE LAW: BARRISTERS AND ENGLISH LEGAL CULTURE IN THE EIGHTEENTH CENTURY* 76–77, 156 (2000).

⁵⁰ The anonymous author of a 1782 review of Blackstone's *Reports* put it bluntly: "It might perhaps occur, that a man like Mr. Blackstone, (who is said 'to have much wanted a graceful delivery and a flow of elocution,') had *mistaken* his profession, in chusing that of a Pleader at the Bar . . ." 67 MONTHLY REV., *supra* note 38, at 4–5 (paraphrasing Clitherow, *Preface*, *supra* note 39, at vii).

⁵¹ Letter from William Blackstone to Sir Roger Newdigate (July 3, 1753), in *THE LETTERS OF SIR WILLIAM BLACKSTONE*, *supra* note 39, at 29.

As behooves a classroom account, the *Commentaries* presented the law as uncomplicated and well-defined, making it easy to access and understand. Not all lawyers thought that this gave an accurate portrayal, however. One near-contemporary critic complained that “there was scarcely one page in Blackstone in which there was not one false principle and two doubtful principles stated as undoubted law.”⁵² Francis Hargrave, the eminent legal antiquarian, “is reported to have said, that ‘any lawyer who writes so clearly as to be intelligible was an enemy of his profession.’”⁵³ The problem as these lawyers saw it was not that what Blackstone had written was wrong—the law did have the rules and procedures he described—but that the law was far more than those rules. In practice, lawyers did not understand the law as a system of rigid generalizations “contain[ing] in itself the answer to legal problems: it was rather a view of the law as a system of reasoning, where most of the ‘sources’ of law were modes of thinking.”⁵⁴

A practitioner would use the law flexibly, as did George Nares in advising a client in 1753. Nares’s client, an innkeeper, sold a horse left behind by a guest who did not pay for his lodgings and who then for months refused the innkeeper’s requests to take the horse back or to pay for its feed. The guest sued the innkeeper for the value of the horse, and the innkeeper came to Nares for counsel. Nares responded that the “Law seems now clearly to be settled” that innkeepers could keep their guests’ horses as security for a debt, but they could not sell the horses to pay the debt. Nonetheless, he pointed out that “tho’ the Law is so settled, yet it may in many Instances be considered as productive of great Hardships, and therefore I apprehend the Judges and more especially a Jury wou’d be glad to take hold of any Circumstance to shew the Guest gave any Authority to an Innholder to sell him.” Consequently, he advised his client that if he could prove that the innkeeper had asked the owner to remove the horse and that owner had told the innkeeper she could do what she pleased with it, “I think no Jury

⁵² 2 ARCHER POLSON, *LAW AND LAWYERS: OR, SKETCHES AND ILLUSTRATIONS OF LEGAL HISTORY AND BIOGRAPHY* 58 (London, Longman, Orme, Brown, Green & Longmans 1840). For an analogous criticism, see *id.* (“Horne Tooke, who was always ambitious of a legal reputation, declared ‘that it was a good gentleman’s law book, clear but not deep.’ It was in short, obnoxious to one charge, viz. that it was *intelligible*.”).

⁵³ *Id.*

⁵⁴ LOBBAN, *supra* note 40, at 6–7. Lobban added that “this conception of the common law as a system of reasoning was one that remained the practising lawyer’s view.” *Id.* at 8; see also *id.* at 59; Postema, *supra* note 12, at 14 (“Common law jurisprudence resolutely resists the theoretical pressure to identify law with canonically formulated, discrete rules of law. Law, on this view, is not a set of rules or laws, but a practised framework of practical reasoning . . . Its rules and norms can be formulated, perhaps, but no such formulation is conclusively authoritative; each is in principle vulnerable to challenge and revision in the course of reasoned argument and dispute in the public forensic context.”); 1 P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 114 (1979) (“[T]he rule of law that prevailed in eighteenth-century England gave full scope to the skill of lawyers who could find ‘ways round’ the rules.”).

wou'd be very willing to give a Verdict" against the innkeeper for selling it.⁵⁵

Nares did not doubt that a law existed that controlled the case, and he seemed to believe that the law was "certain." But as a practitioner he also viewed the law with subtlety, as something that took its substance from the facts and could therefore be adapted to fit the particular case. Seen this way, the law as presented in the *Commentaries*, while perhaps technically correct in the abstract, was too inanimate to be accurate when applied to particular instances.

Blackstone might have produced his work knowing that he was simplifying for his students the picture of what law was and how it worked. Similarly, he might have approached practice in the same pragmatic way other lawyers did, even if as a teacher he had a gift for making the complex clear. However, some evidence from his time at the bar suggests that he did not.

In the early 1760s, while continuing to lecture at Oxford, Blackstone made a second attempt at court advocacy. This time he had two advantages: the accoutrements of a successful barrister and fame. The patronage of a former student, the future Lord Shelburne, and much prodding on Blackstone's part, got him a patent of precedence in 1761,⁵⁶ thereby vaulting him into the ranks of senior barristers despite his near total lack of experience.⁵⁷ Then in 1763 the good graces of Lord Suffolk, whom Blackstone had supported in Suffolk's unsuccessful 1762 bid for the chancellorship of Oxford, won him the more or less meaningless post of Queen's solicitor.⁵⁸ But these trappings did not make him a leader of the bar. He rarely made motions in King's Bench, where most of his practice was centered, and he is recorded

⁵⁵ *Lloyd v. Townsend and Ruston*, Dec. 8, 1753 (Free Library of Philadelphia, MS. LC 14.77 at f° 93) (some punctuation modernized).

⁵⁶ See Letter from William Blackstone to Lord Shelburne (Apr. 2, 1761), in THE LETTERS OF SIR WILLIAM BLACKSTONE, *supra* note 39, at 80–81 ("In the interim permit me once more, and I hope for the last time, to trouble your Lordship with regard to my Affair of the Silk Gown. You will easily I apprehend be able to learn whether his Majesty's Fiat has been signed, & at what time: And, if not Yet done, Your Lordship will recollect the necessary Distinction now to be made (since my Election) between the King's Counsel & the Patent of Precedence. I hope to be at some Certainty in this matter when . . . I have the Honour to see Your Lordship on Tuesday Morning . . ."). A silk gown was the garb of a king's counsel and so became shorthand for the position. Blackstone was mentioning the fact that, having just been elected to Parliament, he could not become a king's counsel without having to resign his seat and seek reelection. The patent of precedence, which gave him the same seniority and precedence of audience before the court, was a way around that rule. *Id.* at 81 n.15. For a more detailed explanation of the patent of precedence and related honors, see *infra* note 120.

⁵⁷ He was nonetheless soon complaining that the patent was costing him more than it was bringing in. Letter from William Blackstone to Lord Shelburne (Dec. 27, 1761), in THE LETTERS OF SIR WILLIAM BLACKSTONE, *supra* note 39, at 88.

⁵⁸ See Wilfrid Prest, *Blackstone on Judges; Blackstone as Judge*, 11 MURDOCH U. ELECTRONIC J.L. 16 (2004).

in the published reports—mostly his own—as having appeared as counsel only thirty-seven times over the course of the decade.⁵⁹

Nonetheless, the reputation of his lectures, and later of his book, did help Blackstone attract clients after he resumed attendance at the bar. Though he had been a lawyer of little weight before he began to lecture at Oxford, and had hardly practiced since leaving Westminster the first time, by the 1760s, with the Vinerian Professorship attached to his name and the *Commentaries* soon to be published, Blackstone was suddenly thought to be an expert in the law.⁶⁰ Lord Ellenborough expressed this evolution well when he said during a debate in the House of Lords in 1812 that:

⁵⁹ A search of the King's Bench rule books, in which the names of counsel making motions are recorded, for the years 1761–1764, 1766–1767, and 1769 turned up only eight appearances by Blackstone: *Shefford v. Mildenhall*, Tuesday next after octave of St. Hilary (Jan. 26), 1762 (National Archives, Kew, England (henceforth, N.A.) KB 125/157); *Doe d. Wither v. Brewer*, Wed. May, 11, 1763 (KB 125/158); *Doe d. Wither v. Brewer*, Tues. Nov. 8, 1763 (*id.*); *Kendrick v. Kynaston*, Friday next after octave of the purification of the Virgin (Feb. 10), 1764 (*id.*); *Tyler v. Johnson*, Friday next after morrow of All Souls (Nov. 9), 1764 (*id.*); *Moorehouse v. Wainhouse*, Tuesday next after octave of the Holy Trinity (June 23), 1767 (KB 125/160); *Hay v. Barrett*, Tuesday next after morrow of All Souls (Nov. 10), 1767 (*id.*); *Hay v. Barrett*, Saturday next after fifteen days of St. Martin (Nov. 28), 1767 (*id.*); *Millar v. Taylor*, Thursday next after three weeks from Easter Day (Apr. 20), 1769 (KB 125/161) (Blackstone listed as counsel but not listed as making a motion). (The author thanks David Seipp for his assistance modernizing the dates.) Note, however, that the rule books are imperfect indicators of court practice because they only list the counsel making the motion, not the counsel opposing it or other counsel involved. See LEMMINGS, *supra* note 49, at 71 (noting also, however, that “other records also frequently name . . . those who argued on the other side, if the motion was contested,” producing a “relatively full source”). A search of the English Reports online turns up thirty-seven cases showing Blackstone as counsel during the following years and at the following frequencies: 1760: 1; 1761: 1; 1762: 3; 1763: 5; 1764: 11; 1765: 4; 1766: 3; 1767: 2; 1768: 3; 1769: 4 (on file with author). He also represented All Souls College in a dispute before the Archbishop of Canterbury in 1762. *Spencer v. All Souls College*, (1762) Wilm. 163, 97 Eng. Rep. 64. He appeared once before Chancery, twice before Exchequer, and before King's Bench in the remainder of his appearances. Only two of these cases were not reported by Blackstone himself. By way of comparison, using the same source, Nares—a very successful barrister—appeared before the various courts at Westminster—primarily Common Pleas and King's Bench, but at least once before both Exchequer and Chancery—107 times in the *published* reports, and in 1770 alone court records list him as appearing before the Court of Common Pleas 248 times. LEMMINGS, *supra* note 49, at 349. The next most prominent Common Pleas practitioners had 164 and 109 appearances that year. *Id.*

⁶⁰ See D. DOUGLAS, *THE BIOGRAPHICAL HISTORY OF SIR WILLIAM BLACKSTONE* 22 (London, J. Bew 1782) (“The Vinerian Professor, having now thoroughly established his reputation, as a great and able lawyer, by his lectures, which he justly thought, might entitle him, to some particular notice, at the bar . . . resumed his attendance at Westminster . . .”); 2 POLSON, *supra* note 52, at 68 (“[The *Commentaries*] tended very considerably to exalt his fame, and probably paved his way to the bench, to which he was ultimately raised.”); 67 MONTHLY REV., *supra* note 38, at 8 (“It ought to be remarked, that . . . the reputation his Lectures deservedly acquired him had induced him to resume his practice at Westminster-Hall; and in a course, somewhat inverted from the general progress of his profession, he, who had quitted the Bar for an academic life, was sent back from the College to the Bar, with a considerable increase of business.”). On the national and international reputation of Blackstone's lectures by the early 1760s, see PREST, *supra* note 5, at 215–16. Regarding Blackstone's continued identification with the *Commentaries* even after he took the bench, see, for example, 1 THE JOURNAL OF SAMUEL CURWEN LOYALIST 113 (A. Oliver ed., 1972).

Blackstone, when he compiled his lectures, was comparatively an ignorant man; he was merely a fellow of All Souls College, moderately skilled in the law. His true and solid knowledge was acquired afterwards. He grew learned as he proceeded with his work. It might be said of him, at the time he was composing this book, that it was not so much his learning that made the book, as it was the book that made him learned.⁶¹

By the time he ascended to the bench, “Blackstone” had become synonymous with “law.”⁶² However, not everyone agreed about the merits of his book. In 1775, two lawyers even dueled over the question.⁶³ But that did not prevent the *Commentaries* from being cited as an authoritative statement of the law in the newspapers and pamphlets, the courts, the House of Commons, the House of Lords, Scotland, and the colonies.⁶⁴ In 1773, a

⁶¹ 23 COBBETT’S PARLIAMENTARY DEBATES FROM THE YEAR 1803, TO THE PRESENT TIME (July 17, 1812) 1083 (1812).

⁶² See PREST, *supra* note 5, at 306 (noting that Blackstone “seems to disappear behind his book”).

⁶³ GAZETTEER AND NEW DAILY ADVERTISER, Sept. 25, 1775, at 2 (“A duel was lately fought in a tavern at the west end of the town, between two gentlemen of the law. The quarrel arose upon the merit of Mr. Justice Blackstone’s Commentaries, one declaring them to be a most superficial, empty performance, and the other as violently extolling them, which altercation brought on mutual reproaches, which were decided at the points of their swords, when one was run through the arm, which put an end to the affair.”).

⁶⁴ See LIEBERMAN, *supra* note 12, at 35–36 (discussing contemporary responses to the *Commentaries*); PREST, *supra* note 5, at 219–21 (discussing praise that greeted the first edition of the *Commentaries*). For a sample of citations to the *Commentaries*, see variously, *MacIntosh v. Dempster* (1768), in JOHN MACLAURIN, ARGUMENTS, AND DECISIONS, IN REMARKABLE CASES, BEFORE THE HIGH COURT OF JUSTICIARY, AND OTHER SUPREME COURTS, IN SCOTLAND 435 (1774); THE TRIAL OF WILLIAM WEMMS, JAMES HARTEGAN, WILLIAM M’CAULEY, HUGH WHITE, MATTHEW, KILLROY, WILLIAM WARREN, JOHN CARROL, AND HIGH MONTGOMERY, SOLDIERS IN HIS MAJESTY’S 29TH REGIMENT OF FOOT, FOR THE MURDER OF CRISPUS ATTUCKS, SAMUEL GRAY, SAMUEL MAVERICK, JAMES CALDWELL, AND PATRICK CARR, ON MONDAY-EVENING, THE 5TH MARCH, 1770, at 145 (Boston 1770) (discussing the trial of soldiers for the Boston Massacre, with Blackstone cited by Josiah Quincy); THE TRIAL OF MUNGO CAMPBELL, BEFORE THE HIGH COURT OF JUSTICIARY IN SCOTLAND, FOR THE MURDER OF ALEXANDER EARL OF EGLINTOUN 78, 86, 97 (2d ed. 1770); GEN. EVENING POST, Aug. 11, 1772, at 4 (“According to Dr. Blackstone, whose authority is, we fancy, unquestionable . . .”); 11 FRANCIS HARGRAVE, A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS 251 (London, T. Wright 1781) (Elizabeth Chudleigh, Duchess Dowager of Kingston, in her 1776 bigamy trial before the House of Lords, stating that “[t]heir jurisdiction is competent in ecclesiastical cases, and their proceedings are conformable to the laws and customs of the land, according to the testimony of the learned judge *Blackstone* (whose works are as entertaining as they are instructive)”); LONDON EVENING POST, Aug. 14, 1773, at 4 (“And to cut off all occasion of caviling at what I have there advanced . . . please to give him the following authority from that most excellent work, Judge Blackstone’s Commentaries on the Laws of England . . .”); LLOYD’S EVENING POST, Sept. 20, 1773, at 282 (including Blackstone among “the highest authorities, antient as well as modern”); LLOYD’S EVENING POST, Jan. 20, 1775, at 77 (former Chancellor, Lord Camden, speaking to the House of Lords in 1775 and declaring that “this was no novel doctrine, but as old as the Constitution, and may be found in all the law books, from Selden down to a Gentleman (meaning Judge Blackstone) whose Commentaries had been so justly and universally received in the world”). Despite Mansfield making a show of banning citations to the *Commentaries* in 1770, while Blackstone was serving on King’s Bench, the ban was soon lifted. See LONDON EVENING POST, May 15, 1770, at 4; see also, e.g., *Taylor v. Whitehead*, (1781) 2 Dougl. 745, 748, 99 Eng. Rep. 475, 477

member of Parliament declared that “if a man’s reputation was not his property he would burn his Blackstone, for he had taught him that it was.”⁶⁵ The same year in another Commons debate another member, referring to the *Commentaries*, declared, “I dare say the House will agree with me when I think that book one of the best that ever was written upon the laws of this constitution, and will do more honour to himself and this country than any that ever yet appeared.”⁶⁶

The result of this fame was that during the 1760s, Blackstone was hired to argue a few important and complex cases alongside and against some of the leading barristers of the time. In several instances, he was chosen to reargue a case when the judges found they could not decide at the first hearing and held the suit over to the following term for further argument.⁶⁷ At

(K.B.); *Arminer v. Spotwood*, (1773) Lofft 114, 114–15, 98 Eng. Rep. 562, 562–63 (K.B.); *Hamilton and Smythe v. Davis*, (1771) 5 Burr. 2732, 2735–36, 98 Eng. Rep. 433, 434–36 (K.B.). Mansfield also cited the *Commentaries* days before Blackstone joined the Court. See *Rex v. Wilkes*, (1770) 4 Burr. 2527, 2567, 98 Eng. Rep. 327, 350 (K.B.) (citing volume 3).

⁶⁵ MORNING CHRONICLE, Mar. 26, 1774, at 2.

⁶⁶ LONDON EVENING POST, May 19, 1774, at 1. The relevant portions of the exchange went like this:

Mr. Phipps: “I think the appeal for murder ought to be sacred in this country; and whatever doctrines gentlemen may imbibe from Mr. Blackstone, I cannot conceive them to be of that authority which ought to guide and direct us.”

Mr. Sykner: “But Sir, I cannot sit down without saying a few words in defence of that able person alluded to, now a great Magistrate, who has thought there is something in our constitution worth preserving. And sorry I am to hear that great and able writer has received any reproach or admonition in this Senate; and I believe the honourable gentleman (Captain Phipps) is singular in his opinion upon this head; and I am glad to find there are no strangers in the gallery, for his own sake, to hear what he said. But, Sir, I am of a different opinion from that honourable gentleman; and I dare say the House will agree with me when I think that book one of the best that ever was written upon the laws of this constitution, and will do more honour to himself and this country than any that ever yet appeared; and I am sorry to hear him reproached even by an individual, when I am sure the greatest honour will redound to this country from that able performance.”

“Capt. Phipps arose to explain himself with regard to Mr. Blackstone, and said, however he may have represented his performance, he was glad to find it was so well defended by the warmth of friendship He sat down rather chagrined to find his opinion with regard to that book was singular.”

Id.

⁶⁷ Among Blackstone’s more important cases were: *Tonson v. Collins*, (1761) 1 W. Bl. 321, 96 Eng. Rep. 180 (K.B.) (copyright; first argument: Wedderburn for the plaintiff, Thurlow for the defendant; second argument: Blackstone for the plaintiff, Yates for the defendant); *King v. Webb*, (1764) 1 W. Bl. 460, 96 Eng. Rep. 265 (K.B.) (Wilkes’s prosecution of the King’s attorney, Philip Carteret Webb, for perjury; Glynn, Eyre, Stone, Dunning, and Wallace for the prosecutor; Blackstone as part of team with Norton and Morton for the defendant); *Triquet v. Bath*, (1764) 1 W. Bl. 471, 96 Eng. Rep. 273 (K.B.) (ambassadorial privilege; Blackstone and Thurlow for the plaintiff; Norton for the defendant); *King v. D’Eon*, (1764) 1 W. Bl. 510, 96 Eng. Rep. 295 (K.B.) (political libel; Blackstone, de Grey, Norton, Clayton, and Wallace for the Crown, no counsel appearing for the defendant); *King v. Guerchy*, (1765) 1 W. Bl. 545, 96 Eng. Rep. 315 (K.B.) (ambassadorial immunity; Glynn and Dunning for the prosecutor; Blackstone for the defendant); *Ricord v. Bettenham*, (1765) 1 W. Bl. 563, 96 Eng. Rep. 326 (K.B.) (validity of ransom bills for captured ships; first argument: Chambers for the plaintiff; Dunning for the defendant; second argument: Norton for the plaintiff; Blackstone for the defendant); *Millar v. Taylor*,

that point, the client, or more likely his solicitor, knew the suit was difficult and presumably would not have given the brief to a lesser lawyer. Blackstone's range as an advocate may, however, have been narrow. It appears he was primarily hired on cases concerning legal subjects that implicated civil or natural law, such as copyright, university matters, international law, or testamentary interpretation.⁶⁸ Nonetheless, in January 1770, Blackstone was supposedly even offered the position of solicitor general, which he refused out of a disinclination to undertake "the Attendance on its complicated Duties at the Bar, and in the House of Commons."⁶⁹ The offer alone, however, testified to the esteem in which he was held, because the solicitor and attorney generalships went to men of both reliable political views and proven legal ability.⁷⁰

(1769) 4 Burr 2303, 98 Eng. Rep. 201 (K.B.) (copyright; first argument: Dunning for the plaintiff; Thurlow for the defendant; second argument: Blackstone for the plaintiff; Murphy for the defendant).

The lawyers mentioned above held the following positions: Fletcher Norton, attorney general (1763–1765), Speaker of the House of Commons (1770–1781). Philip Laundy, Norton, *Fletcher, first Baron Grantley (1716–1789)*, in 41 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY *supra* note 2, at 166. Edward Thurlow, attorney general (1771–1778), Chancellor (1778–Feb. 1783, Dec. 1783–1792). G.M. Ditchfield, *Thurlow, Edward, first Baron Thurlow (1731–1806)*, in 54 *id.* at 715. Alexander Wedderburn, attorney general (1778–1780), chief justice of Common Pleas (1780–1793), Chancellor (1793–1801). Alexander Murdoch, *Wedderburn, Alexander, first earl of Rosslyn (1733–1805)*, in 57 *id.* at 908. John Glynn, serjeant, recorder of London 1772–1779. Peter D.G. Thomas, *Glynn, John (bap. 1722, d. 1779)*, in 22 *id.* at 522. Sir James Eyre, recorder of London (1763–1772), baron of the Exchequer (1772–1793), chief justice of Common Pleas (1793–1799). Douglas Hay, *Eyre, Sir James (bap. 1734, d. 1799)*, in 18 *id.* at 847. John Dunning, solicitor general (1768–1770), chancellor duchy of Lancashire (1782–1783). John Cannon, *Dunning, John (1731–1783), first Baron Ashburton*, in 17 *id.* at 333. Sir James Wallace, declined appointment to King's Bench in 1770; solicitor general (1778–1780), attorney general (1780–1782, 1783). G. M. Ditchfield, *Wallace, James (bap. 1729, d. 1783)*, in 56 *id.* at 934. John Morton (d. 1780), Chief Justice of Chester (1762–1780), 3 SIR LEWIS NAMIER & JOHN BROOKE, *THE HOUSE OF COMMONS 1754–1790*, at 173–76 (1964).

⁶⁸ During the 1760s, Blackstone is recorded as having argued seven interpretation cases: *Wellington v. Wellington*, (1768) 1 W. Bl. 645, 96 Eng. Rep. 375 (Ch.); *Perkins d. Vowe v. Sewell*, (1768) 1 W. Bl. 654, 96 Eng. Rep. 380 (K.B.); *Gulliver d. Corrie v. Ashby*, (1766) 1 W. Bl. 607, 96 Eng. Rep. 352 (K.B.); *Frogmorton v. Holyday*, (1765) 1 W. Bl. 535, 96 Eng. Rep. 310 (K.B.); *Denn d. Satterthwaite v. Satterthwaite*, (1764) 1 W. Bl. 519, 96 Eng. Rep. 301 (K.B.); *Evans d. Brooke v. Astley*, (1764) 1 W. Bl. 499, 96 Eng. Rep. 289 (K.B.); *Stephen v. Coster*, (1763) 1 W. Bl. 423, 96 Eng. Rep. 241 (K.B.), as well as four cases involving international law generally: *Guerchy*, (1765) 1 W. Bl. 545, 96 Eng. Rep. 315; *Ricord*, (1765) 1 W. Bl. 563, 96 Eng. Rep. 326; *Triquet*, (1764) 1 W. Bl. 471, 96 Eng. Rep. 273; *Robinson v. Bland*, (1760) 1 W. Bl. 234, 96 Eng. Rep. 129 (K.B.). He also argued two cases on Oxford or Cambridge matters, *King v. Univ. of Cambridge*, (1765) 1 W. Bl. 547, 36 Eng. Rep. 316 (K.B.) and *Kendrick v. Kynaston*, (1764) 1 W. Bl. 454, 96 Eng. Rep. 261 (K.B.), and three cases on copyright, *Millar*, (1769) 4 Burr. 2303, 98 Eng. Rep. 201; *Baskett v. Cunningham*, (1763) 1 W. Bl. 370, 96 Eng. Rep. 208 (Ch.); and *Tonson*, (1761) 1 W. Bl. 321, 96 Eng. Rep. 180. For more on Blackstone's expertise, see PREST, *supra* note 5, at 106 (telling of an experienced barrister "call[ing] on Blackstone's expert knowledge of academic or university law").

⁶⁹ Clitherow, *Preface*, *supra* note 39, at xix.

⁷⁰ See LEMMINGS, *supra* note 49, at 268. Blackstone's political views have proven difficult to define precisely. He was an Old Interest Tory of some stripe, apparently, but not completely antagonistic to the Whig position. See PREST, *supra* note 5, at 97, 128–29, 133.

But despite his growing reputation, Blackstone remained ambivalent about legal practice.⁷¹ When he first left Oxford for the law in the mid-1740s, he wrote a poem entitled “Lawyer’s Farewell to His Muse,” expressing his regret over trading “the pleasing dream” of humanistic studies for the “tedious forms, the solemn prate/[t]he pert dispute, the dull debate” of the “wrangling Courts and stubborn Law.”⁷² In his second turn at Westminster, during most of which he continued to hold the Vinerian Chair as well, Blackstone still did not fall in love with practice. Instead, almost as soon as he returned to the bar, he began to importune his patrons to support him for preferment as a judge. Being a judge, he and his friends claimed, fit his abilities and temperament better than practice did.⁷³ Being a judge, in fact, was the next best thing to being a law professor, and he said that if he could do both he would happily give up attendance at the bar.⁷⁴ Indeed, in 1762, Blackstone went so far as to insinuate that he would even leave the law altogether if given a well-paying patronage position in some other field.⁷⁵

The usual explanation for his continued ambivalence was that he was not a particularly good pleader: he lacked the verbal quickness, oratorical

⁷¹ See 67 MONTHLY REV., *supra* note 38, at 7 (“Mr. Blackstone was noticed by the University, which he courted; and neglected at the Bar, which he appears never to have heartily loved.”).

⁷² C.L. BRIGHTWELL, MEMORIALS OF THE EARLY LIVES AND DOINGS OF GREAT LAWYERS 125 (2002).

⁷³ See Letter from William Blackstone to Lord Shelburne (July 29, 1762), in THE LETTERS OF SIR WILLIAM BLACKSTONE, *supra* note 39, at 93 (“My Ambition now rises to the Post of an English Judge; for which I hope that my Studies have in some degree qualified me (else I should be ashamed to think of it) though I fear that my natural Diffidence will never permit me to make any very great Progress at the Bar; for which Talents very different are required than those . . . that will qualify for the Bench.”). Not being too fine in his sensibilities, Blackstone mentioned himself as a replacement for a gravely ill judge (who later recovered), and suggested that an elderly judge should be paid to retire so that he could have the seat. *Id.* at 93–94, 102. For other letters soliciting a judgeship, see Letter from William Blackstone to Lord Shelburne (Dec. 12, 1762), in *id.* at 101–02 (“I have Authority to assure Your Lordship (entre nous) that Judge Forster wishes to retire upon a Pension . . . from an office which his advanced Age & Infirmities have rendered him incapable to discharge . . . If, through Your Lordship’s good Offices with Lord Bute & Mr Fox, such a thing could be immediately effected . . . and as I am confident that my Lord Chancellor has no personal Exceptions to me (though previously engaged to Perrott) I might still keep Pace with that Gentleman & we might take our Seats together next Term.”); Letter from William Blackstone to Lord Shelburne (Oct. 9, 1766), in *id.* at 116 (asking to be considered for the vacancy created on King’s Bench when John Eardley Wilmot became chief justice of Common Pleas, because being a judge is “a Situation for which my Friends flatter me that my Talents (if I have any) are better adapted than for the Bar; and to which my Rank in the Profession, and the Character in which I have the Honour to serve the Queen, make it no Presumption to aspire”).

⁷⁴ See Letter from William Blackstone to Lord Shelburne (Dec. 27, 1761), in *id.* at 88 (asking for the vacant chief justiceship of Chester, which he thought “the best suited of any in the Law to my Situation & Wishes; as the Duty of it will not interfere with the Duty of my Oxford Professorship, which with me is still a very favourite Point”).

⁷⁵ See Letter from William Blackstone to Lord Shelburne (Sept. 7, 1762), in *id.* at 94 (“[O]ut of the Law I have never extended my Views;—though I should not be so delicate as to object to any easy & comfortable Situation merely upon that Account.”).

skills, and politesse required to succeed in a highly competitive business.⁷⁶ But he was not the only barrister to lack these gifts. Serjeant George Hill (c. 1716–1808), for instance, was renowned as an awful pleader, but “but having the character of being the best black-letter lawyer of his day, [he] preserved a share of business to a very late period of his life.”⁷⁷ Furthermore, as noted above, some evidence indicates that Blackstone was considered a valuable counsel to hire, at least within the limited range of subjects that involved civil or natural law.⁷⁸ An alternative explanation for Blackstone’s inability to come to terms with legal practice might instead lie in his firm commitment to the principles of the common law orthodoxy, and his misunderstanding of—or refusal to countenance—the practitioners’ normal pragmatic approach.

According to his friend Richard Graves, for Blackstone at the bar “[e]very thing was weighty and decisive.”⁷⁹ He does not appear to have thought of court hearings as merely an opportunity to persuade the judges to vote in favor of his client. Instead, he seems to have viewed legal arguments as a type of academic debate, the goal of which was to get to the one right answer that the theory said should be hidden away in the authorities.⁸⁰ This is suggested by his behavior in *Ricord v. Bettenham*, a 1765 case about ransom contracts for merchant ships caught by corsairs during wartime and released on the promise of a ransom payment.⁸¹ Blackstone was retained by the defendant, the captain of the merchant ship, to reargue at a second hearing that the contract was unenforceable. He had attended the first argument and at its conclusion volunteered to contact continental European lawyers to

⁷⁶ See GRAVES, *supra* note 47, at 57.

⁷⁷ Espinasse, *supra* note 2, at 321. On Hill, see M. McNair, *Hill, George*, in 27 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 2, at 131–32; see also 2 JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES 571–72* (London, J. Murray 1849) (discussing Hill’s impracticality and Mansfield’s treatment of him); 1 POLSON, *supra* note 52, at 78–79 (detailing his defects as an advocate); 1 SAMUEL ROMILLY, *MEMOIRS OF THE LIFE OF SIR SAMUEL ROMILLY 72* (London, J. Murray 1840) (noting that Hill was “a lawyer of very profound and extensive learning, but with a very small portion of judgment, and without the faculty of making his great knowledge useful”); 1 HORACE TWISS, *THE PUBLIC AND PRIVATE LIFE OF LORD CHANCELLOR ELDON, WITH SELECTIONS FROM HIS CORRESPONDENCE 93–94* (London, J. Murray 1844) (providing anecdotes of Hill’s pleading).

⁷⁸ For the list of Blackstone’s major cases, see *supra* note 67.

⁷⁹ GRAVES, *supra* note 47, at 57.

⁸⁰ See, e.g., *Tonson v. Collins*, (1761) 1 W. Bl. 321, 331–32, 96 Eng. Rep. 180, 184–85 (K.B.) (Blackstone arguing with Mansfield about the meaning of precedent); see also *Frogmorton v. Holyday*, (1765) 1 W. Bl. 535, 540, 96 Eng. Rep. 310, 312 (K.B.) (Mansfield commenting that “[t]he Reason given by Mr. Blackstone is too refined, for people in such circumstances as the testatrix”). On Blackstone’s stubborn refusal to abandon a failing legal strategy and his insistence that he was right on the law when he was not, see ANTHONY TAUSSIG, *BLACKSTONE AND HIS CONTEMPORARIES 50–59* (discussing Blackstone’s involvement in the All Souls Founder’s Kin cases).

⁸¹ (1765) 3 Burr. 1734, 97 Eng. Rep. 1071; 1 W. Bl. 563, 96 Eng. Rep. 326 (K.B.).

inquire about their practice.⁸² On the day of the rehearing, he announced that his French and Dutch sources had told him, “upon principles that could not be disputed,” that such contracts were enforceable under their laws.⁸³ As he had decided that “the only objection which seemed to weigh upon the former argument, was, ‘that such an action would not lie in the other countries of Europe,’” he declined to proceed and conceded the case.⁸⁴

Perhaps this is not an accurate reflection of Blackstone's own views. Case reports are faulty sources,⁸⁵ and Blackstone's client might have instructed him to act as he did. However, a similar tendency toward certainty appears in some of his opinions of counsel, documents in which a lawyer was presumably free to advise as he saw best. Written opinions of counsel first appeared in the sixteenth century,⁸⁶ and hundreds of them are extant from the eighteenth century. An attorney (similar to the modern English solicitor),⁸⁷ needing advice on a point of law or wanting to be certain of choosing the correct method of litigation, would put the facts of a case to counsel and then pose the legal question or questions on which he sought guidance. The counsel would write his opinion on the same sheet, directly below the question posed, and return the paper to the attorney.⁸⁸ Over thirty of Blackstone's opinions of counsel from the 1760s survive,⁸⁹ and they reveal that Blackstone had a habit of stating his conclusions categorically.

Three examples illustrate this well. In 1765, Winchester College sought Blackstone's advice about the legality, under the Statute of Mortmain, of its plans to use a bequest that was intended solely for the benefit of the students.⁹⁰ In part, the College intended to apply the money to teachers' salaries so that underpaid teachers would no longer extort additional fees from the students.⁹¹ Blackstone approved the plan, saying: “[T]here is no Probability that ye Society will ever be called to account for it; or, if they should, that they will incur any Censure for their Conduct herein”⁹² He continued:

I have no Doubt, but that every Means, whereby the private Expence w[hi]ch the Scholars must otherwise be at, is lessened, is conducive to their better

⁸² *Ricord*, 1 W. Bl. at 568, 96 Eng. Rep. at 327–28. It is not clear whether Blackstone knew at the time that he would reargue the case. Presumably he did not, but the mechanism of appointing counsel during this period remains unstudied.

⁸³ *Ricord*, 3 Burr. at 1741, 97 Eng. Rep. at 1075.

⁸⁴ *Id.* at 1741, 97 Eng. Rep. at 1075.

⁸⁵ See *infra* note 139 (discussing case reports).

⁸⁶ J.H. BAKER, *THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY* 87 (2001).

⁸⁷ BAKER, *supra* note 29, at 163–64.

⁸⁸ BAKER, *supra* note 86, at 87–88.

⁸⁹ PREST, *supra* note 5, at 221.

⁹⁰ Winchester College Muniments, 330a (Mar. 25, 1765).

⁹¹ *Id.*

⁹² *Id.*

Maintenance & Support. This is so clear a Proposition, that it is only necessary to state it, in order to establish the Truth of it.⁹³

Blackstone was probably correct that the College's plan was acceptable, given that raising teachers' salaries and concomitantly lowering fees do seem to benefit the students. Nonetheless, it is difficult to imagine a well-trained common lawyer like George Nares advising his clients so categorically and with such certainty that the facts could be viewed in only one way.

Admittedly, attorneys sought the opinions of counsel because they wanted definitive guidance, not wishy-washy equivocation, and taken alone, out of the context of a general study of opinions of counsel, it is difficult to judge how unusual Blackstone's tendency to answer queries with apparent certainty was.⁹⁴ In two further instances, however, opinions were issued by both Blackstone and at least one other lawyer on the same case. These opinions reveal that other counsel expressed doubts where Blackstone saw right answers.

The first case arose in January 1757, when the fellows of Oriel College, Oxford, their provost having died, asked Blackstone for an interpretation of the statutory mandate that a new provost be elected "infra Triduum a tempore Notitiae," or "within three days of the time of the notice."⁹⁵ Blackstone wrote, "I should have been desirous of more Time than the present Exigence allows, to have answered a Question of this Consequence, had not ye Statute been in my Opinion extremely clear."⁹⁶ He asserted that the fellows were "obliged" to elect a new provost within three days of the former provost's death.⁹⁷ His only doubt concerned what constituted sufficient no-

⁹³ *Id.* (interlined words inserted into text). Other opinions with similarly definitive statements of advice include: Oxfordshire Record Office MS.DD.Par.Oxford.Sty.Ebbes.c.12, f. A1 (settlement case, Oct. 16, 1762: "However, even if this should be looked upon as a pecuniary Purchase, & therefore not to give a lasting Settlement, yet it certainly makes James Meers irremovable for the present, so that ye Question of his final [interlined] Settlement cannot now be brought in Question."); Berkshire Record Office, W/JQZ/12 (settlement case, Oct. 1766: "I should be clearly of Opinion . . ."); Berkshire Record Office, D/EB/T13 (interpretation of a lease, Nov. 1766: "I apprehend that the half Years Rent . . . belongs clearly to Mrs. Goodenough's Representatives . . ."); ANON., THE CONDUCT OF THE RIGHT REVEREND THE LORD BISHOP OF WINCHESTER AS VISITOR OF ST. MARY MAGDELEN COLLEGE, OXFORD, FULLY STATED WITH BRIEF OBSERVATIONS ON VISITATORIAL POWER ADDRESSED TO HIS LORDSHIP 23 (London, Blyth et al. 1770) (interpretation of the Brasenose College statutes, Mar. 1767: "[T]hough *beneficium* is now usually taken to signify a spiritual preferment, yet nothing is more certain than that anciently it denoted a temporal as well as spiritual *interest* . . ."); William Blackstone, Opinion on Case, *Cutting Trees Under College Lease*, 36 LEGAL OBSERVER 327, 327 (1848) (interpretation of a lease, Mar. 1768: "I am of opinion that (were it otherwise dubious) this Exception . . . will give Mr. Mason (by a strong and almost necessary Implication) a Right . . .").

⁹⁴ No systematic studies of opinions of counsel have been done. BAKER, *supra* note 86, at 87.

⁹⁵ Opinion of counsel by William Blackstone for Oriel College, Jan. 14, 1757 (Oriel College Archives, Oxford, PRO/A1/12).

⁹⁶ *Id.*

⁹⁷ *Id.*

tice, whether it had to be formal notice made by the proper officer, or whether “open Notoriety of ye Fact” sufficed, and he opted for the latter.⁹⁸ “Otherwise this Absurdity must follow; that ye Election might be deferred to any indefinite Time; nay ye College might continue for ever without a Head”⁹⁹

After receiving Blackstone’s opinion, the College consulted a local lawyer, James Gilpin, who opined that the notice period began only when the proper college officer gave formal notice, such as at the time of the funeral.¹⁰⁰ “But,” he added, “if it is apprehended that any strained Construction May be made of this Statute to ye Prejudice of ye College, as the Words are to be Sure Capable of a double Interpretation, It may be More prudent & Sage to give an Earlier Notice”¹⁰¹ Gilpin also saw a different cause for concern. Where Blackstone had focused on long-term consequences, Gilpin was thinking about the people immediately involved: “For any Complaint of the breach of this Statute will be much stronger, in case any one is deprived of his Vote by a too Early notice, than it can be from construing ambiguous words in Such a Sense as no person can be injured by the Construction.”¹⁰² Blackstone’s focus on remote slippery slope problems rather than the just resolution of the affair at hand would reappear in his judicial opinions.¹⁰³

The second case, from 1769, involved the interpretation of a will. Richard Serle had left most of his property to his nephew William Goodenough, but if William died “unmarried, *and* without issue of his body lawfully begotten,” the property was to go to his older brother, Richard Jocelyn Goodenough.¹⁰⁴ In another part of the will, the equivalent phrase read “die unmarried, *or* without issue of his body lawfully begotten.”¹⁰⁵ The question came down to whether “and” in the first phrase could be read disjunctively as “or.”¹⁰⁶ Blackstone was consulted first, in August 1769. His opinion was brief and without reasoned analysis, but his conclusion was simple: “I strongly incline to think, that if mr. W.G. should die without issue of his body begotten, even though he should be married, the estates

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Opinion of counsel by James Gilpin for Oriel College, Jan. 1757 (Oriel College Archives, Oxford, PRO/A1/12).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *infra* text accompanying note 295.

¹⁰⁴ 1 CASES WITH OPINIONS OF EMINENT COUNSEL IN MATTERS OF LAW, EQUITY, AND CONVEYANCING 344 (London, Philip John Kennedy Burton ed., E. Brooke et al. 1791) [hereinafter CASES WITH OPINIONS] (emphasis added).

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ *Id.* at 345, 347.

would go to his brother R.J.G. by way of executory devise.”¹⁰⁷ “And,” in other words, meant “and.” Indeed, because the opinion consisted of only one paragraph, it is not clear that Blackstone even considered any other possibility. In November 1769, Charles Yorke, the former solicitor and attorney general,¹⁰⁸ gave a longer, more reasoned opinion in which he stated that a court would probably construe the words, taken in context, disjunctively. “As the word or may be construed into and, for the sake of complying with a testator’s meaning, so I think that the word and, for the same reason, may be construed into or.”¹⁰⁹ But being hesitant to state this conclusion categorically, as the case was “doubtful, and capable of different constructions in the sense of lawyers and judges,” Yorke advised against depending upon it when making important marriage settlements.¹¹⁰ Having now two contradictory opinions, the client or attorney sought a third in December 1770. John Dunning, a leading barrister and future solicitor general, agreed with Yorke that the testator’s intention would be effected only if “and” were construed to mean “or,” though he also acknowledged that “[t]he construction of mr. Serle’s will is not without its difficulties.”¹¹¹

The attorney did not stop his quest for advice there. Two years later he obtained an opinion from James Booth, a chambers barrister whose opinions survive in great numbers.¹¹² Booth, in a long and quite fully reasoned opinion, demonstrated how much more sense it made in the context of the will for “and” to be interpreted disjunctively.¹¹³ Finally, in an even longer opinion that was unusual because it was stocked with citations to authority, a fifth, unnamed, barrister considered the testament, which he thought “attended with uncommon difficulties,” and arrived at the same conclusion: “and” in this context meant “or.”¹¹⁴

The point of these examples is not that Blackstone came to the wrong conclusions, because perhaps he did not. Rather, what set him apart from the other lawyers who were consulted was that he never seemed even to

¹⁰⁷ *Id.* at 346. Contrast Blackstone’s certainty with the interpretative trope expressed by William de Grey in another opinion of counsel from 1769: “[S]peaking with that diffidence which is necessary in conjecturing upon the operation of wills so untechnically expressed . . .” *Id.* at 359.

¹⁰⁸ John Cannon, *Yorke, Charles (1722–1770)*, in 60 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 2, at 831–32.

¹⁰⁹ 1 CASES WITH OPINIONS, *supra* note 104, at 345.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 347; John Cannon, *Dunning, John (1731–1783), first Baron Ashburton*, in 17 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 2, at 333.

¹¹² Booth practiced “under the bar”—that is, he did conveyancing work and gave legal opinions because, as a Roman Catholic, he was prohibited by statute from practicing before the courts. See J.M. Rigg, rev. Andrew D.E. Lewis, *Booth, James (1707–1778)*, in 6 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 2, at 622–23. To get a sense of how popular Booth’s opinions were, see generally CASES WITH OPINIONS, *supra* note 104 (reproducing a great number of Booth’s opinions, far more than those of more famous lawyers of the time).

¹¹³ 1 CASES WITH OPINIONS, *supra* note 104, at 349–51.

¹¹⁴ *Id.* at 351–53.

consider the possibility that his interpretation was not the only one—that the question was complex and required something more nuanced than a declaration of certainty. Instead, Blackstone's opinions suggest he thought that the law was a system of well-defined rules in which each problem had one and only one answer. Thus if he had lined up his evidence properly, his answer should be correct and should require no equivocation. In other words, his approach to giving legal advice suggests that he carried into his practice the picture he had described in the *Commentaries* regarding how judges and lawyers arrived at decisions. If so, he was bound to get frustrated with the compromise and subtlety of life at the bar, and he was also not unjustified, given his view of judges, in imagining that he would be better off on the bench.

He got his wish in February 1770. Rumored to have been selected at the insistence of the King, to whom Blackstone had a decade before supplied his law lectures,¹¹⁵ he was first appointed to Common Pleas, but almost immediately agreed to swap positions with Justice Joseph Yates, who wanted to transfer from King's Bench to the less busy Common Pleas for reasons of ill health.¹¹⁶ Blackstone served only one term on King's Bench before switching back to Common Pleas in June 1770, after Yates' early

¹¹⁵ MIDDLESEX J., Feb. 10, 1770, at 3 (“It is said that Mr. Blackstone, besides his own peculiar merits to recommend him to a late appointment, had the personal recommendation and interest of a certain great Personage, to whom, a few years ago, he read his Vinerian lectures privately, and gave very great satisfaction.”). See also JOHN BAKER, *THE DIARY OF JOHN BAKER* 320 (Philip C. Yorke ed., 1931) (writing on June 23, 1775, that “the King insisted on his being Judge *contre le gré* of Lord Bute and others, who opposed it”).

¹¹⁶ James Clitherow, *Preface*, *supra* note 39, at xix; Letter from William Blackstone to Sir John Eardley Wilmot (June 8, 1770), in *THE LETTERS OF SIR WILLIAM BLACKSTONE*, *supra* note 39, at 143 (claiming he agreed to swap with Yates “only on account of Yates’s Representation of his infirm State of Health”); GEN. EVENING POST, Feb. 10, 1770, at 4; MIDDLESEX J., *supra* note 115, at 3. Yates’s real reason for wanting to leave King’s Bench has been the topic of speculation since his death. Some have claimed that he did it to escape the overbearing and overly liberal Mansfield. See generally LLOYD’S EVENING POST, Nov. 12, 1770, at 468 (Letter of Junius to Mansfield: “The name of Mr. Justice Yates will naturally revive in your mind some of those emotions of fear and detestation with which you always beheld him. That great Lawyer, that honest man, saw your whole conduct in the light that I do. After years of ineffectual resistance to the pernicious principles introduced by your Lordship, and uniformly supported by your *humble friends* upon the Bench, he determined to quit a Court, whose proceedings and decisions he could neither assent to with honour, nor oppose with success.”); LONDON EVENING POST, Dec. 11, 1770, at 1 (quoting a letter of Robert Morris to Justice Aston referring in pertinent part to Yates’s dislike of what Mansfield had done to the court and insinuating as the reason for his move to Common Pleas: “Timidity or respect might have long imposed a silence upon his mind; but we found, that even his patient perseverance was obliged at last to yield to his great abhorrence of the things, which he saw daily passing before him, shocking to the native integrity of his conscience . . .”); Bray, *supra* note 4, s.v. Francis Yates (writing that Yates “wo[ul]d think for himself, & often differed w[i]th lord Mansfield”). Later commentators perpetuating the theory include: 2 CAMPBELL, *supra* note 77, at 433 n.*; C.H.S. FIFOOT, *LORD MANSFIELD* 47 (1936); FOSS, *supra* note 11, at 411–12; Julian S. Waterman, *Mansfield and Blackstone’s Commentaries*, 1 U. CHI. L. REV. 549, 554 (1934).

death.¹¹⁷ He joined a Court led by the esteemed chief justice, Sir John Eardley Wilmot, with Henry Bathurst and Henry Gould as the other puisnes. In January 1771, Wilmot retired, and Bathurst became Chancellor.¹¹⁸ De Grey and Nares were appointed, and they served alongside Gould and Blackstone until the latter's death at age fifty-six in February 1780.¹¹⁹

Blackstone took the bench a famous man, renowned for his knowledge of the black letter law. But that knowledge had come primarily from books, and it had been shaped by years of teaching rather than decades of legal practice. His knowledge had served him well enough at the bar, but he had never achieved great success nor come to like or perhaps even to understand the practice of law. Now he would discover whether his book-learned approach would serve him better as a judge than it had as an advocate.

III. BLACKSTONE ON THE BENCH

The normal path to the judiciary in the eighteenth century consisted, at base, of spending about a quarter-century in active practice advocating before at least one of the central courts seated at Westminster: King's Bench, Common Pleas, Exchequer, or Chancery. Most future judges acquired some mark of precedence at the bar along the way, whether by becoming king's counsel, taking the medieval degree of serjeant-at-law, or just obtaining a patent of precedence.¹²⁰ By the time the barrister, now quite experienced and usually in his late forties or fifties,¹²¹ was elevated to the bench, he had been well indoctrinated into a way of thinking about the law that might have assumed the principles of the common law orthodoxy but that,

¹¹⁷ See the comment following *King v. Inhabitants of St. Michael*, 2 W. Bl. 718, 719, 96 Eng. Rep. 422, 423.

¹¹⁸ See the comment following *William Fletcher's Case*, 2 W. Bl. 734, 734–35, 96 Eng. Rep. 430, 430.

¹¹⁹ *Id.*

¹²⁰ BAKER, *supra* note 29, at 165. “[K]ing’s counsel were supernumerary law officers who, in return for a small annuity (probably not paid), held permanent retainers which prevented them from appearing against the Crown . . .” *Id.* The positions were highly desired because they gave the holder a right of precedence and preaudience in court, immediately making the holder a senior barrister. *Id.* “The holder of . . . a ‘patent of precedence’ received no salary from the crown and was not sworn. The advantage was that it gave him the same professional rank as a king’s counsel without the corresponding limitation on private practice or disqualification from sitting in parliament.” J.H. BAKER, *THE ORDER OF SERJEANTS AT LAW* 61–62 (1984). Serjeant-at-law was a degree or status conferred on a small number of experienced barristers originally giving them preference of audience before the courts. The serjeants had a monopoly on arguing before Common Pleas, though they were also free to appear before the other courts. By Blackstone’s time, the degree of serjeant was seen by many as more bother and expense than it was worth, because the serjeants had long since been displaced in the order of precedence by the king’s counsel. See *id.* at 108, 111–12, 114–17. On the normal path to the bench, see LEMMINGS, *supra* note 49, at 275–81, and DANIEL DUMAN, *THE JUDICIAL BENCH IN ENGLAND 1727–1875*, at 72–78, 87 (1982).

¹²¹ DUMAN, *supra* note 120, at 72.

in practice, retained a pragmatic approach to decisionmaking that did not treat the theory as an unbendable, immutable guide.¹²²

Blackstone's brethren fit this pattern of advancement to the bench. Henry Gould had practiced for twenty-seven years, including seven as king's counsel.¹²³ By the time George Nares was appointed to the Court in 1771, he had been a barrister for thirty years, including, after 1759, serving as a king's serjeant, the highest-ranking royal counsel.¹²⁴ Serjeants had a monopoly on practice before Common Pleas, and Nares used his position to become a "clear leader" of that Court's bar.¹²⁵ William de Grey was called to the bar in 1742.¹²⁶ A highly successful Chancery barrister, he became a king's counsel in 1758, solicitor general to the Queen in 1761, solicitor general in 1763, and finally attorney general in 1766.¹²⁷ Holding the highest legal office in the land did not lessen his private business. In 1770, his income from his law practice was £8,037, making him one of the earliest barristers to earn over £8,000 in one year.¹²⁸

Although on paper Blackstone passed many of the same career milestones, his achievements were mostly illusory. His patent of precedence and appointment as Queen's solicitor came not as a token of recognition of a successful career at the bar but through patronage alone.¹²⁹ And though he in principle had almost twenty-five years' experience by the time he became a judge in 1770, in reality he had practiced actively for half or less of that time, making him an unusually inexperienced choice for the bench.¹³⁰

¹²² See, e.g., 1 OLDHAM, *supra* note 2, at 202 (discussing Mansfield's treatment of precedent as leaving "considerable maneuvering room").

¹²³ FOSS, *supra* note 11, at 294; Handley, *supra* note 3, at 71. He also had the patronage of the Chancellor, the person who selected puisne judges, through his wife. Bray, *supra* note 4, s.v. Henry Gould. See also Editorial, *To the Printer of the Gazetteer*, GAZETTEER AND NEW DAILY ADVERTISER, Sept. 29, 1775, at 4 (praising Gould's dissent in a complex trial concerning an informer and calling Gould "a sage who hath waded through the depths of the old law to his seat on the Bench, and who hath not, when there, forgot or forsook it").

¹²⁴ BAKER, *supra* note 29, at 164.

¹²⁵ LEMMINGS, *supra* note 49, at 172.

¹²⁶ See Gordon Goodwin, rev. M.J. Mercer, *Grey, William de, first Baron Walsingham (1719–1781)*, in 23 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 2 at 897.

¹²⁷ *Id.*

¹²⁸ DUMAN, *supra* note 120, at 107.

¹²⁹ Patronage was an important part of most appointments, but in most instances the lawyer also had some independent qualifications. See LEMMINGS, *supra* note 49, at 265, 274.

¹³⁰ Blackstone was not the only judge of his era to come to the bench without a great deal of experience. Beaumont Hotham was appointed a baron of the Exchequer in 1775 on the basis of patronage rather than experience. LEMMINGS, *supra* note 49, at 189 & n.131. See also 1 TWISS, *supra* note 77, at 94 ("When Mr. Hotham was made a Baron of the Exchequer, who had never had any business at the Bar, but who, by the effect of great natural good sense and discretion, made a good Judge, he gave, as usual, a dinner at Serjeants' Inn, to the Judges and the Serjeants. Serjeant Hill drank his health thus:—'Mr. Baron Botham, I drink your health.'—Somebody gently whispered the Serjeant, that the Baron's name was not Botham but Hotham. —'Oh!' said the Serjeant aloud, 'I beg your pardon, Mr. Baron Ho-

Without years of practice to inculcate in him the flexibility of the common lawyer and to challenge his devotion to the principles of the common law orthodoxy that he had spent his teaching career professing, he arrived at the bench still very much the Commentator.

This Part considers how Blackstone's principled jurisprudence differed from that of his more pragmatic brethren. Section A introduces Blackstone's *Reports* and notes their importance to this inquiry. Section B contrasts Blackstone's tendency toward abstract rule-oriented decisionmaking with the casuistic minimalism of his colleagues. Section C discusses the centrality of legal authorities to Blackstone's view of the law. Section D focuses on the peculiarly insistent importance of precedent in Blackstone's decisions, while section E reveals how Blackstone's belief that legal rules could be ascertained and must be strictly applied led him to fear judicial discretion. Finally, section F contrasts Blackstone's conservatism with the more liberal, equitable views introduced by his most well-remembered contemporary, Lord Mansfield.

A. *The Reports*

It is important, as a preliminary matter, to note that the primary source for a study of Blackstone as a judge is Blackstone's own *Reports*, as his were the sole continuous reports for Common Pleas during the 1770s. The *Reports* of Serjeant George Wilson ran only until spring 1774,¹³¹ and no more than a handful of additional cases were reported in other published works.¹³² Chief Justice de Grey's bench notebook is extant from Easter

tham, I beg your pardon for calling you Mr. Baron Botham—but none of us ever heard your name in the profession before this day!").

¹³¹ 3 GEORGE WILSON, REPORTS OF CASES ARGUED AND ADJUDGED IN THE COURT OF COMMON PLEAS (London, His Majesty's Law-Printers, 1775).

¹³² See, e.g., 2 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 715 (London, Strahan 1803) (report of the opinions of the twelve judges in *King v. Donnolly* (1779)); HARGRAVE, *supra* note 64, at 162 (reporting *Fabrigas v. Mostyn* (1773)); 1 THOMAS LEACH, CASES IN CROWN LAW (London, G. Woodfall 4th ed. 1815) (cases reserved to the twelve judges for opinion); CAPEL LOFFT, REPORTS OF CASES ADJUDGED IN THE COURT OF KING'S BENCH (1790) (reporting several important Common Pleas cases from 1773–1774); JOSEPH SAYER, THE LAW OF COSTS 25, 247 (London, W. Strahan & M. Woodfall, 2d ed. 1777) (reporting *Collier v. Guillard* (1776); *Melchart v. Halsey* (1771)); JOHN EARDLEY WILMOT, NOTES OF OPINIONS AND JUDGMENTS DELIVERED IN DIFFERENT COURTS 354 (1802) (Wilmot's opinion in *Frogmorton d. Robinson v. Wharrey* (1770)); REPORTS AND CASES OF PRACTICE IN THE COURT OF COMMON PLEAS 917, 922, 930, 937, 1004–05 (Cooke et al. eds., n.p., Lintot 1742) (reporting *Grant v. Mills* (1779), *Golding v. Grace* (1771), *Smith and Mitchell v. Corran* (1774), and *Chandler v. Page* (1778), and including a few notes from Justice Nares's notebooks); THE WHOLE PROCEEDINGS IN THE CAUSE OF ACTION BROUGHT BY THE RT. HON. GEO. ONSLOW, ESQ. AGAINST THE REV. MR. HORNE . . . (London, Joseph Gurney ed., 1770) (pamphlet reporting the trial of *Onslow v. Horne* at which Blackstone presided in 1770); Henry Gould & William Blackstone, *Opinions in Unidentified Case Trinity Term 1771*, in THE LAW AND MODERN PRACTICE OF EJECTMENTS 89–91 (London, His Majesty's Law-Printers, 1779). Concerning the general underreporting of Common Pleas cases, see James Oldham, *Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century*, in LAW AS CULTURE AND CULTURE AS LAW 119 (Hendrik Hartog et al. eds., 2000).

term 1775 to Easter term 1776,¹³³ and about three dozen manuscript reports of Common Pleas cases from the 1770s are also preserved in the collections of the London Inns of Court, though only a few of them include Blackstone's opinions.¹³⁴ Finally, on occasion, the London newspapers published portions of the judges' opinions.¹³⁵ However, the bulk of the material comes from Blackstone himself.

Reviewers, biographers, scholars, and even the work's editor assumed that Blackstone's *Reports* must have been left unfinished by his early death at age fifty-six. They simply could not believe that the author of the *Commentaries* would have intended to publish a work of such "indifferent" quality.¹³⁶ But no evidence supports this theory, and in fact, what is known about the original manuscript leads to the opposite conclusion. Blackstone's brother-in-law, James Clitherow, who saw the *Reports* to publication, wrote in the preface that he found the work written cleanly in large notebooks "prepared for the Press, even to an Index, and a Table of Matters."¹³⁷ It is not clear what else Blackstone might have added to his *Reports* to improve them, having already transferred his notes into those notebooks (likely polishing and supplementing them in the process) and compiled an index.¹³⁸ This suggests that the text we have is indeed the text Blackstone intended for us to see.

¹³³ Lincoln's Inn, Misc. MS 183.

¹³⁴ These are primarily located in the Hill Collection at Lincoln's Inn Library, London.

¹³⁵ James Oldham, *Law Reporting in London Newspapers, 1756–1786*, 31 AM. J. LEGAL HIST. 177, 177–78 (1987). The newspapers paid far more attention to King's Bench than to Common Pleas, so by comparison, the Common Pleas reports are relatively infrequent.

¹³⁶ See 67 MONTHLY REV., *supra* note 38, at 11 ("[Blackstone] knew his name would sell . . . a much more indifferent work than the present . . ."); see also 1 SIR WILLIAM BLACKSTONE, REPORTS OF CASES DETERMINED IN THE SEVERAL COURTS OF WESTMINSTER-HALL FROM 1746 TO 1779, at iii–iv (London, S. Sweet, Charles Heneage Elsley ed., 2d ed. 1828) (the editor, C.H. Elsley, remarking in the Preface that "[t]hese Reports have been for some time not in the best repute . . . partly from their own loose and imperfect style"); Clitherow, *Preface*, *supra* note 39, at xxx (suggesting that "the learned Judge had not given it the last Revisal"); JOHN WILLIAM WALLACE, THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS 443 (Edinburgh, Carswell & Co., 4th ed. 1882) ("Although these Reports were ordered by Sir William Blackstone's last will to be published, it has been generally thought that they were notes *pour servir*, rather than the completed Reports, which, had the elegant commentator's life been spared, would have been given to the profession.")

¹³⁷ Clitherow, *Preface*, *supra* note 39, at xxviii. See also William Blackstone's Holographic Will, 1778 (National Archives, Kew, Richmond, Surrey, PROB 1/18 at f. 4) ("Also my Will is, that my manuscript Reports of Cases determined in Westminster Hall, taken by myself, and contained in several large Note Books, be published after my Decease; and that for such Purpose the Copy be sold, and the Produce thereof be carried to and considered as Part of my personal Estate."). It is not known when Blackstone decided that his *Reports* should be published.

¹³⁸ See *Ackworth v. Kemp*, (1778) 1 Dougl. 40, 43, 99 Eng. Rep. 30, 31 (K.B.) (Mansfield quoting Blackstone's notes, saying: "The printed account [from Wilson] of the case shews the danger of inaccurate reports. I have a very correct report of it from Mr. Justice Blackstone's own notes which I will read."). What Mansfield read corresponds exactly with what is printed in Blackstone's *Reports* in the case of *Sanderson v. Baker*, (1772) 2 W. Bl. 832, 96 Eng. Rep. 490 (C.P.).

Because Blackstone, like other amateur eighteenth-century reporters, did not attempt to produce a verbatim account of what passed in court, his version of a case could emphasize what he thought was important.¹³⁹ And one thing he certainly believed important was evidence of Blackstone, J. delivering methodical, didactic, analytically-tight opinions stocked with authorities, both historical and modern, which built up the proper rule and then applied that rule in a non-discretionary fashion.¹⁴⁰ In addition, display-

¹³⁹ Casual reporters would take notes on what they thought interesting and ignore the rest. They may on occasion have written down an exact phrase, but mostly they paraphrased, probably later supplementing their notes from their memory of what the judges had said. For instance, although Capel Lofft claimed that he used shorthand to take down the opinions “almost verbatim,” he also acknowledged that he did not necessarily include everything that was said and did sometimes merely summarize. LOFFT, *supra* note 132, at xi, xiii (italics omitted). Newspaper accounts on occasion remarked on a judge or lawyer speaking for over an hour, while the corresponding published report consisted of a few paragraphs, indicating much was left unreported. See, e.g., GEN. EVENING POST, Nov. 24, 1772, at 1 (reporting that counsel spoke “above an hour and a half.” The case was *Parsons v. Lloyd*, (1772) 2 W. Bl. 845, 96 Eng. Rep. 498 (C.P.). Such selectivity in the parts of the opinions the reporters chose to record resulted on occasion in different reporters’ versions being almost entirely at variance. Compare *Hitchin v. Campbell*, (1772) 2 W. Bl. 827, 829–31, 96 Eng. Rep. 487, 488–89 (C.P.), with *Kitchen v. Campbell*, (1772) 3 Wils. 304, 307–09, 95 Eng. Rep. 1069, 1070–72 (C.P.) (two versions of de Grey’s opinion almost entirely different); compare *Fisher v. Lane*, (1772) 2 W. Bl. 834, 835–36, 96 Eng. Rep. 492, 492–93 (C.P.), with *Fisher v. Lane*, (1772) 3 Wils. 297, 303–04, 99 Eng. Rep. 1065, 1068 (C.P.) (Blackstone has de Grey’s opinion rely on different principles than does Wilson’s version); see also 1 SYLVESTER DOUGLAS, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF KING’S BENCH; IN THE NINETEENTH, TWENTIETH, AND TWENTY-FIRST YEARS OF THE REIGN OF GEORGE III, at xiv (London, His Majesty’s Law-Printers, 2d ed. 1786) (“The judgments of the court I could have wished to give in the words in which they were delivered. But this I often found to be impracticable, as I neither write short-hand, nor very quickly. Memory, however, while the case was recent, supplied at home, many of the chasms which I had left in court . . .”); LOFFT, *supra* note 132, at ix (“I must observe this, that in a few years of constant attendance I have hardly known a case of any importance, either in law or equity, settled upon the authority of a single reporter, however eminent and respectable; but that I have known . . . numbers of cases, where an obscure point in one reporter, though of no ordinary merit, has been made clear by reference to another where the true gist of the question has been ascertained, and the true reasons of the judgments, by lights drawn from the concurrence, nay, sometimes from the opposition of various reporters.”).

¹⁴⁰ Harold Hanbury, in his 1959 article on Blackstone as a judge, claimed that Blackstone was too modest to record the full extent of his contributions to the Court and gave his “mediocre” brethren more room than they deserved. Hanbury, *supra* note 11, at 26. Nothing could be further from the truth. Blackstone was quite proud of his legal prowess and was anxious to show it off, to the point of noting in his *Reports* when counsel mentioned cases over which he had presided on circuit—even when another version of the same case did not. Compare *Mast v. Goodson*, (1772) 2 W. Bl. 848, 849, 96 Eng. Rep. 500, 500 (C.P.) (recording Wilson for plaintiffs as citing *assize* case before Blackstone), with *Mast v. Goodson*, (1772) 3 Wils. 348, 352–53, 95 Eng. Rep. 1094, 1096–97 (C.P.) (Wilson’s own report, which fails to mention his supposed citation of the *assize* case). See also *Wood v. Chessal*, (1779) 2 W. Bl. 1257, 96 Eng. Rep. 739, 740 (C.P.) (mentioning case tried before him as precedential, saying “I should not mention this as an Authority, but that the Court, on a motion for a new trial, approved of what was done at Nisi Prius.”). See also *Scott v. Shearman*, (1775) 2 W. Bl. 977, 978–82, 96 Eng. Rep. 575, 576–78 (C.P.). Blackstone’s report of that case includes only his own opinion, a fact which is unusual in itself. But he explains that because he was the one who had expressed doubts at the first hearing, he “thought it incumbent on him to deliver his reasons at large for changing the inclination of his first opinion . . .” *Id.* at 978, 96 Eng. Rep. at 576. He then proceeded to give a long opinion in which he laid

ing his interest in the theoretical rather than the practical, he proudly recorded his pedantic excursions. For example, in *Gerard's Case*, Gerard argued that as an attorney he was exempt from either serving in or paying a substitute to serve in the Middlesex Militia.¹⁴¹ Blackstone, believing that “the principles upon which his opinion was founded stood in need of a clear investigation,”¹⁴² followed with a six-page concurrence in which he minutely examined the authorities concerning the privileges of officers of the Court and then the history of the militia acts back to the Middle Ages in order to determine if militia service was a personal or property duty.¹⁴³ He next turned to an analysis of legal and practical arguments concerning the nature of the duty, then—five pages into his opinion—gave the “true and solid distinction upon which [he] found[ed] [his] opinion,”¹⁴⁴ namely that the maximum penalty the attorney would have to pay if he did not serve or find a substitute was, by statute, £10 no matter the actual cost of replacing him.¹⁴⁵

out all the precedent he had found in support of the defendants' argument. This sounds like the usual, scholarly Blackstone opinion, until one looks at the manuscript report of the case found at Lincoln's Inn, Hill Collection, MS 13 at ff. 223–30. In that version, all four judges gave their opinions (although only two are reported), and it was de Grey who went through the precedent in great detail. Blackstone was only allowed to contribute some crumbs and to repeat one or two things de Grey had allegedly said. *Id.*

Blackstone also often went on at length after acknowledging that the other judges had left little to be said. *See, e.g., The Case of Brass Crosby*, BINGLEY'S J., Apr. 20, 1771, at 3 (“Mr. Justice Blackstone apologized for adding any thing of his own, to two such respectable authorities; but said he could not resist, in so particular a case, making a few observations . . .”). *See also* MIDDLESEX J., Apr. 20, 1771, at 4 (reporting Blackstone's remarks in *Brass Crosby*); *The Case of Brass Crosby*, (1771) 3 Wils. 188, 204–05, 95 Eng. Rep. 1005, 1013–14 (C.P.) (same). On the other hand, he often shortchanged Nares and Gould, whose opinions, according to other reports, had in fact been much longer than Blackstone's version suggests. *See, e.g., Cooke v. Colcraft*, (1773) 2 W. Bl. 856, 858–59, 96 Eng. Rep. 505, 506 (C.P.) (opinions by Gould and Blackstone but Nares's opinion reported only as “of the same opinion on the principal question”); *Murray v. Harding*, (1773) 2 W. Bl. 859, 865–66, 96 Eng. Rep. 507, 509–10 (C.P.); Lincoln's Inn, Hill MS 11 at f. 38, 42–44 (Gould opinion substantially longer; Nares opinion longer and makes an additional key point; Blackstone opinion shorter than in his own report); *Bostock v. Saunders* (1773) 2 W. Bl. 912, 915–16, 96 Eng. Rep. 539, 540, 3 Wils. 434, 442, 95 Eng. Rep. 1141, 1146 (C.P.) (Wilson reporting a sizeable speech by Nares; Blackstone reporting Nares as saying only that he concurs). The other reporters returned the favor, regularly abbreviating Blackstone's opinions and eliminating his pedantic historical and academic excursions, which they apparently considered of little value. For examples of cases in which Blackstone gives his own opinion more play than do other reporters, see *Scott v. Shepherd*, (1773) 2 W. Bl. 892, 894–98, 96 Eng. Rep. 525, 526–28, 3 Wils. 403, 409–10, 95 Eng. Rep. 1124, 1127–28 (C.P.); *Mast*, 2 W. Bl. at 850, 96 Eng. Rep. at 500–01, 3 Wils. 348 (giving only an opinion per curiam), 95 Eng. Rep. 1094; *Murray*, 2 W. Bl. at 865–66, 96 Eng. Rep. at 509–10, Lincoln's Inn, Hill MS 11 at f. 43.

¹⁴¹ (1775) 2 W. Bl. 1123, 96 Eng. Rep. 663 (C.P.).

¹⁴² *Id.* at 1125, 96 Eng. Rep. at 664.

¹⁴³ *See id.* at 1125–28, 96 Eng. Rep. at 664–65.

¹⁴⁴ *Id.* at 1130, 96 Eng. Rep. at 666.

¹⁴⁵ *Id.* at 1130, 96 Eng. Rep. at 666. For other examples of Blackstone's didacticism see Nicol v. Verelst, (1779) 2 W. Bl. 1277, 1287–88, 96 Eng. Rep. 751, 755–56 (C.P.) (Blackstone discussing historical geography); *Pickering v. Watson*, (1776) 2 W. Bl. 1117, 1119–20, 96 Eng. Rep. 660, 661 (C.P.) (Blackstone correcting mistake in authoritative text); *Chessal*, 2 W. Bl. at 1255–57, 96 Eng. Rep. at 739–40 (including a long summary of the history of excise laws followed by a discussion of precedent

In choosing to report his own opinions, Blackstone created, whether deliberately or not, his own judicial image. Just as much as his *Commentaries*, his *Reports* became a vehicle for him to communicate his views on the law.

B. Decisionmaking

A longstanding characteristic of the common law judge is the tendency toward minimalism in decisionmaking.¹⁴⁶ From the Middle Ages onward, English judges avoided basing their decisions on broad rules of law when they could dispose of the case on a narrower ground.¹⁴⁷ Justices Gould and Nares, the Court's two former common lawyers, shared a preference for this incremental approach. When Blackstone, joined sometimes by de Grey, wanted to reach out and unnecessarily decide cases on some general—and not always particularly solid—point of law, Gould and Nares would pull back and refuse to join them, concurring instead in the outcome while deciding the case on the narrowest, often procedural, issue.¹⁴⁸ Several cases illustrate this tension.

In the 1777 case of *Hatchett v. Baddeley*, a woman, estranged from her husband and living with another man, incurred debts for which she was sued.¹⁴⁹ She argued that as a *feme covert* she could not be sued in her own name.¹⁵⁰ De Grey and Blackstone devoted pages to a historical analysis of the legal meaning of the term “elopement.”¹⁵¹ Gould acknowledged that what had been “said by the Chief Justice may all be true,”¹⁵² but he did not “think the case . . . ripe for that Determination. I think that the word

while he—and therefore the other judges—had been on the Court); *Wood's Case*, (1771) 2 W. Bl. 745, 746, 96 Eng. Rep. 436, 436 (C.P.) (Blackstone correcting de Grey's history).

¹⁴⁶ For a modern study of this practice, see generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

¹⁴⁷ BAKER, *supra* note 29, at 79.

¹⁴⁸ See, e.g., *Barnard v. Woodcock and Greenland*, (1778) 2 W. Bl. 1201, 1204, 96 Eng. Rep. 708, 709 (C.P.) (“Nares, J., concurred, principally upon the novelty of the motion. Parties should be careful to insert sufficient quantities in their parcels.”); *Miller v. Seare*, (1777) 2 W. Bl. 1141, 1146, 96 Eng. Rep. 673, 675 (C.P.) (Gould deciding the case on abuse of discretion rather than on legal question of powers of bankruptcy commissioners); *Pye v. Leigh*, (1776) 2 W. Bl. 1065, 1067, 96 Eng. Rep. 627, 628 (C.P.) (Gould refusing to give an opinion on the general rule of whether attorneys always had privilege of laying venue in Westminster but deciding only on the specific facts of the case); *Martin v. Kesterton*, (1776) 2 W. Bl. 1089, 1089, 1092, 96 Eng. Rep. 643, 643–45 (C.P.) (Gould and Nares preferring to allow amendment to pleading to solve a bad demurrer); *Bostock v. Saunders*, (1773) 3 Wils. 434, 95 Eng. Rep. 1141 (C.P.) (arguing that the defendant should have pleaded the facts that led him to seek a warrant); *Atkinson v. Teasdale*, (1772) 3 Wils. 278, 287, 95 Eng. Rep. 1054, 1059 (C.P.) (same).

¹⁴⁹ (1777) 2 W. Bl. 1079, 1079, 96 Eng. Rep. 636 (C.P.); Inner Temple, MS 97 at f. 132, 133–39, 140–41.

¹⁵⁰ *Hatchett*, 2 W. Bl. at 1079, 96 Eng. Rep. at 636; Inner Temple, MS 97 at f. 132, 133–39, 140–41.

¹⁵¹ *Hatchett*, 2 W. Bl. at 1081–82, 96 Eng. Rep. at 687.

¹⁵² Lincoln's Inn, Misc. MS 183 at f. 121r (abbreviations expanded) (de Grey bench notebook).

Elopement has not acquired a technical meaning of a criminal departure. I reserve my opinion therefore.¹⁵³ He chose to decide instead on the basis of a defective pleading. Nares agreed, remarking that “as the pleadings stand at present, the Plaintiff cannot have judgment.”¹⁵⁴

By contrast, Blackstone liked to decide cases on generalizable rules when he could.¹⁵⁵ In *Melchart v. Halsey*, for instance, he expressed the wish that the Court would use the case to establish a rule rather than decide on equitable grounds specific to the particular facts at hand.¹⁵⁶ Similarly, in deciding a 1772 trespass case for breaking and entering by a sheriff's officer, Nares based his opinion on a canvass of similar recent cases,¹⁵⁷ while Blackstone focused on the larger legal issue of the agency relationship between the sheriff and his officer, citing as his primary authority the sixteenth century *Brooke's Abridgment*.¹⁵⁸

In *Stevenson v. Hardie*,¹⁵⁹ the Court was confronted with a difficult legal problem that had an easy practical solution. The defendant, upon leaving for Ireland, asked the plaintiff to lend his wife money as she needed it during his absence.¹⁶⁰ The plaintiff gave the money, and the defendant failed to repay him.¹⁶¹ The legal conundrum was that the contract arguably lacked consideration since loans could not be made to a married woman.¹⁶² Gould, supported by the Chief Justice, was not going to be waylaid by the legal difficulty and chose pragmatism instead, saying, “The Court will put

¹⁵³ Inner Temple, MS 97 at f. 139 (abbreviations expanded).

¹⁵⁴ *Id.* at f. 141 (abbreviations expanded, punctuation added). See also LLOYD'S EVENING POST, Feb. 8, 1773, at 138 (noting similar disagreements in an account of Gould's and Nares's opinions in the case of *Murray v. Harding*).

¹⁵⁵ *But see* Pole v. Johnson, (1771) 2 W. Bl. 764, 766, 96 Eng. Rep. 448, 448 (C.P.) (Blackstone joining the other puisnes in objecting that “the Rule, laid down by the Chief Justice [was] too lax and general, and introductive of infinite litigations”); see also Fenner v. Meares, (1779) 2 W. Bl. 1269, 1271, 96 Eng. Rep. 746, 747 (C.P.) (“As this is entirely a new question, and I cannot upon so short a consideration foresee all the consequences attending it, I shall avoid giving any decisive opinion upon it. . . . And from this caution . . . I choose to determine it upon plainer and more indisputable grounds, arising from the evidence before us.”).

¹⁵⁶ (1771) 2 W. Bl. 741, 744, 96 Eng. Rep. 434, 435–36, 3 Wils. 149, 153, 95 Eng. Rep. 982, 985 (C.P.).

¹⁵⁷ Sanderson v. Baker, (1772) 3 Wils. 309, 317, 95 Eng. Rep. 1072, 1076 (C.P.) (“I know of three actions of trespass against the sheriff in cases of this kind: *Tyler versus Johnson*, B. R. tried at Stafford in 1764, was imprisonment against the sheriff; the writ and warrant was to take the party plaintiff in the county of Worcester, and the officer took him in the county of Stafford, instead of Worcester, there was a verdict for the plaintiff, although I objected that the action did not lie against the sheriff, but only against the bailiff; I remember a similar case tried before Lord Chief Justice Wilmot, who was of opinion the action well laid against the sheriff; I also remember a third action of the same kind; so that in practice it is clear that imprisonment lies against the sheriff, for the act of his bailiff.”).

¹⁵⁸ *Id.* at 317, 95 Eng. Rep. at 1076.

¹⁵⁹ (1773) 2 W. Bl. 872, 872–73, 96 Eng. Rep. 513, 513–14 (C.P.).

¹⁶⁰ *Id.* at 872–73, 96 Eng. Rep. at 513–14.

¹⁶¹ *Id.* at 872–73, 96 Eng. Rep. at 513–14.

¹⁶² *Id.* at 872–73, 96 Eng. Rep. at 513–14.

the construction of law on the facts pleaded. The fact, of money lent to the wife by the husband's order, is sufficient to support the declaration. The Court will construe the loan to be a payment or advancing of money in pursuance of such order."¹⁶³ Blackstone arrived at the same conclusion by a different route. Gould and de Grey's straightforward position that "[t]his is a poor shift to get rid of a just debt" was not for him.¹⁶⁴ Instead, Blackstone sought to deal with the underlying legal difficulty by finding an applicable general rule. He discoursed learnedly about express and implied assent, actual and virtual, inchoate, imperfect, and complete contracts.¹⁶⁵

Blackstone's focus on underlying principles rather than the specific facts of a case is also evident in his habit of musing about questions not before the court. He raised such counterfactual issues quite deliberately and seemed to see nothing untoward in doing so.¹⁶⁶ Of the several examples that could be offered,¹⁶⁷ the most unusual was his discourse in *Luke v. Harris*.¹⁶⁸ The case itself turned on a technical procedural question involving a writ of right,¹⁶⁹ one of the oldest common law actions for real property. The action was tried by a special jury called the Grand Assize.¹⁷⁰ Four knights were summoned to elect twelve more jurors to compose the sixteen-member Grand Assize.¹⁷¹ In *Luke*, plaintiff brought the suit at *nisi prius*—the civil side of the docket when the judges heard trials on circuit.¹⁷² The four knights had been summoned to appear to select the recognitors, and the writ of summons instructed the sheriff to return the knights to the Court in Westminster.¹⁷³ The sheriff eventually produced them to the judge on circuit, in violation of the specific wording of the writ.¹⁷⁴ The question in the case was whether the writ should have been phrased in the alternative: pro-

¹⁶³ *Id.* at 873, 96 Eng. Rep. at 514.

¹⁶⁴ *Id.* at 873, 96 Eng. Rep. at 514.

¹⁶⁵ *Id.* at 873–74, 96 Eng. Rep. at 513–14.

¹⁶⁶ Cf. HAMBURGER, *supra* note 14, at 229 n.21 (quoting the opinion of Holt, Chief Justice of King's Bench from 1689–1710, in the 1701 case of *Lane v. Cotton & Frankland*). Holt refused to give an extrajudicial opinion in a matter not before the court because it would be “without the Limits of my Authority.” *Id.*

¹⁶⁷ See, e.g., *Roe v. Lees*, (1777) 2 W. Bl. 1171, 1173–74, 96 Eng. Rep. 691, 692 (C.P.) (“And, when a case shall happen of mere common field land, it may be worth considering . . .”); *Nicol v. Verelst*, (1779) 2 W. Bl. 1277, 1287–88, 96 Eng. Rep. 751, 755 (C.P.) (asserting that “[t]he supposed absurdity of the geographical limits taken in their full Extent, is not now before the Court,” and then discussing the limits).

¹⁶⁸ (1779) 2 W. Bl. 1261, 96 Eng. Rep. 742 (C.P.).

¹⁶⁹ *Id.* at 1261, 96 Eng. Rep. at 742.

¹⁷⁰ *Id.* at 1261–62, 96 Eng. Rep. at 742–43.

¹⁷¹ 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 618 (London, Cambridge Univ. Press 1895).

¹⁷² *Luke*, 2 W. Bl. at 1265–66, 96 Eng. Rep. at 744.

¹⁷³ *Id.* at 1262, 96 Eng. Rep. at 743.

¹⁷⁴ *Id.* at 1262, 96 Eng. Rep. at 743.

duce the knights at Westminster “unless before that” (“*nisi prius*”) the judge comes to the county on circuit.¹⁷⁵

But the case touched on a more fundamental issue that the Court ignored because the question was not directly before it: whether writs of right were cognizable at *nisi prius* at all. Blackstone, however, could not leave such an interesting problem on the table. His reported opinion began: “Blackstone, J., of the same opinion, that the whole should be quashed as irregular, without entering into the question how far, and at what stage of the proceedings, process of *Nisi Prius* may issue on a writ of right.”¹⁷⁶ So far, so good; but he did not stop there:

When that question comes to be agitated, it would be proper to consider, whether in the infancy of the Grand Assise, and of the appointment of justices in eyre, these Justices took cognizance of writs of right: which, if they did not, may account for the total silence of Glanvil on that Head

I shall deliver no determinate opinion on the principal question, but will throw out what has occurred to me for future consideration, in case this matter should come on again.¹⁷⁷

Blackstone then treated his listeners to a study of the authoritative medieval texts, before returning to the issue actually before the Court.

C. Authority

One reason Blackstone may have been comfortable with deciding cases on broad rules and principles rather than on narrow grounds is because of his confidence in the existence of authoritative sources that would guide the judge to the right answer. Blackstone, the erstwhile academic, loved lining up his authorities and did not like to make decisions until he had done so. He has been saddled with a reputation for being a diffident judge, but he was anything but hesitant in his conclusions.¹⁷⁸ Rather than being diffident, he was simply careful. For example, in a 1775 case concerning an allegedly illegal search and seizure it was “asserted by the counsel for the plaintiff, and not denied by the counsel for the defendants, that there was no authority to be found on either side.”¹⁷⁹ Unwilling to decide the case without confirming this assertion for himself, Blackstone asked that the case be

¹⁷⁵ *Id.* at 1262, 96 Eng. Rep. at 743.

¹⁷⁶ *Id.* at 1265–66, 96 Eng. Rep. at 744.

¹⁷⁷ *Id.* at 1266, 96 Eng. Rep. at 744.

¹⁷⁸ SIR JAMES PRIOR, 2 LIFE OF EDMOND MALONE 431–32 (London, Smith, Elder & Co. 1860) (“There were more new trials granted in causes which came before him on circuit, than were granted on the decisions of any other judge who sat at Westminster in his time. The reason was that being extremely diffident of his opinion, he never supported it with much warmth or pertinacity in the court above, if a new trial was moved for.”). I have found no evidence to support Malone’s claim that Blackstone was overturned more often than other judges.

¹⁷⁹ *Scott v. Shearman*, (1775) 2 W. Bl. 977, 978, 96 Eng. Rep. 575, 576–78 (C.P.).

reargued the following term. By then, he had done his research, found a long list of precedents, and was prepared to give a decisive opinion.¹⁸⁰

Authorities were the vital building block of the common law orthodoxy. If the law existed and needed only to be found and expressed, and if judges were not to exercise discretion, then they had to expect that the authoritative sources could provide the rules on which they should base their decisions. Where no authorities existed to support a particular opinion, Blackstone refused all pressure to manufacture one, and as a result sometimes it was Blackstone, with his insistence on adhering to principle, who got the law right.¹⁸¹ For instance, in a forgery case in which, applying an admittedly narrow reading, the statute under which the defendant was indicted did not criminalize the specific act he had committed, Blackstone was the sole judge to hold that “there is no law existing under which he can suffer, and that therefore he ought to have the benefit of the law, and receive an immediate discharge.”¹⁸² By contrast, the other eleven common law judges followed Mansfield’s advice and refused to give an opinion, merely advising the defendant to seek the King’s pardon.¹⁸³

On the other hand, Blackstone’s anxiety about pinpointing the most authoritative source could border on the excessive.¹⁸⁴ The judges of the three

¹⁸⁰ See *id.* at 978–82, 96 Eng. Rep. at 576–78. See also *Mouldsdale v. Birchall*, (1772) 2 W. Bl. 820, 821, 96 Eng. Rep. 483, 484 (Ex. Ch.) (Blackstone refusing to give an opinion at the hearing because he disliked that the precedents offered were not directly on point, “[b]ut afterwards, on looking into [some cases] Blackstone’s doubts were removed”).

¹⁸¹ See, e.g., *Harwood v. Goodright*, (1774) 1 Cowp. 87, 98 Eng. Rep. 981, 987 (K.B.) (following Blackstone’s argument from *Goodright v. Harwood*, (1774) 3 Wils. 497, 511–12, 95 Eng. Rep. 1177, 1184–85 (C.P.), and overturning Common Pleas based in part on precedent and in part on an unwillingness to read into the facts found by the jury). The House of Lords upheld King’s Bench, vindicating Blackstone’s position. *Id.* at 93, 98 Eng. Rep. at 984.

¹⁸² MORNING CHRON., Dec. 10, 1777, at 4. The case was *Rex v. Harrison*, over which Blackstone, Gould, and Baron Peryn presided in 1777. ST. JAMES CHRON., Sept. 11, 1777, at 3. Although Harrison was found guilty, the judges suspended the verdict and referred the case to the twelve common law judges. *Id.* Because England did not have a formal mechanism of appeal in criminal cases, issues of law were debated and decided by the twelve judges assembled, usually at Serjeants’ Inn early in the term following the trial. BAKER, *supra* note 29, at 139.

¹⁸³ MORNING CHRON., Dec. 10, 1777, at 4.

¹⁸⁴ See also *An Argument in the Exchequer Chamber on Giving Judgment in the Case of Perrin and Another against Blake*, by the Hon. Mr. Justice Blackstone, in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND, FROM MANUSCRIPTS 488, 501 (London, Francis Hargrave, ed., T. Wright 1787) [hereinafter A COLLECTION OF TRACTS] (Blackstone commenting that “lord Coke in his commentary on Littleton . . . has often adopted and relied upon [a certain maxim]; and has cited in his margin, to support it, a long list of authorities from the year-books. . . . I have looked into all these, and into some besides. . . . There is one case, which I have never seen cited, and which is by far the earliest of any that have occurred to me upon a diligent search.”). Furthermore, sometimes Blackstone’s research had nothing to do with the law. See, e.g., *Flureau v. Thornhill*, (1776) 2 W. Bl. 1078, 1079, 96 Eng. Rep. 635, 635–36 (C.P.) (The plaintiff sold stocks in order to obtain cash to buy a lease at auction. After the purchase, the seller discovered that he could not provide good title and gave the plaintiff the option of taking the lease as is or receiving his money back with costs and interest. The plaintiff sued for his loss in cashing in his stocks. Blackstone, “[f]or Curiosity,” went and looked into the price of the stocks the

central common law courts, King's Bench, Common Pleas, and Exchequer, only heard questions of law sitting en banc in Westminster Hall. During the spring and summer, they rode circuits, called assizes, to preside individually over trials of fact. Formally, civil cases originated at one of the three courts in Westminster, but at trial they could be heard by any of the twelve judges, regardless of the court on which they sat.¹⁸⁵ In other words, a case brought in King's Bench would be sent out to the county in which it originated for trial on the facts, but the trial might be presided over by the Common Pleas judge going the circuit in which the county was located. However, if the suit was returned to Westminster for the resolution of a question of law, it went back to the court in which it was originally brought, regardless of which judge had heard it on assize.¹⁸⁶ That necessitated some form of communication between the trial judge and the court hearing the legal issue en banc. This communication took the form of a trial report, which summarized the facts and witness testimony and explained the verdict and any actions the judge had taken or opinions he had about the case.¹⁸⁷

Blackstone sent one such trial report to King's Bench in the 1779 trial of *Stevenson v. Mortimer*.¹⁸⁸ The case arose over the question of whether chalk boat owners had to take out a license, called a cocquet, and pay a tax on the transported chalk:¹⁸⁹

It was a Cause of some Consequence; that Part of Sussex being principally manured with Chalk; on which this Fee was a heavy Burthen: And, on ye other Hand, ye Officers of the Customs insisted, that unless these Boats were obliged to take out Cocquets, it gave great Opportunity for Smuggling.¹⁹⁰

To prove their right to levy the fee under the allegedly controlling statute, the defendant customs officers

offered in Evidence certain Tables of Fees, printed in Carkesse's Book of Rates, which Book (it was alleged) is held to be of Authority at ye Customs house, & that the Officers of the Customs in their Instructions are referred to it, as their Guide & Direction I at first scrupled admitting it as Evidence, without better Authority; but finding it to agree verbatim with another Book in Octavo, produced by ye Solicitor of ye Customs, & purporting to be an Ab-

plaintiff sold both on the day of his sale and on the day he could have repurchased them and discovered that there had been no difference in price.). He was equally conscientious as counsel. In *Tonson v. Col-lins*, (1761) 1 W. Bl. 321, 326, 96 Eng. Rep. 180, 182 (K.B.), he mentioned that he looked at "Tottell's Patent for Law Books, 20 Jan. 1 Eliz. (not printed in Ames, but among Mr. Bagford's Manuscripts in the British Museum)."

¹⁸⁵ 1 OLDHAM, *supra* note 2, at 130–31.

¹⁸⁶ *Id.* at 131.

¹⁸⁷ *Id.* at 133.

¹⁸⁸ See Lincoln's Inn, Dampier MS, Buller bundle 51.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1.

ridgment or Digest of ye Laws relating to ye Customs; & having in vain sent all round East Grinstead for an Edition of ye Statutes, which had in it the Book of Rates with the Rules thereunto annexed, I at length permitted it to be read, as probable prima facie Evidence of ye Existence of such a Table of Fees, & as the best Evidence which could at that time be procured.¹⁹¹

Unsatisfied with this evidence, Blackstone “examined the Matter more minutely” after the motion for a new trial,¹⁹² searching out—and quoting in his report for the benefit of the King’s Bench judges—the book of rates attached to the Statute of Tunnage and Poundage, relevant Journals of the House of Commons, and a later statute referring to the validity of the text offered by the customs officials. However, he was still not completely comfortable, explaining, “[t]his leaves no Doubt as to ye Existence & Validity of such an Order; but I do not find it any where set forth by Authority in Print.”¹⁹³

Blackstone’s actions in this case suggest that he lacked a sense of where theory ended and reality intruded. At a certain point, the law is not perfectly neat, not all loose ends can be tied up, and the ideal authoritative source cannot be found. But for Blackstone authority not only had to exist, it also had to be right. He therefore felt compelled to obtain it from the most exact source. Otherwise, the rules could not be as clear and as certain as he believed them to be.

Similarly, Blackstone’s reaction to being challenged in his discussion of precedent in *Martin v. Kesterton* hints at how important it was to him that the authoritative rule be perceived as the sole right answer.¹⁹⁴ In *Martin*, the plaintiff sued for trespass quare clausum fregit, that is, for breaking the plaintiff’s close.¹⁹⁵ The defendant demurred on the grounds that “the number of closes is not stated or set forth in the declaration, neither are they named or sufficiently described therein.”¹⁹⁶ In de Grey’s absence, Gould spoke first, but he deferred to Blackstone, who had shared with him in advance the results of his research.¹⁹⁷ Blackstone then launched into three pages of painstaking examination of the historical precedent of pleading trespass quare clausum fregit.¹⁹⁸ He tried to bludgeon any possible doubts to death by piling authority upon authority. Nares, however, was not convinced and refused to concur, citing a Common Pleas case decided when he

¹⁹¹ *Id.* at 2–3 (unnumbered).

¹⁹² *Id.* at 3 (unnumbered).

¹⁹³ *Id.*

¹⁹⁴ (1776) 2 W. Bl. 1089, 96 Eng. Rep. 643 (C.P.).

¹⁹⁵ *Id.* at 1089, 96 Eng. Rep. at 643.

¹⁹⁶ *Id.* at 1089, 96 Eng. Rep. at 643.

¹⁹⁷ *Id.* at 1089, 96 Eng. Rep. at 643–44.

¹⁹⁸ *Id.* at 1089–92, 96 Eng. Rep. at 643–45.

was at the bar that seemed to go the other way.¹⁹⁹ Blackstone replied—an unusual occurrence in the *Reports*²⁰⁰—with palpable irritation:

It is true, that the Chief Justice lays down the Law in that manner: but it is only arguendo and by way of Illustration, that not being any point in the cause. And he relies for what he says upon that head, upon the authority of Elwis and Lamb in 6 Mod. of which I took notice before.²⁰¹

Blackstone's annoyance could not have arisen simply from Nares's disagreement. Being the Court's most frequent dissenter, Blackstone must have become accustomed to that. More likely he did not appreciate being challenged on his authorities, not only because he was confident that he had found the right answer, but perhaps also because the possibility that authorities could be understood in different ways raised the specter of destabilizing uncertainty, and that would challenge the very notion that clear governing rules could be determined at all.

D. Precedent

In the *Commentaries*, Blackstone wrote that the “modern judge” could not depart from precedent, even though he felt it unfair or illogical, and even though he “might wish it had been otherwise settled” because it was “not in his power to alter it.”²⁰² Some twenty-odd years after he first penned those or similar words in his lecture notes, he followed his own imperative in the case of *Collier v. Gaillard*, where he stated, “I must yield to the weight of authorities which have established this distinction, though I think it is too artificial and refined.”²⁰³ Interestingly, Serjeant Joseph Sayer reported Blackstone's comment slightly differently, writing that “Blackstone J. added; that, although he held himself to be bound by the Cases, which had so settled the Point, the Determinations in those Cases were not, in his Opinion, founded upon good Reason.”²⁰⁴ Compare this to Blackstone's statement in the *Commentaries* that, although a judge was “sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land . . . [y]et this rule admits of exception,

¹⁹⁹ *Id.* at 1092, 96 Eng. Rep. at 645.

²⁰⁰ The only other time Blackstone's *Reports* indicate that a judge who had already given his opinion spoke again was in *Roe d. Pye v. Bird*, (1779) 2 W. Bl. 1301, 1307, 96 Eng. Rep. 762, 764–65 (C.P.), where de Grey spoke after Blackstone's opinion to laud it.

²⁰¹ *Martin*, 2 W. Bl. at 1092, 96 Eng. Rep. at 645.

²⁰² 1 WILLIAM BLACKSTONE, COMMENTARIES at *70–71.

²⁰³ (1776) 2 W. Bl. 1062, 1063, 96 Eng. Rep. 625, 625 (C.P.); cf. 1 WILLIAM BLACKSTONE, COMMENTARIES at *69 (explaining that a judge was “sworn to determine, not according to his own private judgment but according to the known laws and customs of the land,” and “[y]et this rule admits of exception, where the former determination is most evidently contrary to reason”).

²⁰⁴ SAYER, *supra* note 132, at 25. As Sayer was a serjeant, and therefore attended at Common Pleas, he likely was quoting from his own notes of the case.

where the former determination is most evidently contrary to reason.”²⁰⁵ Given an opportunity to exercise a permissible discretion that Blackstone the Commentator had acknowledged was allowed, Justice Blackstone preferred to put strict adherence to precedent first.

Of course, no Common Pleas judge failed to respect precedent when it directly controlled the case before him. Even Gould, the justice most willing to be guided by fairness and equity rather than by law,²⁰⁶ acquiesced when precedent or tradition tied his hands, and he supported outcomes that applied clear, well-known rules and procedures of the Court.²⁰⁷ He would, however, only do so when he had to, as he indicated at the Warwick Summer assize in 1779, where he is reported to have said “that ye determination in C.[P]. was much ag[ain]st ye inclination of ye court, & upon precedent, w[hi]ch he w[oul]d not extend beyond the strict c[ase] in point.”²⁰⁸ De Grey, too, espoused the standard line on precedent. In his seriatim opinion advising the House of Lords in a seminal early copyright case, *Donaldson v. Beckett* in 1774, he asserted that he as a judge must first ask

[w]hether [the question] has been so determined in its favour by the great and learned men who have been my predecessors, in regular cause of judicature; it is not for me to shake a respectable series of decisions, and unhinge the foundations of an established right, by any a priori reasoning of my own²⁰⁹

But as will be shown in the next section, Gould and de Grey’s claims have to be viewed against the evidence that they did not follow precedent when they did not perceive it to be imperative. Blackstone *did*. If he believed that he found an authority that controlled his case, he followed it and did not consider the consequences or weigh the circumstances. In at least one instance, his inflexibility on this point earned him the mockery of King’s Bench. In 1779, Blackstone presided over the trial of *Birt v. Barlow*, a suit for criminal conversation. Blackstone’s trial report explained

²⁰⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES at *69.

²⁰⁶ GEN. EVENING POST, Nov. 24, 1772, at 1 (“[T]he pervading principle which governs our laws, is, that whenever an injury is received, a remedy is always supposed.”). The manuscript account is slightly different, and neither Blackstone nor Wilson report a like comment. Compare Lincoln’s Inn, Hill MS 15 at f. 32, with *Parsons v. Lloyd*, (1772) 2 W. Bl. 845, 96 Eng. Rep. 498, 3 Wils. 341, 95 Eng. Rep. 1089 (C.P.) (Gould stating in the manuscript version that a “Party must have a remedy some where therefore Q[uestio]n is ag[ain]st whom”). See also *Rafael v. Verelst*, (1775) 2 W. Bl. 983, 987, 96 Eng. Rep. 579, 580 (C.P.) (Opinion of Nares, J.) (“Every thing that can be done, should be done to remedy an injury received; and for that Purpose, ‘Boni judicis est ampliari jurisdictionem suam.’” [“Good judges will expand their jurisdiction.”]).

²⁰⁷ *Norris v. Waldron*, (1778) 2 W. Bl. 1199, 1200, 96 Eng. Rep. 707, 707 (C.P.) (Gould was “for adhering to the ancient practice” of giving the plaintiff full costs even though he only won on two counts out of five); *Hill v. Barnes*, (1777) 2 W. Bl. 1135, 1136, 96 Eng. Rep. 670, 670 (C.P.) (“It is of great consequence to the public for the Court to see these powers . . . strictly pursued.”).

²⁰⁸ Lincoln’s Inn, Misc. MS 550 vol. 2 at f. 34b.

²⁰⁹ THE PLEADINGS OF THE COUNSEL BEFORE THE HOUSE OF LORDS IN THE GREAT CAUSE CONCERNING LITERARY PROPERTY 26 (London 1774).

that the plaintiff's witness provided a copy of the parish register entry concerning the marriage, but that he "was of Opinion that this was not sufficient Evidence of the Marriage, but that the Identity of the Parties must be proved; else it might possibly be a Register of ye Marriage, not of the Plaintiff & his supposed Wife, but of some other Persons of the same Name."²¹⁰ Plaintiff's counsel assured the Judge that other witnesses would attest that the woman in question was reputed to be plaintiff's wife and that the couple had cohabitated together. But Blackstone remained unsatisfied:

I still thought that the Evidence, so opened, would be insufficient; holding, in Conformity to ye Case of Morris & Miller . . . that this was the only civil Case, in which Proof of an actual Marriage was requisite, as contradistinguished from Acknowledgement by the Parties, Cohabitation, Reputation, &c. That the best Proof that could be given of an actual Marriage, was by some Person personally present at the Solemnity; which, in my small Experience, I had never seen an Instance of not producing. . . . [I]n the present Case there appeared to have been no less than five Witnesses present at the Marriage thus registered, which was only eleven Years ago. That the Marriage Act had directed the Witnesses to subscribe their Names to the Register, in order to facilitate the Investigation of the legal Evidence of Marriages. And that till these five Witnesses & the Minister were accounted for, as by shewing them all dead, or the like, I could not admit less Proof that that of Some Person present, to demonstrate ye Identity of ye Parties.²¹¹

In denying the proffered evidence, Blackstone thought he was correctly following the controlling precedent. In a nota bene marked "Private" (in other words, not to be read out in Court), Blackstone quoted his own manuscript note of *Morris v. Miller*, pointing out that he understood Lord Mansfield to have held that "collateral Evidence would not be sufficient, if ye Parson or Clerk were living."²¹² Mansfield apparently no longer held such a view by 1779, if he ever had, because in deciding *Birt v. Barlow* he said that

as to the proof of identity, whatever is sufficient to satisfy a jury, is good evidence Suppose the bell-ringers were called, and proved that they rung the

²¹⁰ *Birt v. Barlow*, (1779) 1 Dougl. 171, 172, 99 Eng. Rep. 113, 113 (K.B.) (original in Lincoln's Inn, Dampier MS, Buller bundle 53).

²¹¹ Lincoln's Inn, Dampier MS, Buller bundle 53. See also *Birt*, 1 Dougl. at 172, 99 Eng. Rep. at 113–14.

²¹² Lincoln's Inn, Dampier MS, Buller bundle 53 ("In my MS Note of *Morris v. Miller* (wch agrees in other Respects with Sir Ja. Burrow) Lord Mansfield in delivering the Opinion of ye Court put a Case which is omitted in Burrow[:] 'There must be Proof of a Marriage in fact. Perhaps there need not be strict Proof from the Register, or by a Person present: but strong Evidence of the Fact must be produced; as by a Person present at ye Wedding Dinner, if the Register be burnt, & ye Parson & Clerk are dead. It seemed then to be the Opinion of the Court, that such collateral Evidence would not be sufficient, if ye Parson or Clerk were living.'").

bells . . . ; suppose that the hand-writing of the parties were proved; suppose persons called who were present at the wedding dinner, &c. &c.²¹³

Even Francis Buller, Mansfield's protégé and the youngest member of the Court, got in his jabs: "Suppose a maid servant had proved that [the alleged wife] always went by [her maiden] name till the day of the marriage, and she went out that day, and, on her return, and ever since, was called Mrs. Birt? Surely that would have been evidence of the identity."²¹⁴ Blackstone had believed he was doing what the precedent demanded in requiring an excessively high level of proof. The King's Bench judges just thought he was being ludicrous.

E. Discretion

Searching the authorities turned up precedent, and in Blackstone's mind precedent had the great virtue that it had to be followed, for if it had to be followed he could avoid violating the principle that judges should not exercise discretion.²¹⁵ Blackstone demonstrated the lengths to which he would go to avoid exercising discretion in the trial of George Onslow against John Horne over which he presided in April 1770, just a few weeks after taking the bench. Onslow was the son of a former Speaker of the House of Commons, member of Parliament for Surrey, lord of the Treasury, and member of the privy council.²¹⁶ John Horne (later Horne-Tooke) was a radical preacher and supporter of John Wilkes, who published two anonymous letters addressed to Onslow in the London newspaper, the *Public Advertiser*, in the summer of 1769. In the letters, he accused Onslow of having taken a bribe to appoint a certain Burns to a government post in America.²¹⁷ Onslow brought suit for libel, and the case came before Blackstone on assize.

Hoping to nonsuit the plaintiff, Horne's counsel pointed out that the first letter as printed in the newspaper was dated "July 11," but that in copying the letter into the declaration, the clerk had written "July 11th."²¹⁸ Counsel argued that the variance was fatal, citing the 1706 seditious libel case of *Queen v. Drake*, in which the substitution of "nor" for "not" was found to be fatal, despite the fact that the sense of the document did not change.²¹⁹ The Court in that case held that when the plaintiff chose to prove the exact words of the libel (the tenor) rather than merely its sense (the

²¹³ *Birt*, 1 Dougl. at 174–75, 99 Eng. Rep. at 115.

²¹⁴ *Id.* at 175, 99 Eng. Rep. at 115.

²¹⁵ BOORSTIN, *supra* note 36, at 114–15 (on Blackstone's dislike of discretion).

²¹⁶ G.F.R. Barker, rev., E.A. Smith, *Onslow, George, First Earl of Onslow (1731–1814)*, in 41 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 2, at 876.

²¹⁷ Michael T. Davis, *Tooke, John Horne [formerly John Horne] (1736–1812)*, in 55 *id.* at 9; GURNEY, *supra* note 132, at 7–8, 18–26 (reprinting the letters).

²¹⁸ GURNEY, *supra* note 132, at 44.

²¹⁹ *Id.* at 43–44. The case was *Queen v. Drake*, (1706) 2 Salkeld 660, 91 Eng. Rep. 563 (K.B.).

purport), the words had to be copied verbatim into the information.²²⁰ *Drake*, however, was a criminal case; *Onslow* was civil, and Blackstone and the lawyers understood this might impel a different outcome.

The following colloquy between Blackstone and Leigh and Cox, counsel for Onslow, concerning this variance, offers unusual insight into Blackstone's judicial philosophy because it is ostensibly a verbatim account of what passed in court rather than a paraphrase. The reporter, Joseph Gurney, was one of the early experts in shorthand, and he claimed to take completely accurate reports.²²¹ Furthermore, the exchange offers the opportunity to listen to Blackstone as he struggled spontaneously with a legal problem rather than give his usual considered and well-researched opinion. Therefore, the colloquy deserves to be quoted at length:

Mr. Serjeant Leigh. [D]oes your lordship think the variance fatal?

Court. Yes, I really think so; you ought to prove it literatim in the words, letters, and figures; it strikes me as being so.

Mr. Serjeant Leigh. It seems to me, that 11 and 11th mean the same thing.

Court. Your argument would have done better, if in the record they had wrote it eleven in letters; for the 11 in figures, and eleven in letters, certainly read both alike. But they have wrote the figures, and put the th over it; which alters the reading and the grammar.

Mr. Serjeant Leigh. It is an addition, but not to the sound of the word. No man would read it July eleven to be sure; they stand as much for eleventh, as they stand for eleven. Two units, standing as a mark of date, signify eleventh; standing as a number, they signify eleven.

Court. Your solution then is, that these are two different marks to signify the same word; one mark is used in the printed letter, another in the record; in the letter two units, in the record two units and th; but the word so signified is still the same. This seems the best way of putting it.

Mr. Serjeant Leigh. The principle of law is strict, and ought to be kept sacred; yet it seems to me to say, when two figures do stand for a word, the putting the th does not make the least alteration in the sense.

Mr. Cox. The alteration should be in a word; it is only two letters; it must amount to a word; it is two insignificant letters.

Court. If I admit the variation of a single letter, I don't know where to stop.

Mr. Serjeant Leigh. . . . In the case in *Salkeld*, nor and not are two distinct words; and though it is evidently a mistake of the scribe here, a man will read and understand what is meant. There the sense is maimed; it is not so here in any respect. . . .

²²⁰ *Drake*, 2 *Salkeld* at 660–61, 91 Eng. Rep. at 563–64; Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 736–37 (1985).

²²¹ See *Fabrigas v. Mostyn*, in HARGRAVE, *supra* note 64, at 162 n.(a) (Gurney claiming his transcription of the case is accurate).

Court. . . . I apprehend the law does stand so, that if you undertake to prove the tenor of a libel, it must appear to be literally and numerically the same. Here you do not declare upon the purport, but have declared upon, and undertaken to prove the tenor; therefore, in that case, you ought to have copied it exactly, and should have taken more pains in examining it, before it came down to be tried. . . .

Mr. Serjeant Leigh. Is that your Lordship's opinion? This is merely a civil action.

Court. I do not, on the sudden, recollect any case of a civil action where it has been so determined; but it seems to be the same thing. This is an action founded upon a supposed crime. I own it is very nice, and should be glad if you could draw me a line, to get rid of so minute a nicety; but I take the law to be so settled.

Mr. Serjeant Leigh. The true line is, where there is an alteration of the sense.

Court. I am afraid that will not do. That would let in a hundred altercations, whether the sense is or is not altered, and leave too much in the discretion of the judge: tenor and purport would then signify exactly the same. If you can draw me any rational line, at which I can stop, consistently with the rules of law, I would not consent to non-suit a plaintiff, in a cause of such expence [sic] and expectation, upon such an immaterial variation as this. It is as immaterial as possible, for the sense is not altered in the least. If I am wrong in it, can you put me in any method to set it right?²²²

Counsel had no satisfactory solution, and Blackstone nonsuited the plaintiff.

Another judge, more experienced in the day-to-day workings of the common law, might perhaps have been willing to see the variance in the date as falling within an acceptable level of nuance within the somewhat fuzzy boundaries of the relevant law. Here, de Grey makes a nice comparison because on the bench he acquired a reputation for opposition to unbridled equity and discretion. According to a story told by Lord Eldon, chief justice of Common Pleas from 1799–1801 and Chancellor from 1801–1806 and 1807–1827, the same week Mansfield said that “he never liked Law so well as when it was like Equity,” de Grey “took Occasion publicly to state from the bench ‘that he never liked Equity so well, as when it was like Law.’”²²³ And yet, he had primarily practiced as a Chancery barrister, and “[e]quity cases . . . , traditionally depended on natural law, reason, and ‘conscience’ rather than the issues of law or fact tried at common law.”²²⁴ These conflicting impulses resulted in statements, which can with some confidence be assumed to reflect de Grey's own views,²²⁵ showing him va-

²²² THE WHOLE PROCEEDINGS IN THE CAUSE OF ACTION BROUGHT BY THE RT. HON. GEO. ONSLOW, ESQ. AGAINST THE REV. MR. HORNE, *supra* note 132, at 44–48.

²²³ LORD ELDON'S ANECDOTE BOOK 162 (Anthony L.J. Lincoln & Robert Lindley McEwen eds., 1960) (internal quotation marks omitted).

²²⁴ LEMMINGS, *supra* note 49, at 184, 353.

²²⁵ Because de Grey sometimes had to speak for the Court, he cannot always be assumed to have been giving opinions with which he wholeheartedly agreed. *See, e.g.*, *Turtle v. Lady Worsley*, (1783)

cillating between insistence on strict adherence to the law and openness to equitable decisionmaking.

On the one hand, the theme that judges must follow the law, despite apparent unfairness, resonated throughout many of de Grey's opinions. In *Rafael v. Verelst*, a suit against the president of the East India Company for false imprisonment in India, the other judges wanted to grant a new trial.²²⁶ De Grey angrily reminded them that "[i]n exerting the jurisdiction of granting new trials, the Court is not arbitrary, nor has any discretionary power."²²⁷ In an inheritance case in 1774, he declared, "If the law be so, we cannot determine to the contrary, upon inconvenience, or the hardship of the law."²²⁸

On the other hand, in some cases de Grey appears to have taken positions at odds with these stated views. In a motion for a new trial decided the year after *Rafael v. Verelst*, de Grey said that such motions should be "founded on the true justice of the case . . . and not on little quirks and niceties."²²⁹ In a case concerning the assignability of respondentia bonds, he argued that "[t]he plaintiff is certainly entitled to the money in conscience, and therefore (I think) entitled also at law."²³⁰ And in two different testamentary interpretation cases decided in the same year, in which the question was whether the intention of the testator could be followed contrary to the legal meaning of the words of the will, he took nearly opposing positions. In the first, in which "there was no doubt of the testator's intention, that the elder daughter should inherit before the younger," he was concerned that the Court not merely follow that intent but rather figure out "how to effect that intention consistently with the rules of law."²³¹ In the second case, to get to the outcome he wanted, he did not require certainty of intent but was happy to judge "[b]y implication; not indeed a necessary implication, strictly and mathematically speaking; but so far necessary, as it clearly arises from the reasonable construction of the will."²³² Gould characterized this latter interpretation as "the most just, as well as liberal construction."²³³ De Grey may have held himself out as a conservative, but he exhibited the sort

3 Dougl. 290, 291, 99 Eng. Rep. 659, 660 (K.B.) (Mansfield commenting in the case of *Lean v. Schutz*, (1778) 2 W. Bl. 1195, 96 Eng. Rep. 704 (C.P.), that "the Court were greatly divided in opinion on the general question, and rode off on the point of conformity"). Blackstone reported de Grey as giving the "Opinion of the Court." *Lean*, 2 W. Bl. at 1198, 96 Eng. Rep. at 705.

²²⁶ (1775) 2 W. Bl. 983, 96 Eng. Rep. 579 (C.P.).

²²⁷ *Id.* at 987, 96 Eng. Rep. at 581.

²²⁸ *Goodtitle d. Newman v. Newman*, (1774) 3 Wils. 516, 522, 95 Eng. Rep. 1188, 1191 (C.P.).

²²⁹ *Cutting v. Derby*, (1776) 2 W. Bl. 1075, 1076, 96 Eng. Rep. 633, 634 (C.P.).

²³⁰ *Fenner v. Meares*, (1779) 2 W. Bl. 1269, 1272, 96 Eng. Rep. 746, 747 (C.P.). A respondentia bond was a note given by a shipowner to a financier using the ship's cargo as collateral. 2 WILLIAM BLACKSTONE, COMMENTARIES *458.

²³¹ *Heny v. Purcel*, (1775) 2 W. Bl. 1002, 1003, 96 Eng. Rep. 589, 590 (C.P.).

²³² *Goodright d. Philips v. Allin*, (1775) 2 W. Bl. 1041, 1042, 96 Eng. Rep. 612, 612 (C.P.).

²³³ *Id.* at 1043, 96 Eng. Rep. at 613.

of pragmatic inconsistency and hedging that one does not find in Blackstone's opinions.

At the other extreme, Gould was comfortable with assuming the responsibility of wielding discretion when he believed that would lead to the fairest outcome. In the 1775 case of *Santler v. Heard*, the plaintiff had obtained a change of venue by claiming that he had material evidence in the new venue.²³⁴ At trial, he did not introduce that evidence, but he did win a verdict. The defendant sought to have the plaintiff nonsuited based on violation of the venue statute. De Grey held that “[b]y the verdict it appears, that the justice of the case is with the plaintiff, and therefore one could wish to assist him; but the discretion of the Court is closed by the act of the plaintiff himself.”²³⁵ Gould disagreed:

I do not think that the discretion of the Court is absolutely closed. I am against an absolute nonsuit. The Legislature meant nothing more, than a recommendation to the Court in transitory actions to follow the analogy of real ones, to prevent injustice and oppression. Though the plaintiff has mistaken his way, yet (as he has Merits)²³⁶ I cannot consent he should lose the Whole of his Proceedings ab Ovo.

Gould also made his views on discretion clear in the infamous *Rudd Case*, a spectacular forgery trial that caught the public's attention in 1775.²³⁷ Margaret Caroline Rudd was involved in a scheme to forge bonds with two brothers, Robert and Daniel Perreau.²³⁸ She agreed to inform against the Perreaus, assuming she would be saving herself, but she did not divulge all she knew about the group's crimes.²³⁹ At her trial, over which Gould presided assisted by two other judges, the question arose whether she could be tried for those other crimes given that her testimony had convicted her accomplices.²⁴⁰ Although the other judges disagreed because they believed that she could be tried, Gould gave a lengthy opinion arguing that the judges had to have the right to exercise their discretion in interpreting the statutes on informants “in order to carry the statutes themselves into effectual execution, which without this power would be little more than waste paper.”²⁴¹

That de Grey and Gould were not outliers is demonstrated by a case from 1779 in which the opinions of all twelve common law judges are rec-

²³⁴ (1775) 2 W. Bl. 1031, 96 Eng. Rep. 605 (C.P.).

²³⁵ *Id.* at 1031, 96 Eng. Rep. at 605.

²³⁶ *Id.* at 1032, 96 Eng. Rep. at 605.

²³⁷ DONNA T. ANDREW & RANDALL MCGOWEN, *THE PERREAUS AND MRS. RUDD: FORGERY AND BETRAYAL IN EIGHTEENTH-CENTURY LONDON* (2001).

²³⁸ MIDDLESEX J., Sept. 16, 1775, at 4.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

orded.²⁴² The defendant, Donnolly, had twice accosted the victim and demanded money, threatening that, if the victim did not comply, he would take him before a magistrate and accuse him of attempted sodomy.²⁴³ The jury found the defendant guilty of robbery, but “[t]here being some difference of opinion among the Judges on this case, they directed it to be argued before them . . . at Lord C. J. de Grey’s house, present all the Judges.”²⁴⁴ The question was whether Donnolly’s act was properly defined as robbery even though there had been no actual or threatened force or violence.²⁴⁵

The judges debated the point at some length. Half of them, including Mansfield, de Grey, Gould, and Nares, considered the act a clear robbery.²⁴⁶ The others initially expressed some hesitance, but all eventually acquiesced in the robbery charge.²⁴⁷ Blackstone, however, held out longer than the others. He began with his common refrain: “the difficulty of the case was in drawing the line for the first time.”²⁴⁸ He considered robbery to require either violence or fear of violence, and asserted that “[t]here was no case in which one or the other had not been holden necessary.”²⁴⁹ He then quoted Bracton and Coke regarding the nature of the fear demanded, and pointed out that threats to disgrace did not meet the standard of fear set out by those authorities.²⁵⁰ Therefore, the act was not robbery.

Unlike Ashhurst of King’s Bench, he did not hedge his claims that “he was very averse to extend the law to cases not formerly considered as falling under the crime” with the excuse that “the law should keep pace with the times.”²⁵¹ And unlike Willes, the senior King’s Bench puisne, he did not avoid having to draw a line by observing that “no precise answer was necessary to be given; they must depend upon circumstances.”²⁵² And unlike Baron Eyre of the Exchequer, he did not assuage his doubts by claiming that the “notion of putting in fear . . . seemed to him to be rather a consequential than essential part of the offence.”²⁵³ In the end, Blackstone reluctantly agreed to concur with the rest only after they had convinced him that the law applied because the facts showed a fear of violence.²⁵⁴

²⁴² 2 EAST, *supra* note 132, at 716.

²⁴³ *Id.* at 715–16.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 720, 723–26.

²⁴⁷ *Id.* at 716.

²⁴⁸ *Id.* at 721.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 720.

²⁵² *Id.* at 722.

²⁵³ *Id.* at 719.

²⁵⁴ *Id.* at 722.

F. Blackstone as the Anti-Mansfield

The best-remembered judge from the second half of the eighteenth century is Lord Mansfield, the longtime chief justice of King's Bench. Whereas Blackstone was the staunchest adherent to the common law orthodoxy, Lord Mansfield was the foremost advocate for change. Wanting greater flexibility, he did not hold to Blackstone's narrow view of precedent, which he argued was evidence of the law, but "not the law in itself, much less the whole of the law."²⁵⁵ Mansfield's judicial strength was his creativity. He identified problematic areas of law and set out to fix them as far as the cases that came before him would allow.²⁵⁶ As many of his innovations became a part of the common law, he has gone down in history as a great judge.²⁵⁷ By contrast, Blackstone's strength as a judge was his consistency. He accepted that the judge was a mere mouthpiece without discretion; he believed that precedent was to be followed, and he did not deviate from these guiding principles.

But although Blackstone was a theoretician in an age of pragmatists, the extent to which his rather than Mansfield's beliefs represented the basic conservatism of the bar at the time is neatly summed up in the story of *Perrin v. Blake*, in which Blackstone gave a masterful opinion for which he was recognized in his time.²⁵⁸ The case concerned a dispute over the interpretation of a will. It began in 1746 and wended its way through the courts of Jamaica—an English colony—to the Privy Council, thence to King's Bench, and from there was brought in error to Exchequer Chamber, where Blackstone heard it with the other judges of Common Pleas and the barons of the Exchequer in 1772.

The longstanding rule of testamentary interpretation was that where the testator's intent appeared to conflict with the meaning of the legal terms in a will, courts should give effect to the testator's intention if, first, it was consistent with law, and second, it could be determined.²⁵⁹ Blackstone had been fighting with Mansfield over this aspect of testamentary interpretation

²⁵⁵ *Jones v. Randall*, (1774) Lofft 383, 386, 98 Eng. Rep. 706, 707 (K.B.); JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 365–66 (2004); Postema, *supra* note 12, at 14–15.

²⁵⁶ 12 HOLDSWORTH, *supra* note 6, at 152–53; LIEBERMAN, *supra* note 12, at 100.

²⁵⁷ OLDHAM, *supra* note 255, at 364–65, 369.

²⁵⁸ 1 A COLLECTION OF TRACTS, *supra* note 184, at 488. This is the case on which Blackstone's judicial reputation is often based. See 12 HOLDSWORTH, *supra* note 6, at 707; A.W. BRIAN SIMPSON, BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 59 (1984). Burrow only mentioned Blackstone's and de Grey's opinions when discussing the Exchequer Chamber hearing. See *Perrin v. Blake*, (1770) 4 Burr. 2579, 2581, 98 Eng. Rep. 355, 357. Only Blackstone's opinion was ever published. Charles Fearne called Blackstone's opinion "justly celebrated." CHARLES FEARNE, AN ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVICES 292 (London, A. Strahan and W. Woodfall eds., 4th ed. 1791). On Mansfield, see 8 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 29 (3d ed. 1926) ("[I]n his desire to import reasonable principles into the common law, he was sometimes led to lay down rules which were demonstrably not rules of English law.").

²⁵⁹ 1 A COLLECTION OF TRACTS, *supra* note 184, at 489–90, 495.

since 1764. As counsel he had argued before King's Bench in four cases out of five in favor of strictly applying the law against the intentions of the testator, and in four cases out of five he had lost.²⁶⁰ In *Perrin*, he finally got his revenge when a majority of six to two, de Grey and Baron Smythe dissenting, overturned Lord Mansfield's opinion that the intent of the testator was clear and should control.²⁶¹

The suit arose because of a clause in the testament of William Williams, a wealthy landowner in Jamaica. Reduced to its essence, the clause read, "to John Williams for the term of his natural life; the remainder to the heirs of his body."²⁶² As innocuous as this might appear, it generated several legal complications. The testator seemingly intended that his son, John Williams, should take a life estate and that John's direct heirs should take the property not in descent from John, but as a grant from the testator—what is technically called taking by "purchase." The problem was that the wording of the clause implicated the Rule in Shelley's Case, a sixteenth-century dispute in which the rule was stated—though whether by the Court itself or just as a gloss by Edward Coke, who reported it, is not clear—that "when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases, 'the heirs' are words of limitation of the estate, and not words of purchase."²⁶³ That is, to apply the rule to the situation in *Perrin*, when the testator gave a life estate to John and then gave an estate in freehold to John's heirs (in this case an estate in tail rather than in fee simple because of the words "to the heirs of his body"), the two estates merged in John by operation of law. As such, he took an estate tail, meaning the estate could only go to the heirs of his body and not to anyone who was merely his heir at law. However, if one followed the proper procedure one could "bar" the entail, turning the estate into a freehold and permitting alienation.²⁶⁴ That is what happened. John properly barred the entail and then settled the land on his wife. But if John had by the will only taken a life estate, the settlement was invalid, and, John having died, the land would pass to the original testator's daughters.

²⁶⁰ See *Perkins d. Vowe v. Sewell*, (1768) 1 W. Bl. 654, 96 Eng. Rep. 380 (K.B.) (lost); *Gulliver d. Corrie v. Ashby*, (1766) 1 W. Bl. 607, 96 Eng. Rep. 352 (K.B.) (won); *Frogmorton v. Holyday*, (1765) 1 W. Bl. 535, 96 Eng. Rep. 310 (K.B.) (lost); *Evans d. Brooke v. Astley*, (1764) 1 W. Bl. 499, 96 Eng. Rep. 289 (K.B.) (lost); *Denn d. Satterthwaite v. Satterthwaite*, (1764) 1 W. Bl. 519, 96 Eng. Rep. 301 (K.B.) (lost).

²⁶¹ *Perrin*, 4 Burr. at 2581, 98 Eng. Rep. at 357. De Grey may have dissented to be consistent with the legal argument he had given in the case while attorney general, when it came before the Privy Council. I have not been able to find that argument. See 1 A COLLECTION OF TRACTS, *supra* note 184, at 496 n.†.

²⁶² 1 A COLLECTION OF TRACTS, *supra* note 184, at 496–97 (internal quotation marks omitted).

²⁶³ *Wolfe v. Shelley* (Shelley's Case), (1581) 1 Co. Rep. 88b, 104a, 76 Eng. Rep. 199, 234 (K.B.) (footnotes omitted); A.W. B. SIMPSON, LEADING CASES IN THE COMMON LAW 11, 33–35 (1995).

²⁶⁴ A.W. BRIAN SIMPSON, A HISTORY OF THE LAND LAW 130 (2d ed. 1986).

Although the King's Bench opinions were never fully reported,²⁶⁵ Mansfield apparently held that the Rule in Shelley's Case was outdated and should be interpreted as narrowly as possible so as not to conflict, as the barrister, Charles Fearn, sarcastically said, "with that enlarged and more enlightened stile of doctrine, which, at this period, so eminently distinguished the decisions of the court of King's-Bench."²⁶⁶ The Court ruled three to one (Yates, J. dissenting) that John Williams took only a life estate. In so doing, claimed Fearn, "that court delivered a judgment, which seemed to over-rule and supersede all authorities and precedents, and to assume the air of authoritative repeal of all former opinions and resolutions upon the same point."²⁶⁷ James Booth, a prolific writer of opinions of counsel, agreed, writing that:

[This is] so very surprising and alarming, that though I have signed an hundred Opinions that in cases like the present one, the first devisee under the words to the heirs of his body took an estate tail . . . , I am now obliged to speak more warily . . . , since a new set of judges may form some very fine-spun distinctions, find out many specious argument, by means of which . . . they may maintain that the first devisee in a case like this shall take only an estate for life²⁶⁸

Blackstone could not abide such a maneuver, and in an opinion acknowledged even by that hero-worshipper of Mansfield, the reporter James Burrow, to be "very able and elaborate," he set out to show why the decision below was wrong.²⁶⁹ He began by admitting that the Rule in Shelley's Case was a default rule, which had to give way in the face of the testator's contrary intention. However, he then required that that intention be ascertainable to "a moral certainty."²⁷⁰ Such a high standard was necessary because allowing a "vague discretionary law, formed upon the occasion from the circumstances of every case; to which no precedent can be applied, and from which no rule can be deduced" would lead to chaos in the interpretation of wills.²⁷¹

Next he countered arguments that the Rule in Shelley's Case was a feudal remnant, no longer relevant or authoritative. He traced its history and speculated that its origin was not feudal but rather based in a desire to

²⁶⁵ CHARLES FEARN, AN ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVICES, at viii–xi (London, His Majesty's Law Printers, 3d ed. 1776).

²⁶⁶ *Id.* at 113.

²⁶⁷ *Id.* at 110.

²⁶⁸ Opinion of counsel from 1770, *reprinted in* 1 CASES WITH OPINIONS, *supra* note 104, at 312.

²⁶⁹ *Perrin v. Blake*, (1770) 4 Burr. 2579, 2581, 98 Eng. Rep. 355, 357; James Oldham, *Eighteenth-Century Judges' Notes: How They Explain, Correct and Enhance the Reports*, 31 AM. J. LEGAL HIST. 9, 13 n.22 (1987) ("Although the form and quality of Burrow's Reports have been generally admired, it has been suggested that Burrow was so close to Mansfield that the reports could not have been objectively prepared.").

²⁷⁰ 1 A COLLECTION OF TRACTS, *supra* note 184, at 496.

²⁷¹ *Id.*

increase the circulation of property. But even if the Rule were obsolete and feudal, no court had the power to ignore it, for it was the law. One did not go about toying with the law because, he said, echoing his sentiments in the *Commentaries*, “[t]he law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connexions and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole.”²⁷² Having examined the four situations in which a court had held that the words “heirs of the body” were words of purchase and found that none of them applied to Perrin, he concluded “[w]e have therefore no authority from precedents to warrant such a construction as is now contended for.”²⁷³ Therefore, he held that, despite the fact that the testator’s intention to give John only a life estate was quite evident, it was not clear enough to meet the standard necessary to prevent the judges from exercising any more than the absolute minimum allowable discretion and permit them to override the technical meaning of the language the testator had used. Thus, the will must be held to have granted John an estate in tail by operation of law. The fact that this was very likely not what the testator wanted, and the fact that the testator did not know about the Rule in Shelley’s Case, were of no consequence.²⁷⁴ Once precedent had guided him to a conclusion, Blackstone did not question its certainty. And yet, although the opinion had all the hallmarks of a Blackstonian decision, Blackstone was no outlier in *Perrin*. He spoke in the majority, and Mansfield, chastised by the reversal, “found it ever more difficult to uphold the claims of intention against the authority of rules.”²⁷⁵

The greatest difference between Blackstone and his brethren was the consistency of his views. All of the judges presumably accepted the basic premises of the common law orthodoxy, but they did not cling to them with the same conviction that Blackstone did. He was so firmly convinced that a single, guiding rule could be found through the diligent searching of the authorities, and so certain that the rule, once found, bore a single correct interpretation, that he believed his judicial oath obliged him to follow that law wherever it led.

Perhaps the best opinion to sum up Blackstone’s method and principles of judging is that staple of first year torts casebooks, his famous dissent in *Scott v. Shepherd*.²⁷⁶ Shepherd threw a lighted squib, or firecracker, into a

²⁷² *Id.* at 498; cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *70 (“[I]t hath been an ancient observation in the law of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.”).

²⁷³ 1 A COLLECTION OF TRACTS, *supra* note 184, at 507.

²⁷⁴ *Id.* at 509–10.

²⁷⁵ FIFOOT, *supra* note 116, at 181.

²⁷⁶ (1773) 2 W. Bl. 892, 96 Eng. Rep. 525 (C.P.). Blackstone’s opinion is badly botched by Wilson. *See, e.g.,* *Scott v. Shepherd*, (1773) 3 Wils. 403, 410, 95 Eng. Rep. 1124, 1128 (C.P.) (describing Black-

large, crowded, covered market.²⁷⁷ The squib landed on Yates's stall and Willis, standing nearby, picked it up and threw it deeper into the crowd.²⁷⁸ It then landed on Ryall's stall, and he, too, picked the squib up and threw it into the crowd, where it exploded in Scott's face and put out his eye.²⁷⁹ Scott sued on a writ of trespass.²⁸⁰ At trial, Shepherd objected that the proper action should have been trespass on the case.²⁸¹ The trial judge, Nares, overruled the objection but allowed it to be brought before the whole Court en banc in Westminster.²⁸²

Because the Court was not unanimous, the judges gave their opinions seriatim, beginning with the most junior.²⁸³ Consequently, Nares began, and he made three points. First, he claimed, on the authority of *Reynolds v. Clarke*, a seminal case from 1726 drawing the line between trespass and case, that where an act was illegal, trespass would lie.²⁸⁴ The throwing of squibs was unlawful by statute, so doing that act would give rise to an action of trespass.²⁸⁵ Second, initiating the action was sufficient to create liability under trespass, even if Shepherd never touched Scott nor directly caused him to be touched, because "he who does the first wrong is answerable for all the consequential damages."²⁸⁶ Finally, Nares asserted that the Court should uphold the verdict regardless of whether the writ was correct, because it was just. Scott had been injured; Shepherd had something to do with it, and someone needed to pay.²⁸⁷ "[I]t was declared by this Court," he said, "that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible."²⁸⁸

By the time Nares had finished, Blackstone must have been boiling, because the opinion offended every principle he held dear: Nares misunderstood the precedent, leading him to choose the wrong rule and therefore come to the wrong conclusion. Then, to add insult to injury, he asserted that it did not matter because the Court had a right to act in an equitable,

stone's analogy about the football game). But the other judges may get a fairer shake, and because Wilson reports the arguments of counsel, it is possible to see which elements of Blackstone's arguments are borrowed from Serjeant Burland, who argued for Shepherd. *Id.* at 403, 95 Eng. Rep. at 1124.

²⁷⁷ *Scott*, 2 W. Bl. at 892–93, 96 Eng. Rep. at 525–26.

²⁷⁸ *Id.* at 893, 96 Eng. Rep. at 526.

²⁷⁹ *Id.* at 893, 96 Eng. Rep. at 526.

²⁸⁰ *Id.* at 893, 96 Eng. Rep. at 526.

²⁸¹ *Id.* at 893, 96 Eng. Rep. at 526.

²⁸² *Id.* at 893, 96 Eng. Rep. at 526.

²⁸³ *Id.* at 893, 96 Eng. Rep. at 526.

²⁸⁴ *Id.* at 893, 96 Eng. Rep. at 526; *Reynolds v. Clarke*, (1726) 1 Stra. 634, 93 Eng. Rep. 747 (K.B.).

²⁸⁵ *Scott v. Shepherd*, (1773) 3 Wils. 403, 407, 95 Eng. Rep. 1124, 1126 (C.P.); *Scott*, 2 W. Bl. at 893, 96 Eng. Rep. at 526.

²⁸⁶ *Scott*, 2 W. Bl. at 894, 96 Eng. Rep. at 526.

²⁸⁷ *Id.* at 894, 96 Eng. Rep. at 526.

²⁸⁸ *Id.* at 894, 96 Eng. Rep. at 526.

discretionary fashion despite the law. Blackstone responded with a crisp, logical, and elegant demolition of each of Nares's arguments.

His first step was to correct the statement of the rule. The "settled distinction," as he understood it, was that trespass lay for an immediate act and case for a consequential one.²⁸⁹ He cited *Reynolds v. Clarke*, correcting Nares's misreading of that case. He pointed out that, although something about lawfulness and unlawfulness "is put into Lord Raymond's mouth" in that case, the Judge could not have meant what Nares claimed, first because that was not the holding of the case, and second because, as Blackstone demonstrated, it neither made sense nor corresponded to all the rest of the precedent, some of which Nares had cited.²⁹⁰

After analyzing the facts using standard analogical reasoning to demonstrate that the situation fell squarely into action on the case, Blackstone turned to Nares's final remarks about fairness. He noted that the authority Nares had quoted was not applicable because in that case the verdict had been rendered before anyone had raised procedural objections.²⁹¹ In *Scott*, the objection had been raised at trial, and the verdict was suspended pending the outcome of the hearing.²⁹² Under such circumstances, "the Court will not wink against the Light, and say that Evidence, which at most is only applicable to an Action on the Case, will maintain an Action of Trespass."²⁹³

Blackstone objected to such willingness to play fast and loose with the law because if the distinctions between the writs were not properly maintained, "we shall introduce the utmost confusion."²⁹⁴ As he had done years before when asked by Oriel College about electing a new provost, Blackstone focused more on the remote slippery slope problem than on the consequences to the parties in the case before him. He speculated that case would lie against Shepherd and even raised the possibility that Scott could sue Willis and Ryall, but he did not much care that, if the Court followed his opinion, Scott would have had to bring the suit all over again.²⁹⁵ The fact that the outcome might be unfair or unreasonable could not justify bending the law or "wink[ing] against the Light."²⁹⁶ As he once said in *Hatchett v. Baddeley*—in which a woman estranged from her husband would escape responsibility for her bills, because as a feme covert, she could not be sued—"[t]he rules of Law ought not to be broke thro' for the

²⁸⁹ *Id.* at 894, 96 Eng. Rep. at 526.

²⁹⁰ *Id.* at 894, 96 Eng. Rep. at 526.

²⁹¹ *Scott v. Shepherd*, (1773) 3 Wils. 403, 410, 95 Eng. Rep. 1124, 1128 (C.P.).

²⁹² *Id.* at 410, 95 Eng. Rep. at 1128.

²⁹³ *Scott*, 2 W. Bl. at 897, 96 Eng. Rep. at 527–28.

²⁹⁴ *Id.* at 897, 96 Eng. Rep. at 528 (internal quotation marks omitted).

²⁹⁵ *Id.* at 896, 96 Eng. Rep. at 527.

²⁹⁶ *Id.* at 897, 96 Eng. Rep. at 527–28.

sake of tradesmen.”²⁹⁷ Similarly, the possibility that “admitting any Evidence to supply or explain written agreements” would weaken the Statute of Frauds,²⁹⁸ or that “infinite confusion and disorder would follow, if Courts could by writ of habeas corpus, examine and determine the contempts of others,” represented dire threats to the certainty of the system into which he believed the law fit.²⁹⁹ Above all, Blackstone, ever the man who first succeeded in organizing the English law, feared such intellectual disorder.

CONCLUSION

Justice Blackstone’s reputation has not had a particularly smooth ride in the years since his death. Most historians have echoed the sentiments of the 1782 reviewer of Blackstone’s *Reports* that “as a judge, Sir William Blackstone was certainly respectable; but not the greatest of his time.”³⁰⁰ One explanation for why Blackstone’s judicial reputation never attained the heights his academic reputation did might be attributable to his poor judicial temperament. He is said to have had a bad temper, to have been officious, and to have been overly attached to formalities out of concern that he not “lessen the Respect due to the Dignity and Gravity of his Office, by any outward Levity of Behaviour.”³⁰¹ This fits with the image his opinions give of a fussy, by-the-book pedant.

²⁹⁷ Inner Temple, Misc. MS 97 at f. 141.

²⁹⁸ *Preston v. Merceau*, (1779) 2 W. Bl. 1249, 1250, 96 Eng. Rep. 736, 736 (C.P.).

²⁹⁹ *The Case of Brass Crosby*, (1771) 3 Wils. 188, 204, 95 Eng. Rep. 1005, 1014 (C.P.). For other cases in which Blackstone discussed the slippery slope problem, see *Melchart v. Halsey*, (1771) 2 W. Bl. 741, 744, 96 Eng. Rep. 434, 435 (C.P.) (expressing concern about ruining “the national credit abroad”); *Powel v. Peach*, (1778) 2 W. Bl. 1202, 1204, 96 Eng. Rep. 708, 709 (C.P.) (permitting viva voce evidence as “inlet to fraud”).

³⁰⁰ 67 MONTHLY REV., *supra* note 38, at 5. The reviewer continues:

As a writer on the subject of Law, he stands highly distinguished. Where men of the first abilities were his competitors, and the greatness of the prize called forth the greatest exertions, we see him relinquishing the palm to others, and deviating into the paths of literature; and though we may commend the wisdom of his choice, we have no right to extol it as an evidence of the greatness of his powers.

Id.; but see 2 JEREMY BENTHAM, *THE CORRESPONDENCE OF JEREMY BENTHAM* 116 (1968) (Bentham, in a letter to the French Enlightenment scholar, Jean le Rond D’Alembert (1717–1783), writing that Blackstone was a “Juge savant et éclairé [*sic*], il n’eut jamais reçu de moi que des louages, s’il se fut renfermé [*sic*] dans les bornes de l’occupation qui fait a [*sic*] present son devoir” [“a wise and enlightened judge, he would never have received anything from me but praise had he had confined himself to the limits of the occupation which constitutes his present duty”] (the author thanks Wilfrid Prest for this reference)); 8 FOSS, *supra* note 11, at 249 (1864) (claiming Blackstone “was equally distinguished as a judge as he had been as a commentator”); 12 HOLDSWORTH, *supra* note 6, at 707 (writing that Blackstone was “an able judge” who was “a master of all the law administered in his court”).

³⁰¹ Clitherow, *Preface*, *supra* note 39, at xxvii. In 1771, Thomas Fry, President of St. John’s College Oxford, wrote that Blackstone had been rude to counsel appearing before him by interrupting them during their pleading “in a very uncivil manner.” IAN DOOLITTLE, *WILLIAM BLACKSTONE: A BIOGRAPHY* 87 n.131 (2001) (citing *The Diary of John Fry*, Mar. 8, 1771). Fry, however, was no friend of Blackstone’s. Prest, *supra* note 58, at ¶ 26, n.41; see also PRIOR, *supra* note 178, at 431–32 (“Sir William Blackstone, as Sir Wm. Scott of the Commons observed to me a few days ago, was extremely

Another explanation, however, might be that the bench and bar, while respecting his erudition, understood his limitations as a judge. Blackstone did not think about the law the way they did. He took ideas that animated his *Commentaries*—that the law existed as a system and was expressed in authoritative texts, that judges had to follow precedent, that discretion was undesirable—and adhered to them as his overarching jurisprudential philosophy. Whereas the other judges, who had spent far more time than Blackstone in practice, accepted the limits of the ideal, he either did not grasp or did not accept that law in practice did not fit into his neat theories. Everything that made his *Commentaries* such an important work—the systematizing, the presentation of the law as composed of easily-accessible rules—made Justice Blackstone seem out of touch. The law, in daily practice, was not systematic. The rules were not always certain. The judge did have to exercise some discretion some of the time.

In his work on the history of contract law, P.S. Atiyah observed that, “whatever his faults, Blackstone understood the legal mind.”³⁰² But this is not right. Blackstone’s greatest fault as a lawyer and jurist was precisely that, while he may have known the law, he did not know the legal mind.

irritable. He was the only man, my informant said, he had ever known who acknowledged and lamented his bad temper.”). William Scott (1745–1836), later Lord Stowell, spent almost thirty years as a judge on the high court of admiralty. The contemporary solicitor, William Bray, recounted that:

On one of [Blackstone’s] first circuits, the Sheriff of Oxfordshire was appointed to meet him at such a place, but the Judge went 2 or 3 hours before his time, & not finding the Sheriff, abused him grossly. After the assize he desired the Sheriff to lend him his Coach, the Sheriff told him he had done all required of him & that he behaved so little like a gent[leman] he w[ould] have no more to do with him.

At Bristol in 1772 he came [fro]m Wells before the Judge had finished a long cause in which all the prime[?] Council except Davy were engaged he sent word to ye Council he sh[oul]d sit at 7 ye next morn. It was sooner by some hours than usual, they remonstrated that ye leading Council were left behind, but he to[ok] no notice, on w[hi]ch those who were at Bristol agreed not to go in to Court. He sat at 7 & no one coming, he sent & had ye same answer, on w[hi]ch he said he w[oul]d adjourn ye court until 9, & if they did not come he w[oul]d go on without them. They did not come, & he ordered the Att[orne]ys to proceed. Symons was in ye first cause, & was going to explain the case to the jury, but was stopped by Bl. who told him he sh[oul]d read the declaration & say no more.

Bray, *supra* note 4, s.v. William Blackstone.

³⁰² ATIYAH, *supra* note 54, at 102.

