

# A New Blackstone

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William Blackstone, *Commentaries on the Laws of England* (Ruth Paley & Wilfrid Prest eds., Oxford University Press, 2016).

William Blackstone was for a long time one of the central figures of both British and American legal thought. His *Commentaries on the Laws of England* was the text by which many learned law in England. In the United States, Blackstone was equally authoritative, though often read with additional commentary (e.g., by St. George Tucker<sup>1</sup>).

Blackstone's *Commentaries* has also played a significant role within legal theory—especially for theorists critical of certain features of the approach to adjudication and judicial reasoning that he espoused and are large parts of Anglo-American tradition. Criticism of Blackstone and his *Commentaries* is, for example, integral to much of Jeremy Bentham's writings on law.<sup>2</sup> Bentham was an opponent of judicial law-making in general and the common law approach in particular. In a small piece called "Truth versus Ashurst" he compared the way that common law judges make law to the way people make laws for their dogs: "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it."<sup>3</sup> This attack on the unpredictability and retroactivity of common law decision-making remains important to the present day.

Bentham's student, John Austin, also made a famous attack on natural law theory, using a passage in the *Commentaries* as his stalking horse. Blackstone stated that "no human laws are of any validity if contrary to [the law of nature]."<sup>4</sup> Austin countered that "to say that human laws which conflict with the Divine Law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced by judicial tribunals."<sup>5</sup> To Austin, Blackstone's approach to legal reasoning—and hence many aspects of Anglo-American judicial tradition—conflated what the law is with what it ought to be.

In more recent work, Duncan Kennedy, a critical legal theorist, offered an extended discussion of Blackstone as the occasion for propounding his idea of "the fundamental contradiction."<sup>6</sup> This is a contradiction he perceives between individual liberty and the community coercion that both safeguards and threatens it. Kennedy used details from the *Commentaries* to support the conclusion that there is this ongoing "contradiction" in law and government.

As these examples show, Blackstone's work has provided both a guidepost for a great amount of Anglo-American judicial practice and an object of criticism for a wide array of jurisprudential thinkers concerned with aspects of those traditions.

Until recently, those who wanted to study or cite to Blackstone's *Commentaries* usually made use of a very good 1979 University of Chicago Press edition (Stanley N. Katz, ed.), which was a facsimile of the (1765-1769) first edition of the *Commentaries*. While this version of the *Commentaries* remains good enough for many purposes, the new Oxford University Press edition has significant advantages for those who want to dive deeper into Blackstone's text, with particular attention to historical context and how Blackstone varied his text over the various editions up to the ninth (and first posthumous) edition (1783). Each volume of the new OUP *Commentaries* contains a helpful introduction by a different

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historical expert in the field (David Lemmings for Book I — *Of the Rights of Persons*; Simon Stern for Book II — *Of the Rights of Things*; Thomas P. Gallanis for Book III — *Of Private Wrongs*; and Ruth Paley for Book IV — *Of Public Wrongs*), along with the varia, and helpful tables of statutes and cases mentioned in Blackstone’s text, at the end of each volume.

Blackstone’s *Commentaries* remain a central source for understanding both historical and modern Anglo-American law – as well as many debates in Anglo-American legal philosophy – and Oxford University Press’s new edition of the *Commentaries* offers a valuable new resource for studying them.

1. See, e.g., Robert M. Cover, *Book Review*, 70 **Colum. L. Rev.** 1475 (1970).
2. **Jeremy Bentham, A Comment on the Commentaries** (1776).
3. Jeremy Bentham, *Truth versus Ashurst*, **The Works of Jeremy Bentham**, Vol. V (1843), P. 235.
4. **William Blackstone, Commentaries on the Laws of England**, Vol. 1 (1768), P. 41 .
5. **John Austin, The Province of Jurisprudence Determined** (Wilfrid Rumble, ed., 1995) [1832], Lecture V, P. 158.
6. Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 **Buffalo L. Rev.** 208 (1979).

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