Blackstone’s Legal Actors: The Passions of a Rational Jurist

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The success of Blackstone’s Commentaries is usually attributed to the ambition of his project: to give a synthetic and integrated overview of the common law, whose intricacy had, up to that time, been seen as a definitive feature of legal thought and method. Others had proclaimed that reason was the touchstone of the law, but Blackstone sought to make good on this assertion by providing an organized and methodical account that showed how the doctrines and procedures of common-law courts could be justified and could be revealed as consistent across the various domains in which the courts operated. Blackstone’s effort, however strained, to display the law’s coherence, helps to explain why the Commentaries were taken up by so many generations of avid readers, but the book’s success also owes something to Blackstone’s method of showcasing this coherence and soliciting the reader’s enthusiasm for it. Daniel Boorstin, in discussing the aesthetic conception that informs Blackstone’s search for coherence and order, rightly presents these neo-classical virtues as the objects of Blackstone’s contemplation, but that description implies that feeling enters into the world of the Commentaries only in the passive sense that the law’s orderly structure becomes a source of pleasure to the person who discerns it. Blackstone does not simply methodize the law; he also personifies the law as an active force that produces consistency, and he similarly casts the reader as someone who partakes of the same sensibility and appreciates the same virtues. Blackstone places both the law and the law student in an affective relation to the rationalizing aims promoted
in the *Commentaries*. By positing, within the text, a reader who attaches to the law in this fashion, Blackstone encourages his reader to take it for granted that this sense of attachment is part and parcel of the study of law.

In enlisting the emotions in the service of rationality, Blackstone seems to anticipate Ronald de Sousa’s view that reason and emotion are not simply complementary – that is, distinct parts of a whole – but can in some instances be interrelated aspects of the same enterprise. De Sousa writes, “Despite a common prejudice, reason and emotion are not natural antagonists. On the contrary, … when the calculi of reason have become sufficiently sophisticated, they would be powerless in their own terms, except for the contribution of emotion.”\(^4\) The emotions play various roles in the *Commentaries*, including that of reason’s antagonist, but the affective orientation of Blackstone’s pedagogy also promotes a view of emotional rationality – not so much the wisdom of trusting in one’s gut feelings, but rather the emotive appeal that summons the legal mind and flows from its operations.

While in some respects Blackstone’s treatment of passion typifies an enlightenment commitment to the elevation of thought over emotion, in other respects his account is remarkably prescient. Law, in Blackstone’s account, is itself identified with certain desires and preferences – traits that Blackstone urges the student to identify with as well. Blackstone seems to recognize that, as Susan Bandes and Jeremy Blumenthal put it, “emotion and cognition interact,” and that by acknowledging the role of emotion “as an essential component of social and institutional dynamics,” we gain a better understanding of “the conditions that lead to legal change.”\(^5\) Perhaps the *Commentaries* might have achieved the same success even if Blackstone’s approach had been blandly programmatic and expository, but in appealing to an audience that is conceived as sharing the same values that the law strives for, Blackstone ingeniously conjures up a reader who
is already on the path to becoming a consummate lawyer, already an enthusiast of the same goals that the law seeks, in its personified form within the text, so that the law’s desires and the reader’s aims seem to merge.

In what follows, I begin by examining Blackstone’s figuration of the law and its passions, and the pattern in which he attributes the same dispositions to the reader. Next, I turn to Blackstone’s treatment of emotion in the criminal law, which describes the violent impulses of passionate actors – now presented as objects rather than subjects of legal thought – whose feelings are distinguished from the emotions that inform the law’s operations and that animate the law’s human exponent. Finally, I consider the place of emotion in Blackstone’s often-quoted paean to the imaginative power of the property right – a tribute that also positions the property-owner and his “affections” as the objects of legal thought, while nevertheless allowing them some claim to the emotional rationality that has already been conferred on the reader. When this passage is considered in relation to Blackstone’s other accounts of legal passion, the property-owner emerges as a figure whose feelings might themselves be the product of a Blackstonian legal education.

I. Law’s Rational Emotions

Law is often an actor in Blackstone’s account: it entertains ideas; it pays regard to human frailty; it makes suppositions, presumptions, and implications; it takes notice of some things and ignores others; and it even displays certain penchants and inclinations. Just as these personifications endow the law with an agency that helps to account for legal development, they also imply that the alterations can be attributed to a source that makes adjustments and expresses preferences as part of a centralized, integrating process. The “series of minute contrivances” that characterize the process of legal change are admirable not only because of their gradual
movement, which avoids “any great legislative revolution in the old established forms,”\textsuperscript{8} but also because they can be assumed to emanate from the same constant impulses over time. They may occasionally leave irregular fragments in their wake, but the underlying drive towards symmetry can be trusted to tidy them up later.\textsuperscript{9}

Blackstone’s most salient observations along these lines occur when he speaks of the law’s own desire for coherence and consistency. For example, with respect to advowsons for which the patron has the right to designate the appointee (an advowson donative), Blackstone notes that if the patron should choose, even on a single occasion, to waive that right, and to allow the Bishop to name the office-holder, “the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will thereupon reduce it to the standard of other ecclesiastical livings.”\textsuperscript{10} In writing about the forfeiture of goods and chattels, as a result of a criminal conviction, Blackstone again refers to the law’s love of uniformity to explain why such a forfeiture must follow “in every one of the higher kinds of offence” – namely, in cases of “high treason[,] … petit treason, felonies of all sorts[,] … [and] self-murder.”\textsuperscript{11} In cases of such serious crimes, all of the defendant’s property – both chattels and real property – would be subject to forfeiture if the defendant was attainted after being convicted. Yet as Blackstone observes, “goods and chattels are forfeited by conviction,” whereas “[l]ands are forfeited upon attainder, and not before.”\textsuperscript{12} As it turns out, activating the forfeiture at these different points in the legal proceedings has the potential to create an inconsistency: “[I]n many … cases where goods are forfeited, there never is any attainder,” because attainder may apply only if the defendant is sentenced to death or proclaimed an outlaw. In such a case, the chattels would be forfeit, but not the land. Nevertheless, Blackstone justifies the process in the name of consistency, explaining that if the defendant should receive a sentence of death of outlawry, it
would be inconsistent for the land to be forfeit, while leaving the goods and chattels as assets of the defendant’s estate. It follows, Blackstone concludes, that if the property of the defendant is to be forfeit, that must occur “upon conviction, or not at all; and, being necessarily upon conviction in those [cases involving a possible sentence of death or outlawry], it is so ordered in all other cases, for the law loves uniformity.”

One need not review these doctrines in detail to see that the love of uniformity is neither a necessary nor a sufficient justification for the results that Blackstone describes. English common law in the eighteenth century tolerated many exceptions and inconsistencies. The case of the donor’s waiver for an advowson could easily have been accommodated as a temporary, rather than a permanent, departure from the prior practice. Alternatively, the treatment of waiver as a permanent condition could easily be explained on the ground that any waiver of a right to control the transfer of property will eliminate that right for once and all, because it simplifies the legal conditions governing the property and eliminates a possible source of uncertainty. This rationale – the elimination of uncertainty – offers an equally plausible explanation that was readily available in Blackstone’s era, and it often applies even when uniformity would not be the result. Where the enforcement of a right is widespread, so that the way to create uniformity would be to treat a waiver as a one-time aberration, it might nevertheless seem preferable to give permanent effect to the waiver, so that third parties do not perceive the right as winking in and out of existence. As for the forfeiture of chattels upon conviction of a felony, not only might this result in inconsistency, as already noted, but the policy could in any case be easily explained simply as a penalty that the sovereign is entitled to impose on those convicted of serious crimes. Indeed, that explanation would have the virtue of explaining why the lesser forfeiture (of chattels, but not of land) is always appropriate – namely, because the sovereign, exhibiting
grace and restraint, chooses always to exact the lower penalty, and reserves the higher one only for cases in which the nature of the offense itself demands it. In both instances uniformity may be achieved by diminishing a party’s rights, but one could imagine an equally pervasive uniformity achieved by a law that cherishes rights and demands very strong justifications to overcome any presumption in favor of depriving persons of property claims.

These examples do not show that the love of uniformity is an inaccurate explanation; rather, they show that it applies so easily, where it can be offered, that it does not explain very much. The notable feature in both instances, and in many others that appear in the Commentaries, is Blackstone’s readiness to reach for uniformity as a rationale. His enthusiasm for it is part and parcel of his conception of the common law generally, and of the ideal student of the common law. Throughout the Commentaries, Blackstone extolls the common law for its harmony, consistency, symmetry, and proportionality. And in extolling these virtues, he often makes a point of identifying the reader as someone who is capable of appreciating them – someone who would seek out those virtues himself.

A crucial feature of this legal passion, and one that accords perfectly with its aim, is its abiding nature. To be sure, Blackstone does equate certain emotions with “occasional, intense, unpredictable moods that interfere with a steady state of rationality,” as we will see in his treatment of criminal law. In his characterization of law’s own inclinations, however, Blackstone shows no reluctance to present its rationality as itself a kind of passion. He highlights what Bandes and Blumenthal calls “the affective component[s] of law” and indeed he makes these components essential to law’s functioning. The love of uniformity constantly drives the law’s operations, and one of the distinctive features of Blackstone’s pedagogy involves his efforts to instill the same desire in the student. Numerous passages in the Commentaries might be
understood as glosses on Bandes and Blumenthal’s observation about our capacity to redirect our emotional energies: “Not only can emotions be managed, they can be educated.”¹⁹ The Commentaries are so thoroughly suffused with references to law’s emotional impulses that even the reader who does not consciously register this effect might nevertheless feel its impact. As Bandes and Blumethal observe, “[T]his educative capacity exists … even for intuitive, unconscious emotions.”²⁰

One of the passages that most fully captures these features appears early in the second volume of the Commentaries. Blackstone explains that a full understanding of property law requires frequent resort to historical examples, even if the practice might appear irrelevant to the study of contemporary law:

[T]hough, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time mis-employed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientifical manner, without having recourse to the antient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendor.²¹

The study of obsolete law is useful but also yields rational entertainment; just as the traveler who gazes on majestic ruins derives both instruction and pleasure from the opportunity. The
informative and entertaining aspects of the experience, it seems, arise from the same source. The ancient ruins, beheld in their present state of decay, would be a fascinating object of contemplation even if they had no modern counterparts, but because they are the precursors of contemporary efforts, the original symmetry of these antiquities, insofar as the observer can recognize it, is also satisfying and offers a template for the correct proportions of modern structures. (This point seems to have registered on at least one of Blackstone’s readers, Peter du Ponceau, who in the early nineteenth century would translate the architectural simile into a sculptural one, recommending “gradual and almost insensible” alterations with “the delicate chisel, and not the rough axe,” because “our system of laws” resembles “one of those ancient statues of Phidias or Praxiteles, which have been in part mutilated or defaced by the hand of time.”22) Finally, the contrast between the object’s current state and its former grandeur is itself an instructive reminder of the fate of all human projects.

Blackstone’s architectural metaphor, encompassing the foundations on which modern law is erected, anticipates his much better-known comparison of the common law to a refurbished gothic castle. What emerges more clearly from this elaboration of the analogy is the way in which the student shares the same traits that distinguish the law – or more precisely, the way in which Blackstone’s pedagogy serves at once to identify a set of paradigmatically legal virtues and to strive, while identifying those virtues, to inculcate them in the student as well, and hence to create students who are equal to the law’s configurations. The scholarlike scientific approach to law equips students with the ability to find rational entertainment in their studies, and also to use the same talents in their travels abroad, to antique lands.

The pupil who approaches the study of law in this spirit will share Blackstone’s fondness for the common law and his hostility towards the legislators who have ventured to rearrange it.
The pristine proportions of the law’s original structure, Blackstone explains, have been altered not simply through the passage of time, but more insidiously through the ill-advised efforts of various parliaments that have faddishly introduced new regulations that do not comport with the common law:

> The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties.²³

Again, the primordial virtues inherent in the common law – the symmetry and simplicity of a balanced, integrated, coherent system – do not need to be defended or justified, because they are so obviously the proper basis of a legal aesthetic. In conveying his impatience and disgust implicitly, Blackstone models the attitude of the legally informed gentleman whom the student should aspire to become.

At the outset of the *Commentaries*, in the introductory chapter to the first volume, Blackstone outlines the benefits that will redound to the legal system when it is studied in the scientific manner he recommends:

> The advantages that might result to the science of the law itself, … perhaps would be very considerable. The leisure and abilities of the learned … might either suggest expeditents, or execute those dictated by wiser heads, for improving its method, retrenching its superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system: a task,
which those who are deeply employed in business, and the more active scenes of
the profession, can hardly condescend to engage in.24

Here, the project of smoothing out the inconsistencies, readjusting the parts to make them more
symmetrical, is expressly the aim of this comprehensive overview. By implication, the pupil who
undertakes this course of study will not only come to admire the system as it exists, but will
come away with the skill and the desire to reform the system where it has gone astray. In fact,
Blackstone suggests relatively little by way of reform in the Commentaries, and the proposals he
does offer relate primarily (though not exclusively) to legislation rather than reform of the
common law.25 Yet even if the project of reconciliation and retrenchment receives less attention
than Blackstone seems to promise at the outset, his description of the task lends a dignity and
sense of purpose to an enterprise that might otherwise seem essentially practical and even self-
interested.26

Blackstone’s achievement, then, consists as much in his image of the lawyer as in his
image of the law. In delineating a rational and orderly structure for the law, Blackstone also
imagines its ideal observer, consumer, and exponent: someone similarly inclined to preserve the
law’s carefully crafted proportions and to restore them where they have been disturbed. Arguably
Coke’s Institutes, or Hale’s Analysis of the Law, could similarly be examined in terms of a
postulated reader who is adequate to the subject, but in Blackstone’s case this figure seems to be
imagined more consciously and is endowed with very different attributes from those that a
reading of Coke or Hale might yield – doubtless a result of the Commentaries’ origin as lectures
to students. Indeed, the attributes of Blackstone’s lawyer are different from the ones that
characterize most lawyers in eighteenth-century fiction and drama. Portrayals of lawyers and
judges in nineteenth-century literature and in legal treatises, however, include a wider variety of
personalities, including many more examples of the sort of urbane, equable, and calmly judicious figure whom Blackstone contemplates. The Commentaries are often credited as inaugurating a new tradition of legal treatise-writing among Anglo-American lawyers, but in seeking to rationalize the law, Blackstone also helped to imagine its expositor as a paradigm of rationality, a figure for whom the law’s drive towards uniformity and consistency is itself a source of affection.

II. Criminal Passions

In contrast to the alignment between rationality and emotion that underwrites the Commentaries’ pedagogical efforts, Blackstone associates emotion with the suspension of rational thought when he turns to the criminal law. The fourth volume of the Commentaries, which takes up this subject, presents emotional actors as objects of the law’s concern rather than as adjutants of the law’s operations. Thus his account alternates between what Dan Kahan and Martha Nussbaum have called “the mechanistic and the evaluative conceptions of emotion,” corresponding respectively to a view of “emotions as forces that do not contain or respond to thought” and a view holding that “emotions express cognitive appraisals” and can be “shape[d] … through moral education.” However, Blackstone does not assume that a person overcome by an emotional force should necessarily be treated “tenderly” by the law. At first blush, it might appear that he relies on the evaluative conception when focusing on the educative process by which his reader is brought to share the law’s penchants, and that he uses the mechanistic conception when considering the kinds of emotional responses that justify mitigation of a criminal defendant’s liability. That distinction, however, would reflect a more deeply psychological view of the emotions and their responsiveness to manipulation than the Commentaries affords. Indeed, as many scholars have observed, when discussing the issue of
intention in criminal law – a subject that offers wide scope for psychological inquiry –
Blackstone remains content with an external account that assesses intention on the basis of the
defendant’s actions. \(^{28}\) While he draws on both the mechanistic and the evaluative views of
emotion, he does not consistently relate these views to the implications associated with them
today. To be sure, in some instances Blackstone suggests that when violence results from
mechanistic emotions, the actor’s punishment should be mitigated, but he does not suggest that
as a general matter, the law should be less severe in those cases.

At the beginning of his discussion of criminal law, Blackstone blends the mechanistic and
evaluative conceptions in what amounts to a plea for leniency and an exhortation to study the
subject carefully:

*The infirmities of the best among us, the vices and ungovernable passions of
others, the instability of all human affairs, and the numberless unforeseen events,
which the compass of a day may bring forth, will teach us (upon a moment’s
reflection) that to know with precision what the laws of our country have
forbidden, and the deplorable consequences to which a wilful disobedience may
expose us, is a matter of universal concern.* \(^{29}\)

“Ungovernable” passions are, of course, incapable of being deterred by the actor’s awareness of
the attendant punishment, whereas the crime of the “wilfully” disobedient actor consists in part
in his stubborn persistence in the face of a prohibition that he should have heeded. The whole
passage carries the sense that crimes occur because of random chance, as much as because of any
habitual disposition. \(^{30}\) At the same time, however, Blackstone also suggests that we can avoid the
deplorable consequences that fortune might tempt us to provoke, by learning “precis[ely]” what
is prohibited. The effect is to place criminal behavior in an uncertain territory which, by virtue of
being located halfway between the ungovernable and the educable, is always capable of being associated with either one.

To be sure, in some instances Blackstone makes a point of arguing for leniency because of crimes committed under the sway of strong emotions. Thus, for example, he observes that “the violence of passion … may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses.” A classic context for this point involves the distinction between manslaughter and murder. In recapitulating the distinction, Blackstone offers no observations about the allowance made for unreflective anger, but presents the doctrine as if its rationale were self-explanatory: “[M]anslaughter arises from the sudden heat of the passions, murder from the wickedness of the heart.”

Therefore, he continues,

if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion: and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, … it is manslaughter. But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.

In explaining why the person actuated by provocation incurs a lesser penalty, Blackstone contrasts passion and reason, equating the hasty act with the passionate one. The implication is
not so much that a stricter penalty would have no deterrent effect, but rather that the passionate actor simply lacks the kind of deliberate intent that would justify treating him as a murderer. In short, law pays “regard to human frailty” when passion blocks the formation of intent, and this effect seems to be measurable entirely in temporal terms.

According to this view, someone acting under the sway on an ongoing passion is not entitled to the same consideration, and therefore even a “continued act of passion” must be relatively brief. This explains why Blackstone can acknowledge that the love of gambling may be completely overwhelming, and yet he does not conclude that the impassioned gambler deserves any clemency:

[G]aming in high life … [is] a passion to which every valuable consideration is made a sacrifice … When men are thus intoxicated with so frantic a spirit, laws will be of little avail: because the same false sense of honour, that prompts a man to sacrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may learn what penalties they wilfully incur.34

That the gambler is frantic and intoxicated does not, apparently, mean that he cannot act with deliberation, as the final sentence makes clear. As this passage shows, the question is not whether the law can have a deterrent effect; after all, Blackstone readily acknowledges that “laws will be of little avail.” Rather, the question is whether the actor is in thrall to a brief and reactive passion, or one that, simply because of its duration, can be assumed to allow for deliberation. In the one case, passion simply prevents the formation of rational thought; in the other, passion and reason seem to coexist, at least to the point where the actor deserves no solicitude for allowing passion to gain the upper hand. The contrast between homicide and gambling underscores
Blackstone’s lack of interest in a more densely psychological account of criminal behavior. In effect, he turns to an objective standard – temporal duration – to resolve a problem that later commentators would strive to understand in much more individualized terms.

In arguing for the reform of criminal law, Blackstone similarly associates passion with haste, and in that context, again, he opposes it to rationality. He suggests that the asymmetries and disproportionalities that have ruined the criminal law – in particular, the overuse of capital punishment – can be put down to careless legislatures:

The enacting of penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons, who know what provisions the law has already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil.\(^{35}\)

For the same reason, Blackstone notes that when members of the House of Commons charge a governmental official with criminal abuse of his power, he cannot be tried “before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser.” Rather, “this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests, nor the same passions as popular assemblies.”\(^ {36}\)

If the law student can be regarded as temperamentally eligible to sit in the House of Lords (even if not necessarily qualified by birth to do so), the criminal actor – at least the one whose crime is motivated by passion – acts with the same rashness as the popular assembly. The
field of criminal law provides Blackstone with an alternative sphere for explaining the relation between emotion and reason, and it allows him, by implication, to set off even more strongly the virtues of the rational passions that characterize the law and its exponent – the passions of the calm, steady, contemplative, and thorough scholar.37

III. Property and Affect

These reflections on the objects of the lawyer’s attention and the rational feelings that actuate the spirit of legal inquiry, in turn, may offer a means of reconsidering one of Blackstone’s most famous pronouncements about the feelings that the law inspires. At the beginning of the second volume, when introducing the subject of property and describing its attractions, Blackstone writes,

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.38

Given that much of the volume is dedicated to enumerating the many doctrines that undercut this dream of exclusive control, commentators have wondered whether this opening sketch should be taken literally or ironically.39 The vision of a landlord securely presiding over his little fiefdom soon gives way to an extended discussion of the tenure system, itself based on the premise that all land is held of the king.

In the context of Blackstone’s other reflections on the passions that law exhibits and accounts for, his reflections on the affective powers of the property right are notable for the assurance with which they are ascribed to “mankind” in general. The “affections” that Blackstone contemplates here do not flow from the law itself (as with the love of uniformity,
noted earlier), nor are they objects of the law’s solicitude (as with some of the figures in criminal
law); rather, these affections are inspired by a set of beliefs about the structure and endowments
that the law facilitates. Cast in the generalizing cadences that mark the first sentence of Austen’s
_Pride and Prejudice_, this description, like Austen’s, evidently applies to a very specific group: in
this case, the same audience to whom Blackstone has recommended the study of law at the
beginning of the first volume.\footnote{40} There, he observes that if nothing else, “the understanding of a
few leading principles, relating to estates and conveyancing, may form some check and guard
upon a gentleman’s inferior agents, and preserve him at least from very gross and notorious
imposition.”\footnote{41} In short, Blackstone describes the affections that might be shared by the student
who has been educated – who is being educated – by the _Commentaries_. We might take this
passage as an index of the student’s own development, as a marker of the distance between the
fond but somewhat naïve desires of the legally uninformed gentleman and the sober
understanding of the one who emerges at the end of this course of instruction. On that view, the
vision of “sole and despotic dominion” is not ironic so much as heuristic, a convenient starting
point that will lead to a fuller and more complex picture, but nevertheless an appealing starting
point insofar as it accounts for the subject’s allure.

Indeed, Blackstone does not seem to regard the absolutist vision as simply mistaken,
given that he also refers to it – without any talk of imagination or affection – in the first volume.
After discussing personal security and personal liberty, he explains that “[t]he third absolute
right, inherent in every Englishman, is that of property: which consists in the free use,
enjoyment, and disposal, of all his acquisitions, without any control or diminution, save only by
the laws of the land.”\footnote{42} The final qualifier, of course, accounts for most of the second volume,
and reminds us again of the work still to be achieved before the student can arrive at a full
understanding of this right and its attendant powers. As with the better-known passage, however, this one seems to celebrate the sense of control it envisions, and to suggest that the property-owner’s longing for exclusive control represents a legitimate aspiration. Blackstone ultimately qualifies this “absolute” right, but he presents the land-owner’s vision of sole dominion as one of the abiding, rational passions of the law, not one of the temporary, irrational passions that the law charitably accommodates as a concession to human frailty.

Thus if the fondly imagined right of control betokens an exaggerated sense of untrammeled power, that attitude turns out to serve as an auspicious premise for the land-owner’s legal education. Just as the law itself, according to the metaphor of the modernized castle, continues to preserve a due sense of proportion as it keeps making small adjustments, the land-owner begins with a sense of unified dominion and order (which he administers), and is gradually led to understand the ways in which he must cede control, insofar as “the laws of the land” require it. Indeed, if his home is his castle, then he is the custodian of the very edifice that embodies the law in Blackstone’s account. Seemingly a member of the same audience to whom the Commentaries are addressed, this gentleman harbors the same passions that Blackstone associates with the law. The landlord’s imagined dominion does not simply present a foil for the view of property law that Blackstone will proceed to elaborate, but it also identifies the landlord himself as an example of the figure whose legal education forms the subject of the Commentaries.

Endnotes

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According to Edward Gibbon, Blackstone sometimes exhibited the wrong kind of emotional attachment in his efforts to demonstrate the underlying coherence of the law. Gibbon observed that in addressing the law’s defects, Blackstone showed “the becoming tenderness of a pious son who would wish to conceal the infirmities of his parent.” British Museum Add. MSS 34,881, f. 216v; quoted in Sir William Holdsworth, *A History of English Law* (London: Methuen, 1938), XII:728.


Consider, for example, the following examples from the *Commentaries*: “Such indulgence does the law shew to the frailty of human nature” (1:438); “such public oppressions as tend to dissolve the constitution … are cases which the law will not, out of decency, suppose; being incapable of distrusting those, whom it has invested with any part of the supreme power” (1:237); “the law will take notice [of property in land] and not of [property covered by water]” (2:18); “exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view” (2:24); “the law will not suppose it possible” for a parson to agree to take a smaller modus than he is entitled to (2:30); “the law presumes that he, who buys an office, will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public” (2:36-37); “the law, in favour of infants, is always jealous of guardians” (2:89); “the law … is always ready to catch at any thing in favour of liberty” (2:94); “we may
judge of the favourable disposition, that the law … hath always shewn to [copyholders]” (2:98); “the law prefers … simple and ordinary remedies” (3:233).

7 Michael Meehan, in describing the Commentaries as a “biography,” similarly hints at the significance of personification in Blackstone’s account. Meehan writes that “Blackstone’s Commentaries is presented as a form of legal biography, a tale of the ‘inner’ struggling to re-manifest itself outwardly.” Michael Meehan, “An Anatomy of Australian Law or ‘The Human Element in Legal Argument,’” in J. Neville Turner and Pamela Williams, eds., The Happy Couple: Law and Literature (Sydney: Federation Press, 1994), 384. This habit of personification was one of the features that Bentham fixed on, in his attack of Blackstone’s conservatism:

“[S]ome … look upon it as a kind of presumption and ingratitude, and rebellion, and cruelty, … to suffer any one so much as to imagine, that an old-established law could in any respect be a fit object of condemnation. Whether it has been a kind of personification that has been the cause of this, as if the Law were a living Creature … I shall not here enquire.” Jeremy Bentham, A Fragment on Government (London: Payne, 1776), xiii.

8 Blackstone, Commentaries, 3:268.


11 Ibid., 4:379-80.

12 Ibid., 4:380 (emphasis in original).

13 Ibid.

14 See, e.g., Noy v. Ellis, (1676) 2 Chan. Cas. 220, 221; 22 Eng. Rep. 918, 919 (“it was needful that the Point should be settled; and no Matter what the Law is, so it be certain”); Butler v. Duncomb, (1718), 1 P.W. 448, 452; 24 Eng. Rep. 466, 467 (“where Things are settled, and rendered certain, it will not be so material how, as long as they are so, and … all People know how to act”); Walton v. Tryon, (1753) Dick. 244, 245; 21 Eng. Rep. 262 (“Certainty is the mother of repose, and therefore the law aims at certainty”).

15 Andrew Amos, in his mid-nineteenth-century treatise on Hale, pointed to another inconsistency created by this policy, noting that whereas in this passage, Blackstone justifies forfeiture before the defendant receives a final sentence, elsewhere he delivers a “eulogy on the practice of waiting for an attainder upon escheats,” because (as Blackstone puts it), there always remains “a possibility of the innocence of a convicted prisoner; something may be offered in arrest of judgment, … and thereupon the conviction may be quashed.” Amos concludes, “It must be admitted that it required an ingenious and inveterate optimist to extol the policy of the law, both in waiting for judgment, and in not waiting for it.” Andrew Amos, *Ruins of Time: Exemplified in Sir Matthew Hale’s History of the Pleas of the Crown* (London: Stevens and Norton, 1856), 54-55.
Again, numerous commentators have discussed this tendency; see, e.g., Boorstin, 91-99;


The student and reader are gendered male throughout this discussion, to reflect the historical circumstances in which Blackstone lectured and wrote.


Whereas Deigh imagines this bond attaching to the addressee of the law’s demands, however, Blackstone’s affective rhetoric also encourages the student to identify himself with the law’s operations.


Blackstone, *Commentaries*, 2:44. Blackstone returns to these majestic ruins in volume three, when defending English law Latin as a language “calculated for eternal duration,” just as “[t]he rude pyramids of Egypt have endured from the earliest ages, while the more modern and elegant structures of Attica, Rome, and Palmyra have sunk beneath the strokes of time.” Blackstone, 3:

22 Peter S. du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States (Philadelphia: Small, 1824), 130. Conversely, Hugh Henry Brackenridge could argue, around the same time, that judges were better positioned than legislatures to undertake legal reform precisely because “[t]he legislature can act only by details, and in particulars, whereas the able judge can remove at once, or alter, what was originally faulty or has become disproportioned in the building.” Yet he warned that “no one but a skilful architect, and who can have the whole edifice in his mind … ought … to attempt this.” Hugh Henry Brackenridge, Law Miscellanies (Philadelphia: Byrne, 1814), 75. For further discussion of this passage and its relation to early nineteenth-century American thought about legal reform, see Morton J. Horwitz, The Transformation of American Law 1780-1860 (Cambridge, Mass.: Harvard University Press, 1977), 24.

23 Blackstone, Commentaries, 1:10.

24 Ibid., 1: 30.

26 For example, in “demonstrat[ing] the utility of some acquaintan[e]ce with the laws of the land,” Blackstone mentions, among other benefits, the use of learning enough about real property to acquire “some check and guard upon a gentleman’s inferior agents,” and the value of understanding the “forms necessary in the wording of last wills and testaments.” Blackstone, *Commentaries*, 2:6-7.


30 To that extent, Blackstone anticipates modern scholarship that shows how “people tend to inaccurately predict how they … will be emotionally affected in the future by negative events such as harm or injury.” Bandes and Blumenthal, “Emotion and the Law,” 166 (citing Jeremy A.


32 Ibid., 2:190.

33 Ibid., 2:191. Blackstone gives an equally matter-of-fact summation when explaining the doctrine of self-defense in analogous terms: “[T]his is what the law expresses by the word *chance-medley*, or (as some rather chuse to write it) *chaud-medley*: the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion: both of them of pretty much the same import.” Ibid., 4:184. For a helpful discussion of the “heat of passion” defense and the social psychological research on the assumptions driving this defense; see Steven J. Sherman and Joseph L. Hoffman, “The Psychology and Law of Voluntary Manslaughter: What Can Psychology Teach Us about the ‘Heat of Passion’ Defense?” *Journal of Behavioral Decision Making* 20 (2007): 499–519.


36 Ibid., 4:258.

37 These passions belong to the “set of emotional variables” that Susan Bandes associates with “the mainstream notion of the rule of law”; as she explains, “[T]he passion for predictability, … and mechanisms such as distancing, repressing, and isolating one’s feelings from one’s thought processes, are the emotional stances that have always driven mainstream legal thought; as a result, they avoid the stigma of ‘emotionalism.’” Bandes, “Empathy, Narrative, and Victim Impact Statements,” *University of Chicago Law Review* 63 (1996): 368-69.


In expounding on the affections that the gentleman-landowner cherishes when contemplating his property rights, Blackstone might almost be responding to Addison’s comments about the property-inspired pleasures in store for the educated virtuoso, and reaffirming the class distinctions that inform those comments: “A Man of a Polite Imagination is let into a great many Pleasures, that the Vulgar are not capable of receiving. . . . It gives him, indeed, a kind of Property in every thing he sees.” Joseph Addison, The Spectator, ed. Donald F. Bond, 5 vols. (Oxford: Oxford University Press, 1965), 1:288 (no. 411, June 21, 1712). Addison suggests that the imaginative capacity itself has an appropriative force, whereas for Blackstone, the property right is a spur to the imagination.

Blackstone, Commentaries, 1:7.

Ibid., 1:134.

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