Mr. Justice Blackstone: the Commentator on Common Pleas

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Abstract

Although William Blackstone served longer as a judge on the English Court of Common Pleas than he had as the inaugural Vinerian Professor of English law at Oxford, his post-professorial legal life has been almost entirely ignored by scholars. Only one article, written almost fifty years ago and focused narrowly on legal doctrine, has offered any insight into Blackstone as a judge. And yet the subject is of great interest for two reasons. First, Blackstone was the first law professor to become a judge on an English common law court. Second, his judicial opinions provide an alternative, and arguably a more accurate, path into his legal thought. The lectures that became the Commentaries on the Laws of England were written when he was barely thirty years old and had spent fewer than seven unsuccessful years at the bar. By contrast, his judicial opinions are the work of a mature legal thinker. It is not possible accurately to assess how well the jurisprudence expressed in the Commentaries reflects his true legal thought without also studying his opinions and his other available practical legal writing. This article argues that Blackstone did, in fact, continue to view the law through the lens of the highly systematized and abstract rules that he presented in the Commentaries. Approaching the law with an academic mindset untempered by the realities of legal practice, he did not fully appreciate how the common law worked. Consequently, the man whose work is so admired in American law and who is so often cited as representing the state of the law at the time of the Founders, did not himself have a very good understanding of the legal mind of his age.

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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. At the center sat the newly-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. 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. At one end, George Nares took his place as a new judge. “[B]red to the law,” he was the quintessential common lawyer, and the only one of the four who had practiced at the Common Pleas bar.

And 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 the first law professor to serve as a judge on a common law court. Blackstone joined the bench the previous February after a successful career not as a barrister, like the other members of the Court, but as a law professor. 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, but also a work in which the author presented the law at a level of generality that glossed over the nuances of the real common law. What did it mean to place such a person on the bench? Was his treatment of the law in the Commentaries merely a pedagogical concession by a man with a common lawyer’s understanding but who felt the professor’s need to turn the complexities of the law into a clear and simple system to aid his students’ learning? Or did Blackstone’s broad, categorical statements about how the law functioned truly reflect his personal beliefs?

1. On the date, see 3 Wils. 148. On judicial attire see J.H. Baker, A History of English Judges’ Robes, 12 COSTUME 27, 32 (1976). 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. 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. 1 THE MICROCOMOS OF LONDON, OR LONDON IN MINIATURE plate before pg. 203 (1904). About the seating arrangement of the judges, little is known for sure. 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).

2. 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).
Such questions cannot be answered through recourse to the Commentaries alone, and yet the reams that have been written about Blackstone’s legal thought have depended solely on an analysis of that iconic work, a work aimed at giving young gentlemen a veneer of legal knowledge and composed when Blackstone was himself an inexperienced lawyer. But the mature, experienced Blackstone also left a trail of hundreds of additional pages detailing his thoughts on law in his letters, legal arguments as counsel, opinions of counsel, and judicial decisions, all of which have gone largely unexamined. These documents provide a different route into Blackstone’s legal thought.

This paper argues that Blackstone’s view of the law as a system of sharply defined rules was not merely an academic conceit intended to help him structure his lectures and eventually the Commentaries but was rather a sincerely held view of how the law should be approached. His lectures succeeded because he presented the English law as a coherent, comprehensible system, and in so doing he managed to create clarity where clarity did not exist. But he did not, apparently, view that clarity as an illusion or crutch merely to be deployed to aid beginners. Instead, at the bar and on the bench, he persisted in his notion of the law as composed of straightforward, flat, and knowable rules ordered into a logical system, and even after nearly a decade on the Court, he still revealed the Commentator’s epistemological overconfidence in the clear-cut nature of law.

Blackstone’s rigid treatment of law and authority contrasted with the pragmatic flexibility of the practicing common lawyer. From the lectern, he could present the law as set of generalizable rules to near universal approbation. But on the bench such an approach sometimes made him seem tone deaf and out of step with his colleagues, traditionally-trained lawyers, influenced perhaps by Lord Mansfield’s more equitable approach, who did not have as a systematic a view of law and who were less inclined toward applying it as if it were composed of abstract, imperative rules.


4. 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, JUDGES OF ENGLAND 249 (1864); William Blake Odgers, Sir William Blackstone, 28 YALE L.J. 542, 549-50 (1919); 12 William Holdsworth, A History of English Law 707 (1938); Joseph W. McKnight, Blackstone: Quasi-Jurisprudent, 13 SOUTHWESTERN L.J. 399, 409-10 (1959). A new biography of Blackstone has just appeared and devotes two chapters to a very thorough social and administrative but not legal or doctrinal study of Blackstone’s time on the bench. WILFRID R. PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 259-302 (forthcoming October 2008).

5. Prest, supra note 4 at.

6. On Mansfield and his equitable approach to the law, see 1 OLDHAM, supra note 1 at 196, 201-203 (1992).
ironically but perhaps not surprisingly, the man who had to forsake the
standard English lawyers’ treatment of the law in order to revolutionize how
it was taught and even perceived, never fully accommodated himself to the
reality of how law actually functioned.

The paper examines what happened when Blackstone the Commentator
became Blackstone the lawyer and judge. Part one describes his early vision
of a systematic law and discusses how his beliefs were mirrored in his work
at the bar. Part two turns to his judicial opinions and the approach to the law
he revealed in them. This section shows how Blackstone’s particular
understanding of the law colored his opinion style, his attitude toward
precedent and authority, his discomfort with judicial discretion, and his
theory of testamentary interpretation. Part three compares Blackstone’s
judicial philosophy to that of his brethren, Justices de Grey, Gould, and
Nares, to show how he differed from men who became judges after following
a more typical path to the bench.

I. Blackstone’s Vision of the Law

Blackstone arrived on the bench with his ideas about law already
established. But unlike his brethren, who had spent decades at the bar, he
had not acquired his views through practice. Instead, they came from his
experience as an academic thinker and systematizer. This section
investigates the origins of the philosophy of law he displayed as a judge and
points to early examples of his failure to be fully socialized into the common
lawyer’s mindset.

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. 7
In Littleton’s time, in the fifteenth century, during what Blackstone believed
to have been the heyday of the common law, the house had been
architecturally coherent, but over time it had acquired accretions of
conflicting architectural styles and uneven workmanship.8 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.” 9 The apparent lack of symmetry did not, however,

8. 4 BLACKSTONE, COMMENTARIES *425-28.
destroy the original edifice. It merely made its underlying logic more difficult to discover.\textsuperscript{10}

This letter is the earliest known record of Blackstone’s instinct to organize the law. 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[.]’”\textsuperscript{11} This statement displays the supreme overconfidence that would dog Blackstone’s understanding of law for the rest of his career. He did not treat systematization as a tool. Instead he went to the extreme in treating the law as crystalline, or perhaps it is more apt to say that he retained a layman’s idea of law, and believed that the system was everything: identifying and sorting the rules was all that was required to know the law.

Unfortunately, nothing in Blackstone’s early biography explains how he succeeded in envisioning a system underlying the English law, a notorious muddle that no one before him had proven able to organize satisfactorily.\textsuperscript{12} It may be a tribute to the prodigious administrative abilities he displayed throughout his life,\textsuperscript{13} and studying the Roman law at Oxford surely had some influence, since the civil law was presented as a logical system of substantive rules.\textsuperscript{14} But he was neither the first nor the only common lawyer to have learned the civil law.\textsuperscript{15} Most of them, however, upon coming to the bar, ended up adopting the normal common lawyer’s way of thinking about law, which privileged procedure over substantive rules, case-by-case adjudication over general legal principles or concepts, and getting to a solution that was good for one’s client over insisting on abstract truth.\textsuperscript{16}

Blackstone did not make that step, which might be one reason that, despite his phenomenal knowledge of the black letter law, he 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.\textsuperscript{17} His

\textsuperscript{10} Id.
\textsuperscript{11} R. Graves, The Triflers 54 (1806).
\textsuperscript{12} Milsom, supra note 3 at 8.
\textsuperscript{13} Prest, supra note 4 at .
\textsuperscript{15} David Lemmings, Gentlemen and Barristers. The Inns of Court and the English Bar, 1680-1730 93 (1990).
\textsuperscript{17} His brother-in-law and first biographer affirmed that he “made his Way very slowly, and acquired little Notice and little practice. . . .” James Clitherow, Preface to 1 William
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 struggled to find work. But Blackstone also suffered from poor advocacy skills and a dislike of practice that he never seems to have lost. 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 Deficiency.

Those inclinations and principles, however, apparently made him an ideal person to teach the English law. In October 1753, he began to lecture privately at Oxford, and in 1758, he became the inaugural Vinerian Professor. These lectures turned into the Commentaries, eventually published between 1765 and 1769.

It may be difficult at this remove fully to comprehend what a masterful achievement the lectures and Commentaries were. Here was a man who had been at the bar for about seven years, during which he had seen little business and had 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 representing All Soul’s in a lawsuit in the Archbishop’s court (a court that did not use the common law), in short, doing just about everything except diligently pursuing his legal career in London. And yet, in the course of a relatively brief period of time, he managed to accomplish something no one had done before and create a synthesis of the law so enduring that it has remained in print and the object of discussion for almost 250 years. He did this by effectively turning his back on the usual English legal culture in the eighteenth century. 76-77, 156 (2000).
lawyer’s way of looking at the law. Rather than remedies and procedure, he focused on substance. In 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 synthesis describing the law as a coherent system, built upon clear principles and rules and concerned with what the law was rather than how it worked in practice.  

Blackstone did not originate the idea of treating law as a system. He picked 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.” But where Bacon, Hale, and Gilbert each turned to systematizing after having established their legal and judicial careers, Blackstone came to it as the stereotypical academic who taught because he could not do. He may have initially become interested in trying to place the law in a methodical framework in order to assist his and his students’ studies, but his later legal writing suggests that the need to keep the law sorted into tidy boxes ended up becoming the transcendent principle on which he grounded his belief about how the law worked.

Blackstone presented, in his lectures’ potted account, a law composed of clear, fixed rules with well-defined boundaries all of which could be slotted into their places within his system. This law was, as perhaps behooves a classroom presentation, uncomplicated, sharp-edged, and lacking in nuance. As one near-contemporary critic astutely complained about the Commentaries, “there was scarcely one page in Blackstone in which there was not one false principle and two doubtful principles stated as undoubted

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.” Clitherow, Preface, supra note 17 at xxix.

24. LOBBAN, supra note 16 at 12, 47.
25. DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF LAW 20-22 (1941); 1 COMMENTARIES at *27 (law as science), 32 (“If practice be the whole that he is taught, practice must also be the whole he will ever know: if he be un instructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedent will totally distract and bewilder him: ita lex script 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.” Regarding the beauty of his style see the praise in, e.g., JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT xli (1776); WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 3-4 (1781).
law.”27 Such sentiments made for a coherent presentation of the law in his textbook but obviously did not correspond to what happened in legal practice. The advice George Nares gave to a client in 1753, the same year Blackstone began teaching, illustrates the difference. 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:

The Law seems now clearly to be settled that tho’ Innkeepers can detain a Horse &c for his keeping as a sort of pledge or security for their Demand, yet as the property still remains in the Guest who left him, they cannot justify the sale of the Horse, unless by the Custom of the City of London and perhaps of Exeter; yet 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 for otherwise he might be oblig’d to spend 50lb in Hay &c where the Horse & Owner are not worth 5lb. In the present Case ‘tis stated Mrs. Townsend ask’d the plaintiff to take away his Horse after being there 2 Months & on his refusal she ask’d w[ha]t she must do with him to which he answered w[ha]t she pleased; and if this can be proved and that the keeping came to more than the Value of the Horse at the time of the Sale, I think no Jury wou’d be very willing to give a Verdict for the plaintiff.28

Nares knew the law, and he probably believed that it was “certain,” but as a practitioner he also viewed it with subtlety, as something one followed strictly if one had to and got around flexibly if one needed to. He 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.”29

Blackstone did not quite grasp this classroom versus practice distinction. The rules being fixed, he assumed that they, by logical steps, provided the right answer, and ostensibly the only right answer, to legal disputes. Finding such answers was the job of the judge, those “depository
of the law; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.”

The judges arrived at their decisions using a sort of scientific approach, gathering, ordering, and analyzing evidence in the form of precedents and works of “intrinsic authority,” such as Bracton, Littleton, Fitzherbert, and Coke. And when judges came to a conclusion based on this evidence, they gave, not their 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.”

In other words, once the judge had (correctly) stated a rule, he would be led inexorably to the right decision in the case. At that point, “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. . . .” The law was the law, and once the law had been expressed, future judges need, and even must, do nothing more than apply it to the letter.

Such an approach, if Blackstone took it at face value, left no room for judicial discretion or individual justice. And indeed he does appear to have taken it quite at face value. In the Commentaries he 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.” 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 (1776), 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.”

30. 1 BLACKSTONE, COMMENTARIES *69.
31. Id. at *72-73. 2 id. at *44 (“it is impracticable to comprehend many rules of the modern law, in a scholar-like, scientifical manner, without having recourse to the ancient”). Letter from Blackstone to Gilbert Stuart (Mar. 16, 1778), in THE LETTERS OF SIR WILLIAM BLACKSTONE, supra note 7 at 195 (“I entirely agree with you, that Law cannot be studied as a science without calling in the aid of History; and the higher that history ascends into the ruder ages of mankind, the better interpreter it will be of many ancient legal formularies and customs.”). For a discussion of the role of history in the Commentaries see DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 40-44 (1989).
32. 3 BLACKSTONE, COMMENTARIES *396 (italics in original).
33. 1 id. at *70 (explaining that if the judge had been wrong, the rule he stated had never actually been the law).
34. Id. at *69.
35. Id. at *70-71.
36. 2 W. Bl. 1062, 1063; see also the same case reported in JOSEPH SAYER, THE LAW OF COSTS 25 (2d ed. 1777) (“But 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 Reasons.”) Sayer was a serjeant, so he likely was quoting from his own notes of the case.
In the early 1760s, 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 his part, got him a patent of precedence in 1761, thereby vaulting him, despite his near total lack of experience, into the ranks of senior barristers. Then, in 1763, the good graces of Lord Suffolk, whom he 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. 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 in the published reports (mostly his own) as appearing as counsel only 37 times over the course of the decade.

37. See his letter of Apr. 2, 1761 to Shelburne: “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 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.

38. 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), id. at 88.


40. 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, 1769 turned up only eight appearances: Shefford v. Mildenhall, Tuesday next after octave of St. Hilary, 1762 (N.A. Kew, 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 the octave of the purification of the Virgin, 1764 (id.); Tyler v. Johnson, Friday next after morrow of All Souls, 1764 (id.); Moorehouse v. Wainhouse, Tuesday next after the octave of the Holy Trinity, 1767 (KB 125/160); Hay v. Barrett, Tuesday next after morrow of All Souls, 1767 (id.); Hay v. Barrett, Saturday next after fifteen days of St. Martin, 1767 (id.); Millar v. Taylor, Thursday next after three weeks from Easter Day, 1769 (KB 125/161) (Blackstone listed as counsel but not listed as making a motion). 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. LEMMINGS, supra note 18 at 71. The 37 cases a search of the English Reports online turns up showing Blackstone as counsel occurred during the following years: 1760: 1; 1761: 1; 1762: 3; 1763: 5; 1764: 11; 1765: 4; 1766: 3; 1767: 2; 1768: 3; 1769: 4. He also represented All Soul’s College in a dispute before the Archbishop of Canterbury in 1762. Wilm. 163. He appeared once before Chancery, twice before Exchequer, and the rest before King’s Bench. Only two of these cases were not reported by Blackstone himself. By way of comparison, using the same source, a very successful barrister like Nares 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 at 349 (The next most prominent Common Pleas practitioners had 164 and 109 appearances that year).
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. Lord Ellenborough expressed this evolution well when he said during a debate in the House of Lords in 1812 that,

Blackstone, when he compiled his lectures, was comparatively an ignorant man; he was merely a fellow of All Soul’s 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.

By the time he ascended to the bench, “Blackstone” had become synonymous with “law.” Not everyone agreed about the merits of his book; in 1775, two lawyers even duelled over the question, 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. In 1773, a member of

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41. J POLSON, supra note 27 at 68 (1840) (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 REVIEW, supra note 19 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.”); D. DOUGLAS, THE BIOGRAPHICAL HISTORY OF SIR WILLIAM BLACKSTONE 22 (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 practice at Westminster. . . .”). On the national and international reputation of Blackstone’s lectures by the early 1760s see PREST, supra note 4 at 215-216. Regarding Blackstone’s continued identification with the Commentaries even after he took the bench, see, e.g., THE JOURNAL OF SAMUEL CURWEN LOYALIST 113 (A. Oliver ed., 1972).

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

43. 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.”).

44. PREST, supra note 4 at 219-221 (discussing praise that greeted first edition of Commentaries); LIEBERMAN, supra note 31 at 35-36 (discussing contemporary responses to Commentaries). For a sample of citations to the Commentaries, see variously, MacIntosh v. Dempster (1768), in 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 WAREN, JOHN CARROL, AND HIGH MONTGOMERY, SOLDIERS IN HIS MAJESTY’S 29TH REGIMENT OF FOOT, FOR THE MURDER OF CRISPUS ATTUCKS, SAMUEL GRAY,
Parliament declared, “if a man’s reputation was not his property he would burn his Blackstone, for he had taught him that.”\textsuperscript{45} The same year, in another Commons debate, another member declared, referring to the \textit{Commentaries}, “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.”\textsuperscript{46}

The result of this fame was that, during the 1760s, Blackstone was hired not only to argue some important and complex cases, but also to argue them

\textsc{Samuel Maverick, James Caldwell, and Patrick Carr, on Monday-Evening, the 5th March, 1770 at 145 (Boston 1770)} (trial of soldiers for Boston Massacre, Blackstone cited by Josiah Quincy); \textit{The Trial of Mungo Campbell, before the High Court of Justiciary in Scotland, for the Murder of Alexander Earl of Eglinton} 78, 86, 97 (2d ed 1770); \textit{General Evening Post}, Aug. 11, 1772, at 4 (“According to Dr. Blackstone, whose authority is, we fancy, unquestionable . . .”); \textit{London Evening Post}, Aug. 14, 1773, at 4 (“And to cut off all occasion of caviling at what I have advanced . . . please to give him the following authority from that most excellent work, Judge Blackstone’s Commentaries on the Laws of England . . .”); \textit{Lloyd’s Evening Post}, Sept 20, 1773 at 282 (including Blackstone among “the highest authorities, antient as well as modern”); \textit{Lloyd’s Evening Post}, Jan. 20, 1775, at 77 (former Chancellor, Lord Camden, speaking to the House of Lords in 1775, “this was no novel doctrine, but as old as the Constitution, as 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. . .”); 11 \textit{Francis Hargrave, A Complete Collection of State-Trials and Proceedings for High-Treason, and Other Crimes and Misdemeanours} 251 (4th ed. 1781) (in her 1776 bigamy trial before House of Lords of Elizabeth Chudleigh, Duchess Dowager of Kingston said, “Their 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 an entertaining as they are instructive). . .”). Despite Mansfield making a show of banning citations to the Commentaries in 1770, when Blackstone was serving on King’s Bench, the ban was soon lifted. \textit{London Evening Post}, May 15, 1770 at 4. See, \textit{e.g.}, Hamilton and Smythe v. Davis (1771) 5 \textit{Burr.} 2732, 2735-36 (K.B.); Arminier v. Spotwood (1773) Lofft 114, 114-115 (K.B.); Taylor v. Whitehead (1781) 2 \textit{Dougl.} 745, 748 (K.B.). Mansfield also cited the \textit{Commentaries} days before Blackstone joined the Court, \textit{Rex v. Wilkes} (1770) 4 \textit{Burr.} 2527, 2567 (K.B.) (citing volume 3).

\texttt{45. Morning Chronicle, Mar. 26, 1774, at 2.}

\texttt{46. London Evening Post, May 19, 1774, at 1. The whole exchange went like this:}

\textit{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.”}

\textit{Mr. Syknner, “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.”
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 that they could not decide at the first hearing and held the suit over to the following term for further argument. At 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. 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.” 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.

But despite his growing reputation, Blackstone remained ambivalent about legal practice. 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


48. Clitherow, Preface, supra note 17 at xix.

49. LEMMINGS, supra note 18 at 268.

50. 67 MONTHLY REVIEW, supra note 19 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.”).
the “wrangling Courts[] and stubborn Law.”

In his second turn at Westminster, 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 did practice.

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. Indeed, in 1762, he 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.

The usual explanation for his continued ambivalence was that he was not a particularly good pleader, lacking the verbal quickness, oratorical skills, and politesse required to succeed in a highly competitive business. 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, preserved a share of business to a very late period of his life.”

Furthermore, as noted above,

51. [DOUGLAS], supra note 41 at 4-6.

52. Letter from William Blackstone to Lord Shelburne (July 29, 1762), LETTERS OF SIR WILLIAM BLACKSTONE, supra note 7 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, he 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 Blackstone could have the seat. Id. For other letters soliciting a judgeship see Letter from William Blackstone to Lord Shelburne (Dec. 12, 1762), 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 you 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), 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.”).

53. Letter from William Blackstone to Lord Shelburne (Dec. 27, 1761), 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.”).

54. Letter from William Blackstone to Lord Shelburne (Sept. 7, 1762), id. at 94 (“out 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.”).

55. GRAVES, supra note 11 at 57.

56. Espinasse, supra note 1 at 321. On Hill, see M. McNair, Hill, George, in 27 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, supra note 47 at 131, 132. 2 JOHN, LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES 571-72 (1849) (Hill’s impracticality and Mansfield’s treatment of him); 1 POLSON, supra note 27 at 78-79 (detailing his defects as an advocate); 1 HORACE TWISS, ed., THE PUBLIC AND PRIVATE LIFE OF LORD CHANCELLOR ELDON, WITH SELECTIONS FROM HIS CORRESPONDENCE 93-94 (anecdotes of Hill’s pleading); 1 SAMUEL ROMILLY, MEMOIRS OF THE LIFE OF SIR SAMUEL ROMILLY 72 (1840) (Hill was “a lawyer of very profound and extensive
some evidence indicates that Blackstone was considered a valuable counselor to hire, at least when the case concerned certain areas of law, such as copyright, university matters, international law, or testamentary interpretation—legal subjects that often implicated civil or natural law. An alternative explanation for Blackstone’s inability to come to terms with legal practice might instead lie in his firm commitment to the law as neat and clearly discernable.

According to Richard Graves, for Blackstone at the bar “every thing was weighty and decisive. . . .” He does not appear to have understood court hearings as just 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 whose goal was to get to the one right answer that was hidden away in the authorities. 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 paying a ransom. 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 inquire about their practice. 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. As he had decided that, “the only objection which seemed to weigh upon the former argument, was ‘that such an action

57. During the 1760s, he is recorded as having argued seven interpretation cases (Stephen v. Coster (1763) 1 W. Bl. 423 (K.B.); Evans d. Brooke v. Astley (1764) 1 W. Bl. 499 (K. B.); Denn d. Satterthwaite v. Satterthwaite (1764) 1 W. Bl. 519 (K.B.); Frogmorton v. Holyday (1765) 1 W. Bl. 535 (K.B.); Gulliver d. Corrie v. Ashby (1766) 1 W. Bl. 607 (K.B.); Wellington v. Wellington (1768) 1 W. Bl. 645 (Ch.); Perkins d. Vowe v. Sewell (1768) 1 W. Bl. 654 (K.B.)); four cases broadly involving international law (Robinson v. Bland (1760) 1 W. Bl. 234 (K.B.); Triquet v. Bath (1764) 1 W. Bl. 471 (K.B.); King v. Guerchy (1765) 1 W. Bl. 545 (K.B.); Ricord v. Bettenham (1765) 1 W. Bl. 563 (K.B.)); two cases on Oxford or Cambridge matters (Kendrick v. Kynaston (1764) 1 W. Bl. 545 (K.B.); King v. University of Cambridge (1765) 1 W. Bl. 547 (K.B.)); and 3 cases on copyright (Tonson v. Collins (1761) 1 W. Bl. 321 (K.B.); Baskett v. Cuningham (1763) 1 W. Bl. 370 (Ch.); Millar v. Taylor (1769) 4 Burr. 2303 (K.B.)).

58. Graves, supra note 11 at 57.

59. See, e.g., his argument with Mansfield about the meaning of precedent in Tonson v. Collins (1761) 1 W. Bl. 321, 331-32 (K.B.) and, in Frogmorton v. Holyday (1765) 1 W. Bl. 535, 540 (K.B.), Mansfield’s comment that “The 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 the discussion of his involvement in the All Soul’s Founder’s Kin cases in Anthony Taussig, Blackstone and his Contemporaries (forthcoming 2009) (on file with the author).

60. 3 Burr. 1734; 1 W. Bl. 563.

61. 1 W. Bl. at 568. 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.
would not lie in the other countries of Europe,’” he declined to proceed and conceded the case.62

Of course, case reports are faulty sources,63 and Blackstone’s client might have instructed him to act as he did, so perhaps this is not an accurate reflection on his own views. However, a similar tendency toward rigid certainty appears in some of Blackstone’s opinions of counsel, a document in which the lawyer was presumably free to advise as he saw best. Written legal opinions appeared in the sixteenth century, and hundreds of them are extant from the eighteenth century. An attorney (similar to the modern English solicitor),64 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 wished to be guided. The counsel would write his opinion on the same sheet, directly below the question posed, and return the paper to the attorney.65 Over thirty of Blackstone’s legal opinions survive from the 1760s, and they show a remarkably consistent trend toward stating his conclusion categorically.66

Three examples will suffice. 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. In part, the College intended to apply the money to teacher’s salaries so that underpaid teachers would no longer extort additional fees from the students. Blackstone approved the plan, saying, “there 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. . . .” He continued, “[a]s to the 2d Branch; I have no Doubt but that every Means, whereby the private Expense w[hi]ch the Scholars must otherwise be at, is lessened, is conducive to their better Maintenance & Support. This is so clear a Proposition, that it is only necessary to state it, in order to establish the Truth of it.”67 It is difficult to

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62. 3 Burr. at 1741.
63. See infra text at notes 100-102.
64. BAKER, supra note 26 at 163-64.
66. PREST, supra note 4 at 221.
67. Winchester College Muniments, 330a (March 25, 1765) (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 [interlineated] 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 M”. Goodenough’s Representatives. . . .”; Anon., THE CONDUCT OF THE RIGHT REVEREND THE LORD BISHOP OF WINCHESTER AS VISITOR OF ST. MARY MAGDELEN COLLEGE, OXFORD . . . 23 (1770) (interpretation of the Brasenose College statutes, Mar. 1767): “though 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 . . .”; MR. BLACKSTONE’S OPINION ON CASE, 36 LEGAL OBSERVER 327 (1848) (interpretation of a lease, Mar. 1768): “I am of opinion that
imagine a well-trained common lawyer like George Nares making such
categorical statements.

Admittedly, attorneys sought the opinions of counsel because they
wanted definitive guidance, not wishy-washy equivocating, and taken alone,
out of the context of a general study of opinions of counsel, it is impossible
to judge how unusual was Blackstone’s tendency to answer queries with
apparent certainty. In two further instances, however, different opinions on
the same questions are extant in addition to Blackstone’s, and they show that
other counsel expressed doubts where Blackstone saw right answers. The
first case arose in January 1757, when, their provost having died, the fellows
of Oriel College, Oxford, 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.” 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.” He asserted that the fellows were
“obliged” to elect a new provost within three days of the former provost’s
death. His only doubt concerned what constituted sufficient notice, whether
it had to be formal notice made by the proper officer, or whether “open
Notoriety of Fact” sufficed, and he opted for the latter. “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. . . .”

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.
“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 . . . .” 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.”
Blackstone’s anxiety about remote slippery slope problems rather than about
the just resolution of the affair at hand reappeared many times in his judicial
opinions.

The second case, from 1769, involved the interpretation of a will. Richard Serle had left most of his property to his nephew William

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68. No systematic studies of opinions of counsel have been done. BAKER, supra note 65 at 87.
69. All quotations from Blackstone and Gilpin’s opinions come from Oriel College Archives,
PRO/A1/12.
70. See infra text at notes 173-177.
Goodenough, but if William died “unmarried, and without issue of his body lawfully begotten,” the property went to his older brother, Richard Jocelyn Goodenough. In another part of the will, the equivalent phrase read “die unmarried, or without issue of his body lawfully begotten.” The question came down to whether “and” in the first phrase could be read disjunctively as “or.” 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 would go to his brother R.J.G. by way of executory devise.” “And,” in other words, meant “and.” Indeed, because the opinion is so brief, it is not clear that Blackstone even considered any other possibility. In November 1769, Charles Yorke, the former solicitor and attorney general, 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.” 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.

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.” 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. Booth, in a long and quite fully reasoned opinion, demonstrated how much more sense it made in the context of the will for

71. 1 CASES WITH OPINIONS OF EMINENT COUNSEL IN MATTERS OF LAW, EQUITY, AND CONVEYANCING . . . 344 (1791) (emphasis added).

72. Id. at 345, 347.

73. Id. at 346. Compare Blackstone’s certainty with the interpretative trope expressed by William de Grey in another opinion of counsel from 1769: “speaking with that diffidence which is necessary in conjecturing upon the operation of wills so untechnically expressed. . . .” Id. at 359.

74. John Cannon, Yorke, Charles (1722-1770), in 60 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, supra note 47 at 831, 832.

75. 1 CASES WITH OPINIONS, supra note 71 at 345.

76. Id. at 347. John Cannon, Dunning, John (1731-1783), first Baron Ashburton, in 17 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, supra note 47 at 333.

77. 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 47 at 622-623. To get a sense of how popular Booth’s opinions were, it is only necessary to peruse the volumes of the CASES WITH OPINIONS OF EMINENT COUNSEL IN MATTERS OF LAW, EQUITY, AND CONVEYANCING (1791).
“and” to be interpreted disjunctively. Finally, in an even longer opinion, 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 the context meant “or.”

The knock on Blackstone in all of these cases is not that he came to the wrong conclusion, because maybe he got the answer right. The problem was that he never seemed even to 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 gives the impression that he thought that, because law was a system of well-defined rules in which each problem had one and only one answer, if he had lined up his evidence properly, then his answer should be correct, and he had no need to equivocate. In other words, his approach to the questions on which he was asked to advise suggests that he had carried the beliefs he expressed in the Commentaries into an advocacy practice. 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, 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 Common Pleas, ostensibly for reasons of ill health (Common Pleas having a lighter docket). Blackstone served only one term on King’s Bench before switching back to Common Pleas in June 1770, after Yates’ early death. 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. De Grey and Nares were appointed, and they served alongside Gould and Blackstone until the latter’s death at 56 in February 1780.

78. 1 CASES WITH OPINIONS, supra note 71 at 349-51.
79.  Id. at 351-53.
80. MIDDLESEX JOURNAL, 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, PHILIP C. YORKE, ed. THE DIARY OF JOHN BAKER, BARRISTER OF THE MIDDLE TEMPLE, SOLICITOR-GENERAL OF THE LEeward Islands 320 (1931) (writing on June 23, 1775, “the King insisted on his being Judge contre le gré of Lord Bute and others, who opposed it”).
81. James Clitherow, Preface, supra note 17 at xix; GENERAL EVENING POST, Feb. 10, 1770, at 4. MIDDLESEX JOURNAL, Feb. 10, 1770, at 3. Letter from Blackstone to Sir John Eardley Wilmot (June 8, 1770) (claiming he agreed to swap with Yates “only on account of Yates’s Representation of his infirm State of Health”), LETTERS OF SIR WILLIAM BLACKSTONE, supra note 7 at 143.
82. 2 W. Bl. 734.
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 by a grounding in decades of legal practice. His knowledge had served him reasonably well at the bar, but he had never 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.

II. 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. By the time the barrister, now quite experienced and usually in his late forties or fifties, was elevated to the bench, he had been well indoctrinated into a way of thinking about the law that might have preached certainty but that, in reality, retained a level of open-endedness by applying a pragmatic set of holdings that guided future decision-making without being treated as unbendable, immutable rules.

83. “[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, . . .” The positions were highly desired because they gave the holder a right of precedence and precedence in court, immediately making the holder a senior barrister. Baker, supra note 26 at 165. “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.” John Hamilton Baker, The Order of Serjeants at Law: A Chronicle of Creations, with Related Texts and a Historical Introduction 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 generally Baker, Serjeants, supra and at 108, 111-12, 114-17. On the normal path to the bench, see Lemmings, supra note 18 at 275-81 and Daniel Duman, The Judicial Bench in England 1727-1875, The Reshaping of a Professional Elite 72-78, 87 (1982).

84. Duman, supra note 83 at 72.

85. 1 Oldham, supra note 1 at 202 (discussing Mansfield’s treatment of precedent as leaving “considerable maneuvering room.”). Certainty was very much on the minds of English lawyers, see: Hilary, 5 George III, Pratt, C.J., Singleton Collection, Columbia Law School, No. 5, Vol. 2, f’ 7 (in holding a writ void, “I take it there is no absurdity at all in that for the Law of England which delights in Certainty is more Reasonable that to put a man even to ye hazard of being hurt by an illegal writ either in his Liberty or his freehold, but he may come in & take advantage of it, before he is actually affected by it.”); Matthew Hale’s Criticisms on Hobbes’s Dialogue of the Common Laws, in 5 W.S. Holdsworth, A History of English Law 506 (1927) (“It is one of the things of greatest moment in the profession of the Com[mon] 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 things and Carry on the Same thred of the Law in one Uniforme Rule as neare as
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. By the time George Nares was appointed to the Court in 1771, he had been a barrister for thirty years, including, after 1759, service as a king’s serjeant, the highest-ranking royal counsel. Serjeants had a monopoly on practice before Common Pleas, and Nares used his position to become a “clear leader” of that Court’s bar. William de Grey was called to the bar in 1742. 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. 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. 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. 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. Without

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86. Foss, supra note 4 at 308. Stuart Handley, Gould, Sir Henry (1710-1794), in 23 Oxford Dictionary of National Biography supra note 47 at 71. He also had the patronage of the Chancellor, the person who selected puisne judges, through his wife. Bray, supra note 2, s.v. Henry Gould. See also the comment in a letter to the editor praising Gould’s dissent in a complex trial concerning an informer, 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.” Gazetteer and New Daily Advertiser, Sept. 29, 1775, at 4.

87. Baker, supra note 26 at 164.

88. Lemmings, supra note 18 at 172.

89. Duman, supra note 83 at 107.

90. Patronage was an important part of most appointments, but in most instances the lawyer also had some independent qualifications. See Lemmings, supra note 18 at 265, 274.

91. 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 18 at 189 n.131. See also 1 Twiss, supra note 56 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 Serjeant’s 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
those years of practice to inculcate in him the ethos of the common lawyer and change the rule-obsessed mindset he had developed before and during teaching, he arrived at the bench still very much the Commentator, ready to preach the gospel of law as a rigid, certain science. This section examines how Blackstone’s belief in law as a system infected his judicial approach in three contexts: his opinion style, his attitude about precedent and authority, and his strict adherence to what he perceived to be clear rules.

A. Style

It is important, as a preliminary matter, to realize 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 1774,92 and no more than a handful of additional cases were reported in other published works.93 About three dozen manuscript reports are also preserved in the collections of the London inns of court, but only a few of them include Blackstone’s opinions.94 Chief Justice de Grey’s bench notebook is extant from Easter term 1775 to Easter term 1776.95 Finally, on occasion (rare compared with King’s Bench, however), the London newspapers published portions of the judges’ opinions.96 Thus, the bulk of the material comes from Blackstone, and he had an agenda. He wanted to prove that his systematic

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92. 3 George Wilson, REPORTS OF CASES ARGUED AND ADJUDGED IN THE COURT OF COMMON PLEAS (1775).


94. These are primarily to be found in the Hill Collection at Lincoln’s Inn Library.


approach to judging was superior to that of his more traditionally common law brethren.

This goes far to explain why he left instructions in his will that his Reports should be published when no other judges of the era published continuous runs of reports. Although the usual explanation is that Blackstone knew his name would sell books and intended the proceeds to support his large family, this does not exclude another possibility. Blackstone, of all people, understood the impact a book could have on an author’s reputation and on his ability to influence readers. The Commentaries had made him famous and had rewritten the conversation about law in Great Britain and the colonies. The Reports provided him a similar opportunity, not only to burnish his judicial reputation, but also to advertise his way of looking at the law. The Reports, in other words, were propaganda for Blackstone’s view that law was an organized system that became certain and knowable through the study of precedent and authoritative works.

Blackstone could use his Reports to pursue such an agenda because, like other amateur eighteenth-century reporters, he did not attempt to produce a verbatim account of what passed in court. Like the others, he took notes on what he thought worth recording and ignored the rest. Like others, he may on occasion have written down an exact phrase, but mostly he paraphrased, paraphrased,

97. The reports of John Willes, Chief Justice of Common Pleas from 1737-1761, were published from his notes long after his death. See REPORTS OF ADJUDGED CASES IN THE COURT OF COMMON PLEAS DURING THE TIME LORD CHIEF JUSTICE WILLES PRESIDED IN THAT COURT . . . 1 (1799). Chief Justice Wilmot published a few choice opinions years after he retired. Wilmot, supra note 93.

98. MONTHLY REVIEW, supra note 19 at 11 (“Mr. Justice Blackstone, with his other good qualities, was strictly what the world calls a Prudent man. He knew his name would sell (to speak in the language of the trade) a much more indifferent work than the present; and a desire of encreasing [sic] his personal estate may be well excused in the father of a large family; but perhaps was not worthy of a great literary character.”). See also Clitherow, Preface, supra note 17 at xxviii, who pointedly inserts the clause from Blackstone’s will about the proceeds going to his estate, “as an Excuse for not making any Presents of the Work; which he does not think himself justified in doing, as Trustee for the Author’s Children, to whose Emolument the Profits are specifically directed to be applied.”

99. PREST, supra note 4 at. MORNING CHRONICLE, Jan. 23, 1773, at 4 (“Mr. Justice Blackstone . . . has, with the joint force of genius, learning and experience, given law and equity at large to the intelligent; his doctrines, like those of the purest religion, have spread themselves through the whole kingdom, and, sanctified by his office, obtained universal belief.”).

100. For instance, although Capel Lofft claimed that 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 93 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. E.g., GENERAL EVENING POST, Nov. 24, 1772, at 1 (reporting that counsel spoke “above an hour and a half.” The case was Parsons v. Lloyd, 2 W. Bl. 845). Such selectivity in the parts of the opinions they chose to record resulted on occasion in different reporters’ versions being almost entirely at variance. Compare, for instance, the reports in Hitchin v. Campbell (1772) 2 W. Bl. 827, 829-31 with Kitchen v. Campbell 3 Wils. 304, 307-09; and Fisher v. Lane (1772) 2 W. Bl. 834, 835-36 with 3 Wils. 297, 303-04.
probably later supplementing his notes from his memory of what the judges
had said. Thus Blackstone’s versions of a case do not entirely correspond
with those of Wilson and the others. Usually the reports at least roughly
resemble each other, but in each instance, the reporter had plenty of room for
differences of wording, emphasis, and content.

What becomes apparent from comparison is that Blackstone thought
more highly of his own contributions on the Court than he did of the others’,
in particular of Nares and Gould. (De Grey’s approach was closer to his own
and therefore more to his liking.) 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. 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), taking credit for an opinion that a manuscript note attributed
to de Grey, and going on at length after acknowledging that the other
judges had left little to be said. On the other hand, he often shortchanged
Nares and Gould, whose opinions, according to other reports, had in fact

101. 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 xiv (2d ed. 1786).

102. See LOFFT, supra note 93 at 9: “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.”

103. Hanbury, supra note 4 at 26.

104. Mast v. Goodson (1772) 2 W. Bl. 848, 849 (recording Wilson for plaintiffs citing assize
case before Blackstone, though Wilson (3 Wils. 348, 352-53) did not mention this in his own report
of what he said); Wood v. Chessal (1779) 2 W. Bl. at 1257 (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.”).

105. Scott v. Shearman (1775) 2 W. Bl. 977, 978-82; Lincoln’s Inn, Hill Collection, vol. 13 MS
223-230. Blackstone’s Reports include 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 . . .
.” He then proceeded to give a long opinion in which he laid 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. 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.

106. E.g., The Case of Brass Crosby, as reported in BINGLEY’S JOURNAL, Apr. 20, 1771, at 3
(“Mr. Justice Blackstone apologized for adding anything of his own, to two such respectable
authorities; but said he could not resist, in so particular a case, making a few observations. . . .”);
compare with fuller reports of what he said in MIDDLESEX JOURNAL, April 20, 1771 at 4 and 3
Wils. 188, 204-05.
been much longer than Blackstone’s version suggests. The other reporters returned the favor, regularly abbreviating Blackstone’s opinions and eliminating his pedantic historical and academic excurses, which they apparently considered of little value.

Reviewers, biographers, scholars, and even the work’s editor greeted Blackstone’s Reports with skepticism. They all assumed that the Reports must have been left unfinished by Blackstone’s early death. They simply could not believe that the author of the Commentaries would have intended to publish a work of such “indifferent” quality. 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.” Having transferred the notes he took in court to those notebooks (likely polishing and supplementing them in the process) and even made an index, it is not clear what else Blackstone would have added to his Reports to improve them. This suggests that the text we have is the text Blackstone intended to be seen, and what he wanted his readers to see was Blackstone, J. delivering methodical, didactic, analytically tight opinions that used an historical approach to build up the proper rule and then applied that rule in a narrow, non-discretionary fashion.

107. E.g., Cooke v. Colcraft (1773) 2 W. Bl. 856, 858-59 (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; Lincoln’s Inn, Hill Collection, MS 11, 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; 3 Wils. 434, 442 (Wilson gives Nares sizeable speech, Blackstone has him saying only that he concurs).

108. Examples of cases in which Blackstone’s opinion is longer than that reported in another report: Mast v. Goodson (1772) 2 W. Bl. 848, 850; Murray v. Harding (1773) 2 W. Bl. at 865-66; Lincoln’s Inn, Hill Collection, MS 11 at f. 43; Scott v Shepherd (1773) 2 W. Bl. 892, 894-898; 3 Wils. 403, 409-410.

109. 67 MONTHLY REVIEW, supra note 19 at 11; JOHN WILLIAM WALLACE, THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS at 448 (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.”); 1 WILLIAM BLACKSTONE, REPORTS OF CASES DETERMINED IN THE SEVERAL COURTS OF WESTMINSTER-HALL FROM 1746 TO 1779 iii-iv (2d ed. Elsley 1828); Clitherow, Preface, supra note 17 at xxx (suggesting that “the learned Judge had not given it the last Revise.”).

110. Clitherow, Preface, supra note 17 at xxviii. See also N.A. Kew, prob 1/18 at f. 4 (Blackstone’s 1778 holograph will) (“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.

111. See Ackworth v. Kemp (1778) 1 Dougl. 40, 43 (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, 834.
Justice Blackstone, according to his own Reports, delivered his opinions much the way he had delivered his lectures: with unapologetic pedantry.\textsuperscript{112} In fact, on at least two occasions, Blackstone’s judicial and academic personae overlapped when he cribbed from the Commentaries in court.\textsuperscript{113} This stylistic choice makes sense, because Blackstone was still teaching, only now he did it from the bench. His didactic tendency is evident in his opinion in Gerard’s Case (1775). Gerard argued that as an attorney, he was exempt from either serving in or paying a substitute to serve in the Middlesex Militia.\textsuperscript{114} De Grey was absent, so Gould spoke first, and he seems to have gone into the history of the militia laws, but Blackstone’s report of his opinion is sketchy.\textsuperscript{115} Blackstone, believing that “the principles upon which his opinion was founded stood in need of a clear investigation,” 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.\textsuperscript{116} 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,” 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.\textsuperscript{117}

His tendency to stock his opinions with discussions of authority, whether or not fully on point, is mirrored in his habit of musing about questions not before the court. He raised these counterfactual issues quite deliberately and seemed to see nothing untoward in doing so. Of the several examples that could be offered,\textsuperscript{118} the most unusual was his discourse in Luke

\begin{footnotes}
\item[112.] On Blackstone’s lecture style, see Prest, supra note 4 at.
\item[113.] Atkinson v. Teasdale (1772) 3 Wils. 278, 286 (Blackstone’s comment about the writ of secunda supererogatione closely echo what he wrote in 3 Commentaries at *239); Sanler v. Heard (1775) 2 W. Bl. 1031, 1033 (citations in opinion are exactly the same and in the same order as the citations at 3 Commentaries at *294 n.(d)). See also de Grey’s opinion in Rowning v. Goodchild (1773) 2 W. Bl. 906, 908-09 (citing the same historical sources as Blackstone does at 1 Commentaries at *322-23 and in mostly the same order. Blackstone alludes to the striking similarity saying at 908: “His Lordship then accurately stated the History of the Post-Office from the Reign of Jac. I to 9 Ann. pretty nearly as given in my Commentaries, Book I, c. 8.”).
\item[114.] 2 W. Bl. 1123.
\item[115.] Id. at 1125.
\item[116.] Id. at 1125-28.
\item[117.] Id. at 1128-31. Other examples of Blackstone’s didacticism include Wood’s Case (1771) 2 W. Bl. 745, 746 (Blackstone correcting de Grey’s history); Pickering v. Watson (1776) 2 W. Bl. 1117, 1119-20 (Blackstone correcting mistake in authoritative text); Wood v. Chessal (1779) 2 W. Bl. 1254, 1255-57 (long summary of history of excise laws followed by discussion of precedent while he—and therefore the other judges—had been on the Court); Nicol v. Verelst (1779) 2 W. Bl. 1277, 1287-88 (Blackstone discussing historical geography).\textsuperscript{117}
\item[118.] E.g., Roe v. Lees (1777) 2 W. Bl. 1171, 1173-74 (“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 (“The supposed Absurdity of the geographical Limits taken in their full Extent, is not now before the Court.” Then discussing the limits.).
\end{footnotes}
v. Harris (1779). The case itself turned on a technical procedural question. In a writ of right, one of the oldest common law actions for real property, the suit was tried by a special jury of sixteen called the Grand Assize. Four knights were summoned to elect twelve more jurors to compose the “recognitors of assize.” In Luke, plaintiff brought the suit at nisi prius—the civil side of the docket when the judges heard trials on circuit. The four knights in Luke 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. He eventually produced them to the judge on circuit, in violation of the specific wording of the writ. The question in the case was whether the writ should have been phrased in the alternative: produce the knights at Westminster “unless before that” (“nisi prius”) the judge comes to the county on circuit.

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 triable at nisi prius at all. Blackstone, however, could not simply leave such an interesting problem on the table. His reported opinion began, “Blackstone Justice 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.” 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.

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

Certainly Blackstone often seemed to view his job as a source of intriguing research projects about which he could report at length to a captive audience of barristers and students. But he was not being pedantic from sheer obliviousness. Blackstone had a lesson to teach. He knew lawyers would use his Reports, and he took advantage of that to show them how law should be done. To resolve a dispute, to obtain the sort of total certainty of which Blackstone thought the law capable, the lawyer or judge needed to proceed in an orderly manner, looking to the precedents and authorities to

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119. 2 W. Bl. 1261.
120. 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 618 (1895).
122. Id. at 1266.
obtain the necessary evidence of the appropriate rule to follow. The judge was not to give an opinion based on flighty reasons, such as fairness or equity. The judge was to identify the proper rule, trace its development over time, and apply it as stated. When Blackstone spent five pages going over the statutes, as in *Gerard's Case*, he was showing future lawyers how a judge properly studied a legal problem, and when he reached out and indulged in gratuitous dicta as in *Luke*, he was providing guidance to ensure that, should the issue ever come up, it would be addressed in the correct way.

B. Precedent

Blackstone has been saddled with the reputation for being a diffident judge, but he was anything but hesitant in his conclusions. Rather than being diffident, he was just being a careful—even obsessive—jurist. He merely required that he have the chance to assemble *all* the precedent and authority before reaching a decision. In a 1775 case concerning an allegedly illegal search and seizure, for example, 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. . . .” Unwilling to decide the case without confirming this assertion for himself, Blackstone asked that the case be 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.

Authorities were vital to Blackstone’s theory of law because they led, inexorably, he seemed to believe, to the right answer. His reaction to being challenged in his discussion of precedent in *Martin v. Kesterton* (1776) hints at how important this position was to him. Plaintiff sued for trespass *quare clausum fregit*, that is, for breaking the plaintiff’s close. 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. . . .” 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. Blackstone then launched into three pages of painstaking examination of the historical precedent of pleading trespass *quare clausum fregit*. He tried to bludgeon any possible doubts to death by piling authority upon authority. Nares,

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123. J. PRIOR, LIFE OF SIR EDMUND MALONE 431-32 (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.

124. Scott v. Shearman (1775) 2 W. Bl. 977, 978-82. See the same situation in Moulsdale v. Birchall (1772) 2 W. Bl. 820, 821 (Ex. Ch.) (Blackstone refusing to give an opinion at the hearing because he disliked that the precedents offered were not directly on point. “But afterwards, on looking into [some cases] Blackstone’s Doubts were removed.”).

125. Martin v. Kesterton (1776) 2 W. Bl. 1089, 1089.

126. *Id.* at 1089.

127. *Id.* at 1089-92.
however was not convinced and refused to concur, citing a relatively recent Common Pleas case, of which he had a manuscript note, that seemed to go the other way. Blackstone replied (an unusual occurrence in the Reports) 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 Elvis and Lamb in 6 Mod. of which I took notice before.” Blackstone’s annoyance could not have arisen simply from Nares’s disagreement. Being the Court’s most frequent dissenter, Blackstone had to have become accustomed to that. What he did not like was being challenged on his authorities, not only because he was confident that he had found the single right answer, but also because the possibility that authorities could be understood in different ways raised the specter of destabilizing uncertainty.

Blackstone’s anxiety about pinpointing the most authoritative source sometimes bordered on the ridiculous. The judges of King’s Bench, Common Pleas, and Exchequer, the three central common law courts, only heard questions of fact sitting en banc in Westminster Hall. During the spring and summer, they rode circuits, called assizes, to preside individually over trials of fact. Formally, each civil case originated at one of the three courts in Westminster, but at trial, it could be heard by any of the twelve judges, regardless of the court on which they sat. 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. That necessitated some

128. The only other time Blackstone had a judge who had already given his opinion speak again was in Roe d. Pye v. Bird (1779) 2 W. Bl. 1301, 1307, where de Grey interrupted after Blackstone’s opinion to laud it.
129. Id. at 1092.
130. See also his comment in Perrin v. Blake, “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 his research had nothing to do with the law. See Flureau v. Thornhill (1776) 2 W. Bl. 1078, 1079 (plaintiff sold stocks in order to obtain cash to buy a lease at auction. After the purchase, Seller discovered that he could not provide good title and gave plaintiff the option of taking the lease as is or receiving his money back with costs and interest. Plaintiff sued for his loss in casing in his stocks. Blackstone, “[f]or Curiosity” went and looked into the price of the stocks 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. Collins (1761) 1 W. Bl. 321, 326, 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) . . . .”
131. 1 OLDHAM, supra note 1 at 130-31.
132. Id. at 131.
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.\(^{133}\)

Blackstone sent one such trial report to King’s Bench in the 1779 trial of *Stevenson v. Mortimer*.\(^{134}\) The case arose over the question of whether chalk boat owners had to take out a license, called a cocquet, and pay a tax to transport chalk. “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.”\(^{135}\) 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 Abridgment 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 thereof 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.\(^{136}\)

Unsatisfied with this evidence, after the motion for a new trial, Blackstone “examined the Matter more minutely,” searching out (and quoting in his report for the benefit of the Court) 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.”\(^{137}\)

His actions in this case suggest Blackstone’s lack of a sense of proportion. At a certain point, the law is not perfectly neat, not all loose ends can be tied up, the ideal authoritative source cannot be found. But for Blackstone, authority not only had to exist, it had to be right, and therefore he 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.

\(^{133}\) *Id.* at 133.

\(^{134}\) Lincoln’s Inn, Dampier MS, Buller bundle 51.

\(^{135}\) *Id.* at 1.

\(^{136}\) *Id.* at 2-3 (unnumbered).

\(^{137}\) *Id.* at 3 (unnumbered).
C. Adherence to Clear Rules

Blackstone felt the same anxiety about following the law as he did about his quest to find the right authority. He was so sure that he rule he chose was the correct rule, and his view of rules was so rigid and one-dimensional, that once he knew which rule to apply, he followed that rule precisely, to the letter, no matter what. But in slavishly doing what he believed the precedent ordered he once again, as in Stevenson v. Mortimer, sometimes ended up going to ridiculous extremes.

His unbending rectitude earned him the mockery of King’s Bench in Birt v. Barlow, a 1779 suit for criminal conversation, over which he had presided at trial. Blackstone’s trial report explained that plaintiff’s witness proved 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.”

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 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.

In denying the proferred 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

138. Birt v. Barlow (1779) 1 Dougl. 162, 163 (K.B.) (Original in Lincoln’s Inn, Dampier MS, Buller bundle 53).
139. Lincoln’s Inn Dampier MS, Buller bundle 53. Also Birt, 1 Dougl. at 163-64.
ye Parson or Clerk were living.” 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 bells . . . ; suppose that the hand-writing of the parties were proved; suppose persons called who were present at the wedding dinner, &c. &c.”

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.” 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.

Another example of the lengths to which Blackstone would go in his insistence on reading rules narrowly and avoiding exercising discretion came at the beginning of his judicial career 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. 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. 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.” Counsel argued that the variance was fatal, citing the 1706 seditious libel case of

140. 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.”


142. *Id*. at 167.


145. *Id*. at 44.
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.\footnote{146} 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 purport), the words had to be copied verbatim into the information.\footnote{147} 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.\footnote{148} Furthermore, the exchange offers the opportunity to listen to Blackstone as he struggles spontaneously with a legal problem rather than hear him give his usual considered and well-researched opinion. Therefore, the colloquy deserves to be quoted at length.\footnote{149}

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

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

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

Court. Your argument would have done better, if in the record they had wrote it \textit{eleven} in letters; for the 11 in figures, and \textit{eleven} in letters, certainly read both alike. But they have wrote the figures, and put the \textit{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 \textit{eleven} to be sure; they stand as much for \textit{eleventh}, as they stand for \textit{eleven}. Two units, standing as a mark of date, signify \textit{eleventh}; standing as a number, they signify \textit{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 \textit{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 \textit{th} does not make the least alteration in the sense.

\footnote{146} Id. at 43-44. The case was Queen v. Drake, (1706) 2 Salkeld 660 (K.B.).
\footnote{148} See the claim to accuracy in the report of Fabrigas v. Mostyn, 11 HARGRAVE, supra note 44 at 162 n.(a)
\footnote{149} GURNEY, supra note 144 at 44-48.
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. . . .

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 nonsuit 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?

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

This excerpt illustrates both Blackstone’s rigidity in following the law and his fear of discretion. Although he acknowledged that the variance was immaterial and the case important, even the difference of a single letter sufficed to force him, according to his understanding of the law, to nonsuit the plaintiff. He perceived anything other than perfectly strict adherence to what he took to be the rule as requiring him to exercise discretion, which he neither wished nor considered proper to do. 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.

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Blackstone might have gone over the edge of silliness in Birt and Onslow, but he was not a stupid or incompetent judge. On the contrary, sometimes it was Blackstone, with his didactic approach grounded in an obsessive attention to authority, who got the law right.\textsuperscript{150} He, for example, was the sole judge (of the twelve common law judges) to insist, in a forgery trial in which, applying an admittedly narrow reading, the statute under which the defendant was indicted did not criminalize the specific act he had committed, 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.”\textsuperscript{151} Following Mansfield’s advice, by contrast, the other judges refused to give an opinion and merely advised the defendant to seek the King’s pardon.

Examples of how Blackstone’s inflexibility led him to write opinions of force and authority are on display in his two most famous decisions: Perrin v. Blake and Scott v. Shepherd. Perrin, a masterpiece of proto-formalist logic, was the opinion for which Blackstone was best known in his time.\textsuperscript{152} The case concerned a dispute over the interpretation of a will. It had begun in 1746 and had 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 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.\textsuperscript{153} Blackstone had been fighting with Mansfield over this aspect of testamentary interpretation ever since 1764. As counsel he had argued before King’s Bench in favor of strictly applying the law against the intentions of the testator in four cases out of five, and in four cases out of five he had lost.\textsuperscript{154} In Perrin, he finally got

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  \item \textsuperscript{150}. \textit{E.g.}, his dissent in Goodright on the demise of Rolfe v. Harwood (1774) 3 Wils. 497, 511-12; Lofft 282, 290-94 in which his argument, based in part on precedent and in part on an unwillingness to read into the facts found by the jury, ended up being followed by King’s Bench in overturning Common Pleas. The House of Lords upheld King’s Bench, so Blackstone’s position was fully vindicated. Harwood v. Goodright (1774) 1 Cowp. 87 (K.B.).
  \item \textsuperscript{151}. The case was \textit{Rex v. Harrison}, over which he presided in 1777. Although Harrison was found guilty, Blackstone suspended the verdict and referred the case to the twelve common law judges. \textit{General Evening Post}, Sept. 11, 1777, at 2-3. 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. \textit{Morning Chronicle}, Dec. 10, 1777, at 4.
  \item \textsuperscript{152}. \textit{1 francis hargrave, A Collection of Tracts Relative to the Law of England from Manuscripts} 488 (1787). This is the case on which Blackstone’s judicial reputation is often based. \textit{See} 12 Holdsworth, \textit{supra} note 4 at 707; A.W.B. Simpson, \textit{Biographical Dictionary of the Common Law} 59 (1984).
  \item \textsuperscript{153}. Hargrave, \textit{supra} note 152 at 489-90, 495.
  \item \textsuperscript{154}. Evans d. Brooke v. Astley (1764) 1 W. Bl. 499 (lost); Denn d. Satterthwaite v. Satterthwaite (1764) 1 W. Bl. 519 (lost); Frog Morton v. Holyday (1765) 1 W. Bl. 535 (lost);
his revenge, when a majority of seven to one, de Grey dissenting, overturned Lord Mansfield’s opinion that the intent of the testator was clear and should control.\textsuperscript{155}

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.’”\textsuperscript{156} 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 \textit{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, “where the ancestor takes an estate of freehold, with a remainder, either mediate or immediate, to his heirs, or the heirs of his body, the word heirs is a word of limitation of the estate, and not of purchase.”\textsuperscript{157} That is, to apply the rule to the situation in \textit{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, and 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.\textsuperscript{158} That is what happened. John properly barred the entail 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.

Although the King’s Bench opinions were never fully reported,\textsuperscript{159} the Court apparently held that the Rule in \textit{Shelley’s Case} was out-dated and should be interpreted as narrowly as possible so as not to conflict, as Charles Fearne (whose dislike of the King’s Bench decision led him to write a long and tedious work on contingent remainders) sarcastically said, “with that enlarged and more enlightened stile of doctrine, which, at this period, so

\textsuperscript{155} Gulliver d. Corrie v. Ashby (1766) 1 W. Bl. 607 (won); Perkins d. Vowe v. Sewell (1768) 1 W. Bl. 654 (lost).

\textsuperscript{156} Hargrave, supra note 152 at 496 n.4.

\textsuperscript{157} Hargrave, supra note 152 at 497.

\textsuperscript{158} A.W.B. Simpson, A History of the Land Law 130 (2d ed. 1986).

\textsuperscript{159} Charles Fearne, An Essay on the Learning of Contingent Remainders and Executory Devises viii-xi (3\textsuperscript{rd} ed. 1776).
eminently distinguished the decisions of the court of King’s-Bench.”

The Court ruled three to one (Yates, J. dissenting) that John Williams took only a life estate. In so doing, claimed Fearne, “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.”

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. 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.” 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.

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 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 messing lightly 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.”

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 no authority from precedents to warrant such a construction as is now contended for.” Therefore, he held that, despite the

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160. *Id.* at 113.
161. *Id.* at 110. This opinion is supported by James Booth in his opinion of counsel from 1770 reprinted in 1 CASES WITH OPINIONS, supra note 71 at 311-12 (“I have lately heard, to my great surprize, that there has been this last Hilary Term a Case determined (the name of it was Perrin and Blake . . .), where, after a limitation to one for life, the words ‘to the heirs of the body’ of that person have been held to be words of purchase. . . . [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 life. . . .”).
162. 4 Burr. 2581.
163. HARGRAVE, supra note 152 at 494, 496.
164. *Id.* at 496.
165. *Id.* at 498. *Cf.* 1 BLACKSTONE, COMMENTARIES *70.
166. *Id.* at 507.
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.167

Blackstone was no outlier in *Perrin*. He spoke in the majority, and contemporaries immediately noted the excellence of his opinion. Nonetheless, it still had all the hallmarks of a Blackstonian decision.168 Its theme was the need to draw a line between the proper, narrow application of the rule, stated in the strictest and least flexible terms possible (“a moral certainty”), and any interpretation that might let in undesirable discretion. It privileged historical analysis, at times gratuitous, over legal analysis. And from that analysis Blackstone arrived at a conclusion, the certainty of which he did not question.

A second opinion featuring the same characteristics is the dissent in *Scott v. Shepherd*, a case known well to generations of first year torts students, and a model of Blackstone’s method and principles of judging.169 Shepherd threw a lighted squib, or firecracker, into a large, crowded covered market. The squib landed on Yates’ stall and Willis, standing nearby, picked it up and threw it deeper into the crowd. 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. Scott sued on a writ of trespass. At trial, Shepherd objected that the proper action should have been trespass on the case. The trial judge, Nares, overruled the objection but allowed it to be brought before the whole Court en banc in Westminster.

Because the Court was not unanimous, the judges gave their opinions seriatim, beginning with the most junior. Consequently, Nares began, and he made three points. First, he claimed, on the authority of *Reynolds v. Clarke* (1726), one of the early seminal cases drawing the line between trespass and case, that where an act was illegal, trespass would lie. The throwing of squibs was unlawful by statute, so doing that act would give rise to an action of trespass. Second, initiating the action was sufficient to create liability under trespass, even if Shepherd never touched Scott nor directly caused him

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167. *Id.* at 509-10.

168. Burrow only mentioned Blackstone and de Grey’s opinions when discussing the Exchequer Chamber hearing. 4 Burr. 2581. Only Blackstone’s opinion was ever published. Charles Fearn called Blackstone’s opinion “justly celebrated.” AN ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES 292, 294 (4th ed. 1791).

169. (1773) 2 W. Bl. 892; Blackstone’s opinion is badly botched by Wilson (see, for example, what he does to Blackstone’s analogy about the football game at 410), 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. 3 Wils. 403.
to be touched because “he who does the first Wrong is answerable for all the consequential Damages.”\textsuperscript{170} Finally, he 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. “[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.”\textsuperscript{171}

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, and then, to add insult to injury, he asserted it did not matter because the Court had a right to act in an equitable, discretionary fashion despite the law. Blackstone responded with a crisp, logical, 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. And he cited \textit{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.

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. In \textit{Scott}, the objection had been raised at trial, and the verdict was suspended pending the outcome of the hearing. 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.”\textsuperscript{172}

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.”\textsuperscript{173} 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

\begin{itemize}
\item \textsuperscript{170} Scott, 2 W. Bl. at 894.
\item \textsuperscript{171} \textit{Id}.
\item \textsuperscript{172} \textit{Id}. at 897.
\item \textsuperscript{173} \textit{Id}.
\end{itemize}
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. The fact that the outcome might be unfair or unreasonable did not matter a great deal to Blackstone when weighed against the necessity of bending the law or “winking against the light.” As he once said in a case in which a married women, estranged from her husband, was about to get away with not paying her bills to tradesmen because, as a feme covert, she could not be sued, “[t]he rules of Law ought not to be broke thro’ for the sake of tradesmen.” By contrast, the possibility that “admitting any evidence to supply or explain written agreements” would mean the death of the Statute of Frauds, or that “infinite confusion and disorder would follow, if Courts could by writ of habeas corpus, examine and determine the contempt of others,” such matters he saw as dire threats to the certainty of his system. And above all, Blackstone feared such intellectual disorder.

III. Blackstone’s Uniqueness

English common law judges had long been known for carefully adhering to the letter of the law, and dependence upon precedent was a feature of the legal system in development for centuries by Blackstone’s time. Consequently, it may be difficult to understand what made Blackstone so special. In part the answer is that Blackstone was different because, in the Age of Mansfield, he was such a forceful and important proponent of what Fearne lamented as a “quaint and absurd” and old-fashioned approach to the law. And in part the answer lay in the extremes to which Blackstone’s systematic, clear-rule philosophy pushed him. The purpose of this section is to demonstrate how he differed from his brethren on the Common Pleas in this respect.

De Grey, Gould, and Nares were no radical Mansfieldian reformers. They were, it seems, rather ordinary common law judges, groomed for decades at the bar to think in a certain way, a way Blackstone did not share and may not have understood. This divergence between Blackstone and the others is best seen in their attitudes toward rules versus case-by-case decision-making, the authoritativeness of precedent, and judicial discretion. However, the three judges were not themselves monolithic in their thinking. De Grey, a former Chancery barrister, came much closer to Blackstone’s positions than did Gould or Nares, two old common lawyers. And they

174. Id. at 896.
175. Inner Temple, Misc. MS 97 at f° 141.
176. Preston v. Merceau (1779) 2 W. Bl. 1249, 1250.
177. Brass Crosby’s Case (1771) 3 Wils. 188, 204. Other cases in which Blackstone discussed the slippery slope problem include Melchart v. Halsey (1771) 2 W. Bl. 740, 744 (concern about ruining “the national Credit abroad”); Powel v. Peach (1778) 2 W. Bl. 1202, 1204 (permitting viva voce evidence as “Inlet to Fraud”).
178. 12 HOLDSWORTH, supra note 4 at 146-50.
179. FEARNE, supra note 159 at xii.
cannot all be studied in equal depth for each point, given, in particular, Blackstone’s slighting of Nares and Gould’s opinions and the fact that de Grey sometimes had to speak for the Court and therefore cannot always be assumed to have been giving an opinion with which he wholeheartedly agreed. Nonetheless, even with these caveats, in a comparison, Blackstone emerges as a unique figure on the Common Pleas bench.

Blackstone liked to decide cases on generalizable rules. In *Melchart v. Halsey* (1771), 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 those particular facts.\(^{180}\) Justices Gould and Nares, by contrast, shared a common lawyer’s sensitivity to incremental decision-making. When Blackstone and De Grey wanted to reach out and unnecessarily decide cases on some broad (and not always particularly solid) point of law, Gould and Nares would pull back and refuse to join them. Instead they would concur with the outcome while deciding the case on the narrowest, often procedural, grounds.\(^{182}\) 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. She argued that as a *feme covert* she could not be sued in her own name. De Grey and Blackstone devoted pages to an historical analysis of the legal meaning of the term “elopement.”\(^{183}\) Gould acknowledged that what had been “said by the Chief Justice may all be true,”\(^{184}\) but he did not “think the case . . . ripe for that Determination. I think that the word Elopement has not acquired a technical meaning of a criminal departure. I reserve my opinion therefore.”\(^{185}\) Instead, he chose to decide on the basis of a defective pleading. Nares agreed because, “as the pleadings stand at present, the Plaintiff cannot have judgment.”\(^{186}\)

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\(^{180}\) See, *e.g.*, Mansfield’s comment in *Turtle v. Lady Worsley* (1783) 3 Doug. 290, 291 (K.B.), that in the case of *Lean v. Schutz* (1778) 2 W. Bl. 1195, “in that case 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.” 2 W. Bl. at 1198.

\(^{181}\) 2 W. Bl. 741, 744; 3 Wils. 149, 153.

\(^{182}\) Atkinson v. Teasdale (1772) 3 Wils. 278, 287; Bostock v. Saunders (1773) 3 Wils. 434 (both arguing that the defendant should have pleaded the facts that led him to seek a warrant); Pye v. Leigh (1776) 2 W. Bl. 1065, 1067 (Gould refusing to give opinion on general rule of whether attorneys always had privilege of laying venue in Westminster but deciding only on specific facts of the case); Martin v. Kesterton (1776) 2 W. Bl. 1089, 1092 (Gould and Nares preferring to allow amendment to pleading to solve bad demurrer); Miller v. Seare (1777) 2 W. Bl. 1141, 1146 (Gould decided case on abuse of discretion rather than on legal question of powers of bankruptcy commissioners); Barnard v. Woodcock and Greenland (1778) 2 W. Bl. 1201, 1204 (“Nares Justice concurred, principally on the Novelty of the Motion. Parties should be careful to insert sufficient Quantities in their Parcels.”).

\(^{183}\) 2 W. Bl. 1079, 1080-1082; Inner Temple MS 97 at f’ 133, 133-39, 140-141.

\(^{184}\) Lincoln’s Inn, De Grey Notebooks, Misc. 183 at f’ 121r (abbreviations expanded).

\(^{185}\) Inner Temple MS. 97 at f’ 139 (abbreviations expanded).

\(^{186}\) Id. at 141 (abbreviations expanded, punctuation added). See also similar disagreements recorded in the account of Gould and Nares’s opinions in the case of *Murray v. Harding* reported in LLOYD’S EVENING POST, Feb. 8, 1773, at 138.
Nares, Gould, and de Grey all respected precedent and expected not only that counsel would argue from the authorities but that their own opinions must take them into account. But none of them was quite as committed to the unswerving loyalty to precedent that Blackstone showed. Justice Nares, in particular, had an unusual relationship to earlier cases, because, while his judicial vocabulary was largely the vocabulary of precedent, he treated them more as guidance than as mandates. His commonest contribution, or at least the one Blackstone considered worth mentioning, was to cite one or more precedential cases, usually from Common Pleas and usually ones that had been decided while he was at the bar.\(^{187}\) Even the few times the reports preserve lengthier opinions by Nares, his focus tended to remain on a fairly mechanical discussion of precedent (and if not that, then of procedure).\(^{188}\) As the only member of the Court who had practiced as a serjeant, and thus as the only one with a long institutional memory of Common Pleas precedent, he may have considered it his particular role to remind his brethren and counsel that the Court had decided equivalent cases before. Thus, for example, in a 1772 trespass case for breaking and entering by a sheriff’s officer, Wilson recorded Nares as saying,

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.\(^{189}\)

\(^{187}\) Lincoln’s Inn, Hill MS. 15 at f˚ 32 (Parsons v. Lloyd (1772) 2 W. Bl. 845; 3 Wils. 341) (citing cases). The Warden and the Commonalty of the Mystery of Grocers v. Backhouse (1771) 3 Wils. 221, 227 (comment at the end of the first argument, citing precedent); Stevenson v. Hardie (1773) 2 Bl 872, 874; Lincoln’s Inn, Hill MS. 11 at f. 66 (“J. Nares was of ye same opin[ion] and to prove that the copy[h]ol[d does not derive und[e]r ye Lor[der] he cited these cases . . . all w[h]ich he observed.”). See also Smedley v. Hill (1776) 2 W. Bl. 1105, 1106 (Nares had tried the case and had made a ruling on evidence that was overturned en banc. Blackstone reported that Nares “with great candour admitted the determination to be wrong; and cited a case before Willes, C.J. . . , wherein such evidence was admitted.”).

\(^{188}\) See, e.g., his long opinions in Scott v. Shepherd (1773) 3 Wils. 403, 407-10 (almost entire discussion centered around listing and describing precedential case); Goodrigh d. Rolfe v. Harwood (1774) 3 Wils. 497, 509-10 (listing rules, followed by citation), but see same case in Loffit at 287-88 (Nares’s argument better developed but still largely dependent on describing precedent). Cf. Bostock v. Saunders (1773) 3 Wils. 434, 442 (discussing what defendant should have shown at trial).

By way of contrast, in the same case Blackstone focused on the larger legal issue of the agency relationship between the sheriff and his officer, citing the sixteenth-century Brooke’s *Abridgment*.  

But where Blackstone turned to precedent because it was the required building-block of any new decision, Nares, not considered a strong judge by contemporaries and given to waffling, often used precedent more as a crutch to help him make a decision. When presiding over a trial on circuit in 1776, Nares had to rule on the admissibility of evidence. Plaintiff had brought suit against a pastor for non-residence in his rectory and wanted to introduce evidence that the pastor had confessed himself to be the rector. Defendant objected that such parol evidence was inadmissible. Unable to decide, Nares “sent to consult Forster Serjeant (who went that Circuit with him as Judge) & by him was informed that ye same point had been determined lately on the Norfolk Circuit by Willes J. The plaintiff therefore was nonsuited.” The following term, King’s Bench set aside the nonsuit, finding that such parol evidence against the interest of defendant was admissible.  

But, on the other hand, the fact that a precedent seemed to direct his decision did not, in his view, obligate him to follow it. In a statutory interpretation case from 1779, the other three judges based their analysis on common sense, or, as Chief Justice de Grey said, “I am not sure that I adopt the true, but certainly the better construction of this act. . . .” Nares, though inclined to dissent based on precedent, did not, saying, “had I dissented, I should have relied on the case of *Cann* and *Boyd*, of which I have a manuscript note . . . ; yet I own the reasons given by the rest of the Judges are so strong, that I know not how to oppose them.”  

Most of the time, Chief Justice de Grey made much of the judge’s responsibility to follow the law. He tended, like Blackstone, to base his opinions on historical analysis of doctrine, and, as a relatively scholarly judge, he appears usually to have done so to Blackstone’s satisfaction. His most extensive explanation of his position on precedent came in 1775, when the twelve common law judges were asked to give their opinions to the House of Lords in a seminal early copyright case, *Donaldson v. Becket*. The

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190. *Id.*  
191. Bray, *supra* note 2, s.v. Nares. Samples of Nares’s inability to make up his mind can be found in Cox v. Chubb (1772) 2 W. Bl. 809, 810; Glead v. McKay (1774) 2 W. Bl. 956, 957; Flureau v. Thornhill (1776) 2 W. Bl. 1078, 1079. In *Howell v. Hanforth*, according to De Grey’s bench notes, Nares said that he at first disagreed with the rule the majority put forth because the plaintiff had not followed the proper procedure but then let himself be persuaded to agree. Lincoln’s Inn Misc. Ms. 183 at f˚ 21r. Blackstone gives no seriatim opinions. (1775) 2 W. Bl. 1016.  
193. Mason v. Vere (1779) 2 W. Bl. 1309, 1310.  
194. *Id.* at 1312.  
195. But when he got something wrong or left something out, Blackstone made sure to correct him. See, e.g., Blackstone’s comments in Wood’s Case (1771) 2 W. Bl. 745, 746; Scott v. Shearman (1775), Lincoln’s Inn, Hill MS. ff˚ 229-30.
question at base was whether authors had a common law right to the ownership of their literary property after publication. De Grey, speaking last, stated 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 reputable series of decisions, and unhinge the foundations of an established right, by any a priori reasoning of my own. . . .” After contending that no precedent establishing a common law of copyright existed, he addressed the other side’s arguments, saying,

I have heard but one [argument], namely that such a claim is consistent with the moral fitness of things. This idea of moral fitness is indeed an amiable principle, and one cannot help wishing all claims derived from so pure a source might receive all possible encouragement; but this principle is no universal rule of law, nor can it be made to apply in all cases. Beautiful as it may be in theory, to reduce it into the practice and execution of Common Law, would create intolerable confusion; it would make laws vain, and judges arbitrary. . . .

He recurred to this dislike of natural justice and natural reason in several other opinions, and when he faced a case for which no precedent existed, and which therefore had to be decided “on Principles,” he did not turn to natural law but rather to analogous legal maxims tested by their case law: “But it is said, that no Action will lie against Persons acting in a judicial Capacity. Let us see how far this general Position is warranted by Law.”

On the bench de Grey acquired the 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’. . . .” 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.” These conflicting impulses resulted in statements, which can with some confidence be assumed to reflect de Grey’s own views, that show him

196. The Pleadings of the Counsel Before the House of Lords in the Great Cause Concerning Literary Property; Together with the Opinions of the Learned Judges on the Common Law Copy Right of Authors and Booksellers . . . 26, 29 (c. 1775).
197. Id. at 27.
199. Miller v. Seare (1777) 2 W. Bl. 1141, 1145.
201. Lemmings, supra note 18 at 184, 353.
vacillating between an insistence on strict adherence to the law and an openness to equitable decision-making. The theme that judges must follow the law, despite apparent unfairness, resonated throughout many of his opinions. In *Rafael v. Verelst*, a suit against the president of the East India Company for false imprisonment in India, when the other judges wanted to grant a new trial, de Grey angrily reminded them that, “In exerting the Jurisdiction of granting new Trials, the Court is not arbitrary, nor has it any discretionary Power.” 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.”

On the other hand, in a whole series of other cases, de Grey appears to have taken positions at odds with these stated views. In a case concerning whether *respondentia* bonds were assignable he argued that, “[t]he Plaintiff is certainly intitled to the Money in Conscience, and therefore (I think) intitled also in Law.” 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 justice of the case, and not on little Quirks and Niceties.” 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.” 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.” Gould characterized this latter interpretation as “the most just, as well as liberal Construction.”

De Grey may have held himself out as a conservative, but his is the sort of pragmatic inconsistency and hedging that one does not find in Blackstone’s opinions.

Gould, though just as committed a common lawyer as Nares, and though just as attuned to precedent, saw his role above all as providing

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202. (1775) 2 W. Bl. 983, 987.
204. Respondentia bonds: a note given by a shipowner to a financier using the ship’s cargo as collateral. 2 BLACKSTONE, COMMENTARIES *458*.
206. Cutting v. Derby (1776) 2 W. Bl. 1075, 1076.
207. Heny v. Purcel (1775) 2 W. Bl. 1002, 1003.
209. E.g., Melchart v Halsey (1771) 2 W. Bl. 740, 744 (Gould discussing historical precedent); Batchelor v. Biggs (1772) 3 Wils. 319, 320 (“Mr. Justice Gould . . . desired Serjeant Forster to look into the case of Cooke versus Sayer, 2 Burro. 755.”); Goldswain’s Case (1778) 2 W. Bl. 1207, 1210 (Gould discussing a complication in the Year Book record of a case).
equitable and just outcomes. When precedent or tradition tied his hands, he accepted that, and he supported outcomes that applied clear, well-known rules and procedures of the Court. But when precedent left room to maneuver, he seized the opportunity to push the Court toward a fairer, less rigid decision. He believed, above all, that the role of courts was to give remedies to injured parties. A newspaper account of his opinion in a 1772 case has him saying, “the pervading principle which governs our laws, is, that whenever an injury is received, a remedy is always supposed.”

In Stevenson v. Hardie (1773), for example, the court was confronted with a difficult problem. The defendant, upon leaving for Ireland, asked plaintiff to lend his wife money as she needed it during his absence. Plaintiff gave the money, and defendant failed to repay. The legal conundrum was that the contract arguably lacked consideration since loans could not be made to a married woman. Gould, agreeing with the Chief Justice, said, “The Court will put 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.”

Blackstone arrived at the same conclusion by a different route. Not for him Gould and de Grey’s straightforward position that “[t]his is a poor Shift to get rid of a just Debt.” Instead, Blackstone sought to express a general rule, discoursing about express and implied assent, actual and virtual, inchoate, imperfect, and complete contracts. Nares added, “There was a Case of Poorhead and Smith, next Term after Marriott and Lister, wherein the same Doctrine was held.”

210. Hill v. Barnes (1777) 2 W. Bl. 1135, 1136 (“It is of great Consequence to the Public for the Court to see these Powers . . . strictly pursued.”); Norris v. Waldron (1778) 2 W. Bl. 1199 (Gould was “for adhering to the ancient practice” of giving plaintiff full costs even though he only won on two counts out of five).

211. See, e.g., Dearne v. Grimpe (1779) 2 Bl. 1275 (Gould disagreeing with De Grey on assessment of costs because he thinks only the actual costs expended should be paid and not, as De Grey thought, the costs that would have been assessed had the plea in question not been withdrawn); LI Misc. MS. 550 vol. 2 at f˚ 34b (Gould at Warwick Summer Assize, 1779, Gould “added that ye determination in C.B. was much ag[ain]st ye inclination of ye court, & upon precedent, w[h]ich he w[oul]d not extend beyond the strict c[ase] in point.”). Common Pleas was also called Common Bench, thus C.B.

212. GENERAL EVENING POST, Nov. 24, 1772, at 1. The manuscript account is slightly different, and neither Blackstone nor Wilson report a like comment. Lincoln’s Inn Hill MS. 15 at f˚ 32 (Parsons v. Lloyd (1772) 2 W. Bl. 845; 3 Wils. 341) (In manuscript version, Gould says, “Party must have a remedy some where therefore Q[uestio]n is ag[ain]st whom.”); See also Nares’s opinion in Rafael v. Verelst (1775) 2 W. Bl. 983, 987 (“Every thing that can be done, should be done to remedy an injury received; and for that purpose, ‘Boni judicis est ampliare jurisdictionem suam.’” (“Good judges will expand their jurisdiction.”)).

213. 2 W. Bl. 872, 873.

214. Id.

215. Id.

216. Id. at 874.
Furthermore, although Gould expected procedures to be followed properly, and in the ages-old tradition of common law judges willingly used procedural mistakes as a way to avoid deciding cases on large legal issues,\footnote{Baker, supra note 26 at 197.} he disliked procedural technicalities that threw up unnecessary roadblocks; “beating the air,” he called it.\footnote{Lincoln’s Inn, Hill MS. 15 at f˚ 27-28 (Hawley v. Holby, no date, not reported in published source) (Gould speaking of judging by “common sense” rather than “beating the air” with procedural technicalities).} In such instances, he would encourage his brethren to try to find a way to move the litigation to a resolution rather than simply throw the party out of court. His advice won the day in Santler v. Heard (1775). Plaintiff had obtained a change of venue by claiming that he had material evidence in the new venue. At trial, he did not introduce that evidence, but he did win a verdict. Defendant sought to have the plaintiff nonsuited based on violation of the venue statute. De Grey held, “By 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.”\footnote{2 W. Bl. 1031, 1031.} 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) I cannot consent he should lose the whole of his proceedings ab ovo. There was a Case of Long and Leach, . . . , in which the parties went before the Master to settle the costs for non-performance of this rule. That is one precedent, in which no nonsuit was granted.\footnote{Id. at 1032.} Although Blackstone provided a two-page discussion on the history of the statute and its subsequent evolution, and Nares cited a case he remembered, both in support of the Chief Justice, the parties ended up “agree[ing] to go before the Master.”\footnote{Id. at 1032-34. See also Martin v. Kesterton (1776) 2 W. Bl. 1089, 1089 (“I think the demurrer is not good; but would recommend it to the plaintiff to amend his declaration, by inserting the names of the closes, on being paid his costs.”).}

Gould was comfortable with assuming the responsibility of wielding discretion when he believed that would lead to the fairest outcome. He made his views clear in the infamous Rudd Case, a spectacular forgery trial that caught the public attention in 1775.\footnote{Donna T. Andrew and Randall McGowen, The Perreaus and Mrs. Rudd, Forgery and Betrayal in Eighteenth-Century London (2001).} Margaret Caroline Rudd was involved in a scheme to forge bonds with two brothers, Robert and Daniel Perreau. 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. 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. 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.”

When the case went before the twelve judges for review, Gould was only able to persuade Nares to his side.

The *Rudd* case is somewhat reminiscent of Blackstone’s stubborn dissent in the *Harrison* forgery trial. In both instances, the judge felt that the statute under which the defendant was being prosecuted did not match up properly with the alleged crime. But where Blackstone phrased his opposition in terms of a strict application of the rule, Gould put his in terms of the right of a judge to exercise discretion.

One final case provides an opportunity to glance Blackstone, in 1779, in conversation with all eleven of the other common law judges. 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. 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 . . .” The question was whether Donnolly’s act was properly defined as robbery even though there had been no actual or threatened force or violence.

The judges debated the point at some length. Half of them, including Mansfield, de Grey, Gould, and Nares, considered the act a clear robbery. The others initially expressed some hesitance, but all eventually acquiesced in the robbery charge. Blackstone expressed greater hesitance than the others. He began with his common refrain, “the difficulty of the case was in drawing the line for the first time.” 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.” Given Blackstone’s consistency, the rest of his opinion can be guessed at. He 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. Therefore, the act was not robbery.

Unlike the 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

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226. *Id.* at 720, 723-26.
227. *Id.* at 721.
228. *Id.*
229. *Id.*
falling under the crime” with the excuse that “the law should keep pace with the times.”230 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.”231 And unlike Baron Eyre of the Exchequer, who would be de Grey’s eventual replacement as Chief Justice of Common Pleas, 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.”232 Though in the end, he reluctantly agreed to concur with the rest on the basis that the facts showed a fear of violence, the debates demonstrated that Blackstone was not afraid to follow the law wherever it led regardless of the consequences.233

The greatest difference between Blackstone and his brethren was the inflexibility and consistency of his views. He was so firmly convinced that a single, guiding rule could be found through the diligent searching of the authorities, and he was 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. He did not, like Gould, expect the law to be equitable. De Grey might have claimed that he could not vary from the path laid out by his predecessors, but of all the judges on the Common Pleas, only Blackstone adhered to that standard with such a rigid understanding of what it meant.

IV. 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.”234 One explanation for why his 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

230. Id. at 720.
231. Id. at 722.
232. Id. at 719.
233. Id. at 722.
234. 67 MONTHLY REVIEW, supra note 19 at 5 (He 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 other, 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.”); see also, 2 JEREMY BENTHAM, THE CORRESPONDENCE OF JEREMY BENTHAM 116 (1968) (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.” I thank Wilfrid Prest for this reference); 8 FOSS, supra note 4 at 249 (1864) (claiming Blackstone “was equally distinguished as a judge as he had been as a commentator”); 12 HOLDSWORTH, supra note 4 at 707 (writing Blackstone was “an able judge” who was “a master of all the law administered in his court.”).
“lessen the Respect due to the Dignity and Gravity of his Office, by any outward Levity of Behaviour.”235 This fits with the image his opinions give of aussy, by-the-book pedant.

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 the idea that animated his Commentaries, that the law was a system, and he turned it into an overarching principle of legal philosophy. But what he did not grasp was that law in practice did not fit into neat boxes. It was not clear; the authorities did not have all the answers; the judge did have to exercise some discretion some of the time. Everything that made his Commentaries such an important work—the systematizing, the unnuanced presentation of easily-accessible rules, the focus on substantive law—made Justice Blackstone seem out of touch. The law, in daily practice, was not systematic. The rules were not always certain. The most common issues the Court faced were procedural rather than substantive. In his work on the history of contract law, Patrick Atiyah observed that, “whatever his faults, Blackstone understood the legal mind.”236 But this is not right. Blackstone’s greatest fault, as a lawyer, was precisely that he did not understand the legal mind.

235. Clitherow, Preface, supra note 17 at xxvii-xviii. 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 (2001), citing The Diary of John Fry, Mar. 8, 1771. Fry, however, was no friend of Blackstone’s. Prest, supra note 39 at ¶ 26, n.41 (2004). See also J. PRIOR, LIFE OF SIR EDMUND MALONE 431-32 (1860) (“Sir William Blackstone, as Sir Wm. Scott of the Commons observed to me a few days ago, was extremely 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 Oxforshire 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 f[rom] Wells before the Judge had finished a long cause in which all the prime[?] Council except Davy were engaged he sh[ould] 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 into Court. He sat at 7 & no one coming, he sent & had ye same answer, on w[hi]ch he said he w[ould] adjourn ye court until 9, & if they did not come he w[ould] 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[ould] read the declaration & say no more.

Bray, supra note 2, s.v. William Blackstone.

236. ATIYAH, supra note 16 at 102.