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# Blackstone's Theoretical Intentions;Note

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## NOTES

### BLACKSTONE'S THEORETICAL INTENTIONS

If a definition of municipal law contains no reference to moral values or natural law, must its author be a legal positivist? If a natural law theorist's definition of positive law contains a reference to "right" and "wrong," must this reference be to moral or natural standards? The answer to these questions is commonly affirmative, because it is widely assumed that the main business of natural law theorists is to affirm, and of legal positivists to deny, the thesis: *lex iniusta* by definition *non est lex*.

Some such assumptions have muddled the interpretation of Blackstone's introductory theoretical discourse on law.<sup>1</sup> To elucidate that discourse, by reference to Blackstone's structural and systematic preoccupations in constructing the *Commentaries*, is the object of this essay. The methodology of the *Commentaries* has been ignored in recent discussion. But reflection on it establishes, contrary to received interpretations,<sup>2</sup> both that Blackstone's interest in natural law was real and sustained, and that his definition of municipal law was free from any reference to natural law. To establish these limited exegetical points may help in dispelling a most widespread and obstructive misunderstanding of the natural law tradition in jurisprudence.

#### I

Very commonly it is supposed that Blackstone's introductory chapter on "The Nature of Laws in General" is ornamental, a mere concession to the stylistic or pedagogical conventions of the age, and without substantial intrinsic relation

<sup>1</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND intro. § 2 (1778); hereinafter cited by volume and page of the eighth edition (the last in Blackstone's lifetime), published at the Clarendon Press, Oxford, 1778: thus, I, 38-62. (The pagination of this edition is almost the same as that of the first edition of 1765-1769, save that because of additions in volume I the pages after p. 98 in that volume have numbers up to 12 higher than for the corresponding material in the first edition: e.g., I, 473 in the first edition is equivalent to I, 485 in the eighth.)

<sup>2</sup> See Joseph W. McKnight, *Blackstone, Quasi-Jurisprudent*, 13 SOUTHWESTERN LAW JOURNAL 399 (1959); Hans-Justus Rinck, *Blackstone and the Law of Nature*, 2 RATIO 162 (1960); H. L. A. Hart, *Blackstone's Use of the Law of Nature*, [1956] SOUTH AFRICAN LAW REVIEW 169; DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF LAW 32-61 (1941). See also EDGAR BODENHEIMER, JURISPRUDENCE 56-7 (1962); W. G. FRIEDMANN, LEGAL THEORY 84 (4th ed. 1960); H. D. Hazeltine, *Blackstone*, 2 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 580; J. WALTER JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW 90 (1940); G. W. PATON, JURISPRUDENCE 114 (Derham ed. 1964); ROSCOE POUND, 2 JURISPRUDENCE 52-4, and compare vol. 5 at 62 (1959); ERNEST BARKER, ESSAYS IN GOVERNMENT 120-53 (2nd ed. 1951). Compare Paul Lucas, *Ex parte Sir William Blackstone, "Plagiarist": A Note on Blackstone and the Natural Law*, 7 AMERICAN JOURNAL OF LEGAL HISTORY 142 (1963), proposing the extreme contrary view of Blackstone as a Hobbesian positivist.

to the structure or content of the *Commentaries*.<sup>3</sup> On the basis of this supposition, scholars feel free to attribute to Blackstone the most lax and conflicting intentions concerning, for example, the definition of positive law, the relation of natural law to sovereignty, and the like. Now as will be shown, the content of Blackstone's theory of natural law and the precision of his exposition leave much to be desired. But what is in question at the moment is the scope and integration of the project he set himself. It is fortunate that Blackstone himself has provided an analysis of his work which sufficiently indicates the architectural purpose of his introductory discourse.

Recent scholarship largely ignores Blackstone's *Analysis of the Laws of England*, first published in 1756, and revised in 1771 to provide, in its author's view, an exact "outline or abstract" of the *Commentaries*.<sup>4</sup> The "first endeavour" of the *Commentaries* is stated in Blackstone's preface to his *Analysis*. It is

to mark out a plan of the laws of England, so comprehensive as that every title might be reduced under some or other of its general heads, which the student might afterwards pursue to any degree of minuteness; and at the same time so contracted, that the gentleman might with tolerable application contemplate and understand the whole.<sup>5</sup>

This, if successful, would in Blackstone's view advance him in

the remainder of his design; in deducing the history and antiquities of the principal branches of law, in selecting and illustrating their fundamental principles and leading rules, in explaining their utility and reason, and in comparing this with the laws of nature and other nations.<sup>6</sup>

No clause of the foregoing passages is redundant, hyperbolic or misleading; the description of the preoccupations of the *Commentaries* is exact. But our immediate concern is with the succeeding paragraphs, which make up the bulk of the preface to the *Analysis*. These enforce Blackstone's concern with method, since "in pursuit of these his endeavours, he found himself obliged to adopt a method in many respects totally new."<sup>7</sup> There follows a review of the leading English publicists, from Glanvil and Bracton to Wood and Finch, remarking on the deficiencies of their respective methods of "reducing our laws to a system." This review concludes with Hale, whose *Analysis of the Law* is praised as "the most natural and scientific of any."<sup>8</sup> So Hale's "distribution hath therefore been principally followed,"<sup>9</sup> but with variations sufficient to entitle Blackstone

<sup>3</sup> See the references in note 2 *supra* to works of Barker, McKnight, Hart, Bodenheimer, Friedmann and Hazeltine. Bentham, of course, asserted for controversial purposes that the introductory discourse was "the most characteristic part" of Blackstone's work and "that which was most his own." A FRAGMENT ON GOVERNMENT 96 (Montague ed. 1891).

<sup>4</sup> BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND (hereinafter cited as ANALYSIS) vii (preface) (6th ed. 1771). The work, apart from its preface, appears as the Contents pages of various later editions (e.g., Hovenden's [1836], Hargrave's [1844], Sharwood's [1894], *et al.*).

<sup>5</sup> ANALYSIS iv (preface).

<sup>6</sup> *Ibid.* See also I, 35-6. The program set out by Blackstone in these passages closely follows that commended in JOHN LOCKE, TREATISE ON EDUCATION §§ 186, 187.

<sup>7</sup> ANALYSIS iv (preface).

<sup>8</sup> *Id.* at v.

<sup>9</sup> *Ibid.*

to claim that his own method is "in many respects totally new." Blackstone stresses (without specifying) the variations and recommends that students study how he differs from Hale.<sup>10</sup>

May we not follow Blackstone's advice? In the preface to his *Analysis of the Law*, Hale had said:<sup>11</sup>

The laws of this kingdom do respect either,  
Civil rights; or  
Crimes and misdemeanours.

. . . . .

I shall therefore divide the laws of this kingdom, in relation to their matter, into two kinds:

1. The civil part, which concerns civil rights, and their remedies.
2. The criminal part, which concerns crimes and misdemeanours.

However, it soon becomes evident that Hale's description of his own analysis was not quite exact. For in "the civil part" of his analysis there was indeed a section on "civil rights" (sections II-XXXVIII) and a section on "their remedies" (sections XLV-LIV); but in between there was an equally demarcated section, equipped like the others with its own general introduction: "of wrongs or injuries" (sections XXXIX-XLIV). Moreover, it is evident enough that remedies are appurtenant to wrongs; indeed, Hale's sections on remedies "only give some *General Rules* relating to the manner of the application of those remedies; leaving every particular remedial writ" to the preceding sections in which he had "considered of the various kinds of wrongs or injuries and under these distributions [had] already mentioned their ordinary remedies."<sup>12</sup> Hence, the essential concepts in the "civil part" were "rights" and "wrongs"; while "the criminal part" (which Hale never actually analyzed as such) evidently concerned "wrongs" of some sort.

Hale's analysis therefore ran into (at least) verbal difficulties and asymmetries. If the basal distinction was between "civil" and "criminal," what was the force of the adjective "civil" in the phrase "civil rights"? Were there "criminal rights"? Evidently not; the phrase seems a solecism at least. But neither adjective could be omitted if the term "wrongs" appeared, or ought to have appeared, in the description of both "parts." Might it not, therefore, be better to drop the terms "civil" and "criminal," retaining the terms "rights" and "wrongs," with an option to distinguish between types of rights and wrongs by terms corresponding to, but more perspicuous and symmetrically applicable than, "civil" and "criminal"?

Such, at any rate, was the course Blackstone took. The considerations advanced above are merely eligible conjectures; the outcome in the *Commentaries* is a plain fact. On the Contents page of the *Analysis*, the four books of the *Commentaries* are designated as follows:

<sup>10</sup> *Id.* at vi.

<sup>11</sup> MATTHEW HALE, *ANALYSIS OF THE LAW* preface. (First published 1713.)

<sup>12</sup> *Id.*, intro. to § 45.

The objects of the laws of England; *viz.*

I	The rights of persons . . . . .	Book I
II	The rights of things . . . . .	Book II
III	Private wrongs . . . . .	Book III
IV	Public wrongs . . . . .	Book IV

And the first proposition of the analysis of Book I is: "The objects of the laws of England are, 1. Rights. 2. Wrongs."<sup>13</sup> Obviously, it is necessary to have an exact understanding of the term "objects." Above all, it is necessary to grasp that in this usage it is a formal juridical concept. It does not signify "objectives" or "values" or any moral, natural or other preexisting rule or relationship. It prescind entirely from all such issues, and signifies nothing more than that, as a matter of juridical logic, the content of any legal rule can be expressed in terms of rights and their infringement.<sup>14</sup>

Correspondingly, Blackstone repeatedly stresses that, in this definition of the "objects of the laws of England," the term "rights" is to be taken as signifying something defined and enforced by human law.<sup>15</sup> Some of these rights happen also to be "founded on nature and reason";<sup>16</sup> but in the same breath it must be insisted that "their establishment (excellent as it is) [is] still human."<sup>17</sup> Similarly, he opines that "the principal view of human laws is, or ought to be, to explain, protect, and enforce such rights":<sup>18</sup> but in this sentence the term "view" manifestly does not correspond to the term "object"; its synonyms in the same paragraph are "principal aim" and "primary end," but never "objects." Moreover, natural rights are "immutable,"<sup>19</sup> but the same rights in their municipal juridical form are "subject at times to fluctuate and change."<sup>20</sup> Again, most rights and wrongs are not immediately founded in nature, but are wholly or partly things naturally indifferent where "the very essence of right and wrong depends upon the direction of the laws to do or to omit it."<sup>21</sup> By far the greater part of the *Commentaries* is expressly devoted to such rights and wrongs "*juris positivi*."<sup>22</sup>

In short, the "method" which Blackstone was seeking above all was to catalog the laws of England in terms of the rights of persons and the rights of things, and private and public wrongs. Would it be surprising that a man pre-occupied with "method" should state the logic of his method in his definition of law?<sup>23</sup>

<sup>13</sup> ANALYSIS bk. I, c. 1, § 1.

<sup>14</sup> See I, 122. Contrast Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQUESNE UNIVERSITY LAW REVIEW 345, 352 (1966).

<sup>15</sup> See I, 124.

<sup>16</sup> I, 127.

<sup>17</sup> *Ibid.*

<sup>18</sup> I, 124.

<sup>19</sup> *Ibid.*

<sup>20</sup> I, 126.

<sup>21</sup> I, 55. See also text at note 66 *infra*.

<sup>22</sup> II, 211. See also I, 125.

<sup>23</sup> On the general question of Blackstone's lifelong obsession with method, order and architectural system, see WILLIAM HOLDSWORTH, 12 HISTORY OF ENGLISH LAW 718-20 (1938).

Blackstone's definition of municipal law is designed to justify his "totally new" method of arranging English law. The definition is this:

Municipal, or civil, law is the rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.<sup>24</sup>

Our present concern is with the last clause. When Blackstone turns to justify it, he immediately remarks:

... in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established<sup>25</sup> and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs.<sup>26</sup>

This passage establishes the conceptual linkage between the definition of law and the structure of the *Commentaries*. It is quite clear that the thread of the discussion has nothing to do with "natural law" or "positivism." That Blackstone's concern is with the juridical logic of his whole construction<sup>27</sup> is emphasized by the next paragraph beginning, "For this purpose every law may be said to consist of several parts . . ." <sup>28</sup> I quote the remainder in the shorter form of the *Analysis*:

1. The declaratory; which defines what is right, and wrong. 2. the directory; which consists in commanding the observation of right, or prohibiting the

<sup>24</sup> ANALYSIS intro. § 2. Also I, 44, 58.

<sup>25</sup> The force of the term "established" may be gathered from the following: "The absolute rights of every Englishman . . . as they are founded on nature and reason . . . though subject at times to fluctuate and change: their establishment (excellent as it is) being still human." I, 127.

<sup>26</sup> I, 53.

<sup>27</sup> This concern is made explicit on the first page of Book I (I, 121) and of Book III (III, 1); the latter passage is quoted here since this relegates to footnotes the decorative references to Cicero and Bracton which have bedevilled interpretation of the former, otherwise identical passage:

At the opening of these commentaries municipal law was in general defined to be, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." From hence therefore it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned the distribution of these collections into two general heads; under the former of which we have already considered the *rights* that were defined and established, and under the latter are now to consider the *wrongs* that are forbidden and redressed, by the laws of England. III, 1.

Blackstone's first editor, Christian, was the first of many who have complained that the second portion of the definition of municipal law must either be superfluous and tautologous or else a false claim to actual or conceptual identity or correspondence of positive with natural law. See note to I, 44 in Christian's editions, also Hovenden's and Sharswood's editions. Other supporters of this view, or of the view that Blackstone's definition is a hybrid of positive and natural law elements, include F. S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUMBIA LAW REVIEW 809, 838 (1935); McKnight, *op. cit. supra* note 2, at 402. See also the absurd exegesis in JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES 70-2 (Everett ed. 1928). In fact the definition has nothing to do with natural law, and is not superfluous since it seeks to reveal the juridical logic on which the *Commentaries* are based. Likewise, it is not *opposed* to natural law, as Lucas, *op. cit. supra* note 2, represents.

<sup>28</sup> I, 53.

commission of wrong. 3. the remedial; or method of recovering private rights, or redressing private wrongs. 4. the vindicatory sanction of punishments for public wrongs; wherein consists the most forcible obligation of human laws.<sup>29</sup>

It is of the utmost significance that among the ten paragraphs which constitute Blackstone's own analysis of his introductory chapter on the nature of laws in general, there is no hint that the *definition* of municipal law canvassed any issue about the relations of natural and positive law.<sup>30</sup> However, "in the explication" of his definition, Blackstone "endeavoured to weave a few useful principles, concerning the nature of civil government, and the obligation of human laws."<sup>31</sup> People who do not discern the central themes of the discourse, *viz.* the themes set out in the *Analysis*, often suppose that these interwoven passages are the main substance of the chapter; hence the chaos of interpretations.

It is true that, in discussing the "declaratory part" of municipal laws, Blackstone offers a theory of natural rights and duties which do not in his view "receive any additional strength when declared by the municipal laws to be inviolable."<sup>32</sup> But this paragraph begins with the clear assertion that the declaratory part "depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator."<sup>33</sup> It is followed by a paragraph stressing the purely positive origin of most laws, and the discussion culminates, in the succeeding paragraph, with the remark that "The law that says, 'thou shalt not steal,' implies a declaration that stealing is a crime"; and "the principal obligation of human laws" (whatever their origin) "consists in the penalty annexed."<sup>34</sup> Blackstone is simply showing that his theory of the parts of a law,

<sup>29</sup> ANALYSIS intro. § 2, 8.

<sup>30</sup> Blackstone's analysis of his introductory discourse is as follows:

*Of the nature of laws in general.*

1. Law is a rule of action, prescribed by a superior power.
2. Natural Law is the rule of human action, prescribed by the creator, and discoverable by the light of reason.
3. The divine, or revealed, law (considered as a rule of action) is also the law of nature, imparted by God himself.
4. The law of nations is that which regulates the conduct and mutual intercourse of independent states with each other, by reason and natural justice.
5. Municipal, or civil law, is the rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.
6. Society is formed for the protection of individuals; and states, or government, for the preservation of society.
7. In all states, there is an absolute supreme power, to which the right of legislation belongs; and which, by the singular constitution of these kingdoms, is vested in the king, lords, and commons.
8. The parts of a law are [quoted in text at note 29 *supra*].
9. To interpret a law, we must enquire after the will of the maker: which may be collected either from the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the Law.
10. From the latter method of interpretation arises equity, or the correction of that, wherein the law (by reason of its universality) is deficient.

<sup>31</sup> I, 59.

<sup>32</sup> I, 54.

<sup>33</sup> *Ibid.*

<sup>34</sup> I, 55, 57. Theft is by natural law *malum in se*. I, 54.

necessary to explain just how law commands what is right and prohibits what is wrong, is unaffected by the theory of natural laws and rights expounded earlier in the chapter.

Likewise, the famous discussion of "purely penal laws," which occurs at the end of the justification of the definition, is merely an appendage or "interweaving" of "a few useful principles" about "the obligation of human laws."<sup>35</sup> It detracts nothing from the insistence that "the main strength and force of a law consist in the penalty annexed to it."<sup>36</sup> The obligation of laws "upon men's consciences" is worth a paragraph; but this must be prefaced by insisting that "if that were the only, or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance."<sup>37</sup>

Finally, it should be noticed how the "parts of a law," adduced to explain the last clause of the definition of municipal law, correspond to the parts of the *Commentaries*. For the declaratory and directory parts should be taken together (since the directory "virtually includes the former, the declaration being usually collected from the direction"),<sup>38</sup> and together they define rights (Books I and II) and the wrongs relative to them; while the remedial part indicates the "method of recovering private rights, and redressing private wrongs"<sup>39</sup> (Book III) and the vindicatory concerns "public wrongs" (Book IV).

In short, the introductory definition of law is thus far intimately related to the structure of the *Commentaries* as a whole. Moreover, the definition of municipal law is shown to be concerned with structural and methodical questions, not problems of political or moral theory.

## II

Still, not a few pages of the introductory discourse are concerned with natural and divine laws, and with the origins of society as canvassed by political philosophers. Does it follow, from what has just been established, that these pages are mere ornamental interweavings, substantially unrelated to the rest of the *Commentaries*? Three main arguments are advanced and repeated in the literature on Blackstone, to establish the merely decorative character of these pages.

(i) First, there is said to be a contradiction between Blackstone's theory of natural law and his theory of parliamentary sovereignty; hence one of the theories must be sacrificed as inconsequential, and it is the natural law theory.<sup>40</sup>

More than one hundred pages separate the main discussion of parliamentary sovereignty<sup>41</sup> from the discourse on natural law. Can Blackstone by then have

<sup>35</sup> I, 59.

<sup>36</sup> I, 57.

<sup>37</sup> *Ibid.*

<sup>38</sup> I, 55.

<sup>39</sup> ANALYSIS intro. § 2, 8.

<sup>40</sup> See the references in note 2 *supra* to works of Bodenheimer, Paton, Rinck, Barker, Stone and Friedmann. Compare JOHN W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 188-90* (1955).

<sup>41</sup> I, 160.



forgotten his introductory assertion that "no human laws are of any validity, if contrary to" the law of nature?<sup>42</sup>

It seems not. The principle of parliamentary sovereignty is upheld within five pages of the assertion just quoted from page 41. On page 46, legislature is defined as "the greatest act of superiority that can be exercised by one being over another,"<sup>43</sup> and "sovereignty" and "legislature" are said to be convertible terms. On page 49, it is said that "there is and must be in all [governments] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside." On page 51, it is said of Parliament: "Here then is lodged the sovereignty of the British constitution"; "the British parliament . . . has the supreme disposal of everything." And on page 54, it is again said of natural rights that "no human legislature has power to abridge or destroy them."

Blackstone's meaning is simply that no human law has any moral validity or force against a natural law, and that no human law can affect the content of a natural right as such. On the other hand, the significance of Parliament's "irresistible, uncontrolled authority" is simply that stated on the very same page: "all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end."<sup>44</sup> Again, in a little-noticed passage later in the Introduction, Blackstone specifies his meaning:

if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it . . . for that were to set the judicial power above that of the legislature, which would be subversive of all government.<sup>45</sup>

Opinions may differ about the truth of the last clause. But only someone who mistakenly supposed that the doctrine of judicial review in *Marbury v. Madison*<sup>46</sup> is an absolute juridical necessity<sup>47</sup> could suppose that there is any contradiction between the sovereignty of Parliament and a doctrine of a higher law critique of the exercise of that sovereignty. As Blackstone might have said, the courts may bow to Parliament rather than to the higher law, but it does not follow that individual conscience should similarly be subject; and vice versa.<sup>48</sup>

Hence the alleged contradiction does not exist, and the natural law doctrine need not be sacrificed as inconsequential.

(ii) Secondly, it commonly is suggested that Blackstone's introductory discourse on law in general was so extraneous to his central preoccupations that he merely transcribed (without acknowledgment) passages on natural law from the

<sup>42</sup> I, 41.

<sup>43</sup> *I.e.*, legislation.

<sup>44</sup> I, 49.

<sup>45</sup> I, 91.

<sup>46</sup> 1 Cranch 137 (1803).

<sup>47</sup> Compare *Eakin v. Raub*, 12 S. & R. 330, 344-58 (Pa. 1838) (Gibson, J., dissenting).

<sup>48</sup> Thus Blackstone can assert both that where a human law is contrary to natural law, "we are bound to transgress that human law," (I, 43; also IV, 28), and that "however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal." (IV, 28.)

Swiss publicist Burlamaqui, whose work *The Principles of Natural and Politic Law* had then recently been translated.<sup>49</sup> Against this, it has recently been alleged that no such transcription occurred.<sup>50</sup>

The truth of the matter can readily be ascertained by anyone willing to read the two works; so there is no point in discussing the question at length. Suffice it to say that Burlamaqui's book, in Nugent's translation, obviously lay before Blackstone when he was writing his introductory discourse. Thus Burlamaqui's passage:

. . . the subjection in which he finds himself, does not permit him to entertain the least reasonable hopes of acquiring any solid happiness, independent of the will of his superior, and of the views he may propose in relation to him. Besides, this has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other, is greater or less, absolute or limited.<sup>51</sup>

in Blackstone appears as:

This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited.<sup>52</sup>

Similarly, Blackstone substantially reproduces Burlamaqui's categorization of God's attributes as "power, wisdom and goodness,"<sup>53</sup> his discussion of promulgation,<sup>54</sup> his concept of a "rule"<sup>55</sup> and his strictures against Clarke's "fitness" theory of natural law.<sup>56</sup> But Blackstone's definition of law in general<sup>57</sup> owes nothing to Burlamaqui's,<sup>58</sup> nor does his definition of municipal law.<sup>59</sup> Blackstone's idea of a state of nature contradicts Burlamaqui's,<sup>60</sup> and after transcribing the sentence last quoted above, Blackstone ignores Burlamaqui's repeated and emphatic insistence that the mere power and supremacy of God could not create an obligation.<sup>61</sup> Indeed, simply to read in each text the six sentences following the respective passages quoted above is to see the radical independence of Blackstone from Burlamaqui on matters of theoretical substance.

Our present purpose is not to trace the intellectual provenance of Blackstone's discourse, but to insist that the charge of lazily adopting any other man's theory for decorative purposes is unfounded.

(iii) Finally, there is H. L. A. Hart's interesting suggestion that Blackstone's

<sup>49</sup> See the many references assembled in Lucas, *op. cit. supra* note 2, at 143 note 2.

<sup>50</sup> *Id.* at 144.

<sup>51</sup> JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITICAL LAW* 77 (Nugent trans., 3rd ed. 1784).

<sup>52</sup> I, 39.

<sup>53</sup> I, 40, 49, 51. BURLAMAQUI, *op. cit. supra* note 51, at 89.

<sup>54</sup> I, 45. BURLAMAQUI, *op. cit. supra* note 51, at 79.

<sup>55</sup> I, 44. BURLAMAQUI, *op. cit. supra* note 51, at 78.

<sup>56</sup> I, 41. BURLAMAQUI, *op. cit. supra* note 51, at 63.

<sup>57</sup> I, 38.

<sup>58</sup> BURLAMAQUI, *op. cit. supra* note 51, at 45.

<sup>59</sup> I, 44. BURLAMAQUI, *op. cit. supra* note 51, at 78.

<sup>60</sup> I, 123. BURLAMAQUI, *op. cit. supra* note 51, at 42-3.

<sup>61</sup> I, 39-40. BURLAMAQUI, *op. cit. supra* note 51, at 88, 69, 77.

theory of natural law performs, not a genuinely theoretical function, but rather the practical purpose of stifling criticism of existing law:

his exploitation of the law of nature in defence of the existing law very largely consists in the assertion that the institution which he is defending is just one of such "matters in themselves indifferent," and that since the law of nature has nothing to say *against* the institution or is not "contradicted" by it, there is no ground for criticism.<sup>62</sup>

Thus Blackstone's law of nature is said to dissolve into a series of gaps, leaving Blackstone with "no tool of social criticism at all."<sup>63</sup>

This suggestion, as we shall show in our concluding section, is not without point. But on the whole it cannot be admitted. In the first place, it is misleading to say, as Hart does, that the theory of "things naturally indifferent" (i.e., matters to which no natural law rule directly applies) is "distinctive," or peculiar to Blackstone.<sup>64</sup> It is in principle a scholastic commonplace, handed down in English law by St. German, whose very examples are similar to Blackstone's.<sup>65</sup> But what is distinctive of Blackstone is the variety of senses in which he uses the term "indifferent" — a variety which Hart seems to have overlooked. The fact is that the category of "things indifferent in themselves" shifts its meaning uneasily between (i) matters so "indifferent" that legislation on them is unjustified; (ii) matters so "indifferent" that a legislator should be content with

<sup>62</sup> Hart, *op. cit. supra* note 2, at 169, 171. Samuel Shuman follows Hart, and describes Blackstone's purpose as "malicious": LEGAL POSITIVISM 186 (1963). See also the articles of Lucas and McKnight cited in note 2 *supra*.

<sup>63</sup> Hart, *op. cit. supra* note 2, at 172.

<sup>64</sup> *Id.* at 171. The phrase "things naturally indifferent" (I, 55) (emphasis added) is used in the text to emphasize the variety of meanings attached by Blackstone to the term "indifferent." Note that by additions to his text after the sixth edition, Blackstone makes it clear that he is expressly postulating at least three categories of law, including laws about at least two categories of "things indifferent." See I, 58. First, there are laws about *mala in se*. Second, there are laws about things which are naturally indifferent, but which in given circumstances involve "any degree of public mischief or private injury." (I, 58, added in 7th ed.) Third, there are laws about things "wholly a matter of indifference," noncompliance with which laws will cause at most a compensable "civil inconvenience": such a law is *lex pure poenalis*, whereas a law of the second category is *lex poenalis mixta*. (I, 58 note m, added in 7th ed. But notice that this defensive appeal to Sanderson is misleading, since Sanderson's wholly voluntarist theory of penal law has only terminology in common with Blackstone's.) Note also that none of the three examples adduced by Hart fall into any of these categories of *mala*, since all these examples concern laws conferring powers or rights. But as "*mala prohibita*" is for Blackstone a complex category, so is his category of "things indifferent" complex in ways not noticed by Hart. Curiously, Austin misinterpreted Blackstone's remarks about the rights of the half-blood in the same way. JOHN AUSTIN, 2 LECTURES ON JURISPRUDENCE 913 (3rd ed. 1869).

<sup>65</sup> See CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT bk. I, c. 5. Compare Blackstone's discussion of distress at I, 55. Of course, Blackstone's notion of matters *wholly* indifferent (I, 58. See note 64 *supra*) is not shared by all scholastics nor by St. German insofar as it relates to the theory of *mala* merely *prohibita* and purely penal laws importing an obligation only to pay the penalty. But it is shared insofar as it amounts to the theory that there are many cases in which alternative rules on the same matter could have been adopted with equal propriety (e.g., drive on the left rather than the right; property to descend to eldest rather than youngest son; etc.), and that in such cases no more than disputable and changeable balances of convenience are at stake. (See text *infra* at notes 68-79.) Hart's discussion of *mala prohibita* can obscure the fact that it is the latter, not the former, theory that is at stake in the three examples that he cites.

either performance or payment of penalty; (iii) matters "indifferent" in that, though of great moment to a given society, they are not of moment to all conceivable societies; and (iv) matters only "indifferent" in that, though of great moment to social living, they would not be of great moment in a state of nature.<sup>66</sup> Moreover, the matters in categories (iii) and (iv) include matters, the regulation of which is of great moment, but which could be regulated in a variety of alternative but more or less equally reasonable ways.<sup>67</sup> With these cautions in mind, the three examples adduced by Hart should be given a closer interpretation.

The first concerns the rule that estates should escheat to the Crown rather than pass by succession to a brother of the half-blood. Hart cites only the discussion in the Introduction, where Blackstone is concerned merely to establish that those who devised rules of common law should not be presumed to have acted without reason, and that precedent must be followed by judges.<sup>68</sup> But Blackstone refers to the rule very elaborately in Book II. He defends it against the criticisms (not utilitarian!) of Craig,<sup>69</sup> establishes its feudal rationale, demonstrates the unlikelihood that it often causes hardship, admits that it is "a very fine-spun and subtle nicety" that has been pushed too far,<sup>70</sup> and concludes that the question whether legislative intervention is to be preferred to shaking a long-established rule "is not for me to determine."<sup>71</sup> Later he remarks that the "artificial reason" of the rule, "arising from feudal principles, has long ago entirely ceased," and that the rule is "hard."<sup>72</sup> So it does not seem right to say that his rebuttal of Craig's criticisms on Craig's own ground amounts to a general attempt to stifle all criticisms of the rule.

The other two passages concern rules of testamentary disposition and intestate succession.<sup>73</sup> Craig and Locke had raised natural law objections to the English rules,<sup>74</sup> and once again Blackstone meets them on their own ground. His arguments here are not *ad hoc*, but are strict deductions from his general theory of property and the state of nature.<sup>75</sup> But it is simply not the case that for Blackstone these natural law arguments close the matter or exhaust all criticisms. Besides the passages cited by Hart, there are important passages in which Blackstone sets out political and social justifications for these English rules,<sup>76</sup> and emphasizes that other rules have been adopted for other polities.<sup>77</sup> He defends the power to disinherit children as based on "a principle of liberty,"<sup>78</sup> but re-

<sup>66</sup> See (i) I, 126; (ii) I, 58; (iii) I, 299 (iv) I, 55.

<sup>67</sup> See note 65 *supra*.

<sup>68</sup> I, 70-1.

<sup>69</sup> II, 232. Compare THOMAS CRAIG, *DE JURE FEUDALE* II, c. 15, § 14.

<sup>70</sup> II, 228-31.

<sup>71</sup> II, 233.

<sup>72</sup> III, 430.

<sup>73</sup> Hart, *op. cit. supra* note 2, cites II, 2-3, 8-12, 208-12.

<sup>74</sup> II, 210, note w. See CRAIG, *op. cit. supra* note 69, at II, c. 13, § 15. JOHN LOCKE, *FIRST TREATISE OF CIVIL GOVERNMENT*, § 90.

<sup>75</sup> Compare the very similar arguments in ST. GERMAN, *op. cit. supra* note 65, at bk. II, c. 10.

<sup>76</sup> II, 373-74.

<sup>77</sup> II, 490-91.

<sup>78</sup> I, 450.

marks that "perhaps it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence."<sup>79</sup>

Finally, we must notice a passage that stands Hart's interpretation on its head. This is the passage in which Blackstone repudiates the view that there is any "natural injustice" in the game and forest laws "as some have weakly enough supposed."<sup>80</sup> For this does not hamper him from levelling the most insistent and mordant criticisms at those laws on social grounds.<sup>81</sup> It must be concluded that Hart was misled by the variety of senses in which Blackstone uses the term "indifferent." All the examples advanced by Hart are of matters "in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits." Hart quoted this description of "indifferent points," but omitted the portion here emphasized.<sup>82</sup> The plain fact is that considerations of "the benefit of society" are in principle and in fact admitted by Blackstone.

### III

With these standard obstacles to understanding Blackstone removed, it is possible to discern the role of the introductory discourse in the architecture of the *Commentaries*. Once again, since Blackstone is his best interpreter, we should look to his *Analysis* to establish what are the central notions of the introductory discourse (they are set out in footnote 30 above).

(i) First there is the definition of law in general as a rule of action prescribed by a superior power. This stipulative (but also lexical) definition *per genus et differentiam* provides a characterization of the genus within which natural, divine, international and municipal laws form differentiated species (sections 2, 3, 4, 5 of the analysis of Ch. I). The notions of command or prescription and of superior authority are introduced *ab initio*, and reappear in sections 6, 7, 8 and 9 of the analysis. Section 10 adverts to the defects of generality implicit in the idea of a "rule." Hence the interrelationship between section 1 and the remainder of the chapter is complete.

Of course, in the discourse itself, Blackstone predicates on this general definition a number of remarks about laws of nature in the physical sense, as patterns of action imposed by the Creator on creation. Hart has criticized this as a blurring of distinctions.<sup>83</sup> I do not wish to defend Blackstone against all charges of this sort; but it is worth pointing out that he is not the only jurist who has felt called upon to notice the similarities and connections as well as the differences

<sup>79</sup> *Ibid.*

<sup>80</sup> II, 412.

<sup>81</sup> II, 412-16. IV, 173-74, 416.

<sup>82</sup> Hart, *op. cit. supra* note 2, at 171. (The passage from Blackstone is at I, 42.) Later on the same page, Hart notes, parenthetically, one of Blackstone's references to "promoting the welfare of society" by regulating "matters in themselves indifferent." But Hart seems to give these phrases no weight in interpreting Blackstone. Compare I, 126: ". . . laws . . . if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty . . ."

<sup>83</sup> Hart, *op. cit. supra* note 2, at 170. A similar point is made in H. L. A. HART, *THE CONCEPT OF LAW* 183-84 (1961).

and distinctions between physical "laws" and moral or human laws. Hart himself has devoted some valuable pages to the ways in which even social, moral and legal rules can be regarded from an "external viewpoint" as simple "regularities of observable behaviour" such as a scientific observer might record,<sup>84</sup> and some equally valuable pages on some of the constant human "wants and fears"<sup>85</sup> that provide a stable function for law and thus a "minimal natural law."<sup>86</sup> Blackstone's distinction between what he calls laws of "action in general" and laws of "*human* action" is poorly explained.<sup>87</sup> But at least it is insisted upon, and man's "reason and freewill" are placed at the forefront of the discussion.<sup>88</sup>

(ii) Secondly, there is the definition of natural law as the rule of human action prescribed by the Creator and discoverable by reason. People often ask what relevance this notion has to the *Commentaries*, and conclude that it is a conventional ornament. But this notion is no more peripheral to Blackstone than a chapel was peripheral to the foundation of an English university college at any time between the thirteenth and nineteenth centuries. Whatever may be the case today, God's will for man was a subject of interest and concern, and the divine order of creation was reasonably seen as a pattern and precondition for man's ordering of his soul and thus of his society. The mere fact that municipal law could be given an autonomous definition was not regarded as a reason for ignoring questions of rational conscience.

Moreover, questions of conscience were integral to Blackstone's theoretical structure. For men's consciences, formed by the notion of natural rights conferred on them by the Creator, set up the trust upon which authority was conferred by peoples on governments.<sup>89</sup> And Blackstone, while insisting vigorously that *within constitutional and positive law* (e.g., as a matter of judicial review, or of royal "animadversion")<sup>90</sup> there was no restraint on parliamentary sovereignty, was cautiously willing to suppose that a basic violation by the government of its fundamental trust might amount to a dissolution of the constitution and a license to the people to construct a new one.<sup>91</sup> Such a case, in Blackstone's view, would be one where "though the positive laws are silent . . . nature and reason prevailed."<sup>92</sup>

Furthermore, as promised, the "primary rules and fundamental principles" of English law are indeed "weighed and compared with the precepts of the law of nature"<sup>93</sup> as understood by Blackstone. The express references to particular implications of natural law and the "state of nature" are so numerous that little

<sup>84</sup> HART, *THE CONCEPT OF LAW* 86-7.

<sup>85</sup> "The only true and natural foundations of society are the wants and fears of individuals." I, 47. Compare HART, *THE CONCEPT OF LAW* 189-95.

<sup>86</sup> HART, *loc. cit. supra* note 85.

<sup>87</sup> I, 39 (one of the weakest pages in the *Commentaries*).

<sup>88</sup> *Ibid.*

<sup>89</sup> See I, 124, 127, 211.

<sup>90</sup> I, 244. See also I, 91, 161-62.

<sup>91</sup> See I, 52, 161-62, 211, 213, 233, 244; IV, 440.

<sup>92</sup> I, 245.

<sup>93</sup> I, 36. See also I, 32.

more than a list of citations can here be offered,<sup>94</sup> with the warning that many "reasons" advanced to explain features of English law might also count as natural law reasons though not advertised by Blackstone as such. Still, even a list should show why the first element in Blackstone's description of jurisprudence is that it is "a science which distinguishes the criterions of right and wrong."<sup>95</sup> Natural law is one criterion, and (as we have shown that Blackstone insisted) municipal law is quite another; a comparison is what seemed to Blackstone to be needed. Indeed, so interesting did such a comparison seem to Blackstone that he arranged the whole structure of the *Commentaries* to show how the rights and wrongs which were the *formal objects* of English law substantially (though not perfectly or inevitably)<sup>96</sup> corresponded to and protected the natural rights (but *not* natural duties)<sup>97</sup> which properly (i.e., naturally) constituted its *material ends or objectives*. The first chapter of Book I explains this project in detail, and the introductory discourse is an indispensable preface.

(iii) Thirdly, there is the notion of divine law, that part<sup>98</sup> of the natural law which God has revealed in the Holy Scriptures. Since it is merely the natural law in another mode, the divine law receives little separate discussion in the *Commentaries*. But its importance for Blackstone remains. It is, for him, of "infinitely more authority" than any speculation on unrevealed natural law.<sup>99</sup> It is the basis of Christianity, and "Christianity is part of the laws of England."<sup>100</sup> Moreover:

The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the supreme being, and a firm persuasion that he superintends and will finally compensate every action in human life . . . these are the grand foundation of all judicial oaths . . .<sup>101</sup>

<sup>94</sup> The following are some of the occasions for reference to natural law or the law of nature, roughly classified for convenience. I, 126-44 (individual rights); I, 211-13 (limitations on the Crown); I, 253 (ambassadors and *mala in se*); I, 365 (the poor laws); I, 423 (slavery); I, 447 (maintenance of children); I, 453 (maintenance of parents); I, 458 (maintenance of bastards); II, 2-3, 7-8, 293 (origins of property); II, 11 (succession by occupancy); II, 18 (property in water); II, 258-59 (occupation on death of tenant *pur autre vie*); II, 389, 392, 411 (animals *ferae naturae*); II, 438 (action popular); II, 455-57 (usury); III, 3 (self-defense); III, 31 (multiplicity of courts); III, 133 (need for certainty); III, 160-63 (*quantum meruit*, unjust enrichment, etc.); III, 168 (abatement of freehold); III, 208 (trespass); IV, 3 (basis of criminal law); IV, 7-11 (punishment); IV, 29 (*mala in se* and marital coercion); IV, 30 (*mala in se* and duress); IV, 42 (offenses against private morality); IV, 66-71 (offenses against law of nations); IV, 116 (self-defense); IV, 176-80 (homicide); IV, 199 (duelling); IV, 215-16 (sexual perversions); IV, 220 (arson); IV, 230 (larceny); IV, 242 (robbery); IV, 283 (*audi alteram partem*); IV, 320 (outlawry); IV, 416 (game laws). Contrast BARKER, *op. cit. supra* note 2, at 138.

<sup>95</sup> I, 27. Note that Blackstone's first description of legal science is "that science, which is to be the guardian of his natural rights and the rule of his civil conduct." I, 4.

<sup>96</sup> See, for example, I, 450-51, where children's natural right to education is said to be only defectively protected by English law. Also I, 365.

<sup>97</sup> See I, 124; IV, 41.

<sup>98</sup> I, 42.

<sup>99</sup> *Ibid.*

<sup>100</sup> IV, 59. Compare Blackstone's speech in Parliament on 3 February 1769: "When I see all religion made a mockery and jest of, it behoves me to vindicate my God and my King." LEWIS NAMIER and JOHN BROOKE, *THE HOUSE OF COMMONS 1754-1790*, at 96 (1964).

<sup>101</sup> IV, 43-44.

Above all, divine law (the basis of the established Church) was for Blackstone one of those available "criteria of right and wrong" which in jurisprudence must be distinguished from municipal law with insistent care. He was loath to "enter upon the detail of the several species of crimes and misdemeanours"<sup>102</sup> without having "premised this caution":

though part of the offences to be enumerated . . . are offences against the revealed law of God, others against the law of nature, and some are offences against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.<sup>103</sup>

This distinction was not a matter of merely analytical moment for Blackstone. It enabled him to insist upon the existence of private<sup>104</sup> moral duties "which man is bound to perform considered only as an individual"<sup>105</sup> and hence of "private vices" which in *foro conscientiae* are offenses against divine law but which are (i.e., ought to be) beyond the cognizance of human law because not "attended with public inconvenience."<sup>106</sup> This distinction between natural private duties and the natural private rights which the law of England providentially upholds was Blackstone's way of maintaining the classical tradition that crime and sin are not coextensive.

(iv) The law of nations is the fourth notion prefaced to the discussion of municipal law. In Blackstone it occupies the same position in order of treatment as the *ius gentium* occupied in the scholastic treatise. But its meaning had shifted in Hooker from the law at once natural and positive, common to all societies, to a new meaning as the natural and contractual law governing relations between States.<sup>107</sup> Blackstone employs the newer meaning, though retaining formulae more appropriate to the old.<sup>108</sup>

The treatment of the law of nations is perfunctory, but not wholly so. It is not to be overlooked that the arrangement of Book IV follows that of the introductory discourse: "Crimes and Misdemeanors, cognizable by the Laws of ENGLAND, are such as more immediately offend, 1. The DIVINE Law [c. iv]. 2. The Law of NATIONS [c. v]. 3. The MUNICIPAL Law [cc. vi *et seq.*]"<sup>109</sup>

It goes without saying that once again Blackstone insists on the formal distinction between offenses against the law of nations, and offenses against the law of nations "as adopted by the law of England"<sup>110</sup> — despite his important doctrine that, *as a matter of fact*, the law of nations is "a part of the law of

<sup>102</sup> IV, 41.

<sup>103</sup> IV, 42.

<sup>104</sup> In Blackstone's terminology, "absolute" as opposed to "relative or social." I, 123.

<sup>105</sup> IV, 41. Also I, 123-24.

<sup>106</sup> IV, 42.

<sup>107</sup> THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, q.95, a.4; II-II, q.57, a.3. RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* bk. I, c. 10, §§ 12-13.

<sup>108</sup> I, 43. Traces of the old conception of *ius gentium* may be found in the citations on I, 43, and at II, 10: "the universal law of almost every nation (which is a kind of secondary law of nature)"; II, 44, 258; III, 145.

<sup>109</sup> ANALYSIS bk. IV, c. iii, § 1. See I, 43; IV, 66.

<sup>110</sup> IV, 67. See also IV, 66, 68.



the land" and "adopted in its full extent by the common law."<sup>111</sup>

If further examples of the substantive relation between the introductory discourse and the contents of the *Commentaries* are desired, one might point to Blackstone's exposition and justification of the rule that foreign ambassadors lose their diplomatic immunity if they commit offenses against natural law.<sup>112</sup>

(v) Sufficient has been said to show the organic yet differentiated relations between the definition of municipal law and the remainder of both introductory discourse and *Commentaries* as a whole.

(vi) The last section of Blackstone's analysis of the introductory discourse that calls for any discussion here is the sixth: "Society is formed for the protection of individuals, and States or governments for the preservation of society." This statement is based on the orthodox contemporary theory of a double original contract;<sup>113</sup> but to say this does not exhaust the significance of Blackstone's theorem.

In the first place, it enabled Blackstone to cut through the debates of political theorists about the original contract to what he regarded as the essential principle of legal consequence:

And this is what we mean by the original contract of society . . . : namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.<sup>114</sup>

This principle of reciprocity is employed by Blackstone for the explanation and justification of many laws and institutions besides the State itself. In fact, since it is a principle which "*in nature and reason* must always be understood and implied, in the very act of associating together,"<sup>115</sup> it should be regarded as one of the most important elements of natural law thinking in the *Commentaries*. It expressly grounds a whole chapter on the King's duties;<sup>116</sup> the discussion of allegiance and citizenship;<sup>117</sup> the general theory of the merely civil rights of property and the various dependent doctrines of forfeitures;<sup>118</sup> the doctrine of action of debt upon judgment;<sup>119</sup> and by explicit analogy the notions of implied assumpsit on a *quantum meruit*, on a *quantum valebat*, and for money

<sup>111</sup> IV, 67.

<sup>112</sup> I, 254; IV, 8.

<sup>113</sup> See OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY* 107 note 68 (ed. Barker, 1950).

<sup>114</sup> I, 47-8.

<sup>115</sup> I, 47-8. (Emphasis added.) See also I, 233, 366. Compare II, 8.

<sup>116</sup> I, c. 6 (I, 233-37). See also IV, 139, where this notion of the duties of the superior to the inferior is accounted a central "true principle" of government, radically distinguishing the genius of English law from the spirit of despotism.

<sup>117</sup> I, 366, 369-71; IV, 74, 77.

<sup>118</sup> I, 299; III, 161-62.

<sup>119</sup> III, 160.

had and received, as well as the rules of account stated;<sup>120</sup> the doctrines of warranty of performance and fitness which have become the modern law of negligence and sale of goods;<sup>121</sup> the general theory of punishment of *mala* merely *prohibita*,<sup>122</sup> and the interesting and liberal discussion of capital punishment;<sup>123</sup> as well as the discussions of the constitutional implications of the Glorious Revolution,<sup>124</sup> of civil disobedience,<sup>125</sup> of papal usurpations and *praemunire*,<sup>126</sup> of parliamentary omnipotence,<sup>127</sup> of the principles of poor law reform,<sup>128</sup> and of recaption or reprisal.<sup>129</sup>

Next, this sixth heading of the introductory discourse provides the link (so important to Blackstone) between the formal juridical "rights and wrongs" referred to in the definition of municipal law (sec. 5) and the natural and rational rights which English law successfully upheld. "Society is formed for the protection of individuals," and English law (unlike some other systems) performed its trust.

Finally, the distinction drawn between the implied contract of society and the implied contract of government was employed by Blackstone to structure Book IV. For the theory produces the series: individual — society — government, and this is the series explicitly<sup>130</sup> employed to arrange all crimes after those against divine law and the law of nations: crimes against the king and government (IV, cc. vi - ix), against the commonwealth (IV, cc. x - xiii), and against individuals (IV, cc. xiv - xvii).

Thus, in sum, the concerns which Blackstone identified as central to his introductory discourse are shown to be central to the *Commentaries* themselves. And while the autonomy and the positivity of municipal law are strictly insisted upon, natural law is freely admitted as a source of law and jurisprudential explanation.

#### IV

None of the foregoing is intended as a defense of the content of Blackstone's theory of law. But by diverting attention from the superficial, a sound exegesis can reveal more fundamental objections to Blackstone's thought on the relations between natural and positive law. This is not the place to develop these objections, but the central problem should briefly be indicated.

For Blackstone the "state of nature" means, not a historical state of affairs, but the condition of man considered as an individual, in abstraction from all social (or at least all civil) relations.<sup>131</sup> Reflection on this state of nature is the source of most of the rules of natural law identified by Blackstone. The state

<sup>120</sup> III, 161-63.

<sup>121</sup> III, 165-66.

<sup>122</sup> IV, 8.

<sup>123</sup> IV, 9-11.

<sup>124</sup> I, 210-13, 245.

<sup>125</sup> I, 250-51; IV, 82.

<sup>126</sup> IV, 110, 371.

<sup>127</sup> I, 160-62.

<sup>128</sup> I, 365.

<sup>129</sup> III, 4.

<sup>130</sup> IV, 42-3, 176, 250. See also the last Contents page of the ANALYSIS.

<sup>131</sup> I, 123.

of nature is one of equality, liberty and community of property (subject only to qualified individual rights of occupation and use), where every man has the right to punish infringements of these natural rights.<sup>132</sup> For example, since occupancy is a natural right, robbery and arson are natural offenses; but larceny is only partially so, since most property rights are merely civil.<sup>133</sup>

At the same time, this state of nature is one attended by so many evils that a system of positive law is primitive and contemptible the more closely it approximates to it.<sup>134</sup> Moreover, the boundaries of the state of nature are ambiguous: when man is considered as an individual, is it permissible to consider him as husband of a wife and father of a family? And if, as Blackstone admits,<sup>135</sup> the family is a *natural* society, why are not also larger communities answering to other "wants and fears of individuals"? If the rights and duties between parent and child and husband and wife are natural and extend, beyond mere respect for liberty, to duties of care and maintenance,<sup>136</sup> why should civil rights and duties be more limited or less natural?

Furthermore, the notion of a state of nature as the source of natural rights seems unable to account for the data. Blackstone lists reputation and good name among the natural individual rights upheld by English law,<sup>137</sup> and the classification seems appropriate until one reflects that reputation and good name are inconceivable in abstraction from society. Blackstone's explanation of his classification is interesting: "without these it is impossible to have the perfect enjoyment of any other advantage or right."<sup>138</sup> The explanation attempts, but fails, to disguise the fact that what is being discussed is a natural and social want: a desire to be well regarded by one's fellows.

So at this point the question becomes urgent: What is the relation between the state of nature and that pursuit of man's "true and substantial happiness" which Blackstone described in his introductory discourse<sup>139</sup> as the single foundation of natural law? This question may prompt another: What is the relation between the "self-love" that for Blackstone is the "universal principle of action" and guide to the content of natural law,<sup>140</sup> and the self-love that for Aristotle is the root of friendship, which in turn is the motive<sup>141</sup> and greatest good<sup>142</sup> of social life and the *polis*? These Aristotelian notions are explicitly the heart of the notion that the state is an association or community whose object is the full actualization of its members in the good, noble, independent and happy life.<sup>143</sup>

In Blackstone's explicit theory, society and law *add* little or nothing to human

<sup>132</sup> IV, 7.

<sup>133</sup> IV, 220, 230, 242; II, 3, 258; I, 138.

<sup>134</sup> III, 327. Compare III, 4. See also III, 168; I, 193, 213.

<sup>135</sup> I, 47, 422.

<sup>136</sup> I, 422, 447, 453.

<sup>137</sup> I, 134; III, 123-27.

<sup>138</sup> I, 134.

<sup>139</sup> I, 41.

<sup>140</sup> I, 40-1.

<sup>141</sup> ARISTOTLE, POLITICS 1280<sup>b</sup>39.

<sup>142</sup> *Id.* at 1262<sup>b</sup>7. Also NICOMACHEAN ETHICS 1167<sup>b</sup>5-16.

<sup>143</sup> POLITICS 1280<sup>a</sup>7-1281<sup>a</sup>9.

life; their role is preservative.<sup>144</sup> Correspondingly, natural law looks back to the naked individual in his state of nature as a standard. Again, since natural law can be completely stated in abstraction from society, there is little relation of derivation between natural and positive law.

As against St. German's thesis that:

in every law positive well made is somewhat of the law of reason and of the law of God; and to discern the law of God and the law of reason from the law positive is very hard . . .<sup>145</sup>

one finds Blackstone's disconcerting but express thesis that the bulk of human laws has no foundation in nature.<sup>146</sup> The various theories of derivation in Aquinas, Hooker and St. German<sup>147</sup> have all disappeared and have not been replaced. It is this impoverishment that lends substance to Hart's theory discussed above.<sup>148</sup>

Similarly, the concept of the common good, whose component values might ground the varying manifold of positive laws, has virtually disappeared.<sup>149</sup> The only natural good is individual and presocial, and the great ends of the law are the protection of preexisting individual rights.<sup>150</sup> Of course, not even the law of the eighteenth century could adequately be accounted for, in the way Blackstone desired, with this limited theoretical apparatus. Ends deriving from the positive program of Western civilization have occasionally to be admitted: to explain laws on sexual matters, Blackstone has to allow that "one end of society and government" is to prohibit promiscuity.<sup>151</sup> But in general, the category of end — so essential to Blackstone's whole explanatory and apologetical purpose — is eliminated from his *ex professo* theory of law.

The immediate consequence of these theoretical inadequacies is the confusion and terminological inexactitudes which have so muddled the interpretation of Blackstone. We have already tabulated some of the unadvertised shifts in the meaning of "matters indifferent in themselves."<sup>152</sup> For Blackstone to have adverted to these shifts would have raised the problem — for him unanswerable — of the differing modes of derivation of positive laws from natural values. For the same reason, Blackstone cannot explain the status of the "principles of society" to which he often appeals, but which are neither natural nor merely positive.<sup>153</sup>

<sup>144</sup> Compare Gierke's description of Locke's "insurance" theory of society, *op. cit. supra* note 113, at 113 note 110. Aristotle ridiculed the theory. *POLITICS* 1280<sup>b</sup>5-1281<sup>a</sup>4.

<sup>145</sup> ST. GERMAN, *op. cit. supra* note 65, bk. I, c. 4. St. German continues: "And though it be hard, yet it is much necessary in every moral doctrine, and in all laws made for the commonwealth." This is the challenge to which Blackstone responds, but unsuccessfully.

<sup>146</sup> I, 55.

<sup>147</sup> AQUINAS, *SUMMA THEOLOGIAE* I - II, q.95, a.2. HOOKER, *op. cit. supra* note 107, bk. I, c. 10, § 10. ST. GERMAN, *op. cit. supra* note 65, bk. 1, cc. 5-7.

<sup>148</sup> See text at note 63 *supra*.

<sup>149</sup> It makes faint and skeletal appearances in passages such as I, 45 ("subsistence and peace of the society"); I, 125 ("general advantage of the public"); I, 126 ("common utility"); I, 129 ("public convenience"); I, 139 ("common good").

<sup>150</sup> I, 48, 124; II, 15.

<sup>151</sup> I, 438.

<sup>152</sup> See text at note 66 *supra*.

<sup>153</sup> See, for example, I, 131; III, 168. See also citations in note 108 *supra*.

As a further consequence, because the state of nature is an ambiguous and impoverished explanatory category, because natural and positive law lack intelligible modes of interconnection, and because superior will rather than reasonable connection between end and means is made the basis of obligation,<sup>154</sup> Blackstone's theory not only is unable to account for his data or even his terminology but also is in danger of collapsing into a positivism that will regard explanation as extraneous to the exposition of law.

The finest fruits of Blackstone's method were almost the last; they may be seen in Sir William Jones's *Essay on the Law of Bailments* (1781).<sup>155</sup> The essay has three parts, denominated *analytical*, *historical* and *synthetical*. For Jones, to treat a set of rules analytically is to trace "every part of it up to the first principles of natural reason";<sup>156</sup> to treat it historically is to show the extent to which various legal systems conform to these first principles; and to treat it synthetically is to restate the law by way of (a) definitions, (b) rules, (c) propositions derived from the combination of (b) with (a), and (d) exceptions to the propositions.<sup>157</sup> The definitions will derive principally from the experience and complexity of English law, while the rules "may be considered as axioms flowing from natural reason, good morals and sound policy"<sup>158</sup> as verified against the vast comparative learning of the "historical" survey.<sup>159</sup> How different from the program announced by Bentham in his *Fragment on Government* (1776) and thereafter followed by analytical jurisprudence:

To the province of the *Expositor* it belongs to explain to us what, as he supposes, the Law is: to that of the *Censor*, to observe to us what he thinks it *ought to be*. The former, therefore, is principally occupied in stating, or in enquiring after *facts*: the latter, in discussing *reasons*. The *Expositor*, keeping within his sphere, has no concern with any other faculties of the mind than the *apprehension*, the *memory*, and the *judgment*: the latter, in virtue of those sentiments of pleasure or displeasure which he finds occasion to annex to the objects under his review, holds some intercourse with the *affections*.<sup>160</sup>

This epistemology prevailed, and the notion was lost that any useful exposition of law will require an imaginative and sympathetic insight into the intelligible values which ground all human effort, which issue in general principles and which ramify into the manifold of particular rules variously derived according to convenience and circumstance.

After the spread of the Benthamite positivism, the sense of the natural law

<sup>154</sup> See also Rinck, *op. cit. supra* note 2 at 163, 166, 168, 173-74.

<sup>155</sup> For Jones, Blackstone's *Commentaries* were "the most correct and beautiful outline, that ever was exhibited of any human science." AN ESSAY ON THE LAW OF BAILMENTS 3 (1781).

<sup>156</sup> *Id.* at 4.

<sup>157</sup> *Id.* at 127.

<sup>158</sup> *Id.* at 119.

<sup>159</sup> *Id.* at 11-116. Jones was the greatest comparative legal scholar of his age, and died in the midst of an immense study of Hindu and Islamic law.

<sup>160</sup> BENTHAM, *op. cit. supra* note 3, at 98-9. It was this analysis that, broadly speaking, prevailed in analytical jurisprudence, and not the notion which Bentham somewhat inconsistently introduced (*id.* at 117-22) that an expositor could not properly (*i.e.*, "naturally") arrange his work without first establishing a complete "synopsis" or "map" of the legal system (all legal systems) in terms of the tendency of actions to produce pain or pleasure.

enterprise was forgotten and (despite the eclipse of Bentham's epistemology) it has remained usual to believe that the heart of any theory of natural law is, not the problem of the varying derivation of positive from natural law, but the thesis that positive law is "for all purposes" void if it contradicts natural law.<sup>161</sup> Thus Blackstone's introductory discourse and definition of municipal law have standardly been interpreted on the assumption that any discussion of the relation between natural and positive law must be headed for an assertion or denial of that crude slogan, *lex iniusta non est lex*. The foregoing remarks should help to show that the *content* of Blackstone's theory made such misunderstandings plausible, but that Blackstone's theoretical *intentions* were far more interesting and complex.

J. M. FINNIS

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<sup>161</sup> Compare HART, *op. cit. supra* note 84, at 203-207.