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Blackstone in America

Remarks

Rethinking the History of Early American Law:
Kathryn Preyer's *Blackstone in America*
Massachusetts Historical Society
April 15, 2010

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I am appreciative to the MHS and to Pauline for organizing this wonderful event. Our co-editor, Maeva Marcus, extends her thanks also and is sorry she could not be here tonight to join in the celebration of Kitty's work. The editors are particularly grateful to Lew Bateman at Cambridge and Bob Preyer for making the publication of the book possible.

I have never missed Kitty quite as much recently as I did last month when the *New York Times* reported that the Texas Board of Education approved a social studies curriculum that replaced Thomas Jefferson with William Blackstone, along with Calvin and Aquinas, as writers who "inspired revolutions in the late 18th century and 19th century . . . ."[1]

In an essay reprinted in this volume –seemingly aimed precisely at the Texas Board, Kitty wrote: "Does familiarity automatically imply influence? Such relationships are notoriously difficult to determine, and pronouncement regarding the influence of any single author on the Founding Fathers will be inevitably flawed."

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[1] James C. McKinley, Jr., "Texas Conservatives Win Curriculum Change," NYT, March 12, 2010.

Yet *Blackstone in America* was Kitty's title for her book. One that we, as editors, stuck to firmly. The astute reader, however, will notice that Blackstone only merits one brief reference in the entire 276-pages of text.

Why did Kitty want to title her book, *Blackstone in America*?
I think the title embodied three critical insights of her work.

The first relates to periodization: how historians divide history temporally.

The second involves geographical boundarization? or whatever term refers to the way in which historians divide history geographically.

The third involves transmission, the way in which historians explain how ideas move among people and influence events.

<u>Periodization</u>

First, let me address periodization. American history has been traditionally divided by the Revolution. 1776. A new beginning. Colonial history vs. U.S. history. The division has advantages, providing an exciting beginning or ending to the college lecture course. But it leads to an inaccurate understanding of American legal history. American law, before and after the Revolution, was and remained in conversation with English law, as much for what was borrowed and received, as was rejected and abandoned.

Among legal historians and constitutional law folks, 1787 sometimes replaces 1776 as the dividing line: pre-Constitutional/early national. But Kitty was too subtle a thinker and serious student of early national struggles to believe the Constitution was a new beginning. She saw the Constitution was a blurred boundary – something like a new steel beam to support the transition between a regal, formal older home and its more democratic family room.

Moreover, Kitty wasn't completely a colonial historian. She had been a graduate student at Wisconsin of the nineteenth-century historian, Merle Curti, not the colonialist Merrill Jensen. Kitty admired Jensen and he, her; but Jensen appears not to have had women students in Kitty's time. Her dissertation took at topic set as early as possible in the nineteenth century (the 1801 Judiciary Act) – with subjects who had been born and educated in the pre-Revolutionary world. The dissertation, like much of Kitty's work, straddled the 1776-1787 dateline that others found predetermined events, identities, and conclusions, whereas Kitty interpreted the events as simply shifting and opening up problems to be resolved.

Kitty's work was situated in a period beginning in the late 1750s and ending around 1803.

But what period was this? What name to describe the indebtedness to the imperial world, the subsequent formal rejection of it, and the slow and gradual struggles to solve the resulting problems that led inexorably to the great problems of the nineteenth century?

For Kitty: *Blackstone in America.*

Conceived as a historical period, Blackstone in America began around 1756 (the date of Blackstone's syllabus of lectures and the beginning of American oral reports of his lectures).[2] It ended in 1803 with the important American edition of Blackstone, produced by St. George Tucker with notes trying to sort out the relationship between Blackstone and Virginia law, particularly the law of slavery.

Thus "Blackstone in America" contains Kitty's insight, contained in all her work, about the need for a periodization that could reach farther back before the Revolution and farther out from the Constitution.

Geographical Boundaries

Blackstone in America also described a broader geographic boundary to American history.

Over the last ten years, transatlantic and Atlantic history has become increasingly an accepted, dare one say, preferred perspective on the early period of American history. The isolationist idea that one could understand the development of the early United States removed from larger world history has been largely overthrown.

[2] Dennis R. Nolan, "William Blackstone and the American Republic: A Study of Intellectual Impact," 51 New York University Law Review 731 (1976).

Kitty, as comfortable in London, as she was in Cambridge, had long grasped the significance of a broader lens.

In 1959, her dissertation had opened with the statement that "[d]espite the fact that local necessities modified to a certain extent the principles and procedures of the laws of England" the colonies "were dependent wholly on the mother country" with respect to admiralty law (an oft-neglected subject) and the Privy Council's review of judicial decisions and colonial legislation. Kitty's insight into the struggles over the judiciary acts flowed from her understanding that the Revolution had created a gaping black hole of political and legal power by eliminating these areas –and into this vortex political intrigues and power plays quickly flowed.

Blackstone in America – understood as a metaphor for this broader lens – symbolized the American-British empire strand of transatlantic scholarship. But as the final two essays in the book suggest, Kitty was moving towards an even broader lens.

Kitty loved Italy, particularly, of course, Venice. And it was Italy and the influence of ideas beyond traditional English sources, to which Kitty turned in her later scholarship.

Kitty took up the influence of Cesare Beccaria. Beccaria, was born in Milan, in 1738. In 1764, he published his *Essay on Crimes and Punishments*. The criminal law was never again the same. Beccaria suggested that deterrence alone mattered for criminal law, and

to this end, punishments should be certain and proportionate. He wrote against secret examination, torture, cruel and unusual punishments, and the death penalty. Jefferson and Adams both read him. At the turn of the century, Pennsylvania (1786), Virginia (1776-1796), the Massachusetts criminal code (1805) owed much of their liberalizing tendencies to his influence.[3]

Beccaria revealed that Blackstone was simply too narrow a lens. American criminal law as it emerged from the colonial period owed far more to Beccaria than to inherited or reformist English ideas.

Beccaria also suggested that developments that looked American or even Anglo-American might, in fact, be part of something much larger. The final essay in the book compared the criminal law reform of Jefferson and Peter Leopold, Grand Duke of Tuscany. Kitty wrote, "The simultaneous transnational attention to the laws of crime and punishment and the networks among those engaged in efforts to reform criminal codes is – like the abolition of slavery – one of the most absorbing phenomena of modern Western history."

Years of teaching broad survey classes suggested themes larger than any particular reformer (Jefferson) or country (the United States). Kitty concluded, these transnational reforms resulted in the criminal justice system being "more consciously woven into the process of building the infrastructure of the modern state."

[3] On Massachusetts, see Sibley on Samuel Sewall and Nathan Dane (1805).

To see in Jefferson's struggle with criminal reform, the global development of the modern state – to see the shift from disproportionate and cruel punishments to the state's growing ability to exercise social control – even today, few historical works achieve such breadth.

Blackstone in America – *Beccaria in America* – described Kitty's insight about the need for a wide geographic lens and the willingness to situate national developments within large global transformations.

Transmission

Beccaria also represented for Kitty a third insight, the need to study the "agencies of transmission."

In 1944, Kitty's advisor at Wisconsin, Merle Curti, had won a Pulitzer for his book, The Growth of American Thought (1943). Curti had written a "socio-economic history of American thought," in which "'[t]he status of knowledge, the tissue of thought, the cluster of values are all at any particular time affected by the physical environment and economy, polity, and social arrangements." As Kitty wrote in her application for the PhD program in 1950, she had no interest to "plunge into disembodied intellectual speculations on 'the American mind.'"[4]

[4] Preyer Application for the Study of American Civilization, UW-Madison Archives.

To an intellectual history embedded in the world, Kitty brought her curiosity as a law book collector. One of the first rare law books Kitty indeed acquired was the 1778 Philadelphia edition of Beccaria. She had little interest in pristine first editions – no one had read them so what was the point? What she liked were books that had been read – that proved through their physical condition that ideas had been transmitted.

In the 1990s, Kitty enthusiastically embraced the growing field of scholarship exploring the history of the book in America.

Blackstone in America symbolized transmission through the mobility of the book. Kitty's collecting suggested that a book (as an intellectual entity) could move by actual physical importation (ships and booksellers), but also by intellectual importation through reprints, commonplaces, abridgments, and annotated editions.

Blackstone was an outstanding example of both mobilities. The 1st English edition was imported into the colonies, with over 1000 sets sold by 1771. Of equal importance, Robert Bell's American reprint (Philadelphia) was ordered by over 1500 subscribers – and there were likely an equivalent number of law student commonplaces of the work. And then in 1803, St. George Tucker added notes to his reprint converting an English text to one which explicitly confronted tensions between English and American law (particularly, slavery).

But for Kitty, the study of the book, carried a small regret. She had no book of her own.

The fact that she was a woman in a world where universities that had the funds to support book production (such as Wisconsin) were not hiring women faculty in any numbers, that articles (not books) were the end product for many outstanding dissertations of her day, explains the initial absence of a book.

Kitty began her career at Rockford College, then a small women's college. In 1955, "with an alacrity that knows no bounds," she accepted a position at Wellesley to teach the US survey, US Foreign Relations, and the Intellectual History for 3800 dollars.[5] By 1960, Kitty had already successfully published two of the three articles that she had planned from her dissertation. She wrote Wisconsin that "there is no proportion between a footnote credit in someone else's work and the publication of articles under one's own name."[6] With this focus and drive, in today's world, Kitty would have had a prize-winning book.

But a book was not to be. Kitty continued to publish outstanding and prize-winning articles. She accepted new courses. In 1961, she wrote Merrill Jensen that she had agreed to teach the history of the Americas: I'm "stuffing myself with Latin American and Canadian history in order to keep this rolling." "Frankly, Merrill, most of all do I want an opportunity to move forward swiftly with my work in legal history."

By the time that I came to know her well, she wished for a book of her own.

[5] Preyer to Harrington, Feb. 10 [1955], UW-Madison Archives.
[6] Preyer to William Sachse, June 11, 1960, UW-Madison Archives.

Kitty's great love for teaching at Wellesley; her colleagues, students, and friends (many of whom are here tonight); her loyalty to a series of professional organizations and historical societies (among them the MHS); and her family (Bob, her stepdaughters, her nephew, her extended family) – all of these wonderful commitments led her to keep putting her book on hold.

Had she lived longer, she would have had a book of her own – a book that would provide the means by which her intellectual insights would be transmitted to others who never had the good fortune to know her.

We are blessed to have her book with us today.