

Blackstone's Law and Economics

IN THE IDEOLOGICAL warfare around law and economics, the Common Law and its expounder, William Blackstone, are pawns buffeted around by the various participants. It is my purpose here to suggest that the Common Law *à la* Blackstone is too rich and complex to be anyone's pawn. Blackstone fits the category of neither the stock reactionary nor the efficiency-minded theorist of the law and economics movement. Thomas A. Green has clearly stated the reactionary perspective on Blackstone. He claims that

Blackstone's chapters on offenses against public justice, peace, trade and health describe much of the vast misdemeanor jurisdiction of the justices of the peace that had been steadily increasing since the fourteenth century. The reader need only glance at the table of contents in order to sense the extent to which regulatory law pervaded politics, enterprise, and morals in the eighteenth century. The Elizabethan obsession with public order and the consequent management of private behavior had hardly abated by Blackstone's day. Blackstone shared the assumptions of the rulers of his tightly knit and closely regulated society. His paternalism and prudery were virtually unbounded. He thus insists upon the highest standards from public officials and from the practicing bar; details with evident approbation the myriad prohibition against even the most minor causes of public disorder; and excoriates public nuisances of every sort, reserving his most moralistic tone for gaming, horse racing, and private lotteries, which tended "by necessary consequences to promote public idleness, theft, and debauchery" among the poor. For Blackstone the virtues of industriousness, thrift, and common decency were more than ends in themselves: they were instrumental

to the security of the property, liberty, and persons of all subjects of the realm.¹

Richard Posner, in his important article on "Blackstone and Bentham," has given us an antithetical picture of the one provided by Green. According to Posner the ultimate purpose of the law for Blackstone is to secure fundamental human rights, referred to as "liberties of Englishmen," and include primarily security, liberty, and property. By these rights, Posner noted, Blackstone meant nothing "more pretentious than the conditions for social welfare maximization."² Blackstone, according to Posner, divorced law from conscience, anticipated Holmes's "bad man" theory of the law, and interpreted law in a secular and liberal manner as discouraging "conduct that reduces social welfare." Posner adds that this is a conception of law which "invites us to analyze law in terms similar, perhaps identical, to those which we use to analyze economic behavior."³ Last but not least, Posner reinterprets the Blackstonian reference to the judges as living oracles of the law in such a way that "once it is understood what Blackstone was about" the judges become a passive transmitter of economic efficiency.⁴

Let us first explore an example which seems to give some support to Posner and to cast some doubt on Green's interpretation. In Volume I of the *Commentaries* Blackstone makes the following comparison between the civil law and the common law:

In this care of idiots and lunatics the civil law agrees with ours; by assigning them tutors to protect their persons, and curators to manage their estates. But in another instance the Roman law goes much beyond the English. For, if a man by notorious prodigality was in danger of wasting his estate, he was looked upon as *non compos* and committed to the care of curators or tutor by the praetor. And by the laws of Solon such prodigals were branded with perpetual infamy. But with us, when a man on an inquest of idiocy

hath been returned as *unthrift* and not an *idiot*, no further proceedings have been had. And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefitting the individual and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of having their own property as they please. "*Sic utere tuo, ut alienum non laedas*," is the only restriction our laws have given with regard to economic prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigour (I:295-6).

Whatever one thinks about the Roman law position criticized by Blackstone, and there is much which could be said in defense of it, the point still remains that Blackstone is quite willing to use prodigality and luxury for political ends. His paternalism and prudery seemed to have quite definite bounds. In fact his position could be described as a non-raucous statement of Mandeville.

The rhetoric of Blackstone's defense of using private property as one pleases as long as one does not harm another certainly sounds classical liberal. But in fact Blackstone is slightly more cautious in his explicit treatment of sumptuary laws: "under the head of public economy may also be properly ranked all sumptuary laws against *luxury*, and extravagant expenses in dress, diet, and the like; concerning the general utility of which to a state, there is much controversy among the political writers. Baron Montesquieu lays it down, that luxury is necessary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whose government is compounded of both species, it may still be a dubious question, how far private luxury is a public evil; and, as such,

cognizable by public laws" (IV:170). One should be suspicious when one sees private property being subordinated to the necessities of the "mixed constitution." It is a mistake to extrapolate political philosophies out of legal maxims that are usually meant to be taken *ceteris paribus*. Also one should be cautious in drawing liberal interpretations of such doctrines or maxims, unless one has already solved the great begged question of externality theory: What constitutes harm? What kinds of actions and activities count as harm and injury, and who decides?

The crimes and offences that Blackstone includes in his definition of police powers would lead one back to much older conceptions of justice that reflect a good man theory of the law, rather than the quasi-libertarian view that Posner suggests. Blackstone in Book IV on "Public Wrongs" claims:

The last species of offences which especially affect the commonwealth are those against the public *police* and *oeconomy*. By the public police and *oeconomy* I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprizes all such crimes as especially affect public society, and are not comprehended under any of the four preceding species (IV:162).

It is clear from the above list that Blackstone did not look upon the purpose of the law to be that of preparing saints. That, presumably, is the purpose of the church. But one should not be too quick to agree with Posner's conclusion that "the role of law is not to improve people's chances of getting into heaven but to discourage, by penalizing, conduct that reduces social welfare."⁵

The control of the Common Law over morals and manners in the name of the police powers is probably responsible for the confusion resulting from the scandal of Lady Buckinghamshire, Lady Archer, and Lady Mount Edgcumbe, known collectively as "Faro's Daughters," in 1796. Lord Kenyon in analyzing a case that had been brought to recover a gambling debt took the occasion to denounce the vice of private gambling, particularly by the aristocracy: "They think they are too great for the law; I wish they could be punished. If any prosecutions of this nature are fairly brought before me, and the parties are justly convicted, whatever be their rank or station in the country — though they be the first ladies in the land — they shall certainly exhibit themselves on the pillory."⁶

M. Dorothy George has pointed out that what Kenyon meant was unclear since the pillory was not a penalty for gaming.⁷ Perhaps this minor mystery can be resolved when one considers that the penalty for forestalling, regrating, and engrossing on the third offence includes being set in the pillory. These were crimes of speculation as much as gambling. Kenyon's concerns with both of these common law offences may have led to a natural blurring of the appropriate penalties.

There can be no question that the statute 5 & 6 Edw. VI. c.14 described by Blackstone in the *Commentaries* (Book IV, Ch.12) is a restriction of economic freedom and property rights. Adam Smith's Digression on the Corn Laws, which refers to the same statutes of Edward VI, looks as if it could have been written as a step-by-step refutation of Blackstone's reasoning.

It is instructive to consider that Blackstone, who is not usually reluctant to point his finger at errors that have been made in the past, gives the "description" of the crimes from the statute of Edward VI without comment. For example, forestalling is a group of practices which "make the market dearer to the fair trader." Regrating is a practice of buying corn and "other dead victual" in a market

and selling them again in the same market; this "enhances the price of the provision, as every successive seller must have a successive profit." Engrossing "must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provision at their own discretion" (IV:158-159).

If Blackstone and the Common Law were simply mouthpieces for Classical Liberalism, then it is hard to understand the persistence of the doctrines of forestalling, regrating, and engrossing. A.V. Dicey in his discussion of the Old Toryism of Eldon and Kenyon clearly saw that there were certain tensions between the Common Law and economic liberalism. In Dicey's words, "it has of course often happened that the ideas entertained by the judges have fallen below the highest and most enlightened public opinion of a particular time. The Courts struggled desperately to maintain the laws against regrating and forestalling when they were condemned by economists and all but abolished by Parliament."⁸ In fact 12 Geo. III, c.71, by which Parliament repealed in effect the laws against engrossers, was not recognized by the courts under the leadership of Lord Kenyon, Lord Chief Justice from 1788-1802. In spite of the vaunted legislative supremacy, the legislature did not get its way until 1844, and even then victory was not complete until 1910.

Although there would be substantial difference between Dicey and E.P. Thompson on what would constitute "enlightened public opinion," Dicey's observation has been elaborated in Thompson's "The Moral Economy of the English Crowd in the Eighteenth Century." Thompson elaborated the paternalistic origins and flavor of the laws against forestalling, regrating, and engrossing. A.W. Coats in his rejoinder does not dispute the view of the common law presented, but he essentially elaborates the economic reasons why Smith and the political economists ought to be considered the "enlightened public opinion." In Coats's words Smith is grounded in the "liberal-moral philosophy

of the eighteenth-century enlightenment." Coats correctly points out that liberalism "was an antidote to authoritarianism and paternalism in all spheres of life."⁹

The dispute between Thompson and Coats involves two different levels. One is the positive question of what is the best method of producing and distributing corn. Were the laws against forestalling, regrating, and engrossing efficacious? The second level is the normative question of the purposes of the law. Even if it is efficacious, *i.e.*, the law in fact achieves its

stated objectives, is it the correct purpose of the law to be concerned with paternalism? The purpose of the preceding comments has been to show that Blackstone's purposes do not seem to be reducible to those of John Locke, Adam Smith, Herbert Spencer, or Richard Posner. But, unfortunately, Blackstone does not always make it exactly clear what he means when he says "Christianity is part of the laws of England" (IV:59).

— William F. Campbell

¹Thomas A. Green's introduction to Volume IV of the facsimile reprint of the First Edition of the *Commentaries on the Laws of England* (Chicago, 1979), p. vi. All future references to the Commentaries will refer to this edition by volume number followed by page number. ²Richard Posner, "Blackstone and Bentham," *The Journal of Law and Economics* (October, 1979), p. 574. ³*Ibid.*, 579. ⁴*Ibid.*, 582. ⁵*Ibid.*, 578-579. It is curious to note that Blackstone certainly includes the ecclesiastical courts, although in Book IV he states: "I speak not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animae*: or, which is looked upon as equivalent to all the rest, by a sum of money to the officers of the court by way of commutation of penance. Of those we discoursed sufficiently in the preceding book. I am now speaking of such courts as proceed according to the course of the common law; which is stranger to such unaccountable barterings of public justice" (IV: 272-273). This is clearly a case where Blackstone rejected the pecuniarization of

penalties, which casts some doubt on the operational significance of Posner's observation that "Implicitly in Blackstone's account legal sanctions act as prices which influence the demand for and hence incidence of proscribed activities." *Ibid.*, 579. ⁶Quoted in George Paston, *Social Caricature in the Eighteenth Century* (New York, 1968), p. 32. See also Plate LI for the famous cartoon, *The Exaltation of Faro's Daughters*. ⁷M. Dorothy George, *Hogarth to Cruikshank: Social Change in Graphic Satire* (New York, 1967), p. 62. Well illustrated in this volume is Gillray's *Discipline à la Kenyon* and I. Cruikshank's *Dividing the Spoil*. ⁸A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (London, 1905), p. 366. ⁹E.P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past and Present*, No. 50 (February 1971), 76-136. A.W. Coats responded with "Contrary Moralities: Plebs, Paternalists and Political Economists" in *Past and Present*, No. 54 (February 1972), 130-133.