

LAW FOR HISTORIANS: WILLIAM BLACKSTONE ON WIVES, COLONIES AND SLAVES

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We are often exhorted to break down the various barriers inhibiting free commerce between the academic disciplines. So far as law and history are concerned, such urgings are almost redundant. While historians have long drawn upon legal records and texts as sources of evidence about the widest conceivable range of individual and social experience, legal argument and doctrine frequently embody much at least quasi-historical content. Yet problems can arise when historians employ legal sources, no less than when lawyers seek to bring historical evidence into court. The great legal historian F W Maitland famously suggested that historians and lawyers operate on quite distinct wavelengths, using two different modes of argument; these he characterised as 'the logic of authority and the logic of evidence'. Lawyers, according to Maitland, are primarily interested in finding legal authorities, the more recent the better, with which to support the cases of their clients. Historians, on the other hand, recognize themselves as bound by no authority, except evidence bearing on the event or phenomena they study; generally speaking, the closer that evidence in time to their subject, the greater its credibility and utility. Thus, according to Maitland,

The process by which old principles and old phrases are charged with a new content is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding ... The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems a contradiction in terms.¹

Particularly concerned in his Cambridge inaugural lecture as Downing Professor of the Laws of England to underline the propensity of lawyers to misread and misuse history, Maitland almost certainly exaggerated the gap, both formal and psychological, between legal and historical reasoning. Or so it seems today, in the light of both late twentieth-century jurisprudential reactions against the strongest forms of legal positivism, and contemporaneous post-modernist revolt against variants of historical positivism which exaggerate the scientific character of

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¹ F W Maitland, 'Why the History of English Law is Not Written' (1888) in H A L Fisher (ed), *The Collected Paper of F W Maitland* (1911) 490-1.

historians' working methods and the objectivity of their results. But whether or not lawyers are prone to distort or oversimplify historical evidence, historians, for their part, frequently misinterpret legal sources. This may occur because the historian fails to understand the technical significance of documents originally generated for some specific legal purpose, as for example when the young Lawrence Stone unfortunately confused large sums of money specified in penal bonds given as security for their loans by aristocratic Elizabethan and early Stuart debtors with the amounts they had actually borrowed.² But legal texts of a less intricate or esoteric nature can also present problems of historical interpretation.

Many scholars have drawn on William Blackstone's *Commentaries on the Laws of England* for an authoritative summary of English law and government at the beginning of George III's reign, before the disruptive impact of industrialisation, population growth, urbanisation, the American and French Revolutions, the Napoleonic wars, and the major transformation of both substantive law and legal institutions during the Victorian era. This is a perfectly legitimate procedure in principle. For Blackstone's *Commentaries* represent the first successful attempt to provide an outline map of English law, both public and private, at a point when Britain's imperial destinies were about to be decisively transformed by the loss of her North American colonies (with the significant exception of Canada) and an expanding imperial presence in Asia, Africa and the Pacific. Yet difficulties arise when modern scholars seek to appropriate Blackstone's meticulously-crafted words for their own present purposes.

In the first place, it is entirely possible to invoke Blackstone's powerful authority without actually consulting his words. Thus the following passage appears in a volume of historical essays recently published by Australia's foremost academic press:

Eighteenth-century British law canonised a crucial precedent for men's 'ownership' of the conjugal body. Sir William Blackstone judged that the man who physically beat his wife with a stick no thicker than a 'man's thumb' was doing so 'for her own good'. For, he argued, 'even the disabilities which the wife lies under are for the most part intended for her protection and benefit'. Blackstone's rule of thumb legitimated marital abuse of women....³

The sole bibliographical reference for this passage directs readers to the 1771 Dublin edition of the *Commentaries*, which for the first two volumes follows the text of the third Oxford edition of 1768-9.⁴ Here are the words Dr (not yet Sir William) Blackstone actually wrote, in Book I ('The Rights of Persons') ch. 15 'Of Husband and Wife' of his *Commentaries*:

² See H R Trevor-Roper, 'The Elizabethan Aristocracy: an Anatomy Anatomized' (1951) 2nd ser *Economic History Review* 279-98.

³ J Eveline, 'Feminism, Racism and Citizenship in Twentieth-Century Australia' in P Crawford and P Maddern (eds), *Women as Australian Citizens: Underlying Histories* (2001) 146.

⁴ For the complex publishing history of the *Commentaries*, see C S Eller, *The William Blackstone Collection in the Yale Law Library: A Bibliographical Catalogue* (1938).

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or his children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds; and the husband was prohibited to use any violence towards his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, liciter et rationabiliter pertinet* [other than licitly and reasonably pertains to a husband for ruling and chastising his wife]. The civil law gave the husband the same, or larger authority over his wife; allowing him, for some misdemeanours *flagellis et fustibus acriter verberare uxorem* [with whips and rods sharply to beat his wife], for others, only *modicam castigationem adhibere* [to apply moderate chastisement]. But with us, in the politer reign of Charles the second, this power of correction came to be doubted: and a wife may now have security of the peace against her husband; or in return, a husband against his wife. Yet the lower rank of the people, who were always fond of the old common law, still claim and exert their antient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.⁵

No mention of thumb-sized sticks. Our modern author clearly derived that conceit from some other, uncited, source, together with the seemingly authenticating reference to Blackstone's text. A genealogy, or rogues' gallery, of such false and misleading secondary 'authorities' has been compiled by Henry Ansgar Kelly, who besides professing English in the University of California at Los Angeles takes a special interest in 'legal mythology'.⁶ Despite its somewhat obscure place of publication, at least so far as the historical profession is concerned, Kelly's prize-winning paper should have demolished, once and for all, the false notion that English law ever gave husbands the right to beat their wives with a rod no thicker than their thumb, let alone the myth that Blackstone's *Commentaries* endorsed such a rule. Yet as recently as 2005 a distinguished colonial American historian from Kelly's own university could still claim that

Deeply embedded in England's common law, and encoded in Blackstone's *Commentaries on the Laws of England*, the rule of thumb made it permissible for husbands to beat their wives so long as the stick or club did not exceed the thickness of a man's thumb.⁷

In fact Blackstone's text nowhere asserts the legality of wife-beating in his own day. On the contrary, his readers are informed that although once permitted under

⁵ W Blackstone, *Commentaries on the Laws of England* (1768-9) i.432-3.

⁶ H A Kelly, 'Rule of Thumb and the Folklaw of the Husband's Stick' (1994) 44 *Journal of Legal Education* 341-65.

⁷ G B Nash, *The Unknown American Revolution* (2005) 204.

the common law, this practice was ‘doubted of’ after the restoration of Charles II in 1660, and a legal remedy provided for abused or threatened wives (and husbands). Blackstone’s arch allusion to the continued impolite behaviour of the ‘lower rank of the people’ sufficiently indicates where his own more self-consciously enlightened sympathies lay, besides conceding (or asserting) the law’s practical impotence in this domestic realm. Finally, the reference to the wife’s disabilities under coverture forms part of the conclusion to this entire chapter; its final sentence is perhaps merely a semi-facetious flourish or variation on the *Commentaries*’ largely positive view of the common law – although we note that Blackstone does not claim a wife’s legal disabilities were *all* ‘intended for her protection and benefit’.⁸

Notwithstanding his paternalistic acceptance of female dependency in marriage – scarcely a novel doctrine in the mid-eighteenth century, however unpalatable today – the man whose brother-in-law recorded that he

passed near nineteen Years in the Enjoyment of the purest domestic and conjugal Felicity (for which no man was better calculated) and which, he used often to declare, was the Happiest part of his Life

was scarcely endorsing ‘marital abuse’ of women, let alone ‘judging’ that a man who physically assaulted his wife was ‘doing so for her own good’.⁹ Our modern author’s references to ‘precedent’ and to Blackstone as having ‘judged’ may point to misunderstandings of the *Commentaries*’ institutional status. Nevertheless, even granting that the ironical tone of the Blackstone’s text could complicate its reading, neither lack of technical (or at least legal) expertise, nor any particular difficulties of interpretation presented by the distinctive form or content of Blackstone’s writings appear to be the prime source of error here.

So much for the words Blackstone wrote and published, as distinct from their reception or interpretation. But we might also seek to know how, and to what effect, his writings on the increasingly sensitive topic of marital violence were construed by later generations, not just in England but throughout the common-law world. Kelly has conducted some research along precisely these lines in North American sources; he concludes that an 1824 case in Mississippi (*Bradley v State*) and an 1871 Alabama judgment ‘wrongly assumed that Blackstone was upholding the [wife-beating] privilege claimed by the lower classes as still supported by the common law’. Unfortunately no such data is forthcoming for colonial Australia or New Zealand; we have merely the attribution, or assertion, of a long-term influence

⁸ E Foyster, ‘At the Limits of Liberty; Married Women and Confinement in Eighteenth-Century England’ (2002) 17 *Continuity and Change* 42-3, notes that Blackstone’s text was among other ‘rulings’ which ‘did not give husbands a general right to confine their wives, but limited that right to husbands whose wives were thought to be abusing their freedoms in some way, for example by being “extravagant”’.

⁹ J Clitherow (ed), *Reports of Cases ... Compiled by the Honourable Sir William Blackstone ... With a Preface Containing Memoirs of His Life* (1781) i.xvi. See also J Bailey, ‘Favoured or Oppressed? Married Women, Property and “Coverture” in England, 1660-1800’ (2002) 17 *Continuity and Change* 351-72.

(legitimizing marital violence – presumably in a domestic as well as juridical context) to Blackstone’s words – albeit words Blackstone never wrote.

II

Distinguishing between Blackstone’s own words, or intended meaning, and readings of those words and meanings by later generations, is particularly important with respect to Indigenous or Aboriginal land rights. In 1982 the first chapter of Alex Castles’s *Australian Legal History* emphasized the profound influence of Blackstone’s writings on decisions by both Australian and British courts as to the reception of English law in British colonies.¹⁰ Five years later the Australian historian Henry Reynolds published *The Law of the Land*, a tract for the times which famously argued that English common law (properly understood) had recognized the existence of Aboriginal land rights in Australia as both predating and surviving British settlement. This thesis directly contradicted what Reynolds represented as the lawyers’ ‘traditional view ... that before 1788 Australia was *terra nullius*...’.¹¹

Reynolds relied heavily upon Blackstone’s *Commentaries* in discussing both the nature of property, occupancy and possession in relation to the issue of British sovereignty over Australia and the transfer of English law to British colonies, including Australia. In his Introduction to Book I of the *Commentaries*, which deals with ‘Countries subject to the Laws of England’, Blackstone divides colonies into two types. On the one hand there were those which had been acquired by conquest or treaty; here any existing local laws would continue to prevail unless and until they were changed by the British Crown as incoming sovereign. On the other hand lay colonies of settlement, ‘claimed by right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country’ – English laws ‘are immediately there in force’ (i.26-8). Reynolds asserted that by ‘desart and uncultivated’ Blackstone *really* meant ‘uninhabited’ (because he would otherwise have written, ‘desart *or* uncultivated’). That being so, the *Commentaries* ‘could have been used to prove that nomadic peoples like the Aborigines were in possession of their land’.¹² Reynolds further quoted Blackstone’s scathing condemnation of ‘the seizing of countries already peopled and driving out or massacring the innocent and defenceless natives’ as powerful evidence against any attempt to appropriate his powerful authority as that of a ‘*de facto* apologist for the expropriation of Aboriginal land’.¹³ Indeed Reynolds claimed that colonial ‘lawyers continued to babble about a desert and uninhabited land when all informed observers knew that was nonsense’, precisely because they understood and accepted

¹⁰ A C Castles, *An Australian Legal History* (1982) 11-19.

¹¹ H Reynolds, *The Law of the Land* (1987) 12; M Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (2005) is a hypercritical and largely unconvincing attack on Reynolds’s work.

¹² Reynolds, above n 11, 33.

¹³ Reynolds, above n 11, 34-5.

Blackstone's views about the necessary connection between lack of an indigenous population and lack of a pre-existing legal regime in a settled colony.¹⁴

The argument is complex and somewhat confused, perhaps partly because one of Reynolds's aims was to persuade Australia's High Court to reverse a long line of judicial authority by accepting the continued existence of Aboriginal rights in land, or native title. For this reason, it has been suggested, Reynolds 'turned the dispossession of Aboriginal people into a legal event', rather than an act of more or less violent imperial invasion and dispossession.¹⁵ In such a juridical scenario Blackstone and his *Commentaries* plainly had to figure, given their prominence in contemporary English legal culture, even though (as Reynolds himself pointed out) the first edition of the *Commentaries* was published well before Captain Cook returned from his first Pacific voyage in 1771.

So we can only guess whether Blackstone, who died in 1780, would have classified post-1788 Australia as a settled or a conquered colony (or indeed something else again). When discussing colonies he plainly had in mind those of classical times, and Britain's American plantations. Reynolds is entirely justified in underlining Blackstone's personal disapproval of the violent expropriation of indigenous peoples by European, including British, colonists, very much in line with his Enlightenment principles. Indeed Reynolds's interpretation of Blackstone's own moral stance is reinforced by the latter's sardonic reference to Britain's North American plantations as having been obtained 'by right of conquest and driving out the natives (with what natural justice I shall not at present enquire)'. (i.105). On the other hand, in an immediately adjacent passage which Reynolds does not quote, Blackstone also stated that conquered or ceded colonies were 'already cultivated'. These words suggest that Blackstone, following John Locke's theoretical approach to the institution of private property, regarded absence of agriculture, not mere lack of human habitation, as the prime criterion of a settled colony.¹⁶ Of course this is all somewhat hypothetical, since Blackstone obviously had no opportunity to comment on the case of Australia.

In a lecture delivered at the Australian National Library in 1986 and subsequently published, Reynolds noted that an important 1971 judgment of Mr Justice Blackburn had confirmed the Privy Council's decision in the 1889 leading case of *Cooper v Stuart*. Here England's Law Lords had held that pre-1788 Australia 'a tract of territory practically unoccupied, without settled inhabitants or settled law'. Reynolds commented as follows: 'The authority for that view was Blackstone's *Commentaries*, published in 1765-69. So Australian law in the 1970s leapt straight from Blackstone to Blackburn...'.¹⁷ Here we see Reynolds himself portraying

¹⁴ Reynolds, above n 11, 35.

¹⁵ B Attwood, 'The Law of the Land or the Law of the Land? History, Law and Narrative in a Settler Society' (2004) 2 *History Compass* 1-30, 7.

¹⁶ See further S Banner, 'Why *Terra Nullius*? Anthropology and Property Law in Early Australia' (2005) 23 *Law and History Review* 93-131.

¹⁷ H Reynolds, *Aboriginal Law Rights in Colonial Australia* (1988) 18.

Blackstone as an apologist for the expropriation of Aboriginal lands, only a year before *The Law of the Land* first appeared in print, with its claim that Blackstone was no such apologist (because he evidently disapproved of the violent dispossession of Indigenous peoples by Europeans). Yet the contradiction is more apparent than real. Whatever Blackstone's personal convictions, and however unsatisfactory his distinction between settled and conquered colonies, the dominant legal view in 1987 was indeed as voiced by Mr Justice Blackburn in 1971 (following the Privy Council in 1889), that Blackstone's expression 'desert and uncultivated' must be taken to include any non-European 'territory in which live uncivilized people in a primitive state of society'.¹⁸ It was precisely this longstanding legal interpretation – or fiction – which *The Law of the Land* sought to overturn. Yet what role if any Reynolds's book played in bringing about the Australian High Court's acceptance of native title in its 1992 Mabo judgment remains a matter of lively dispute.

As it happens, not all nineteenth-century lawyers, whether British or Australian-British, were content to 'babble about a desert and uncultivated land'. In 1836 counsel defending an Aboriginal charged with murder argued before NSW Supreme Court that

It was laid down in First Blackstone, 102, and in fact in every other work upon the subject, that land obtained like the present were not desert [sic] or uncultivated, or peopled from the mother country, they having a population of [their] own more numerous than those who have since arrived from the other country ... therefore in point of strictness and analogy to our law, we were bound to obey their laws, not they to obey ours.¹⁹

Needless to say, the bench unanimously rejected this plea to its jurisdiction. In so doing the judges relied on other pronouncements of Blackstone which support the doctrine of undivided Crown sovereignty. But as Castles has pointed out, they might equally have followed Blackstone if they had wished to recognize Aboriginal customary practices as part of the common law of New South Wales.²⁰ All of which goes to show that the *Commentaries* covered a wide swathe of legal territory, and have been quite variously read and employed since their first publication, not least in relation to particular colonial circumstances of which their author plainly had no foreknowledge.

III

So far I have urged the desirability of going to Blackstone's own words, not someone else's version of them, and then of distinguishing, so far as possible, what Blackstone originally wrote or meant from subsequent constructions of his text. Yet

¹⁸ *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* 201; Cf J Bray, 'Underestimating the Fundamentals' (Feb 1988) 47 *Adelaide Review*.

¹⁹ *R v Murrell and Bummaree* (1836), cited from on-line report at www.law.mq.edu.au/scnsw.

²⁰ Castles, above n 10, 528-9.

attempting to establish what Blackstone originally wrote, or meant, is a complicated business. The *Commentaries* first appeared in four volumes from 1765 to 1769, the end-product of a course of Oxford lectures given and revised over a thirteen-year span from 1753 onwards. The book went through eight consecutive editions during its author's lifetime; a ninth appeared in 1783 'with the last corrections of the author', although some minor changes may well have been the work of its editor, Richard Burn. Obvious difficulties of interpretation arise from this state of affairs: when a passage of his text has been heavily reworked, how can we hope to know which variant represents the authentic views of William Blackstone, as distinct from, say, second- or third thoughts, to which he might have been persuaded by others? This problem is best illustrated by a final example.

In 1974 Blackstone's pronouncements on the institution of slavery were sharply criticised by the African historian Folarin Shyllon, who set out to show that successive editions of the *Commentaries* diluted an initial outright condemnation of slavery, in pusillanimous deference to the more cautious position of Blackstone's powerful professional 'patron and mentor', William Murray, Lord Mansfield, Chief Justice of King's Bench from 1756 to 1788.²¹ This was not an altogether novel accusation. In 1820 the first biographer of Granville Sharp, who a half-century before had effectively secured the judicial outlawing of slavery in England by sponsoring the momentous Somerset test case, asserted that Blackstone had 'corrected' the text of his first edition during the course of Sharp's litigation; a later commentator read this as 'an insinuation against Blackstone ... that he altered his text on account of the actions brought by Sharp'. Indeed Sharp himself had claimed that Blackstone was 'induced (as it was said) by the sentiments of the Chief Justice of the King's Bench to withdraw' his former opinion, although not in or as the result of the law suits Sharp mounted on behalf of slaves in England.²²

However Shyllon presented a more detailed and specific indictment, devoting a whole chapter of his book to the '*Commentaries* of Sir William Blackstone on Slavery'. He gave particular attention to correspondence exchanged between Blackstone and Granville Sharp in relation to the rewording of a passage on slavery in the first chapter of Book I of the *Commentaries*. Here, at the end of a paragraph eulogizing British liberty, Blackstone originally wrote that 'this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* [from that point] a freeman'. So ran the first (1765) edition. But the second edition of Book I, which appeared next year (November 1766), changed the sentence following the word 'laws' to read 'and so far becomes a freeman; though the master's right to his service may probably still continue'. The same qualification appears in the third

²¹ F O Shyllon, *Black Slaves in Britain* (1974) ch 5 *passim* and 75.

²² P Hoare, *Memoirs of Granville Sharp, Esq* (1828) i. 137-9 and see also i. 59, reference to Sharp receiving 'little satisfaction' from [Blackstone's] opinion on slavery; E Fiddes, 'Lord Mansfield and the Somersett Case' (1934) 50 *Law Quarterly Review* 506; Hoare, *Memoirs*, i. 62.

(1768) edition, although from the fourth edition of 1770 onwards the word ‘probably’ was replaced by ‘possibly’.

In a letter of February 1769 to Sharp, who had previously sent Blackstone a manuscript draft of his *A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery in England*, the latter claimed that his first alteration merely brought the text into line with a later discussion in chapter 14 of Book I.²³ Here, after condemning slavery as repugnant to both reason and natural law, and affirming that ‘the law of England abhors, and will not endure the existence of, slavery in this nation’, Blackstone nevertheless noted that while a slave became a freeman on arrival in England, ‘Yet with regard to any right which the master may have acquired, [‘lawfully acquired’ and ‘by general not by local law’ from the fifth edition of 1773 onwards] by contract or the like, to the perpetual service of John or Thomas, this will remain exactly in the same state as before; for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years ...’ (*Commentaries*, i. 412-413).

According to Shyllon, Blackstone’s letter to Sharp ‘merely repeated what he had said’ in the second edition of the *Commentaries*; his attempted defence of his changes ‘though apparently ingenious, is downright contradictory ... lamentable and unworthy’. For Shyllon could accept no compromise: ‘On a matter of life or death, freedom or slavery, there is not and never can be a half-way house.’ That stance is incontrovertible from a late twentieth-century vantage point. But the issue could hardly have appeared so straightforward to English lawyers in the 1760s and early ‘70s. As Ruth Paley has recently noted, ‘Case law on the subject of slavery in England before *Somerset* was confused and uncertain. The precedents were not only badly reported but contradictory.’²⁴ Something of this complexity is conveyed by the concluding paragraph of the February 1769 letter, which Shyllon does not print in full. Here Blackstone had assured Sharp that

You want no assistance with regard to the nature of Villenage; a thing totally distinct from that of Negro Slaving; except that it may be Collected from the Law of Villenage, how little a matter will serve (in the humanity of the English Law) for an Evidence of Manumission. The only Argument that can be drawn from it against you, is, that as Villenage was allowed by the Common Law; it cannot be argued that a state of Servitude is absolutely unknown to and inconsistent therewith.²⁵

Shyllon suggests that while Blackstone might have been ‘polite and affable’ to Sharp, ‘his loyalty and “personal esteem” were elsewhere’.²⁶ However, as with

²³ *The Letters of Sir William Blackstone*, W Prest (ed), (2006) 138-9.

²⁴ R Paley, ‘After *Somerset*: Mansfield, Slavery and the Law in England, 1772-1830’ in N Landau (ed), *Law, Crime and English Society 1660-1830* (2002) 168.

²⁵ *Blackstone Letters*, above, 23, 139.

²⁶ Shyllon, above n 21, 63; writing to Blackstone on 4 October 1768 Sharp mentioned ‘the polite and affable reception’ received when he called upon Blackstone at his house in Lincoln’s Inn Fields, seeking assistance in a suit with the West Indian slave owner David Lisle : Gloucestershire Record Office, D 3549 13/1/B25. Blackstone’s note acknowledging Sharp’s

Simon Schama's recent spirited account of this same episode, Shyllon may well both exaggerate the extent and distort the significance of the personal bond between Mansfield and Blackstone.²⁷ Long after both men were dead, Mansfield's biographer published a lengthy anecdotal passage suggesting that their relationship was one of mentor and client, while no less an authority than the late Dame Lucy Sutherland asserted that the two enjoyed 'a long friendship'.²⁸ Yet corroborative evidence is not thick on the ground. No letters between Blackstone and Mansfield appear to have survived, nor indeed other contemporary indications of a close relationship between the two, even if Mansfield (then plain Mr Solicitor-General Murray) was very likely one among those 'most eminent Men' at the bar with whom Blackstone 'contracted an Acquaintance' when attempting to establish his legal practice in the late 1740s.²⁹ Schama's suggestion that Murray 'had been decisive in procuring for Blackstone the Vinerian Chair at Oxford' seems based on a misunderstanding of Holliday's story (perhaps following Shyllon). It may well be that Murray's patron, the earl of Newcastle, was given Blackstone's name by Murray as a potential candidate for Oxford's vacant chair of Roman or civil law in 1752. But after his rejection for that post on political grounds, Blackstone's successful campaign for the new Vinerian chair of common law seems to have been a wholly domestic affair, with no documented intervention from outside the university.³⁰

We do know that after volume I of the *Commentaries* appeared Mansfield and his judicial colleague Sir John Eardley Wilmot both supplied Blackstone with suggested corrections and revisions for a second edition. Mansfield's modern biographer suggests that this editorial assistance sufficiently explains the changed passage on slavery, as the result of a correction in the interests of internal consistency, without either imputing any improper wish on Mansfield's part to make Blackstone toe the former's judicial line, or accusing Blackstone of undue timidity in maintaining his own position.³¹ No evidential justification exists for

'Valuable present' of a copy of his *Representation of the Injustice ... of Tolerating Slavery* (1769) 'sincerely wishes him Success on his humane undertaking', a passage quoted by Shyllon without comment.

²⁷ S Schama, *Rough Crossings: Britain, the Slaves and the American Revolution* (2005) 39-40. Schama also understates Blackstone's principled rejection of slavery, asserting that 'he was not judging the propriety or even legitimacy of a master's right to enslave'.

²⁸ John Holliday, *The Life of William Late Earl of Mansfield* (1797) 88-9; L. S. Sutherland, 'Blackstone and the Legal Chairs at Oxford', in R. Wellek and A. Ribiero (ed.), *Evidence in Literary Scholarship* (1979) 230-5.

²⁹ Clitherow, above n 9, vii.

³⁰ D J Ibbetson, 'Charles Viner and His Chair: Legal Education at Eighteenth-Century Oxford' in J A Bush and A Wiiffels (ed), *Learning the Law: Teaching and Transmission of English Law, 1150-1900* (1999) 315-28. The anecdote reprinted by Shyllon from the *Gentleman's Magazine* of 1793, representing Blackstone as unaware of Mansfield's Scottish antecedents, hardly points to a close personal relationship.

³¹ J Oldham, *English Common Law in the Age of Mansfield* (2004) 316-17. Carole Pateman, *The Sexual Contract* (1988) while generally following Shyllon, also notes the fourth edition rendering of 'possibly' in the key passage of Book 1, ch 1, commenting 'Certainly, his original statement sat very oddly with another argument in the first edition, in book I, chapter 14 ...' (145).

Schama's further claim that 'Mansfield, in all likelihood, had prevailed upon William Blackstone to excise the embarrassing passages concerning the illegitimacy of slaveholding under the Common Law from the later editions of his *Commentaries*'. Moreover (as already noted) Blackstone continued fiddling with his text even after the Somerset verdict, so that the fifth (1773) and later editions further problematised the supposed property rights of masters over negro servants bought as captives. There is ample evidence in other contexts of Blackstone's singular independence of mind, sometimes at the expense of his personal career prospects. Not for nothing did he choose for his professional motto the Latin tag *secundus dubiisque recte* ['whatever the circumstances, he is upright'].³²

In conclusion, Blackstone's *Commentaries* holds out the promise of providing an authoritative account of English law and politico-legal institutions on the eve of the nineteenth century. Unfortunately for such hopes, many topics which interest modern historians receive only cursory or slight treatment in the *Commentaries*. This is hardly surprising, given that early modern English law was far from treating all aspects of life in equal detail. Nor was the law which the *Commentaries* expounded altogether fixed and certain in substance and application. But while problems of this nature complicate attempts to use law books as historical sources, such texts hardly differ from other forms of evidence, in that they most amply repay careful, direct and contextualised reading.

³² J H Baker, *The Order of Serjeants at Law* (1984) 216, 482; the phrase derives from Horace, *Odes*, 4, 9, 35-6: '*secundis temporibus dubiisque rectus*'.