

Ex Ante

BE AN EPHEMERAL INSECT

IN 1979, THE UNIVERSITY OF CHICAGO Press published a photographic reprint of the first edition of Sir William Blackstone's *Commentaries on the Laws of England*. Previous editions of the *Commentaries* were abundant, but their quality varied, and the silt deposited by two centuries of English and American editors often diverted or interrupted the flow of Blackstone's elegant prose. Despite short introductions to each volume by distinguished scholars, Chicago's facsimile was not a scholarly edition. It included no editorial enhancements; it did not reflect the many changes Blackstone himself made in each edition through the posthumously published ninth edition of 1783; and, to the bane of anyone tracing old citations, it did not match the "star paging" that innumerable editions had vaguely patterned on the tenth edition. It did, however, make it easy for modern readers to confront Blackstone the way his contemporaries (including many in America's Founding generation) did – unencumbered by successive editors and eminently readable. Chicago's reprint deservedly became the standard edition of the *Commentaries*. The *Green Bag* is happy to see, for the first time in many years, that it is again available in hardback (slipcased and dressed in a blue buckram livery that is more handsome than the burnt sienna of the last printing).



Blackstone could reasonably be called the father of legal academia. From constitutional law to the common law and criminal law, what is today the core curriculum of our law schools was not studied at universities until Blackstone began lecturing at Oxford in the 1750s. Given subsequent developments, it is ironic that Blackstone's approachable writing style was probably necessary for the common law to be welcome on campus. As Jeremy Bentham (one of Blackstone's students at Oxford) famously wrote: Blackstone "taught Jurisprudence to speak the language of the Scholar and the Gentleman ... and sent her

abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies.”

In other words, the *Commentaries* are the original “entertaining journal of law.” But, like any Eden, they harbor a seductive dark side. In 1812, Thomas Jefferson complained that Blackstone, “altho’ the most elegant & best digested of our law catalogue, has been perverted more than all others to the degeneracy of legal science.” The problem? The *Commentaries* too “easily persuade[.]” an “indolen[t]” student “that if he understands that book, he is master of the whole body of the law.” Even “unlettered common people,” Jefferson sniffed, recognize such instant attorneys for what they are worth, giving “the appellation of Blackstone lawyers to these ephemeral insects of the law.”

Can you handle an entertaining legal treatise? At the risk of sounding like a pusher, the *Green Bag* suggests there is only one way to find out.

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 4 vols. (Oxford 1765-69; reprinted by Chicago 2002); Jeremy Bentham, A COMMENT ON THE COMMENTARIES & A FRAGMENT ON GOVERNMENT, ed. J.H. Burns and H.L.A. Hart (London 1977); Letter from Thomas Jefferson to Judge John Tyler, June 17, 1812, available at <http://memory.loc.gov/master/mss/mtj/mtj1/046/0100/0116.jpg>.

OXFORD ON THE HUDSON

PACKING ALL OF AMERICAN LAW into a few hundred pages is impossible, but there are at least two ways to make a partial survey both useful and readable. One is Lawrence Friedman’s two-volume history of American law (the second volume of which is reviewed on page 85). Another is *The Oxford Companion to American Law*, a short

encyclopedia that mixes predictable general topics (citizenship, family law, taxation) with an idiosyncratic sprinkling of narrower ones (bail bondsmen, mayhem, Watergate). Its broad topical coverage and excellent index make this book a useful reference tool, but the quirky selections invite browsing. For example, consider the following, which reminds us of one reason why Microsoft is willing to let its expensive, distracting, and occasionally embarrassing antitrust litigation with the states and the federal government drag on and on:

The federal government’s landmark antitrust case against International Business Machines (IBM) is most remarkable for the length of the trial and its inconclusive outcome. Robert Bork called it the Antitrust Division’s Vietnam. The United States alleged that the giant manufacturer had illegally maintained a monopoly in the sale of general-purpose digital computers by engaging in several kinds of anticompetitive practices. After eight years of investigation and discovery, the trial began in May 1975 and ended nearly seven years later when the government dropped the case. Not only was the trial among the longest in antitrust history; more importantly, in no case of even roughly comparable magnitude had the government so close to the end of its proceedings simply dismissed charges.

The peculiar history of the IBM litigation was mainly a product of shifting ideology in antitrust law. The complaint was filed on 17 January 1969, three days before the end of the Lyndon B. Johnson administration. At that time, the federal law was hostile to dominant firms, holding that a firm with a large market share violated the Sherman Act simply by using aggressive tactics to maintain its position. The government challenged IBM’s low and discriminatory pricing, its bundling of hardware, software, and support services, and its policy of preannouncing production schedules on new “phantom machines.” IBM vigorously defended its practices and argued that the government had used an unduly narrow market definition that inflated the firm’s market power.