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Celebrating the common law rights of man — a note on Blackstone's work on natural law and natural rights*

1. Introduction

William Blackstone's (1723-1780) *Commentaries*, a four-volume work, the first edition of which appeared in 1765, was produced in an epoch of natural law theory which marked the transition from "justification" to the "exposition" of natural law precepts and the shift from the ground of obligation of natural law to the formulation of detailed rules in natural law jurisprudence. Similar in style to E de Vattel's *Le Droit des Gens, ou Principes de la Loi Naturelle* (1758), and T Rutherford's *Institutes of Natural Law* (1748), Blackstone focused on the detailed rules of natural law rather than indulging in the philosophical underpinnings of natural law theory as such.

From this tendency of "detailed crystallisation" emerged the efforts at codification in Austria, Prussia, Hanover and the states of the Holy Roman Empire.[1] Also in France and England, ambitious restatement of positive law in natural law terms found their parallels in Pothier's work on French law[2] and Blackstone's work on English law.[3]

In the Anglo-American legal fold the work of Blackstone in stating the "Anglo-natural" rights of man in the form of positive laws proved to have enduring value, in spite of Bentham's vehement criticism of the non-utilitarian elements in Blackstone's *Commentaries.*[4]

Blackstone's efforts at synthesising the ideal of the free-willing individual with the existence of universal principles of justice and rights reflected a straightforward exposition of English common law and demonstrated the practical applicability of rationality and equity undergirding the English common law system. Blackstone's systematic exposition of the common law is based on four basic principles: the convergence of natural rights with the common law rights embedded in English common law; freedom of contract as a natural right;

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1 Cf. Stone 1965:73.

2 Cf. e.g. his *Du contrat de société* (1765); *Des contrats de prêt de consumption* (1766); *Du contrat de depot et de mandate* (1766).

3 Boorstin 1996.

4 Cf. Warren 1971:117ff.; Holdsworth 1938:238ff.; Boorstin 1996; McKnight 1959:399-411.

L Nydam, Blackstone Legal Fellow, Duke University School of Law.
AWG Raath, Professor at the Faculty of Law, University of the Free State.

vested property rights and freedom of testamentary disposition as a natural right, and the principle of no liability without fault as a precept of natural law.

Blackstone's basic statement of the immutable principles of equity undergirding the English common law reflects a fundamental concern for the juridico-moral foundations protecting and upholding the fundamental rights wrested from monarchical absolutism and authoritarianism in a long and bloody history of constitutional liberation which culminated in the establishment of the authority of Parliament as a consequence of the revolution of 1688 and the establishment of a society based on equity and moral sensitivity to justice and fairness.

From the perspectives in the opening pages of his *Commentaries*, Blackstone states the principle aim of society as being the protection of individuals "in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature," and that the moral content of laws are superior to any and all statements of laws emanating from the will of the lawmaker, because "this law of nature being coeval with mankind and dictated by God Himself, is, of course, superior in obligation to any other …. No human laws are of any validity if contrary to this".[5]

The implications of Blackstone's views on the interchangeability of natural rights and traditional common law rights are ingrained in the legal culture permeating the common law system, to the point where even the sovereignty of Parliament in its law-making functions cannot upset or nullify the culture of liberty manifested in the common law. This could be called the preservative function of natural law. On the other hand, the natural law statements of Blackstone provided a basis from which the common law provided the proponents of revolutionary liberty in the break of the American colonies from the English mother country, with a platform to confirm rather than upset the traditional rights "founded on nature and reason … coeval with our form of government though subject at times to fluctuation and change" and representing "that residuum of natural liberty … not required by the laws of society to be sacrificed to public convenience".[6] Blackstone's definition of natural law "being coeval with mankind and dictated by God Himself", thereby manifesting the superiority of the obligations emanating from natural law, together with the universality of natural law norms and the constitutive validity thereof, expresses the standards of the idea of law in terms of universal moral criteria representative of universal standards in all legal cultures.

A closer reflection on the nature of the norms of natural law reveals these criteria as ideals worth striving for in all legal cultures, particularly the English legal system. Blackstone's optimism concerning these fundamental criteria of justice becomes manifest to the point where he maintains the constitutive nature of these principles in spite of the supremacy of law and of Parliament as an outflow of the 1688 revolution. Although it is not our aim to discuss the merits or demerits of Blackstone's optimism, the point is that all legal cultures should reflect an urge for maintaining the constitutive effect of justice, in the

5 *Commentaries* (Bl. Comm.), 1, 1, 124. All references to Blackstone's *Commentaries* are to Edward Christian's 12th edition of 1771 except where otherwise indicated.

6 Bl. Comm., 1, 1, 127.

absence whereof a legal culture becomes merely a battlefield of conflicting aims subjected to the whims and fancies of a sovereign lawmaker.

In addition to the broad and wide connection between natural law and the positive law emanating from Parliament, Blackstone also identifies a more particular link between the idea of law and the concept of law. In other words: the precepts of natural law ingrained in the common law tradition do not only serve as ideas of rational morality guiding the legal system in its practical functioning; they also function indirectly in giving shape to positive law because in the normal course of affairs there are a great number of matters to which natural law is indifferent. Blackstone's explanation of the law of nature in defence of existing law largely consists in asserting that the particular situation which he is defending is one of those "matters themselves indifferent" and that since the law of nature has nothing to say against the institution itself, there is no ground for criticism.

Proceeding from this perspective one could say that because the matters in themselves indifferent in a legal system are by far the most frequent, natural law functions inconspicuously in most areas of legal reasoning and legal discourse.

Arguably it was the emphasis on natural rights in the Anglo-American legal culture which proved beyond doubt the longevity of Blackstone's legacy. Whereas in America the Declaration of Independence's recital of the self-evidence of man's endowment with the rights of life, liberty and the pursuit of happiness, and the people's right to replace any government destructive of such rights emanated from Blackstone's works, in English and South African law Blackstone's *Commentaries* served as a most useful source for identifying and applying the universal tenets of justice for securing the natural rights to life, personal security, personal liberty and private property.[7]

2. Blackstone's legacy in English law

2.1 Blackstone's *Commentaries* in England

Blackstone's *Commentaries on the Law of England* constituted the first synthesis of English common law into a comprehensive publication. An extremely large body of case law was reduced and simplified into straightforward principles, creating a commentary that was useful for judges, lawyers, and laymen alike. The *Commentaries* became the basis for legal education and ironically enough enabled philosophers such as Jeremy Bentham, in spite of his vehement criticism of Blackstone's anti-utilitarianism, to become familiar with the entirety of English law and to advocate reform. Textbooks became expansions on Blackstone's clearly written synthesis of the system of English law, which revolutionised the way the English legal system operated. Previously, obscure legal principles hidden in an overwhelming mass of case law necessitated that England's legal system operate in a manner heavily focused on procedure. After Blackstone's *Commentaries* were published and became the foundation

7 Bl. Comm., 1, 1, 127.

for legal textbooks, lawyers and judges were better able to fit fact patterns with the appropriate rules. Thus the legal system shifted from procedurally produced remedies to a system keen on employing substantive law.[8]

Even in the current post-modern era Blackstone continues to influence English jurisprudence through his impact on the common law. He is cited in well over five hundred English cases as an authority on human rights, governmental structure and judicial processes, and his *Commentaries* still provide a comprehensible and defensible basis for judges to determine the outcome of significant issues in modern cases.

2.2 Blackstone's natural rights legacy in English law

2.2.1 Prisoners' rights and the right to life

Blackstone's views on the natural right of every individual to life, liberty, and protection were not new in and of themselves, but these views became valuably innovative through his efforts in particular to employ natural rights in the context of prison reform. He "has rightly been credited with giving relatively early and clear voice to the unease growing during the second half of the eighteenth century at the ramshackle state of penal statutes and savage scale of punishment enacted for a vast range of crimes."[9] In his *Commentaries*, Blackstone attempted to express a new unified theory of criminal law which was sensitive to humanitarian values such as natural rights.

Prisons in Blackstone's day, and throughout the surrounding centuries, were "marked by dirt and disorder to an extent now difficult to grasp."[10] The inhumane circumstances began in police cells, into which prisoners were admitted before being taken to prison, and which were tiny, almost completely dark, and filled with human refuse. Prisoners were subsequently crammed into transport so closely that the ride to the prison was painful, and violent crimes occurred unchecked throughout the journey. Upon arrival at the prison, they were stripped of all belongings and clothes, judged by a doctor to be fit for hard labour, and then women and men alike had their hair cut off in a painful and degrading fashion. Within the prisons there were many arbitrary rules and a punishment for breaking each one. Cells afforded no privacy and contained planks of wood for beds with foully soiled blankets, and many prisons had no cells but housed all prisoners in crowded common areas. Beer was available, although food was scarce and violence broke out to claim what little there was.[11] It is not surprising then that these prisons tended to corrupt rather than reform the morals of the inmates.

Perhaps the most unjust aspect of the criminal justice system was its excessive use of severe punishment for petty crimes and for those awaiting

8 Smith 1998:15.
9 Smith 1998:22.
10 Priestly 1985:3.
11 Priestly 1985:5-34.

trial. Parliament's overwhelming concern was punishment, which was meted out generously to all citizens, including children. Debtor's prison was only escapable through paying one's debt, which was nearly impossible as there was no paid work in prison. Unconvicted prisoners were subject to identically degrading and inhumane prison conditions as convicted felons.[12] At the time of Blackstone there existed over one hundred and sixty offences punishable by death, including petty theft, writing a threatening letter, and pick-pocketing.[13] This harsh system of laws and punishment came to be known in later centuries as "The Bloody Code" for the number of crimes deserving capital punishment.

In response to such a harsh system, Blackstone asserted that criminal law "should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind."[14] The right to liberty was so deeply rooted in natural law that it was an absolute right, only to be abridged when a citizen committed an act that amounted to forfeiture. The right to life, also being absolute, should not have been so easily taken from subjects. His natural law criminal justice theories in the *Commentaries* were widely appealed to by prison reformers in the century after Blackstone, but he was also one of the pioneers of the movement, proposing prison reform measures as both parliamentarian and judge.[15]

Modern English jurisprudence still reflects Blackstone's influence in this regard in a number of ways and cites Blackstone as authority on prisoners' rights. In *Hawksley v. Fewtrell*, an action for damages for false imprisonment and malicious prosecution, the judge left the court before the jury had finished deliberating. The next day the judge disregarded the jury's simple verdict in favour of the defendants, given in his absence, and entered judgment for the defendants. The appeals court cites Blackstone eleven times in the case, each time showing that the current system embraces human rights in a manner suitably sensitive to prisoners. Although the appeal did not succeed, the quotations from Blackstone's *Commentaries* and other sources of English law show that the defendant had been treated fairly throughout the judgement process.[16] Therefore the defendant had been proven guilty, and by his unsocial acts had forfeited his freedom, and his absolute right to liberty had not been inappropriately abridged.

Blackstone's view on the absolute right to life also persists in modern jurisprudence. Recently, a case came on appeal before the English court regarding a hospital's plea to separate, without the parents' consent, newborn conjoined twins sharing a heart. Together, the twins could only survive for several months; their shared heart was not strong enough to provide two bodies with blood indefinitely. Separated by surgery, Jodie would be capable of independent existence, but Mary would die. Although each child had its own perfectly functioning brain, the lower court held "that the remaining months of M's life would not only be worth nothing to her, but also hurtful; that to prolong her life for

12 Priestly 1985:15.
13 Chambers 1867:245.
14 4 Bl. Comm. 3.
15 Carrese 2003:167.
16 *Hawksley v Fewtrell and Another* 2 All ER 1486 (1953).

those few months would be seriously to her disadvantage."[17] They justified their decision by saying that the operation would therefore be in the interests of both children, and that it was not a positive act because it was merely the withdrawal of Mary's blood supply, analogous to withdrawing a feeding tube. The court of appeals, reviewing the decision, overturned the insensitive holding, ruling that the right to life is absolute. To justify their decision they quoted Blackstone that a man under duress "ought rather to die himself than escape by the murder of an innocent".[18] Therefore the sanctity of life pertained with equality to both twins, and killing of one to save the other was in violation of the natural law, and the court would not allow the separation.

2.2.2 The right to property

Blackstone's *Commentaries* came at a period in England's history when property ownership as a social fact was undergoing a significant transformation, and yet the accepted concept of property remained stagnant. By mid-1700 the foundation for the Industrial Revolution was laid and the mercantilist system was breaking down. Population growth, agricultural changes, and the invention of the steam engine were just a few of the factors that were radically changing life in England and moving the ownership of property from landowners to shopkeepers, store owners, and manufacturers. Despite this, John Locke's formulation of the nature of property remained dominant, and because of its ambiguity was used to back the arguments of both those in favour of reform and those against it.[19]

It was in this climate that Blackstone wrote volume two of the *Commentaries*, titled "The Rights of Things". Radicals advocating property reform sought to overhaul the entire legal structure relating to property. Traditionalists favoured maintaining the feudal system. In response to this, Blackstone advocated a conservative approach to reform, firmly grounded in the laws of nature. He described property as an inviolable right grounded in natural law, originating in the relationship between man and nature. For protection of property in society, it was also a construction of civil government, but "so great moreover is the regard of the law for private property, that it will not authorize the least violation of it."[20] Civil government was, therefore, subordinate to the natural right of property ownership and could not abridge it in any way.

Because of this relationship of the government as the guardian of a natural right to property, Blackstone was cautious about the power of courts alone to make changes in property law without at least the tacit consent of the legislature. At the same time, Blackstone also believed that it was the natural duty of judges to shape the common law in accord with the desires of the people and the legislature, keeping in conformity with the laws of nature.[21] In response to this, the courts, between 1770 and 1870, played a crucial role in advancing

17 *Re A (children) (conjoined twins: surgical separation)* 4 All ER 961 (2000).
18 *Id*., at 1014, quoting 4 Bl. Com. (1857 edn.) 28.
19 Boorstin 1996:167-68.
20 1 Bl. Comm. 135.
21 Carrese 2003:167-75.

general principles of contract law associated with the development of the free market, which instilled in the notion of property freedom of contract for property owners.[22] Property had thus originated in nature but was fulfilled by the law. Blackstone's dual theory of property as resting in both the natural law and in the state invested it with the uninfringeable quality of a natural right while at the same time making it harmonious with the peaceful progress of society.[23]

Blackstone's theory of property continues to have lasting influence in modern England, as courts cite him as an authority on various rules of property law. For example, in *Land Settlement Association Ltd v. Carr*, Blackstone's definition and treatment of "estate for years" was outcome-determinative.[24] The court relied on his definition to settle a tenancy dispute. In *Kearry v. Pattinson*, the right of property owners to retake their escaped, living chattel was preserved as long as they do not interfere with the property of another, and the court quoted Blackstone's views on ownership of living animals as the authority.[25] Whether fixed or movable, property theory in English common law still relies substantially on Blackstone's *Commentaries*.

3. Blackstone's legacy in the law of the United States of America

3.1 The *Commentaries* and the new American society

The influence of English law on American jurisprudence is indisputable. Before the colonies declared independence, English law governed the land. Even as the founding fathers of America began forming their new country's government, they continued to embrace many of the philosophical doctrines underlying English law, writing these principles with conviction into their controlling legal documents.

Blackstone was among the three most influential English political philosophers impacting on the formation of American law, and cited frequently in the writings of the founding fathers. The number of times he is cited is second only to Charles Montesquieu; he is even cited more frequently than John Locke.[26] Blackstone's most important work was his *Commentaries on the Law of England*. These were published between 1765 and 1769, a crucial time in the formation of this new country. The United States Declaration of Independence was adopted by the Continental Congress on July 4, 1776, and the United States Constitution was adopted on September 17, 1787. Blackstone's *Commentaries*, published just decades earlier, were materially influential in the shaping of these two documents,

22 Brewer 1996:133.
23 Boorstin 1996:170.
24 *Land Settlement Association Ltd v Carr* 2 All ER 126 (1944).
25 *Kearry v Pattinson* 1 All ER 65 (1939).
26 Lutz 2005:143.

as well as the Bill of Rights, as the founding fathers analysed English law and sifted through it to discern what their new country would embrace or reject.[27]

In particular Blackstone's natural law theory was embraced by the vast majority of America's founding fathers. Samuel Adams declared that inalienable rights included "first, a right to life; secondly, to liberty; thirdly, to property — together with the right to support and defend them,"[28] perfectly echoing Blackstone's doctrine of the three absolute individual rights. Thomas Jefferson similarly declared the purpose of government to be "to declare and enforce only our natural rights and duties and to take none of them from us," stating almost verbatim what Blackstone wrote in the *Commentaries* concerning the relationship between government and natural rights.[29]

His legal writings were considered final authority in American courts for a century and a half after the adoption of the US Constitution, until the body of American case law began to stand on its own, and even today he is quoted with deference in US courts. During the first century of American legal education, the *Commentaries* were standard reading for every law student and other textbooks were based upon them. All early lawyers relied heavily on Blackstone's writings in understanding and applying the law. As one commentator remarks: "Upon Blackstone's Commentaries, United States Supreme Court Justice John Marshall and other early American jurists built the American legal system."[30] Blackstone is cited by the United States Supreme Court in *Faretta v. California* concerning the natural right of a people to representation in their government: "The Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the anti-lawyer sentiment of the populace, but also the 'natural law' thinking that characterized the Revolution's spokesmen."[31] Influenced by the *Commentaries*, election of representatives was essential to the concepts of justice and freedom for the framers. Blackstone's natural law theory appealed to the founders of the new free nation and, despite postmodernism permeating most spheres of legal thought, remains influential even in court decisions today.

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27 Some editions of Blackstone's *Commentaries* were published in a format specifically suitable for use as an American textbook. Tucker's Blackstone is a vivid example of such an "amplified" American version of Blackstone's work, the full title of which was: *Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia. In five Volumes. With an Appendix to Each Volume, Containing Short Tracts upon such Subjects as Appeared Necessary to Form a Connected View of the Laws of Virginia, As a Member of the Federal Union. By St. George Tucker, Professor of Law, in the University of William and Mary, and One of the Judges of the general Court in Virginia.* Philadelphia: William Young Birch & Abraham Small (1803).

28 Adams 1865:502.

29 Jefferson 1830:278.

30 Titus 1980:5.

31 *Faretta v Cal.* 422 U.S. 806 (1975), Footnote 39.

3.2 Blackstone's *Commentaries* and the culture of fundamental rights

Blackstone's influence in the United States Bill of Rights is apparent in the language of the Amendments, through the founders' quotations of Blackstone in their personal documents, and through the continuing deference he is shown by American courts. Well over eight hundred Supreme Court cases cite Blackstone as the authority on a number of fundamental rights. His philosophy on human rights, based in the unchanging natural law, provides a solid basis for determining protected rights that remains applicable centuries later in modern jurisprudence. Blackstone stated that absolute human rights "may be reduced to three principal or primary articles: the right of personal security, the right of personal liberty, and the right of private property,"[32] and he has been quoted regarding numerous rights falling under these three categories.

In the recent landmark case *District of Columbia v. Heller*, Blackstone was cited by a Supreme Court deciding to uphold the right to bear arms. This right, embedded in the Second Amendment of the U.S. Constitution, stating "A well regulated militia being necessary to the security of a free state, the right of the People to keep and bear arms shall not be infringed," came under attack when the District refused to license the personal handgun of a special police officer. Gun ownership was not explicitly illegal, but the District had made it a crime to carry an unregistered firearm and registration of handguns was prohibited.

In answering the question of whether gun ownership was a fundamental right which should be protected, the Supreme Court turned to the words of Blackstone for clarity and support. At issue was whether the right to bear arms applied solely in the context of a militia or whether it was a right held by individuals. They began by saying that "by the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works, we have said, 'constituted the preeminent authority on English law for the founding generation,'[33] cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen."[34] The Court in Heller recognised that their country's laws were founded in English law, and one of the finest sources of English common law was Blackstone. Therefore, Blackstone's explanation of the right to bear arms became crucial in defining the modern right, and it was recognised that "his description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation,"[35] and "the right of having and using arms for self-preservation and defence."[36] Because of the clarity given to the language of the Second Amendment by Blackstone's natural law principles, the Court in Heller concluded that the Second Amendment protected the right of the individual to own firearms.

32 1 Bl. Comm. 125.
33 *Alden v Maine* 527 U.S. 706 (1999), 715.
34 *D.C. v Heller* 128 S. Ct. 2783 (2008), 2798; See 1 Comm. 136, 139-40.
35 1 Bl. Comm. 139.
36 *D.C. v Heller* 128 S. Ct. 2783 (2008), 2798.

In addition to the right to bear arms, the Supreme Court has cited Blackstone with regard to other privileges flowing from the natural right to personal security. For example, the Court in *Ingraham v. Wright* held that children are protected from excessive force in punishment, specifically from their teachers. Their reasoning for this was because "Blackstone catalogued among the 'absolute rights of individuals' the right 'to security from the corporal insults of menaces, assaults, beating, and wounding,'[37] but he did not regard it a 'corporal insult' for a teacher to inflict 'moderate correction' on a child in his care. To the extent that force was 'necessary to answer the purposes for which [the teacher] is employed,' Blackstone viewed it as 'justifiable or lawful.'"[38] Although Blackstone made these statements centuries ago, the Court notes that the rule has not changed. The Court also quotes Blackstone in defence of personal security in *Washington v. Glucksberg*, in which the Court upheld Washington State's ban on assisted suicide as constitutional, noting that "although States moved away from Blackstone's treatment of suicide, courts continued to condemn it as a grave public wrong."[39] The right to life and personal security is inalienable in a country founded on natural law principles.

Blackstone's writings are cited in a similar manner regarding the right to personal liberty, which covers the right to trial by jury. This right is protected in the United States by Amendments V, VI, and VII, which guarantee that no citizen will be deprived of life, liberty, or property, without due process of law, and which warrant the right to jury trial. The outline for Blackstone's fourth book in the *Commentaries*, in which he discusses public wrongs, defines the prosecutorial process and provides the details for stating the constitutional rights to due process and jury trial.[40] When these rights have been tested, the Supreme Court has repeatedly quoted Blackstone to uphold and define the boundaries of those rights. In *Blakely v. Washington*,[41] the Supreme Court phrases the "two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,'" in the apt words of Blackstone.[42] In the infamous case of *Alaska, Exxon Shipping Co. v. Baker* regarding punitive damages as a result of a massive oil spill, the Supreme Court quoted Blackstone to justify the intervention of a judge in the judicial process when punitive damage awards were out of control.[43] In numerous other cases, courts have cited Blackstone as final authority on various aspects of the judicial process when due process rights have come under examination.

Also falling under the right to personal liberty is each citizen's right to be free from oppressive and unjust laws. Although continuity regarding the law is desirable, no government body is completely bound by past governmental decisions in the event that a decision is realised to be undesirable. The

37 1 Bl. Comm. 134.
38 *Ingraham v Wright* 430 U.S. 651 (1977), at 661.
39 *Wash. v Glucksberg* 521 U.S. 702 (1997), at 714.
40 Hickok 1991:221-22.
41 *Blakely v Washington* 542 U.S. 296 (2006).
42 *Id.*, at 301; see 4 Comm. 343.
43 *Exxon Shipping Co. v. Baker* 128 S. Ct. 2605 (2008), at 2630.

Supreme Court cites Blackstone's statement of the centuries-old concept that one legislature may not bind the legislative authority of its successors:

> Acts of parliament derogatory from the power of subsequent parliaments bind not. ... Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind the present parliament.[44]

Thus laws can be repealed, amended or disregarded by future legislators representing the will of the people. This legal tenet enabled the abolition of slavery, voting rights for women and racial integration, and is a crucial legal concept allowing America to progress and provide adequate rights for all citizens.

3.3 Blackstone's influence on the right to private property

Blackstone's influence is also manifest in the Bill of Rights regarding private property. The Fifth Amendment states "nor shall private property be taken for public use, without just compensation." This very closely echoes Blackstone's own words in his *Commentaries*, where he states "(s)o great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no not even for the general good of the whole community … [without] full indemnification and equivalent for the injury thereby sustained."[45] Courts have interpreted this part of the Constitution, as well as other property law principles, based largely on the traditions of private property in England and on Blackstone's description of this system in his *Commentaries.*

Justice Thomas began his dissent in *Kelo v City of New London* by stating that "long ago, William Blackstone wrote that 'the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property ...'"[46] The framers embodied that principle in the Constitution, allowing the government to take property not for 'public necessity,' but instead for 'public use.'"[47] He quoted Blackstone six more times in his dissent, urging the Court to consider traditional property law values and not to include "public purpose" within the bounds of "public use" as described by the Fifth Amendment. This dissent, influential because of its foundation in Blackstone's natural law, was successful in that it prompted state legislation restricting takings under this newly expanded theory of eminent domain as well as criticism by lower courts.[48] Reminding state

44 *United States v Winstar Corp.* 518 U.S. 839 (1996), at 872; see 1 Comm. 90.
45 1 Bl. Comm. 135.
46 1 Bl. Comm. 134-35.
47 *Kelo v City of New London* 545 U.S. 469 (2005), 505.
48 *City of Norwood v Horney* 110 Ohio St. 3d 353 (2006), 355. The Court in *Kelo* acknowledged that, although the taking at issue was not unconstitutional, state courts and legislatures remained free to restrict such takings pursuant to state laws and constitutions in order to protect property owners. In response to that invitation, Ohio's General Assembly unanimously enacted 2005 Am.Sub. S.B. No. 167, which imposed a moratorium on takings under the rule in *Kelo*. Expressly noted in the Act is the legislature's belief that as a result of *Kelo*, "the interpretation and use of the state's eminent domain law could be expanded to allow the taking of private property

legislatures and lower courts of Blackstone's views on property had a profound effect on them, causing them to work around the majority opinion in *Kelo* in order to uphold traditional concepts of the natural right to property.

In addition to the sanctity of private property as something that cannot be wantonly seized, even by the government, privacy regarding the use of that property is a fundamental right. Even police officers must obtain permission through the warrant process to enter a private home. "Invasions on the part of the government ... of the sanctity of a man's home and the privacies of life"[49] are a grievous offence because "the home is entitled to special protection as the centre of the private lives of our people."[50] Even a "knock at the door, as a prelude to a search, with-out authority of law … [is] inconsistent with the conception of human rights enshrined in [our] history" and Constitution."[51] All of these cases have been decided based on Blackstone's natural law principle that "the common law generally protected a man's house as 'his castle of defence and asylum.'"[52] Blackstone's views on property law theory consistent with the laws of nature have widespread implications in the American property system, from the nature of property to the nature of man's rights in using his property.

4. Blackstone's legacy in Southern African law

4.1 Blackstone and the reception of the common law

South African jurisprudence is unique because it combines elements of both English and Roman-Dutch law, each with its own legal traditions. Each of these bodies of law featured prominent natural law theorists, with Blackstone commenting on natural and English law, and Grotius writing mainly about the laws of nature within the context of Roman-Dutch law. Grotius, who lived about a century before Blackstone, had a profound impact upon the later writings of the English jurist.[53] Because both the English and Dutch colonised parts of South Africa, both natural law philosophers helped to shape South African jurisprudence, and Blackstone is cited in more than one hundred South African cases.

Blackstone's views on the natural values ingrained in the common law also impacted on South African law. Arguably one of the clearest statements on the values of natural law inherent in our system of common law was made in the case of *Mota en Andere v Moloantoa & Andere,*[54] in which the court

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that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person" in violation of the Ohio Constitution. Section 4(A), 2005 Am.Sub.S.B. No. 167.

49 *Boyd v United States* 116 U.S. 616 (1886), at 630.

50 *Minnesota v Carter* 525 U.S. 83 (1998), at 99.

51 *Wolf v Colo.* 338 U.S. 25 (1948), at 28.

52 *Hudson v. Michigan* 547 U.S. 586 (2006), at 620-21, quoting 3 W. Blackstone Commentaries *288.

53 Wigmore 1918:538.

54 1984 (4) SA 761 (O).

held that "Blackstone's 'general customs' or 'customs of the realm' are those fundamental principles in legal relationships which for the most part are not to be found in any express formulation, but are assumed to be inherent in our social relationships."

4.2 Blackstone and fundamental rights

As in the United States and in England, courts in South Africa cite Blackstone in defence of its citizens' protected rights. In *In Re Intestate Estate of F.J. Dolphin*, the court had to decide whether a guardian dative could remove a child from the custody of her mother. Blackstone's family values, grounded in natural law, provide an absolute right of children to be taken care of by their parents. Because of this, the court ruled that the mother was entitled to custody of her child, irrespective of the guardian's wishes. The court ruled that it would only authorise removal upon very strong grounds, because "the mother is what Blackstone calls the guardian 'by nature.'"[55]

Blackstone's influence on the criminal justice rights of individuals surfaced manifestly in the Constitutional Court's judgement in *S v Basson*[56] in which Ackermann J remarked as follows on the constitutional protection against double jeopardy: "The plea of double jeopardy also forms part of the English common law and was recorded by Blackstone as a universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. The constitutional protection against double jeopardy is part of the right to a fair trial."[57] In the domain of procedural rights the case of *S v Leepile*[58] is illustrative of the typical Blackstonian logic in fostering a culture of openness by promoting justice. In this case the court, with reference to Blackstone, held that the common law requirement of holding trial with open doors, is "more conducive to the clearing up of the truth" than the private and secret examination of witnesses.[59] In the case of *Botha v Rondalia Versekeringskorporasie Bpk*[60] the court went so far to hold that Blackstone's views entail that the civil law is simply a system of rights, and that a "wrongdoer" is simply a person who has infringed a right and is thereby liable to pay compensation, which is in the nature of a debt.[61]

Blackstone's common law views are arguably the most evident in the sphere of the criminal justice systems of Southern African jurisdictions. In the Zimbabwean case of *Blanchard and Others v Minister of Justice, Legal and Parliamentary Affairs and Another*[62] the court held that the fundamental rights of awaiting trial prisoners demand that punishment, deterrence or retribution are out of harmony with the presumption of innocence. Quoting Blackstone

55 *In Re Intestate Estate of F.J. Dolphin* 15 NLR 343 (1894).
56 2005 (1) SA 171 (CC).
57 At 198.
58 (1) 1986 (2) SA 333 (W).
59 At 338.
60 1978 (1) SA 996 (T).
61 At 1002.
62 1999 (4) SA 1108 (ZS).

the court held that a prisoner ought to be treated with the "utmost humanity," and neither be "loaded with needless fetters," or subjected to other handlings such "as are absolutely requisite for the confinement only".[63]

4.3 The right to private property

Although Roman-Dutch law primarily governs the South African concept of property, Blackstone has had an influence as well. In *Donges, No. v. Dadoo*[64], the passport of an airplane passenger was seized by government officials. His passport was valid and had been properly obtained, yet the Department of the Interior recalled it without his notice. After boarding an airplane, security officials were notified that they must confiscate the passport and return it to the Department, which they did. The court stated that "the remedy invoked was one which the Roman-Dutch law provides and which is governed by Roman-Dutch principles," but that this view was influenced as well by English jurisprudence. The court quoted Blackstone to further justify that the passport should be returned to the citizen, stating that it is "greatly for the safety of the subject, that the Crown may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury".[65] Blackstone therefore plays a supporting role in justifying the private property principles passed on to the South Africa from Roman-Dutch law.

5. Conclusion

Blackstone's continuing impact upon the English and American systems of law, as well as the recepted common law principles in Southern African law, are attributable mainly to three factors: first, the statement of the idea of law in such a way that it appeals to the ideals of refined systems of law in a spontaneous way; second, that the norms of justice do not receive their validity from the will of competent lawmakers but are representative of the ideals of fairness and equity ingrained in a legal system as such; and third, that norms of the common law reflect the ideals and standards of justice in a broad and universal fashion, thereby leaving room for extension and development, whilst giving effect to universal ideals of morality and reason informing the positive law.

The year 2010 witnesses the 240th commemoration of Blackstone's death. Because of the importance of his work to all jurisdictions influenced by the English common law system, a more penetrating study of the impact and motivations for his legal views would probably be the most suitable form of homage that could be brought to one of the most elegant minds in the Anglo-American legal fold.

63 At 1114.
64 1950 (2) SA 321 (A).
65 3 Bl. Comm. 259 (Kerr's ed. 1876).

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