

May 1979

The First Two Vinerian Professors: Blackstone and Chambers

Rupert Cross

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Legal History Commons](#)

Repository Citation

Rupert Cross, *The First Two Vinerian Professors: Blackstone and Chambers*, 20 Wm. & Mary L. Rev. 602 (1979), <https://scholarship.law.wm.edu/wmlr/vol20/iss4/6>

Copyright c 1979 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

ARTICLES

This is the second in a series of four articles commemorating the bicentennial of American legal education, dating from the establishment of the first chair of law and police, occupied by George Wythe, at the College of William and Mary on December 4, 1779. The colonial antecedents to the College's formal relation to professional legal education may be traced to the career of Sir John Randolph, a student at William and Mary, 1705-1713, who then prepared for the bar at Gray's Inn, London (1715-1717). Randolph's two sons, Peyton ("The Patriot") and John ("The Tory") followed his example, first at the College of William and Mary and subsequently at the Middle Temple. His grandson, Edmund, after study at the College on the eve of the Revolution, read for the bar under his father and uncle. The Randolphs and their cousins, Thomas Jefferson and John Marshall, were prototypes of various leaders of legal and political thought in colonial and early post-Revolutionary Virginia whose efforts "Americanized" English legal institutions and thus created a logical need for a new school to teach this "Americanized" law. This series of articles addresses some aspects of law and procedure and legal thought which were the backdrop for the establishment of the first American law school in 1779.

The chair of law and police at William and Mary is the second oldest chair of common law in the English speaking world. The oldest is the Vinerian Chair of English Law at All Souls College in the University of Oxford.

To help commemorate the bicentennial of America's oldest chair of law, The College of William and Mary, through its Marshall-Wythe School of Law, invited Sir Rupert Cross, the current Vinerian Professor, to deliver a Vinerian Lecture in Williamsburg. This lecture, the George Wythe Lecture for 1979-1980, was given so as to coincide with the annual meeting of the American Society for Legal History, which was held in Williamsburg in honor of the bicentennial. This article is substantially a transcript of that lecture.

THE FIRST TWO VINERIAN PROFESSORS: BLACKSTONE
AND CHAMBERS

RUPERT CROSS*

When I chose the title of this lecture more than a year ago I was indulging in two practices which are common among academic speakers. I was keeping my options open and I was making a little go a long way. I need say no more about the first. We all do it. The invitation comes, we think of a subject appropriate in general terms to the occasion, and we have a natural inclination to defer the consideration of matters of detail until we get down to the task of preparing the lecture. I certainly left myself ample scope for choice when I did no more than indicate that I would talk about Blackstone and Chambers.

The nature of the second practice can be stated with equal brevity. We give a talk to a college society or write a note for a learned periodical. The talk or note is enlarged into an article and, before you can say "knife", the article has become a book. It is, however, necessary for me to say quite a bit more in order to indicate the exact mode of my indulgence in the practice of making a little go a long way on this particular occasion.

In November 1753, Blackstone, then aged thirty, began his first course of lectures on English law in the University of Oxford. It was to be repeated in each academic year until 1766, but, from 1758 on, the lectures were those of the first Vinerian professor,¹ Blackstone having been appointed to the chair in the spring of that year. They became the *Commentaries on the Laws of England*, published in four volumes in 1765, 1766, 1768, and 1769, respectively. Blackstone resigned his chair in 1766 and died in 1780 after having served as a judge of the Common Pleas for ten years.

Blackstone was succeeded by Robert Chambers (1737-1803) who had been elected to a Vinerian scholarship when Blackstone was made a professor in 1758 and became a Vinerian fellow in 1762. He gave his annual course of lectures on English law from 1767 to 1773, when he was appointed to a puisne judgeship in Bengal. He

* Doctor of Civil Law, 1958; Honorary degrees, LL.B., Edinburgh and Leeds; Honorary Master of the Bench of the Middle Temple, 1972; Fellow, Magdalen College, Oxford, 1948-1964; Fellow of the British Academy, 1967; Knighted, 1973; Vinerian Professor of English Law, All Souls College, Oxford, 1964-1979.

1. So called after the donor of the funds to provide for the chair, Charles Viner, author of the famous *Abridgement* (d. 1756). Provision was also made for the appointment of Vinerian scholars and a Vinerian fellow.

was given three years leave of absence from Oxford "on the supposition that the precarious state of his health might compel him within that period to throw up his appointment and return to England."² These fears proved to be unfounded and he resigned the Vinerian chair early in 1777. The rest of his active life was spent in India where he became Chief Justice of Bengal before returning to England for good in 1798. He died in 1803.

According to his nephew, Sir Charles Harcourt Chambers, Robert Chambers had intended to write *de novo* a commentary on the common law to be made public only on "the maturest consideration." These cautionary words did not deter Sir Charles from editing a *Treatise on Estates and Tenures*, published in 1824, and containing the lectures on real property included in part III of his uncle's course. It is not known what became of the manuscript from which the book was compiled and the *Treatise* was thought for a long time to be all that remained of the second Vinerian professor's Oxford lectures. The discovery that this is not the case was made by a Johnsonian scholar, the late Professor E.L. McAdam, Jr. of New York University.³

Not the least of Chambers' claims to distinction is the affection he inspired in Dr. Johnson who once wrote of him as a man "Whose purity of manner and vigour of mind are sufficient to make everything welcome that he brings."⁴ In spite of the disparity in their ages (Johnson being the elder by 28 years), there is abundant evidence of their close friendship from 1754, when Chambers went up to Oxford, to 1773, when he set sail for India. There is no doubt that, in the last quarter of 1766 and the first quarter of 1767, the new Vinerian professor was experiencing difficulty in getting started on his course of lectures. For confirmation it is only necessary to refer to the belated commencement of the course, March 1767, and the fact that Chambers was fined £54 for failing to give 27 of the 60 lectures then required of the Vinerian professor by the Oxford University statutes.⁵ Johnson visited Chambers in Oxford

2. SIR CHARLES HARCOURT CHAMBERS, A TREATISE ON ESTATES AND TENURES, *preface* (1824).

3. See notes 6-9 *infra*.

4. LETTERS OF SAMUEL JOHNSON, Letter 353 (Chapman ed. 1952). I owe this reference and that in the next note to Professor Thomas Curley of Bridgewater State College, Mass.

5. *Viner's Accounts 1757-1874*, Department of Western Manuscripts, Bodleian Library, Oxford. The professor had to give 60 lectures per annum and was liable to have £2 deducted

at the end of October 1766 and it is not unlikely that his assistance was invoked. It was certainly offered, if it had not been given before, in the following letter dated December 12, 1766:

I suppose you are dining and supping and lying in bed. Come up to town, and lock yourself up from all but me, and I doubt not but that lectures will be produced. You must not miss another term. Come up and work, and I will try to help you. You asked me what amends you could make me. You shall always be my friend.⁸

Chambers appears to have complied. In all probability this was not the end of the matter. Johnson paid further visits to Oxford and Chambers suffered further fines for failing to comply with the university's lecturing requirements before the course was finally completed in 1769.

In 1939, Professor McAdam wrote an article in *The Review of English Studies*⁷ drawing attention to a number of passages in *A Treatise on Estates and Tenures* which he attributed to Johnson. While this article was in the press, he discovered a complete manuscript of *A Course of Lectures on English Law* by Robert Chambers in the British Library. It had been requested by George III and was presented in 1773. It passed to the British Museum when George IV sold his father's books and papers to that institution.⁸ In 1951, McAdam produced a book entitled *Dr. Johnson and the English Law* containing all the major Johnsonian passages in which reference is made to the law. There is a chapter on Johnson and Chambers with copious citations from the King's manuscript designed to reinforce the claim, already made in his 1939 article, that the two men were collaborators in the fullest sense of the word.⁹ This claim was treated with reserve in 1948 by Sir Arnold McNair,¹⁰ a very distinguished lawyer, but subsequent literary scholars appear to accept the thesis that the collaboration with Chambers was fairly ex-

from his salary of £200 for each of these lectures which he failed to give. The professor could charge for attendance at the lectures.

6. Cited in E.L. McADAM, *DR. JOHNSON AND THE ENGLISH LAW* 68 (1951).

7. *Dr. Johnson's Law Lectures for Chambers: An addition to the Canon*, 15 REV. OF ENG. STUD. 385 (1939).

8. See McADAM, *The King's Manuscripts*, 16 REV. OF ENG. STUD. 159 (1940).

9. E.L. McADAM, *supra* note 6, at 65-122.

10. DR. JOHNSON AND THE LAW 78-79 (1948).

tensive, as well as being a surprisingly well-kept secret in view of the fact that Mrs. Thrale was "in the know."¹¹

The question of the collaboration is plainly a matter on which further opinions are desirable and the time has come for lawyers to be given the opportunity of assessing the merits of Chambers' lectures quite independently of the issue concerning Johnson's role in their preparation. I am therefore very pleased to say that two Johnsonian scholars, Professor Donald Greene of the University of Southern California and Professor Thomas Curley of Bridgewater State College, Mass., are planning a printed edition of the full course of the second Vinerian professor's lectures as contained in the King's manuscript with an introduction and biographical note. They have done me the honour of an invitation to contribute a foreword and, in order to comply with it, I have read the entire manuscript. Now you see what I mean by "making a little go a long way" in my choice of subject for this lecture. I perused the manuscript for the purpose of a brief foreword and that perusal is now to be called in aid for a more ambitious task. The rest of this lecture is to be devoted to a comparison of certain aspects of Chambers' lectures with Blackstone's *Commentaries*. As becomes a mere lawyer I express no opinion with regard to the provenance of the passages from the lectures which I quote; nor do I have anything to say with regard to the logistics of whatever collaboration may have taken place between Chambers and Johnson. McAdam suggests that Chambers brought his notes to a session; then they plotted out the course of a series of lectures and Johnson finally dictated a paragraph or so to get him started.¹² In the first draft of the introduction to the proposed edition of the lectures Professor Curley doubts the dictation. He may well be right, and I am certainly not the person to gainsay him, but I must confess to a liking for the idea of Johnson striding up and down the room dictating life into the dull lucubrations of the academic. Which of us would not have welcomed such an intervention when not merely the *mot juste*, but words of any sort, were unforthcoming?

The fact that I am about to compare parts of the *Course* with parts of the *Commentaries* must not be taken to suggest that it is

11. W. BATE, SAMUEL JOHNSON 418-26 (1977); D. GREENE, THE POLITICS OF SAMUEL JOHNSON 192 *et. seq.* (1960); J. WAYNE, SAMUEL JOHNSON 217 (1974).

12. E.L. MCADAM, *supra* note 6, at 68.

my opinion that the merits of the two works are in any way comparable. At the beginning of Chambers' first lecture the following words, attributed to Johnson by McAdam, are to be found:

Professors like princes are exposed to censure not only by their own defects but by the virtues of their predecessors. . . . I hope to erect such a fabric of juridical knowledge as may stand firm by its solidity, though it should not please by its eloquence, and shall think it sufficient to mould those materials into strength, which only the genius of a Blackstone could polish into lustre.¹³

For my part I think that, when *A Course of Lectures on English Law* comes to be published in full, the question which lawyers will be asking themselves is whether the hope expressed by the author can be said to have been fulfilled. The comparisons I make are mainly intended to facilitate what I believe to be the first account by a lawyer of Chambers' lectures. It is necessarily brief and highly selective.¹⁴

Some general comparisons.

Subject to what I have said about the respective merits of their two works, I would say that Chambers was more of a historian and less of a jurist than Blackstone, that his exposition has the advantage of greater simplicity at certain points, though this detracts from its interest, and, whatever their provenance may be, there are some brilliant rhetorical passages.

The greater simplicity is displayed in the arrangement of his course. After four introductory lectures it is divided into three parts, part I containing sixteen lectures on the public law of England, part II containing fourteen lectures on the criminal law of England, and part III containing twenty-two lectures on the private law of England. Blackstone's division of his subject into four books dealing respectively with the rights of persons, the rights of things,

13. B.L. King's Manuscripts 80 nn. 2-4. *A Course of Lectures on English Law* by Robert Chambers is in King's Manuscripts 80-97 in the British Library. I am unable to give number and folio references in my subsequent citations because I have worked largely from a typescript kindly supplied by Professor Donald Greene. For the curious, the references in the text to the number of the lecture in which the cited passage occurs should make identification a fairly simple matter.

14. *The Treatise on Estates and Tenures* is discussed by my predecessor H.G. Hanbury in chapter 5 of *THE VINERIAN CHAIR AND LEGAL EDUCATION* (1958).

private wrongs and public wrongs, is more elaborate, but it has an interest of its own on account of its relevance to his definition of municipal law as "A rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."¹⁵ The business of the law is to enforce rights and redress wrongs. Each successive book is thus an enlargement of the original definition.¹⁶

That definition, repeated several times in the *Commentaries*, is given in the second of the four sections of the introduction. It is entitled "Of laws in general." The respective titles of the first, third and fourth sections are "On the study of Law", "Of the laws of England" and "Of the countries subject to the laws of England." Chambers began his course with four introductory lectures with the following titles: "Of the law of nature, the revealed law, and the law of nations, the primary sources of the law of England"; "Of the origin of feudal government, and of the Anglo-Saxon government and laws"; "Of the feudal law strictly so-called, and of the effects of that law on our constitution and government"; and "Of the general divisions of the laws of England." The second and third of these lectures reveal his learning and greater interest in the factual origins of law and government, but the omission from his introduction of matter commonly regarded as jurisprudentially important is striking. There is no definition of municipal law, not a word about precedent and, for statutory interpretation, the audience was referred to Wood's *Institutes* to be supplemented by the third section of the introduction to Blackstone's *Commentaries*. Yet there is an undeniable attraction in the simplicity of such juristic statements as there are.

At the beginning of the first lecture we are told that "The laws of England, like those of other Christian nations, consist partly of local and occasional rules framed or adopted for the government of this particular society, partly of those which oblige men considered as men, independently of all positive institutions, and partly of the revealed law of God." The second and third of these items are often spoken of together as "the law of nature." Chambers tends to confine this term to the laws which oblige men as men, but the point

15. I. ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES* 44 (1803) [hereinafter cited as *Comm.*].

16. See Finnis, *Blackstone's Theoretical Intentions*, 12 NAT. L.F. 163 (1967).

is largely semantic because he considers that each flows from the will of God, the revealed law directly, the law which governs men as men indirectly through the powers of reasoning bestowed on us by the Almighty. In the course of a long passage ascribed by McAdam to Johnson, Chambers says: "Of revelation the greatest part of the ancient world has either no knowledge at all, or only obscure and corrupt traditions; they must therefore have had recourse to reason to discover the will of those whom they believed to be gods." He surmises that men must have learnt the rules of natural law by observation, regarding as good those actions which tended to promote the happiness of society as a whole and as bad those actions which had a converse effect.

He then turns to human institutions, "that other parent of right." He recognises that the origins of civil government must be a matter of conjecture, but maintains that, by whatever means "political bodies" were first established, they are supported by man's desire for social life and his willingness to submit to some rule of obedience rather than "to exchange the protection and pleasures of society for the solitude and horrors of a desert." It is thus apparent that some public authority must be necessary "to overrule single opinion or private interest." It follows that the first care of every new society must be "to select and establish governors, and its first law must constitute the power by which laws are to be made."

The stage is thus set for the discussion of public international law introduced in the following passage which sums everything up:

But whilst the subjects of each state are governed by these, its positive institutions, as the *rule* of their *civil conduct*, and owe an obedience to the laws of God and of nature, as the *rule of their moral behaviour*, the state itself considered as a single person is bound to observe a certain rule of *political conduct* (if I may so speak) called the *law of nations*, which may be defined as so much of the law of reason (or which is the same thing, the law of nature) as nations have perceived and acknowledge they have perceived, with the addition of so much positive institution as may ascertain and modify the exercise of natural rights.

The concluding words refer to pacts and the customary international law which the author proceeds to discuss.

The law of nature.

I want to make three points with regard to the above account of the law of nature, municipal law and the law of nations. Each of them is primarily concerned with the law of nature.

(1) Subject to the omission by Chambers with which my third point is concerned, there is little material difference between his account of the subject and that of Blackstone, but I think that Chambers' version is to be preferred for its greater clarity and simplicity. The question of Blackstone's precise meaning has given rise to much controversy. I don't think that such controversy will arise when the pundits come to consider this part of *A Course of Lectures on English Law*. Had it been available to him, I doubt whether Bentham would have been able to make the sallies against Chambers' account of the subject which he made against Blackstone in the first chapter of *A Comment on the Commentaries*.

(2) In Chambers' account there is no equivalent of the following famous passage in Blackstone:

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.¹⁷

The nearest I can find is the statement in Chambers' fourth introductory lecture that nothing can be the law of England which is contrary to the law of God, but the context suggests that this is no more than an emphatic statement of the doctrine, recognized until long after Chambers' day, that Christianity was part of the law of England. It was invoked to justify the invalidity of polygamous unions and of marriages within the prohibited degrees. For the rest there is no departure, real or apparent, from the statement that the subjects of each state owe obedience to the law of God and nature as the rule of their *moral* behaviour. We are not told whether a grossly immoral provision of municipal law is no law, or a law which those subject to it are bound to disobey, but on the whole

17. I *Comm.* at 41. For confirmation of my account of Chambers' views about the binding force of the law of nature, see text accompanying note 25 *infra*.

the latter view is more in accordance with Chambers' words.

This second point of mine may be no more than an exemplification of the first — that Chambers' version of natural law has the merit of greater clarity — for I am far from convinced that Blackstone meant to say anything more than that municipal laws contrary to natural law do not bind in conscience. Literally construed, the famous passage which I have just quoted means, not only that human laws contrary to natural law are invalid, but also that, in order to be valid, every human law must be derived from natural law. So construed it is inconsistent with another important passage which comes shortly afterwards:

There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty, but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy: for with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former. . . . But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool to foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.¹⁸

(3) There is no equivalent of this last passage in Chambers. Blackstone is said to have relied on the fact that a particular legal rule concerned "matters in themselves indifferent" as an answer to criticism of it.¹⁹ Even so, I think that the point made in the passage is one that should find a place in any account of the relation of law to morals. "Matters in themselves indifferent" include, not merely laws, such as the rule of the road, prohibiting conduct which is generally considered to be morally neutral and juristically uninteresting, but also rules governing the exercise of powers such as the making of wills and contracts. The question whether a holograph will signed by the testator alone should be admitted to probate, or whether there should be witnesses and, if so, how many, like the question whether a contract comes in to existence when the letter

18. I *Comm.* at 42-43.

19. Hart, *Blackstone's Use of the Law of Nature*, SOUTH AFRICAN L. REV. 169 (1957).

of acceptance is posted by the offeree or when it is received by the offeror, are certainly amenable to legal discussion, but it strains language to call them "moral questions." Only someone who, like Bentham, has one single yardstick for measuring the merits of all moral and legal rules would wish to do so.

A timely warning.

Part I of *A Course of Lectures on English Law* deals with many of the subjects covered by the first book of the *Commentaries*. Lecture 1 of this part, on the origins of parliament, contains a passage attributed by McAdam to Johnson and I make no apology for quoting it at length to an audience which is largely composed of legal historians:

It may not be improper in this place to caution young enquirers into the origin of our government against too great confidence in systematical writers or modern historians of whom it may justly be suspected that they often deceive themselves and their readers when they attempt to explain by reason that which happened by chance, when they search for profound policy and subtle refinement in temporary expedients, capricious propositions, and stipulations offered with violence and admitted by compulsion and therefore broken and disregarded when that violence ceased by which they were enforced. Our political historians too often forget the state of the age they are endeavouring to describe, an age of tyranny, darkness and violence, in which perhaps few of the barons to whom the contrivance of this wonderful system of government is ascribed were able to sign their names to their own treaties, and in which therefore there could be little foresight of the future because there was little knowledge of the past. When they thought themselves oppressed by the regal power, they endeavoured to set themselves free as a horse unbroken shakes off his rider; but when they had obtained a present relief, they went back to their castles and their tenants and contrived little for themselves and nothing for their posterity.

In the mouth of a teacher whose predecessor had asserted that England was provided with a centralised system of justice by King Alfred and that its navy was founded by King Edgar, these were

timely words.²⁰

The sovereignty of parliament.

The second lecture in part II is concerned with the constitution of parliament. It contains what, from the jurisprudential point of view, is one of the most interesting discussions in Chambers' course and one in which he probes deeper than Blackstone. The subject is the sovereignty of parliament, the point at issue being the extent, if any, to which it can be said to be limited. While mildly disapproving of the use of the word "omnipotent" in this context, Blackstone had expressed himself in the same unequivocal terms as Coke. He spoke of parliament as "the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the Constitution of these kingdoms."²¹ He attributed to it "sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, revising and expounding the laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal."²² He alludes to the opinions of Locke and "other theoretical writers" that the people might remove or alter parliament's legislative powers if there were a breach of trust, but says that they cannot be adopted in practice because their implementation would mean the dissolution of the whole government, the annihilation of sovereign powers, and the repeal of all laws with the result that the people would be compelled to build afresh on new foundations.²³ Blackstone concludes that, so long as the English constitution lasts, "we may venture to affirm that the power of Parliament is absolute and without control."²⁴

Chambers' views are substantially similar, but he adds some interesting observations on the moral restrictions on the exercise of parliamentary power. Coke's words about absolute parliamentary sovereignty are quoted and accepted with the reservation that a valid exercise of the supreme juridical power might require conduct

20. IV *Comm.* at 404-05.

21. I *Comm.* at 160.

22. *Id.*

23. *Id.* at 161-62.

24. *Id.* at 163.

contrary to the law of God and to that extent not be binding.²⁵ The representative position of members of the House of Commons is then called in aid in support of the doctrine that a parliament cannot fetter the legislative power of its successors or preclude their election:

if it be asked how the inability to limit future Parliaments, or to preclude the summons of Parliaments hereafter, is consistent with that universal power which Parliament has already been supposed to possess: it may be briefly answered that no power can effect contradictions. . . . That a Parliament chosen by the people should destroy the people's power of choosing Parliaments is morally speaking a contradiction.

He had already cited the action of the first parliament of Henry IV in support of the view that attempts to prohibit the repeal of statutes are ineffective, and he had used strong language in relation to the conduct of the members of the House of Commons who had participated in the passage of the statute of 1537 empowering Henry VIII to legislate by proclamation. They were said to have been guilty of a "perfidious and dastardly surrender of their trust, contrary to the principles of the English government, and to the faith implicitly given to their constituents." Like Blackstone, Chambers does not analyse the concept of sovereignty, but the above words anticipate those used by John Austin sixty years later with regard to the application of that concept in England: "[S]peaking accurately, the members of the commons' house are merely trustees for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the King and the peers, with the electoral body of the Commons."²⁶ Whatever its theoretical merits, in relation to the unreformed English electoral system this view was as unrealistic as that also propounded by Austin according to which the sovereign body in the United States is both houses of Congress acting in conjunction with three-fourths of the states of the Union because it is by their action

25. Cf. text accompanying note 17 *supra*.

26. PROVINCE OF JURISPRUDENCE DETERMINED 230-31 (Hart ed. 1954).

that the Constitution can be amended.

Taxation without representation.

More realistic language is used in lecture 15 of part I when the vexed question of the taxation of the colonies comes to be considered:

[I]t has been objected that our colonies cannot legally be taxed because every subject of this Kingdom is taxed by the consent of his representative. That the British Empire in general is represented by the British Parliament, the law uniformly supposes, but if we attempt to subdivide this representation and consider what proportion the representing powers bear to the numbers represented, we shall find nothing but deficiency, vacuity and confusion, small villages with two representatives, the greatest city in the world with only four and many large and opulent towns to which having risen, since the original regulation, no representatives have ever been granted. . . . Surely it cannot be charged as injustice that we do not for our colonies what we do not for ourselves, that we content ourselves with the ancient mode of election, notwithstanding the changes that have been made amongst us by commerce and by time. If we are content that the owners of land should tax those whose possessions are in money; if we do not permit our trading companies to delegate to the great council any particular guardians of their interests; if we allow equal authority to the voice of him who represents half the inhabitants of a village almost uninhabited, as to him who is deputed by a fourth part of the inhabitants of London, it may surely be allowed us to include our colonies in this extensive legislation, and commit them to the care of the Parliament on the same terms as we commit ourselves.

These words were probably written and spoken in 1767.²⁷ Having regard to the similarity of the argumentation with that contained in *Taxation no Tyranny* by Samuel Johnson, published in 1774, it is hardly surprising that McAdam attributes them to him.

A curious and perplexing statement.

Part I concludes with what McAdam justly describes as a "curious and perplexing statement:"

27. The introduction and the whole of part I were probably delivered in that year.

Having now, Gentlemen, finished account of publick law, I shall proceed to the law criminal, which will give my auditors better entertainment as for want of time and leasure [sic], I have been obliged to borrow some unpublished lectures from my learned predecessor.

McAdam relates these words to the part of the course which had just been concluded. He thinks that the borrowed material might have been used in the lectures which did not contain Johnsonian passages. He also speaks of the ineptitude of the unintentional reference to Blackstone, and attributes it to Chambers' timidity.²⁸

I must admit that I am disposed to read it as a coy reference to auditorial pleasures to come when the second part of the course was read. I would like to have been able to add with confidence that the unpublished lectures in question were some of those in Blackstone's course which were to be included in book IV of the *Commentaries* published in 1769, but I am unable to identify them. There are occasional similarities in the structure of parts of book IV with that of some of the lectures in part II of Chambers' course, but nothing more than that. I therefore find the passage as perplexing as McAdam did and can only hazard the guess that, whereas Chambers assiduously refrained from relying on his recollection of, or notes on, Blackstone's lectures when preparing part I of his course, he had no such qualms with regard to part II. He must have known those lectures like the back of his hand because, after attending them as an undergraduate, he had to attend them throughout his tenure of his Vinerian scholarship.

Duress and necessity.

Part II, lecture 3 on criminal incapacity bears a striking resemblance to chapter 2 of book IV of the *Commentaries* in which all incapacitations are reduced to the single consideration of the "want or defect of will." There is, however, at least one significant difference. When dealing with duress *per minas* "when the will is oppressed by compulsion or terror," Chambers follows Hale in saying that it is only allowed as a defence in times of war and insurrection, the reference being to cases in which people were obliged to join rebel forces and withdrew at the earliest opportunity. Black-

28. E.L. McADAM, *supra* note 6, at 120.

stone says that duress "takes away . . . the guilt of many crimes and misdemeanours; at least before the human tribunals."²⁹ He then draws a distinction between positive crimes, "so created by the laws of society", which society may excuse, and natural offences, "so declared by the law of God, wherein human magistrates are only the executioners of divine punishment."³⁰ Then follows the famous passage from Hale:

And therefore tho a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person: this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.³¹

There is also a tantalising difference between the discussions of homicide by necessity in lecture 8 of Chambers' part II and chapter 14 of book IV of the *Commentaries*. The former speaks only of self-defence in the strict sense whereas the latter also refers to the situation in which one of two innocent people must inevitably perish. They are exemplified by the hypothetical case, handed down from antiquity by Bacon, in which two shipwrecked mariners get on the same plank but find that it is not strong enough to save them both. If one pushes the other off with the result that he is drowned, the homicide is said to be excusable "through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life."³²

I have spoken of these distinctions as significant and tantalising. No doubt the legal historian will think of them in this way if only because of the importance of being informed why Blackstone's successor departed from his exposition of obscure portions of the law, but they are surely more tantalising for Johnsonian scholars and all those interested in the great moralist's reflections. Assuming that the two men collaborated to the extent to which the scholars contend, there must have been a regrettable failure of communication at this point. Chambers can't have brought Johnson into the dis-

29. IV *Comm.* at 30.

30. *Id.*

31. 1 HALE'S PLEAS OF THE CROWN 51; see IV *Comm.* at 30.

32. IV *Comm.* at 186.

cussion of duress and necessity. If he had done so, it is difficult to believe that his lectures would not have been embellished by rhetorical pronouncements on some of the thorniest moral problems which the criminal law can conjure up.

The death penalty for offences against property.

Blackstone is justly famous for his reservations about the extent of the eighteenth century use of capital punishment and there is nothing to suggest that Chambers was any more of an enthusiast for the death penalty. But the tenth lecture in part II of his course contains what seems to me to be a dangerously incorrect justification of its application which is not to be found in Blackstone. The lecture begins with a good account of the arguments for and against the infliction of capital punishment in the case of offences against property. In many respects it is similar to the discussion of the punishment for larceny in chapter 17 of book IV of the *Commentaries*. The conclusion is that the death penalty in these cases is necessary for the preservation of society. Subsequent events have proved that this is not so, but there is no doubt that the conclusions of Blackstone and Chambers were in accord with the views of practically all the lawyers of their day. The time for a serious movement in favour of the wholesale reduction, if not the total abolition, of capital punishment had not quite arrived and this is not the place to speculate about the causes of its belatedness.

The justification to which I object simply amounts to the proposition that the death penalty may be inflicted in the case of all crimes which can be justifiably prevented by the taking of life. Lecture 10 comes after a lecture on offences against the person and it begins with the justification of capital punishment for the more serious of them:

Those Offences against the *Persons* of Men, which have been mentioned as Capital Crimes are generally agreed to be justly punished with Death; because it is certain that in a State of natural Independence Life or Limbs or Chastity may be preserved by the Death of an Assailant; and it is allowed that what may be defended by the Destruction of Life may by the Destruction of Life be subsequently punished.

A little later on the same argument is applied with even less plausibility to offences against property:

If Property be not effectually defended by the Laws it must be defended by the Possessor, and how could it be defended but by the Danger both of his own Life and that of the Invader? Law therefore at the worse only takes away that Life which without Law might have been justly lost. But Law moreover does that for which it was originally received; it confines the Danger of Violence to the Violator of Right, which without Law would be equally incurred by the Violator and Defender.

The criteria by which the law determines whether life may be taken in defence of person or property are necessarily different from those according to which capital punishment may be justified. Reasonableness is the yardstick in the first case, whereas considerations of general deterrence and retribution apply in the second. What an individual may be entitled to do when confronted with a robber is one thing; what the state is entitled to do to the robber when he has been convicted weeks or months later is another. Johnson was making this very point in 1778 when he said that he would rather shoot someone who was trying to rob him than afterwards swear against him at the Old Bailey to take away his life.³³ This could be why the passages I have quoted are not attributed to him by McAdam although they contain powerful rhetoric which some may think has a Johnsonian ring.

The shortcomings of part III.

Of the twenty-two lectures in part III of Chambers' course twelve (3-14) are on real property, four (15-18) on personal property, and four (19-22) on equity. Lectures one and two are respectively entitled "Of personal rights and the injuries affecting them" and "Of economical relations and private civil relations." Topics covered by the latter are husband and wife, parent and child, and master and servant. Lecture 1 contains a brief account of the principal torts of the eighteenth century apart from nuisance which is dealt with in lecture 13 on injuries affecting real property, and a small part of the account of personal property is devoted to contract. Assuming that anything like complete coverage of the principal branches of the laws of England was its aim, *A Course of Lectures on English*

33. III J. BOSWELL, *LIFE OF JOHNSON* 239-40 (G.B. Hill ed.) (revised and enlarged by L.F. Powell, 1934).

Law leaves a lot to be desired as compared with the *Commentaries*. The most striking omission is that of any account of procedural matters apart from the brief reference to actions for the recovery of land in lecture 14 and some details about *habeas corpus* in lecture 1.

Common recoveries.

The lectures on real property are substantially reproduced in *A Treatise on Estates and Tenures* mentioned at the beginning of this lecture. For one as ignorant of the subject as I am this could have been a golden excuse for saying no more about it. I might even have belied my respect for this recondite branch of the law by endorsing the view expressed by Chambers as he passed on to personal property in lecture 15 that real property is "a subject of which the dullness and obscurity can only be compensated by its importance." However I want to say a few words about the contrast between the reason given in his lectures for the lawyers' invention of the common recovery and that to be found in the *Commentaries*. I suspect that this may be a case in which my contention that Chambers was more of a historian than Blackstone is borne out by what he does not say.

The intention of the statute *De Donis Conditionalibus* of 1285 was to ensure that the wishes of the grantor of an estate tail were carried out. The limitation was not to be construed as one creating a fee simple conditional on there being an heir of the prescribed class, and the entail was to be unbarrable. Why did the lawyers of the reign of Edward IV invent the common recovery, a wholly fictitious procedure, to enable the tenant-in-tail in possession to bar the entail? Why did the judges aid and abet the lawyers? The answer given to both questions in a passage attributed by McAdam to Johnson can be summarized in six words: "the promotion of freedom of alienation." The passage occurs in lecture 12 of part III of Chambers' course. The first part deals with what may be described as the commercial undesirability of entails and it is especially appropriate to the second question. The second half of the passage raises what may be called the individualist objection to restrictions on alienation, and it is especially appropriate to the first question:

What were the evils of entails which required and justified a remedy at once so laborious and so fraudulent, we perhaps do

not at this distance sufficiently discern. It is, however, apparent that if all land be devolved by entails through a settled and necessary succession, no land can be sold, and none therefore can be bought; no new families therefore can be raised, the future proprietors of the country can only be the heirs of the present. The great motive to adventure and industry would be taken away, few would have the hopes of growing rich, and those whom skill in trade or any other ability had enabled to accumulate money would be tempted to remove their wealth to some other country where they might obtain possessions permanent and secure.

Doubts are expressed whether this was the reason that first incited the artifice of recoveries because England had little trade at the time and those without lands were seldom able to purchase them with money, but it is by no means improbable that the commercial objection to entails influenced the judicial attitude towards the common recovery. It is said to be more probable that: "[M]en grew weary of having estates which they (in effect) held only for life, and which being determined by a certain course of succession, gave them no power to raise hope or fear, or enabled them to reward kindness or to punish neglect."

What is conspicuous by its absence is anything in the nature of the following Blackstonian lament concerning the effects of *De Donis*:

Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then, under colour of long leases, the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the land they had fairly bought; of suits in consequence of which our ancient books are full: and treasons were encouraged; as estates tail were not liable to forfeiture for longer than the tenant's life.³⁴

Some of this may have been true, but I find it hard to believe that all of it was.

34. II *Comm.* at 116.

Equity.

At the beginning of this lecture I expressed the opinion that Chambers was less of a jurist than Blackstone. I think that this is borne out by their respective treatments of equity, but, in fairness to Chambers, it must be said that the inadequacies of Blackstone on the subject were constantly stressed by my predecessor in the Vinerian chair. Moreover, the four concluding lectures of *A Course of Lectures on English Law* are fuller than chapter 27 of book III of the *Commentaries*, the account of cases in which legal evidence or legal trial would be insufficient being of especial interest. This is not the place for a full discussion of what one means by a "Jurist", but it can at least be said that he is someone who is interested in criticism as well as exposition of the law and, if his subject happens to be a contemporary one, current judicial developments are very much his concern. It is here that Chambers was lacking. Like Blackstone he was lecturing at the time when Lord Mansfield was giving judgments which foreshadowed the fusion of law and equity, but he remained silent on the subject. By contrast the views on equity expressed in Blackstone's earlier lectures differ markedly from those contained in the *Commentaries* on account of Lord Mansfield's pronouncements. It is beside the point that his decisions were not followed. It is a venial juristic sin, if sin at all, to approve of cases which are later overruled. The complete failure to mention them, or the views for which they stand, is an altogether different matter.³⁵

Legal education.

Chambers ends where the *Commentaries* begin, with some remarks about the study of the law. His advice is primarily addressed to those proposing to enter the legal profession. Having learnt the general scheme and original principles of the law from his lectures (or "some better means of information"), they are urged to procure books of the highest authority such as Coke upon Littleton, and, for the criminal law, the works of Hale and Hawkins. These were to be carefully read before any attention was paid to the reports of cases, curious advice to modern ears, but perhaps

35. For the differences between Blackstone's lectures and the *Commentaries* on equity, see 12 HOLDSWORTH, HISTORY OF ENGLISH LAW 583 *et seq.*

not unreasonable when the nature of the proposed textbooks is borne in mind. Attendance in court is strongly recommended.

When the series of a legal process is known and the common language of the law is completely understood, it would not be improper to take notes, though this is a labour which may be deferred for some time with very little loss, for he that takes notes while everything is equally new must necessarily write without selection and will accumulate with great labour what he will afterwards throw contemptuously away.

All this is rigorously practical advice, but, before Blackstone is praised for mixing the academic with the practical approach, it is necessary to remember that his discussion of legal study is in his inaugural lecture and not at the tail end of a concluding lecture on equity.

For present purposes it is only necessary to stress two points, Blackstone's insistence on the merits of the law school as an instrument of law reform and his repudiation of the idea that practical instruction is all that is required by the aspiring practitioner. His own words, to which too little attention has been paid in general assessments of his merits as a jurist, make each point with crystal clarity:

The advantages that might result to the science of the law itself, when a little more attended to in these seats of knowledge, perhaps would be very considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads, for improving its methods, retrenching its superfluities, and reconciling the little contrarieties which the practice of many centuries will necessarily create in any human system; a task, which those who are deeply employed in business and the more active scenes of the profession, can hardly condescend to engage in.³⁶

If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him; *ita lex scripta est* is the utmost his knowledge will arrive at, he must never aspire to form, and sel-

36. I *Comm.* at 30.

dom expect to comprehend any arguments drawn *a priori*, from the spirit of the laws, and the natural foundations of justice.³⁷

It follows that I do not share the suspicion entertained by McAdam that Blackstone was in danger of forgetting that the stated purpose of his course was to give a general knowledge of law and its proper place in a liberal education of gentlemen, and not primarily to train lawyers for their profession.³⁸ The suspicion was aroused by "the detail with which he enters into procedure, as well as his appendices of sample legal documents," and a contrast was being drawn with the total absence of such things in the works of Chambers. I suggest that the contrast is far from favourable to the latter. Some inculcation of elementary procedure is essential at an early stage in legal education and the *Commentaries* would have been the poorer if the chapters on trials were omitted from books III and IV. No one nowadays would think of giving the most rudimentary instruction in conveyancing without providing specimens of the relevant forms, but it is unnecessary to labour Blackstone's merits as a teacher for they are proved to the hilt by the clarity, coherence and elegance of his writings. In the words of one of his most distinguished successors, "He produced the one treatise on the laws of England which must for all time remain a part of English literature."³⁹ I very much doubt whether the publication of Chambers' lectures, notwithstanding what may be a number of Johnsonian contributions, will be thought to affect the accuracy of the above statement, but this does not necessarily mean that he failed "to erect such a fabric of juridical knowledge as may stand firm by its solidity."

It is fitting that this lecture should conclude with some remarks about legal education for we are here to celebrate the inauguration of university instruction in the common law in the United States. My choice of subject may not have been wholly inept for the occasion, but at most it was only second best. A lecture on Wythe and Tucker would have been much better, but only an American could have produced it. Perhaps there will be an American Vinerian pro-

37. *Id.* at 32.

38. E.L. McADAM, *supra* note 6, at 80.

39. A.V. Dicey, 6 CAMBRIDGE L.J. 295. Dicey was the seventh Vinerian Professor from 1882 to 1909. The remark was made in the course of his valedictory lecture.

fessor of the calibre of the present Oxford professor of jurisprudence when this law school celebrates its tricentenary.** In the meantime I must thank Dean Spong and his colleagues for having conferred on me the highest honour in the way of a lecturing invitation that could be conferred on any Vinerian professor.

** [Ed. note—the present professor of jurisprudence is Ronald Dworkin, an American and a scholar of exceptional ability.]