



Department of Justice

ADDRESS

OF

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Among the things Australia and the United States have in common is a certain ambivalence concerning the legal traditions and institutions of Great Britain. Although we have both been greatly influenced by the Common Law, and although Australia has a parliamentary government, we are, unlike Britain, federations of states formed under written constitutions. These few facts about legal traditions and constitutional structure are closely related to attitudes concerning individual rights, which is what I want to speak about briefly.

Because Sir William Blackstone was a major voice of expression for the Common Law in the New World, he had an enormous influence on those who founded the American Republic, both before and after the Revolution. When the American Bar Association presented a statue of Blackstone to the British Bar in 1924, former Attorney General George Wickersham expressed that debt as follows:

". . . Blackstone and his great Commentaries, which supplied the revolutionary forces in America with convincing arguments in support of their determination to sever the political bonds which united them to the mother country, also furnished the new nation with a system of law and a conception of government, which constitutes the most lasting bonds of union between our two countries."

It was not just a set of legal principles and procedures

which crossed the Atlantic, but more important, a set of premises about what that legal system was intended to accomplish. While digesting Blackstone's outline of the law, the colonies had also absorbed, from a variety of sources, a philosophy of law and of individual rights espoused by Blackstone. It is this philosophy which is evident both in the Declaration of Independence which rejected Britain and in the American Constitution which is so indebted to Britain.

The important terms in Blackstone's vocabulary were those that had already become familiar via John Locke and others: nature, reason, rights, social contracts. Nature itself, for example, carried with it certain fundamental values and rights which were evident even in primitive societies and which human reason could unravel. Governments did not grant those rights, but rather were formed to protect them. Consequently, in order to challenge a legal decision in any society it was always sufficient to be able to show that it was contrary to natural reason. Overarching this scheme for Blackstone was one additional notion, simple but powerful: it was a belief in Providence, which ensured that the progress of human societies would properly complete the picture that nature and reason had outlined. The Common Law, being a concrete model of this general outline, was therefore based on natural law, augmented by human reason, the traditions of England, and the providential helping hand.

Blackstone's belief in fundamental individual rights was a strong one, particularly with respect to the three cardinal rights of life, liberty, and property. Of the first, he had written that "life is the immediate gift of God, a right inherent by nature in every individual." The right of liberty, which included the right of free movement as well as such other privileges as the writ of habeas corpus, also enjoyed a prominent place in the Commentaries. But overshadowing them all was the right of property, which has been called by Librarian of Congress Daniel Boorstin the "high altar of Blackstone's legal theology." Whereas even life and liberty could be forfeited by due course of law for the good of society, no such violation could be contemplated for property. For Blackstone, the right of property was an inalienable right, before which even the greater good of society had to recede.

The interesting thing is that although this fundamental right of property is without doubt the cornerstone of the Common Law tradition in Britain, the emphasis on individual rights residing in nature did not have its greatest influence in Blackstone's own country. Britain has remained a country committed to the supremacy of Parliament, which of course is the instrument of the collective majority. It was rather across the Atlantic Ocean that a government was constructed on principles which also underlay Blackstone's so-called "legal theology."

Consider the phrases that became the legal basis of the American Revolution, from our Declaration of Independence: "the equal station which the laws of nature and of nature's god entitle them"; "we hold these truths to be self-evident"; "endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"; "to secure these rights, governments are instituted among men"; "with a firm reliance on the protection of divine providence", and so on. All the elements of Blackstone's philosophy are here.

But the United States Constitution is even more telling. The privilege of the writ of habeas corpus, the right of security in one's person and house, the right of due process when life, liberty, or property are to be deprived, the right of trial by jury, the prohibition against cruel and unusual punishment all echo Blackstone's systematization. In its content, the Constitution was certainly no duplicate of Blackstone; other rights such as the freedom of the press were given much greater emphasis in America and property rights were not as pre-eminent. But the belief in dominant individual rights which the colonists shared with Blackstone gave their new government a distinct character. By incorporating the Bill of Rights and other guarantees into the supreme law of the land, the new American Republic made clear its commitment to limit the power of the majority, and the government, by

the natural rights of the individual. In a similar but less pronounced way, the Australian Constitution was designed to both create and set limits on a new federal government as well.

The departure from the British model symbolized by our written constitutions has accounted for the greater power of the judiciary. In the United States, it is the check on Congress, that is the majority, provided by judicial review of the legislature's acts which has not only protected the rights of individuals but also expanded and refined them over the years. And I believe it is no accident that the power of the courts to assess the constitutionality of legislation, a power foreign to Britain, has been a feature of the Australian system as well. In the case of the United States at least, it is clear that while our legal roots clearly lie in Britain, the system we have chosen reflects a supremacy of individual rights which has made our legal development very different.

I hasten to add, however, the observation of Mark Twain that history does not repeat itself - it rhymes. It is surely the case that with respect to the most basic rights of individuals, Great Britain, the United States and Australia have not only rhymed, but have been in rhythm as well. While the foundations we have built for ourselves may differ from one another in form, there is much which continues to bind us together, and which we

trust will continue to make us an allied force for law and justice in the world.