

Did Blackstone get the Gallic Shrug?

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BEFORE HE DIED Blackstone saw his *Commentaries* appear in two separate French translations. Yet notwithstanding his enormous success in England and in America, how was he received in France? Did he get the Gallic shrug, or has he had a larger impact than we might reasonably expect of any writer on the common law? What follows is an exploratory mission, seeking traces of any significant influence William Blackstone may have had in France since the publication of the *Commentaries*, especially after they became available in French.

I BEFORE THE REVOLUTION

French eighteenth-century thought was overwhelmingly dominated by French writers, notably Voltaire, Rousseau and Montesquieu. How could a primarily descriptive work on the English legal system compete with the conceptual passion of the French debates of the day? Moreover, France and England for much of the century were at war; their enmity only deepened with the Revolution, and Napoleon. To make things worse, in 1778 Jeremy Bentham was actively mailing off copies of his own anti-Blackstone *Fragment on Government* to key French writers, such as d'Alembert, his collaborator on the *Encyclopédie* André Morellet, and François Jean de Chastellux.¹ Yet of these three, only Chastellux seemed in agreement with the ambitious young Bentham. D'Alembert replied politely and Abbé Morellet not at all.² Morellet may well already have had his own copy of

¹ Bentham, *Correspondence* vol 2, pp 115–16, 118–19, 149–50.

² Letter to Chastellux, 4 August 1778: *ibid* 143.

Blackstone's *Commentaries*, the quarto edition of 1774 sent over to him by Lord Shelburne, and preferred to form his opinions without young Bentham's aid.³

Indexes to the standard collected works of Voltaire, Rousseau, Diderot and d'Alembert reveal an almost conspicuous absence of Blackstone's name. Nevertheless, Edouard Tillet did find a passing reference to Blackstone in Voltaire's *Prix de la justice et de l'humanité*, published in 1777; here Voltaire briefly acknowledged in Blackstone the merit of 'having made known the best and the worst of English criminal law'.⁴ Elsewhere the Swiss jurist Jean-Louis de Lolme (1741–1806), an English resident since 1768, invoked Blackstone on several occasions to support his favourable views of the common law in *The Constitution of England*, published first in French in 1771, then in English from 1775.⁵

Blackstone was certainly not without supporters in pre-revolutionary France. Auguste-Pierre Damiens de Gomicourt (1723–1790) published in London a French language review from 1769 to 1772 entitled *L'Observateur français à Londres*, which included occasional extracts from the *Commentaries*.⁶ Gomicourt's extracts 'spurred demand for the whole work' ('firent désirer l'ouvrage entier'). He accordingly undertook a complete translation of the fourth edition, published in Brussels over the course of the years 1774–76 in six quarto volumes.⁷ Also in that last momentous year, Gabriel François Coyer published a translation of the fourth volume of Blackstone's *Commentaries*, 'Of Public Wrongs' or criminal law. In his preface, Coyer claimed that 'if ever there was a time ripe for reform of France's criminal law, it was now, yet for that to happen, to form public opinion, his book would have to be read by many'.⁸

Catherine the Great read Gomicourt's translation with great enthusiasm. Anthony Cross cites her praise in a letter written in August 1776 to her friend and confidant Baron von Grimm: 'his commentaries and I are inseparable; he is an endless source of topics and ideas'.⁹ But Abbé Coyer,

³ *Lettres de l'Abbé Morellet à Lord Shelburne* (Paris, 1898) 45–6. Morellet asked Lord Shelburne to send him the *Commentaries* in a letter dated 20 October 1774; it is not known if he received them, and there is no further mention of the work in their correspondence.

⁴ Voltaire, *Prix de la justice et de l'humanité* (Geneva, 1778), cited E Tillet, *La constitution anglaise, un modèle politique et institutionnel dans la France des lumières* (Aix-en-Provence, 2001) 446.

⁵ Reprinted in 1821 in London by Wilks and Co.

⁶ A-A Barbier, *Examen critique et complément des dictionnaires historiques les plus répandus* (Paris, 1820) vol 1, p 235.

⁷ Cf CS Eller, *The William Blackstone Collection in the Yale Law Library: A Bibliographical Catalogue* (New Haven CT, 1938). 72–3.

⁸ G-F Coyer, *Commentaire sur le code criminel d'Angleterre* (Paris, 1776) ix: 'Pour former l'opinion public, il faut qu'un ouvrage soit beaucoup lu'.

⁹ Anthony Cross, *Catherine the Great and the British* (Nottingham, 2001) 79. Cited in the original French: 'ses commentaires et moi, nous sommes inséparables; c'est un fournisseur de choses et d'idées inépuisables'.

who really had hoped to stir up some reform of French criminal law, was very disappointed. In 1779, three years after the publication of his selection of Blackstone, he lamented its failure to achieve that end :

This simple man genuinely believed that the public would welcome the work with open arms; that without being asked lobbyists would take it in hand; that the legal profession, the judges in particular, would consider it and incorporate it into their criminal law, which is a blot on this nation . . . He flattered himself perhaps (as all authors do) with a revolution. Vain hope; he doubts even having been read; and his bookseller has sworn that he will no longer stock any book urging reform of law or morals.

(Cet homme simple croyait bonnement que le public allait accueillir l'ouvrage; que les Prôneurs et les Prôneuses, sans en être priés, le prendraient sous leur protection; que les gens de Loi, que les premiers magistrats, principalement, le méditeraient, le comporterait avec leur code criminel, qui calomnie d'une nation douce ... Il se flattait peut-être (comme tous les auteurs se flattent) d'une révolution. Vaine espérance; il se doute s'il a été lu; et son libraire a juré qu'il ne se chargeraient plus d'aucun ouvrage, qui tendrait à la reformation des lois ou des mœurs.)¹⁰

Both Gomicourt and Coyer would be later criticised for their efforts. In 1820 Gomicourt's translation was said to be 'not highly regarded; one hopes for a more accurate and elegant version'.¹¹ In 1854 the author of Coyer's entry in the *Biographie universelle*, while allowing that some of his observations were correct, accused him of 'devoting himself too much to praising the English'.¹²

Blackstone himself was aware of the shortcomings of one of these translations, though we will never be quite certain which. In a letter written in French from Oxford on 25 May 1775, perhaps to the Parisian advocate Jean-Baptiste-Élie de Beaumont, perhaps to one of the translators, he expressed his thanks

for the details you provide about the translation of my work. I knew already that it was not faithful, truncated in more than one section, but there are protocols in every country to which it is necessary to conform. I am not complaining, therefore, about being subjected to the scissors. I won't conceal from you, however, that I am astonished you are not happy with it.

¹⁰ G-F Coyer, *Nouvelles observations sur l'Angleterre, par un voyageur* (Paris, 1779) 66–7.

¹¹ A-A Barbier, *Examen critique et complément des dictionnaires historiques le plus répandus* (Paris, 1820) vol 1, p 235: 'Cette traduction n'est pas estimée ; on en désire une plus exacte et plus élégante.'

¹² L-G Michaud (ed), *Biographie universelle* (Paris, 1854) vol 9, p 419: 'Quelques-unes de ces observations sont justes et bien présentées, mais cet auteur affecte trop de louer les Anglais.'

(Je vous remercie, Monsieur, des détails que vous me donnez au sujet de la traduction de mon ouvrage. Je savais déjà qu'elle était infidèle, tronquée en plus d'un endroit mais il y a des formes obligées dans tous les pays auxquelles il faut se conformer quand on veut y vivre. Je ne me plains donc pas des coups de ciseaux que j'ai reçus. Je ne vous dissimule pas néanmoins que je suis étonné que vous n'en soyez pas satisfait.)¹³

Blackstone almost certainly did not know perhaps the most appreciative of his readers in 1770s France. Honoré Gabriel Riqueti, comte de Mirabeau (1749–1791), had been several times incarcerated in the dungeons of the château of Vincennes by his autocratic father for running up debts, and became a critic of arbitrary imprisonment as a result. In 1776 Mirabeau published an *Essai sur le despotisme* condemning the practice, for which he was again locked up in Vincennes from 1777 to 1780. During this period he completed an exhaustive comparative study of various penal systems, in particular focusing on the relationship between crime and punishment.

Not having access to writing paper, Mirabeau tore out blank pages from the books he was allowed to borrow and read, wrote in tiny writing and sewed the resulting text into his clothing. These notes were only published during the 1830s, as part of his collected works. They always cite Blackstone in the original English, especially in volume 7, *Des lettres de cachet et des prisons d'état*, first published in 1835, which covered *habeas corpus*, jury selection, breach of the peace, civil liberties and feudal customs. Mirabeau's interest in Blackstone's jurisprudence was not motivated solely by his own plight; he was concerned for the French legal system overall, writing that 'The severity of laws, says Blackstone, is an almost certain symptom that the State is being attacked by some insidious disease, or at very least indicates the weakness of its constitution.' ('La sévérité des lois, dit Blackstone, est un symptôme presque certain que l'État est attaqué de quelque sourde maladie, ou tout au moins elle indique la faiblesse de sa constitution.')

¹⁴

Mirabeau's conclusion, written a decade before the Revolution, shows a concern for one of the most precious of the English legal system's concepts, lack of which in France allowed people to be thrown into prison without reason shown, or recourse:

The scholarly and judicious Blackstone argues that the use of trial by one's peers or by juries, and upholding the law of *habeas corpus*, is sufficient to guarantee for ever the liberty of a nationBut on Blackstone's own assumptions, British liberty is now seriously threatened or rather being damaged, since the English are

¹³ *Letters* 152.

¹⁴ Mirabeau, *Œuvres* (Paris, 1835), vol 7, p 407.

abandoning, bit by bit, trial by jury, and it is not obvious that they are sufficiently guaranteeing the security of *habeas corpus*, which is suspended at this moment that I am writing.¹⁵

(Le savant et judicieux Blackstone soutient que l'usage de l'examen par pairs ou par jurés, et le maintien de la loi d'habeas corpus, suffisent pour garantir à jamais la liberté d'une nation. ... Mais dans la supposition même de Blackstone, la liberté britannique est très menacée ou plutôt entamée; car les Anglais abandonnent, petit à petit, l'examen par jurés, et l'on ne voit pas qu'ils aient une sûreté suffisante du maintien de la loi d'habeas corpus, suspendue au moment où l'auteur écrivait.)

The contemporary relevance of Blackstone's and Mirabeau's concerns for such fundamental rights as *habeas corpus* cannot be overlooked in the post-2001 world. But Mirabeau's letters, although written in the late 1770s, would not see the light of day for over 50 years. In the meantime there was the Revolution.

II FRENCH REACTIONS DURING AND AFTER THE REVOLUTION

One reliable sign of French sympathies regarding English thinkers after the Revolution is the honorary French citizenship awarded to Jeremy Bentham on 23 August 1792. Bentham's star had risen in Europe during the previous decade. When he sent his *Essay on Political Tactics* to Abbé Morellet in February 1789—11 years after the Abbé had ignored his *Fragment on Government*—the reception was quite different. Morellet replied, without delay, full of praise:

Light-minded and unreflecting persons cannot estimate the importance of the subject you have treated in your 'Parliamentary Tactics'. It is an instrument by which great victory will be won by reason and by freedom, over ignorance and the tyranny of bad laws and vicious constitutions.¹⁶

The previous year Bentham's *Defence of Usury* had brought him to the attention of d'Alembert, whom he met while in France. Bentham would become a valued supporter of the new republic.

Blackstone, on the other hand, almost disappeared from sight. The literature on the principal constitutional theorist of the Revolution, Sièyes, shows no sign of Blackstone's name. True, Blackstone was mentioned at least three times in the early republican parliamentary debates on matters relating to jury trial and other aspects of criminal law reform. In April

¹⁵ *Ibid* 496; the final reference must be to the provisions of 17 Geo III c 9 (1777): see TE May, *Constitutional History of England since the Accession of George III 1760–1860* (London, 1865) vol 2, p 263.

¹⁶ Letter from Abbé Morellet, undated, in response to Bentham's of February 1789: *The Works of Jeremy Bentham* ed J Bowring (Edinburgh, 1838–43) vol 1, p 199.

1790 the lawyer François Tronchet elaborated a long argument on the subject of a jury's sphere of competence. He compared the positions taken by Sièyes and another French writer, Adrien Duport, to the English system.¹⁷ Duport was in favour of only asking juries to decide questions of fact, as in England, while Sièyes argued that they should be entrusted with matters both of fact and of law. Tronchet, however, believed that it was impossible to follow the English system because, unlike the French, it gave precedence to sworn oral testimony over written submissions:

In England the jury's verdict must always focus on what they call the issue of the cause, or in other words, the point upon which the issue is joined. An example will allow you to see both the truth and the peculiarity of English case law. I take this example from Blackstone, book III, chapter XXIII, 'of the jury'.¹⁸

(En Angleterre l'objet sur lequel doit porter le jugement du jury est toujours un point simple et unique, fixé par ce qu'on appelle l'issue de la cause, c'est-à-dire la question prise entre les parties. Un exemple va vous faire sentir tout à la fois cette vérité et la bizarrerie de la jurisprudence anglaise. Je prends cet exemple dans Blackstone, livre III, chap. XXIII, du jury.)

Tronchet later shifted to the question of jury selection, again turning to Blackstone, this time to defend the system's merits:

If, Blackstone says, the administration of justice were entirely entrusted to a body of men, all chosen by the prince, made up of people who possess the highest State offices, whatever one supposes about their integrity, their decisions will unconsciously almost always lean towards those who are closest to them in rank and status.¹⁹

(Si, dit Blackstone, l'administration de la justice était entièrement confiée à un corps d'hommes, tous choisis par le prince, composé de gens qui possèdent les plus grands offices de l'Etat, quelque intégrité qu'on leur suppose, leurs décisions pencheront presque toujours involontairement vers ceux qui les approchent en rang et en dignité.)

Next year, in July 1791, the Assembly's reporter recorded a speech by the Girondin leader Jacques-Pierre Brissot on the topical subject of whether a monarch could be put on trial by his subjects:

Brissot then passes to England, and says that this country's famous commentators, Locke, Sidney, Milton, Macaulay, Blackstone, Jones, have unanimously taught that the prince can be judged, deposed by the nation, and that his legal inviolability does not extend to crimes against the nation.²⁰

¹⁷ François-Denis Tronchet (1723–1806) a politician and lawyer, was among those appointed by Napoleon in 1804 to draft the *Code Civil*.

¹⁸ P.-J.-B. Buchez and P.-C. Roux, *Histoire parlementaire de la Révolution française, ou Journal des assemblées nationales depuis 1789 jusqu'en 1815* (Paris, 1838) vol 5, p 263.

¹⁹ *Ibid* vol 5, p 275

²⁰ Buchez and Roux, vol 11, p 9.

(Brissot passe ensuite à l'Angleterre et dit que tous les publicistes fameux de cette contrée, Locke, Sidney, Milton, Macaulay, Blackstone, Jones, ont unanimement enseigné que le prince peut être jugé, déposé par la nation, et que son inviolabilité cesse en matière de crime national.)

Brissot then moved on to cite examples of the tyranny that results where the king can do no wrong and is not required to obey the law.

Three more partial translations of Blackstone appeared over the next decade or so. In 1792 the lawyer (or 'homme de loi') Clement-François Blanc published *Du Jury en matière civile et criminelle traduit de Blackstone*, a work doubtless reflecting earlier interest in the topic but which seems to have attracted little notice in the deepening revolutionary crisis.²¹ Ten years later, under Napoleon, Antoine Ludot 'membre du Tribunat' brought out another volume on the administrative and criminal laws of England, translated (once again) from the fourth book of the *Commentaries*.²² Signs of a slightly broader interest in Blackstone's work came in 1803, when one M Joguet published a French translation of the precursor to the *Commentaries*, Blackstone's *Analysis of the Laws of England*.²³ But if the availability of Blackstone in translation indicates some mild continuing professional interest, nineteenth-century French attitudes generally seem to have ranged from indifference to outright hostility.

This seems to hold true across the political spectrum. Thus Maurice Rubichon, the conservative French Catholic 'Christian economist', whose observations as a royalist *émigré* formed the basis of the account of England's government and economy which he published between 1815 and 1819, attacked Blackstone in the following terms:

My reader must see already that it is rather interesting to travel in that country, holding in one's hands the writings of the likes of Montesquieu, Delolme or any number of other foreign writers, and to compare what they say to what there is. But the philosopher Blackstone has been translated into French; browsing through him one finds commentary on law and custom; often he deplors what I permit myself to admire, and he admires what I permit myself to deplore; perhaps, however, he would be better appreciated by my reader; Blackstone is anyway one of the most fallacious talents ever produced by fertile England.²⁴

²¹ C-F Blanc, *Du jury en matière civile et criminelle* (Paris, 1792). The anonymous *Recherches sur les cours et les procédures criminelles d'Angleterre: extraits des Commentaires de Blackstone* (Paris, 1790) appears to be the translation 'inferior to the other two' (ie de Gomicourt and Coyer) listed by Ludot in 1801 (n 22 below, vii–viii; Eller (n 7) 73).

²² AN Ludot, *Des lois de police et criminelles d'Angleterre; des divers modes d'y instruire les proces des prevenus; et specialement, de l'institution du jury en matiere criminelle; ouvrage tr de l'anglais de Blackstone, avec des notes* (Paris, 1801).

²³ AM Joguet, *Analyse de lois anglaises, précédé d'un discours préliminaire sur l'étude des lois, traduite de l'anglais de William Blackstone* (Paris, 1803).

²⁴ M Rubichon, *De l'Angleterre* (Paris, 1817) vol 2, p 4; A Dign, *French Political Thought from Montesquieu to Tocqueville* (Cambridge, 2008) 55–6.

(Mon lecteur doit voir déjà qu'il est curieux de voyager dans ce pays-là, tenant à la main les écrits des Montesquieu, des Delolme ou de tant d'autres romanciers étrangers, et de comparer ce qu'ils disent avec ce qui est. Mais le philosophe Blackstone a été traduit en français; en le parcourant, on y trouvera la loi et la coutume commentée; souvent il déplore ce que je me permets d'admirer, et il admire ce que je me permets de déplorer; peut-être n'en sera-t-il pas moins bien accueilli par mon lecteur; Blackstone est d'ailleurs un des esprits le plus faux qu'ait jamais produit la fertile Angleterre.)

Having satisfied his bloodlust, Rubichon then moves to another topic, making no further mention of Blackstone, whose vigorous defence of anti-catholic penal laws had embarrassed even the otherwise favourably disposed Coyer.

Despite a second full translation of the *Commentaries* by the Parisian lawyer Nicholas Maurice Chompré in the early 1820s, Blackstone retained only a marginal presence in France. He was occasionally criticised for undue complacency over the lack of any constitutional separation of powers in Britain. In 1850 the radical democrat Ledru Rollin (chief of the 'Red Republicans' according to his English translator) charged Blackstone, along with other British writers, of having ignored the manner in which the judiciary served as a tool of the aristocracy:

'The judges are the masters', cried Chancellor Bacon three centuries ago; for three centuries this dictum has vainly been repeated by the likes of Romilly, Bentham, Mackintosh, and Taylor. Even Blackstone, that great apologist of English law, cannot help but recognise that at every step these laws are blanketed in the deepest obscurity.²⁵

(‘Les Juges sont les maîtres’, s’écriait le chancelier Bacon, il y a trois siècles; et, depuis trois siècles, cette parole a été vainement répétée par les Romilly, les Bentham, les Mackintosh, les Taylor. Blackstone, ce grand apologiste des lois anglaises, ne peut s’empêcher de reconnaître, à chaque pas, qu’elles sont recouvertes de ténèbres épaisses.)

Considerably more moderate in his political views, the novelist Stendhal also vehemently denounced Blackstone's faith in the English system. Stendhal's sentiments were published posthumously in his *Mémoires d'un touriste* (1854). In an extraordinary outburst, he claimed that

The parliamentary reforms in England are entirely due to Blackstone's lies. There have never been three powers in England: when the famous Blackstone published the work in which he argues that there are three powers—the King, the Lower House and the Upper House – he was regarded as a reckless innovator. There has never been in England, up to the moment of the parliamentary reforms carried out these days, but one single power, the aristocracy, or the House of Lords,

²⁵ A-A Ledru-Rollin, *De la décadence de l'Angleterre* (Paris, 1850) I 78; L Rollin, *The Decline of England* (London, 1850) vii.

which nominated the House of Commons. The King and his ministers inevitably followed in the same direction as the two Houses. Blackstone's error was to claim that the people were represented by the House of Commons, and this has been repeated by Montesquieu and Delolme. Soon this lie was accepted everywhere as the truth.²⁶

(La réforme parlementaire en Angleterre est due entièrement aux mensonges de Blackstone. Il n'y eut jamais trois pouvoirs en Angleterre : lorsque le célèbre Blackstone publia l'ouvrage où il avance qu'il y a trois pouvoirs : le roi, la chambre basse et la chambre haute, il fut regardé comme un novateur téméraire. Il n'y a jamais eu un Angleterre, jusqu'au moment de la réforme parlementaire opérée de nos jours, qu'un seul pouvoir, l'aristocratie ou la chambre des pairs, laquelle nommait la chambre des communes. Le roi et ses ministres marchaient forcément dans le sens des deux chambres. L'erreur de Blackstone, qui prétendait que le peuple était représenté par la chambre des communes, fut répétée à l'étranger par Montesquieu et Delolme. Bientôt ce mensonge fut admis généralement comme une vérité.)

Stendhal concluded his rant with the suggestion that a humourless and dogmatic person might make a nice book out of the history of Blackstone's lie.²⁷

On 2 July 1853, the celebrated French liberal commentator Alexis de Tocqueville wrote to the English political economist NW Senior in terms revealing that he was far from overawed by the *Commentaries*:

I have followed your advice, my dear Senior, and I have read, or rather re-read, Blackstone. I studied him twenty years ago. Each time it has made upon me the same impression. Now, as then, I have ventured to consider him (if one may say so without blaspheming) an inferior writer, without liberality of mind or depth of judgment; in short, a commentator and a lawyer.²⁸

Tocqueville's reaction provides a clue to Blackstone's lukewarm reception in France. The French held a very narrow view of what constitutes a writer. Tocqueville sought to squeeze Blackstone into the French notion of a *jurisconsulte* or *publiciste*, rather than allowing for the fact that he came from a very different philosophical and intellectual tradition. The very title *Commentaries* sufficiently indicated the nature of Blackstone's aims. Tocqueville dismissed Blackstone as nothing more than a 'commentator'; yet, had he taken any notice of this title, he might have recognised that that was exactly what Blackstone aimed to be.

In contrast to the usual negative remarks of the time, we may notice one positive, if brief, treatment of Blackstone. In 1842 Léon Galibert and Clément Pellé mentioned Blackstone's famous comparison of the English

²⁶ Stendhal, *Mémoires d'un touriste* (Paris, 1854), 1150. Since Montesquieu died in 1755, he could hardly have repeated anything originating from Blackstone.

²⁷ *Ibid* 1151–2.

²⁸ A de Tocqueville, *Memoirs, Letter and Remains* (London, 1861) vol 2, p 223.

legal system to an old Gothic castle, adding a substantial footnote which demonstrates an awareness for the English point of view that Ledru-Rollin, Stendhal and Tocqueville seemingly lacked. They cite Lord Mansfield's response when asked about the best introductory work for young lawyers:

'till of late I could never, with any satisfaction to myself, answer that question; but since the publication of Mr Blackstone's *Commentaries*, I can never be at a loss. In that work you will find analytical reasoning displayed a pleasing and perspicuous style. The student will find in it with no trouble the first principles on which our excellent laws rest!'²⁹

('Ce n'est que dans ces derniers temps et depuis la publication des *Commentaires* de M. Blackstone, disait Lord Mansfield, que j'ai pu répondre à cette question. Dans cet ouvrage, vous trouverez un raisonnement analytique fait dans un style clair et agréable. L'élève y reconnaîtra sans peine les premiers principes sur lesquels reposent nos excellentes lois!')

Galibert and Pellé then mention Jeremy Bentham's heated attack ('beaucoup de chaleur') on the *Commentaries* and his concession that Blackstone was nevertheless the first jurist to write clearly about the English legal system.

In short, isolated mentions of Blackstone occur in a number of works published in France over the course of the nineteenth century. It is obvious that Blackstone was largely perceived as peripheral to the French legal and political system.

III A CHANGE IN THE TWENTIETH CENTURY

In 1907 we witness a startling challenge to French thought regarding William Blackstone, with the posthumous publication of a volume of essays by the Anglophile comparative lawyer, educationist and political writer Émile Boutmy (1835–1906).³⁰ Here Boutmy examined the origins of the Declaration of the Rights of Man (1789), with special attention to Article 2, which outlines the fundamental rights of liberty, property, security and resistance to oppression. He argued that, despite the accepted wisdom that the French were directly influenced by the Americans in drafting this clause, its wording is significantly different from the American constitutional guarantee of 'life, liberty and the pursuit of happiness'. The source must be elsewhere, and Boutmy cites Blackstone's elevation of precisely these rights to absolute:

²⁹ L Galibert and C Pellé, *Angleterre* (Paris, 1842–44) vol 4, pp 173–4, paraphrasing J Holliday, *The Life of William, late Earl of Mansfield* (London, 1797) 89–90.

³⁰ ODNB.

If Blackstone really used this language from 1754 on, if he repeats it in his celebrated *Commentaries* which appear in 1765, why would we not suppose as much that our Declaration, promulgated in 1789, no less than the American Bill of Rights, published between 1776 and 1786, directly borrowed its formula from the English jurist? Is there a logical necessity, a proof of fact, that France borrowed directly from the United States?³¹

(Si Blackstone a véritablement tenu ce langage dès 1754, s'il le répète dans ses célèbres *Commentaries* qui parurent en 1765, pourquoi ne supposerait-on pas qu'autant notre Déclaration, promulguée en 1789, que les Bills of rights américains, publiés de 1776 à 1786, ont emprunté directement sa formule au légiste anglais? Y a-t-il une nécessité logique, y a-t-il une preuve de fait, que la France ait fait directement cet emprunt aux États-Unis?)

Boutmy proceeds to challenge what he sees as the astounding assumption that France would choose to borrow from the Americans rather than the English:

If it is almost certain that Blackstone's maxims were known by the Anglo-Saxons of the new continent, what reason do we have to believe that the draftsmen of the French Constitution, having in front of them a highly authoritative text, already old, a text which had had the time to act on the minds of the eighteenth century and win them over to its ideas, had deliberately neglected it to go in search of a model beyond the Atlantic, from some colonies who then hardly figured in the world, and whose acts had had little impact? Blackstone no doubt had no need of an intermediary to inspire either people.³²

(S'il est à peu près certain que les maximes de Blackstone ont été connues des Anglo-Saxons du nouveau continent, quelle raison a-t-on de croire que nos constituants français, ayant tout près d'eux un texte d'une grande autorité, déjà ancien, un texte qui avait eu le temps d'agir sur les esprits du XVIII^e siècle et de les gagner à ses idées, l'aient de propos délibéré négligé, pour aller demander un modèle, au-delà de l'Atlantique, à des colonies qui faisaient alors bien peu de figure dans le monde, et dont les actes avaient peu de retentissement? Blackstone n'a sans doute pas eu besoin d'intermédiaire pour inspirer l'un et l'autre peuple.)

This is quite a jump from the peremptory passing mentions of Blackstone in the preceding one hundred and twenty years or so. Boutmy does not mention Blackstone again in this essay, and he died just before his book was published. Has his work been followed up by more detailed studies of the French Constitution and Blackstone's *Commentaries*? It appears that his hypothesis may have been left aside and taken no further.

Twenty years later, another startling assertion was published by Henri-Lévy Ullmann, in his study of the *English Legal Tradition*, translated into

³¹ É Boutmy, *Études politiques* (Paris, 1907) 145.

³² *Ibid* 145–6.

English in 1935.³³ Blackstone is mentioned in discussion of various topics during the course of this volume, but at one point Lévy-Ullmann follows Holdsworth in stressing Blackstone's proven authority over the fullness of time, notwithstanding Bentham's damaging assaults:

‘the Blackstonian synthesis, far from suffering from the [triumph of Benthamism], found in the test a proof of its good quality. Like Littleton's work, which we have seen, came out on the eve of the expansion of Equity, Blackstone's *Commentaries* had to encounter the itch for legislation which marked the 19th century in England—an encounter favourable in every respect both to the new legislation and to the Common law. The sound framework provided for the latter enabled it to receive, without breaking, the rush of new law, and, at the same time, helped jurists to get their bearings and open up a way through ‘the labyrinth of statutes which have changed the face of English law’. To these highly suggestive views of Sir William Holdsworth, may a Continental jurist add, on the basis of French experience, that Blackstone's books may have served in the defence of unwritten law as the impassable trenches which shattered all Bentham's assaults in the cause of codification? *Who will venture to assert that our ancient Common Lawyers, authors of the Civil Code, such as Tronchet, would not have deemed their task devoid of purpose had their guide and master, Pothier—the French Blackstone—endowed our country with a full Commentary on the ‘Loix’ of ancient France?*’ (emphasis added)³⁴

Thus Lévy-Ullmann dared to suggest that the French *Code Civil* had only been necessary because no French author—by implication Montesquieu as well as Pothier—had managed to emulate Blackstone's achievement.

The year before he first published these views, Lévy-Ullmann supervised the appearance of the first extended study of Blackstone by a French scholar, Dunoyer's *Blackstone et Pothier*; familiarity with that work is likely to have inspired his speculation. Yet Dunoyer's conclusion was, curiously, quite different from Lévy-Ullmann's, arguing that Pothier's success was greater in France than Blackstone's in England, for the very reason that he prompted the *Code civil*. But Dunoyer's work is rather negative overall, concluding that neither of the two authors he studied had any enduring relevance:

Whatever the legal system of each country, there comes a time when the legal scholars lose their influence on the destiny of their national law. In England, where the law has not been codified, Blackstone's works, on the surface, still inspire a few modern works, although in reality one no longer finds a trace of Blackstone in them. In France, the *Code civil* has borrowed the substance of

³³ H Lévy-Ullmann, *The English Legal Tradition*, tr M Mitchell (London, 1935); first publ as *Éléments d'introduction générale à l'étude des sciences juridiques, tome II, Le système juridique de l'Angleterre* (Paris, 1928).

³⁴ *Ibid* 157.

Pothier's arguments, but today, our *Code* lives its own existence, and the author on whom it was modelled has lost credibility.³⁵

(Quel que soit le système juridique du pays auquel ils appartiennent, il vient un moment où les juristes perdent toute influence sur les destinées de leur droit national. En Angleterre, où le droit n'a pas été codifié, les œuvres de Blackstone peuvent, en apparence, inspirer encore certains ouvrages modernes, en réalité, l'esprit de notre auteur en est éliminé. En France, le Code civil a emprunté la substance des traités de Pothier, mais aujourd'hui, notre Code vit d'une existence propre, et l'auteur qui fut son modèle a perdu tout crédit.)

These two speculative passages by Émile Boutmy and Henri Lévy-Ullmann nevertheless represent a transformation in French opinion on the impact of William Blackstone. They point to a petty nationalist jealousy among French writers since the Revolution, who tended to criticise Blackstone for incidental and trivial reasons—such as being an 'inferior writer'—missing the point of what Blackstone had set out to do. Sylvester Douglas came across this attitude when talking to Madame de Staël just after the battle of Waterloo: 'She was surprised when I mentioned to her that I thought Blackstone perhaps the best prose-writer in England of our days, and she begged Mr Schlegel to attend to this.'³⁶ Blackstone had not set out to compete with Montesquieu or Voltaire; he was concerned to make sense of hundreds of years of piecemeal case law in England, to synthesise it into a coherent intellectual construct. Lévy-Ullmann believed that if Blackstone had not published his *Commentaries*, English law would have been doomed 'after a majestic course, [to] vanish in a waste of sandbanks'³⁷—exactly what happened to pre-revolutionary French law.

IV IN GUISE OF A CONCLUSION

Two larger questions seem to beg the resolution of a more extensive survey of Blackstone's impact in France:

- 1 How well translated was Blackstone by Gomicourt, Coyer and Chompré and others? Were specific concepts and terms (eg 'writ') dealt with accurately? If not, what effect did this have on the French reception of Blackstone? (Of course, even if read in the original, French readers' comprehension of English customs and practices may have been insufficient for full understanding.)

³⁵ LH Dunoyer, *Blackstone et Pothier* (Paris, 1927) 159.

³⁶ *The Diaries of Sylvester Douglas*, ed F Bickley (London, 1928) vol 2, p 162.

³⁷ Lévy-Ullman (n 35) 158; see also F Lessay, 'Blackstone et les libertés anglaises : l'individu entre mythe et histoire' in GM Cazzaniga and YC Zarka (eds), *L'individu dans la pensée moderne* (Pisa, 1995) 577–94.

- 2 Did Blackstone indeed directly influence the making of the 1789 French Constitution? What do the records of its drafting show? Has anyone gone further than Boutmy?

Blackstone's role in the making of modern France remain largely unmapped. It looks likely that his influence was more considerable than generally accepted, and though the modern French legal system differs largely from the English one, at their constitutional core the difference may not be so great as it is customary to believe. It is also likely that Dunoyer's conclusions were unnecessarily gloomy, and perhaps even miss the point. Blackstone, like Pothier and the *Code civil*, might not now figure in the day-to-day workings of the common law. But if the *Commentaries* helped draft the original French bill of rights, then Blackstone was virtually responsible for their modern soul, regardless of whether his name is known now, then, or ever. Hence a thorough assessment of Blackstone's French reception and impact is undoubtedly well worth pursuing.