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English Ideas on Legal Education in Virginia

W.H. Bryson

In 1700 the only methods of legal education in England and Virginia were apprenticeship to a practising lawyer, either a barrister, a solicitor or a court clerk, and independent reading of law books; most persons seeking active membership in the legal profession did an apprenticeship supplemented by reading and observing the courts in action.¹ In 1700 the inns of court had long since ceased to provide legal instruction,² and the universities in England and Virginia had not yet begun to do so. The obvious importance of legal education was, however, not overlooked on either side of the Atlantic Ocean.

Books, which were designed to aid the law student, were published in England and read in Virginia. Edmund Plowden's *Queries* (1620?; 2nd edn, London, 1662) was owned by Richard Hickman, clerk of the council of Virginia, in 1732 and by Henry Churchill of Fauquier County in 1762.³ The subtitle to the second edition of this book is 'A Moot Book for Young Students'. Robert "King" Carter owned a copy of William Fulbeck, *Direction of, or Preparative to, the Study of the Law* (London, 1600, 2nd edn, London, 1620).⁴ Robert Carter was not a lawyer, but he was the land agent for the Fairfax proprietary of

¹ This essay is reprinted from *Essays on Legal Education in Nineteenth-Century Virginia* (Buffalo, 1998) with the kind permission of the William S. Hein & Co., Inc. The author would like to thank Professor Peter G. Stein and Dr John W. Cairns for their kind and very helpful comments on this essay as it was delivered at the conference in Cambridge.

² W.C. Richardson, *History of the Inns of Court* (Baton Rouge, Louisiana, 1975), pp. 167-210; W.S. Holdsworth, 'The Disappearance of the Educational System of the Inns of Court', *University of Pennsylvania Law Review*, 69 (1921), pp. 201-22.

³ W.H. Bryson, *Census of Law Books in Colonial Virginia* (Charlottesville, Virginia, 1978), p. 69.

⁴ L.B. Wright, 'The "Gentleman's Library" in Early Virginia: The Literary Interests of the First Carters', *Huntington Library Quarterly*, 1 (1937), p. 47; 'Carter Papers', *Virginia Magazine of History and Biography*, 6 (1899), p. 262.

the Northern Neck, a member of the house of burgesses from 1691 to 1699, and a member of the general court of Virginia from 1699 to 1732, the year of his death.⁵ Fulbeck advised the law student to keep a commonplace book and listed the various English law books in print, which were to be commonplace. John Doddridge, *Lawyer's Light: or A True Direction for the Study of the Law* (London, 1629), was owned by John Mercer.⁶ Mercer, who died in 1768, had a very successful law practice in Virginia and was the author of *An Exact Abridgment of All the Public Acts of Assembly of Virginia, in Force and Use* (Williamsburg, Virginia, 1737; 2nd edn, Glasgow, 1759). Doddridge gave only general advice as to the study of the law, and he provided a list of principles and maxims. William Phillips, *Studiū Legalis Ratio: or Directions for the Study of the Law*, went through four editions in the late seventeenth century, in 1662, 1667, 1669, and 1675. There were copies in the libraries of Arthur Spicer⁷ and William Byrd, II.⁸ Spicer, who died in 1699, was a practising lawyer, a justice of the peace, and a member of the house of burgesses from 1685 to 1696. Byrd, a barrister of the Middle Temple, never practised law, but he was a justice of the peace, a member of the house of burgesses from 1696 to 1697, and a member of the general court from 1709 to 1744.⁹ Phillips gave a list of English law books and then recommended a course of study. These books for students were thin in size and in content; one may very well speculate as to their lack of utility being a source of disappointment to their long distance purchasers.

These seventeenth century books for law students were, however, superseded in 1708 by William Bohun, *Institutio Legalis: or Introduction to the Study and Practice of the Laws of England*, of which there were four editions by 1732 and at least eight copies present in

⁵ *Dictionary of American Biography* (New York, 1929), ii, pp. 541–42.

⁶ C.M. Watkins, *The Cultural History of Marlborough, Virginia* (Washington, DC, 1968), p. 203.

⁷ L.G. Tyler, 'Libraries in Colonial Virginia', *William and Mary Quarterly*, 1st series, 3 (1894), p. 134; E.C. Delano, 'Arthur Spicer's Inventory', *Tyler's Quarterly Magazine*, 10 (1929), pp. 163–64.

⁸ J.S. Bassett, *The Writings of Colonel William Byrd* (New York, 1901), p. 418.

⁹ See generally P. Marambaud, *William Byrd of Westover, 1674–1744* (Charlottesville, Virginia, 1971); R.C. Beatty, *William Byrd of Westover* (Boston, 1932).

colonial Virginia.¹⁰ This work was soon, in 1720, overshadowed by the first edition of Thomas Wood, *An Institute of the Laws of England*. This popular book went through eleven editions in the eighteenth century; there were ten copies known to be present in Virginia before 1776.¹¹

In 1708 and again in 1727, Thomas Wood published a lengthy essay advocating the teaching of the English municipal law in the English universities.¹² Although no copies of this pamphlet are known to have been present in colonial Virginia, eighteenth-century Virginians were certainly not isolated from England and current English ideas; there was regular communication between the mother country and the colony. In 1745, an essay in the *Virginia Gazette* suggested that, as a means to improving the quality of the bench and bar of Virginia, 'our own university'¹³ might teach the law by a skilled professor'.¹⁴

The first teaching of English law in a university was William Blackstone's course of lectures at Oxford in 1753. Whether Blackstone should have the credit for the idea is unclear. In 1752, the preceding year, Charles Viner had made a will leaving money to Oxford University to establish a professorship of English law, and, independently, Sir William Murray (later Lord Mansfield) had urged Blackstone to offer lectures on English law, his application to teach Roman law there having been unsuccessful. However, Blackstone is due the credit for having put the idea into execution. In 1756, Viner died, and, two years later, Blackstone was elected the first Vinerian Professor of English Law.¹⁵ In the 1760s, English common law also began to be taught at Trinity College Dublin.¹⁶

¹⁰ Bryson, *Census of Law Books*, p. 35.

¹¹ *Ibid.*, p. 81.

¹² T. Wood, *Some Thoughts Concerning the Study of the Laws of England, Particularly in the Two Universities* (London, 1708, 2nd edn, London, 1727); reprinted in M.H. Hoeflich, ed., *The Gladsome Light of Jurisprudence* (Westport, Connecticut, 1988), pp. 34-52.

¹³ I.e. the College of William and Mary.

¹⁴ *Virginia Gazette*, 10 October 1745, p. 1.

¹⁵ H.G. Hanbury, *The Vinerian Chair and Legal Education* (Oxford, 1958), pp. 12-13,

15.

¹⁶ In 1761, a chair of feudal and English Law was established; the first professor was Francis S. Sullivan; the second was Patrick Palmer: R.B. McDowell and D.A. Webb, *Trinity College Dublin, 1592-1952* (Dublin, 1982), pp. 65-66; the chair was held from

Blackstone's lectures were an immediate success, and they were soon published under the title of *Commentaries on the Laws of England* (Oxford, 1765-69). An edition was published in Philadelphia in 1771; both the English and the American editions sold widely in Virginia.¹⁷

In 1773, Clementina Rind's *Virginia Gazette* published a substantial essay commenting on the projected addition to the fabric of the College of William and Mary. The author, an anonymous justice of the peace, eloquently advocated the establishment of a professorship of law at the College of William and Mary once the addition was finished.¹⁸ The inspiration for this essay must have been the successful lectures of Blackstone at Oxford. The 1745 essay in the *Virginia Gazette* would most likely have been forgotten by 1773, and contacts with Ireland at the time were slight compared to England. On the other hand, most if not all Virginia lawyers would have been familiar with Blackstone's *Commentaries*.

Six years after the 1773 essay, the suggestion was acted on, and lectures on the common law were begun at William and Mary. Considering the turbulence of those years in America, it is not likely that any earlier action could have been taken. In 1779 under the leadership of Thomas Jefferson, a member of the board of visitors, the curriculum of the college was substantially changed. One of the most significant changes was the establishment of the professorship of law and police. Jefferson's former legal mentor, George Wythe, was installed in this chair.¹⁹ Chancellor Wythe, as is evident from his published opinions,²⁰ was a true scholar of the law, and he looked to

continued

1776 to 1816 by Patrick Duigenan: J.V. Luce, *Trinity College Dublin* (Dublin, 1992), p. 58.

¹⁷ 'Subscribers in Virginia to Blackstone's *Commentaries*', *William and Mary Quarterly*, 2nd series, 1 (1921), pp. 183-85.

¹⁸ *Virginia Gazette* (Rind), 30 December 1773, p. 1. This article is printed as an appendix to this essay.

¹⁹ R.J. Honeywell, *The Educational Work of Thomas Jefferson* (New York, 1964), pp. 54-56; E. Dumbauld, *Thomas Jefferson and the Law* (Norman, Oklahoma, 1978), p. 7; J.E. Morpurgo, *Their Majesties' Royall Colledge, William and Mary* (Williamsburg, Virginia, 1976), pp. 189-98; P.D. Carrington, 'The Revolutionary Idea of University Legal Education', *William and Mary Law Review*, 31 (1990), pp. 533-41.

²⁰ G. Wythe, *Decisions of Cases in Virginia by the High Court of Chancery* (Richmond, Virginia, 1795; 2nd edn, Richmond, Virginia, 1852; 3rd edn, Charlottesville, 1903).

Blackstone's *Commentaries* as the foundation of his own lectures.²¹ The most famous person to hear Wythe's lectures was John Marshall, whose formal legal education consisted of attending them for three months in 1780.²²

In 1790 Wythe was succeeded as professor of law and police at the College of William and Mary by St George Tucker. Like Wythe, under whom he had read the law, Tucker based his own lectures on Blackstone's *Commentaries*. The close connection between Blackstone and Tucker is shown by Tucker's preparing for publication an American edition of the *Commentaries*.²³ Tucker's edition of Blackstone, which was published in 1803, contained numerous footnotes to Virginia and federal statutes that had changed the basic common law. Moreover, the first volume has such extensive additional appendices relating to Virginia and federal constitutional law that it had to be published in two books.²⁴

Tucker resigned his position on the faculty of William and Mary in 1804. For the next thirty years, the chair was held by undistinguished local judges, of whom very little is known. Then, in 1834, Tucker's younger son, Beverley Tucker, was appointed to the professorship of law. Beverley Tucker chose as his textbook his father's edition of Blackstone's *Commentaries*. However, as it was for

²¹ 'Extract from the Diary of Ezra Stiles', 8 June 1784, J.P. Boyd, ed., *Papers of Thomas Jefferson* (Princeton, New Jersey, 1953), vii, p. 303; J. Blackburn, *George Wythe of Williamsburg* (New York, 1975), pp. 104-5; R.B. Kirtland, *George Wythe: Lawyer, Revolutionary, Judge* (New York, 1986), p. 116; see generally A.T. Dill, *George Wythe: Teacher of Liberty* (Williamsburg, Virginia, 1979); E.L. Shepard, 'George Wythe', in W.H. Bryson, ed., *Legal Education in Virginia* (Charlottesville, 1982), pp. 749-55.

²² C.T. Cullen, 'New Light on John Marshall's Legal Education', *American Journal of Legal History*, 16 (1972), pp. 345-51; H.A. Johnson et al., eds, *Papers of John Marshall* (Chapel Hill, 1974), i, pp. 37-41.

²³ Tucker's edition of Blackstone's *Commentaries* was based on the 1795 edition by Edward Christian, who was the first professor of English law at Cambridge, later first Downing Professor of Law, and brother of Fletcher Christian, the *Bounty* mutineer. For Christian, see M.H. Hoffheimer, 'The Common Law of Edward Christian', *Cambridge Law Journal*, 53 (1994), pp. 140-63.

²⁴ C.T. Cullen, *St George Tucker and Law in Virginia, 1772-1804* (New York, 1987), pp. 116-41; C.T. Cullen, 'St George Tucker', in Bryson, *Legal Education in Virginia*, pp. 657-86.

his father's course, Blackstone was not the entirety of the course but was rather the foundation and point of departure.²⁵

Beverley Tucker died in August 1851, and little is known about the teaching methods of his immediate successor. In 1855 the chair of law and police in the College of William and Mary was given to Lucian Minor, and among the textbooks he assigned was Blackstone's *Commentaries*.²⁶

Before passing on to the next university law school to be established in Virginia, we pause to consider several proprietary law schools. The first was that of Chancellor Creed Taylor, which was founded in 1821 in Needham, Virginia, roughly half way between Richmond and Lynchburg.²⁷ Taylor's law school was organised to revolve around a series of moot courts at the trial level; Taylor did not lecture to his students. Before a student could begin the moot court exercises, however, he was required to pass an examination based on a substantial list of books. This list, which was to be read in a prescribed order, began with *Coke upon Littleton*; the second book was Tucker's edition of Blackstone's *Commentaries*.²⁸

In 1824 Judge Henry St George Tucker, the older son of St George Tucker, began his law school in Winchester, Virginia. Henry Tucker found Coke's *Institutes* to be 'profound' and a 'mine of learning'. However, it was Blackstone who worked this mine and 'brought order out of chaos and placed the study of the law in the rank of the sciences by system and classification'. Blackstone's *Commentaries*, on the other hand, 'is to be regarded less as an institute of law than as a methodical guide or elementary work adapted to the commencement of a course of study. [Blackstone] treats most subjects in a manner too general and cursory to give to the student an adequate knowledge of them'.²⁹ Therefore, although Henry Tucker based his

²⁵ N.B. Tucker, *A Lecture on the Study of Law* (Richmond, Virginia, 1834), p. 9; see also R.J. Brugger, *Beverley Tucker: Heart over Head in the Old South* (Baltimore, Maryland, 1978), pp. 91-106; B.D. Tucker, *Nathaniel Beverley Tucker: Prophet of the Confederacy, 1784-1851* (Tokyo, 1979), pp. 262-64.

²⁶ A.J. Rosser, Jr, 'Lucian Minor', in Bryson, *Legal Education in Virginia*, p. 441.

²⁷ S.A. Riggs, 'Creed Taylor', in Bryson, *Legal Education in Virginia*, pp. 589-95.

²⁸ C. Taylor, *Journal of the Law School* (Richmond, Virginia, 1822), pp. 9-13.

²⁹ H.St G. Tucker, 'Introductory Lecture', *Notes on Blackstone's Commentaries for the Use of Students* (Winchester, Virginia, 1826), p. 10.

course on Blackstone's *Commentaries*, he added material on Virginia and federal law. Tucker aimed his law course at future lawyers and skipped over the sections on government and politics at the beginning of Blackstone's *Commentaries*; it was his intention to come back to those topics at the end of the course, if time permitted.

Not only did Tucker base his law course on Blackstone's great publication, he also based his own two-volume *Commentaries on the Laws of Virginia: Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School* on Blackstone. These two substantial volumes were first published in 1831 and were an encyclopedia of Virginia law. Tucker's *Commentaries* has a substantial basis in and numerous lengthy quotes from Blackstone's *Commentaries*, but the discussion of the British constitution and monarchy was replaced. By 1831 there was much Virginia material to be worked into Blackstone's outline, and Tucker must have laboured long and hard to accomplish it. Tucker's *Commentaries* was the first substantial treatise on Virginia law, except for several earlier books written for justices of the peace. It continued to be the major work for Virginia lawyers and judges until John B. Minor's *Institute of Common and Statute Law* (1875-78).

In 1831, Judge John Tayloe Lomax, who had recently resigned his professorship of law at the University of Virginia, opened a law school in his home in Fredericksburg. Lomax did not believe in teaching law by lecturing to students but instructed 'by textbooks with examinations and explanations' what we would today call Socratic teaching. The textbooks upon which Lomax based his course were Blackstone's *Commentaries*; William Cruise, *A Digest of the Laws of England Respecting Real Property* (New York, 1827); Tucker's *Commentaries*; and James Kent, *Commentaries on American Law*.³⁰

John W. Brockenbrough, United States judge for the western district of Virginia, opened his law school in Lexington in 1849. It is interesting to note that Judge Brockenbrough had received his legal education in Judge Henry Tucker's Winchester Law School during the 1827-28 term. Brockenbrough taught by means of what he referred to as the 'catechetical system of instruction'. This Socratic

³⁰ E.L. Shepard, 'John Tayloe Lomax', in Bryson, *Legal Education in Virginia*, pp. 358-66.