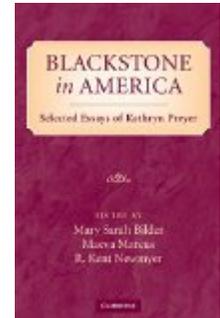


Kathryn Preyer. *Blackstone in America: Selected Essays of Kathryn Preyer.* Edited by Mary Sarah Bilder, Maeva Marcus, and R. Kent Newmyer. Cambridge: Cambridge University Press, 2009. xii + 287 pp. \$85.00, cloth, ISBN 978-0-521-49087-0.



Reviewed by R. B. Bernstein

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Commissioned by Christopher R. Waldrep (San Francisco State University)

Some books exist because they ought to exist. And some of those books exist because a great scholar's friends and admirers make them happen. Kathryn Turner Preyer (1925-2005), for many years a professor of history at Wellesley College, published a select array of first-rate articles and a profusion of book reviews focusing on American constitutional and legal history in the Revolutionary, Confederation, and early national periods. Like another great scholar, Douglass G. Adair, Preyer hoped to gather her essays into a book, but did not live to achieve that goal. Again like Adair, Preyer had friends and colleagues who were ready and able to take on the unfinished task and see it through.[1] It is our melancholy good fortune that discussions taking place at Preyer's memorial at the 2005 American Society for Legal History (ASLH) Convention set in motion the effort that brought this book into being. But this is more than a memorial to a distinguished scholar--it is a book that should be put before every beginning student of American constitutional and legal history, to learn how a master of the craft does it.

It is not merely a commemorative monument to a great career, but a monument for use. *Blackstone in America* sorts Preyer's published work into three categories, each introduced by a leading scholar in the field. A general introduction by Stanley N. Katz, developing the eloquent in memoriam essay he wrote for the March 2006 *Perspectives*, rounds out the volume.

Part 1, "Law and Politics in the Early Republic," is introduced by Maeva Marcus, longtime editor of *The Documentary History of the Supreme Court of the United States, 1789-1801*, and past president of the ASLH, who commissioned one of the essays included here. These four essays concentrate on the turbulent period from the late 1790s through the first years of Thomas Jefferson's presidency, when contests over the scope and extent of federal power often embroiled the law, and when campaigns to reform the federal judiciary blended disinterested public policy with unabashed grappling for political advantage. Part 1 may be of greatest interest to a wide array of readers beyond practitioners of constitutional

and legal history or specialists in the early Republic, because these essays illuminate one of the all-time great bedtime stories of popular history and “Founder Chic.” Preyer wrote her doctoral dissertation (under the guidance of Merrill Jensen and Merle Curti at the University of Wisconsin) on the Federalist Judiciary Act of 1801 and the circumstances surrounding that controversial measure’s framing and adoption. In Preyer’s capable hands, that often-maligned statute recovers some measure of plausibility as the culmination of a long and difficult campaign for reform of the federal judiciary. Further, her examination of the circumstances surrounding the appointment of John Marshall as the nation’s fourth chief justice illuminates the fraught politics preceding and following the election of 1800. Finally, Preyer both brings to life the efforts to appoint new judges under the 1801 Judiciary Act and dispels the hoary myth that they were “midnight judges” named solely and exclusively to bedevil the incoming Republican administration of President Jefferson. The concluding essay reexamines the trial under the 1798 Sedition Act of the Scottish-born Virginia printer and polemicist James Thomson Callender (for some reason, his middle name appears as Thompson rather than as Thomson),[2] stressing its place as a key event in the history of attempts by the federal judiciary to claim a greater place for itself in the development of both federal law and a national legal culture. Part 1 illustrates Preyer’s constellation of gifts as a historian—her ability to map the interactions of law and politics in the early Republic, and to trace and explain the complex intertwining of partisan advantage and legal change while at the same time being able to distinguish the one from the other; her historical detachment, which steers her clear of the almost irresistible temptation to take sides; and her mastery of primary sources and secondary scholarship alike.

Part 2, “The Law of Crimes in Post-Revolutionary America,” is introduced by R. Kent Newmyer (professor emeritus of history and law at the Uni-

versity of Connecticut-Storrs and author of distinguished biographies of Joseph Story and Marshall). Its three essays assess the development of criminal law and its administration at state and federal levels in the era of the Revolution, Confederation, and early Republic. The first essay, “Penal Measures for the American Colonies: An Overview,” examines the state of criminal law and the range of punishments for crimes in the era preceding the American Revolution. Not only does it continue to serve as a map of the research agenda for all historians working on this topic, but it also ably synthesizes and distills a vast body of material to present the “unreformed” criminal law of colonial America and to point out how reform-minded Americans saw this body of legal doctrine, statute law, and custom and usage. “Crime, the Criminal Law, and Reform in Revolutionary Virginia” offers a careful and close-focus examination of perhaps the most famous case study of state legal reform in Revolutionary America, with the added benefit of reexamining Jefferson’s work as law reformer. In Preyer’s view, Jefferson deserves great credit for his emphasis—in his failed 1779 “Bill for Proportioning Crimes and Punishments”—on removing the death penalty as the default-level punishment for a host of crimes, but she also notes his acceptance of retribution-based theories of punishment, contrasting Jefferson’s views with the rehabilitation-based views of George Keith Taylor, author of the reform statute enacted in 1796, who insisted that the criminal law envision the goal of moral reform of the criminal. In “Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic,” Preyer illuminates a confluence of three important and politically charged subjects. While challenging the conventional view that, before the U.S. Supreme Court decided *United States v. Hudson and Goodwin* (1812), there was general recognition and acceptance of a federal common law of crimes, she does not simply argue for the opposite position, but rather demon-

strates the controversial and essentially acontested nature of the question.

Part 3, introduced by Mary Sarah Bilder of Boston College, author of *The Transatlantic Constitution* (2004), presents two essays showcasing Preyer's explorations of a relatively new approach to American constitutional and legal history, rooted in the new scholarly study of the history of the book. As Bilder notes in her introduction, and as these essays make clear, Preyer was fascinated by the consequences for the intellectual history of American law and constitutionalism of the seemingly mundane question of what law books were available to American lawyers and legal thinkers, and what availability actually meant. To put the question bluntly, because a lawyer can buy a notable work of legal scholarship, does that mean that he will buy it; or, having bought it, that he will read it; or, having read it, that he will make use of what he read? The first essay in part 3 presents a valuable, refreshing reexamination of one of the platitudes of the intellectual history of American law--that the slender, brilliant 1769 *Essay on Crimes and Punishments* by the Italian nobleman Marquis Cesare Beccaria profoundly influenced Jefferson's efforts to reform the criminal law of Virginia. Preyer traces the likely influences of Beccaria on Jefferson, but she goes further, showing that Beccaria had a wide and appreciative readership among American lawyers in other colonies and states, and that in many ways Beccaria's book may be the "vital precipitant" of key reforms of criminal law throughout the American states--even though she also notes the vital roles played by differing conditions and political contexts among the several states. Thus Preyer stresses the interaction between ideas of reform and the political possibilities and limitations of reform in the various states. The second essay in part 3, broadening Preyer's focus to transatlantic dimensions, juxtaposes Jefferson as American law reformer with Peter Leopold, Grand Duke of Tuscany. Both men were avid readers and students of Beccaria, and both sought to reshape the criminal

law by reference to his teachings, but Preyer also highlights the differences between the situation of a legislator in a republic's bicameral legislature and the situation of a quasi-monarchic ruler with greater freedom of action to recast law as he sees fit. As Bilder notes, Preyer's essay suggests the value--indeed, the necessity--of addressing the history of legal change in America with careful awareness of its place in a larger Atlantic context.

The only qualm I have about this splendid volume is its title. To be sure, we learn that Preyer intended this book to be called *Blackstone in America*--and yet the volume's index gives Sir William Blackstone only two references, both of them glancing. I suspect that had she lived, Preyer would have written either another essay that would have given the book its title, or that she would have explored that subject in the introduction she never got to write. The resulting lack of fit between the book's substance and its title is thus another sad reminder of what we lost when Kitty Preyer was gathered to her ancestors--and a call to action to younger scholars to continue that work, with the essays presented here as models of research, analysis, and interpretation.

Notes

[1]. Douglass G. Adair, *Fame and the Founding Fathers: Essays of Douglass Adair*, ed. Trevor Colbourn (New York: W. W. Norton for the Institute of Early American History and Culture, 1974; Indianapolis: Liberty Fund, 1998).

[2]. See Michael Durey, *With the Hammer of Truth: James Thomson Callender and America's Early National Heroes* (Charlottesville: University Press of Virginia, 1990). Callender was named for the poet James Thomson.

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