

## The ‘least repulsive’ work on a ‘repulsive subject’:

### Jeremy Bentham on William Blackstone’s *Commentaries on the Laws of England*

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#### I. Introduction

Jeremy Bentham’s *A Fragment on Government*, which appeared in April 1776 and constituted his first major published work,<sup>1</sup> was ostensibly a critique of a short passage on the nature and origin of government that had appeared in William Blackstone’s *Commentaries on the Laws of England*.<sup>2</sup> Bentham took a paragraph or set of paragraphs in turn and highlighted the contradictions, ambiguities, and ambivalences in Blackstone’s prose, before informing the reader what, as he inferred, Blackstone had meant to say, before going on to offer substantive criticism and outlining some of his own alternative views. Bentham made three main criticisms of Blackstone’s account.<sup>3</sup> First, he criticized Blackstone’s methodology. Blackstone had failed to distinguish between the role of the expositor and that of the censor, and had, therefore, confused the question of what the law is with the question of what the law ought to be. Bentham picked up on Blackstone’s statement, concerning the law of heresy, that ‘[e]verything is now as it should be’ (usually rendered by Bentham as ‘every thing is as it should be’),<sup>4</sup> and took it to be characteristic of Blackstone’s whole approach, and, therefore, as an appropriate sobriquet for his antagonist. As far as Bentham was concerned,

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<sup>1</sup> J Bentham, *A Comment on the Commentaries and A Fragment on Government*, JH Burns and HLA Hart (eds), (London, Athlone Press, 1977) Editorial Introduction, p. xxx. *Fragment on Government* was one part of a more extensive critique of Blackstone entitled ‘A Comment on the Commentaries’, which, in the event, Bentham did not publish.

<sup>2</sup> W Blackstone, *Commentaries on the Laws of England*, 4 vols, W Prest, D Lemmings, R Paley, TP Gallanis, and S Stern (eds), (Oxford University Press, 2016) i. 38–42. The work was first published by the Clarendon Press in four volumes in 1765–9.

<sup>3</sup> Bentham’s criticisms of Blackstone in ‘Comment on the Commentaries’ and *Fragment on Government* have been explored, amongst others, by D Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge, Cambridge University Press, 1989) 228–30, 244–5, 258–63; GJ Postema, *Bentham and the Common Law Tradition* (Oxford, Clarendon Press, 1986) 243–50, 268–74, 304–8; MJ Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford, Clarendon Press, 1991) 169–73; and P Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford, Oxford University Press, 2006) 51–7, 112–14.

<sup>4</sup> See Blackstone, *Commentaries*, iv. 32.

Blackstone's mistake had been to adopt a nonsensical moral theory, the natural law, which, through its doctrine that *lex iniusta non est lex* (an unjust law is no law), led to the ultra-conservative view that if something was a law, then it must be just. Second, following David Hume,<sup>5</sup> Bentham criticized Blackstone's support for the theory of the social contract on the grounds that it failed to provide both an adequate explanation of the actual foundation of government, and any adequate justification for it. In Bentham's view, 'natural society' and 'political society' co-existed in varying degrees in all societies, and hence it made no sense to posit the notion of a natural society being transformed into a political society by means of a social contract. Even if there had been some form of contract in the past, it could not bind persons who had not agreed to it, and, moreover, like any promise, it could never have any moral authority in and of itself, but only by reference to some external standard. Third, Bentham criticized Blackstone's theory of sovereignty, which claimed that in every state there must exist 'a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside'.<sup>6</sup> Bentham pointed out that there were examples of states where sovereign power was limited, otherwise it would be as much as to say that there was 'no such thing as government' in the German Empire, the Dutch Provinces, or the Swiss Cantons.<sup>7</sup> In *A Fragment on Government*, Bentham did not restrict himself to mere criticism.<sup>8</sup> He outlined a number of themes which he would go on to develop in later writings: the habit of obedience as the foundation of law-making power; a 'natural arrangement' of offences (that is one based on the harm caused by the act in question), instead of the 'technical arrangement' (that is one without any principled basis) that characterized the Common Law and Blackstone's account of it, as the appropriate structure

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<sup>5</sup> At *Comment/Fragment*, 439 n., Bentham cites the third volume of Hume's *Treatise on Human Nature*: see David Hume, *A Treatise of Human Nature*, 2 vols, DF Norton and MJ Norton (eds), (Oxford, Clarendon Press, 2007) Book 3, Part 2, §§ 7–10, i. 349–62.

<sup>6</sup> Blackstone, *Commentaries*, iv. 39.

<sup>7</sup> Bentham, *Comment/Fragment*, 488–9.

<sup>8</sup> As Bentham himself explained, his chief task had been 'to *overthrow*', but he had also taken the opportunity 'to *set up*': *ibid.*, 420–1.

for a legal system; the principle of utility as the standard by which to ascertain the point at which resistance to government became justified; and paraphrasis (the relating of abstract terms to entities in the real, physical world) as the correct method for the exposition of fundamental legal terms.

As David Lieberman notes, Bentham's 'preoccupation with Blackstone was to survive throughout [his] long career in legal theory',<sup>9</sup> a view echoed by J.H. Burns when describing Bentham's engagement with Blackstone as 'A Lifetime's Dialectic'.<sup>10</sup> This engagement began in December 1763, when, aged 15, Bentham attended Blackstone's lectures at Oxford,<sup>11</sup> and continued for the remaining near-seven decades of his life through to what has been described as his 'last work', namely 'Auto-Icon: or, Of the Farther Uses of the Dead to the Living'.<sup>12</sup> Here Bentham imagined Blackstone's auto-icon (appropriately articulated, with its limbs being moved by a small boy hidden behind its robes) reading from the *Commentaries*, and then, with the auto-icons of several other jurists, including Justinian, Bracton, and Coke, engaging in conversation with Bentham's auto-icon, and no doubt being upbraided for their errors.<sup>13</sup> To follow in detail Bentham's 'Lifetime's Dialectic' with Blackstone would require a volume, and so what will be attempted here is a comparison of his engagement with Blackstone in *A Fragment on Government* and in a body of contemporaneous material entitled 'Preparatory Principles' on the one hand, with an apparently unfinished essay composed fifty years later in 1828 under the proposed title of 'Blackstone familiarized' on the other hand.<sup>14</sup> This latter work was intended for a periodical, would have appeared anonymously in three instalments, and would have given a succinct

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<sup>9</sup> Lieberman, *Province*, 221.

<sup>10</sup> JH Burns, 'Bentham and Blackstone: A Lifetime's Dialectic' (1989) 1 *Utilitas* 22–40.

<sup>11</sup> Bentham, *Comment/Fragment*, 526 n.

<sup>12</sup> See 'Auto-Icon; or, Of the Farther Uses of the Dead to the Living' (printed for, but excluded from, J Bowring (ed), *The Works of Jeremy Bentham*, 11 vols, (Edinburgh, William Tate, 1843)), Note by the Editor, 1.

<sup>13</sup> *Ibid.*, 12, 13.

<sup>14</sup> See University College London Library, Bentham Papers, Box xxxi, fo. 75 (23 July 1828): 'Title understood to be proposed: A familiar View of Blackstone: or say, Blackstone familiarized: or else, Blackstone and Law familiarized.' This work has never been printed, and has remained almost unnoticed in the literature.

account of the evils of English law, as expounded by Blackstone, by contrasting it, through the medium of universal jurisprudence, with a system of law founded on the greatest happiness principle. A comparison of these earlier works with ‘Blackstone familiarized’ will reveal not only an extraordinary consistency in that the criticisms advanced in the earlier writings reappear in the later, but also a striking development in terms of their being put to political use, a development which in turn may be related to the emergence of the notion of sinister interest in Bentham’s thought in the first decade of the nineteenth century and his subsequent commitment to democracy.<sup>15</sup> The provenance and purpose of ‘Blackstone familiarized’ are specifically related to Bentham’s efforts in the late 1820s to promote law reform. He was working on a ‘Petition for Justice’ in the hope that a mass popular movement, led both outside and inside the House of Commons by Daniel O’Connell, would pressure Parliament into a significant measure of codification.<sup>16</sup> More generally, the work belonged to his attempt to undermine the whole political, legal, and ecclesiastical establishment of the United Kingdom, and replace it with a representative democracy or, in his terminology, a republic. He distinguished between the oppressing ‘ruling few, whom he identified with the non-productive classes, consisting of the monarcho-aristocratic establishment on the one hand, and the oppressed ‘subject many’, the productive classes consisting of the unenfranchised mass of the people on the other hand.<sup>17</sup> It was to the latter group that ‘Blackstone familiarized’ was addressed.

## **II. Why (still) Blackstone?**

In the 1770s in ‘Preparatory Principles’, Bentham explained that he ‘attacked’ Blackstone’s *Commentaries*, and not works by other authors, in the first place because of its ‘giving Law to

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<sup>15</sup> Schofield, *Utility and Democracy*, 109–36. In 1809 Bentham began to write on parliamentary reform, and from 1822 to work on a ‘Constitutional Code’, his own blueprint for a democratic constitution: *ibid.*, 137–40, 244–9.

<sup>16</sup> *Ibid.*, 319–20.

<sup>17</sup> J Bentham, *First Principles preparatory to Constitutional Code*, P Schofield (ed), (Clarendon Press, Oxford, 1989), 136–7, 155–67.

men's opinions'—in other words, because the degree and extent of its influence was greater than that of any other work—and in the second place because of its lack of 'sincerity and openness'. He explained that, 'The opinion which it seems to be the constant and almost universal scope of the work to inculcate is that that ought ever to be, which *is*.' The *Commentaries* would 'produce an epidemic debility in the moral department of men's intellects. A state of listless and abject quietism'.<sup>18</sup> Both themes were taken up in *A Fragment on Government*. In relation to the latter point, Bentham referred to Blackstone's 'antipathy to reformation' as the 'grand and fundamental' blemish in the *Commentaries*, and of his own aim of 'laying open and exposing the universal inaccuracy and confusion which seemed ... to pervade the whole'. Bentham linked Blackstone's 'antipathy to reformation' to his 'obscure and crooked reasoning', for 'so intimate is the connexion between some of the gifts of the understanding, and some of the affections of the heart'.<sup>19</sup> In relation to the former point, Bentham admitted that Blackstone's works had been more widely read, had received greater praise, and had enjoyed more influence than any other writer on English law, but this merely made it all the more important to counter them. As an 'Author of great name', who had 'awow[ed] himself a determined and persevering enemy' of reform, 'the interests of reformation, and through them the welfare of mankind' required 'the downfall of his works'.<sup>20</sup> In 1769, having tentatively begun his career at the bar, Bentham had quickly committed himself to the reform of the law,<sup>21</sup> and, given his reaction to hearing Blackstone's lectures and reading the *Commentaries*,<sup>22</sup> it no doubt seemed to him that Blackstone represented a major obstacle to his project. Bentham complemented Blackstone on his 'style', which was '[c]orrect, elegant, unembarrassed, ornamented', and confessed that he had 'taught

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<sup>18</sup> J Bentham, *Preparatory Principles*, DG Long and P Schofield (eds), (Oxford, Clarendon Press, 2016) 291–2. Cf. *Comment/Fragment*, 498, where Bentham refers to 'that spirit of obsequious *quietism* that seems constitutional in our Author'.

<sup>19</sup> *Ibid.*, 394.

<sup>20</sup> *Ibid.*, 394.

<sup>21</sup> Bentham, *Works*, x. 51, 54.

<sup>22</sup> See Bentham, *Comment/Fragment*, Editorial Introduction, pp. xix–xxii.

Jurisprudence to speak the language of the Scholar and the Gentleman’, had ‘decked her out ... from the toilette of classic erudition’, and ‘enlivened her with metaphors and allusions’.

He continued:

The merit to which, as much perhaps as to any, the work stands indebted for its reputation, is the enchanting harmony of its numbers: a kind of merit that of itself is sufficient to give a certain degree of celebrity to a work devoid of every other. So much is man governed by his ear.<sup>23</sup>

In Bentham’s eyes, the *Commentaries* represented a victory of style over substance.

Bentham’s efforts in *A Fragment on Government* and in his writings in the intervening fifty years had, by his own admission, made little impact on Blackstone’s general reputation.<sup>24</sup> In ‘Blackstone familiarized’, Bentham acknowledged the great influence still being exercised by the *Commentaries* and confessed that it remained the best account of English law. In one of several drafts of the ‘Introduction’, he gave three reasons for inserting Blackstone’s name in the title. First, the word ‘law’ and the name of Blackstone were inextricably associated in the minds of anyone who wished to know the state of the law. Second, in his own short work, Bentham could only cover a ‘small portion of the immense and absolutely unmeasurable mass’ of English law, and so, for further detail, he would refer the reader to the *Commentaries*, revised as it had been by various editors, and ‘from which ... more satisfaction is derivable than from any other single work’. Third, Blackstone’s was the ‘least repulsive’ work ‘on this repulsive subject’.<sup>25</sup> Elsewhere in ‘Blackstone familiarized’, Bentham noted that the *Commentaries* had for sixty years formed the standard account of

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<sup>23</sup> Ibid., 413–14. Bentham did acknowledge that some parts of Blackstone’s *An Analysis of the Laws of England* (Oxford, Clarendon Press, 1756) were based on ‘a sort of method, which is, or comes near to what may be termed a natural one’ (*Comment/Fragment*, 418–19), and that in the *Commentaries* there were several passages in which good reasons had been given for beneficial institutions and some criticisms and suggestions for reform offered for mischievous ones, but ‘so plainly adverse to the general maxims’ of the work as a whole were these passages, that ‘[o]ne would think some Angel had been sowing wheat among our Author’s tares’ (ibid., 420). Bentham more characteristically states (ibid., 438–9) that Blackstone’s ‘tinsel-work’ consists ‘partly of self-evident observations, and partly of contradictions; partly of what every one knows already, and partly of what no one can understand at all’. In ‘Blackstone familiarized’, as we will see, Bentham did not spare Blackstone’s *Analysis* from criticism.

<sup>24</sup> For a brief account of the immediate popularity and enduring influence of the *Commentaries* see W Prentiss, ‘General Editor’s Introduction’, in *Commentaries*, i. pp. xii–xv.

<sup>25</sup> UC xxxi. 106 (31 August 1828).

English law not only for the layman, but for the profession as well,<sup>26</sup> containing as it did ‘the clearest explanation capable of being found any where’ of ‘Law as it is’, albeit in ‘technical’ language.<sup>27</sup>

Bentham not only referred to Blackstone’s *Commentaries* as the most popular and attractive work on the subject, but also to its justificatory role in showing that ‘every thing is as it should be’. In order to counter the complacency induced by the *Commentaries*, Bentham’s intention was to expose those matters on which Blackstone, together with the lawyers who followed and admired him, pretended that the law was different from what it really was and what it ought to be, so that readers would avoid ‘the snares into which they are thus in danger of falling’, and thereby reduce ‘to its smallest dimensions the quantity of the suffering, to which, by Law as it is, they are, at every step they take, in this thorny and cloudy region, so unhappily exposed’.<sup>28</sup> If his purpose was to give an account of English law, Bentham asked himself, then why not simply give an abridgment of the *Commentaries*? The answer was that Blackstone’s work, despite all the efforts that had been made to render it comprehensible to non-lawyers, and despite its four large volumes, remained ‘in but a very imperfect degree intelligible’. Hence, it was unlikely that any abridgment, in the form of the three ‘small numbers’ into which Bentham’s work would be compressed, would be any less unintelligible than the *Commentaries*. The solution was to give an account of law as it ought to be, thereby giving ‘some conception ... of law *as it is* taken in large masses’.<sup>29</sup> Bentham explained that it would be ‘through the instrumentality of Universal Jurisprudence’ that the reader would see what the law ought to be, and thereby have a standard of reference with which to compare law as it is, and to see how the latter could be brought closer to the

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<sup>26</sup> UC xxxi. 93 (9 August 1828).

<sup>27</sup> UC xxxi. 75 (23 July 1828). On the relationship of law as it is, law as it ought to be, and law as it pretends to be see part III below.

<sup>28</sup> UC xxxi. 105 (30 August 1828).

<sup>29</sup> UC xxxi. 76 (23 July 1828).

former,<sup>30</sup> the desideratum that Bentham had announced in *A Fragment on Government*.<sup>31</sup> The point was to demonstrate to the subject many that the laws of England were an instrument of oppression in the hands of the ruling few.<sup>32</sup>

### III. A Dream

In the hope of rendering ‘Blackstone familiarized’ as appealing as possible to its intended readership, the subject many, the general mass of the people, Bentham had the idea of presenting it in the form of a theatrical performance that had appeared to him in a dream. One version of Bentham’s dream begins as follows: ‘Once upon a time—no matter when—it can not have been long ago—I—no matter who I am—dreamed a dream.’ The scene was set ‘in the Lecture Room of the London University’:<sup>33</sup>

The forms were filled with Scholars. At the upper end, on an elevated station before a long Bench, were placed four desks or boxes similar to those which, in the Westminster Hall Courts, are placed before the Judges. At a lower elevation, under one of the four boxes, was a seat with another such box before it.

Through a door behind the upper bench there entered four females wearing ceremonial robes. The train of one of them was borne by a man ‘clad in the sort of robe worn by a Doctor of Law in the University of Oxford’. This man, as Bentham revealed later in the dialogue, was Blackstone. The eldest lady sat at the seat equivalent to that taken by the Chief Justice in the Westminster Hall Courts. One of the younger ladies sat on her right, and the two others on her left. The Doctor of Law sat at the lower box, underneath the lady immediately to the left of the eldest lady.<sup>34</sup>

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<sup>30</sup> UC xxxi. 104 (30 August 1828).

<sup>31</sup> Bentham, *Comment/Fragment*, 415–18.

<sup>32</sup> Cf. Bentham, *First Principles*, 130–2.

<sup>33</sup> The fact that Bentham describes a University of London lecture room is circumstantial evidence that he may have visited the new University. The passage was written on 30 September 1828, the very same day on which a General Meeting of the Proprietors was held in one of the new University’s lecture rooms (see H Hale Bellot *University College London 1826–1926* (London, University of London, 1929), 75). Bentham was a proprietor, and so may have attended the meeting, though his name does not appear in the list of persons present recorded in the official minute book: see UCL Records Office, ‘University of London Minutes of General Meetings 1826 to 1834’, not paginated.

<sup>34</sup> UC xxxi. 200 (30 September 1828).



The eldest lady rose and, ‘in a voice that sounded as if it came from heaven’, addressed the audience, whom she called her ‘Disciples’. She explained that she was Astræa, Goddess of Justice,<sup>35</sup> and introduced the other three ladies as her daughters. From the four of them, the disciples (presumably representing the subject many) would receive all the instruction that they needed. Astræa herself would ‘explain ... that which belongs to all the nations upon earth. It has been stiled Universal Jurisprudence: it consists of the language of law, and nothing more.’ She then introduced her daughters. On her right was Felicia (i.e. Happy), who would, by applying the greatest happiness principle, explain ‘what the law ought to be’. Immediately on her left was Gubernia (i.e. Government), who would deal with ‘what the law is, or at any rate is, by those who have the power, likely to be declared to be’, and beyond her was Dolosa (i.e. Deceitful), who would explain ‘that which the law, in a case in which it is not so, is pretended to be’. Dolosa held two masks, each resembling one or other of her sisters, and either one or other of which she would wear whenever she was delivering instruction.<sup>36</sup> In this version of the dream, Blackstone sat immediately beneath Gubernia, the Goddess of law as it is. In another version, Blackstone’s seat was placed below and between the Goddess of law as it is and the Goddess of law as it is pretended to be. The dreamer noted that Blackstone ‘appeared a great favorite with both’.<sup>37</sup>

In *A Fragment on Government* and related writings, including *An Introduction to the Principles of Morals and Legislation*, Bentham had discussed universal jurisprudence, law as it is, and law as it ought to be, and the relationship of each with the other.<sup>38</sup> In ‘Blackstone familiarized’, consistently with his earlier account, Bentham explained that universal jurisprudence dealt with what, in relation to law, was common to all nations. This did not,

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<sup>35</sup> Bentham made reference to Astræa’s appearance in Ovid’s *Metamorphoses*, where she fled the world during the Iron Age. According to legend, she would one day return to Earth and instigate a new Golden Age.

<sup>36</sup> UC xxxi. 201 (30 September 1828).

<sup>37</sup> UC xxxi. 202a: fragment in copyist’s hand glued to a sheet dated 11 December 1828.

<sup>38</sup> See, for instance, J Bentham, *An Introduction to the Principles of Morals and Legislation*, JH Burns and HLA Hart (eds), (London, Athlone Press, 1970) 293–300.

therefore, apply to particular ordinances or enactments, since they were different in different nations, but to ‘certain of the ideas’ that law ‘is composed of’. Different languages had, of course, adopted different words to signify these ideas, but to the extent that the same ideas were being expressed, it could be claimed that, ‘of the language of law, there is a portion which is common to all nations’.<sup>39</sup> The new element introduced in 1828, or rather by 1828,<sup>40</sup> was law as it pretends to be. The emergence of this notion, personified in Dolosa, was, as noted above, perhaps related to the emergence of Bentham’s political radicalism in the first decade of the nineteenth century. Bentham had come to recognize that the state of the law was not the product of complacency and deference to the authority of the past, but due to rulers, and in particular lawyers in the form of ‘Judge & Co.’, having a sinister interest in maintaining and promoting abuses.<sup>41</sup> The problem did not lie, as Bentham had thought, in a failure of the understanding, but in the corruption of the will.<sup>42</sup> The legal establishment feared that merely to describe law as it is might result in the exposure of its shortcomings, and so needed to present it as a system of perfection in order to continue to delude the subject many.<sup>43</sup> Bentham aimed to present Blackstone as the stooge, the willing collaborator, of the ruling few in this exercise of deception. The distinction between law as it is and law as it pretends to be drew attention to what Bentham conceived to be the gap between actual legal practice and the account presented in Blackstone.<sup>44</sup> Bentham’s critique of Blackstone’s

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<sup>39</sup> UC xxxi. 56 (30 August 1828).

<sup>40</sup> The distinction appears in the title (but not in the text) of ‘Truth versus Ashhurst; or, Law as it is, contrasted with what it is said to be’, which, though written in 1792, was not published until 1823, when the sub-title was perhaps added: see Bowring (ed), *Works of Bentham*, v. 231–7.

<sup>41</sup> See W Twining, *Theories of Evidence: Bentham and Wigmore*, (London, Weidenfeld and Nicolson, 1985) 75–9.

<sup>42</sup> In the unpublished ‘Preface’ for the second edition of *Fragment on Government* of 1823, he explained his naivety at the time of original publication in 1776 in relation to the reasons that lawyers had for their disapproval of both the work and Bentham himself. See also the footnote added for the second edition at *Comment/Fragment*, 499 n.: in the text, Bentham had complained of ‘legislative indolence’ as the cause of the lack of reform, but in the note stated that he should have said ‘*corruption*’.

<sup>43</sup> For Bentham on the use of delusion by lawyers see *First Principles*, 184–5.

<sup>44</sup> JH Langbein, ‘Blackstone on Judging’, in Prest (ed), *Blackstone and his Commentaries*, 65–77, looking at the way that judges actually operated in the eighteenth century, supports Bentham’s criticism of Blackstone’s account of judging, and in so doing lends credence to Bentham’s criticism of Blackstone as presenting an account of law as it pretends to be. See also Postema, *Bentham and the Common Law Tradition*, 268, 298.

presentation of English law was not, therefore, necessarily identical with his critique of English law itself.<sup>45</sup>

The point is taken up in another of the dialogues that Bentham composed involving the four Goddesses and Blackstone. Having spoken about ‘Wrongs’, the dialogue moved on to the subject of ‘Remedies’. Astræa explained that, were it not for remedies, there would be no point in having knowledge of the wrongs that might be committed. She first asked Felicia to comment on the relationship between wrongs and remedies. Felicia responded that ‘every wrong ought to have its remedy’. Astræa then turned to Gubernia, who stated that it did not matter whether the wrong had a remedy or not: ‘I deal them out, all or none of them, as I please.’ Thereupon Dolosa interjected: ‘Oh yes, every wrong has its remedy. Ask Blackstone else: and for every wrong, one remedy is quite sufficient. Ask Blackstone else.’<sup>46</sup> Gubernia resumed: ‘My Judges give remedies for whatever wrongs they and I please to give: and they deny remedies for whatever wrongs they and I please they should be denied.’ In general, Gubernia explained, they gave no remedy for breach of trust, and there was no restitution of a thing unlawfully taken, but instead they gave a sum of money which might be to any amount below the value of the thing taken.<sup>47</sup> Dolosa pointed out that the equity judges gave a remedy in both cases: ‘Ask Blackstone else.’ The conversation proceeded as follows:

ASTRÆA. Yes, a remedy which is worse than the disease. If, by the wrong, you have lost to the amount £10 paid, they first make you lose £100, and then, for a great number of Years, they have great doubts what to do about the matter, and when you are ruined or dead of a broken heart, they give you either nothing or something which goes to pay your lawyer.

GUBERNIA. In some cases, the wrongdoer puts me in such a passion that I do not know what I am about: I then kill the man: and if he has any money I can get at, I put it into my own pocket. Sister Felicia would, I warrant her, give it to the party wronged: in case of a murder, to the widow and children of the party murdered. That is because she is such a simpleton.

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<sup>45</sup> This is to add a nuance to the view expressed in *ibid.*, 312, that Bentham’s attack was not restricted to Blackstone, but was directed against the whole system of thought that underpinned the Common Law, and aimed to shift the paradigm of law away from customary rules and practices to statute law and codification.

<sup>46</sup> See Blackstone, *Commentaries*, iii. 73: ‘For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.’

<sup>47</sup> UC xxxi. 209 (28 September 1828).

What need I care about the party wronged? What should I get by giving him the money? What matters it to me what he suffers? Not a straw: does it, Professor Blackstone?

BLACKSTONE FROM BELOW. No, indeed, Madam, as you say, not a straw: the satisfaction you give to yourself by seeing the other man suffer being so very great.

DOLOSA. Blackstone, you do not know what you are saying—satisfaction to the public, you should have said.

BLACKSTONE. Madam, I stand corrected: the press shall be corrected accordingly.

FELICIA. Would the public be the less satisfied, if the individual wronged were satisfied too?<sup>48</sup>

Bentham was drawing attention to the gloss that Blackstone had put on the Common Law, and suggesting that he had understood perfectly well the way in which the law in fact operated, but had been so naively convinced of its excellence, and so oblivious to its inherent injustice, that he had been prepared to describe it without a second thought as to whether he might inadvertently be exposing the whole sham. At this point, the knowing and corrupt ruler in the person of Dolosa had to intervene, and prod Blackstone into changing his terminology in such a way that it appeared that the community as a whole, rather than the legal and political establishment alone, benefited from the ‘satisfaction’ extracted from the wrongdoer.

#### **IV. The Greatest Happiness Principle**

In another dialogue, Bentham took the opportunity to explain the proper end or purpose of a legal system, and hence to draw a contrast with the actual, corrupt end or purpose of the English legal system.<sup>49</sup> Astræa asked Felicia to ‘inform our disciples what in this country law ought to be’. Felicia explained that, ‘Law as it ought to be has for its end the greatest happiness of the greatest number: that is to say of the members of the community in question’.<sup>50</sup> Astræa pointed out that Felicia had made ‘an error in expression’, and that, instead of ‘the greatest happiness of the greatest number’, she should have said ‘the greatest happiness of the whole community’. The point was that the greatest happiness of the greatest

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<sup>48</sup> UC xxxi. 210 (28 September 1828).

<sup>49</sup> For the distinction between the proper and the actual ends of government in general see Bentham, *First Principles*, 232.

<sup>50</sup> UC xxxi. 214 (18 November 1828).

number did not equate with ‘the greatest happiness of the whole number together’, in that the happiness of a majority might be promoted at the expense of that of a minority, and overall happiness be diminished. Suppose, said Bentham, a community of 2,001 persons, where 1,001 were masters and 1,000 slaves:

the community of which the masters are members made as happy as it is in the power of the best laws to make them: but the slaves as ill-treated and thence as unhappy as it is possible for them to be, consistently with their remaining slaves. Is it credible that, in this state of things, the quantity of happiness in the 2,001 taken together would be as great as if, still under the best system of laws possible, all were free, none slaves, none masters of slaves?<sup>51</sup>

At some point, possibly in the mid-1820s,<sup>52</sup> Bentham had come to recognize that he had to make it clear that the promotion of the greatest happiness did not simply involve counting the number of individuals who benefited or suffered from a certain law, measure, policy, or action, but the degree to which each such individual benefited or suffered.<sup>53</sup>

In response to Astræa’s exposition of the greatest happiness principle, Dolosa stated: ‘Madam, it is all theory: it is a dangerous doctrine: it is innovation: manifest innovation.’ Gubernia then said that she and Dolosa were not concerned with the happiness of the community: ‘The Law of England has for its all-comprehensive end the giving on all occasions execution and effect to the pleasure of its Sovereign Lord the King. Is it not, D<sup>r</sup> Blackstone?’

BLACKSTONE. To be sure, Madam. The King can do no wrong. So I have said in my *Commentaries*. This having been universally affirmed[?] by us and acted upon, never contested, and accordingly incontestable, what other can be a so unerring guide: what need we trouble ourselves about other people’s happiness. He is all perfection. So I have said in my *Commentaries*. Our Laws, are they not the King’s laws? He being all perfection, let us be but obedient—then his laws will like him be all perfect—law as it is and law as it ought to be will be one and the same thing: and, as I have said, speaking of the Church, is actually the case, every thing would be as it should be.

DOLOSA. The Law is the perfection of reason. Is it not, D<sup>r</sup> Blackstone?

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<sup>51</sup> UC xxxi. 215 (18 November 1828).

<sup>52</sup> There is no mention of this ‘error in expression’ in, for instance, the footnotes concerning the greatest happiness principle added to the second editions of *An Introduction to the Principles of Morals and Legislation* (14–15 n.) and *Fragment on Government* in 1823 (*Comment/Fragment*, 446 n.).

<sup>53</sup> Schofield, *Utility and Democracy*, 38–40.

BLACKSTONE. Madam, to be sure it is. I have said so in so many words.<sup>54</sup> ...  
Yes: and to make it, if possible, still clearer—‘Reason is the life of the Law.’<sup>55</sup>

DOLOSA. Then why need you—Disciples—why need you set off upon a wild-  
goose chase after other people’s happiness?<sup>56</sup>

According to Dolosa, the distinction between law as it ought to be and what the law was in England was ‘no better than a fanciful one: mere theory, nothing better: neither Grotius nor Puffendorf<sup>57</sup> knew of any such distinction’. Given that the English law was ‘the perfection of reason’, any arrangement which ought to be established was necessarily established.

Conversely, once it was established, it was ‘exactly that which ought to be established’.

The law ought to [be] so and so: therefore, so it is: the law is so and so: therefore, so it ought to be. Such is our logic. This being admitted, it follows that, when applied to the law of England, the *is* and the *ought to be* are interconvertible terms.

This was more particularly true of the Common Law, which was wholly the product of the judges. As for statute law, the judges ‘take it in hand and mould it into proper form, as if it were so much common law’, just as Mansfield had declared that it was his practice ‘to mould the law’. ‘Equity is but an improved modification of the Common Law: Lord Eldon, when he was Chancellor, was seen practising this ingenious art on the Chancery Bench for the instruction of his learned spectators.’<sup>58</sup>

Three themes emerge from this dialogue. The first is the condemnation of the greatest happiness principle as ‘theory’, reiterating a point that Bentham had made, for instance, in *The Book of Fallacies*, in the context of arguments that were used in order to thwart reform, and where Bentham denominated such an argument as the ‘practical-man’s, or blind-horse’s, or thought-condemner’s, or reason-abjurer’s argument’.<sup>59</sup> The second is the familiar allusion

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<sup>54</sup> For the relevant passage see Blackstone, *Commentaries*, i. 52.

<sup>55</sup> ‘Blackstone’ is quoting Coke, I *Institutes*, 97. b.

<sup>56</sup> UC xxxi. 216 (18 November 1828).

<sup>57</sup> Bentham was making ironic allusion to the authoritative status, in the natural law tradition, of the works of Hugo Grotius and Samuel Pufendorf. According to Bentham, Grotius and Pufendorf ‘make as many Laws of Nature, at a minute’s warning, as they have occasion for’: see *Preparatory Principles*, 131. Neither they, nor Blackstone, had any interest in distinguishing censorial from expository jurisprudence.

<sup>58</sup> UC xxxi. 217 (18 November 1828).

<sup>59</sup> J Bentham, *The Book of Fallacies*, P Schofield (ed), (Oxford, Clarendon Press, 2015) 204–12. As might be expected, Blackstone is criticized at several points in *Book of Fallacies*, but in particular for claiming (in

to Blackstone's identification of law as it is with law as it ought to be—the confounding of the roles of the expositor and censor—a product of his commitment to the natural law. The third is the subversion of the legislative process by judges. All three themes were linked by the 'antipathy to reformation' with which Bentham, as we have seen, had charged Blackstone in *A Fragment on Government*.

## V. The Structure of a Legal System

In the mid-1770s in 'Preparatory Principles', Bentham pointed out that it was necessary to explain the nature of private rights before public rights could be understood. Laws which concerned public interests, establishing public powers, duties, and restraints, were 'not intelligible' but by reference to those regulating private interests, establishing private powers, duties, and restraints. Hence, in order to describe clearly a legal system, it was necessary to deal first with the private before dealing with the public. 'Many writers', Bentham claimed, had begun with the latter, 'and in proceeding thus they are obliged to take up with the gross conceptions that men have of them from habit without instruction'. A man best understood the interest he had in what he called his own, and it was through comparing his interest in his own things with the interests that corporate bodies and public trustees had in the things under their charge that these latter interests could be most clearly explained. The more simple idea of private powers over things was the key to understanding the more complex idea of public powers.<sup>60</sup> In short, in order to provide a clear explanation, it was necessary to begin with that which was simple and could be comprehended by itself, and proceed to that which was more complex.

In 'Blackstone familiarized', Bentham applied this criticism explicitly to Blackstone's organization of English law in the *Commentaries*, which began with the rights of government

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Bentham's view), at *Commentaries*, i. 70–1, that the Act of Union of 1707 presented 'an insurmountable bar' to the reform of the Church of England, which Bentham categorized as an example of 'the posterity-chainer's device' (254–6, 444–6).

<sup>60</sup> Bentham, *Preparatory Principles*, 96–7.

officials instead of the rights of private individuals. Bentham now offered two reasons for dealing with private rights before public: one was the logical point that he had put forward in the 1770s, namely that the more simple should be explained before the more complex, and it was, therefore, impossible to understand the nature of public rights and duties before the nature of private rights and duties had been explained; the other was a political point, not advanced in the 1770s, that to follow the reverse order was to insinuate that the rights of rulers were more important than those of subjects. Astræa combined both points when announcing the rule dealing with the order of explanation: ‘The course meant to be pursued on this occasion is this: those things which are at the same time most extensively interesting and most easily intelligible first.’ She went on to explain that law was not only necessary to the well-being, but to the existence, of human beings in a social state, and that in order to achieve this purpose, it created rights and their correspondent obligations. The rights of which a person had the most immediate need to be aware were those from which he received the most obvious benefit, and the obligations those by the non-fulfilment of which he was in most danger of being subjected to punishment. Of less importance to the individual, and less immediately intelligible, were the rights and obligations that made up the machinery of government, and which in turn, apart from protecting the community against foreign enemies, were only valuable insofar as they created and secured the rights of individuals.<sup>61</sup> At this point, Gubernia complained that ‘this is not the order pursued by Doctor Blackstone’. Astræa retorted that Blackstone’s object was ‘to recommend his work to the favour of the constituted authorities’, whereas her object was ‘to instruct, and by the instruction serve and benefit, those for whose sake they have been or ought to have been so constituted’. For the politically radical Bentham, the two elements of the choice of arrangement and the corrupt purpose of the *Commentaries* were intimately linked: ‘Public is to Private what plural is to singular.

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<sup>61</sup> UC xxxi. 219 (19 November 1828).



[Blackstone] sets about explaining plurals before any explanation given of the singulars of which they are composed. He speaks of the few considered as governors, before speaking of the many considered as governed.’ It was far more important to a person to know what rights he himself had rather than those which the King had, especially when he realized that the latter could only be understood once the former had been explained.

The right which an individual has to the hat he has on his head, is of more immediate and certain importance to him than the right which the King has to his crown. The machinery by which the individual’s right is created and conferred is more simple than that by which the King’s right is created and conferred: the operation, when explained, will be found more easily intelligible.<sup>62</sup>

In the arrangement adopted in the *Commentaries*, Blackstone, as the mouthpiece of rulers, had elevated the rights of the King above those of the people

Bentham continued his attack on the overall structure of the *Commentaries* through a consideration of Blackstone’s discussion of rights as it appeared in *An Analysis of the Laws of England* (in essence an abridgment of the *Commentaries*). Referring to Blackstone’s arrangement of the work into rights of persons, rights of things, private wrongs, and public wrongs, Bentham remarked:

In this arrangement may be seen a semblance of apt method and expression: but the reality ... is wanting. By this method of his, clear conceptions not capable of being afforded, hence the necessity of another, by which such conceptions may be afforded, and by reference to which the clouds in which his method is involved may be dispelled.

Bentham took in hand the fourth Chapter of the first Book of *Analysis*,<sup>63</sup> where Blackstone stated that the objects of the laws of England were first rights, and second wrongs, and went on to divide rights into the rights of persons and the rights of things. Blackstone noted that ‘Wrongs are the Privation of Rights’, but, complained Bentham, the word ‘privation’ was obscure. No one talked about the privation of a right. Had Blackstone said ‘violation’ or

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<sup>62</sup> UC xxxi. 220 (19 November 1828). For an insightful statement of Bentham’s mature views on the logical structure of a legal system see ‘Letters to Count Toreno’, Letter V, in *Of the Liberty of the Press, and Public Discussion*, C Pease-Watkin and P Schofield (eds), (Oxford, Clarendon Press, 2012) 186–229.

<sup>63</sup> Blackstone, *Analysis*, 6–8.

‘infringement’, then ‘clearness, instead of obscurity, would have been the result’. Bentham pointed out that Blackstone, in order to explain ‘the conception attached by him to the word Wrongs’, had referred to ‘the conception attached by him to the word *right*’, but he had neither given, nor had attempted to give, any such explanation. In Blackstone’s interpretation of law as it is, ‘at the very first step’ there was ‘confusion’, for he had then referred to the rights of persons and the rights of things, and seemed to think that, because he had used the same preposition *of* in both cases, that he had conveyed the same idea, ‘but in reality no such thing has he done’. The word *of* denoted ‘the idea of possession’, and while it made sense to say that persons possessed things, both corporeal and incorporeal, it did not make sense, except figuratively, to speak of a thing possessing something. You possess your coat, but your coat does not possess anything, except properties such as being made of a certain sort of cloth and being of a certain colour, and such qualities were not ‘real beings—parcels of matter—as your coat itself is: they are but so many fictitious beings—fictitious entities—spoken of as if they were really existing—spoken of in this way of necessity for the purposes of discourse’. When applied to persons, the word *right*, continued Bentham, indicated the possession of the right; when applied to things, it indicated the subject-matter of the right.<sup>64</sup>

Bentham advanced a further criticism—that Blackstone had confounded rights with duties. Blackstone had written that ‘when the Person TO whom [rights] are due is regarded, they are called (simply) RIGHTS; but when we consider the Person FROM whom they are due, they are then denominated DUTIES’. Bentham retorted that a right was a benefit, while a duty

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<sup>64</sup> UC xxx. 110–12 (25 August 1828). N Graham, ‘Restoring the “Real” to Real Property Law: A Return to Blackstone?’ in Prest (ed), *Blackstone and his Commentaries*, 150–67 at 152, describes Bentham’s definition of property as ‘metaphysical’ and, therefore, problematic in that ‘it detaches land use practices from the physical capacities of the property itself’. Such a view would have made no sense to Bentham. His point was not to detach land from property, but on the contrary to link the abstract notion of property (the name of a fictitious entity) to the land or other substances and services (names of real entities or names of fictitious entities more nearly related to real entities) that formed the subject-matter of property. In other words, Graham’s account fails to appreciate that Bentham’s point was to distinguish between the notion of property and the physical matter that constituted the subject-matter of property. Physical matter was what existed, while the term property denoted the fact that there existed certain rights and obligations in relation to that matter. See Schofield, *Utility and Democracy*, 9–27.

was a burden, and while benefits and burdens were ‘necessarily concomitant to each other’, they were ‘essentially different and ever opposite’. You had a right to wear your coat, while every one else was laid under the obligation of not meddling with it. It would have made as much sense for Blackstone to have said ‘that Husband and Wife are one and the same person, because a Husband can not be such unless he has a Wife, nor a Wife such unless she has a Husband’. Bentham was, of course, picking up on Blackstone’s loose expression, though his point was that ideas such as rights and duties were too important to be left in obscurity and confusion.<sup>65</sup> Instead of the term ‘duty’, Bentham explained that he preferred the term ‘obligation’. The word duty was more likely to convey the idea of a moral as well as a legal duty, than the word obligation that of a moral as well as a legal obligation. Bentham speculated that Blackstone, whether aware of it or not, had used the word duty in order ‘to inculcate the persuasion that, whatever it is made a man’s *legal obligation* or say *duty* to perform, it is thereby also made the same man’s moral duty to perform’. To admit this would be as much as to say that it was ‘the duty of every subject to pay absolute obedience to whatsoever mandate should emanate from the ruling one or ruling few, and that, by absolute obedience on the one part, create and confer absolute power on the other’.<sup>66</sup> In other words, this was a further example of the familiar criticism that Blackstone had confounded expository with censorial jurisprudence, with a view to serving the interests of rulers.

Even though Bentham gave Blackstone credit for presenting English law in a more coherent manner than any other writer, there remained a great deal of incoherence within the structure adopted by Blackstone. As Bentham had stated in *A Fragment on Government*, Blackstone had arranged ‘the elements of Jurisprudence, as wants little, perhaps, of being the best that a technical nomenclature will admit of’, but the problem was that ‘a technical

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<sup>65</sup> For Bentham’s sustained critique of such a confusion in the French Declaration of Rights of 1789 see ‘Nonsense upon Stilts’, in *Rights, Representation, and Reform: Nonsense upon Stilts and other writings on the French Revolution*, P Schofield, C Pease-Watkin, and C Blamires (eds), (Oxford, Clarendon Press, 2002) 317–401.

<sup>66</sup> UC xxx. 112–13 (25 August 1828).

arrangement, governed ... by a technical nomenclature can never be otherwise than *confused* and *unsatisfactory*'.<sup>67</sup> In 'Blackstone familiarized', Bentham continued the theme of criticizing in minute detail the vagaries of Blackstone's expression by reference to Blackstone's horse. Having given his own exposition of the notion of the 'legal possession' of an object which was under the physical control of another person, and in particular addressed the notion of 'recaption',<sup>68</sup> Bentham went on, in the fashion of *A Fragment on Government*, to criticize in detail Blackstone's account of recaption in the *Commentaries*, which he had exemplified, under the head of 'Private Wrongs', by reference to his horse. According to Blackstone,

this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law.<sup>69</sup>

Bentham's first point was that, had Blackstone merely referred to 'bodily contention', his explanation would have been clearer, although further elucidation of these words would be required. The insertion of 'strife' and 'the peace of society', however, produced uncertainty. The raising of 'doubts upon doubts' was typical of everything that Blackstone said, reflecting 'the property of whatever is said under the name of Common Law to make us believe that we know what, in case of our doing so, would be done to us by the Judge—though that same knowledge is essentially impossible'. The Common Law had no determinate form of words. While one party in a case might say that such and such were the words of the Common Law, his adversary might deny this and say that some other set of words were the words of the Common Law. Insofar as each party claimed that what the other party said was false, they were speaking the truth; but insofar as each party claimed that their set of words was the

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<sup>67</sup> Bentham, *Comment/Fragment*, 415.

<sup>68</sup> See UC xxx. 77–8, xxxi. 23–9 (21, 23, 26–8 August 1828).

<sup>69</sup> Blackstone, *Commentaries*, iii. 3.

Common Law, what they said was false.<sup>70</sup> As for ‘Blackstone’s horse’, it was impossible to know ‘who, in the several cases put by its master, would with propriety, and with correspondent legal effect, in the event of a suit at law, be said to be in possession of it’.<sup>71</sup> Here, perhaps, Bentham saw Blackstone as representing law as it pretends to be: the reality was much messier and much less certain.

Another case, explained Bentham, ‘which, under *Law as it is*, is richly pregnant with doubts is that of *distress*’, where certain persons had the right to take goods from the possession of some other persons, the ‘principal example’ being that of landlords at the charge of their tenants. Blackstone had considered distress ‘in near neighbourhood with the case of the horse’.<sup>72</sup> Having thus discussed redress by the act of the party without recourse to a judge, that is recaption and distress, Blackstone ‘flies off from the topic of wrongs, and proceeds to tell us of the ulterior mode of redress, to wit by recourse to the Judge’, leaving further consideration of wrongs to some future unspecified point in the work.<sup>73</sup> Bentham’s point was that, having discussed wrongs in the first two Chapters of Book III, Blackstone confusingly devoted the following four Chapters to a discussion of the histories and jurisdictions of the various English courts. A further related inconsistency in Blackstone’s arrangement noted by Bentham was that ‘his exposition of the functions and functionaries [of the] Legislative and Administrative Departments’ appeared under the ‘Rights of Persons’, while those of the Judiciary appeared under ‘Private Wrongs’, even though they dealt with public wrongs as well as private ones.<sup>74</sup>

Bentham’s purpose in these passages of ‘Blackstone familiarized’ was to contrast what he considered to be his own clear and concise account of the nature of fundamental legal terms, explained through the medium of universal jurisprudence, with the confused and

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<sup>70</sup> UC xxxi. 30 (28 August 1828).

<sup>71</sup> UC xxxi. 31 (28 August 1828).

<sup>72</sup> See Blackstone, *Commentaries*, iii. 4–9.

<sup>73</sup> UC xxxi. 59 (28 August 1828).

<sup>74</sup> UC xxxi. 59 (28 August 1828).

incoherent account of English law given by Blackstone, resulting from his concern to show that ‘every thing is as it should be’.<sup>75</sup> The wider purpose in the essay as a whole was to undermine the legitimacy of the English legal establishment in the eyes of the subject many, by showing how it worked in the interests of the ruling few, and not, as was often pretended, in the interests of the whole community. ‘Blackstone familiarized’ was, therefore, just one more contribution to Bentham’s campaign to introduce representative democracy into Britain.

## VI. Conclusion: New Ideas

In material written in October and November 1814 for a chapter entitled ‘J.B.’s new ideas derived from Logic’ and intended for his essay on ‘Logic’, Bentham made a list of fourteen such ‘new ideas’.<sup>76</sup> The eighth point in the list was ‘Conditions to the accomplishment of any object, in so far as depends upon human means.’ Bentham explained that, for any agent to perform any action, including ‘the due execution of any public trust’, both will and power were necessary. Power was either *ab intrà*, that is to say proportionate to the degree of knowledge or ‘intelligence’ and active talent (that is the willingness to perform an appropriate action) possessed by the actor, or *ab extrà*, that is to say proportionate to ‘the extent and degree of compliance on the part of those over whom it is considered as being exercised’. Where a person had a moral duty to perform an act, the person who possessed ‘the appropriate will or inclination’ thereby possessed ‘the virtue of *probity*’.<sup>77</sup> Hence, the three requisites were probity, intelligence, and active talent, which Bentham had, by 1822, renamed and to some extent recast, as moral aptitude, intellectual aptitude, and active aptitude. The securing of official aptitude became the principal theme of Bentham’s later writings on representative democracy, and in particular of his ‘Constitutional Code’, the major endeavour

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<sup>75</sup> According to Bentham, the qualities desirable in any body of law were clearness, correctness, completeness, conciseness, compactness, and consistency: see *‘Legislator of the World’: Writings on Codification, Law, and Education*, P Schofield and J Harris (eds), (Oxford, Clarendon Press, 1998), 180.

<sup>76</sup> See British Library Additional MS 33,550, fos. 4–47.

<sup>77</sup> BL Add. MS 33,550, fo. 35 (25 October 1814).

of the final decade of his life.<sup>78</sup> He explained that he had derived the threefold division from Blackstone:

Wisdom, probity and power, of these three—on attending Blackstone’s Lectures, and afterwards reading them when in print under the name of *Commentaries on the Laws of England*—I observed the concurrent existence laid down by him as a condition necessary and at the same [time] sufficient to ensure, in any given political community, the existence of good government.<sup>79</sup>

In the *Commentaries*, Blackstone had referred to ‘the three grand requisites ... of wisdom, of goodness, and of power’ as ‘the requisites that ought to be found in every well constituted frame of government’.<sup>80</sup> Bentham complained that Blackstone had restricted his analysis to ‘government in the highest stations’, and had not showed how the qualities were related to each other, nor whether the division was ‘exhaustive’. Bentham had recognized, however, that ‘the enumeration and division’ could be applied to all political offices, and indeed to all actions whatsoever.<sup>81</sup> Hence, the central organizing principle of ‘Constitutional Code’, the implementation of which would have seen the overthrow of every institution that Blackstone cherished—the balanced constitution, the Common Law, the established Church, and even the University of Oxford—had emerged from his engagement with Blackstone. Bentham’s experience of attending Blackstone’s lectures had not, therefore, from his perspective, been entirely fruitless. It also emphasizes the point that, had there been no Blackstone, there would have been a very different Bentham.

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<sup>78</sup> See Schofield, *Utility and Democracy*, 142–5, 272–303.

<sup>79</sup> BL Add. MS 33,550, fo. 35 (25 October 1814).

<sup>80</sup> See Blackstone, *Commentaries*, i. 39.

<sup>81</sup> BL Add. MS 33,550, fo. 36 (25 October 1814).

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