



Bentham Versus Blackstone¹

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Jeremy Bentham's first published work, *A Fragment on Government*, appeared in 1776, a date memorable for other reasons. Even as a literary event it was eclipsed by such more notable works as *The Wealth of Nations* and *The Decline and Fall of the Roman Empire*. Yet there is a peculiar appropriateness in Bentham's maiden appearance at that time. For his philosophy was one of several versions of the "new science of politics" that competed for dominion in the New World.

Bentham himself was properly impressed by the historical importance of his work. His copy of the *Fragment* bore the handwritten note: "This was the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor-worship on the field of law."² When the book was reissued in 1838 as part of Bentham's collected works, an admiring editor included that comment. It is an eminently quotable statement, and few of his biographers and commentators have been able to resist quoting it—or, more important, to resist accepting it at face value.

"The trammels of authority and ancestor-worship" refers to William Blackstone, whose *Commentaries on the Laws of England* was the authoritative exposition of English law. Bentham himself, as a young student of the law, had attended Blackstone's lectures at Oxford in the 1760s. More than half a century later, he recalled that even as a sixteen-year-old he had listened to those lectures with "rebel ears," although he had not had the audacity to think of "publishing my rebellion."³ When he did get around to publishing it, in the *Fragment*, it created—again, as he later remembered it—a "sensation." He published it anonymously, not out of any lack of "audacity," but because he thought that secrecy would stimulate curiosity

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2. *Works of Jeremy Bentham*, ed. John Bowring (Edinburgh, 1838–43), I, 260.

3. Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government*, J. H. Burns and H. L. A. Hart (London, 1977), p. 526. (All citations are to this edition, unless otherwise noted.)

and thus sales. The strategy, he claimed, succeeded. The book was attributed to various authors, all of them “of the very first class”: Lord Mansfield (Chief Justice of the King’s Bench), Lord Camden (formerly Lord Chancellor), and John Dunning (formerly Solicitor-General, better known by his later title, Lord Ashburton).⁴ The sensation, unfortunately, dissipated when the true authorship was revealed by a doting parent.

Such was Bentham’s account, written in 1822 and first published as a “Historical Preface” to the 1838 edition of the *Fragment*. About fifty pages in length (half as long as the *Fragment* itself), rambling, anecdotal, often abusive, at times almost incoherent, the essay would surely have been dismissed as the meanderings of a man in his dotage, had it come from any less a personage than Bentham. At the very least, its allegations would have been subjected to scrutiny. Is there any independent evidence that the book was attributed to those notables, that it produced a “sensation,” that Mansfield was “delighted” with it, while others greeted it with “alarm and displeasure”?⁵ Almost all of Bentham’s biographers, commentators, and editors have echoed his assertions, often without making it clear that they were his. Indeed, such facts as Bentham himself offers belie his claims. In the “Historical Preface” he reprinted the whole of one of the reviews (there were two in all), and explained that it would have stimulated controversy had a friend not chosen to reply to it, thus putting an end to the welcome publicity. But the review said almost nothing about the substance of the book, objecting rather to Bentham’s “peculiar” and “tedious” mode of argument and his “conceit” in presuming to argue with Blackstone—hardly a selling review. Nor was the complaint about the lack of advertisements and the difficulty of obtaining the book from the booksellers—as if “the author may have had reasons for introducing it as privately as possible”—evidence of its having created a sensation.^{6,7}

There is a more interesting sense in which Bentham’s account is self-contradictory. If the *Fragment* could have been attributed to such eminences of the legal establishment as Mansfield, Dunning, and Camden, if it could have been received warmly by Mansfield himself and (again according to Bentham) by such other Tories as Lord North and Samuel Johnson, and if these claims could have been accepted and perpetuated by generations of commentators—surely we ought to reconsider the conventional roles in which Bentham and Blackstone have been

4. *Ibid.*, pp. 504, 526, 540.

5. *Ibid.*, pp. 515, 517.

6. *Ibid.*, pp. 545–7.

7. According to his friend and editor, John Bowring, the first edition consisted of five hundred copies. A year after publication, Bentham reported to his brother that the stock of one bookseller had been sold out, but he later discovered that a parcel of the books had been mislaid in the warehouse. See *Correspondence of Jeremy Bentham*, ed. Timothy L. S. Sprigge (London, 1968), II, 103, 148–9 (March 10, 1777).

cast. Perhaps Blackstone was not quite the sacred cow of the establishment and Bentham the lone iconoclast bravely defying the “trammels of authority and ancestor-worship.” Not the least of the curiosities of this affair is the fact that no one has thought to ask how so subversive a work could have been attributed to the very people whose views were being subverted.

One final oddity: Toward the end of the preface Bentham casually mentioned one other person to whom the book had been attributed, John Lind. Today that name is virtually unknown, but at the time it was far better known than Bentham's. Lind was the unofficial minister in London of the king of Poland, a friend of North and Mansfield and an occasional writer and journalist. In 1774 he wrote a critique of Blackstone which he gave Bentham for his comments. Bentham was so taken with the idea that after editing Lind's essay he decided to write his own, whereupon Lind good-naturedly turned over the subject to him. Although Bentham privately acknowledged that Lind's was the “parent” work to which his own was “much indebted,” he failed to make such an acknowledgment in public. Instead, he accused Lind of plagiarizing from him—the charge involving several sentences in a letter by Lind on another subject published in a newspaper.⁸ Whatever else the story suggests about Bentham's character, it confirms the fact that Bentham was not alone in challenging the authority of Blackstone and that the intellectual atmosphere of the time was hardly as repressive and conformist as Bentham might lead one to think.

A Fragment on Government is sometimes described as a commentary on Blackstone's *Commentaries*.⁹ It is in fact a commentary on seven pages of the introduction to that four-volume work. And those seven pages, as Bentham noted, were a “digression,” casual reflections on the nature of sovereignty and the origins of society and government. Reading the few pages that inspired this impassioned critique, one is struck by how unprovocative they were even from Bentham's point of view. If one did not know otherwise, one might attribute some of Blackstone's sentences to Bentham himself: the pronouncement, for example, on the sovereignty of the legislature (“sovereignty and legislature are indeed convertible terms; one cannot subsist without the other”); or the absolute nature of sovereignty (“supreme, irresistible, absolute, uncontrolled”); or the requisites of sovereignty (“wisdom to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge

8. For a more complete account of this episode, see Gertrude Himmelfarb, “Bentham Scholarship and the Bentham ‘Problem,’” *Journal of Modern History*, 1969, pp. 200–4. Lind's manuscript (or part of it) is in the collection of Bentham papers at University College London (Mss. XCV: 1–28).

9. The *Fragment* should not be confused with Bentham's *Comment on the Commentaries*, a more ambitious but incomplete work which was first published almost a century after his death. But even this much larger work dealt almost entirely with two sections of Blackstone's introduction.

and intention into action”).¹⁰ Even the account of the origins of society was less controversial than might be thought, since the “social contract” was described as a figurative expression which did not imply any actual historical contract or state of nature.¹¹ The only part of this section that was obviously objectionable to Bentham was the eulogy of “mixed government”: a form of government “so admirably tempered and compounded” that it preserved all the virtues of the three classical forms and combined them in a harmonious whole.¹²

If Bentham made so much of this digression, it was because he was convinced that Blackstone was a “determined and persevering” enemy of reform and that “the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works.”¹³ And if he spent less time on the substantive issues and more on logical flaws—inconsistency, imprecision, faulty reasoning—it was because he believed that moral deficiencies revealed themselves in rational deficiencies, that Blackstone’s “antipathy to reformation” expressed itself in “obscure and crooked reasoning.”¹⁴

The irony is that Blackstone, whatever might be said of his antipathy to reformation, did accomplish a considerable reform, and precisely of the kind that Bentham himself was later to undertake (with far less success). The *Commentaries*, after all, was the first serious attempt to systematize and clarify the entire body of English law. Elsewhere Bentham paid grudging tribute to it on this account, admitting that, for all its faults, it was a “work of light, in comparison with the darkness which previously covered the whole face of the law.”¹⁵ But in the *Fragment* the most he would concede was a certain felicity of style; and even this was cause for criticism since it served to make attractive “a work still more vicious in point of *matter* to the multitude of readers.”¹⁶

Bentham’s most devoted admirers would be hard put to absolve him of “crooked reasoning” (still more to attribute to him any stylistic felicity). A crucial part of his argument centered on a phrase that appeared not in this section but in the final volume of the *Commentaries*: “everything is now as it should be.”¹⁷ Bentham cited this as if it had been applied to the entire judicial and constitutional system of England. But in fact (as Bentham admitted at one point), it referred

10. William Blackstone, *Commentaries on the Laws of England* (Oxford, 1765–9), I, 46–9. This, the first edition, was the one used by Bentham (*Fragment*, p. 401). Unless otherwise noted, all references are to this edition.

11. *Ibid.*, p. 47.

12. *Ibid.*, p. 51.

13. *Fragment*, p. 394.

14. *Ibid.*

15. “A General View of a Complete Code of Laws” (1802), in *Works*, III, 163.

16. *Fragment*, p. 413.

17. *Ibid.*, pp. 400, 407; Blackstone, *Commentaries*, IV, 49. Bentham quoted this first as “everything as it should be,” and then as “everything is as it should be.”

only to the Church's laws regarding heresy. On another occasion he deliberately omitted Blackstone's qualification of a statement, and then justified that omission in a typically obtuse fashion: "When a sentiment is expressed, and whether from caution, or from confusion of ideas, a clause is put in by way of qualifying it that turns it into nothing, in this case if we would form a fair estimate of the tendency and probable effect of the whole passage, the way is, I take it, to consider it as if no such clause were there."¹⁸ Elsewhere he chose to disregard not only the qualification but the sentiment itself, the substance of Blackstone's opinion, when it belied the view that Bentham ascribed to him. Thus when Blackstone was perverse enough to criticize a particular law and propose a reform, Bentham found these so out of keeping with his "general disposition" that "I can scarce bring myself to attribute them to our Author"; at best they were evidence of "an occasional, and as it were forced contribution, to the cause of reformation," and therefore not to be taken seriously.¹⁹

If Bentham sometimes refused to attribute to Blackstone what Blackstone actually said, at other times he attributed to him opinions and words he never uttered. He made great play, for example, with the "perfection" claimed for the social contract: the "*perfect* habit of obedience" presumed to exist in political society and "perfectly" absent in natural society; the "*perfect state of nature*" or "state of society perfectly natural" as against a "*government* in this sense perfect."²⁰ From the repeated and italicized appearance of "perfect," and the large objection Bentham took to it, one might suppose that the word was Blackstone's. In fact, he never used it in this context. On the contrary, he went to some pains to make it clear that there never was any state of nature, that the very notion was "too wild to be seriously admitted."²¹ His discussion of the subject was deliberately tentative and qualified, quite the opposite of anything like the "perfect state of nature" Bentham ascribed to him.

Nor did Blackstone credit the British constitution or government with "perfection," as Bentham claimed. Certainly in the seven pages under review, the government did not appear as "all-powerful + all-wise + all-honest = all-perfect."²² The only time Blackstone used the word "perfection" in this context was when he spoke of those qualities of government—wisdom, goodness, and power—"the perfection of which are among the attributes of Him who is emphatically styled the Supreme Being."²³ The point of this statement was exactly the opposite of

18. *Ibid.*, p. 409.

19. *Ibid.*, p. 420.

20. *Ibid.*, pp. 429–31.

21. *Commentaries*, I, 47.

22. *Fragment*, p. 472.

23. *Commentaries*, I, 48.

that imputed to him by Bentham. It was God alone who had those virtues in “perfection”; human beings and institutions had them only to an imperfect degree.²⁴ Even Blackstone’s praise of mixed government was expressed in utilitarian and relative terms. He may have been mistaken or excessive in his praise, but not absurd or nonsensical.

In his preface Bentham announced that his task was essentially negative—to “overthrow” a work that was all the more “vicious” because it was so influential.²⁵ Toward the end he confronted the obvious question: If Blackstone’s idea of the constitution was so thoroughly unsatisfactory, what was Bentham’s own idea of it? His answer was disdainful and dismissive. “I may have settled it with myself and not think it worth giving; but if ever I do think it worth giving, it will hardly be in the form of a comment on a digression stuffed into the belly of a definition.”²⁶ One can imagine the ridicule with which he would have greeted such an evasion on Blackstone’s part.

The *Fragment* itself yields only a few clues by way of an answer. The most positive idea in the book, and its most obvious claim to distinction, was the principle of utility. The opening page of the preface enunciated the “fundamental axiom”: “It is the greatest happiness of the greatest number that is the measure of right and wrong.”²⁷ But that idea was only occasionally invoked and not at all developed, and the axiom itself, as Bentham acknowledged, originated not with him but with Beccaria, Helvétius, and Priestley. More distinctive was Bentham’s assertion that utility was “the sole and all-sufficient reason for every point of practice whatsoever.”²⁸ While the principle of utility was common enough, in that exclusive and absolute form it may well have been unique to him. Thus he praised Hume for demonstrating that “the foundations of all *virtue* are laid in *utility*,” but went on to

24. Elsewhere in the *Commentaries*, although not in the section analyzed in the *Fragment*, Blackstone did use language suggestive of “perfection.” But when he did so, he qualified it by saying that while the principles of the constitution approached perfection, the practice fell short of it, which was why it was so important to understand and respect the principles. The last paragraph of the work, which he himself referred to as a “panegyric,” concluded by speaking of the faults of the constitution:

Nor have its faults been concealed from view; for faults it hath, lest we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge entrusted principally to the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament. The protection of the liberty of Britain is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind. (IV, 435)

25. *Fragment*, pp. 420, 413.

26. *Ibid.*, p. 473.

27. *Ibid.*, p. 393. Here, as elsewhere, I have eliminated most of the italics. Bentham used italics so indiscriminately that to reproduce them all gives an undue impression of emphasis.

28. *Ibid.*, p. 448.

rebuke him for making “exceptions” to that principle.²⁹ Bentham’s own principle, however, while absolute and unqualified, had little positive substance; it was not even related to the “greatest happiness” axiom he had enunciated earlier. Instead, it served an essentially negative, critical function. There is surely some truth in Bentham’s criticism of Blackstone: that by being an “expositor” of the law rather than a “censor” (critic), by giving reasons for the law as it is rather than as it ought to be, Blackstone was bestowing upon the law an implicit “approbation.”³⁰ The converse could be said of Bentham, who assumed the exclusive role of “censor”; by making utility the sole basis of the law as it ought to be and ignoring the reasons for the law as it is, Bentham implicitly illegitimized the existing body of law.

On one subject Bentham and Blackstone were in agreement: their opposition to American independence. Although the subject as such was not mentioned either in the *Commentaries* or in the *Fragment* (even in the later editions of those works), their views may be deduced from their discussion of other issues—and from what was not discussed.³¹ Blackstone’s opposition to independence, for example, could have been used by Bentham as an example of his incorrigible “antipathy to reformation”—had Bentham himself not been equally opposed to it. Blackstone’s attitude is not surprising; as a staunch defender of the British Constitution and a supporter of the Tory government, he was bound to resist the Revolution. Bentham, on the other hand, professedly independent, untrammled by authority and unawed by the constitution, might have been expected to sympathize with the American cause. How could he do less than Edmund Burke?

Bentham did, in fact, do far less. At one point in the *Fragment* he seemed to suggest that his philosophy allowed for a great tolerance of revolution, in principle at least, than Blackstone’s. Blackstone’s idea of a social contract, Bentham argued, made “a *necessity* of submission”; having contracted to enter society and form a government, to exchange their wills for the will of the sovereign, the people could not reverse that decision.³² This might have been a telling argument against a Hobbesian contract, but not against the Lockean variety which Blackstone held to and which posited, in effect, two contracts, one establishing society and the other

29. *Ibid.*, p. 440.

30. *Ibid.*, pp. 398–9.

31. Again and again one awaits some reference in the *Fragment* to America: in the chapter on the “Formation of Government,” when Bentham alluded to the American Indians but not to the colonists; or when he wondered at what point the Dutch colonies, claiming independence from Spain, could be said to be in a state of rebellion and therefore in a state of nature; or in the following chapter, when he cited numerous cases of political conflict (between the Spaniards and Mexicans, Charlemagne and the Saxons, and other more obscure examples) without ever mentioning the obvious case of George III and the Americans. He even derided Blackstone’s use of the word “founders,” again without any reference to America. *See* *ibid.*, p. 452.

32. *Ibid.*, p. 481.

government, so that the latter could be overthrown without reverting to a state of nature. This was a small difficulty, however, compared with what was to follow. For having accused Blackstone of making a necessity of submission, Bentham then proceeded to accuse him of being “eager to excite men to disobedience,” and to do so upon “the most frivolous pretences,” indeed, upon “any pretence whatsoever.” This incitement to sedition Bentham found in the doctrines of natural and divine law. Blackstone had written that no human laws should be “suffered to contradict” the laws of nature and of revelation, and if any did so, “we are bound to transgress that human law.” The practical effect of this injunction, Bentham said, was to force resistance “as a point of *duty*,” to “impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like.”^{33,34}

In place of this “dangerous maxim” Bentham proposed the doctrine of utility, which permitted each man to calculate his own “juncture for resistance” against the “probable mischiefs of submission.” While this calculus might justify the resistance of any particular individual, it did not provide any “common sign” or “common signal” that could serve as a collective call to resistance. In the absence of such a common sign, there were no grounds for revolution, and the sovereign remained inviolate. Moreover, sovereignty itself was unlimited. “Unless such a sign then, which I think impossible, can be shown, the field, if anyone may say so, of the supreme governor’s authority, though not infinite, must unavoidably, I think, unless where limited by express convention, be allowed to be indefinite.”³⁵ Lest it be thought that “express convention” referred to a written constitution limiting the sovereign authority, Bentham explained in a footnote that what he had in mind was the case of a state which had submitted itself to the government of another. Whatever infelicities or ambiguities might be found in this passage (it was typical of Bentham’s mode of expression and reasoning), the burden of his argument was clear. Revolution was “impossible” and sovereignty was “indefinite.” The supreme body, the legislature, had no “assignable” or “certain” bounds; there was nothing “they *cannot* do,” nothing that was “illegal” or “void” or “exceeding their authority.”³⁶

Since sovereignty was absolute, the question of whether a government was

33. *Ibid.*, pp. 482–3.

34. This is, in fact, the way some radicals read Blackstone. William Cobbett, for example, much preferred him to Bentham (even the later Bentham, who professed to be a radical). In 1818, at a time of social unrest and political agitation, Cobbett cited Blackstone (perhaps not quite accurately) on the right of resistance. “I say, therefore, upon this point, what judge blackstone says: and that is, that the right to resist oppression always exists, but that those who compose the nation at any given time must be left to judge for themselves when oppression has arrived at a pitch to justify the exercise of such right.” See William Cobbett, in *Political Register*, 1818. His *Legacy to Labourers* (1834) was also full of quotations from Blackstone.

35. *Fragment*, p. 484.

36. *Ibid.*, pp. 485–6.

free or despotic depended not upon any “limitation of power” but upon “circumstances of a very different complexion”:

On the manner in which that whole mass of power, which, taken together, is supreme, is, in a free state, distributed among the several ranks of persons that are sharers in it:—on the source from whence their titles to it are successively derived:—on the frequent and easy changes of condition between the governors and governed; whereby the interests of the one class are more or less indistinguishably blended with those of the other:—on the responsibility of the governors; or the right which a subject has of having the reasons publicly assigned and canvassed of every act of power that is exerted over him:—on the liberty of the press; or the security with which every man, be he of the one class or the other, may make known his complaints and remonstrances to the whole community:—on the liberty of public association; or the security with which malcontents may communicate their sentiments, concert their plans, and practise every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them.³⁷

This passage may seem to support the claim that Bentham was a liberal in the American tradition established by the Founding Fathers. But in the context of the book as a whole, that claim is dubious. Here, as in his later writings, Bentham insisted that it was important to provide for good government without in any way limiting the power of government; indeed, the legislature was required to have unlimited power in order to satisfy the principle of utility and achieve the greatest happiness of the greatest number. It is questionable whether this doctrine of an “omnipotent legislature,”³⁸ subject only to the kinds of conditions Bentham specified—frequent elections, publicity, a free press, and freedom of association—is “liberal” in the usual meaning of that word, and even more questionable whether it resembles anything remotely like the American mode of liberalism, which depends precisely upon the limitation of power.

The denial of any limitation on power is hardly consistent with the kind of government established in the wake of the American Revolution. Indeed, the denial of the possibility of revolution would seem to preclude any kind of American revolution. Yet Bentham later gave quite a different account of his early views. In the preface to the *Fragment* written half a century later, he contrasted the English government, “the least bad of all bad governments,” with that of the United States, “the first of all governments to which the epithet of good, in the positive sense of the word, could with propriety be attached.”³⁹ He did not specify what was

37. *Ibid.*, p. 485.

38. *Constitutional Code*, in *Works*, IX, 119.

39. *Fragment*, pp. 502–3.

good about the American government, but since he never wavered in his belief that checks and balances, the separation of powers, judicial review, a bicameral legislature, and a bill of rights were unequivocally bad, the “epithet of good” must have been considerably qualified.

Bentham also later claimed that he had not opposed the American Revolution as such but had only objected to the ground on which the Americans had justified their revolution—the principle of natural right instead of utility.⁴⁰ This is a plausible view of the matter, but not, as it happens, a true one. In 1776, when Lind was writing a pamphlet attacking the colonists, Bentham prepared an outline of the arguments that should be used against them. Making no mention of either utility or rights, he based his case entirely on the principle of sovereignty: the “power vested in the crown” which invalidated the American claim to independence.⁴¹ Nor did he alter his position after independence had been achieved. Five years after the end of the American war, having almost completed his *Principles of Morals and Legislation*, he prepared to send a copy to Benjamin Franklin, with a letter candidly expressing his disapproval of the revolution. “If any...of the ideas contained in it [the book] should be the means of adding to the prosperity of *your* country (since the unhappy distinction is now made) it will be some consolation for the misfortunes you have been a means of bringing upon *mine*.”⁴²

Even the reference in the *Fragment* to the liberty of the press—one of the very few times the word “liberty” appears in that book—turns out to be problematic in the light of Bentham’s other writings at the time. Among his manuscripts is a thirty-page document entitled “Plan for a Government Newspaper,” written soon after the publication of the *Fragment*. Provoked by the “malignant,” “virulent,” “incendiary” attacks on the government in the opposition press (attacks directed especially against Lord North’s policy on America), he recommended that the government establish its own newspaper to present its own point of view. The bulk of his proposal consisted of a series of “maneuvers” and “screens” designed to conceal the government’s ownership and control of the paper: a title containing some such word as “candid” or “impartial”; a price low enough to attract circulation but not so low as to arouse suspicion about the subsidy; a printer known to have been prosecuted under the libel laws; and occasional articles mildly critical of the government.

A government-owned newspaper was justified, Bentham argued, because “the business of conducting newspapers may be considered a very important branch of national education.” While a minister was not authorized to take that

40. “Memoirs,” in *Works*, X, 57, 63.

41. *Ibid.*

42. Mary P. Mack, *Jeremy Bentham: An Odyssey of Ideas* (New York, 1963), p. 363.

business “out of improper hands,” he did have the power to “put it *into* hands that he thinks proper.”⁴³ Bentham did not address himself to the propriety of secrecy and deception, the “maneuvers” and “screens” to prevent the public from knowing that the paper was owned and controlled by the government. Nor did he try to reconcile these stratagems with the principle of publicity he made so much of on other occasions, and which was one of his main securities against the abuse of power. Although nothing came of this proposal, it hardly inspires confidence in Bentham’s solicitude for the liberty of the press. And it reminds us once more how equivocal his liberalism was.

If Bentham was not as liberal and progressive as he is often made out to be, neither was Blackstone as benighted and reactionary. It is curious to find that only two years after his impassioned attack on Blackstone, Bentham endorsed a penal bill drafted by Blackstone and William Eden; the only changes he recommended were designed to make the regimen of the prisoners more arduous and to “augment the terror” of punishment. It was this bill, providing for prisons in the form of “Houses of Hard Labour,” that later inspired Bentham’s first reform proposal, the Panopticon; and his proposal was considerably harsher than Blackstone’s.⁴⁴ Blackstone also anticipated Bentham in advocating reforms of the criminal law, the game laws, and the laws governing property and inheritance. Even on the subject of parliamentary reform, Blackstone was amenable to change: in the *Commentaries* he criticized the rotten boroughs and suggested that there might be a reason to favor a “more complete representation of the people.”⁴⁵

But it was not for these reasons that the Americans, both before and after the Revolution, read Blackstone so diligently and, for the most part (with the notable exception of Jefferson), so respectfully. Long before Bentham proposed to create a “science” of the law by codifying and systematizing it, Blackstone had done just that. He had, in fact, used that very word, referring to the *Commentaries* as an attempt to create a “science of the law.”⁴⁶ Mill is often quoted as saying of Bentham: “He found the philosophy of law a chaos, he left it a science.”⁴⁷ But the same can be said—indeed, has been said—about Blackstone. The nineteenth-century jurist James Fitzjames Stephen was not alone in claiming that it was Blackstone who “first rescued the law of England from chaos.”⁴⁸

43. Bentham Papers, University College London, Mss. CXLIX.

44. Gertrude Himmelfarb, “The Haunted House of Jeremy Bentham,” in *Victorian Minds* (New York, 1968), pp. 39–40.

45. *Commentaries*, I, 172.

46. *Ibid.*, I, 4, 27, 30.

47. John Stuart Mill, “Bentham,” in *Essays on Politics and Culture*, ed. Gertrude Himmelfarb (New York, 1962), p. 113.

48. James Fitzjames Stephen, *A History of the Criminal Law of England* (London, 1883), II, 214–15.

Daniel Boorstin has argued that in making law accessible not only to lawyers but to all educated laymen, Blackstone “did more than any other writer in the English-speaking world to break down the lawyer’s monopoly of legal knowledge.”⁴⁹ This itself, as Bentham pointed out on other occasions, had a democratic effect, democratizing the law by demystifying it, as we would now say. It also had the effect of instilling among Americans a respect for English common law and principles of government. This is what Burke had in mind when he pointed out, on the eve of the Revolution, that nearly as many copies of the *Commentaries* had been sold in America as in England. That legal training, he said, gave the Americans the habit of thinking in terms of principles rather than mere grievances. The principles, moreover, were those of the mother country. “They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles.”⁵⁰

However much Blackstone himself opposed the American Revolution, he gave the revolutionists the heritage of parliamentary and legal institutions that has come down to us today as the “Anglo-American” tradition. That tradition has been much modified over the years, and in some respects (the principle of “one man one vote,” for example) in ways that might have displeased Blackstone and would certainly have pleased Bentham. But in other respects we are even further from Bentham today than we ever were, further not only from his idea of an “omnicompetent legislature” but also from his proposals for legal reforms: the abolition of the jury system, the elimination of legal procedures that impede the swift execution of justice, and changes in the rules of evidence to admit whatever evidence, however obtained and from whatever source, a judge might deem relevant (including the testimony of a wife against her husband or a lawyer against his client).

The conflict between Bentham and Blackstone reflected a profound difference of philosophy and disposition. What Blackstone and the Founding Fathers had in common, and what Bentham notably lacked, was a large tolerance for complexity. When Bentham quarreled with the idea of mixed government, he was not only opposing the particular “mix” favored by Blackstone; he was rejecting any kind of mix, any multiplicity of principles and institutions. His own “political and moral science” derived from a single principle: the “sole and all-sufficient” principle of utility.⁵¹ It was the singleness of that principle, as much as the principle itself, that he took to be an essential part of his science, just as it was the singleness

49. Daniel J. Boorstin, *Mysterious Science of the Law* (Boston, 1958), p. ii.

50. Edmund Burke, “Speech on Moving the Resolutions for Conciliation with the Colonies,” in *Works* (London, World’s Classics ed., n.d.), II, 185–90.

51. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart (London, 1970), p. 9; *Fragment*, p. 448.

of the legislature (“omnicompetent” and unicameral) that he took to be an essential feature of a rational polity.

The Founding Fathers, on the other hand, like Montesquieu, believed simplicity to be a feature of despotism and complexity a condition of liberty. So far from relying on a single principle, their “science of politics” was deliberately based upon the “efficacy of various principles.” Even while establishing a new nation and a new regime—and a republic at that—they deliberately retained as many features of the British system of law and government as were compatible with republicanism. Indeed, it was precisely a new government, and a republican one, that they believed most in need of a plurality of principles and competing institutions, of all the means that resourceful men could devise so that “the excellencies of republican government may be retained and its imperfections lessened or avoided.”⁵² Thus in addition to the separation of powers, checks and balances, judicial review, and bicameral legislature, they introduced one additional principle: federalism.

It is little wonder, then, that Blackstone, not Bentham, was a guiding spirit in the early years of the Republic. “In the history of American institutions,” Boorstin has written, “no other book—except the Bible—has played so great a role as Blackstone’s *Commentaries on the Law of England*.”⁵³ Bentham’s works, by contrast, were almost unknown in America during the formative years of the Republic and well into the nineteenth century. If today it is Bentham who more often engages our attention, who appears as the more “modern” and “relevant” thinker, that can only testify to a profound misunderstanding either of Bentham or of America.

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52. *The Federalist*, number 9.

53. Boorstin, p. i.

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Gertrude Himmelfarb (1922–2019) was professor of history at the Graduate School of the City University of New York. She authored the following books: *Lord Acton: A Study in Conscience and Politics* (1952), *Darwin and the Darwinian Revolution* (1959), *Victorian Minds: A Study of Intellectuals in Crisis and Ideologies in Transition* (1968), *On Liberty and Liberalism: The Case of John Stuart Mill* (1974), *The Idea of Poverty: England in the Early Industrial Age* (1984), *Marriage and Morals Among the Victorians* (1986), *The New History and the Old: Critical Essays and Reappraisals* (1987), *Poverty and Compassion: The Moral Imagination of the Late Victorians* (1991), *On Looking into the Abyss: Untimely Thoughts on Culture and Society* (1994), *The De-Moralization of Society: From Victorian Virtues to Modern Values* (1995), *One Nation, Two Cultures* (1995), and *The Roads to Modernity: The British, French, and American Enlightenments* (2004). Since her passing on December 30, 2019, many tributes to her and her exemplary and prodigious scholarship have appeared, including [one by Yuval Levin](#).

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