

**The Scientific Approach to Legal History and Legal Reform:  
comparing the legal philosophy, historical methodology, and legal  
science of Blackstone, Kames, and Bentham**

By

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A thesis submitted to  
University College London  
for the degree of  
PhD

January 2016  
Faculty of Laws  
UCL



**I, Kristi Gourlay, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.**

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## **Acknowledgements**

I would like to thank my supervisor Philip Schofield. Without his guidance and support this thesis would not have been possible. Thank you for believing in me and making me a better historian. I would also like to thank David Lieberman, whose feedback and suggestions inspired many ideas in this thesis. I like to think that Philip trained me to appreciate the importance in detail and precision – like looking at a masterpiece close up and seeing the detail that goes into the whole – and working with David was like stepping back and seeing how the detail comes together in the complete painting. Words cannot express how grateful I am to have worked with these two geniuses.

I would also like to thank the Bentham Project for their support, and the Faculty of Laws at University College London for their support and for providing me with funding to attend multiple conferences, which aided in the development of my thesis. Also, thank you to the Center for the Study of Law & Society at University of California, Berkeley for having me as a Visiting Scholar in Winter 2015. My time at Berkeley proved to be a fruitful experience. Furthermore, thank you to Ian Williams and Colm O’Cinneide for their advice and suggestions during the upgrade procedure. Likewise, thank you to Prince Saprai and Simon Palmer for reading the final draft of the thesis and providing helpful feedback.

Finally to my family in Canada – my mother, brothers, and sisters – thank you for always believing in me and always being there for me when I need you.



## Abstract

This thesis examines how William Blackstone, Lord Kames, and Jeremy Bentham each understood the significance of history in relation to legal development. By dedicating a chapter to each writer, discussing their legal and moral theory, and then examining their use of history within their writings, I show how each writer incorporated historical study within their legal sciences, and how it informed their ideas for legal reform.

Each writer was representative of a specific moral theory – natural law, moral sense and common sense, and utilitarianism – and advocated a type of legal system. Blackstone adopted natural law theory and argued that it was the common law's consistency with natural law that gave it validity. Kames advocated the idea of moral sense and common sense, and argued that legal change could occur within a court of equity. Finally, Bentham advocated the principle of utility, and argued that the English common law legal system should be replaced with a system of legislation based on the principle of utility. Thus, explaining the role that history played within their legal sciences provides a window into their views on the study of history and its usefulness for understanding law and society.

While it is often assumed that Bentham's philosophy was ahistorical, Bentham's use of history was un-tendentious in comparison to Blackstone and Kames, who were concerned to appeal to history in order to support their legal and moral theories. Because Bentham's legal science did not directly rely on history for validation or for determining legal reform, he was able to investigate and examine history at face value without being influenced by contemporary eighteenth-century issues. Bentham, moreover, wished to create a legal system that was clear, transparent, public, and rationally calculated. The rationality and transparency of Bentham's legal system aimed to permit legal change to occur openly and quickly whenever needed.





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## Chapter One: Introduction

This thesis examines how William Blackstone, Henry Home, more commonly referred to as Lord Kames, and Jeremy Bentham each understood the significance of history in relation to legal development.<sup>1</sup> Considerable attention has been paid towards the debate on the common law between Blackstone and Bentham. In 1758, Blackstone was appointed as the first Vinerian Professor of English Law at Oxford and remained in that role until he resigned in 1766.<sup>2</sup> In 1765-1769, he published the four volumes of *Commentaries on the Laws of England*. In response to what Bentham heard as a student present at Blackstone's Oxford lectures in 1764, and what he read in *Commentaries on the Laws of England*, he wrote 'A Comment on the Commentaries' and *A Fragment on Government* (1776). *A Fragment on Government*, which was published anonymously, received, for a short time, a degree of acclaim from a number of prominent legal and political figures in England.<sup>3</sup> The work focused on a short section of Blackstone's 'Introduction' that discussed the origin of society and government. Both works, however, illustrated what Bentham regarded as the errors in Blackstone's arguments, including:

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<sup>1</sup> Sir William Blackstone (1723-1780), first Vinerian Professor of English Law at Oxford University 1758-1766, MP for Hindon 1761-1768 and Westbury 1768-1770, Justice of the Common Pleas 1770, 1770-1780, Justice of the King's Bench 1770: see his *Commentaries on the Laws of England*, 4 vols., Oxford, 1765-1769. Henry Home, Lord Kames (1696-1782), Lord Ordinary of the Court of Session 1752-1763, Lord Commissioner of Justiciary 1763-1782. Jeremy Bentham (1748-1832), philosopher and jurist. Bentham is considered the founder of utilitarianism.

<sup>2</sup> Charles Viner (1678-1756), jurist: see his *General Abridgment of Law and Equity* (1742-1753). When he died, he left his personal estate to the University of Oxford to create a common law chair.

<sup>3</sup> *A Fragment on Government* was so well received that speculation on its author was wide spread. It was attributed to many prominent figures, such as: John Dunning, Lord Camden, Lord Mansfield, Edward Gibbon, and John Lind. Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*, eds. J. H. Burns and H. L. A. Hart, *The Collected Works of Jeremy Bentham* (Oxford: Oxford University Press, 2008), xxx-xxi. John Dunning (1731-1783), first Baron Ashburton, Solicitor General 1768-1770, Chancellor of the Duchy of Lancaster 1782-1783. Charles Pratt, Lord Camden (1714-1794), first Baron and first Earl Camden, Chief Justice of the Common Pleas 1761-1766, Lord Chancellor 1766-1770, Lord President of the Council 1782-1783, 1784-1794. William Murray, Lord Mansfield (1705-1793), first Baron and first Earl of Mansfield, Lord Chief Justice of the Court of King's Bench 1756-1788. Edward Gibbon (1737-1794), MP for Liskeard 1774-1780 and Lymington 1781-1784: see his *The History of the Decline and Fall of the Roman Empire* (1776-1788). John Lind (1737-1781), barrister and pamphleteer: see his *An Answer to the Declaration of the American Congress* (1776).

Blackstone's nonsensical ideas and definitions, his appeal to natural law, divine law, and natural rights, his belief in the social contract, and his antipathy to reform.

Richard A. Posner and J. H. Burns have produced detailed accounts of the Blackstone and Bentham debate. In 'Blackstone and Bentham', Posner contends that Blackstone and Bentham did not display a fundamental ideological inconsistency, but that Blackstone anticipated some of the views that Bentham presented on criminal justice. Posner argues that in order to comprehend Bentham's dislike for Blackstone, it is important to understand Bentham's goals and methods.<sup>4</sup> As Bentham's aim was to advocate complete legal reform, he thought that Blackstone represented four things that prevented a speedy adoption of his reform proposals: first, the common law legal system and the lawyers and judges that profited from it; second, intellectual confusion from semantic ambiguity; third, the imperfectly representative system of government in contemporary England; and fourth, perhaps the worst from Bentham's point of view, Blackstone's attack on the very principle of codification.<sup>5</sup> Posner contends that their differences were not over substantive politics but were due to Blackstone's defence of a gradualist approach to legal reform, and his use of traditional language. Bentham saw all of these stances as obstacles to the adoption of his reform proposals.

Posner concludes that both Blackstone and Bentham purposefully misrepresented the English legal system. Blackstone knew that the administration of the English legal system was not perfect. An example of this imperfection was that the English government was more oligarchic than Blackstone admitted.<sup>6</sup> Similarly, Bentham knew that England had made enormous strides and its legal system was impressive in comparison to other

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<sup>4</sup> Richard A. Posner, "Blackstone and Bentham," *Journal of Law and Economics* 19, no. 3 (1976): 589-593.

<sup>5</sup> *Ibid.*, 594.

<sup>6</sup> *Ibid.*, 583.

eighteenth-century systems of law and governance.<sup>7</sup> Blackstone focused on the strengths of the system, while Bentham focused on its weaknesses.<sup>8</sup> These two methods suited the purposes of their works: one was a textbook elucidating the current state of English law and the other was a tract arguing for legal reform.

In ‘Bentham and Blackstone: A Lifetime’s Dialectic’, Burns contends that most of Bentham’s views throughout his writings on law and governance can be viewed as a continuation of his initial refutation of Blackstone’s *Commentaries*. Burns agrees with Posner that it was Blackstone’s antipathy to reform that was Bentham’s principal charge against him. According to Bentham, Blackstone confused the roles of censor and expositor, and hence justified the existing law, claiming that everything is as it should be.<sup>9</sup> Furthermore, Blackstone’s reliance on natural law as a fundamental law that prevailed over the ordinary law, and his belief that the ordinary law was void if it was repugnant to the fundamental law, was a view that Bentham found unacceptable. Bentham also rebuked Blackstone’s reliance on the social contract, and instead posited a habit of obedience as the foundation of government, and argued that judges should not have the power to repeal law.<sup>10</sup> Burns contends that these early objections to Blackstone’s *Commentaries* – his antipathy to reform, and his espousal of natural law, the social contract, and the sovereign power of judges – would resonate throughout Bentham’s writings and aid in the formation of his legal and political theory. Closely connected to these views was Bentham’s insistence on the importance of definition, as clarity and transparency were integral to Bentham’s system of legislation. Burns notes that Bentham first introduced his views on paraphrasis,

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<sup>7</sup> *Ibid.*, 604.

<sup>8</sup> *Ibid.*, 605.

<sup>9</sup> J. H. Burns, “Bentham and Blackstone: A Lifetime’s Dialectic,” *Utilitas* 1, no. 1 (1989): 22-24.

<sup>10</sup> *Ibid.*, 34-38.

one of his techniques for the exposition of abstract items, in a footnote in the final chapter of *A Fragment on Government*.<sup>11</sup>

In *Bentham: A Guide for the Perplexed*, Philip Schofield elucidates the significant role of logic and language within Bentham's theory. Schofield argues that while the principle of utility is considered to be the starting point for Bentham's theory, there is a much deeper aspect to his thought, namely his views on ontology. Bentham's radical ontological question was 'what exists?', and his answer was, what we perceive to exist in the physical world. In order to make sense, Bentham argued, language had to refer to physical objects in the real world. These objects he termed real entities. Names of fictitious entities were words that did not represent physical objects in the real world, but could be explained by their relation to physical objects using the techniques of paraphrasis and phraseoplerosis.<sup>12</sup> The principle of utility, for instance, did not represent a physical object; however, the term could be explicated through the process of paraphrasis. An adherent to the principle of utility was a person who approved of actions which promoted the greatest happiness of the greatest number, while happiness consisted in a balance of pleasure over pain. Schofield explains how the important terms used in ethics – good, evil, motive, interest – were explained by Bentham by their relation to the real entities of pleasure and pain.<sup>13</sup> Likewise, the principle of utility, unlike the nonsensical terms natural law and divine law, could also be explained by its relation to the real entities of pleasure and pain. Blackstone's use of nonsensical ideas and definitions, the imprecision of the common law

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<sup>11</sup> *Ibid.*, 30.

<sup>12</sup> The technique of paraphrasis is when a proposition containing the name of a fictitious entity is translated into a proposition containing the names of real entities. The technique of phraseoplerosis is when a sentence containing the word that needs to be explained is 'filled up'. Philip Schofield, *Bentham: A Guide for the Perplexed*. Continuum Guides for the Perplexed (London: Continuum, 2009), 52-53.

<sup>13</sup> *Ibid.*, 50-53.



system he supported, and his use of traditional language, were at the root of Bentham's critique of Blackstone.

Considerable attention has been placed on the Bentham and Blackstone debate because they represent two important views on eighteenth-century law and reform. Bentham's scathing attack on Blackstone's *Commentaries* was based on the fact that Blackstone argued against legal codification, and instead promoted the common law legal system and related theories of natural law, divine law, and the social contract. In addition, Bentham contended that by stating that judges could repeal laws if they were found to be repugnant to the natural law, Blackstone placed a thinly veiled ability to change the law in the hands of judges. Blackstone supported the continued existence of the common law system, and, as Posner argues, his views stood in the way of Bentham's goal of legal codification. The debate becomes increasingly significant when one views the entirety of Bentham's writings as a continuation of his original rebuttal to Blackstone's *Commentaries*. As Burns argues, many of Bentham's ideas on law and jurisprudence were influenced by his early response to Blackstone. Furthermore, when connected to Bentham's views on ontology and the principle of utility, Blackstone's support for natural law, divine law, and judicial sovereignty supported a legal system that lacked transparency and openness, could be manipulated by judges, and in the final analysis could not even be said to exist.

Adding a third figure to the debate, in the form of the Scottish judge and writer Lord Kames is significantly overdue. This addition provides a fuller account of the richness of legal debate in eighteenth-century Britain. John W. Cairns identifies three main features of legal theory within the Scottish Enlightenment: first, the engagement of the legal profession

in theorizing; second, an interest in history and law that led to examinations of a ‘proto-anthropological’ and a ‘proto-sociological’ nature; and third, a move away from legislation towards the formation of new rules from the decisions in specific cases.<sup>14</sup> Kames represented these three trends, and thereby adds an additional perspective to the Blackstone and Bentham debate. In *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain*, David Lieberman acknowledges the need for the comparison of these three writers. Lieberman argues that Bentham’s ideas for law reform must be viewed in relation to the other popular reform traditions of his time. Kames, as well as Lord Mansfield,<sup>15</sup> are used by Lieberman to help explain the relationship between, and the transition from, Blackstone to Bentham. Lieberman suggests that Kames shared Bentham’s view on the importance of utility, but looked to the bench and not to legislation to enact legal change.<sup>16</sup> On this view, Kames anticipated Bentham. Lieberman places Bentham within a more detailed historical context, and at the same time situates Bentham within the broader evolution of legal theory and the philosophical-legal dialogue of the eighteenth century. Bentham’s legislative science was not the definitive ideology of legal reform, but was one of many approaches expounded in the period.

Adding Kames to the Blackstone and Bentham debate will provide considerable insight into the approaches to studying legal history in Scotland and England in the eighteenth century. Furthermore, Blackstone, Kames, and Bentham are representative of the three predominant moral theories in the eighteenth-century: natural law, moral sense and common sense, and utility. They also represent three separate forms of law and legal

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<sup>14</sup> John W. Cairns, “Legal Theory,” in *The Cambridge Companion to the Scottish Enlightenment*, ed. Alexander Broadie (Cambridge: Cambridge University Press, 2003), 222-242.

<sup>15</sup> See 3n on pp. 13; See Norman S. Poser, *Lord Mansfield: Justice in the Age of Reason* (Montreal: McGill-Queens University Press, 2013); James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004).

<sup>16</sup> David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain. Ideas in Context* (Cambridge: Cambridge University Press, 1989), 174-175.

system: common law, equity, and codification. Finally, these three types of law and legal system are inherently connected with the three ‘agents of legal change’ expounded by Henry Maine: legal fiction, equity, and legislation.<sup>17</sup> In order better to understand the comparison between Blackstone, Kames, and Bentham, it is helpful to trace the development of natural law thought within common law doctrine, as well as the rise of both sentimentalism and the principle of utility. By elucidating the rise of these three moral theories, I hope to situate these three figures within the historical context and legal dialogue of late eighteenth-century Britain.

### *Natural Law*

Natural law is a philosophical theory whose proponents contend that certain values are laid down by God and are universally valid in all times and places. Underpinning natural law was the view that God ruled the universe through an eternal and universal law. The proponents of natural law tended to agree on three points: first, natural law was God’s reason and will, and was discernable through man’s reason, which could be used to perceive the distinction between morally right and wrong. Second, the natural law was eternal and unchangeable. Thus, all people were bound by natural law. Finally, it was believed that no positive laws were morally right or legally valid if they contradicted the natural law. While various positive laws were unique to different states, all laws had to be the product of reason and be consistent with natural law.

Anthony J. Lisska explains that Aquinas’s exposition in *Summa Theologiae* is often referred to as the classical canon of natural law theory. Although Aquinas gave a strong role to human reasoning in the conception of natural law, it was completely subordinate to

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<sup>17</sup> Henry Sumner Maine, *Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas* (New York: Henry Holt and Co., 1906), 25-28.

religious faith. Aquinas effectively harmonized Christianity and natural law: ‘All law proceeds from the reason and will of the lawgiver; divine and natural law from the intelligent will of God, human law from the will of man regulated by reason.’<sup>18</sup> He contended that humans were naturally social beings; they shared the same set of fundamental properties that constituted human nature, and could only flourish in connection with family, community, and polity. Thus, natural law for Aquinas was best understood as rooted in the set of dispositional properties that comprised human nature. The first principle of practical reason was ‘good is to be done and pursued, and evil avoided’.<sup>19</sup> Thus, Aquinas argued that good is defined in terms of an end.<sup>20</sup>

The connection between natural law and common law was not unique to Blackstone’s *Commentaries*, but had been a recurring theme since the late Middle Ages. Various writers on the common law stressed the consistency between the English law and the fundamental natural law, which was discernible through the use of reason. Many of these eminent English lawyers and writers had argued that natural law was a component of, and a legitimate source of, English law. As such, they routinely introduced their analyses of English law by showing how natural law precepts were expressed in the rules of the common law. Richard H. Helmholz explains that while the terms ‘law of nature’ or ‘natural law’ may not have been explicitly stated, the notion that ‘reason’ would dictate the law

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<sup>18</sup> St. Thomas Aquinas, *Summa Theologiae: Latin Text and English Translation, Introductions, Notes, Appendices, and Glossaries* (London: Eyre & Spottiswoode, 1964), 149.

<sup>19</sup> Anthony J. Lisska, “The Philosophy of Law of Thomas Aquinas,” in *A Treatise of Legal Philosophy and General Jurisprudence*, ed. Enrico Pattaro (New York: Springer, 2005), 295-296.

<sup>20</sup> For more on Thomas Aquinas’s natural law theory, see Lisska, “The Philosophy of Law of Thomas Aquinas,” 285-310; Anthony J. Lisska, *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (Oxford: Clarendon Press, 2002); Howard P. Kainz, *Natural Law: An Introduction and Re-Examination* (Chicago: Open Court, 2004); John Finnis, *Aquinas: Moral, Political, and Legal Theory*. Founders of Modern Political and Social Thought (Oxford: Oxford University Press, 1998); C. Fred Alford, *Narrative, Nature, and the Natural Law from Aquinas to International Human Rights* (New York: Palgrave Macmillan, 2010); Joseph Owens, “Aristotle and Aquinas,” in *The Cambridge Companion to Aquinas*, eds. Norman Kretzman and Elenore Stump (Cambridge: Cambridge University Press, 1993), 38-59.

implied the existence of a natural law.<sup>21</sup> Blackstone was influenced by the legal tradition sustained and reinforced by the author of the text known as Bracton, Christopher St. Germain, and Edward Coke, among others.

The author of the text known as *Bracton* was perhaps the first legal writer to emphasise the importance of natural law principles within the English common law.<sup>22</sup> In *De legibus et consuetudinibus Angliae* (1250), the author defined natural law as ‘a certain instinctive impulse arising out of animate nature by which individual living things are led to act in certain ways’.<sup>23</sup> He contended that natural law was what ‘God himself, taught all living things’ and that it was a form of ‘natural instinct’.<sup>24</sup> Thus, Bracton took natural law from canon law and associated natural law with the will and the reason of man. Sir John Fortescue continued this tradition in *De laudibus legum Angliae* (1470).<sup>25</sup> Fortescue followed Aquinas by arguing that the objective of legislators was to incline people to virtue. Fortescue maintained the view that a king could not amend the law at his pleasure, because he ruled a government that was both regal and political. Michael Lobban explains that this meant that laws were made by the King with the assent of the kingdom through the three estates of the realm. Fortescue contended that a regal and political government ensured that the King would not enact unjust laws.<sup>26</sup> Fortescue agreed with Aquinas that natural law was revealed in the Old Testament and in the Gospels. As S.B. Chrimes notes, Fortescue argued that natural law came from God and that all human laws were established

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<sup>21</sup> Richard H. Helmholz, “Natural Law and Human Rights in English Law: From Bracton to Blackstone,” *Ave Maria Law Review* 3, no. 1 (2005): 1-22.

<sup>22</sup> Henry de Bracton (c. 1210-1268), appointed to the court *coram rege* (the court held before the King) to advise Henry III: see his *De legibus et consuetudinibus Angliae* (On the Laws and Customs of England) (1250).

<sup>23</sup> Henry de Bracton and Samuel E. Thorne, *Bracton On the Laws and Customs of England*, ed. George E. Woodbine, vol. ii (Cambridge, Mass.: Harvard University Press, 1968), 26.

<sup>24</sup> *Ibid.*

<sup>25</sup> Sir John Fortescue (1394-1480), Chief Justice of the King’s Bench 1442-1460: see his *De laudibus legum Angliae* (Commendation of the Laws of England) (1470).

<sup>26</sup> Michael Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900*, ed. Enrico Pattaro, *A Treatise of Legal Philosophy and General Jurisprudence* (New York: Springer, 2005), 8-10.

by the law of nature or by its authority. Thus, statutes were null and void if they were found to be contrary to natural law.<sup>27</sup> Similarly, in *Doctor and Student* (1528), Christopher St. Germain argued that the natural law was a starting point for the introduction of the common law.<sup>28</sup> R.S. White contends that St. Germain's work was responsible for explicitly introducing the fundamental ideas of natural law into the English system of law. St. Germain linked equity with natural law, and attempted to present common law and equity as complementary and mutual. According to White, '*Doctor and Student* ensured that in all forms of law (common law, equity, parliamentary legislation) the rhetoric and substance of Natural Law reasoning was preserved'.<sup>29</sup> Following Aquinas, he argued that law was an ordinance of reason made for the common good. The law of nature was written in each man's heart, and informed him of what was to be done and what was to be avoided. Agreeing with Fortescue and those before him, St. Germain contended that if statutes or customs conflicted with the law of reason, they were null and void.<sup>30</sup>

In addition to English writers, legal thinkers on the Continent also espoused natural law theories. Hugo Grotius and Samuel von Pufendorf were especially influential on Blackstone's natural law theory.<sup>31</sup> Grotius was deeply influenced by the Spanish Scholastics.<sup>32</sup> Francis Oakley notes that 'few have attracted more persistent, more

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<sup>27</sup> S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge: Cambridge University Press, 1936), 200-201.

<sup>28</sup> Christopher St. Germain (1460-1540), lawyer and legal writer: see his *Dialogus de fundamentis legum Anglie et de conscientia* (known as *Doctor and Student*) (1528).

<sup>29</sup> R.S. White, *Natural Law in English Renaissance Literature* (Cambridge: Cambridge University Press, 2006), 51-53.

<sup>30</sup> Chrimes, *English Constitutional Ideas in the Fifteenth Century*, 203-206.

<sup>31</sup> Hugo Grotius (1583-1645), Dutch jurist and philosopher: see his *De jure belli ac pacis* (On the Law of War and Peace) (1625). Samuel von Pufendorf (1632-1694), German jurist and philosopher: see his *De Jure Naturae et Gentium* (Of the Law of Nature and Nations) (1672).

<sup>32</sup> The Spanish Scholastics were known as the School of Salamanca, and included such Spanish and Portuguese writers as Francisco Suarez and Francisco de Vitoria. They combined the natural law teachings of Aquinas with the real practical political and economical world. They argued that law had originated in nature and that all humans had a right to life and liberty. See Francisco Gómez Camacho, "Later Scholastics: Spanish Economic Thought in the XVIth and XVIIth Centuries," in *Ancient and Medieval Economic Ideas and Concepts of Social Justice*, eds. Todd S. Lowry and Gordon Barry (New York: Brill, 1998), 503-562.

concentrated, and, ultimately, more conflicted attention than the celebrated words lodged in the “Prolegomena” to the classic *De jure belli et pacis* (“On the Law of War and Peace”)’ published by Grotius in 1625.<sup>33</sup> Grotius developed a natural law theory that he boldly declared was truly independent of the question of whether God existed. While there is evidence that others before him questioned whether natural law would be binding if God did not exist, Grotius was more explicit in his views, creating a new secularized understanding of natural law. For Grotius, natural law was binding because of the social nature of human beings and the necessity of maintaining these social relationships. For Grotius, natural law was discoverable from human nature, as laws were created in order to ensure self-preservation compatibly with similar strives by others.<sup>34</sup>

Pufendorf agreed with Grotius that self-preservation and human sociability were basic features of natural law. However, Pufendorf challenged Grotius’s claim that natural law was inherent in nature prior to God’s legislation. Pufendorf argued that there were no moral qualities inherent in the natural world, and that God was necessary because the obligation to conform to laws only existed when there was a superior.<sup>35</sup> Moreover, he argued that God created both natural law and Biblical law, and thus they could not contradict one another. Whereas Grotius believed in a natural law that could exist independently from God and was discovered through observation and experience,

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<sup>33</sup> Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: Continuum, 2005), 63.

<sup>34</sup> Kainz, *Natural Law*, 31-34; Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996), 26-30. For more on Grotius see Knud Haakonssen, “Hugo Grotius and the History of Political Thought,” *Political Theory* 13, no. 2 (May 1985): 239-265; Knud Haakonssen, *Grotius, Pufendorf and Modern Natural Law* (Dartmouth: Dartmouth Publishing Company, 1999), 3-104; Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Oxford University Press, 1991).

<sup>35</sup> Haakonssen, *Natural Law and Moral Philosophy*, 38.

Pufendorf believed that God was essential for obligation, and that natural law was inherent in human nature as a manifestation of God's will.<sup>36</sup>

Perhaps two of the most influential figures for Blackstone's understanding of natural law within his legal theory were Edward Coke and Mathew Hale.<sup>37</sup> Coke stated that the King and Parliament was under God. In Calvin's case, Coke declared that the law of nature was part of the English law, that it was prior to any judicial or municipal law, and that it was immutable. Coke famously declared:

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature. And by this law written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world.<sup>38</sup>

While Coke cited natural law as a basis for his position, Lobban explains that Coke was employing natural law to answer a question – whether a man born in Scotland after the accession of James VI (James I in England) was considered an alien in England – in which there was no clear solution in the common law.<sup>39</sup> Thus, Coke was stating that the law of nature was authoritative when there was no positive law. Furthermore, in *Bonham's case*, Coke laid down the principle of judicial review:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.<sup>40</sup>

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<sup>36</sup> *Ibid.*, 38-40.

<sup>37</sup> Matthew Hale (1609-1676), Justice of the Common Pleas 1653-1659, Chief Baron of the Exchequer 1660-1671, Chief Justice of the King's Bench 1671-1676. Edward Coke (1552-1634), Chief Justice of the Common Pleas 1606-1613, Chief Justice of the King's Bench 1613-1616.

<sup>38</sup> Calvin's Case, 7. Co. Rep. 12a-12b (1610).

<sup>39</sup> Michael Lobban, "The Common Law Mind in the Age of Sir Edward Coke," *Amicus Curiae*, no. 33 (February 2001): 19.

<sup>40</sup> *Bonham's Case*, 8 Co. Rep. 118a (1610).



It has been argued by Theodore F. T. Plucknett that the decision in *Bonham's* case that judges were able to strike down unconstitutional and unjust statutes was based on natural law principles. This ruling supported the idea that fundamental law, that is 'the paramount law of reason', limited the power of King and Parliament.<sup>41</sup>

Hale argued that the common law was the emanation of natural law peculiarly adapted to English circumstances.<sup>42</sup> Hale, like Blackstone, placed great importance on the role of history and natural law for validating the common law. Common law was an expression of a deeper reality based on continued use and acceptance. This emphasis on continued use and acceptance validating customs of the common law derives from the natural law theories, expressed by Grotius and Pufendorf, that the obligation to conform to natural laws came from the natural impulse to survive. Laws were developed, and continued to be practised, because they were believed to promote the wellbeing of society. Gerald J. Postema explains that for Hale, 'The continued practice of the law both manifests and reinforces a general sense of the reasonableness and historical appropriateness of the rules and concepts of Common Law'.<sup>43</sup> Long and immemorial usage confirmed that a law was valid based on its continued practice. Furthermore, laws that had been proven to be unsuitable to society had been abolished or adapted better to suit its needs.<sup>44</sup> Thus, not only

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<sup>41</sup> Theodore F. T. Plucknett, "Bonham's Case and Judicial Review," *Harvard Law Review* 40, no. 1 (November 1926): 31. See also Allen Dillard Boyer, "'Understanding, Authority, and Will': Sir Edward Coke and the Elizabethan Origins of Judicial Review," *Boston College Law Review* 39, no. 1 (1998): 43-94. Boyer argues that for Coke, law rested upon both custom and reason. The law was valid because it was based on the wisdom of judges. While Coke's legal opinions are seen as significant in the development of natural law theory and the role of reason within the law, Ian Williams has questioned the extent of these arguments. Williams contends that while historians assume that Coke asserted a power to declare statutes void based on fundamental law, there is no evidence that Coke adopted a natural law position. See Ian Williams, "Dr Bonham's Case and 'Void' Statutes," *The Journal of Legal History* 27, no. 2 (August 2006): 111-128. However, for the purpose of this study, the fact that Blackstone likely believed that Coke adopted a natural law position is what matters.

<sup>42</sup> Matthew Hale, *The History and Analysis of the Common Law of England*, repr. (Union, N.J.: Lawbook Exchange, 2000), 58-59.

<sup>43</sup> Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), 5.

<sup>44</sup> Michael Lobban, "Blackstone and the Science of Law," *The Historical Journal* 30, no. 2 (June 1987): 315.

did history provide validity for individual laws and customs, but the common law legal system's ability to maintain reasonable laws and abolish or modify bad ones proved the validity and value of the system as a whole.

Common law theory continued to rely on both history and reason in the eighteenth century. As David Ibbetson argues concerning the influence of natural law on the common law:

In a range of different ways, its lessons were learned by Common Lawyers, and seemingly consciously used to re-orient English laws. It would not be too much of an exaggeration to say that the classical Common Law of the nineteenth and twentieth centuries was really a product of the eighteenth-century Natural Law tradition.<sup>45</sup>

The understanding of natural law provided a legally acceptable foundation for the modernization of common law rules and traditions. Blackstone noted that 'traditional reason' – reason used to create legal principles and decide particular cases, shaped by the tradition from which it had been exercised – was important for constructing general principles and deciding particular cases.<sup>46</sup> Postema explains that, according to Blackstone, the naturalness and reasonableness of the law could be demonstrated by experience and long usage. Thus, Postema contends that Blackstone's natural law theory was not a 'high law' used to judge positive human law, but was 'the light of reason shining through the law'.<sup>47</sup> Similarly, as Alan Cromartie contends, for Blackstone, the presumed consent of the wider population became the ultimate criterion of the law's legitimacy and reasonableness.

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<sup>45</sup> D. J. Ibbetson, "Natural Law and Common Law," *Edinburgh Law Review* 5 (2001): 6.

<sup>46</sup> Postema, *Bentham and the Common Law Tradition*, 30-36. Postema distinguishes traditional reason from natural reason, which was the rational faculty that was common in all humans.

<sup>47</sup> *Ibid.*, 37.

Customs received binding power from long and immemorial usage and universal reception, and it was these two factors that deemed a law consistent with natural law.<sup>48</sup>

The relationship between natural law and positive law was fundamental to how common law theorists envisaged the English law. The interplay between natural law and positive law can be elucidated with three precepts. First, when there was no positive law concerning a legal question, judges and legislators should turn to natural law to find an answer. Second, if the natural law was silent upon a legal question, it was left to rulers to enact a positive law suitable to society. This law was valid as long as it was not inconsistent with natural law. This explains how laws could be specific to certain nations in certain times.<sup>49</sup> Third, if positive law and natural law contradicted one another, the natural law would be authoritative. These three precepts underline the important claim made by many common law theorists that common law was consistent with natural law. The trend of linking natural law and common law continued into the eighteenth century and beyond. Eighteenth-century natural law theory focused on the belief that individual rights of person and property were deeply embedded in the natural law, engrained within humans by God, and clearly discoverable in the light of human reason. Blackstone was representative of this prominent natural law tradition in eighteenth-century English legal thought.<sup>50</sup>

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<sup>48</sup> Alan Cromartie, "The Idea of Common Law as Custom," in *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, eds. Amanda Perreau-Saussine and James B. Murphy (Cambridge: Cambridge University Press, 2007), 203-227.

<sup>49</sup> This second precept also included what natural law theorists have termed *determinatio*. While positive law was authoritative when natural law was silent, it was also needed to determine the law when natural law provided reasonable alternatives. While the specific details of the laws were not directly governed by natural law, they needed to be consistent with natural law. See Jeremy Waldron, "Torture, Suicide and Determinatio," *American Journal of Jurisprudence* 55 (2010): 1-4.

<sup>50</sup> The prevalence of natural law theory in common law writings before and during Blackstone's time means that there are many influential legal theorists that cannot be covered in this brief introduction. For an extensive list of notable figures that discussed natural law in their writings, see Helmholz, "Natural Law and Human Rights in England Law," 5-11.

## *Moral theories in eighteenth-century Britain*

Natural law theory was also influential in Scottish legal thinking in the eighteenth century. Cairns explains that while it was not unusual for Scots lawyers to train in civil and canon law on the Continent, predominantly in France, after the Glorious Revolution, students increasingly chose to study in Dutch universities. These universities focused on the natural law foundations of Roman law, and offered entire courses dedicated to the philosophies of Grotius and Pufendorf. Cairns notes that this explains why Stair's *Institutions of the Laws of Scotland* was heavily influenced by Grotian jurisprudence, and why natural law and equity were integral to Scots law.<sup>51</sup>

Initiated by the work of Anthony Ashley Cooper, third Earl of Shaftesbury, and Francis Hutcheson, moral sense theories superseded natural law theories in Scotland.<sup>52</sup> Moral sense theories typically held that the distinction between moral and immoral was discoverable from emotional responses to experience. The moral sense was the means by which humans perceived virtue and vice in both themselves and others, and from which they derived pleasure or pain. The moral sense received sensations, but also generated desires and aversions, especially through reflection, which provided incentives to action. Actions were motivated by desires, which could be generated by either affections or passions. Thus, whether an action was good or evil was dependent on the motives and not simply on the action itself.<sup>53</sup>

Proponents of the moral sense theory contended that people were virtuous if they acted from the sense of right and wrong, and this standard of right and wrong had been

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<sup>51</sup> Cairns, "Legal Theory," 226-228.

<sup>52</sup> Anthony Ashley Cooper (1671-1713), third Earl of Shaftesbury, MP for Poole 1695-1698, philosopher: see his *Characteristics of Men, Manners, Opinions, Times* (1711). Francis Hutcheson (1694-1746), philosopher, Professor of Moral Philosophy at the University of Glasgow 1730-1745: see his *A System of Moral Philosophy* (1755). See John D. Bishop, "Moral Motivation and the Development of Francis Hutcheson's Philosophy," *Journal of the History of Ideas* 57, no. 2 (1996): 277-295.

<sup>53</sup> See Luigi Turco, "Moral Sense and the Foundations of Morals," in *The Cambridge Companion to the Scottish Enlightenment*, ed. Alexander Broadie (Cambridge: Cambridge University Press, 2006), 136-156.

implanted or imprinted in each person's soul. Both Shaftesbury and Hutcheson's moral sense theories, which were responses to the 'selfish hypothesis',<sup>54</sup> contended that something was good if it contributed to the well-being of the system of which it was a part. Christian Maurer explains that, for Shaftesbury, when the moral sense was operating properly, humans had positive feelings towards self-affections and social affections that promoted the public interest, and negative feelings towards unnatural affections, such as delight in viewing distress, that hindered the well-being of humanity. Similarly, Hutcheson promoted a virtuous life and active involvement in public life, based on the benevolence of God, the harmony of the universe, and man's sociable disposition.<sup>55</sup> It is important to note that Hutcheson was one of the first theorists to state the phrase the 'greatest happiness for the greatest numbers'. Hutcheson, like his Scottish contemporaries however, was not a consequentialist, but instead placed great emphasis on the motivations behind actions. Since he argued that whether an action was moral or immoral was dependent on its motivation, he was not a utilitarian.<sup>56</sup>

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<sup>54</sup> Proponents of the 'selfish hypothesis', such as Thomas Hobbes and Bernard Mandeville, contended that all actions, even benevolent ones, could be reduced to self-interest. Thomas Hobbes (1588-1679), political philosopher: see his *Leviathan* (1651). Bernard Mandeville (1670-1733), political philosopher: see his *The Fable of the Bees* (1714).

<sup>55</sup> See Christian Maurer, "Self-Interest and Sociability," in *The Oxford Handbook of British Philosophy in the Eighteenth Century*, ed. James A. Harris (Oxford: Oxford University Press, 2013), 296-298; Turco, "Moral Sense and the Foundations of Morals," 36-156.

<sup>56</sup> Amnon Goldsworth argues that the first articulation of the phrase 'the greatest happiness for the greatest numbers' was in Hutcheson's *An Inquiry Into the Original of Our Ideas of Beauty and Virtue*. However, he also notes that the same phrase was used by Beccaria in *Dei delitti e delle pene*. While Bentham claimed that he was first acquainted with the phrase when reading Joseph Priestley, Goldsworth notes it was probably through Beccaria that Bentham first encountered the term. Amnon Goldsworth, "The Meaning of Bentham's Greatest Happiness Principle," *Journal of the History of Philosophy* 7, no. 3 (July 1969): 315-316. Robert Shackleton also argues that it was probably from the English translation of Beccaria's work that Bentham first found the phrase. Shackleton notes that the phrase was neither in Priestley's nor Claude Adrien Helvétius's works. Robert Shackleton, "The Greatest Happiness of the Greatest Number: The History of Bentham's Phrase," *Studies on Voltaire and the 18<sup>th</sup> Century* 90 (1972): 1461-1482. Cesare Bonesana-Beccaria (1738-1794), Marquis of Gualdrasco and Villareggio, Italian criminologist and philosopher: see his *On Crimes and Punishment* (1764). Joseph Priestley (1733-1804), theologian and natural philosopher. Claude Adrien Helvétius (1715-1771), French philosopher: see his *De l'esprit* (On Mind) (1758).

Common sense theory was the other prominent moral theory in eighteenth-century Scotland, and its greatest advocate was Thomas Reid.<sup>57</sup> As Reid was one of Kames's closest friends and the two were known to discuss theories of science and philosophy, Reid's theory of common sense presented in *An Inquiry into the Human Mind on the Principles of Common Sense* (1764), arguably gives more valuable insight into Kames's own theory.<sup>58</sup> Common sense was a type of self-evident knowledge available to all mankind through experience. Reid contended that certain opinions were widely shared by all individuals, and they were the standard for judgment. Moral knowledge was not the privilege of learned society, as all humans understood their duties well enough to be held accountable if they transgressed them.<sup>59</sup> Thus, Reid agreed with the sentimentalists that the moral sense was reliable as the foundation of ethics was present in all rational beings. While the moral sense was the inherent sense of right and wrong, the common sense was the universal standard of right and wrong that had developed with experience and observation. Although a refined moral sense would most often reflect common sense, it was possible that the moral sense and common sense could clash. If so, the moral sense would yield to the developed understanding of right and wrong. It was the role of judges to determine what common sense dictated. William C. Lehmann notes that common sense was

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<sup>57</sup> Thomas Reid (1710-1796), Professor of Moral Philosophy at the University of Glasgow 1764-1781: see his *An Inquiry into the Human Mind on the Principles of Common Sense* (1764), *Essays on the Intellectual Powers of Man* (1785), and *Essays on the Active Powers of the Human Mind* (1788).

<sup>58</sup> An account of the relationship between Kames and Reid can be found in Ian Ross, 'Unpublished Letters of Thomas Reid to Lord Kames, 1762-1782,' *Texas Studies in Literature and Language* 7, no. 1 (Spring 1965): 17-65 and William C. Davis, *Thomas Reid's Ethics: Moral Epistemology on Legal Foundations* (London: Continuum, 2006), 29-30. Ross argues that Kames and Reid were in agreement concerning the nature of reality, including the view 'that common sense is a sufficient guarantee for the objectivity of the external world as well as the integrity of the self' (21). Davis contends that Kames and Reid both stood between sentimentalism and rationalism. Davis notes that while Kames benefitted Reid with his political influence, helping him secure the position of Professor of Moral Philosophy at the University of Glasgow, Reid 'provided Kames with an acute auditor of his ideas on a wide range of subjects, including physics and aesthetics' (29).

<sup>59</sup> Davis, *Thomas Reid's Ethics: Moral Epistemology on Legal Foundations*, 98.

‘that universal element in human experience or that basic trait in human nature which enables men to arrive at essential truth without reasoning about abstract principles’.<sup>60</sup>

In *An Inquiry into the Human Mind on the Principles of Common Sense*, Reid stated that there were various kinds of powers instilled in humans by God. Some powers were both planted and reared, while others had been planted in our minds and left for nature to cultivate. The innate feelings that were necessary for survival and that humans shared with brutes were those that were both planted and reared. Reid argued that it was by the proper nurturing of the powers left to nature to cultivate that humans ‘are capable of all those improvements in intellectuals, in taste, and in morals, which exalt and dignify human nature; while, on the other hand, the neglect or perversion of them makes its degeneracy and corruption’.<sup>61</sup> Both Kames and Reid agreed that life experiences and human development were influenced by these powers instilled in humans by God. Reid’s argument that certain powers were reared by nature and were capable of improving intellect, taste, morals, and dignified human nature, accorded with Kames’s argument that morality had evolved and refined over time. Kames posited that it was essential for the benefit of mankind for the government and legal system to embed this evolved moral knowledge, a universal opinion of right and wrong known as common sense, within society.

Kames’s moral theory combined aspects from both the moral sense school and the common sense school. Like Hutcheson, Kames contended that man perceived his duties and was able to discern right from wrong, not from reason or self-interest, but by a moral sense. However, Kames stressed the notion of human sociability and the use of empirical evidence, which could be collected through observation and historical investigation. Kames

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<sup>60</sup> William Christian Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment: A Study in National Character and in the History of Ideas*, International Archives of the History of Ideas 41 (The Hague: Martinus Nijhoff, 1971), 164-165.

<sup>61</sup> Thomas Reid, *An Inquiry into the Human Mind on the Principles of Common Sense*, ed. Derek R. Brookes. The Edinburgh Edition of Thomas Reid (Edinburgh: Edinburgh University Press, 2000), 13.

contended that morality had become the product of history and society. In order to effect legal change, Kames blended moral sense and common sense, sentimentalism and reason, as judges were to make decisions by reasoning upon the moral sense – their own perception of good and ill – and the developed common sense of society.<sup>62</sup>

### *Principle of Utility*

In addition to natural law and moral sense theories, the third prominent approach to ethics that characterized eighteenth-century thought was utilitarianism. The principle of utility stated that actions and behaviours were right in so far as they promoted happiness or pleasure, and wrong if they tended to promote unhappiness or pain. Actions that resulted in a benefit, and hence promoted pleasure, were good, while actions that resulted in a loss, and hence produced pain, were evil. Bentham argued that ‘the greatest happiness of the greatest number’ should be the guiding principle for public policy as well as individual actions.

Bentham noted that he first was introduced to the idea of the ‘greatest happiness of the greatest number’ from Joseph Priestley, but writers such as David Hume, David Hartley, Montesquieu, Helvetius, Beccaria, and Voltaire also influenced Bentham’s development of the principle of utility.<sup>63</sup> While Blackstone, Kames, and other eighteenth-century philosophers and writers advocated the promotion of happiness, and supported

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<sup>62</sup> See pp. 102-110.

<sup>63</sup> Schofield, *Bentham: A Guide for the Perplexed*, 4. David Hume (1711-1776), philosopher and historian: see his *A Treatise of Human Nature: Being an Attempt to introduce the experimental Method of Reasoning into Moral Subjects*. Charles-Louis de Secondat (1689-1755), Baron de La Brède et de Montesquieu, French lawyer and philosopher: see his *De l’esprit des lois* (On the Spirit of the Laws) (1728). David Hartley (1705-1757), philosopher and physician. François-Marie Arouet (1694-1778), known as Voltaire, French historian, philosopher, and satirical polemicist. These figures all advocated radical philosophical and political views. As such, Bentham combined various elements from these thinkers to construct his legal science.



actions and legislation that were beneficial to society, Bentham's principle of utility was distinctive because of its purely secular nature.

While secular and theological utilitarianism both measured pleasure and happiness by their consequences, Bentham's principle was distinct because it supported a rational calculation of the real perceptions of pleasure and pain. 'Theological utilitarians', such as William Paley who wrote *The Principles of Moral and Political Philosophy* (1785), contended that humans were egoists who needed threats of eternal punishment in order to be persuaded to act morally. Similar to 'secular utilitarians', they advocated individual actions and legislation that promoted the good of mankind; however, they saw the will of God, as the ultimate standard of morality. Regardless of this fundamental difference between Bentham and Paley, as Schofield notes, they did agree on a number of fundamental points: they both dismissed competing moral theories; they both equated moral goodness with pleasure and moral evil with pain; they both drew no distinctions of quality between pleasures; they both saw happiness as a balance of pleasure over pain; and they both saw general happiness as the criterion for virtue.<sup>64</sup>

The distinction between secular and theological utilitarianism is significant to this thesis, as the fundamental religious division between the two theories resulted in different perspectives on the importance of history and legal reform. Since theological utilitarians argued that this world was where the divine plan was revealed, there was less of an incentive to change it, and more to try and understand it. As such, Paley saw the will of God in tradition, and believed that utility would be found in past decisions. Bentham, on the other hand, argued that tradition and prejudice were obstacles to utility, as past rulers acted in self-interest. Thus, according to Bentham, legal tradition should give way to his

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<sup>64</sup> Philip Schofield, "A Comparison of the Moral Theories of William Paley and Jeremy Bentham," *The Bentham Newsletter* 11 (June 1987): 7.

new science of legislation.<sup>65</sup> Bentham's presentation of the principle of utility and how history contributed to a utilitarian calculation will be covered in greater detail in Chapter Four.<sup>66</sup>

### *Thesis and Outline*

This thesis examines how Blackstone, Kames, and Bentham each understood the significance of historical study in relation to legal development. By dedicating a chapter to each writer, discussing their legal and moral theories, and then examining their use of history within their writings, I am attempting to explain how each writer incorporated historical study within their legal sciences, and more importantly, into their ideas for legal reform. As noted above, each writer was representative of a particular moral theory – natural law, moral sense and common sense, and utility. In addition, each writer also advocated a legal system that directly corresponded with a specific legal practice. Blackstone adopted natural law theory and argued that the common law's consistency with natural law was indicative of its validity. Kames advocated moral sense and common sense theory, and argued that legal change might best occur within a court of equity. Kames argued that a judge in a court of equity should use reason, moral sense, and the principles of utility and justice to make his final determination. Finally, Bentham advocated the principle of utility, arguing that England should eradicate the common law and replace it with a codified system of legislation. Explaining the role that history played within their legal sciences provides a window into their views on the study of history and its usefulness for understanding law and society.

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<sup>65</sup> *Ibid.*, 21-22.

<sup>66</sup> See pp. 136-149.

In the second chapter, entitled ‘Blackstone’s History of English Law: the role of natural law in directing progress and validating continuity’, I will first examine Blackstone’s legal theory, showing how Blackstone continued the tradition of associating the common law with the natural law that had been developed by former English legal writers. I will then provide examples of Blackstone’s historical narratives in *Commentaries on the Laws of England* and *The Great Charter and Charter of the Forest* (1759). In these narratives, Blackstone drew upon three historical methods to connect law and history: first, he gave a straightforward account of English law and its development; second, he argued that English law was consistent with natural law; and third, he demonstrated that customary laws, in force since time immemorial, were rational because they had been gradually adapted to changing circumstances and remained in force over long periods, thus proving their necessity to civil society and their benefit in increasing social welfare. Blackstone balanced the ideas of continuity and progress in his historical accounts. While history was evidence of what the law was, it concurrently provided proof that the law was consistent with natural law, and thus was just and beneficial to society.

In the third chapter, entitled ‘Discovering the Science of Improvement: Kames’s study of history and human nature’, I will first focus on Kames’s legal and moral theory and then on his historical methodology. Kames’s legal and moral theory was propounded in *Essays on the Principles of Morality and Natural Religion* (1751), where he argued that it was important to develop a holistic account of morality, and contended that a variety of factors could influence human actions, morality, and law. In *Principles of Equity* (1760), Kames sought to reduce equity to a science and argued that judges should employ the moral sense, reason, and the principles of justice and utility when making a decision. Kames’s style of writing conformed to the Scottish style of conjectural and theoretical history, and thus he presented his histories in a

four-stage model. This style made room for speculation about historical events in an attempt to create a deeper understanding of social development. This style and method included creating a holistic account of all the factors that contributed to an event. In *Essays upon Several Subjects Concerning British Antiquities* (1747), Kames attempted to correct common historical misconceptions by advocating a holistic approach to historical analysis. In *Historical Law Tracts* (1758), Kames traced laws from their origins and explained how they had developed in order to determine whether they were still relevant or if they were in need of reform. His objective was to compare the laws of England and Scotland with the greater ambition of creating a unified law for the whole of Britain. In *Sketches of the History of Man* (1774), Kames provided a conjectural and theoretical history, wherein he traced the progress of man and society from savagery to civilization. Most importantly, he traced how laws evolved in response to the progress of moral beliefs in society. Finally, in *Elucidations Respecting the Common and Statute Law of Scotland* (1777), Kames advocated the use of reason by judges in place of reliance on past authority and precedent. Each of Kames's writings focused on a discrete part of Kames's overall position on history and law. Kames's position is best understood by seeing how each element combines into a complete system. According to Kames, a holistic account of history was important in understanding how England and Scotland and their laws had developed. By accurately tracing this development, judges and legislators could determine where reform was needed, and whether laws continued to reflect the needs of society. If laws were no longer appropriate, reform could be implemented by courts of equity, by judges employing reason, the moral sense, and the principles of justice and utility, in place of relying on past authority.

In the fourth chapter, entitled 'Bentham and the Utility of History: using history and experience to justify reform', I focus on Bentham's principle of utility, and reveal how history entered into Bentham's legal and moral theory. The second section of this chapter

will attempt to ascertain Bentham's specific views on the value of history by examining both his comments on, and use of, history within his writings. Ultimately, Bentham's views on history can be summarized in two principles. First, to insist on retaining a law made in the past because it was the product of ancestral wisdom was a fallacy. The fact that a law was established in the past was not in itself justification for its continuation. Second, experience was the mother of wisdom, and legislators and writers could learn from history. The second section will elucidate these two principles by first focusing on Bentham's rejection of the ancestor-worshipper's fallacy. Following this, I will look at Bentham's direct criticism of Blackstone's argument that antiquity gave moral validity to existing laws. Finally, following the discussion of Bentham's repudiation of Blackstone's improper use of history for law, I will provide instances where Bentham showed how the study of history could be used as a source of example, in order to benefit law and society. Bentham utilised historical analysis to argue against the idea that ancient and long usage gave moral value to existing laws, and instead propounded the importance of creating a science of legislation based on the principle of utility.

In the fifth chapter, entitled 'Blackstone, Kames, and Bentham and the Role of History in Determining Eighteenth-Century Law', I compare the different objectives and historical methods used by Blackstone, Kames, and Bentham. I first examine the range of sources and examples of history that each writer used. Following this, I use the Bible as a case study to explore how each writer used an historical source. Finally, I examine how each writer incorporated the feudal system into their writings, which further reveals their opinions on history and how history entered into their legal and historical methodology. While Blackstone argued that history could validate the existing law, and Kames contended that history could aid in identifying the best avenues for legal reform, Bentham argued that history should not play an active role in validating or identifying current and future laws.

At the same time, I will show that the standard view that Bentham's thought was ahistorical is incorrect. Bentham used historical examples to illustrate his arguments and had a sophisticated understanding of the flaws and problems inherent in historical analysis. Bentham believed that the use of history was beneficial to the extent that past experience was the basis of knowledge, but he was also aware that history could be exploited by historians and legislators with particular and sinister interests. Thus, in comparison to Blackstone and Kames, Bentham was much more aware of, or at least more transparent about, the pitfalls of studying and utilizing history.

In the sixth chapter, entitled 'History, Utility, and Legal Reform: The "Rational Legal Sciences" of Blackstone, Kames, and Bentham' I will first compare each writer's 'rational legal science'. Important for this comparison is how historical study entered into their interpretations of the nature of legal systems and their philosophies. Following this, I will examine each writer's stance on the social contract debate, and how history entered into his discussion. Finally, I will examine each writer's opinions on legal punishment. By analysing each writer's opinions on the social contract debate and their views on punishment, I will demonstrate the extent to which their moral and legal theories permeated the entirety of their legal sciences. Integral to this study is Henry Maine's identification of the three agents of legal change: legal fiction, equity, and legislation. Blackstone, Kames, and Bentham each advocated the use of a different one of these agents. Their views on history and law were embedded within their views on legal reform. Their ideas of history and law were both consistent with, and deeply entrenched within, their development of, or presentation of, a 'rational legal science'.

Unlike Blackstone and Kames, Bentham did not accord any authority to history, because how a law had originated and developed into its existing state, while it might

reveal its corrupt origins, was inconsequential for his legal science. While Blackstone used history to support the existing legal system, and Kames used history to determine how to reform the law, Bentham advocated the introduction of laws that would result in the greatest happiness of the greatest number. To achieve this aim, one first had to ascertain whether the existing laws could be altered or abolished without resulting in a loss that outweighed the benefit. Since human beings and society had developed with the benefit of experience, it was important to create a legal code that reflected this experience. While it is often assumed that Bentham's philosophy was ahistorical, he had no need to present a partial view of history, unlike Blackstone and Kames, who tended to skew history in order to support their legal and moral theories. Because Bentham's legal science did not directly rely on history for validation or for determining legal reform, he was able to investigate and examine history, as he saw it, at face value. This was in accordance with Bentham's choice of legislation as the proper agent of legal change. Bentham attempted to create a legal system that was clear, transparent, public, free of bias, and rationally calculated. This was in direct contrast to the legal systems that were espoused by Kames and Blackstone. Their support for legal fictions and equity, respectively, emphasises this point. The rationality and transparency of Bentham's codified legal system would allow, in his view, legal change to occur openly when needed.

## **Chapter Two: Blackstone's History of English Law: the role of natural law in directing progress and validating continuity**

### **Introduction**

Blackstone's *Commentaries on the Laws of England* (1765-1769) supplied the first modern systematization of the principles of the laws of England. Having given private lectures at Oxford, using *An Analysis of the Laws of England* as a course aid,<sup>1</sup> in 1758 he was appointed as the first Vinerian Professor of English Law, and remained in that role until he resigned in 1766. Stemming from his popular lectures delivered as Vinerian Chair, Blackstone published the four volumes of *Commentaries on the Laws of England*, the most influential treatise on English common law in the eighteenth century and the first suitable for lay readership.<sup>2</sup>

Blackstone wrote the *Commentaries* to familiarize the average layman, as well as lawyers, and legislators, with English law. As Lieberman states, 'The primary and lasting value of the work rested upon Blackstone's consummate success in presenting English law as a rational and coherent system'.<sup>3</sup> Blackstone contended that the law was foreign to every Englishman who was not a lawyer, and thus the method employed in the *Commentaries* attempted to rectify this lack of general knowledge by providing a coherent systemization of the principles of the laws of England. Blackstone explained that it was important for

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<sup>1</sup> William Blackstone, *An Analysis of the Laws of England* (Oxford: Clarendon Press, 1756).

<sup>2</sup> After he resigned as Vinerian Chair, Blackstone returned to a career as a barrister, which proved to be more successful than his previous attempt, partly due to the fact that the *Commentaries* gave him greater prestige. In 1770 Blackstone was named a Justice of the Common Pleas, briefly served as a Justice of the King's Bench, and then returned to Common Pleas. For more detailed accounts of Blackstone's career as a lawyer and a judge, see Wilfrid R. Prest, *Blackstone as a Barrister: Selden Society Lecture Delivered in Lincoln's Inn Old Hall, July 10<sup>th</sup>, 2007*. Selden Society Lecture 2007 (London: Selden Society, 2010); Wilfrid R. Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford: Oxford University Press, 2008), 259-302.

<sup>3</sup> Lieberman, *The Province of Legislation Determined*, 32.



every man, especially every propertied Englishman, to understand the law.<sup>4</sup> Since they could be called upon to take part in a jury, and since the role of the jury was to mitigate the power of the judges, he argued that knowledge of the law was essential, especially in cases where law and fact were intertwined.<sup>5</sup> In addition to laymen, Blackstone also observed that many influential people, including Members of Parliament (MPs) and peers, were not erudite in the law. Thus, he wrote in an institutional style derived primarily from Matthew Hale in order to provide a suitable exposition of common law for lawyers and MPs.<sup>6</sup>

Studies on Blackstone have been significantly influenced by the scathing attack on his *Commentaries* by Bentham in both *A Fragment on Government* (1776) and ‘A Comment on the Commentaries’. These two works demonstrated what Bentham believed were the errors in Blackstone’s work, most importantly, his appeal to natural law, divine law, and natural rights, his reliance on the social contract, and his antipathy to reform. Wilfrid Prest contends that Bentham’s impression of Blackstone as ‘an authoritarian, obscurantist reactionary’ was widely accepted in the nineteenth century by ‘radicals, reformers, and non-lawyers, and is by no means defunct today’.<sup>7</sup> Prest’s recent work focuses on debunking the myth of Blackstone as an anti-reformist. Introducing Part II of *Blackstone and his Commentaries: Biography, Law, History*, Prest asserts that, despite Bentham’s harsh treatment of Blackstone, they had similar goals for reform, especially concerning criminal justice and the penal system. Blackstone criticised specific legal rules, including the game laws, the doctrine of corruption of blood, and the proliferation of capital

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<sup>4</sup> Nigel E. Simmonds, “Reason, History and Privilege: Blackstone’s Debt to Natural Law,” *Zeitschrift der Savigny-Stiftung* 105, no. 1 (1988): 200.

<sup>5</sup> William Blackstone, *Commentaries on the Laws of England*, vol. i, 4 volumes (Oxford: Oxford University Press, 1765-1769), 8.

<sup>6</sup> John W. Cairns, “Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State,” *Oxford Journal of Legal Studies* 4, no. 3 (Winter 1984): 352; Wilfrid R. Prest, *Blackstone and His Commentaries: Biography, Law, History* (Oxford: Hart Publishing, 2009), 31; Harold J. Berman and Charles Reid Jr., “The Transformation of English Legal Science from Hale to Blackstone,” *Emory Law Journal* 45 (1996): 485-497.

<sup>7</sup> Prest, *William Blackstone Law and Letters in the Eighteenth Century*, 9.

offences.<sup>8</sup> These laws were what Blackstone would refer to as laws that had been invented through an improper use of reason. Blackstone's approach to these issues, among others, sheds light on the complexity of his thought and his constant struggle with balancing continuity and change.

Blackstone venerated the existing state of English law and the mixed constitutional government, believing they had evolved into a truly remarkable system that supported and nurtured English liberty. Daniel J. Boorstin notes that Blackstone argued that liberty was implied by the common law legal system, as it was composed of customs that were introduced by the consent of the people.<sup>9</sup> There was a tension, however, between Blackstone's reverence for the developed common law system, and his appreciation for ancient and natural law.<sup>10</sup> This tension is seen in his historical narratives which concurrently venerated the significance of long and immemorial usage, Anglo-Saxon laws and customs used before the Norman Conquest (1066), and natural law. According to Blackstone, the fact that certain English laws were similar to laws found in foreign nations or in past civilizations gave extra weight to the belief that they were consistent with natural law and founded in reason. In addition, the idea that customary laws antedated legal records and remained in use supported the fact that they were necessary and beneficial to mankind.

This chapter will first examine Blackstone's legal theory and then analyse a sample of Blackstone's historical narratives. An analysis of Blackstone's historical narratives in *Commentaries on the Laws of England* and *The Great Charter and the Charter of the Forest* (1759) reveals that he had three methods of using history to strengthen the

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<sup>8</sup> Prest, *Blackstone and His Commentaries*, 63.

<sup>9</sup> Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries Showing How Blackstone, Employing Eighteenth Century Ideas of Science, Religion, History, Aesthetics, and Philosophy, Made of the Law at Once a Conservative and a Mysterious Science* (Chicago: University of Chicago Press, 1996), 157.

<sup>10</sup> *Ibid.* The tension relates to how a common law that was seen to have developed over time could be consistent with the view that ancient and natural laws were authoritative.

legitimacy of English law. Blackstone's first method was to provide a straightforward account of English law and its development. In order to understand the English law, it was necessary to examine how it had originated and developed. In the 'Introduction' to the *Commentaries*, Blackstone traced the development of the common law in England and its rise to prominence over civil and canon law. He concurrently demonstrated how common law's unique development had resulted in its absence from university education.

Blackstone's second method, as discussed above, was to show that English law was consistent with natural law. The fact that English laws were similar to laws that existed in past societies – Biblical times, Ancient Greece, Ancient Rome – proved that they were consistent with natural law, and thus consistent with reason and human necessity. The example I will use to demonstrate this method is found in the 'Introduction' to Book II of the *Commentaries*, where Blackstone used the Bible as an historical source to assert that the notion of property was consistent with natural law. By demonstrating how property existed in the Bible, before the development of civil society, Blackstone showed how it naturally benefitted human kind. Although both property and inheritance had been regulated by English positive municipal laws, they both had developed instinctively in society. Showing that property had existed during Biblical times, and had developed in other societies, legitimized its existence in English law and its central role in English legal theory. This argument supported Blackstone's view that valid laws developed naturally in response to human needs, and that people should be wary of rash attempts to alter and reinvent the law.

Blackstone's third method was to demonstrate both the continuity and progress of English law. First, Blackstone demonstrated the continuity of the law by showing that common law received its validity from long historic usage. Customary laws, in force since beyond the reach of memory, were rational because they continued to be universally

accepted, thus proving their necessity in civil society and their benefit in increasing social welfare. Second, Blackstone demonstrated progress by showing that many laws naturally occurred due to human adaptation to changing circumstances. Legal change occurred when laws were revealed to be either inconsistent with natural law or shown to have been enacted out of self-interest to the detriment of society. I will provide three examples of this method in Blackstone's work. The first example of this balancing of continuity and progress was found in Blackstone's account of the development of *Magna Carta* in the 'Introduction' to *The Great Charter and Charter of the Forest*. Blackstone demonstrated the significance of Anglo-Saxon laws through the actions of the barons and earls in 1213 and 1214 in attempting to restore English laws. The barons and earls thought the current laws were unjust and attempted to restore the Anglo-Saxon laws that they believed were beneficial. *Magna Carta* was an important stepping-stone towards the constitutional government that had developed by the eighteenth century. By firmly establishing the origins of *Magna Carta* in the pre-Norman laws of Edward the Confessor (r. 1042-1066) and the Charter of Henry I (r. 1100-1135), which the earls and barons claimed reinforced ancient liberties, Blackstone aimed to illustrate legal continuity from Saxon England, and place the foundation of the common law in Anglo-Saxon laws. The final two examples are both found in the *Commentaries*. The second example is the narrative 'Of the King, and his Title' where Blackstone asserted the legitimacy of the Hanoverian line by showing the succession of royal blood from Egbert to George III. In addition, he demonstrated that Parliament had a right, confirmed by historic precedent, to regulate the succession of the Crown. Thus, Blackstone provided an historical account to prove the legality of the Hanoverian claim to the English throne. Progress was shown through Parliament directing the succession of the Crown; however, arguing that this action was legally valid through

historic precedent also showed continuity. The final example is taken from Blackstone's account 'Of the Rise, Progress, and gradual Improvements, of the Laws of England'. Blackstone separated the history of English legal development into specific eras that conformed to important events that in turn had led to the creation of the legal and political system that existed in eighteenth-century England. This historical narrative illustrated the connection between natural law and common law and traced the progressive change in English law. Blackstone emphasised the point that the greatest changes to the legal system that had taken place in English history had only occurred when the previous laws had been shown to be unjust or inconsistent with natural law.

Blackstone's historical narratives traced the continuity and progress of English laws. Progress and continuity, seemingly at odds, coalesced to perfect English law because for Blackstone, if a law was unjust or unnatural, it would have been revealed to have been so, and, as a result, would have been altered. Thus, laws that had stood the test of time were deemed just, and the fact they had stood the test of time made them authoritative. In this way, history provided validation for laws and went hand in hand with progress. Blackstone utilised his theory of history – the historical account of its development and the fact English laws were validated by their consistency with natural law and by long continued usage – to make the whole of English law intelligible to both lay people and lawyers alike, and to celebrate the liberty-promoting nature of the existing constitutional government. According to Blackstone, history provided evidence of what the law was, and the fact that the current law was consistent with natural law proved that it was just and beneficial to society.

## Section 1: Blackstone's Legal Theory

Using a Roman law structure, Blackstone attempted to provide a coherent systemization of the principles of the laws of England, and to argue that common law, like natural law, was based in rationality and reason. Thus, the second section of the 'Introduction' of the *Commentaries*, entitled 'Laws of nature in general', set out the formal legal theory upon which his detailed treatment of English law would be based. Blackstone defined the law of nature as 'the will of his maker', stating:

For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.<sup>11</sup>

An important link established between the common law and natural law was the belief that nothing was law that was against reason. Blackstone went on to claim that law contrary to natural law was not law at all, and thus should not be obeyed. Natural law was dictated by God and thus provided the moral foundation of all human laws. Laws that were derived from natural law would conform to the rational nature of human beings.

Blackstone utilised Pufendorf, Grotius, John Locke, Jean Barbeyrac, and Montesquieu to develop his theory of natural law.<sup>12</sup> Grotius's and Pufendorf's theories on natural law were popular throughout continental Europe and were adopted by English

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<sup>11</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 39-40.

<sup>12</sup> John Locke (1632-1704), philosopher: see his *Two Treatise of Government* (1689). Jean Barbeyrac (1674-1744), French jurist: see his translation of Pufendorf's *De Jure Naturae et Gentium* (1672). Scholars have also noted the influence of Jean-Jacques Burlamaqui on Blackstone's natural law theory. Blackstone, however, did not cite Burlamaqui in his *Commentaries*. See Paul Lucas, "Ex Parte Sir William Blackstone, 'Plagiarist': A Note on Blackstone and Natural Law," *The American Journal of Legal History* 7, no. 2 (April 1963): 142-158. Burlamaqui (1694-1748), Swiss legal and political theorist: see his *Principes du droit naturel* (1747) and *Principes du droit politique* (1751).

theorists like Thomas Wood and Henry Ballow.<sup>13</sup> Both Wood and Ballow turned to natural law to explain legal authority.<sup>14</sup> As Prest and other scholars have noted, Blackstone studied Wood's *Institute of the Laws of England* and drew heavily upon Wood throughout his historical narratives in the *Commentaries*.<sup>15</sup>

As discussed above, Grotius and Pufendorf agreed that self-preservation and human sociability were the basis of natural law. The major distinction between the natural law theories of Grotius and Pufendorf concerned whether natural law could exist independently of God. Grotius contended that there were moral reasons for justice that were independent of religion, and denied that natural law could be identified with either divine law or biblical law. Grotius argued that if there was no God, the obligation to conform to laws of nature came from the natural impulse to survive.<sup>16</sup> Pufendorf re-attached a theological angle to natural law theory, arguing that God was necessary because the obligation to conform to laws only existed where there was a superior. Furthermore, he noted that laws and morals may be human made, but they were no more than deductions from natural laws, which were inherent in human nature.<sup>17</sup> While they diverged on whether God was necessary for obligation, they agreed that the law of nature could be seen from rational reflection on human nature. The three tenets, self-preservation, sociability, and rational reflection, were central to Blackstone's conception of the relationship between natural law and the common law. Both natural law and the common law were rooted in reason, and the fact that certain English laws were analogous to laws that had developed in other societies and in other eras

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<sup>13</sup> Thomas Wood (1661-1722), lawyer: see his *Institute of the Laws of England; or the Laws of England in their Natural Order, according to Common Use* (1720). The treatise was the leading work on English law until superseded by Blackstone's *Commentaries*. Henry Ballow (1707-1782), lawyer: see his *A Treatise Upon Equity* (1737).

<sup>14</sup> Julia Rudolph, *Common Law and Enlightenment in England, 1689-1750*. Studies in Early Modern Cultural, Political and Social History, vol. 15 (Woodbridge, Suffolk: The Boydell Press, 2013), 171.

<sup>15</sup> *Ibid.*, 184-185; Prest, *William Blackstone: Law and Letters in the Eighteenth Century*, 68.

<sup>16</sup> Haakonssen, *Natural Law and Moral Philosophy*, 26-30.

<sup>17</sup> *Ibid.*, 26-30, 37-42.

showed that they were consistent with natural law. In addition, Grotius's and Pufendorf's natural law theories were consistent with Blackstone's notion that laws were validated by long usage. English laws originated, and continued to exist, because the English believed they were beneficial and necessary. These laws had originated and developed in response to human necessity, sociability, and self-preservation.

Blackstone believed that man was empowered through the faculty of reason to discover God's laws. He argued that God had created the world and implanted in every individual an innate sense of natural law, and thus man knew when reform was necessary. Thus, Blackstone's natural law theory was a hybrid of the natural law theories produced by Grotius and Pufendorf. Blackstone argued that laws developed to reflect natural law: 'These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions'.<sup>18</sup> As God created the universe and human beings capable of reasoning, the need to adopt certain laws and reform others was understood by reflecting on human necessity. Blackstone explained: 'This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce it's laws by an immediate and direct revelation.'<sup>19</sup> God gave man the rational faculty to both perceive the need for laws and the ability to implement them. Legislators and judges throughout history enacted legal change in response to the fact that the existing laws or practices in their time were inconsistent with natural law, or had been enacted with self-interest in mind to the detriment of society.

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<sup>18</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 40.

<sup>19</sup> *Ibid.*, 41-42.



Blackstone's views on the development of English law and its connection to natural law were similar to those promoted by Hale. Hale wrote that laws continuously evolved, always improving and adapting to the needs of society.<sup>20</sup> As Postema notes, for Hale, the continued practice of a law throughout history proved its reasonableness. Laws originated and continued to be practiced because people continued to believe they benefitted society. Likewise, if a law were found to be unreasonable, it would be adapted to become more suitable. Thus, there was a connection between the natural law and history in common law theory. The legal and moral legitimacy of a law came from its continued usage and universal acceptance, and it was these two factors that signalled that a law was consistent with natural law.

Historians, such as Posner and Boorstin, place too much emphasis on the importance of strictly rediscovering past Anglo-Saxon laws in Blackstone's theory, and have not given enough prominence to the significance of natural law as a standard for validation. According to Posner, Blackstone viewed the common law as a set of customs of immemorial antiquity. Blackstone rationalized judicial creativity in adapting the common law to contemporary social needs by describing it as an attempt to recover natural law; more specifically, laws that were lost as a result of the Norman Conquest and the introduction of feudalism. The task of the eighteenth-century judge was to scrape away the Norman practices and rediscover the Anglo-Saxon laws. Posner argues that while one could contend that this may seem to have given the judge an active role in law reform, Blackstone's argument was that once the judge had succeeded in rediscovering the Saxon custom, he was merely a 'passive spokesman for legal concepts of immemorial antiquity'.<sup>21</sup> This is similar to Boorstin's argument that Blackstone combined primitivism – the attempt

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<sup>20</sup> Lobban, "Blackstone and the Science of Law," 315.

<sup>21</sup> Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1983), 25.

to recover lost virtue – and natural progression into a theory to justify English law, and warned men to be wary of rash attempts to reform the law.<sup>22</sup> While Posner and Boorstin are correct in identifying Blackstone’s appreciation for immemorial usage and laws founded in the Anglo-Saxon era, the laws Blackstone hoped judges would ‘scrape away’ were not distinctively Norman laws, but were, more accurately, what he described as laws that were invented for self-interest and were not consistent with natural law. According to Blackstone, reason should be used to discover and understand the law, but should never be used to invent and reform the law. The adoption of Pufendorf’s and Grotius’s theories of natural law, which were based in reason, human necessity, and self-preservation, contributed to Blackstone’s understanding of the relationship between natural law, reason, and time immemorial in the development of English law.

## **Section 1.2: Contradictions and Confusions in Blackstone’s legal theory**

Many of the scholars who have written on Blackstone have concurred with Bentham’s view that the *Commentaries* is riddled with confusion and contradiction. These contradictions have been the result, as Lobban argues, of the fact that Blackstone adopted and borrowed different theories and ideas that ultimately conflicted with one another.<sup>23</sup> Blackstone attempted to reconcile two legal forms and approaches: he merged the English law with a Roman law structure, in order to reduce the chaotic appearance of the former into an order and to prove that it could be seen as a logical system based on principles. The Roman law structure was important to Blackstone for showing that reason was embodied in the English law. The consensus among historians has been that this merging of these two approaches ultimately failed.

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<sup>22</sup> Boorstin, “The Tendency of History,” in *The Mysterious Science of the Law*, 62-84.

<sup>23</sup> Lobban, “Blackstone and the Science of Law,” 328.

Another problem in the *Commentaries* was the fact that Blackstone adopted the notion of parliamentary sovereignty without realizing its difficulties for his natural law arguments and his belief in the supremacy of the common law. Historians such as C.K. Allen, Ernest Barker, and A.V. Dicey have pointed out the contradiction between Blackstone's conception of common law, his theory of natural law, and his notion of parliamentary sovereignty.<sup>24</sup> At times he inferred that Parliament was supreme and that parliamentary law could not be overturned or challenged. The contradiction is found in the fact that the notion of parliamentary sovereignty directly opposed his view that substantive laws contrary to reason and natural law were not law. Lobban discusses the contradictions that exist in Blackstone's theory. On one hand, God had dictated the law of nature, which was binding all over the globe. On the other hand, in all governments there must be a supreme, irresistible, uncontrolled authority. Lobban explains, 'These contradictions may have been accentuated by his borrowing from sources which were incompatible in his introductory chapters'.<sup>25</sup>

The above historians found a contradiction between Blackstone's support for parliamentary sovereignty and his theory of natural law. It is important to remember that Blackstone, like Locke before him, accepted that natural law alone was not sufficient for social coordination. Political society was needed to adopt and enforce law. The role of the sovereign was to enact municipal laws that were consistent with natural law. Locke believed that rebellion would occur when a sovereign's behaviour revealed a consistent intention to act against the public good; more specifically, enacting laws that were

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<sup>24</sup> Carleton Kemp Allen, *Law in the Making* (Oxford: Clarendon Press, 1966), 450; Ernest Barker, *Essays on Government* (Oxford: Clarendon Press, 1945), 130-137; A.V. Dicey, *The Law of the Constitution*. Oxford Edition of Albert Venn Dicey, vol. i (Oxford: Oxford University Press, 2013), 38-39.

<sup>25</sup> Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900*, 100.

repugnant to the natural law.<sup>26</sup> Lieberman explains that should this point be realised, it would be necessary to dissolve the constitution as a whole. However, the dissolution of government would have to exist outside the realm of constitutional law, because a government could not enact a law that allowed for its own demise.<sup>27</sup>

This possibility of the constitution dissolving explains Blackstone's aim to instruct every man, from layman to legislator, in the study of common law. With the help of the *Commentaries*, legislators would become more knowledgeable of the law and understand the importance of, and interplay between, the common law, natural law, and reason. Blackstone consistently noted the significance of positive imposition in advancing the law, especially through repealing unreasonable statutes. He noted past legislative advances, including the Military Tenures Abolition Act (1660) and the *Habeas Corpus* Act (1679), as well as areas where legislation was currently needed, for instance, the bloody code. Laws and practices that needed reform could be identified by demonstrating their inconsistency with natural law. The *Commentaries* can be seen as Blackstone's attempt to reconcile parliamentary sovereignty with natural law. As Lieberman states: 'It was vital to exhibit England's historic system of law as a genuinely rational and coherently organized system in order further to reveal the past damage which resulted from uninformed legislative modifications and in order to disclose the legal structure upon which responsible law-making might in future occur.'<sup>28</sup> Blackstone claimed that the governing classes' ignorance of the common law was a major reason for past legislative failures.<sup>29</sup> Thus, Blackstone's *Commentaries* was intended to enable English legislators to better inform themselves of the

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<sup>26</sup> John Locke, "Of the Dissolution of Government," in *Two Treatises of Government*. Student Edition. Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1988), 384-416.

<sup>27</sup> Lieberman, *The Province of Legislation Determined*, 52-53.

<sup>28</sup> *Ibid.*, 63-64.

<sup>29</sup> *Ibid.*, 65.

significance of natural law, reason, and common law, and in the process promote the adoption of customs consistent with natural law within civil society. Blackstone's message was that Parliament should build upon the foundation of the common law, and that statutes were to be regarded as either declaratory of the common law or remedial of defects therein.<sup>30</sup> When parliamentary sovereignty and natural law conflicted, Blackstone avoided committing himself to a natural law position. However, Blackstone hoped that by educating MPs, Parliament would not enact laws that were contrary to natural law, which could ultimately lead to the dissolution of government.

This aim of the *Commentaries* helps to explain Blackstone's goal of supplying a coherent exposition of the principles of the laws of England. If legislators were better informed about the significance of natural law for English law and understood that the aim of society was to provide security to individuals and allow them to enjoy the benefits granted to them by the immutable laws of nature, legislators would be less likely to adopt immoral laws. In addition, they would not create a future situation that threatened the dissolution of the constitutional government. Thus, while parliamentary sovereignty conflicted with the notion that positive laws that were contrary to natural law should not be obeyed, Blackstone believed that an educated House of Commons, aided by the check and balance of King and Lords, would not knowingly enforce a law that conflicted with human liberty and natural law. This interpretation of English government and law allowed Blackstone's views on parliamentary sovereignty, social contract, and natural law to co-exist.<sup>31</sup>

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<sup>30</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 86.

<sup>31</sup> This inconsistency between sovereignty and natural law was a conflict that existed in most of the works developed by natural law theorists. Fortescue was the first to attempt to explain how these two notions could coexist by claiming that the King would not enact laws that were injurious to the people because the King was both political and regal (*dominium politicum et regale*). Lobban explains that for Fortescue this meant that the King governed by laws that were made by the King with consent of the three estates – King, Lords, and

## Section 2: Blackstone and the use of History

A common characteristic of historical narratives written in the eighteenth century was the historiographical approach subsequently termed the ‘Whig interpretation of history’. This term has been used retrospectively to categorise the popular style of historical narrative. Historians have acknowledged that Blackstone put forward a ‘Whig interpretation of history’ because he traced the historical development of England towards a constitutional monarchy. Herbert Butterfield defines the Whig interpretation of history as ‘the tendency in many historians to write on the side of the Protestants and Whigs, to praise revolutions provided they have been successful, to emphasise certain principles of progress in the past and to produce a story which is the ratification if not the glorification of the present’.<sup>32</sup> Duncan Forbes illustrates the difference between scientific or sceptical Whiggism and vulgar Whiggism. A writer employed in scientific Whiggism, such as Hume, considered themselves to be in the philosopher’s trade, attempting to be a detached observer on the state of current society and its history. Forbes explains that scientific Whiggism ‘was skeptical because it questioned the value and holiness of the holy cows of the Whigs’.<sup>33</sup> Proponents of scientific Whiggism questioned the tenets of vulgar Whiggism: ‘the justification of the Revolution ... the contrast between English liberty and French “slavery”; the “ancient constitution” of the common lawyers and Commons’ apologists in the seventeenth century and later modifications; [and] the wickedness of the Stuart kings’.<sup>34</sup> Forbes argues that Blackstone’s historical methodology was an example of vulgar

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Commons – of the realm. Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900*, 18-19.

<sup>32</sup> Herbert Butterfield, *The Whig Interpretation of History* (New York: Norton, 1965), v.

<sup>33</sup> Duncan Forbes, *Hume’s Philosophical Politics* (Cambridge: Cambridge University Press, 1975), 139.

<sup>34</sup> *Ibid.*, 139.

Whiggism. He notes that Blackstone quoted Locke on law and freedom and praised England for its political and civil liberty, which ‘falls little short of perfection’, and that Blackstone contended that English laws were adapted for the preservation of this liberty.<sup>35</sup> There is no doubt considering Blackstone’s narratives and methods, that he used history to praise and glorify the existing liberty-promoting state of England.

Blackstone also portrayed English history, its revolutions and changes, as an inevitable progress. As R.J. Smith contends, Blackstone adopted Hale’s belief in an immemorial yet ever-changing law that gradually progressed through a series of changes and revolutions until it reached its perfection in the time in which they were writing.<sup>36</sup> Boorstin notes that Blackstone warned men against rash attempts needlessly to transform the law,<sup>37</sup> as Blackstone noted reason could lead to corruption, and an understanding that was replete with errors.<sup>38</sup> Blackstone claimed that if man did not meddle with the law, that it would progress in response to societal needs. Blackstone acknowledged the benefit of certain legal reforms that he believed were necessary by emphasizing the fact that the laws prior to change had been inconsistent with natural law. These unjust laws were most likely the result of legislators and judges using reason to promote self-interested pursuits. He accentuated the difference between adopting laws that were beneficial to society, and inventing laws using reason for self-interest, which perverted the natural progression of law and society. The distinction between using reason for invention instead of for discovery was integral to Blackstone’s theory of natural law. Blackstone argued that God endued man with free will, but also laid down certain immutable laws of human nature which regulated that free will. God gave man the faculty of reason to discover the purport of these laws, and

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<sup>35</sup> Ibid., 149.

<sup>36</sup> R.J. Smith, *The Gothic Bequest: Medieval Institutions in British Thought, 1688-1863* (Cambridge: Cambridge University Press, 2002), 91.

<sup>37</sup> Boorstin, *The Mysterious Science of the Law*, 64.

<sup>38</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 41.

man should only create law when nature failed to declare it. In short, using reason for invention and self-interest, instead of discovery, resulted in straying from the natural law.<sup>39</sup>

Both the ‘Whig interpretation of history’ and the guidance of natural law framed Blackstone’s historical narratives. I will now discuss the three methods, mentioned above, that Blackstone employed in his historical narratives found in *Commentaries on the Laws of England* and *The Great Charter and Charter of the Forest*.

### **Section 2.1: The historical account of the development of the common law**

Blackstone’s ‘Introduction’ to the *Commentaries* outlined the nature and extent of the laws of England. It provided two significant historical narratives for comprehending the status of English law in the eighteenth century. The first account focused on ascertaining why English law was not studied in universities, while the second account traced the development of English law. In the first account, Blackstone utilised legal tracts and treatises – written by such figures as Matthew Hale, Edward Coke, and John Selden,<sup>40</sup> as well as Acts of Parliament, papal declarations, and Roman law tracts – to trace the evolution of the common law in England, its rise to prominence over civil and canon law, and how this development resulted in the absence of English law in university education. This first account provided context for the second account, which traced the development of English law back to the Anglo-Saxon era and demonstrated the significance of long and immemorial usage for validating common law.

In the first historical narrative, entitled ‘On the Study of the Law’, Blackstone traced the development of the study of English law. Blackstone argued that at the time of the Norman Conquest, William the Conqueror and his followers were ignorant of the

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<sup>39</sup> Boorstin, *The Mysterious Science of the Law*, 48-53.

<sup>40</sup> John Selden (1584-1654), MP for Lancaster 1623 and Great Bedwyn 1626, lawyer and historical and linguistic scholar: see his *Ad Fletam Dissertatio* (1647).



language and laws prevalent in England. In addition, the discovery of the Pandects at Amalfi brought civil law into use across Western Europe.<sup>41</sup> The rational system of laws in England, which had been long established and legitimized by the Domesday Book, which outlined the customs of the realm, ensured that the civil law was not received in England. Even though King Stephen (r. 1135-1154) prohibited the study of civil law, the clergy, however, read and taught it in schools and monasteries.<sup>42</sup> According to Blackstone, the country was divided between the bishops and clergy who were dedicated to the civil and canon laws, and the nobility and laity who were loyal to the old common law. This chasm directly influenced the development of legal education in England. Blackstone contended that by the time of Henry III (r. 1216-1272), ecclesiastics were forbidden from appearing as advocates in secular courts. At this time, in the thirteenth century, there was a spread of civil law wherever the clergy gained influence, with Pope Innocent IV (r. 1243-1254) prohibiting the reading of the common law by the clergy. This gulf coincided with the birth of scholastic discipline within the universities. As the universities were entirely under the influence of the popish clergy, the common law was excluded from being taught. As a result, the common law was taught and cultivated by laymen.<sup>43</sup>

The teaching and cultivation of the common law was enhanced by John's (r. 1199-1216) and Henry III's decisions to fix the Court of Common Pleas in a single place in Westminster. This fixing of the Court of Common Pleas encouraged the professionalization and growth of the municipal law. Blackstone argued that this development helped raise the legal system to perfection under Edward I (r. 1272-1307).<sup>44</sup> As the Court was stationary, the

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<sup>41</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 17.

<sup>42</sup> *Ibid.*, 19.

<sup>43</sup> *Ibid.*, 19-21.

<sup>44</sup> It may seem as though there is a contradiction between the belief that the legal system acquired great perfection under Edward I and Blackstone's belief in the perfection of the eighteenth-century government. Writers like Blackstone and Hale revered Edward I because he improved the judicial structure and made great advances in individual rights. These were great advancements that allowed for future reform to take place.

study of the common law naturally fell into a collegiate system in London in the Inns of Court and Inns of Chancery.<sup>45</sup> By the eighteenth century, however, the four Inns of Court had become crowded and their teaching had become less effective. Blackstone believed that this decline in education in the Inns signalled an opportune moment to introduce the study of common law into England's universities.<sup>46</sup>

The second historical account presented in the 'Introduction' explained the origin of the English legal system. Blackstone explained the significance and rationale behind the common law by tracing the way in which the legal system had developed and by showing from where it had derived its authority. Blackstone explained that the common law received its binding force by long and immemorial usage. English law was a product of the intermixture of nations – the Romans, the Picts, the Saxons, the Danes, and the Normans – that had come together to create England. Blackstone contended that the mixture and incorporation of customs from different nations improved 'the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries'.<sup>47</sup> King Alfred (r. 871-899) compiled his dome-book, which consisted of the local customs of the several provinces of England. Blackstone noted that it contained 'the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings'.<sup>48</sup> Blackstone explained, however, that the interruption of the Danes caused the dome-book to be debased with foreign laws and to fall into disuse.

By the beginning of the eleventh century, there were three types of laws in England: Mercian, West-Saxon, and Danish. Following in the footsteps of his grandfather King

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<sup>45</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 21-23.

<sup>46</sup> *Ibid.*, 25-26.

<sup>47</sup> *Ibid.*, 64.

<sup>48</sup> *Ibid.*, 65.

Edgar (r. 959-975), Edward the Confessor (r. 1042-1066) compiled a single digest of laws from the three to create a concise law for the entirety of England, which became the foundation of the common law.<sup>49</sup> This law was no more than a new edition of the dome-book, ‘with such additions and improvements as the experience of a century and an half had suggested’.<sup>50</sup> Blackstone posited that this partly explained why laws garnered weight and authority from long and immemorial usage. Laws that had been practised since before the Norman Conquest were considered original English laws, had stood the test of time, and had garnered the experience of long usage. Blackstone contended that old laws were proven to be rational and consistent with natural law either because they had remained intact and enforced over a long period of time, or because they had been improved when proven necessary. Blackstone believed that the laws that had originated prior to the Norman Conquest had developed instinctively and had been adopted out of necessity. Conversely, many Norman laws were unjust and unnatural, and seen as an interruption to the natural progression of English law. Thus, Anglo-Saxon laws that originated pre-Norman Conquest lay at the foundation of the English common law.

‘Time immemorial’ was a term that, to common lawyers, signified that a law had existed since beyond the reach of memory. Hale described any law that had been created before the beginning of the reign of Richard I (6 July 1189) as before immemorial usage. He labeled such laws as *leges non scripta* and explained they were further divided into those that had existed before William the Conqueror and those introduced after William. This distinction was due to the fact that before William there were no authentic records of laws, and between William and Richard I, there were only transcripts.<sup>51</sup> Lobban contends that Blackstone’s references to ‘time out of mind’ are best understood as meaning prior to

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<sup>49</sup> Ibid., 65-66.

<sup>50</sup> Ibid., 66.

<sup>51</sup> Hale, *The History and Analysis of the Common Law of England*, 3-6.

1189, the limit of legal memory.<sup>52</sup> However, Blackstone never used the term ‘time immemorial’, and instead routinely cited ‘immemorial usage’ and ‘immemorial custom’ to denote that a practice had been in use since beyond the reach of memory. Blackstone only once cited the traditional understanding of ‘immemorial usage’ – in a section concerning incorporeal hereditaments<sup>53</sup> – as ‘long ago ascertained by the law to commence from the reign of Richard the first; and [that] any custom may be destroyed by evidence of it’s non-existence in any part of the long period from his days to the present’.<sup>54</sup> However, he qualifies his view on time immemorial and its value concerning a writ of right in a footnote, stating:

This rule was adopted, when by the statute of Westm. I. (3 Edw. I. c. 39) the reign of Richard I was made the time of limitation in a writ of right. But, since by the statute 32 Hen. VIII. c. 2. this period (in a writ of right) hath been very rationally reduced to sixty years, it seems unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an era so very antiquated.<sup>55</sup>

Blackstone, then, contended that An Act for Limitation of Prescription of 1540 altered the date of prescription to a more rational date of sixty years. Blackstone was not refuting the importance of immemorial usage, but was commenting on how it might be more realistic to provide evidence of continued usage for sixty years rather than from 1189. It is intriguing, however, that Blackstone’s first and only mention of 1189 being the limit of legal memory is in Book II, and not in Book I where he emphasised the importance of long and immemorial usage. Furthermore, Blackstone routinely placed great importance on the significance of Anglo-Saxon laws. Thus, it seems plausible to suggest that Blackstone did not give much weight to the establishment of 1189 as the limit of legal memory, and

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<sup>52</sup> Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900*, 103.

<sup>53</sup> In this section, Blackstone is explaining how a person could be discharged from paying tithes by custom or prescription. Blackstone, *Commentaries on the Laws of England*, vol. ii, 29-31.

<sup>54</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 31.

<sup>55</sup> *Ibid.*

instead applied the term ‘immemorial’ more loosely, to denote ‘beyond the reach of memory’ and simply to signify long usage.

Hence, Blackstone uses the terms ‘immemorial usage’ and ‘immemorial custom’ to signify that the practice of a custom had persisted since beyond the reach of memory, and had received its force by universal acceptance.<sup>56</sup> This explains why Blackstone dedicated a portion of his ‘Introduction’ to a detailed narrative of the origin of Anglo-Saxon laws and the creation of the dome-books. Blackstone praised Anglo-Saxon laws because they had been in force since time out of mind, were part of the foundation of the common law, and were purely English laws introduced by English kings and had continued to be universally accepted.

This first method of historical analysis used by Blackstone focused on explaining how English laws had developed and gained legitimacy. Blackstone described the origin of the English legal system, how it had developed, and why its laws continued to be practised. Blackstone explained how and why laws gained authority and validity from long usage and the quality of immemoriality. Blackstone argued that historical usage gave validity to existing customary laws, and thus presented the history of English law and its roots in Anglo-Saxon laws in order to validate and justify the continued practice of the common law legal system.

## **Section 2.2: English law and its consistency with natural law**

The second way that Blackstone used history was to argue that English law was consistent with natural law. The fact that laws had existed in various past societies signalled that they were natural laws, were founded in reason and human necessity, and consistently

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<sup>56</sup>Blackstone, *Commentaries on the Laws of England*, vol. i, 5; 64; 68; 73; 75; 80; 110; 113. Throughout the ‘Introduction’ of the *Commentaries*, Blackstone argued that common law received its binding power and authority from ‘immemorial usage’ or ‘immemorial custom’.

found to be beneficial for promoting social welfare. An example of this method appears in ‘Of the Rights of Things’. Blackstone contended that property was present before civil society, and that the use and possession of land, or an item, implied temporary ownership.<sup>57</sup> Blackstone argued that there was a link between population growth and the need for agriculture that naturally led to the existence of property.<sup>58</sup> Blackstone used the Bible and accounts of uncivilized nations to demonstrate that property and inheritance had developed out of necessity and had existed before civil society, and thus were established by long and inveterate custom.

Lobban argues that Blackstone contended that property was an absolute right of persons, and that Blackstone made it clear he did not believe absolute rights were enforceable before civil society. Lobban goes on to state that Blackstone ‘refused to commit himself on the precise origins of property, but for practical purposes regarded it as a civil right’.<sup>59</sup> Thus, Blackstone only traced a few of the positive laws of property to nature. Certainly, according to Blackstone, with the development of the common law and legislation, laws concerning property gained greater legal force. Nevertheless, Blackstone’s tracing of the origins of property to Biblical times demonstrated that customary forms of property existed prior to civil society. Property was a fundamental maxim of English law, and by utilizing the Bible as an historical source to demonstrate that property existed in past societies, Blackstone emphasised the rational nature of property, and its consistency with natural law. Furthermore, by depicting the natural transition from common property to personal property and the adoption of the right of property into English law, Blackstone presented his natural law theory of progress that was based on human necessity, sociability, and self-preservation.

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<sup>57</sup> *Ibid.*, 3.

<sup>58</sup> *Ibid.*, 5.

<sup>59</sup> Lobban, *A History of the Philosophy of Law in the Common Law World*, 100-101.

It is probable that Grotius, Pufendorf, and Locke influenced Blackstone's theory of original property. Both Locke and Blackstone pinpointed the origin of property to the time when God gave dominion over the Earth to all mankind, meaning that 'in the beginning' all was in common among them. Locke noted: '*As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property*'.<sup>60</sup> Both Locke and Blackstone believed that property originated in usage. Locke also utilised the Bible as an historical source to explain the origin of property, how use implied ownership, and how property existed prior to its being adopted by positive law.<sup>61</sup> Locke believed that people had a duty founded in natural law to respect the property of others. Grotius argued that the law of nature could be understood as the defence of *suum* (life, limbs, and liberty) and contended that this was pre-legal because depriving an individual of their *suum* would be unjust. *Suum* necessarily gave way to use-right because the preservation of life required the use of natural resources. Grotius argued that private property developed naturally through the extension of *suum*.<sup>62</sup> Pufendorf claimed that the covenant to establish property was a gradual development that was made necessary by social needs, the growth of population, and the need for industry.<sup>63</sup> Following Pufendorf, Blackstone explained: 'when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used.'<sup>64</sup> Thus, the move from common property to personal property was shown to be a necessary step in the evolution of man and society.

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<sup>60</sup> Locke, *Two Treatises of Government*, 290.

<sup>61</sup> *Ibid.*, 295-296.

<sup>62</sup> Haakonssen, *Natural Law and Moral Philosophy*, 31-32.

<sup>63</sup> Forbes, *Hume's Philosophical Politics*, 28.

<sup>64</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 4.

Blackstone, similarly to Grotius, Pufendorf, and Locke, understood the development of property in relation to human sociability and self-preservation.<sup>65</sup>

In order to demonstrate that the common law was consistent with natural law, Blackstone's method was to show that the notion of property had developed rationally and instinctively in Biblical society. Blackstone wrote:

Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature.<sup>66</sup>

Blackstone posited that property had developed out of human necessity. Without property, human society would not have developed and evolved, and instead would have remained in a state similar to that of beasts. The existence of property inferred that men were living together in a society connected with other individuals.

Blackstone demonstrated that the notion of property had developed naturally, and that it existed before it was adopted by positive law, by utilizing the Book of Genesis, which showed that a person could own water, or a well, if they occupied it, or more importantly if they were responsible for its creation. For example, Abraham asserted his ownership of a well because he was responsible for its excavation. Moreover, ninety years later, Issac reasserted his ownership over his father's property.<sup>67</sup> This suggested the existence of inheritance. Another Biblical example used by both Locke<sup>68</sup> and Blackstone was the story of Abraham and his nephew Lot. When their joint property became so great that pasture grew scarce, it was no longer feasible for them to dwell together. Abraham instructed his people to go to a neighbouring land where they could produce their own food.

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<sup>65</sup> Haakonssen, *Natural Law and Moral Philosophy*, 27-31; Rudolph, *Common Law and Enlightenment in England, 1689-1750*, 187.

<sup>66</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 7.

<sup>67</sup> *Ibid.*, 6, citing Genesis c. 13.

<sup>68</sup> Locke, *Two Treatises of Government*, 295-296.



Blackstone argued that this implied an acknowledgement of the right to occupy any land that was not pre-occupied by other tribes.<sup>69</sup> Blackstone furthered his position by noting that it was a common practice throughout history. The Phoenicians, Greeks, Germans, Scythians, and other northern peoples all engaged in the practice of migrating to unoccupied land when populations grew too large.<sup>70</sup> The idea that an action was in accord with reason, was necessary for survival, and had been practised by various societies throughout history, contributed to the argument that it was consistent with natural law.

Furthermore, Blackstone posited that the fact that property existed in nations that did not have a developed government and legal system substantiated the view that property had originated naturally and was not dependent on positive law. He gave the Tartars as an example:

This practice [property] is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage stage of vagrant liberty, which was universal in the earliest ages; and which Tacitus informs us continued among the Germans till the decline of the Roman empire.<sup>71</sup>

Blackstone suggested that the fact that the understanding of property existed in an uncivilized nation confirmed the idea that property was natural. If property existed without a developed government system to enforce the right to it, then it was natural to man.

Although Blackstone argued that property existed before it was adopted and strengthened by positive law in civil society, he also contended that civil society enabled it to be perfected. The role of constitutional government was to strengthen the fundamental rights of the people. Blackstone stated:

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<sup>69</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 6.

<sup>70</sup> *Ibid.*, 7.

<sup>71</sup> *Ibid.*, 6.

Whereas now (so graciously has providence interwoven our duty and our happiness together) the result of this very necessity has been the enobling [*sic*] of the human species, by giving it opportunities of improving it's *rational* faculties, as well as of exerting it's *natural*. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties.<sup>72</sup>

The notion of property was justified by natural law, and the role of the government was to protect and strengthen natural laws, like those concerning property, by adopting them into the constitution.

As the role of the constitutional monarchy was to strengthen the fundamental rights of the people, Blackstone next explained how the idea of property, specifically inheritance, was adopted and fortified by English law. Blackstone explained how civil society gave a person the power of 'disposing of his property by will', and if this was not done, the municipal law of the country declared who succeeded.<sup>73</sup> Blackstone contended that the right of inheritance had originated naturally, though he noted that 'we often mistake for nature what we find established by long and inveterate custom'.<sup>74</sup> Inheritance naturally occurred as a result of the next of kin being with a man as he died or because the next of kin also used the land or item that had belonged to the man in question, and implied ownership. This was the general practice and custom that naturally developed into legal provisions. While the notion of property and inheritance, more specifically the continuation of property in the next of kin, had developed naturally, Blackstone argued that 'the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right'.<sup>75</sup> Inheritance had become a permanent political establishment ensured by

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<sup>72</sup> Ibid., 7-8.

<sup>73</sup> Ibid., 10-11.

<sup>74</sup> Ibid., 11.

<sup>75</sup> Ibid.

municipal laws. The practice of property continuing after death, as a man could will his property, was an example of how municipal laws could alter natural laws to the specific needs of society.

Laws concerning property and inheritance continued to develop, in that, as Blackstone noted there was a gradual increase in instances where inheritance went to non-family members chosen by the deceased. Blackstone identified this as the result of positive municipal laws, arguing that ‘Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them’.<sup>76</sup> Blackstone questioned what would happen if a case arose in which a person died and bequeathed land to a complete stranger instead of his next of kin. He answered that some would claim that it was the natural right of the father to choose his heir and others would argue that it was the natural right of the first-born son to inherit. Blackstone asserted that both these arguments were erroneous. In this case, the municipal law of England ‘directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint’.<sup>77</sup> Here Blackstone exemplified the practice and belief that positive municipal laws were authoritative on legal questions when natural law was silent. Natural law was silent upon the question of whether next of kin should automatically inherit property or if it was the dying person’s right to choose, and thus the question fell to positive law to decide. Blackstone demonstrated how the English municipal laws concerning property determined legal practices, so long as they were not inconsistent with natural law. By illustrating how municipal law altered, strengthened, and clarified the right to property, Blackstone elucidated the important relationship between natural law and municipal law.

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<sup>76</sup> Ibid., 12.

<sup>77</sup> Ibid., 13.

Blackstone used the history of property and inheritance to show the foundation of both the common law and natural law in reason and efficacy. Although both property and inheritance had been strengthened by civil society, they had first developed instinctively, and thus were conformable to man's rational nature. The role of the government was to strengthen the fundamental, natural rights of the people. Blackstone, like Locke before him, highlighted property as one of the fundamental rights of man, as natural law recognized the existence of property rights. By identifying property as a natural law that had developed instinctively in human nature, Blackstone was stressing its rational nature, and demonstrating how natural rights predated the earliest positive laws, even *Magna Carta*, in both natural law and custom. Furthermore, the fact that the laws of England had adopted and strengthened natural laws demonstrated the assimilation of natural law into common law doctrine, and showed the necessity and benefit of having a legislator or sovereign to ensure obligation to the law. Ultimately, by proving that the common law was consistent with natural law – that many laws were not peculiar to England and were similar to laws that had been adopted in other nations and in other times – Blackstone was demonstrating that England's laws were rational and had proven themselves beneficial in promoting social welfare.

### **Section 2.3: Using history to demonstrate the significance of long usage and the balance between continuity and progress**

Blackstone's historical narratives demonstrated that immemorial laws were rational because they naturally occurred due to human adaptation to changing circumstances and had remained in force throughout recorded history, thus proving their necessity in civil society and their benefit towards increasing social welfare. Blackstone's approach will first be demonstrated through an analysis of the 'Introduction' to *The Great Charter and*

*Charter of the Forest*, wherein Blackstone explained the origin of *Magna Carta*. Following the history of *Magna Carta*, two examples will be provided from the *Commentaries*. The first narrative from the *Commentaries* will be ‘Of the King, and his Title’, wherein Blackstone argued that both the hereditary claim of the Hanoverians to the Crown and the role of Parliament in regulating its descent were legal and necessary. The second example from the *Commentaries* will be the historical narrative entitled ‘Of the Rise, Progress, and gradual Improvements, of the Laws of England’. Blackstone maintained that the common law received its validity from long historic usage. However, it was equally important to show how English law had developed and modernized. Thus, while custom and long historic usage were used to show continuity, Blackstone concurrently demonstrated the progressive change in the law. While natural law provided the standard of validity for the common law, it likewise could signal the need for legal reform. If a current law was not consistent with natural law, it was deemed void, and should be replaced with a new law, which was consistent with natural law.

### *The Great Charter and Charter of the Forest*

Several eighteenth-century writers emphasised the importance of *Magna Carta* for understanding the origins of the English constitutional tradition.<sup>78</sup> R.J. Smith notes that the publication of Blackstone’s *The Great Charter and Charter of the Forest* and the accompanying text was a major stimulus in the revival of polemical interest in the charter that occurred in England in the mid to late eighteenth century. As will be shown in this section, *Magna Carta* was seen to be not only the origin of English liberty but also

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<sup>78</sup> One writer who emphasised the importance of *Magna Carta* was Edmund Burke. Stanlis notes that Burke argued that *Magna Carta* preserved the structure of English institutions and reformed the abuses of arbitrary power in the monarchy. Peter J. Stanlis, *Edmund Burke: The Enlightenment and Revolution* (New Brunswick, N.J.: Transaction Publishers, 1967), 210-211. See also Peter J. Stanlis, *Edmund Burke & the Natural Law* (New Brunswick, N.J.: Transaction Publishers, 2013).

demonstrated legal continuity from Saxon England.<sup>79</sup> *Magna Carta*, issued in 1215 by King John, was the first document forced on to a king to limit his powers and protect the rights of the people. In 1759, Blackstone recreated both *Magna Carta* and the Charter of the Forest.<sup>80</sup> Blackstone's rationale for recreating *Magna Carta* was that,

There is not hitherto extant any full and correct copy of the charter granted by king John, M. Pine's engraving excepted, which, on account of the antiquity of it's character, is not fitted for general perusal: and the charters of king Henry the third have always been printed, even in our statute-books, not from the originals themselves, but from an *Inspeximus* of king Edward the first.<sup>81</sup>

He believed that while these charters were two of the most important legal documents created in English history, neither had been passed down through time with accuracy and precision.<sup>82</sup> Thus, Blackstone recreated the two documents, as well as 'some other auxiliary charters, statutes, and corroborating instruments', using the originals and contemporary enrolments and records.<sup>83</sup>

While recreating the charters in their original form was Blackstone's main objective, he also thought it was imperative to supply the reader with the historical context surrounding their creation. Thus, he preceded the texts of the two documents with an introduction that included a brief history of their origins. I will focus on Blackstone's account of the origin of *Magna Carta*. Blackstone's narrative highlighted the attempts of the barons and earls to reintroduce Anglo-Saxon laws. He contended that the Normans had instituted certain laws that were alien to the English, which led to the earls and barons elevating both the laws of Edward the Confessor, and the laws granted in Henry I's Charter,

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<sup>79</sup> Smith, *The Gothic Bequest*, 91.

<sup>80</sup> In refashioning *Magna Carta*, Blackstone gave it the numbering system that is still used today.

<sup>81</sup> William Blackstone, *The Great Charter and the Charter of the Forest, with Other Authentic Instruments: To Which Is Prefixed An Introductory Discourse, Containing the History of the Charters* (Oxford: Oxford University Press, 1759), i.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, ii.

as ancient liberties that needed to be reinstated. With this historical account, Blackstone emphasised the importance of natural law for the modernization and progress of English law.

Blackstone claimed that *Magna Carta* had been created in 1213 by a group of barons and earls at a congress held in Runingmede. On 20 July 1213, after Archbishop Stephan Langton had absolved him from excommunication at Winchester, John had sworn to abolish all unjust laws and to restore the laws of Edward the Confessor. After a council held later in 1213, it was commanded by John that the laws of Henry I should be observed. Two weeks later, the nobility held a meeting at St. Paul's where Langton announced he had discovered a Charter of Henry I, which would re-establish their ancient liberties. In the following year 1214, the league of barons assembled at Bury St. Edmunds and created a Charter based on Henry I's. Together they swore to wage war on John if he refused to acknowledge the liberties granted in the Charter.<sup>84</sup> Presenting their demands to the King at Christmas time, the barons initially met with outright rejection. John then decided to deliberate until Easter and requested that the barons present their demands in writing.<sup>85</sup> The earls and barons sent John a list of demands, partly consisting of Henry I's Charter, and partly of the laws granted by Edward the Confessor. Blackstone argued that this list formed the basis and foundation of what would become *Magna Carta*. He contended that many of the articles found in Henry I's document were afterwards repeated in John's.<sup>86</sup>

At Easter 1215, the barons met at Stamford in Lincolnshire with an army and marched to Brackley in Northamptonshire. The earls and barons sent their demands to the King, through his representative the Earl of Pembroke, and warned that if the King rejected

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<sup>84</sup> Ibid., iii.

<sup>85</sup> Ibid., ix.

<sup>86</sup> Ibid., i-iv.

the demands, they would seize the King's castles and all of his possessions.<sup>87</sup> John responded to the barons and earls by proposing to abolish all 'evil laws' that he had created or that had been created by his brother Richard and father Henry II, but the barons refused any proposals of accommodation. On 5 May 1215, they disclaimed all allegiance to the King and were absolved from their oaths of fealty by one of the canons of Durham, and they commenced an attack on the King's castles.<sup>88</sup> The barons took possession of London by private agreement with the citizens on 24 May 1215. The King surrendered and met with the barons at a conference ending on 19 June 1215. They drew up articles and agreements, which were reduced to the form of a charter, and to these John was supposed to fix his seal.<sup>89</sup> They agreed that twenty-five barons would be elected as guardians of English liberty and they would ensure that the charter was strictly followed.<sup>90</sup> Blackstone explained that *Magna Carta* was the product of these events and that the official document was created from the lists of demands that the barons and earls had presented in 1213 and 1214. John attempted to eradicate the charter with the help of the Pope, but John died soon after, with the charter finally and officially ratified by his successor, Henry III. While there were differences between the final version of the charter and the one John originally agreed to, which Blackstone outlined in the narrative, the portions of the charter originating in the demands of 1213 and 1214 remained unaltered.<sup>91</sup>

The fact that the laws of Edward the Confessor were lauded, and that the earls and barons demanded that they be restored and observed, demonstrated the appeal of the laws that had been observed before the Norman Conquest. Blackstone was accentuating the fact that the earls and barons longed for the old English laws. Henry I's Charter was cherished

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<sup>87</sup> *Ibid.*, xi.

<sup>88</sup> *Ibid.*, xiii.

<sup>89</sup> *Ibid.*, xv.

<sup>90</sup> *Ibid.*, xx.

<sup>91</sup> *Ibid.*, xxix-xxxi.



because of its attempt to re-establish ancient liberties.<sup>92</sup> Cairns argues that Blackstone attributed the good parts of the common law to the Anglo-Saxons, especially Alfred, and all the absurdities to the Normans.<sup>93</sup> Lobban contends that Blackstone followed another eighteenth-century legal writer, Sir Martin Wright,<sup>94</sup> in arguing that, at the time of the Norman Conquest, the English were tricked by Norman lawyers, ‘who penned the law in terms which would allow the introduction of an absolute feudal dependence’.<sup>95</sup> In the *Commentaries*, Blackstone asserted that the English wanted ‘a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived’.<sup>96</sup> He noted that this restoration was finally achieved during the reign of Charles II. This explains why he emphasised the origins of *Magna Carta* in the laws of Edward the Confessor and in Henry I’s Charter that purportedly re-established ancient liberties. The idea that the Normans introduced laws that were alien to the English led to an interest in rediscovering the laws and government that had existed before the Norman Conquest

Furthermore, Blackstone’s account in *The Great Charter and Charter of the Forest* demonstrated the significant value attributed to long and immemorial usage in English law.

As Blackstone stated in the *Commentaries*,

Whence it is that in our law the goodness of a custom depends upon it’s having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it it’s weight and authority; and of this nature are the maxims and

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<sup>92</sup> Ibid., iii.

<sup>93</sup> Cairns, “Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State,” 354-355.

<sup>94</sup> Maitland was first to argue that Wright promoted the view that English common law had feudal origins and that Blackstone popularized this view. Cairns and Grant McLeod contend that Wright’s views were heavily influenced by Thomas Craig’s writings on feudalism. See John W. Cairns and Grant McLeod, “Thomas Craig, Sir William Wright, and Sir William Blackstone: The English Discovery of Feudalism,” *The Journal of Legal History* 21, no. 3 (2000): 54-66. Sir Martin Wright (1692-1767), Baron of the Exchequer 1739-1740, Justice of the Court of King’s Bench 1740-1755: see his *Introduction to the Law of Tenures* (1730). Thomas Craig (1538-1608), Scottish lawyer and jurist: see his *Jus feudale tribus libris comprehensum* (1655).

<sup>95</sup> Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900*, 103.

<sup>96</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 413.

customs which compose the common law, or *lex non scripta*, of this kingdom.<sup>97</sup>

Blackstone argued that the fact a law was created before the Norman Conquest and was in practice during the reigns of Alfred, Edgar, and Edward the Confessor, gave weight to its authority. These laws were considered to be truly Anglo-Saxon laws, and were strengthened by the test of time. In Blackstone's historical narrative, the laws that existed before the Norman Conquest were viewed as more friendly to liberty, and thus the freedom-loving earls and barons had drawn on these old laws to create the list of demands presented to John. These earls and barons were similar, in Blackstone's eyes, to the Whig aristocrats of the eighteenth century who also cherished liberty. This view demonstrated a characteristic of the Whig interpretation of history: the anachronistic assumption that past figures had similar beliefs and goals to current figures. Furthermore, by attempting to re-establish the laws of Edward the Confessor and Henry I, the earls and barons were responding to a situation in which they believed they had been stripped of rights that had been beneficial. Forcing John to sign *Magna Carta* into law was a step taken by barons and earls, who believed that the existing Norman society and its laws were unnatural and unjust.

Blackstone's emphasis on the influence of Edward the Confessor's laws and Henry I's Charter in the emergence of *Magna Carta* demonstrated an appeal to Anglo-Saxon laws. *Magna Carta* was a significant stepping-stone towards eighteenth-century constitutional government and its common law. As some of the Whigs argued that England's constitution was founded on a social contract, *Magna Carta* was often presented as the actual compact between the sovereign and the people.<sup>98</sup> By firmly entrenching *Magna Carta's* origins

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<sup>97</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 67.

<sup>98</sup> It is important to note that later in the eighteenth century, Thomas Paine would deny that *Magna Carta* was a legitimate example of a social contract because it had not been devised by elected representatives, but was the product of the aristocracy. Thomas Paine (1737-1809), author and revolutionary: see his *Common Sense* (1776).

within the laws of Edward the Confessor and Henry I's Charter, and by pinpointing the origin of the common law in Anglo-Saxon laws, Blackstone was demonstrating the importance of pre-Norman Conquest laws to the existing government and legal system. His history of *Magna Carta* combined the importance of continuity and progress. It demonstrated continuity by reaffirming and praising Anglo-Saxon laws, and demonstrated progress by elucidating how the earls and barons re-established laws that they believed were beneficial to England. *Magna Carta* was one of the most important English constitutional documents that supported individual freedoms against ruling despots. Thus, while *Magna Carta* confirmed Anglo-Saxon liberties, it concurrently signalled progress in securing civil liberties, since these protections were entrenched in a legal document.

*'Of the King, and his Title'*

An example of Blackstone presenting a Whig interpretation of history appears in the account entitled 'Of the King, and his Title'. Blackstone explained that regal governments were either hereditary or elective, and while elective governments were more popular historically and were more conducive to liberty, hereditary governments were better in that elective governments tended to lead to bloodshed when the strongest men in society vied for the kingship. Blackstone affirmed that, 'The hereditary right, which the laws of England acknowledge, owes it's origins to the founders of our constitution, and to them only'.<sup>99</sup> He wrote:

An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of antient imperial Rome, and the most modern experience of Poland and Germany, may shew us are the consequences of elective kingdoms.<sup>100</sup>

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<sup>99</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 185.

<sup>100</sup> *Ibid.*, 186.

Blackstone utilised historical examples to show the failure of other political and legal systems to produce peace and utility, as a means to support his preferred structure: hereditary government. It is important to note that while Blackstone supported a hereditary regal government, instead of an elective regal government, he did not support an absolutist regal government. The Crown was one part of the balance of power in England – King, Lords, and Commons – that Blackstone celebrated. He was merely arguing that the Crown should descend hereditarily. Blackstone once again equated historical use with value; the fact that England had always had a single sovereign, or returned to a single sovereign after experimenting with alternative forms of government, meant, for Blackstone, that it had been historically proven to be the most efficacious system of government.

For Blackstone, history was significant in determining whether an existing law was legitimate and valuable. When refuting the argument that the doctrine of hereditary right implied an indefeasible right to the throne, Blackstone asserted: ‘No man will, I think, assert this, that has considered our laws, constitution, and history, with out prejudice, and with any degree of attention.’<sup>101</sup> In this case, history had shown the value of the doctrine of hereditary right. The practices of the past gave legal and moral validity to the current practices of society. Thus, in addition to the hereditary right to the Crown, the fact that Parliament had altered the succession in the past validated its right to grant the Crown first to William and Mary and then to the heirs of the Electress Princess Sophia. In this narrative, Blackstone traced the history of the succession of the Crown with an eye to the present, and to glorify the existing legal system. First, Blackstone highlighted Parliament’s right to control the succession and supplied reasoning why this influence was both legally valid and beneficial. Second, Blackstone substantiated George III’s legitimacy as King

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<sup>101</sup> Ibid., 188.

through hereditary succession and provided reasoning as to why the Crown eventually came to be vested in the Hanoverians. Blackstone believed that both the hereditary right to the Crown and the role of Parliament in regulating its descent were shown to be legal and efficacious by history.<sup>102</sup>

Blackstone began his narrative with the rule of King Egbert, which commenced around the year 800. While Kames, who advocated a holistic investigation into historical events, would have focused on how Egbert became King and the various factors that influenced his rule, Blackstone stated: ‘How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to enquire.’<sup>103</sup> The fact that the line of succession in England could be traced back to 800, and had remained more or less intact, was enough for Blackstone’s argument. Though there was an interruption to the royal succession due to the Danes and the rule of Canute (r. 1016-1035), the royal bloodline was restored with Edward the Confessor. Blackstone contended that the Norman Conquest and the rule of William the Conqueror also interrupted the royal bloodline. However, Blackstone stated that it was presumed that the original Saxon bloodline of succession was restored with the accession of Henry II. Although there were minor interruptions, the royal bloodline had descended intact from Egbert through to Henry II.

Closely connected with the persistence of the royal bloodline were the continued efforts of sovereigns and Parliament to regulate the succession. Blackstone presented a history of succession in England that was riddled with parliamentary interference. It was when, following Edward II’s (r. 1307-1327) abdication, Edward III (r. 1327-1377) succeeded to the Crown, Blackstone noted, that Parliament’s right to settle the succession

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<sup>102</sup> Whether Parliament had the right to alter the royal succession was a controversial issue in the seventeenth century. The issue had been effectively settled by the Glorious Revolution: see Howard Nenner, *The Right to be King: The Succession to the Crown of England, 1603-1714* (Chapel Hill: University of North Carolina Press, 1995).

<sup>103</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 190.

of the Crown was first asserted. Similarly, Henry IV (r. 1399-1413) bypassed four others to receive the Crown, which was justified by Parliament on the grounds of agnatic primogeniture – the tracing of inheritance through male descendants exclusively. As in Henry IV’s case, such interventions tended to occur when there existed a disagreement over the rightful heir to the throne. Concerning this statute of Henry IV, Blackstone argued: ‘It however serves to shew that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession of the crown.’<sup>104</sup> While the succession of the Crown in general followed a hereditary line, disagreement and confusion over the rightful heir could occur, and thus it was left to Parliament on occasion to settle the dispute.

Blackstone asserted that the practice of Parliament regulating the succession of the Crown continued, and was legally strengthened, during the reign of Henry VIII (r. 1509-1547). During his reign, several statutes were enacted which effectively regulated the succession of the Crown: the Succession to the Crown Act of 1533 declared the succession to be in Elizabeth and the heirs of her body; the Succession of the Crown Act of 1536 effectively bastardized Elizabeth and Mary and settled the Crown on the King’s children by Jane Seymour; and the Act of Succession of 1543 re-legitimated Elizabeth and Mary with the Crown being limited to Prince Edward, then Mary, and then Elizabeth, and the heirs of their respective bodies.<sup>105</sup> Both Mary and Elizabeth also enacted statutes that acknowledged their own hereditary claims to the throne.<sup>106</sup> Blackstone noted that, with the Treasons Act of 1571, the right of Parliament to direct succession to the Crown was asserted in the clearest of words. Blackstone quoted the statute:

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<sup>104</sup> Ibid., 196-197.

<sup>105</sup> Ibid., 199-200.

<sup>106</sup> Ibid., 200.

“If any person shall hold, affirm, or maintain that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; or that the queen’s majesty, with and by the authority of parliament, is not able to make laws and statutes of sufficient force and validity, to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof; such person, so holding, affirming, or maintaining, shall during the life of the queen be guilty of high treason; and after her decease shall be guilty of a misdemeanour, and forfeit his goods and chattels”.<sup>107</sup>

In this statute, Elizabeth declared that it was treasonous to assert that Parliament could not control the succession of the Crown. Blackstone asserted the necessity of regulating the succession to the Crown when disputes arose, but also the importance of conferring legitimacy on the current sovereign. It was imperative that whoever held the Crown was confirmed as the rightful heir, and thus Parliament had created statutes to bestow validity on the sovereign. Furthermore, by highlighting the historical occurrences where the succession of the Crown had been regulated, Blackstone was showing the legal validity of the validating action itself. Blackstone also reasserted the legitimacy of the royal bloodline by stating that, with James I (r. 1567-1625), the Saxon line had been once again restored. James I was a descendent of both Egbert and William the Conqueror.<sup>108</sup>

In the remainder of this narrative, Blackstone continued to focus on Parliament’s right to alter and limit the succession of the Crown, which was based on that fact that it had been exercised in the past with Henry IV, Henry VII, Henry VIII, Mary, and Elizabeth.<sup>109</sup> Blackstone claimed ‘that the crown of England hath been ever an hereditary crown; though subject to limitations by parliament’.<sup>110</sup> With the arrival of William and Mary of Orange, once again there were questions concerning the rightful succession to the Crown.

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<sup>107</sup> Ibid., 201.

<sup>108</sup> Ibid., 201-202.

<sup>109</sup> Ibid., 203.

<sup>110</sup> Ibid.

Blackstone, like other writers, explained that the break in the hereditary line after James II resulted from his abdication: ‘Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the conquest had lasted above six hundred years, and from the union of the heptarchy in king Egbert almost nine hundred’.<sup>111</sup> With the vacancy of the throne, it fell on Parliament to preserve the union of England, because no other legal body was qualified or had the authority to undertake such a responsibility. The Lords and Commons enacted the declaration of 12 February 1689 to fill the vacancy in the throne. Blackstone explained:

Perhaps, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family intirely new, and strangers to the royal blood: but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any farther from the antient line than temporary necessity and self-preservation required.<sup>112</sup>

Thus, William and Mary claimed the Crown, not by descent, but by the equivalent of purchase or donation.<sup>113</sup> This understanding of possession by purchase or donation was entrenched firmly within the English law of property.

Parliament’s need to limit and appoint the succession of the Crown occurred again when William and Mary, and then Anne, failed to produce heirs. With the Act of Settlement of 1701 it was enacted that ‘whoever should hereafter come to the possession of the crown, should join in the communion of the church of England as by law established’, and the Crown was settled on the Hanoverian line in the heirs of Sophia.<sup>114</sup> Blackstone undertook this narrative of the hereditary right to the Crown to emphasise the historical legitimacy of the Hanoverian claim. The Crown was bestowed upon Sophia and limited to

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<sup>111</sup> Ibid., 204.

<sup>112</sup> Ibid., 207.

<sup>113</sup> Ibid., 208.

<sup>114</sup> Ibid., 209.



protestant members of the Church of England who were married to none but Protestants.<sup>115</sup> Blackstone utilised historical narrative to show that Parliament's role in placing the Crown in the Hanoverian line was legitimate. Its legitimacy was shown by the fact that Parliament's right to alter the succession of the Crown had been practised at various points in English history. Furthermore, closely intertwined with Parliament's right to intervene in the succession of the Crown when needed was the immemorial practice of hereditary government. By tracing the succession of the Crown from Egbert to William I, through to Henry II, to James I, and then to the Hanoverians, the existing monarchical government's validity and authority was confirmed by and through history.

*'Of the Rise, Progress, and gradual Improvements, of the Laws of England'*

Blackstone's 'Of the Rise, Progress, and gradual Improvements, of the Laws of England' was an historical view of the state of English law, and a succinct exposition of feudal law. In the opening sentence, Blackstone described this section of the *Commentaries* as an 'historical review of the most remarkable changes and alterations, that have happened in the laws of England'.<sup>116</sup> Lieberman states that in this section, Blackstone 'described trial by jury as an immemorial common law right, insisted the Norman Conquest had not violated constitutional continuity, and viewed Magna Carta as a straightforward confirmation of Anglo-Saxon liberties'.<sup>117</sup>

Blackstone divided the legal history of England into six specific eras, within which he traced the rise and fall of various legal traditions. Blackstone elucidated the reasoning behind certain legal reforms that he believed had been necessary by emphasizing the point that the laws prior to the change had been either inconsistent with natural law or had been

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<sup>115</sup> Ibid., 210.

<sup>116</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 407.

<sup>117</sup> Lieberman, *The Province of Legislation Determined*, 41.

found unsuitable for society. In contrast to these necessary changes was what Blackstone described as legal reforms that had been undertaken with the Crown's self-interest in mind. These were examples of what Blackstone labelled legal inventions; when men used reason to create laws for personal gain, instead of discovering laws that were natural, necessary, and beneficial for society. As Boorstin argues: 'Though he might be sincere in his desire to hasten progress, man had to be aware that he was treading sacred ground and had better leave the laws of nature and of history to work themselves out.'<sup>118</sup> Blackstone warned that using reason to invent law could only pervert the legal system. Blackstone presented this narrative once again to highlight the importance of immemorial usage and natural law for the progression of English law.

The first era that Blackstone focused on was from the earliest times until the Norman Conquest. Blackstone used this era to emphasise the importance of old English laws and the authority of long usage. Blackstone stressed the state of confusion within England during this period caused by the existence of a variety of legal codes. This confusion led both Alfred (r. 871-899) and Edgar (r. 959-975) to consolidate and reform the English legal system. Blackstone suggested that prior to Alfred's rule, it was unclear where laws had originated, as different laws from different areas were 'blended and adopted into our own system'.<sup>119</sup> In response to this confusion, when Alfred succeeded to the monarchy of England, 'his mighty genius prompted him to undertake a most great and necessary work'.<sup>120</sup> Alfred created the judicial polity in which England was 'subdivided into tithings, and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king'.<sup>121</sup> Blackstone praised this system for its perseverance

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<sup>118</sup> Boorstin, *The Mysterious Science of the Law*, 83.

<sup>119</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 403.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*, 404.

through to the eighteenth century. In addition, Alfred found it beneficial and necessary to compile a legal code because of the confusion over the origins of each law and custom, and from where each derived its authority in England. Alfred ‘collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his dom-boc, or *liber judicialis*’.<sup>122</sup> Blackstone’s narrative stressed the rationality and necessity of Alfred’s actions by accentuating the state of confusion prior to his reforms. In addition, Blackstone emphasised the value of Alfred’s code, which had been demonstrated by the longevity of his judicial polity.

Blackstone next explained how, after the Danes had invaded and had been subsequently expelled, there were three types of law in England: *Dane-Lage*; Alfred’s *West-Saxon-Lage*; and the kingdom of Mercia’s *Mercen-Lage*. Blackstone contended that Edgar, ‘observing the ill effects of three dominions’, completed a uniform digest of laws, ‘with some improvements suggested by necessity and experience’.<sup>123</sup> According to Blackstone, this digest was the origin of the common law.<sup>124</sup> Thus, Blackstone showed that Alfred’s and Edgar’s legal reforms were considered necessary because both legal systems prior to reform were marked by confusion. In addition, Blackstone showed the value in these reforms by identifying their laws as the foundation of common law.

The second era described by Blackstone focused on the legal development that occurred after the Norman Conquest. Blackstone derided this era, explaining all the ways in which each king from William the Conqueror (r. 1066-1087) to John (r. 1199-1216) contributed to the deterioration of the legal system of England. Blackstone explained the

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid., 405.

<sup>124</sup> Ibid., 405-407. Blackstone lists the following as ‘remarkable Saxon laws’ instituted by Edgar: the constitution of parliaments; the election of magistrates by the people; the descent of the Crown; the great paucity of capital punishments; the prevalence of certain customs like military service in proportion to every man’s land; the estates being liable to forfeiture for treason; the descent of land to all males equally; the courts of justice consisting principally of the county courts; and the use of trials by ordeal, or wager of law, or jury.

following changes in great detail: the separating of ecclesiastical courts from civil courts; the depopulating of whole counties as a result of the introduction of continental forest laws; the narrowing of the remedial influence of the county courts; the introduction of trial by combat; and the introduction of the fiction of feudal tenure.<sup>125</sup> Blackstone contended that as the Normans had introduced laws that were foreign to English liberty, it became apparent to Englishmen that they needed to change these laws:

From so complete and well concerted a scheme of servility, it has been the work of generations for our ancestors, to redeem themselves and their posterity into that state of liberty, which we now enjoy: and which therefore is not to be looked upon as consisting of mere incroachments on the crown, and infringements of the prerogative, as some slavish and narrow-minded writers in the last century endeavoured to maintain; but as, in general, a gradual restoration of that antient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman.<sup>126</sup>

This particular passage refers to the view that as a result of the Norman Conquest, the ancient constitution of England had been lost. Since the Conquest, the English had repeatedly attempted to restore their ancient laws. With this example, Blackstone articulated the distinction between a monarch improving a legal system in which reason revealed reform was necessary, and a monarch adopting or implementing foreign laws, which were harmful to a society and had obstructed the natural progress of English society.

Blackstone went on to outline how, confronted with these new laws, the majority of kings continued Norman practices. The only king who attempted to restore Saxon laws was Henry II (r. 1154-1189), who limited the powers of the Pope with the Constitutions of Clarendon (1164); introduced traveling justices in eyre; established the grand assize; and

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<sup>125</sup> Ibid., 408-411.

<sup>126</sup> Ibid., 413.

introduced escuage or pecuniary commutation for personal military service.<sup>127</sup> By the time of John's reign, Blackstone contended that 'the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories'.<sup>128</sup> *Magna Carta* and the Charter of the Forests, discussed above, were a direct revolt against the unjust and unnatural legal system introduced by the Normans. The laws that Edgar and Alfred implemented were natural and beneficial to society. By adopting and upholding Norman laws, the Kings following the Norman Conquest went against the natural order of legal development in England. Thus, as seen in Blackstone's previous work on *Magna Carta*, the barons and earls in 1214, realizing the unnatural and unjust state of English law, forced John to sign an agreement improving and safeguarding their rights.

Blackstone's third era began with the reign of Edward I. Blackstone, like Hale before him, believed that the English legal system achieved 'a very great perfection' under Edward I (r. 1272-1307).<sup>129</sup> He noted that Edward I, among other measures, confirmed and settled *Magna Carta* and the Charter of the Forest; limited and established the bounds of ecclesiastical jurisdiction; defined the limits of the Courts of King's Bench, Common Pleas, and Exchequer; settled boundaries of authority between inferior courts; and secured the property of subjects.<sup>130</sup> Blackstone contended: 'it is from this period, from the exact observation of magna carta, rather than from its making or renewal, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head; though

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<sup>127</sup> Ibid., 415-416.

<sup>128</sup> Ibid., 416.

<sup>129</sup> Hale, *The History and Analysis of the Common Law of England*, 158. Hale celebrated Edward I as 'our English Justinian; for in his Time the Law, quasi per Saltum, obtained a very great Perfection.' There is a clear influence of Hale on Blackstone as both theorists celebrated the greatness of Edward I and justified this view with a similar list of accomplishments.

<sup>130</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 425-426.

the weight of military tenures hung heavy upon it for many ages after.’<sup>131</sup> Edward, seeing the current state of English liberties, reformed the English legal system. While it would take nearly four hundred years for the English government and common law to reach the perfection of Blackstone’s time, Edward I’s improvements to the legal system drastically benefitted the English people at the turn of the fourteenth century. That these measures were regarded as beneficial was shown by their continued acceptance.

In great contrast to Edward I’s legal reforms, Blackstone noted that other monarchs in this third era acted in self-interest, to the detriment of their subjects. For example, Blackstone explained how Henry VII (r. 1485-1509) enacted numerous laws with the sole purpose of extorting money and increasing revenue for the Crown. These pernicious measures included: resurrecting old and forgotten penal laws; permitting informations to be received at assizes in lieu of indictments in order to multiply fines; destroying entails, which made the owners of real property more vulnerable to forfeiture; allowing benefit of clergy only once for offenders; permitting a writ of *capias* on all actions on the case; and allowing defendants to be outlawed so that their goods would become the property of the Crown.<sup>132</sup> Instituting or adopting laws for self-interested purposes was harmful to the development of English law. In this way, Blackstone emphasised the difference between adopting laws that were beneficial to society and laws that were invented. Blackstone concluded: ‘In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.’<sup>133</sup>

The fourth era stretched from the reign of Henry VIII to the Restoration of Charles II. While Henry VIII made numerous improvements to the legal system and redressed many

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<sup>131</sup> Ibid., 420.

<sup>132</sup> Ibid., 422.

<sup>133</sup> Ibid., 422-423.

of the grievances and oppressions instituted by his father, Blackstone remarked that, during his reign, the royal prerogative reached a tyrannical and oppressive height.<sup>134</sup> Moreover, while Elizabeth's reign was traditionally characterized as the 'golden days of genuine liberty', she increased the power of the Star Chamber, established the High Commission Court in matters ecclesiastical, and on many occasions carried 'the prerogative as high as her most arbitrary predecessors'.<sup>135</sup> Blackstone argued that these years were 'the times of the greatest despotism', as Henry VIII and his Tudor line extended the royal prerogative to tyrannical heights. By the time of James I there was a growing middle rank, and while there was no increase in the degree of royal power exercised by him, 'The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion'.<sup>136</sup> Blackstone continued:

The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it.<sup>137</sup>

When Charles I (r. 1625-1649) succeeded to the throne, he attempted to revive laws that had been dormant during James I's reign, such as 'the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances'.<sup>138</sup> These reforms proved unacceptable to the people and resulted in the overturning of the church and monarchy, and the trial and murder

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<sup>134</sup> Ibid., 431.

<sup>135</sup> Ibid., 426.

<sup>136</sup> Ibid., 429.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

of Charles I. The growth of the middle rank ensured that new laws considered unjust and unnatural could not easily be imposed on the English people.

The fifth era began with the Restoration of the monarchy with Charles II as head of state, and ended with the Revolution of 1688, which reflected the rise of the power of Parliament over the Crown with the overthrow of James II. Blackstone contended that the restoration of Charles II marked the ‘complete restitution of English liberty, for the first time, since it’s total abolition at the conquest’.<sup>139</sup> With the Restoration, Blackstone claimed that all the oppressive appendages of foreign dominion had been removed. In addition, liberties were confirmed with the introduction of the *Habeas Corpus* Act of 1679, which formed a second *Magna Carta*. The greatest accomplishment of this era was the fact that ‘the people had as large a portion of real liberty, as is consistent with a state of society; and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative’.<sup>140</sup> The Revolution of 1688 proved that the English people had the ability to ensure the government and legal system maintained their freedoms.

The final era was that of the new constitutional monarchy that had flourished since 1688. Blackstone emphasised the slew of liberty-promoting bills that had passed as a result of the Glorious Revolution. In addition, he noted that the Crown had gained almost as much in influence as it had lost in prerogative, with the result that the English government exhibited a perfect balance between the Crown, House of Lords, and House of Commons. Blackstone’s purpose in this section was to emphasise the historical development of the British constitutional monarchy. He was attempting to encourage support for the British government by separating the legal history of England into specific eras surrounding important events that had led to the creation of the existing legal and political system. As

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<sup>139</sup> *Ibid.*, 431.

<sup>140</sup> *Ibid.*, 433.



those who have attributed a Whig interpretation of history to him have recognized, Blackstone emphasised the way in which historical development had led towards the constitutional monarchy of eighteenth century England, anachronistically assuming that the political figures of the past had had the same views as those of his own time, and presenting historical figures as heroes or villains based on whether they had advanced the movement towards the modern state or hindered it. Moreover, Blackstone highlighted the particular role of reason in legal discovery. Blackstone's views on legal development were best captured near the end of the *Commentaries* when he wrote:

We have taken occasion to admire at every turn the noble monuments of antient simplicity, and the more curious refinements of modern art. Nor have it's faults been concealed from view; for faults it has, 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.<sup>141</sup>

Blackstone insisted that there was a difference between enacting legal reform when it was shown to be necessary by current circumstances, and enacting unscrupulous laws for self-interested purposes, such as increasing revenue for the Crown or strengthening the royal prerogative. Furthermore, Blackstone cautioned against all laws and legal reforms that were not necessary, arguing that they would cause harm to society. Blackstone wrote his historical narrative 'Of the Rise, Progress, and gradual Improvements, of the Laws of England' to support his theory of an inevitable progress directed by the understanding of natural law, while concurrently emphasizing the significance of long usage.

## **Conclusion**

An analysis of the historical narratives present in *Commentaries on the Laws of England*, as well as in *The Great Charter and Charter of the Forest*, reveals that

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<sup>141</sup> Ibid., 436.

Blackstone had three methods of using history to strengthen the legitimacy of English law. Blackstone's first method was to provide a straightforward account of English law and its development by tracing English law from its foundation in Anglo-Saxon times. This method showed how long and immemorial usage confirmed that a law was beneficial just because it had enjoyed continuous universal acceptance. In particular, Blackstone emphasised the appeal of Anglo-Saxon laws. These laws constituted immemorial customs, were the foundation of the common law, and had developed naturally in England, and had not been imposed by a foreign king. The second method was to demonstrate that English law was consistent with natural law. This method also showed how English laws were beneficial and consistent with natural law because of their universal acceptance. The fact that laws had existed in past societies signalled that they were natural laws, and were beneficial to society. Blackstone's third and final method was to demonstrate both the continuity and progress of English law. According to Blackstone, if laws had remained in force for a long time, it was because they were necessary to civil society and beneficial for social welfare. However, laws would often need to be altered in response to changing circumstances, or if they were discovered to be inconsistent with natural law, or if they had been invented for self-interested pursuits. The creation of *Magna Carta*, the Restoration, and the Glorious Revolution were just a few examples of historical points at which unjust laws had been corrected. By identifying the foundation of the common law in Anglo-Saxon laws, demonstrating the relationship between the common law and natural law, and highlighting the significance of long usage and the role of reason in legal development, Blackstone attempted to make English law intelligible to both lay people and lawyers alike, and in the process celebrate the liberty-promoting nature of the existing constitutional government.

## **Chapter Three: Discovering the Science of Improvement: Kames's study of history and human nature**

### **Introduction**

Kames belonged to a group of eighteenth-century thinkers and writers who dedicated themselves to studying the science of human nature. Following the successful discoveries made by Newton regarding the physical world, eighteenth-century thinkers made a concerted effort to discover the universal truths of the moral world. Kames argued that, through historical study, the science of human nature could be understood, thus opening up new avenues for human development and progress. Whether as a judge of the Court of Session, an advocate, a member of the Select Society,<sup>1</sup> or as a writer on history, law, and agriculture,<sup>2</sup> Kames remained devoted to the goal of reform and improvement. He contended that the best way to improve current society was through studying the history of law and tracing how civilization had developed.

Kames argued that law was only in a state of perfection when 'it corresponds to the manners of a people, their circumstances, their government. And as these are seldom

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<sup>1</sup> The Select Society was an elite literary group in Edinburgh during the eighteenth century. Kames, along with Adam Ferguson, Hume, and Adam Smith, were four of the fifteen founding members. In 1755, the Select Society founded the Edinburgh Society for Encouraging Arts, Sciences, Manufactures, and Agriculture in Scotland. This group's existence underscored the importance of improvement among the Scottish Enlightenment literati. Mainly focused on the improvement of the Highlands, as a member of the board of trustees, Kames oversaw the attempt to promote good government, industry, and the protestant religion. See Nicholas Phillipson, "The Scottish Enlightenment," in *The Enlightenment in National Context*, eds. Roy S. Porter and Mikuláš Teich (Cambridge: Cambridge University Press, 1981), 19-40. Adam Ferguson (1723-1816), Professor of Natural Philosophy at University of Edinburgh 1759-1766, Professor of Pneumatics and Moral Philosophy 1764-1785, see his *An Essay on the History of Civil Society* (1767). Adam Smith (1723-1790), moral philosopher and political economist, Professor of Moral Philosophy at the University of Glasgow 1752-1764: see his *The Theory of Moral Sentiment* (1759) and *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

<sup>2</sup> Throughout his life Kames was interested in agricultural improvement. He used both the estate inherited from the Kames family in Berwickshire and the estate inherited from his wife's family, the Drummonds, to experiment with different forms of agriculture and rotation. He also wrote extensively on the improvement of agriculture in Scotland. In 1766, he published *Progress of Flax-Husbandry in Scotland*; in 1771 'Observations upon the Paper concerning Shallow Ploughing'; and in 1776 *The Gentleman Farmer: Being an Attempt to Improve Agriculture by Subjecting It to the Test of Rational Principles*.

stationary, the law ought to accompany them in their changes'.<sup>3</sup> Thus, Kames's methodology for studying legal systems was to outline the rationality behind laws and how each law had evolved in response to society's changes. This practice concurrently indicated which laws were out-dated and necessitated reform. Kames's methodology and views conflicted with the opinions of other notable legal theorists in the eighteenth century. As discussed in Chapter Two, the English jurist and judge William Blackstone relied on natural law and long and immemorial usage as central sources of legal authority, and argued that the law had achieved a state of perfection in eighteenth-century England. Blackstone's understanding of the consistent and static nature of fundamental law was in direct contrast to Kames's belief in continuously evolving ideas of morality and law.<sup>4</sup>

The philosopher and jurist Jeremy Bentham, the subject of Chapter Four, applauded Kames's study of legal history, praising Kames's *Historical Law Tracts* as an example of how history could be applied to jurisprudence. Bentham considered Kames's historical approach to be superior to Blackstone's method in the *Commentaries*. In *A Fragment on Government* (1776), Bentham commented that Kames's *Historical Law Tracts* provided an 'ingenious and instructive view of the progress of nations'.<sup>5</sup> While Bentham agreed with Kames that laws should change with the evolution of society, he thought it was the role of the legislator to make these changes and that they should be done openly and explicitly. According to Bentham, society should be governed by a legal code, scientifically calculated, and based on the principle of utility. The comparison between Kames, Blackstone, and Bentham will be explored further in Chapters Five and Six.

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<sup>3</sup> Henry Home, *Select Decisions of the Court of Session, from the Year 1752 to the Year 1768*, 2nd ed. (Edinburgh: Bell & Bradfute, 1780), iii.

<sup>4</sup> Blackstone was aware of Kames's work, and questioned Kames's idea of equity and his understanding of the common law. Relaying Kames's belief that a court of equity existed to 'abate the rigour of the common law' and determine 'according to the spirit of the rule, and not according to the strictness of the letter', Blackstone retorted that the common law also allowed judges 'to fix and adopt the true sense of the law in question.' Blackstone, *Commentaries on the Laws of England*, vol. iii, 430-431.

<sup>5</sup> Bentham, "A Fragment on Government," 430.

It is important to contrast Kames's views with other notable eighteenth-century legal theorists because, as the eighteenth-century scientist and historian William Smellie noted, in Scotland's 'supreme court, the law-writings of Lord Kames are held in equal estimation, and quoted with equal respect, as those of Coke or Blackstone in the courts of England'.<sup>6</sup> Thus, not only is it important to examine Kames's writings for their application of legal history towards developing an argument for legal reform, but also because he was highly respected and influential in the Scottish legal system.

Kames believed that law was only a rational study when traced historically 'from its first rudiments among savages, through successive changes, to its highest improvements in a civilized society'.<sup>7</sup> In order wholly to comprehend a law or a legal system, one must understand its origin, and how it had progressed through different ages into its present form. While Kames argued that this was the only way successfully to study law as a rational science, he noted that it was rarely undertaken in this way. One of Kames's reasons for studying and tracing the historical evolution of the legal system was the fact that England and Scotland possessed separate and distinct legal traditions. This became a problem after the Acts of Union of 1706-7 when Scotland retained its own law and legal process.<sup>8</sup> As William Lehmann explains, 'its many social and economical consequences served to bring the differences, and in some respects the conflicts, between the laws of the two countries into sharper focus than was before the case, and every "writer," advocate and judge had continuously to struggle with this problem'.<sup>9</sup> According to Kames, a thorough historical study of how English and Scottish laws came into being would help reveal which

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<sup>6</sup> William Smellie, *Literary and Characteristical Lives of John Gregory, M.D., Henry Home, Lord Kames, David Hume, ESQ, and Adam Smith, L.L.D.* (Edinburgh: Bell & Bradfute, 1800), 128-129. William Smellie (1740-1795), antiquarian and editor of the *Scot's Journal* and the *Encyclopaedia Britannica*.

<sup>7</sup> Henry Home, *Historical Law Tracts*, 1st ed., vol. i, 2 vols. (Edinburgh: A. Kincaid and J. Bell, 1758), v.

<sup>8</sup> The Acts of Union 1707 were two Acts of Parliament: the Union with Scotland Act 1706 passed by England and the Union with England Act passed by Scotland in 1707. The Acts joined England and Scotland into the single United Kingdom of Great Britain.

<sup>9</sup> Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment*, 197-198.

legal traditions were logical and rational, and therefore which laws should be retained by the unified kingdom.<sup>10</sup> As Lieberman argues, Kames proposed two important general methodological principles: that law had to be studied as an historical subject; and that the rationality of the law must be assessed in historical terms.<sup>11</sup> Tracing laws from their creation to their current state would give greater clarity to the law, could aid in reforming and merging the two current legal systems in Britain, and ultimately would contribute to uncovering the science of human nature.

Throughout his writings, Kames consistently argued for a more holistic understanding and interpretation of law, morality, and society. Kames's study of the science of human nature, and his unwavering devotion to the goal of reform and improvement in every aspect of society, from law to agriculture, will be demonstrated through an analysis of some of his writings. First, I will focus on Kames's legal and moral theory. In *Essays on the Principles of Morality and Natural Religion* (1751), Kames argued that human actions and morals could not be reduced into simple theories of human conduct, and that a more holistic approach was needed to understand the motives producing a person's actions. In *Principles of Equity* (1760), Kames outlined the role and duty of the Court of Session and attempted to reduce equity to a science. He saw a variety of factors, including utility, justice, and the moral sense, as being significant in law and legal reasoning. Following an analysis of his legal and moral theory, I will focus on Kames's use of history. In his legal dictionaries – *The Decisions of the Court of Session from its institution to the present time, abridged and digested under proper heads, in the form of a Dictionary* (1741), *The Statute Law of Scotland Abridged, with Historical Notes* (1757), and *Select Decisions of the Court of Session, from 1752 to 1768* (1780) – Kames compiled legal decisions, making the current law more accessible for lawyers, judges, and writers. Finally, in

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<sup>10</sup> Home, *Historical Law Tracts*, vol. i, xvi.

<sup>11</sup> Lieberman, *The Province of Legislation Determined*, 149.

*Essays upon Several Subjects Concerning British Antiquities* (1747), *Historical Law Tracts* (1758), *Sketches of the History of Man* (1774), and *Elucidations Respecting the Common and Statute Law of Scotland* (1777), Kames argued that historical knowledge was essential for the study of law.

It is essential to draw on the arguments from each of his essays to reveal Kames's complete view on history and law. A holistic account of history was important to understand how England and Scotland and their laws had developed. By accurately tracing this development, judges and legislators could determine where reform was needed, and whether laws reflected the present morality of society. If not, reform could be undertaken by courts of equity, by the employment of reason, the moral sense, and principles of justice and utility, in place of relying on past authority or precedent. His arguments for a more holistic understanding of human conduct and his wish to reduce equity to a science harmonized with his historical methodology and his ambition for legal reform. Kames's study of the science of human nature focused on improvement and the advancement of society from savagery to civilization. He argued that only through the science of human nature and an appreciation of history could society be understood and ultimately make progress towards perfection.

### **Section 1: Kames and the Holistic Understanding of Human Nature and Law**

As Kames was a prominent figure in Scottish literary circles – he was a member of the Select Society and a founding member of the Philosophical Society of Edinburgh – it is important to relate his theory to the larger moral theory debates occurring in Scotland, as well as in England and Europe. With his belief in a moral sense and common sense of right and wrong based on God and experience, Kames placed himself in the middle of the moral

debate. On one side of the argument, scholars such as Gershom Carmichael,<sup>12</sup> Shaftesbury, Pufendorf, and Hutcheson contended that God gave all creatures an innate fundamental understanding of right and wrong. On the other side, Hobbes argued that there was no natural moral order and thus man needed to establish society with leaders and rules to prevent inevitable war against all. According to Hobbes, there was no moral justification for any particular set of rules, but rules were necessary to structure and contain society. While Kames believed in an innate moral sense, he also believed that human experience played an important role in developing morality and that laws were needed in order to entrench the moral sense into society.<sup>13</sup> Thus, Kames proposed a compromise between psychological egoism and altruism, demonstrating the complexity of human nature.<sup>14</sup>

In order fully to understand Kames's theory of law, it is necessary to grasp his theory of human nature. For Kames, these two theories were inseparable and both were enhanced by the proper study of history. The study of history provided knowledge concerning the origin and the evolution of humans living in society and the laws that

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<sup>12</sup> Gershom Carmichael (1672-1729), Professor of Moral Philosophy at the University of Glasgow 1727-1729.

<sup>13</sup> For a more detailed consideration of the role of experience and environment on human development, see Robert Wokler, "Apes and Races in the Scottish Enlightenment: Monboddo and Kames on the Nature of Man," in *Philosophy and Science in the Scottish Enlightenment*, ed. Peter Jones (Edinburgh: J. Donald Publishers, 1988). Wokler compares Mondobbo's and Kames's theories of human nature. Kames did not follow Montesquieu's belief that climate had a physiological effect on humans. Kames instead argued that custom and experience were more influential determinants of human nature. Kames invented the anthropological view, later termed 'polygenesis', that the diverse races of men comprised distinct species.

<sup>14</sup> The views presented in *Essays* and in *Principles* harmonize with his ideas later developed in *Elements of Criticism* (1762). Kames's objective in *Elements* was to illustrate how criticism was a rational science and was founded on the principles of human nature. As a subject of reason and taste, Kames believed that the art of criticism contributed to humanity, and thus society's advancement towards civility. Following in the footsteps of Locke and Hume, Kames argued that humans experienced a train of ideas, which could be related by order, resemblance, contiguity, and cause and effect. Similar to *Principles*, he argued that the moral sense and the sense of beauty were inherently internal senses and that a combination of innate senses, experience, learning, and judgment were needed to form taste. Similar to his desire to reduce equity to a science, he wanted to reduce criticism to a science, in effect establishing standards of criticism for the arts. A polished taste in the arts signified that a society was refined and civilized, and thus a scientific analysis of its development was essential to Kames's studies. The reduction of taste into a science contributed to his investigation into the science of human nature. Henry Home, *Elements of Criticism*, 1st ed. (Edinburgh: A. Kincaid and J. Bell, 1762). Kames explained the relationship between a refined moral sense and the progress of taste in the fine arts in the second edition of *Principles of Equity*. Henry Home, *Principles of Equity*, 2nd ed. (Edinburgh: A. Kincaid and J. Bell, 1767), 8. For more information on Kames's theory in *Elements on Criticism*, see Helen Whitcomb Randall, *The Critical Theory of Lord Kames*, vol. 22 (Depts. of Modern Languages of Smith College, 1944).



governed their actions. Kames argued that law existed to ensure the peace and welfare of society. Social values and morals were promoted in society by the existence of laws regulating human conduct. Thus, law and society were so intertwined that society could not function without the presence of laws. To better understand Kames's theory of human nature, *Essays on the Principles of Morality and Natural Religion* and *Principles of Equity* will be considered. *Principles of Equity* will then be used to analyse Kames's theory of human nature in relation to the law.

### **Section 1.1: Kames on man and morality**

In *Essays on the Principles of Morality and Natural Religion*, Kames's primary argument was that philosophers routinely attempted to oversimplify the fabric of the human mind. He argued that modern philosophers tried to reduce the phenomena of morality, and the motivations influencing actions, into a single theoretical framework based on a single principle. In order to create a unifying principle, philosophers had attempted to wed different concepts together, such as self-love, universal benevolence, sympathy, utility, and consonance with the divine will. By oversimplifying the human mind, Kames contended that philosophers had placed the principles of human conduct on too narrow a basis.

Alexander Fraser Tytler captured Kames's belief in *Memoirs of the Life of Kames*, when he wrote that, for Kames, human actions were

most frequently the combined result of opposite springs, tempering and restraining each other's power; and that the moral feeling is a separate principle, of which it is the function, to judge with unerring rectitude of all those motives to action, and direct the conduct of man to one great and beautiful end, the utmost happiness of his nature.<sup>15</sup>

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<sup>15</sup> Alexander Fraser Tytler Woodhouselee, *Memoirs of the Life and Writings of Lord Kames*, vol. i, 3 vols. (Edinburgh: T. Cadell and W. Davies, 1814), 133.

Kames argued that human conduct was intricate, requiring a holistic approach to the many factors influencing actions and moral beliefs.

Kames placed considerable stress on the idea of justice and the freedom of human will. According to Kames, when a person transgressed a duty or an obligation, there was an innate sense of remorse and dread of merited punishment. He noted that justice was a natural sense and its existence gave rise to society: ‘Justice is that moral virtue which guards property and gives authority to covenants ... that justice, being essentially necessary to maintenance of society, is one of those primary virtues which are enforced by the strongest natural laws’.<sup>16</sup> The virtue of justice was central to Kames’s theory of human nature. Without an innate sense of justice in the individual, Kames believed that society was incapable of forming and progressing.

In his opening essay ‘Of our Attachment to Objects of Distress’, Kames noted that since self-love operated by reflection and experience, every object that raised happiness subsequently raised the desire of possessing that object.<sup>17</sup> He concluded that ‘pleasure and pain are the only motives to action, so far as self-love is concerned’.<sup>18</sup> In addition, Kames contended that there was a difference between the impulses that used reasoning and reflection on past experiences, and the direct impulses of appetites and affections that humans possessed in common with brute creatures, which acted blindly without any reasoning towards consequences.<sup>19</sup> While Kames argued that it was common for humans in

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<sup>16</sup> Henry Home, *Essays on the Principles of Morality and Natural Religion In Two Parts*, 1st ed., vol. i, 2 vols. (Edinburgh: A. Kincaid and A. Donaldson, 1751), 103.

<sup>17</sup> *Ibid.*, 8.

<sup>18</sup> *Ibid.*, 11.

<sup>19</sup> Kames’s understanding of free will was that the moral world and the physical world were both guided by fixed laws. He believed that humans had no control over their motives, but they acted with the conviction that they were free and thus were accountable for their actions and capable of vice and virtue. Kames argued that if the public knew that all choices were necessitated, public morality would be harmed. He concluded that God made man to believe in individual freedom because it was needed for moral responsibility to exist. This combination of free will and determinism caused controversy in Scottish political and religious circles and resulted in three published attacks on the *Essays*. This controversy led Kames to retract his theory of the delusive feeling of liberty in his second edition. See Arthur E. MacGuiness, *Henry Home, Lord Kames*.

infancy to act blindly on impulse, once they had developed the faculty to reason and reflect on experiences, actions were based predominantly on feeling, intuition, and the passions. Furthermore, actions were also part of a continuous process of learning and habit formation.

Kames next contended that ‘mutual sympathy must greatly promote the security and happiness of mankind’.<sup>20</sup> In attempting to marry self-regard and sympathetic regard, Kames explained that ‘we cannot help approving of this tenderness and sympathy in our nature; we are pleased with ourselves for being so constituted, we are conscious of inward merit; and this is a continual source of satisfaction’.<sup>21</sup> Kames understood that pleasure was the consequence of some sympathetic actions. While self-regarding motives accounted for a majority of human actions, humans needed sympathetic actions in order for a society to be secure and for a community to thrive. As Arthur E. MacGuinness argues, ‘In *Essays* Kames tries to work out some of the conflicts between the ethical approaches of the “Moral Sense School” on the one hand, and rationalism and Deism on the other’.<sup>22</sup> This was another way in which Kames opted for a more holistic understanding of human motives to action. By making a compromise between psychological egoism and altruism, Kames endeavoured to construct a more comprehensive understanding of human nature. While Hobbes and Mandeville argued that man acted solely on selfishness or self-love, Shaftesbury and Hutcheson believed that man was good and was capable of being motivated by selflessness and benevolence. Kames offered a third option that attempted to prove that self-love and benevolence worked together for the benefit of individuals and society as a whole.<sup>23</sup>

Kames continued the philosophical debate from *Essays*, concerning whether man was inherently benevolent or selfish, in *Principles of Equity*. In accordance with his views

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Twayne’s English Authors Series 82 (New York: Twayne, 1970), 23; Woodhouselee, *Memoirs of the Life and Writings of Kames*, 139.

<sup>20</sup> Home, *Essays on the Principles of Morality and Natural Religion*, vol. i, 17.

<sup>21</sup> Ibid.

<sup>22</sup> MacGuinness, *Henry Home, Lord Kames*, ii.

<sup>23</sup> Home, *Principles of Equity*, 2nd ed., 35-37.

in *Essays*, Kames's position was that man was neither wholly benevolent nor wholly selfish; man acted with both intention and will. He wrote that both sides in the debate were 'equally distant from truth: man is of a complex nature, endued with various principles, some selfish some social'.<sup>24</sup> He also claimed that 'the social and selfish principles are, by divine wisdom, so blended as to fit man for his present state'.<sup>25</sup> Kames was exploring the inherent characteristics of man for the purpose of understanding the moral sense. He argued that a man's actions could be motivated by both self-interest as well as the well-being of society as a whole. While man was naturally social with a disposition towards benevolence, Kames insisted that law needed to exist in order for moral action to become a duty.

Furthermore, in *Essays* Kames questioned why humans chose to cause themselves pain through certain actions, such as viewing sad art, dwelling on painful experiences, and attending public executions. Kames explained the desire for painful experience through entertainment as a thirst for knowledge. By witnessing others in pain, a person exercised their mind and improved their virtue.<sup>26</sup> Kames argued:

Thus, tragedy engages our affections, not less than true history. Friendship, concern for the virtuous, abhorrence of the vicious, compassion, hope, fear, and the whole train of the social passions, are roused and exercised by both of them equally.<sup>27</sup>

Kames provided these examples to show that 'even self-love does not always operate to avoid pain and distress'.<sup>28</sup> When a human chose to reflect on a pain caused by the suffering of another, 'We approve of ourselves for suffering with our friend, value ourselves the more for that suffering, and are ready to undergo cheerfully the like distress upon the like

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<sup>24</sup> *Ibid.*, 3.

<sup>25</sup> *Ibid.*

<sup>26</sup> Home, *Essays on the Principles of Morality and Natural Religion*, vol. i, 20.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 22.

occasion'.<sup>29</sup> While a person might not experience pleasure as an immediate consequence of an action, Kames reasoned that pleasure could be felt as a reflection of our sympathetic self. Through experiences in which he could approve of appropriate conduct and condemn vices, a person's mind and habits of virtue were strengthened with practice.

In *Essays on the Principles of Morality and Natural Religion*, Kames discussed his views on morality, human action, and law. Kames believed that human action and morality could not be reduced to simple theories, and that a more holistic account was needed to comprehend the influences motivating a person's actions. Central to his theory was the idea that justice was a primary sense that was essential for the development of society. While Kames saw pleasure and pain as the only motives to action, so far as self-love was concerned, he noted the importance of sympathy and other innate senses of passion and emotion that led to benevolence. Finally, Kames married self-regard and sympathetic-regard, explaining that a person could feel pleasure from sympathetic feeling towards those who were suffering. An idea present in many of Kames's writings, but first introduced in *Essays*, was the importance of the interdependent nature of society. Kames understood that self-love, driven by pain and pleasure, motivated a majority of human actions. However, in order for society, morality, and law, to progress, sympathy and other innate passions and emotions were also needed. A benevolent act might not result in immediate pleasure, but through reflection, a person could feel pleasure in the compassionate action they had undertaken, thus improving their own moral character, and the character of society. By blending self-regard and sympathetic-regard, Kames established a more holistic and intricate understanding of morality and the many motivations, both selfish and selfless, influencing human actions. Using this approach to understand human nature, Kames hoped to reform the socio-legal tradition in Scotland.

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<sup>29</sup> Ibid., 24.

## Section 1.2: Kames on law and judging

In *Principles of Equity*, Kames outlined the role of the Court of Session and attempted to reduce equity to a science. Reducing equity to a science was an attempt to introduce security and expectation into the reasoning of the Court of Session. As Lobban argues, Kames ‘sought to develop a natural jurisprudence which could reveal broader principles running through the system which came neither from a direct command of a sovereign, nor from abstract reason’.<sup>30</sup> Kames aimed to eliminate the chance of arbitrary judgements by illuminating the principles upon which equity judges should found their decisions. As the Court of Session had both an equity and a common law jurisdiction, Kames attempted to demarcate the extent of each. Equity intervened when the established rules of the common law acted in an unjust way and when they failed to fulfil the requirements of justice.<sup>31</sup> Where the custom or precedent was defective or it exceeded just bounds, the role of the court was to draw upon the principles of justice and utility in order to remedy the imperfection. Equity also provided for every natural duty that was not provided for at common law by converting duties of benevolence, which had been refined over time, into duties of justice. Kames saw multiple factors, including utility, justice, and the moral sense, as being significant in law and legal reasoning. The purpose of the moral sense was to regulate conduct in society, and equity allowed moral principles to enter the legal process. As equity converted duties of benevolence into duties of justice, it was the

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<sup>30</sup> Michael Lobban, “The Ambition of Lord Kames’s Equity,” in *Law and History, Current Legal Issues, 2003*, vol. vi, eds. Michael Lobban and Andrew Lewis (Oxford: Oxford University Press, 2004), 103.

<sup>31</sup> An important area of Scottish equity was *nobile officium*. This was the power reserved to the Court of Session to interfere with strict law. In *Historical Law Tracts*, Kames referred to this as the power to redress wrongs of all kinds. Home, *Historical Law Tracts*, vol. i, 324-325. Kames did not discuss *nobile officium* in *Principles of Equity*. Lobban explains that this was due to the fact that in *Principles*, Kames was interested in examining a wider concept of equity for both Scottish and English lawyers. Michael Lobban, “Editor’s Introduction,” in Henry Home, *Principles of Equity. The Third Edition* (Indianapolis: Liberty Fund, 2014), xxi.

role of equity to accept new rules recognized by the moral sense, that were not yet enforced by common law.<sup>32</sup>

Kames contended that the sources of equity were justice and utility, and that equity was based on benevolence. Thus, Kames argued that reasoning based on the principles of justice and utility would ensure the most benevolent outcome in the Court of Session. Kames began *Principles of Equity* by outlining the roles that justice and utility played in deciding cases. While justice referred to the warranted punishment of a crime, utility referred to a more holistic view that considered the larger effect of a mischief on the welfare of both current and future society. Kames argued that when justice and utility were in opposition, utility should prevail. As Lieberman explains, Kames noted that there were three types of cases: those decided by justice, those by utility, and those in which justice and utility clashed. In these latter cases, as long as it concerned the interests of the entire society, utility had to prevail.<sup>33</sup> In addition to Kames's belief that utility should prevail over justice when a case concerned the interest of the entire society, he also argued that utility was of greater benefit to law than justice. Kames explained:

Justice is concerned in two things equally capital, one to make right effectual, and one to redress wrong. With respect to the former, utility coincides with justice; with respect to the latter, it goes a great way further. Wrong must be done before justice can interpose. But utility, having a more extensive view, lays down measures that are preventive of wrong. With respect to measures for the positive good of society, and for making men still more happy in a social state, these are reserved to the legislature. It is not necessary that such extensive powers be trusted with courts of law. The

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<sup>32</sup> For more on Kames on the nature of Scottish equity, see Andrea Rahmatian, "Introduction: Lord Kames and his *Principles of Equity*," in *Principles of Equity. The Third Edition*, vols. 1 and 2, facsimile reprint, (Clark, N.J.: The Lawbook Exchange, 2011), pp. 1-65; Daniel J. Carr, "An Iron Mind in an Iron Body: Lord Kames and His Principles of Equity," *Edinburgh Law School Working Paper Series* (2013): 1-39; Lobban, "Editor's Introduction," in *Principles of Equity*, ix-xxvii.

<sup>33</sup> Lieberman, *The Province of Legislation Determined*, 168; Henry Home, *Principles of Equity*, 1st ed. (Edinburgh: A. Kincaid and J. Bell, 1760), xii.

power of making right effectual, of redressing wrong, and of preventing mischief are sufficient.<sup>34</sup>

The greatest benefit of using the principle of utility was that it could prevent mischief and harm in the future. Justice, in contrast, could only be employed retrospectively when an act of mischief had been already performed.

Kames also believed that justice fell short of utility in a forensic setting because justice was more simplistic. Using utility to decide a case ensured a more holistic view.

Kames argued that utility ensured that a case was decided with all factors considered.

It [justice] never looks beyond the parties engaged in the suit. The principle of utility, on the contrary, not only regards the parties engaged in the suit, but also the society in general; and comprehends many circumstances concerning both.<sup>35</sup>

The benefit of reasoning in a legal case upon the principle of utility was that it ensured that more factors were considered. While the principle of justice was invoked to make “right effectual” and to “redress wrong”, the principle of utility looked at the broader situation and how decisions would affect the interests of society as a whole. In many cases, a just decision, although the obvious cause to take, might have an overall negative effect on the rest of society and thus should be avoided. Hence, the principle of utility dictated the limits and boundaries of justice. Similarly, the principle of utility dictated that duties of justice had to be capable of being formulated as rules. A just decision could only be made if the decision was capable of being made into a rule that was binding in all similar future cases.<sup>36</sup>

This would offer a check against arbitrary decisions, since judges would be unable to make particular decisions for particular cases. Utility operated within equity by encouraging judges to consider the wider effect that their decisions would have on society and the

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<sup>34</sup> Home, *Principles of Equity*, 1st ed., 173.

<sup>35</sup> *Ibid.*, 186.

<sup>36</sup> Lobban, “Editor’s Introduction,” in *Principles of Equity*, xxii-xxiii.



implications for future cases. This argument harmonized with Kames's belief in the importance of a more holistic understanding of morality, motivations to action, and law.

The 'Preliminary Discourse' in *Principles of Equity* gives further insight into Kames's theory. The first edition of *Principles of Equity* was published in 1760 and the second edition, corrected and enlarged, in 1767. An essay entitled 'Enquiry into the laws that govern the conduct of individuals in society' was sent to Adam Smith between the publication of the two editions. This essay became the 'Preliminary Discourse' placed before the introduction to the second and subsequent editions of *Principles of Equity*. Kames's objective in *Principles of Equity* was to reduce equity to a science by placing reasoning upon certain axioms. Kames stated:

As the faculty of reason is confined to the investigation of unknown truths by means of truths that are known, it is clear, that in no science can we even begin to reason, till we be provided with some *data* to found our reasonings upon: even in mathematics, there are certain principles or axioms perceived intuitively to be true, upon which all its demonstrations are founded. Reason is indeed of great use in morality, as well as in other sciences; but morality, like mathematics, is and must be provided with certain axioms or intuitive propositions, without which we cannot make a single step in our reasonings upon that subject; and to trace these with care and caution is the chief purpose of the present inquiry.<sup>37</sup>

The two terms that Kames chose with which to measure moral perceptions were 'good' and 'ill.' Kames explained that, 'An agreeable effect or event produced intentionally by acting, is perceived by all to be *good*: a disagreeable effect or event produced intentionally by acting, is perceived by all to be *ill*'.<sup>38</sup> Kames labelled good and ill as two sensations

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<sup>37</sup> Home, *Principles of Equity*, 2nd ed., 2.

<sup>38</sup> *Ibid.*, 4.

perceived intuitively, and argued that either one or the other was connected to every moral perception.<sup>39</sup> Kames stated:

Thus, right and wrong, like good and ill, and all other qualities, are objects of perception or intuition; and supposing them hid from our perception, an attempt to discover them by reasoning would be absurd; not less so, than such an attempt with respect to beauty or colour, or with respect to the external objects to which these qualities belong.<sup>40</sup>

Kames contended that the attribution of good and ill in effects corresponded to the qualities of right and wrong in actions. Thus, the moral perceptions of good and ill, and right and wrong, were the innate sensations that should be used for the art of reasoning in court.<sup>41</sup>

Kames next questioned whether there was a uniformity of opinion concerning right and wrong. While different standards of right and wrong had existed throughout history and in different nations, Kames argued that this inconsistency only proved that the moral sense had not always been equally perfect.<sup>42</sup> Kames explained that there was a common sense of right and wrong that had developed towards perfection as society progressed:

That if there be great uniformity among the different tribes of men in seeing and hearing, in truth and falsehood, in pleasure and pain, etc. what cause can we have for suspecting that right and wrong are an exception from the general rule? Whatever minute differences there may be to distinguish one person from another; yet in the general principles that constitute nature, internal and external, there is wonderful uniformity.<sup>43</sup>

It is evident that Kames believed in a sense of universal right and wrong within the human condition. However, as a common sense of right and wrong existed in various degrees of perfection throughout history, Kames argued that moral knowledge became more refined as society progressed. Thus, Kames believed that a common nature of mankind existed, and

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid., 5.

<sup>41</sup> Ibid., 4-6.

<sup>42</sup> Ibid., 7-9.

<sup>43</sup> Ibid., 9.

consisted of a combination of intuitive perceptions of the moral sense and a refined universal standard of morals.

Kames anticipated the views developed by the Scottish School of Common Sense, including its leading members Reid, Dugald Stewart and Adam Ferguson.<sup>44</sup> As discussed above, a helpful comparison can be made between Kames's theory and Reid's theory of common sense.<sup>45</sup> Reid contended that various powers were instilled in humans by God; some were both planted and reared, others had been planted in our minds and left for nature to cultivate. Reid argued that it was by the proper nurturing of the powers left to nature to cultivate that humans were capable of improvement in 'intellectuals, in taste, and in morals'.<sup>46</sup> Reid's common sense views accorded with Kames's argument that the moral sense had evolved and refined over time.

Furthermore, Reid argued that common sense was the 'first-born of Reason', and thus reason and common sense were inseparable. In *Essays on the Intellectual Powers of Man* (1785), Reid contended that reasoning consisted of two steps. The first step was the ability to judge of things self-evident, which Reid described as 'the province, and the sole province, of common sense'.<sup>47</sup> The second step was the ability to draw conclusions from those self-evident senses. The ability to judge of things self-evident was the domain of reason.<sup>48</sup> Similarly to Reid's two-step process of reasoning, Kames believed that judges of the Court of Session should base their reasoning on the moral sense – both their intuitive

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<sup>44</sup> The Common Sense school maintained that every person had common ordinary experiences that provided intuitive assurance of the existence of the self, of real tangible objects, and of principles upon which morality and religious beliefs could be founded. The notion that Kames foreshadowed the views of the Scottish School of Common Sense was argued by Henry Laurie in *Scottish Philosophy in Its National Development* (Glasgow: James Maclehose and Sons, 1902), 103. Dugald Stewart (1753-1828), Chair of Moral Philosophy at University of Edinburgh 1785-1809: see his *Elements of the Philosophy of the Human Mind* (1792-1827).

<sup>45</sup> See pp. 30-32.

<sup>46</sup> Reid, *An Inquiry into the Human Mind on the Principles of Common Sense*, 13.

<sup>47</sup> Thomas Reid, *Essays on the Intellectual Powers of Man*, eds. Derek R. Brookes and Knud Haakonssen, 1st cloth ed., The Edinburgh Edition of Thomas Reid (University Park, PA: Pennsylvania State University Press, 2002), 433.

<sup>48</sup> *Ibid.*

perception of good and ill and the universal standard of right and wrong that had refined as society evolved. Kames contended that all humans were instilled with a moral sense with intuitive perceptions of good and ill, and right and wrong. However, he believed that only through reasoning upon this sense and years of human development, could a more perfect standard of the common sense of mankind be cultivated.

Similarly to Reid, Kames argued that there was moral uniformity amongst creatures of the same kind, and that this uniformity resulted in a common nature.<sup>49</sup> He noted that there was an ‘innate sense or conviction of a common nature, not only in our own species, but in every species of animals: and our conviction is verified by experience’.<sup>50</sup> The existence of a common nature was necessary to Kames for entrenching morality into the legal system by means of equity. Kames stated that the purpose of morality was to regulate conduct in society:

This sense accordingly, considered as a branch of the common nature of man, is admitted by all to be perfect; and, consequently, to be the ultimate and unerring standard of morals; to which all are bound to submit, even in opposition to their own private sense of right and wrong.<sup>51</sup>

Kames explained that a man’s personal beliefs concerning right and wrong were trumped by the common sense of right and wrong. The idea that every man was bound to submit to the common sense of mankind was strengthened by the law. Kames related his common sense theory to the law when he stated:

Happy it is for men, that in all their disputes about right and wrong, they have this standard to appeal to: it is necessary, that in society the actions of individuals be uniform with respect to right and wrong; and in order to uniformity of action, it is necessary that their perceptions of right and wrong be

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<sup>49</sup> Home, *Principles of Equity*, 2nd ed., 9-10.

<sup>50</sup> *Ibid.*, 9. This idea of the common sense introduced the idea of conjectural and theoretical history into Kames’s theory of human nature, thus linking Kames’s theory of human nature with his later historical projects, which will be discussed later in this chapter.

<sup>51</sup> Home, *Principles of Equity*, 2nd ed., 10.

uniform: to produce such uniformity, a standard of morals is indispensable; which is daily applied by judges with great success.<sup>52</sup>

Kames noted that this standard of common sense could be introduced into law by means of a court of equity. This argument is present in the ‘Preliminary Discourse’ sent to Adam Smith. When writing about the common sense, Kames argued:

One thing is clear, that were there no general law, no standard of right and wrong, to appeal to when individuals differ, society must soon degenerate into anarchy, and every controversy be determined in brute force: there can be no government without Judges; and Judges would be established in vain, without a general standard of right and wrong to produce an uniformity of Judgement.<sup>53</sup>

Kames contended that a universal standard of right and wrong existed and was the product of a refined moral knowledge. While the moral sense was the immediate perception of good and ill, the common sense was the developed notions of right and wrong that had evolved over time. Although a refined moral sense would most often reflect common sense, it was possible that the moral sense and common sense could clash. If so, the moral sense would yield to the developed understanding of right and wrong. It was the role of judges to determine what common sense dictated.

In short, in *Principles of Equity*, Kames attempted to reduce equity to a science. Kames believed that utility, justice, and the moral sense, were vital to law and legal reasoning. While man was naturally social with a disposition towards benevolence, Kames insisted that law was needed in order for moral action to become a duty. He believed that laws should be the product of reason, using the perceptions of the moral sense. Thus, as the purpose of the moral sense was to regulate conduct in society, judicial decisions should be

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<sup>52</sup> Ibid., 11.

<sup>53</sup> Henry Home, “Enquiry into the Laws That Govern the Conduct of Individuals in Society,” 1760, Special Collections, University of Glasgow, 7.

founded on intuitive perceptions of good and ill and strengthened by the developed universal opinion of right and wrong.

## **Section 2: Kames, Scotland, and the History of the Law**

The Scottish Enlightenment writers believed that historical knowledge was essential for understanding modern society. According to Kames, history should consist of a study of cause and effect and that simply seeing history as a compilation of facts was unacceptable. The traditional narrative history style, focusing simply on what happened, failed to answer questions concerning long-term trends and causality. In the opening pages of *Historical Law Tracts*, Kames argued:

Law in particular becomes then only a rational study, when it is traced historically, from its first rudiments among savages, through successive changes, to its highest improvements in a civilized society. And yet the study is seldom conducted in this manner. Law, like geography, is taught as if it were a collection of facts merely: the memory is employed to the full, rarely the judgment.<sup>54</sup>

Kames contended that it was necessary to trace the history of law from its origin to the present. Demonstrating cause and effect, and linking events, was the key to historical investigation.

Kames's historical methodology was an example of the Scottish study of history that Dugald Stewart labelled 'theoretical or conjectural history'.<sup>55</sup> This form of history, originally attempted by Montesquieu and made popular in Scotland by Kames, Hume, and the English philosopher Bolingbroke,<sup>56</sup> was universal in scope and progressive in shape,

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<sup>54</sup> Home, *Historical Law Tracts*, vol. i, v.

<sup>55</sup> Christopher J. Berry, *Social Theory of the Scottish Enlightenment* (Edinburgh: Edinburgh University Press, 1997), 61.

<sup>56</sup> Henry St. John (1678-1751), first Viscount Bolingbroke, Secretary of State 1710-1714: see his journal *The Craftsman*, which included his twenty-two essays that formed his *Remarks on the History of England* (1730-1731).

and showed a scientific approach to the history of man.<sup>57</sup> The main assumption among Scottish philosophers was that historical records allowed the theorist to fix the principles of his science, which demonstrated a constancy in human nature.<sup>58</sup> Collecting data from the history of man in different geographical locations allowed the scholar to show that there was uniformity in human nature.<sup>59</sup> By focusing on the trajectory of human history, relating causes and effects, the conjectural historian could infer why events occurred in relation to one another.

By tracing laws from their origin to their current state, Kames contended he would be able to discern the laws that were in need of reform. Kames praised the many legal practitioners – Lords Fountainhall, Durie, Stair, Dirleton,<sup>60</sup> and others – who wrote reports on the cases they judged, and thus made it possible to trace the history of law. According to Kames, the study of history was important for all lawyers:

I was early taught a high regard for them, not only for their ingenious and acute reasonings, but for their carrying on the history of our law; and it has always been my opinion, that any time a Lawyer has to spare from his profession, cannot be more usefully employed than in such a work.<sup>61</sup>

Relying primarily on the manuscripts of lawyers and judges, Kames attempted to trace the history of the law. Thus, Kames outlined the dual role of legal practitioners who needed both to read legal history and to provide legal sources for current and future scholars.

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<sup>57</sup> Ian Simpson Ross, *Lord Kames and the Scotland of His Day* (Oxford: Clarendon Press, 1972), 203-204.

<sup>58</sup> Berry, *Social Theory of the Scottish Enlightenment*, 68.

<sup>59</sup> *Ibid.*, 67-69.

<sup>60</sup> John Lauder, Lord Fountainhall (1646-1722), second Baron Fountainhall, Lord of Session 1689-1690, Lord of Justiciary 1690-1707. Alexander Gibson, Lord Durie (d. 1644), Lord of Session 1621-1644: see his *Decisions of the Lords of Council and Session* (1690). James Dalrymple, Lord Stair (1619-1695), first Viscount Stair, Lord President of the Court of Session 1671-1681: see his *The Institutions of the law of Scotland, deduced from its originals, and collated with the civil, canon and feudal law; and with the customs of neighbouring nations* (1681). John Nisbet, Lord Dirleton (1609-1687), Lord Advocate 1664-1677.

<sup>61</sup> Home, *Select Decisions of the Court of Session, from the Year 1752 to the Year 1768*, iii.

Kames and his fellow Scottish philosophers believed that a comprehensive knowledge of history was important to understand past and current society. As a result, a recurrent topic in Kames's writing was the feudal system. Kames argued:

The feudal customs ought to be the study of every man who proposes to reap instruction from the history of the modern European nations: because among these nations, publick transactions, not less than private property, were some centuries ago, regulated by the feudal system.<sup>62</sup>

Kames believed that without a complete account of the feudal system, a scholar could not wholly understand historical events. Kames furthered this argument by stating:

The feudal system is connected with the municipal law of this island, still more than with the law of nations. It formerly made the chief part of our municipal law, and in Scotland to this day makes some part. In England indeed, it is reduced to a shadow.<sup>63</sup>

Kames used the history of the feudal system to show the value of studying the history of English and Scottish laws. He argued that without knowledge of how the feudal system functioned, a scholar could not possibly appreciate the political, social, and economic history of England and Scotland. Furthermore, as remnants of the feudal system were found in Scots law, an understanding of feudalism was essential to comprehend modern law.<sup>64</sup>

While Kames placed importance on studying the history of the law, he also argued that reason should take precedence over authority. Kames believed that lawyers and judges relied too heavily on historical precedent and should instead consider the merits of each case individually to find the most rational answer. In *Elucidations*, Kames argued that,

In other sciences reason begins to make a figure: Why should it be excluded from the science of law? The authority of men of eminence has deservedly great weight; for nature gives it

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<sup>62</sup> Home, *Historical Law Tracts*, vol. i, vii.

<sup>63</sup> *Ibid.*, viii.

<sup>64</sup> It is possible that Kames's focus on the feudal system, and how certain eighteenth-century laws were remnants of feudalism, was influenced by the focus on the feudal system in Lord Stair's *Institutes* or in Thomas Craig's *Jus feudale tribus libris comprehensum* (1655).



weight. But authority ought to be subservient to reason; which the God of nature has bestowed on man, as his chief guide in thinking as well as in acting.<sup>65</sup>

According to Kames, the use of history and reason could function together to improve the law. Through historical inquiry, the reason behind an established custom could be clarified. Kames believed that the reliance on custom, a common English practice, was irrational and too frequently resulted in legal decisions that did not promote utility.

An analysis of Kames's writings will demonstrate the various ways in which the study of history could be used as a mechanism to initiate legal reform. First, an analysis of his legal dictionaries – *The Decisions of the Court of Session from its institution to the present time, abridged and digested under proper heads, in the form of a Dictionary, The Statute Law of Scotland Abridged, with Historical Notes*, and *Select Decisions of the Court of Session, from 1752 to 1768* – will illustrate how an expository account of past legal decisions aided lawyers and judges in the legal process. Second, an analysis of Kames's historical works will reveal how Kames used the study of history to justify legal reform: *Essays upon Several Subjects Concerning British Antiquities* illustrates the importance of historical enquiry by investigating the origin of the feudal system; *Historical Law Tracts* illuminates Kames's methodology of tracing laws from their origin and how they evolved into their current form; *Sketches of the History of Man* will show how Kames's methodology was a product of the conjectural and theoretical history style; and finally, *Elucidations Respecting the Common and Statute Law of Scotland* demonstrates how Kames's methodology was utilised for legal reform and will reveal the significance of reason in the legal profession.

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<sup>65</sup> Henry Home, *Elucidations Respecting the Laws of Scotland* (Edinburgh: William Creech, 1777), x-xi.

## Section 2.1: Kames's Legal Dictionaries

Prior to becoming one of Scotland's most accomplished and revered judges, Kames was admired for his legal dictionaries. Kames's objective in organizing and systematizing legal decisions was to help lawyers and judges to understand current Scots law and to determine its future direction. Before Kames compiled the decisions made in the Court of Session, in *The Decisions of the Court of Session*, they were not methodized or published, and could only be found in a few manuscript collections, which were not easily accessible and were difficult to consult.<sup>66</sup> In *Select Decisions of the Court of Session, from 1752 to 1768*, Kames catalogued the decisions he made or he witnessed being made in the Court. Both of these dictionaries used the *ratio decidendi* (the rule of law on which the judgment rested) of each decision to classify a judgment under a title relating to a specific legal principle. Through the organization and systematization of past legal decisions, Kames elucidated the current state of the law. The history of previous case law allowed philosophers and legislators alike to devise educated, informed, theories concerning society, law, and politics, in addition to formulating decisions in a court of law.<sup>67</sup> In *Select Decisions of the Court of Session*, Kames stated:

Even Decisions that deviate from just principles, are of use: They give exercise to the reasoning faculty, embolden the student to think for himself, and to let nothing pass but after the strictest examination.<sup>68</sup>

The systematization of legal decisions into a dictionary provided a valuable record of what had previously been decided in various areas of the law. It informed writers, lawyers, and judges how past judges had ruled on specific issues. In addition, when applied to the

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<sup>66</sup> Woodhouselee, *Memoirs of the Life and Writings of Kames*, 157-159.

<sup>67</sup> As Lieberman states in *The Province of Legislation Determined*, there was a worry about the growing number of statute laws in the eighteenth century. Lieberman states that the statute law books had multiplied ten times in size in comparison to Coke's time. Lieberman, *The Province of Legislation Determined*, 16.

<sup>68</sup> Home, *Select Decisions of the Court of Session, from the Year 1752 to the Year 1768*, iv.

science of human nature, it revealed how social values and the laws that reflected those values might have shifted since those decisions were recorded. Kames continued cataloguing decisions until 1786 when the court, realizing the benefit of such dictionaries, appointed a clerk for this undertaking.<sup>69</sup>

In *The Statute Law of Scotland Abridged*, Kames, in a similar fashion to the above dictionaries, organised all the statutes that had been enacted in Scotland. The purpose of this undertaking was to enable scholars, lawyers, and judges to see at one glance the entirety of what the legislature had enacted upon a particular subject.<sup>70</sup> The author of Kames's memoirs, Alexander Fraser Tytler, commended the manner in which Kames methodized and systematized laws and judgments in his legal dictionaries, claiming that they aided lawyers and judges 'to furnish instruction in the law as a science'.<sup>71</sup> Kames's efforts to systematize past statutes and legal decisions emphasised his devotion to legal scholarship and legal improvement.

## **Section 2.2: Essays Upon Several Subjects Concerning British Antiquities**

In *Essays Upon Several Subjects Concerning British Antiquities*, Kames utilised a conjectural and theoretical approach to history in order to correct common historical misconceptions. A chief concern for Kames was the lack of historical knowledge regarding the feudal system. In the first essay, entitled 'Of the Introduction of the Feudal Law into Scotland', Kames investigated the history of the feudal system. He attempted to understand how feudalism had emerged, when it had been implemented, and how and why nobles had decided to subject themselves to feudal service. I will focus on the first two inquiries. Kames believed that the feudal system was too often glossed over by other historians

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<sup>69</sup> Randall, *The Critical Theory of Lord Kames*, 7.

<sup>70</sup> Henry Home, "The Statute Law of Scotland Abridged, with Historical Notes".

<sup>71</sup> Woodhouselee, *Memoirs of the Life and Writings of Kames*, 159.

without proper consideration of its causes. In the spirit of conjectural history, Kames attempted to speculate on the true history of feudal society. The consensus of historians was that King Malcolm II (r. 1005-1034) rewarded his nobles, who had defeated the Danes in war in 1017, by dividing the Crown lands among them. To show their gratitude, the nobles surrendered their land to the King as his property.<sup>72</sup> Kames doubted that feudalism was introduced as early as Malcolm II and maintained that there was little evidence for this view. The only evidence was the fact that Skene,<sup>73</sup> the author who republished and provided the title of the law code, *The Laws of King Malcolm Mackenneth*, claimed Malcolm II was King when feudalism was instituted.<sup>74</sup> Kames argued that it had been shown that Scotland had repeatedly borrowed its laws from England, and thus it was important to note, because of its inevitable impact on the Scottish legal tradition, that William the Conqueror (r. 1066-1087) introduced the feudal system into England. Kames contended that, for a century after William the Conqueror, feudal customs in England and Scotland were identical.<sup>75</sup> In addition, Kames argued that in *The Laws of King Malcolm Mackenneth*, frequent mention was made of ‘Earls’, ‘Barons’, ‘Chancellor and his Court’, and ‘Coroner’. Kames astutely noted that these titles were not customary during Malcolm II’s reign, nor before that of William the Conqueror. It was agreed upon by all antiquarians that it was Malcolm III (Malcolm Canmore, r. 1058-1093) who created the titles ‘Barons’ and ‘Earls’ in Scotland.<sup>76</sup> Thus, Kames argued that it was more plausible that the law code was actually composed during Malcolm III’s reign. Based on the fact that William the Conqueror came to England in 1066 and the conjecture that *The Laws of King Malcolm*

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<sup>72</sup> Henry Home, *Essays Upon Several Subjects Concerning British Antiquities*, 1st ed. (Edinburgh: A. Kincaid, 1747), 2-3.

<sup>73</sup> Kames is referring to Sir John Skene (1543-1617), who became Lord Curriehill as Lord of Session 1594-1611. Skene also compiled an edited version of the *Regiam Majestatem* published by Parliament in 1609.

<sup>74</sup> Home, *Essays Upon Several Subjects Concerning British Antiquities*, 9.

<sup>75</sup> *Ibid.*, 6.

<sup>76</sup> *Ibid.*, 9-10.

*Mackenneth* were actually the laws of Malcolm III, and not, as Skene had claimed, Malcolm II, Kames concluded that feudal law was most likely introduced into Scotland between 1066 and 1093.

Kames's conjecture about the introduction of feudalism into Scotland being later than previously assumed led him to question other related common historical misconceptions. He noted that there was a full and accurate account of feudal law in the *Regiam Majestatem*, the earliest surviving book on Scots law, which eighteenth-century historians believed to have been written in the reign of David I (r. 1124-1153). The comprehensive account of feudal law in the *Regiam Majestatem* suggested that feudal society was fully developed in Scotland at the time of its creation.<sup>77</sup> Kames argued that if his conjecture about feudalism being introduced during the reign of Malcolm III was true, it was improbable that the feudal law would have made enough progress to be 'ripe for a regular Institute' in the days of David.<sup>78</sup> These speculations led Kames to reason that 'The Argument is weighty; and we must either give the Feudal Law a more early Date in Scotland than the Reign of Malcolm Canmore, or the *Regiam Majestatem* a later Date than the Reign of David I'.<sup>79</sup> Based on his previous conjecture concerning the introduction of feudalism in Scotland, Kames concluded that the *Regiam Majestatem* must have actually been composed during the reign of David II (r. 1329-1371). He supported this conjecture by arguing that the author of the *Regiam* seemed to be well acquainted with civil law and thus the *Regiam* must have been compiled after the civil law had spread into Scotland. Kames argued that since Roman law was only rediscovered with the copy of the *Pandects* found in

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<sup>77</sup> Ibid., 14.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

Amalfi in 1127, David I could not have ordered the writing of the *Regiam*. Thus, it must have been drafted during the reign of David II.<sup>80</sup>

By considering the history of feudalism more broadly and combining a variety of historical events and facts, seemingly unrelated when organised in the traditional historical style, Kames was able to correct two common misconceptions in Scottish history. With this revised history of feudal law, scholars could attempt a more complete and accurate account of the eleventh, twelfth, and thirteenth centuries. In addition, scholars could better understand areas of Scots law that continued to be influenced by the feudal tradition.

### **Section 2.3: Historical Law Tracts**

In *Historical Law Tracts* and *Sketches of the History of Man*, Kames blended both his moral theory and his theory of development. Cairns contends this method was derived from Montesquieu's insight that there were links between the laws of nations, whether these societies functioned through navigation and trade, or agriculture, or hunting.<sup>81</sup> Kames's view was that society needed to develop in order to reflect the needs of commercial society. Cairns captures Kames's argument perfectly, stating: 'that historical development constantly turned duties of beneficence into duties of justice' and that the 'courts had to recognize this and develop the law accordingly'.<sup>82</sup> Thus, Kames contended that it was the responsibility of judges to advance the law.

In *Historical Law Tracts*, Kames used cases from both the Court of Session in Scotland and from the Court of Chancery in England to compare the development of law in the two nations. Tract I and Tract XI demonstrate Kames's methodology and exemplify how tracing laws from their origin, and how they had evolved to the present, clarified the

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<sup>80</sup> *Ibid.*, 15-17.

<sup>81</sup> Cairns, "Legal Theory," 232.

<sup>82</sup> *Ibid.*

rationale behind their current state, and raised the question of whether a particular law or an area of law was still relevant or in need of reform. ‘Tract I: History of the Criminal Law’ illustrated the way in which the punishment of criminals was transferred from private hands to the hands of the magistrate. ‘Tract XI: The History of Personal Execution for payment of debt’ explained how personal execution became the final attempt at procuring repayment from a debtor following the seizure of his property and land.

Kames began *Historical Law Tracts* with a chapter entitled ‘History of the Criminal Law’, in which he illustrated the way criminal punishment had been transferred over time from private hands into the hands of the magistrate.<sup>83</sup> This tract was one of the first conjectural histories produced. Kames noted that society was originally formed for mutual defence against hostile neighbours. When a person was the victim of an offence, it was his responsibility to punish the offender. Kames explained that under the law of nature, the injured person acquired the right to chastise and punish the criminal who had wronged him, in proportion to the extent of the injury. In addition, the wrong-doer knew of this right and was obliged to submit freely to it.<sup>84</sup> But as the criminal law began to restrain actions that were not private, such as disturbing the peace, punishment moved from private hands to the magistrate.

The idea of a crime against the public meant that the welfare of society was affected by an offence. The practice of the victim punishing the offender did not suit crimes against the public interest, and thus a practice needed to be established concerning punishment for crimes that affected society as a whole. The role of the magistrate developed out of this need to punish crimes that broke the peace of society, and as a result, all punishment eventually fell under the jurisdiction of the magistrate. Kames explained this phenomenon

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<sup>83</sup> Home, *Historical Law Tracts*, vol. i, 28.

<sup>84</sup> *Ibid.*, 21.

by stating that, 'It naturally comes to be considered, that by all atrocious crimes the publick is injured, and by open rapine and violence the peace of society broke'.<sup>85</sup> A private crime against a particular individual or group affected the peace of society as a whole, and thus fell under the magistrate's jurisdiction. Kames contended that through understanding the history of criminal punishment, current practices that seemingly lacked a rationale became less obscure. Two examples provided by Kames of current legal practices that could be explained through historical inquiry were taking sanctuary in the Church and the King's pardon.

The practice of taking sanctuary in the Church was common when individuals were attempting to escape the direct punishment from a person against whom they had transgressed. Kames argued that granting sanctuary should no longer be tolerated when punishments were in the hands of an official third party, the magistrate.<sup>86</sup> Kames aptly suggested that this was an example of a current legal norm rooted in past custom, as taking sanctuary in the church did not suit modern social conditions.

Another example of a custom that had persisted was the King's pardon. Kames explained that originally, when the atrocity of a crime called for more severe punishment, the interposition of the sovereign could occur. Kames argued that 'this prerogative could not regularly subsist after criminal jurisdiction was totally engrossed by the publick, and a criminal was regularly condemned by the solemn sentence of a judge'.<sup>87</sup> However, Kames explained how this prerogative was misinterpreted and became the power of pardoning. Kames averred that this was an example of where the novelty of an extraordinary remedy for a defect in law wore off by the repetition of an act and became a practice of the common law. Kames maintained that 'the King's prerogative of pardoning arbitrarily,

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<sup>85</sup> *Ibid.*, 58.

<sup>86</sup> *Ibid.*, 48.

<sup>87</sup> *Ibid.*, 85.



which is asserted by all lawyers, can have no foundation other than this now assigned'.<sup>88</sup> Kames believed that if it were limited in criminal cases, as it was in civil cases, to give remedy to strict laws that were overbalanced by equity, it would have a more rational foundation.<sup>89</sup> However, the current practice of arbitrarily pardoning criminals had no positive effect on modern society and law. Through tracing the history of criminal law, Kames explained the foundation of obscure customs that could only be explained as vestiges of previous legal practices.

In Tract XI, Kames explained how personal execution became the customary practice after seizure of a debtor's property and land had failed to obtain full repayment.<sup>90</sup> This account illustrated how statutes contradictory to every principle of reason, equity, and humanity, were adopted and implemented without due deliberation. While personal execution for payment of debt existed in Ancient Egypt and Athens, under feudal law it was not commonly administered because the debtor would owe services to his lord. As feudal law declined, personal execution for payment of debts became more commonly practised.<sup>91</sup>

In this tract, Kames explained the contrast between the forms of personal execution in England and in Scotland. In England, the *capias ad satisfaciendum* was a writ directed to the sheriff to imprison a debtor until the creditor was repaid. However, in Scotland, with the exception of an act of warding, a debtor was not committed to prison merely due to not making a payment. He had to be declared a rebel before a *capias* could be issued by the courts. The *capias* in Scotland was not *ad satisfaciendum*, because being imprisoned was a penalty against rebellion. Since the person was imprisoned as a rebel, and not as a debtor,

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid., 86.

<sup>90</sup> Home, *Historical Law Tracts*, vol. ii, 73.

<sup>91</sup> Ibid., 74.

the debtor would remain in prison until he obtained a pardon for rebellion from the King. Thus, even after repaying the debt, a debtor still had to obtain letters of relaxation, which would end his condition of rebel.<sup>92</sup>

Kames elucidated the present state of personal execution for debt in England and Scotland by examining the origin and development of the practice in the respective countries. Kames noted that the first statute concerning personal execution for personal debt to be enacted in either England or Scotland was introduced in England in 1282. Originally introduced to ensure greater security for merchants and to encourage trade, it was directed at the inhabitants of royal boroughs. In 1284, an additional security was added, stating that if a debtor failed to pay, he would first be imprisoned, and eventually his land and moveables would be given to the merchant to hold until the debt was paid.<sup>93</sup> As the statute of 1282 proved to be a successful means of obtaining payment of debt, in 1351 Edward III introduced and extended that statute to all forms of debt in England. A creditor could use a writ of execution entitled *capias ad satisfaciendum* to have the debtor placed in prison. However, the act introduced by Edward III was not adopted by Scotland's legislature, and thus there was no equivalent of *capias ad satisfaciendum* in Scotland, other than in the single case of warding in royal boroughs.<sup>94</sup>

The main difference between the English and Scottish practice was the latter's use of the letters of four forms for cases of debt.<sup>95</sup> The main use of these letters was to force a person to perform an action or obligation, or to surrender his body to prison. If he refused, he would be declared a 'rebel.' Originally in Scotland, obligations for payment of money

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<sup>92</sup> Ibid., 98-99.

<sup>93</sup> An act of warding was a writ for executing a sentence already decreed by a magistrate for imprisonment of debtors in a financial position not sufficient to constitute bankruptcy.

<sup>94</sup> Home, *Historical Law Tracts*, vol. ii, 74-76.

<sup>95</sup> The letters of four forms were four letters sent to debtors demanding they pay. The first letter was a charge to pay, the second was a charge to pay and a warning that horning would be direct, the third letter was horning, and the fourth was for an arrest. The letters of horning declared a debtor who was unable or unwilling to pay a debt, a 'rebel,' and thus he was imprisoned for this reason.

lent were viewed differently than in England, as failure to repay was regarded as an inability to pay a debt rather than as a display of obstinacy. Accordingly, a person's moveables and land were liable to be taken to repay debt, but the debtor was not subjected to any other form of punishment. However, experience showed that failure to repay debt happened just as frequently due to unwillingness as to inability, as many debtors would hide their possessions in order to thwart their creditors.<sup>96</sup> For this reason, Scotland enacted the act of sederunt of 1582, which appointed letters of horning. Since the letters of horning declared a debtor who was unable or unwilling to pay a debt a 'rebel,' he was imprisoned on the grounds that he was a 'rebel,' and not directly for the failure to repay a creditor.<sup>97</sup>

Kames then proceeded to explain his reason for undertaking this specific investigation: 'There is not in the law of any country a stronger instance of harshness, I may say of brutality, than occurs in our present form of personal execution for payment of debt ... It is a subject however of curiosity, to enquire how this rigorous execution crept in.'<sup>98</sup> A letter of horning demanded that the debtor pay what he owed or he would be declared a 'rebel,' without the option of surrendering his person to a ward.<sup>99</sup> Thus, while originally a debtor was only labelled a 'rebel' when he refused to pay or refused to surrender his person to a ward, the inability to pay a debt became sufficient reasoning for a debtor to be labelled a 'rebel'. Kames argued that this new use of 'rebel' status was 'a monster of a statute, repugnant to humanity and common justice'.<sup>100</sup>

Kames explained how many judges continued this practice of invoking the letter of four forms, not based on reason, but because it was a custom in Scotland. Kames aptly identified that this was a perfect example of how 'statutes so contradictory to every

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<sup>96</sup> Home, *Historical Law Tracts*, vol. ii, 77-80.

<sup>97</sup> *Ibid.*, 80-85.

<sup>98</sup> *Ibid.*, 81.

<sup>99</sup> *Ibid.*, 87-90.

<sup>100</sup> *Ibid.*, 94.

principle of equity and humanity could make their way and be tamely submitted to'.<sup>101</sup> However, although it was a custom to use an act of horning for a single charge, Kames noted that judges did not always follow it, because 'no judge could be so devoid of common humanity, as willingly to give scope to such penalties'.<sup>102</sup> Kames argued that since the law was too strict and led to judges not convicting, a distinction was made between treason and rebellion.<sup>103</sup> 'Civil rebellion' was used for debtors who did not pay their creditors. Until 1563, letters of four forms continued to be the only warrant for personal execution authorized by the Court of Session.<sup>104</sup>

This summary of Kames's history of personal execution for payment of debt, exemplifies Kames's historical methodology. First, this example showed how society and the legal system had developed from feudal law, and how the end of feudalism allowed personal execution for debt to be introduced. Second, Kames questioned how personal execution for payment of debt had originated. Third, Kames explained how the existence of severe punishments did not result in fewer instances of failure to repay debt, because judges were less likely to convict, and thus severe laws did not successfully produce deterrence. Finally, showing the distinction between how personal execution for payment of debt was enforced in England and Scotland was a study in comparative jurisprudence.

The method of tracing the evolution of laws through history was performed by Kames with two purposes in mind. First, tracing the history of the law established greater clarity in the law itself. Second, and most importantly for Kames, tracing the history of law highlighted the areas of the law that needed reform. Kames believed that as society evolved, its laws should continuously change and mirror the cultural mores of the nation. According

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<sup>101</sup> Ibid., 94-95.

<sup>102</sup> Ibid., 95.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid., 97.

to Kames, the current legal system had adopted customs without deliberation as to whether they were relevant or rational. Through his historical method, Kames believed that outdated laws could be identified and subsequently modernized.

#### **Section 2.4: Sketches of the History of Man**

A key characteristic of conjectural and theoretical histories was the use of the four-stages theory. The theory showed how societies developed through four consecutive stages that were based on a form of subsistence: hunting, pasturage, agriculture, and commerce.

Ronald L. Meek explains:

To each stage there corresponded different ideas and institutions relating to property; to each there corresponded different ideas and institutions relating to government; and in relation to each, general statements could be made about the state of manners and morals, the social surplus, the legal system, the division of labor, etc.<sup>105</sup>

The four-stages theory was adopted in Smith's *Wealth of Nations* (1776), Ferguson's *An Essay on the History of Civil Society* (1767), and John Millar's *Observations concerning the Distinction of Ranks in Society* (1771).<sup>106</sup> While this style gained prominence in Scottish literary circles, Dugald Stewart quoted Millar, stating that,

'Upon this subject he followed the plan that seems to be suggested by Montesquieu; endeavouring to trace the gradual progress of jurisprudence, both public and private, from the rudest to the most refined ages, and to point out the effects of those arts which contribute to subsistence, and to the accumulation of property, in producing correspondent improvements or alterations in law and government.'<sup>107</sup>

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<sup>105</sup> Ronald L. Meek, "Smith, Turgot, and the 'Four Stages' Theory," *History of Political Economy* 3, no. 1 (1971): 10.

<sup>106</sup> John Millar (1735-1801), Regius Professor of Civil Law at the University of Glasgow 1761-1800.

<sup>107</sup> Dugald Stewart and John Veitch, *The Collected Works of Dugald Stewart: Biographical memoirs of Adam Smith*, William Robertson, Thomas Reid, ed. William Hamilton (London: T. Constable and Company, 1858), 12.

As noted above, the method of tracing the development of law and society through four specific stages of history was influenced by Montesquieu.<sup>108</sup>

In *Sketches of the History of Man*, Kames used the four-stages theory to explain how laws and society had developed. Kames showed that during the first two stages, ‘Hunting and fishing’ and ‘Pastoral-nomadic’, there were no laws or government because there was no concept of property that needed protection. In the third stage, ‘Agriculture’, cooperation was necessary to bring in the annual harvest, and the creation of new jobs (blacksmiths, carpenters, masons, etc.) resulted in greater intimacy among people with dependent obligations. This greater intimacy and interdependency resulted in more possibilities for conflict between people with competing interests. Thus, it was in this third stage of history that laws and government were needed to govern society. In the final stage, ‘Commercial society’, further laws were necessary, including laws governing the commercial sale of commodities. Kames argued that historical change was related to changes in the means of production and that shifting forms of property accelerated advancement into civil society.<sup>109</sup> An example of this historical method is found in the section entitled ‘Progress of Morality’. Kames used the four-stages theory in this sketch to explain the emergence of laws in response to evolving moral attitudes and the advancement of society.

Kames argued that when humans lived in small communities, they seldom transgressed rules of morality within their own tribes. While the earth’s population was

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<sup>108</sup> Stefan Collini, Donald Winch, and John Burrow also note that Montesquieu’s *De l’Esprit* focused on the idea that laws had to have a constant connection with the constitution of governments, climate, culture, commerce, religion, and the situation in, and state of, society as a whole. The Scots embraced this theory first developed by Montesquieu and created the four-stage theory, showing how societies advanced from savagery to civilization. Stefan Collini et al, *That Noble Science of Politics: A study in nineteenth-century intellectual history* (Cambridge: Cambridge University Press, 1983), 16-18.

<sup>109</sup> Henry Home, “Origin and Progress of commerce” in *Sketches of the History of Man*, vol. i, 4 vols. (Dublin: James Williams, 1774), 67-88. Kames explained the connection between commerce, art, and manufacture, and contended that if commerce failed, humans would be reduced back to savagery. (77)

meagre and humans lived in small, dispersed tribes, resources for survival were plentiful, and thus there was no need to quarrel with others over them. As population grew, tribes became neighbours and disagreements occurred. Kames argued that cruelty became predominant in the human race, as humans were dealing with groups of indistinct people as opposed to relatable individuals. As a result, Kames argued, there was little moral authority during the dark ages. He believed that morality had very little influence when overwhelmed by feelings of revenge. Kames explained the common punishment of the innocent as an example of revenge and the lack of moral authority during the dark ages. He argued that in comparison, during the enlightened age, punishment of innocent people rarely occurred.<sup>110</sup> However, Kames believed morality did not necessarily advance with the progress of society, and that in many cases, morality actually declined as a nation improved.

In the fourth stage of history, Kames argued that riches, selfishness, and luxury, were ‘diseases’ that weakened morality in prosperous nations.<sup>111</sup> While it was important to note that love of money excited industry, Kames maintained that the ‘hoarding-appetite’ was a major antagonist of morality. Kames believed that ‘in the first stage of civil society, men are satisfied with plain necessities; and having these in plenty, they think not of providing against want. But money is a species of property, so universal in operation, and so permanent in value, as to rouse the appetite for hoarding’.<sup>112</sup> Kames pointed to the multitude of thieves and rogues hanged during the reign of Henry VIII and Elizabeth I as examples of low morality.<sup>113</sup> He proclaimed that, ‘During the infancy of a nation, vice prevails from imbecility in the moral sense: in the decline of a nation, it prevails from the

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<sup>110</sup> Home, *Sketches of the History of Man*, vol. iv, 86-94.

<sup>111</sup> *Ibid.*, 87.

<sup>112</sup> *Ibid.*, 108-109.

<sup>113</sup> *Ibid.*, 110. Kames related that it was commonly believed that seventy-two thousand thieves and rogues were hanged during Henry VIII’s reign, and between 300-400 were hanged yearly for theft and robbery during Elizabeth’s reign.

corruption of affluence'.<sup>114</sup> Kames argued however, that to control the hoarding appetite, God had provided men with the moral sense and the notion of property. When the moral sense and right of property were cherished under a good government, they formed a sufficient counterbalance to the hoarding-appetite.<sup>115</sup> As society progressed and became more polished, the corruption of affluence infected society, and thus law developed out of the need to curb immoral actions. Lehmann argues that this element of pessimism and moral scepticism was a distinct feature of eighteenth-century Scottish writing, and distinguished Scottish writers from continental writers who were more optimistic about progress.<sup>116</sup>

With the introduction of commerce came the hoarding-appetite and a marked increase in criminal and immoral activity. Thus, as morality declined in reaction to the increased appetite for hoarding, good government with rational laws was needed to mend and control society. As society advanced through the stages of history, knowledge concerning moral and immoral actions may have improved, but the actions of men did not reflect the enlightened spirit of the age. However, with the improvement of society and the foundation of good government, morality was aided by the creation of laws to curb the immoral actions of men.<sup>117</sup> While humans were born with an innate sense of right and wrong, which was cultivated through common experiences and refined as society progressed, laws were needed in order to entrench this developed common sense into society.

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<sup>114</sup> Ibid., 114.

<sup>115</sup> Ibid., 108-111.

<sup>116</sup> Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment*, 191-192.

<sup>117</sup> The cyclical style of the four-stages theory was common throughout Kames's sketches. For example in his sketch on patriotism, Kames argued that in the original state patriotism was non-existent. In the 'Pastoral-nomadic' stage, a common interest developed but there was no idea of patriotism. In the 'Agriculture' stage, patriotism began to appear. However, in the fourth stage, when luxury became the sole pursuit of individuals, patriotism vanished. Berry argues that this cyclicalism was a common feature of Renaissance and Classical thought. Christopher J. Berry, *The Idea of Luxury: A Conceptual and Historical Investigation*, Ideas in Context 30 (Cambridge: Cambridge University Press, 1994), 176.



Kames's believed that the study of history revealed the possibility of cyclical recovery. As George W. Stocking Jr. argued: 'By understanding the way different aspects of human nature were affected by different forms of government and different degrees of civilization, one could perhaps hope to create a rational science of progress'.<sup>118</sup> By understanding human nature in relation to the cycles of history, Kames sought to uncover how society could remain in the state that came before luxury and decay. Stocking termed this state the 'golden mean'.<sup>119</sup> Thus, Kames's *Sketches* were not mere historical sketches of the development of man, but were sketches of how society existed in each state and how different forms of social relations, governments, and economies affected society. With historical study, Kames sought to improve society through developing a means of preventing luxury, poverty, and decay, and thus progressing towards the 'golden mean'.<sup>120</sup> With this view, Kames aligned himself with Stewart who also believed in the perfectibility of society.<sup>121</sup>

## **Section 2.5: Elucidations Respecting the Common and Statute Law of Scotland**

In *Elucidations Respecting the Common and Statute Law of Scotland*, Kames continued to use the history of law as an instrument to argue for legal reform. An important

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<sup>118</sup> George W. Stocking Jr., "Scotland as the Model of Mankind: Lord Kames' Philosophical Views of Civilization," in *Toward a Science of Man: Essays in the History of Anthropology*, ed. Timothy H. H. Thoresen (Chicago: Aldine Press, 1975), 80.

<sup>119</sup> *Ibid.*, 81.

<sup>120</sup> The four-stage theory of development was not limited to the improvement of the moral sense. The four-stage theory applied to various senses. For example, the sense of property developed through the stages. While during the hunter-gatherer stage, property was only associated with possessions, during later stages man had a greater sense of ownership over animals (pastoral stage) and land (agriculture stage). See Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900*, 117-118.

<sup>121</sup> Collini, *That Noble Science of Politics*, 39-41. Collini contends that this was a major distinction between the views on progress expressed by Hume and Smith with those developed by Stewart. Hume and Smith were sceptical concerning the future of society. They contended that while human follies could be contained or modified, they did not, as Stewart argued, believe that these follies were in a process of being replaced by their virtuous opposites. Kames, like Stewart, contended that humanity was in a constant state of progress and, through advancement in intellect, it was possible to progress to perfection, which consisted in the golden mean.

element of the study of history for Kames was the use of reason. Kames believed that reason should be more frequently employed by legal professionals instead of a reliance on past authority. Kames's intention in *Elucidations* was 'to give examples of reasoning, free from the shackles of authority' and 'not to say what our law actually is, but what it ought to be'.<sup>122</sup> The dependence on custom instead of reason was introduced by Kames in *Historical Law Tracts*, when he described the persistence of criminals taking church sanctuary and the use of pardons.<sup>123</sup> In *Elucidations*, Kames continued this approach, showing how reason and history functioned together to fix the law. An example of his methodology in *Elucidations* is in the first tract, entitled 'Voluntary obligation by a minor without consent of curators, and by a married woman'. Kames illustrated how current law, rooted in established custom, dictated that legal agreements made by minors and married women were null and void. By illustrating the history of such legal agreements in Roman law, he argued that this practice was based on a misconception. Thus, through legal-historical investigation and the application of reason, Kames highlighted laws that needed reform.

Kames explained that a minor's bond, without the consent of his curator, was held to be void by writers on the Roman law and Scots law.<sup>124</sup> While no distinction was made between a major and a minor in Roman law, curators were provided to protect minors. Kames explained that in Rome the role of the praetor was to remedy defects in the law. While he had no power to annul a bond issued without the consent of a curator, the praetor could render it ineffectual.<sup>125</sup> In Scotland, Kames argued that 'a minor who grants a bond without consent of curators, is presumed to be hurt by it; and the presumption is admitted

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<sup>122</sup> Home, *Elucidations Respecting the Laws of Scotland*, xiii.

<sup>123</sup> See pp. 120-121.

<sup>124</sup> A curator was a legal guardian or trustee in ancient Rome.

<sup>125</sup> Home, *Elucidations Respecting the Laws of Scotland*, 1-2.

by way of exception, because it requires no proof”.<sup>126</sup> This fact had led many lawyers and writers to contend that all bonds by a minor without the consent of the curator were null and void. However, Kames argued that if evidence were provided to support the usefulness of the bond, it should not be voided. Thus, bonds without consent should not be inevitably void, but they retained a voidable characteristic.

The legal right for married women to issue bonds was similar to that of a minor. To establish the current custom, Kames repeated Lord Stair’s opinion that ““By our custom, a wife’s obligation for debt, or personal obligation, contracted during marriage is null.””<sup>127</sup> Kames argued, however, that bonds from married women were similar to those supplied by minors. The laws of Scotland allowed a wife to have an exception against a bond when she believed herself ‘over-reached’. Kames claimed, however, that if the wife did not use the exception, the bond was effectual in law.<sup>128</sup> While writers and practitioners of the law argued that minors needed the consent of their curators and that wives needed the consent of their husbands, Kames proved both of these assumptions to be erroneous. The exceptions placed into law were intended to protect both wives and minors from making harmful decisions. Thus, bonds were sanctioned if they were not considered damaging.

In *Elucidations*, Kames illuminated common practices and beliefs in Scottish law to show how a blind dependence on the past was problematic. His main goal in *Elucidations*, and also in *Principles of Equity*, was to demonstrate how employing reason in place of custom resulted in outcomes that were more just and promoted more utility. In this particular example, Kames showed how reason and historical inquiry could function together to uncover the law that promoted the most utility, instead of blindly relying on the authority of established custom and practice.

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<sup>126</sup> *Ibid.*, 2.

<sup>127</sup> *Ibid.*, 3.

<sup>128</sup> *Ibid.*

## ***Conclusion***

Two common features of the Scottish Enlightenment were the study of history and the development of a scientific approach to human nature. Kames amalgamated these fields of study to gain a more comprehensive understanding of society. Through his works on history and human nature, it is evident that reform and improvement were his prime objectives. In *Essays on the Principles of Morality and Natural Religion* and *Principles of Equity*, Kames argued that the science of human nature could only be understood through a holistic account of human actions and morality. Legal reasoning and equity should incorporate various factors, including utility, justice, and the moral sense, to improve judicial decision-making. In his various dictionaries and in *Essays upon Several Subjects Concerning British Antiquities, Historical Law Tracts, Sketches of the History of Man*, and *Elucidations Respecting the Common and Statute Law of Scotland* Kames exemplified the significance of historical investigation for understanding both past and current society.

Kames used common sense theory – the conjunction of innate senses and a developed universal standard of right and wrong – to create a more holistic understanding of human nature. The study of history and tracing the progress of human nature aided scholars in reforming current society. For example, Kames’s attempt at legal reform, reducing equity to a science in *Principles of Equity*, was facilitated by a belief in the existence of a common sense and a constant human nature. Showing that humans had innate senses of good and ill, and that a universal standard of right and wrong had refined as society had progressed, revealed the significance of continuously evolving laws that reflected improved moral standards. For Kames, law and society functioned together to ensure the moral conduct of its members. The moral sense and the common sense formed the foundation of social duties through their appropriation into law. Thus, it was possible to trace changing social mores through history by studying the evolving laws. This approach

accentuated the importance of equity in courts. As Kames argued that laws and the moral sense should develop together, the use of reason, in place of custom, in legal reasoning would ensure the adoption of society's moral values into law. Kames believed that the inclusion of a refined moral sense into law, in conjunction with the reforming of antiquated laws, would create an enlightened legal system. Kames showed that legal-historical investigation was an essential study for uncovering the science of human nature and for attempting to understand both past and present society, with the aim of future progress.

## **Chapter Four: Bentham and the Utility of History: using history and experience to justify reform**

Jeremy Bentham understood that historical knowledge was a useful tool in political debate, as is evident from the repeated occurrence of historical analysis within his writings as a means to justify reform and to discredit traditionalism. Unlike most other eighteenth-century British legal theorists, he was sceptical about using historical analysis to place moral value on existing law or to determine how to reform the law. Bentham accused Blackstone of being so satisfied by the views of any individual from history – especially if he spoke Latin – that his views on a law would be alone sufficient as proof of the existence and continued value of that law.<sup>1</sup> While Kames argued that a thorough study of legal history provided the basis for legal reform and Blackstone contended that legal history explained the value of the existing law, Bentham believed that the best laws could be created through observation of society, using a science of legislation based on the principle of utility. A critical examination of existing and past laws would tend to demonstrate how they were flawed, and how legislators applying the principle of utility would be more capable of determining the best laws.

This chapter will first discuss Bentham’s legal and moral theory presented in *A Fragment on Government*, *An Introduction to the Principles of Morals and Legislation*, *Principles of the Civil Code*, and *Deontology*. I will focus on the connection between Bentham’s principle of utility and its subordinate ends, derivative utility, and the juncture for resistance, and reveal the role of history within Bentham’s moral and legal theory. The second section of this chapter will look at Bentham’s opinion on the value of history, as well as his use of historical analysis, as revealed in ‘A Comment on the Commentaries’, *A*

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<sup>1</sup> Bentham, “A Comment on the Commentaries,” 148.

*Fragment on Government*, and *Principles of the Civil Code. Book of Fallacies* will also be utilised to clarify his views and reveal how his earlier views on history matured in his later years. Bentham's views on history can be summarized in two principles. First, to insist on retaining a law made in the past because it was the product of ancestral wisdom was a fallacy. The fact that a law was established in the past was not in itself justification for its continuation. Second, experience was the mother of wisdom, and legislators and lawyers learned from history. The second section will elucidate these two principles by first focusing on Bentham's rejection of the ancestor-worshipper's fallacy. Bentham showed how legislators could learn from history and experience, instead of being constrained by the authority of ancient laws and writers. Following this, I will look at Bentham's criticism of Blackstone's argument that antiquity gave moral validity to existing laws. In addition, by highlighting Blackstone's failure to provide accurate and consistent historical accounts throughout the *Commentaries*, Bentham challenged the connection that Blackstone made between law and history, and thus further undermined the basis of Blackstone's position. Finally, following Bentham's repudiation of Blackstone's improper use of history for law, I will provide examples where Bentham showed how the study of history could be used to benefit law and society. Bentham drew upon a variety of examples from history to support his moral and legal theory, in order to show how the legal and political structures of past societies were flawed. In doing so, Bentham showed how legislators could learn and progress from the proper study of legal history, instead of being constrained by the adoption of laws whose authority was based solely on antiquity. Bentham utilised historical analysis to argue against the idea that ancient and long usage gave moral value to existing laws, and instead to propound the importance of creating a science of legislation based on the principle of utility.

## Section 1: Bentham's Legal and Moral Theory

### *Principle of Utility*

Bentham commenced *An Introduction to the Principles of Morals and Legislation* by explaining that 'Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.'<sup>2</sup> Bentham provided a classification of fourteen pleasures and twelve pains and argued that it was the prospect of some of these pleasures or the avoidance of some of these pains that constituted the motives to action of every individual.<sup>3</sup> Pain and pleasure governed the actions of individuals and constituted the standard of right and wrong. In other words, pain and pleasure were the foundation of human psychology, determining what individuals actually did, and of morality, pointing out what individuals ought to do. The principle of utility held that actions or behaviours were right in so far as overall they promoted pleasure, and wrong in so far as overall they tended to produce pain, for everyone affected. Actions that resulted in a benefit, and hence promoted pleasure, were good, while actions that resulted in a loss, and hence produced pain, were evil. In order to achieve this balance of pleasure over pain in a community, Bentham argued that 'the greatest happiness of the greatest number' should be the guiding principle for public policy as well as individual action. It was the role of the legislator to create policies and laws that increased overall happiness, ensuring a predominance of pleasure over pain in the community as a whole.<sup>4</sup> Thus, promoting pleasure and avoiding pain, were the ends that the legislator had in view.<sup>5</sup>

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<sup>2</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, eds. J. H. Burns and H. L. A. Hart, The Collected Works of Jeremy Bentham (Oxford: Oxford University Press, 1996), 11.

<sup>3</sup> *Ibid.*, 34-41.

<sup>4</sup> *Ibid.*, 12.

<sup>5</sup> It is worth noting that underlying Bentham's critique of Blackstone was his theory of logic and language. Schofield explains: 'It is often assumed that the starting-point for Bentham's thought is the principle of utility. There is, however, a deeper aspect to his thought, on which the principle of utility is founded. This is his



Bentham identified the principle of asceticism and the principle of sympathy and antipathy as the two categories to which all other rival theories of law and morality belonged. He argued that in order to prove these other principles wrong, one had only to explain how they were contrary to the principle of utility.<sup>6</sup> Bentham explained that a principle could conflict with utility in either of two ways: it might either be constantly opposed to it or it might be occasionally opposed. The principle of asceticism, which held that humans should approve of actions that diminished their happiness, was wholly at odds with utility. Religionists and moralists, who promoted self-sacrifice in pursuit of spiritual goals, usually adhered to the principle of asceticism. The principle of sympathy and antipathy was sometimes at odds with utility, and sometimes not. It held that individuals should approve or disapprove of actions based on their own feelings and sentiments. Bentham argued that to adhere to the principle of sympathy and antipathy was in effect to say that morality depended upon what an individual liked or disliked.<sup>7</sup> Bentham contended that sympathy and antipathy were a mask for selfishness, tyranny, and intolerance. Thus, the application of this principle to law making resulted in laws that favoured the particular interest of legislators or rulers, and not the best interest of the community. In contrast, an adherent of the principle of utility attempted to use accurate calculations of benefits and costs to introduce laws that promoted the greatest happiness of the greatest number.

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ontology, and the theory of logic and language which is linked to it.' The need for clarity in language was directly related to Bentham's need for security and expectation in the law. One of the primary functions of law was to create security and hence promote expectation utilities. Bentham believed in the importance of a scientifically descriptive language. The fundamental ontological question for Bentham was the relationship between the human mind and the physical world. There was nothing in human experience that was not ultimately referable to some physical fact. Schofield, *Bentham: A Guide for the Perplexed*, 50; Philip Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism," *Current Legal Problems* 56, no. 1 (2003), 12; Philip Schofield, *Utility and Democracy The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press, 2006), 24-25.

<sup>6</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, 17.

<sup>7</sup> *Ibid.*, 29.

Bentham contended that the quantity of a portion of pleasure and pain could be measured using seven variables: intensity, duration, certainty, propinquity, fecundity, purity, and extent. Bentham presented this calculation, which has become known as the felicific calculus or the hedonistic calculus, as a means of determining the tendency of certain actions to create pleasure or pain. Bentham argued that it was only through the principle of utility and the felicific calculus, and not through inward reflection or divine inspiration, that the most beneficial laws would be enacted.<sup>8</sup> As Michael Quinn argues, Bentham's moral reasoning depended on the possibility of the calculation of quantities of pleasures and pains. The advantage of utilitarianism lay in its ability to predict the outcomes of rules by calculating the pleasures and pains that resulted from their observance. However, according to Quinn, what challenged Bentham in creating a complete code based on the principle of utility was his awareness of the inherent difficulties in accurate calculation. Unlike other moral theorists, Bentham attempted to construct a system of quantification by creating a formula, while recognizing the difficulties present in the procedure. Such difficulties include: the legislators' inability to predict outcomes with certainty, the existence of individual sensibilities, and the difficulty of calculating the intensity of pleasures and pains.<sup>9</sup> Quinn concludes that, despite these difficulties, Bentham maintained that calculation was the only basis for a rational morality. Calculation, using the real entities of pleasure and pain, was the only reliable method of creating laws that would promote the greatest happiness of the greatest number.

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<sup>8</sup> *Ibid.*, 34-35.

<sup>9</sup> Michael Quinn, "Bentham on Mensuration: Calculation and Moral Reasoning," *Utilitas* 26, no. 1 (March 2014): 61-104.

## *Security and Expectation in the Civil Code*

While Bentham argued that the common law system should be replaced with a legal system based on the principle of utility, he understood that a drastic and abrupt reform of the legal system could lead to evil consequences. A certain law or policy might promote the most utility if one were starting *de novo*, but it was important to take into account the existing expectations of members in society and how new or altered laws and policies might lessen their happiness by undermining these expectations. The importance of considering established expectations in society directly related to Bentham's arguments concerning the importance of security. Security, as well as subsistence, abundance, and equality, formed Bentham's four subordinate ends of legislation.<sup>10</sup> The more perfect the enjoyment of these four ends, the greater the sum of happiness, and thus, according to Bentham, legislators should have these four ends in mind when creating policies and laws.<sup>11</sup> When the subordinate ends conflicted, Bentham argued that security and subsistence were the most important and thus took precedence over abundance and equality.<sup>12</sup> It was essential for the legislature to protect individuals while they laboured, and provide security for the product of their labour. Security and subsistence ensured the basic survival of individuals. Establishing abundance however, ensured that subsistence was more secure. In addition, if equality were also established, the overall happiness of society would be augmented, as subsistence and security would be widespread. While security and subsistence were necessary for basic survival, abundance and equality safeguarded survival.

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<sup>10</sup> Subsistence referred to the use of food, clothing, shelter, medicine, and any item that was necessary for survival. Security referred to protection from harm and the assurance of future subsistence. Abundance referred to the accumulation of wealth.

<sup>11</sup> Jeremy Bentham, "Principles of the Civil Code," in *The Works of Jeremy Bentham*, ed. John Bowring, vol. i (Edinburgh, 1843), 302. It is important to note that Bentham's *Principles of the Civil Code* is refracted through the lens of his French editor, Etienne Dumont (1759-1829).

<sup>12</sup> *Ibid.*, 303.

According to Postema and P.J. Kelly, who have written on Bentham's theory of law and the importance of security and expectation, Bentham contended that any reform should take established expectations into account, as there was disutility in undermining such expectations. Postema argues that Bentham saw the task of law as being the coordination of social interaction and stability, which made possible the pursuit of individual aims, purposes, and plans of life. Thus, Bentham aspired to create a judicial system that provided stability and certainty and secured the expectations of the people. Expectation utilities were derived from two main sources: first, habits, customs, and promises; and second, statutes and customs of officials. It was important to institute rules that could establish and fix expectations, and define and establish the bounds of public order by securing stability. The common law could not achieve the appropriate degree of stability, because it could not focus expectations or coordinate social interaction. Postema argues that what was distinctive in Bentham's theory, due to the importance he placed on expectation and *stare decisis*, was the attempt to weave the doctrine of precedent into the fabric of an essentially direct-utilitarian conception of practical decision-making.<sup>13</sup>

Similarly to Postema, Kelly argues that the aim of legislators using the principle of utility was the introduction of a legal framework in which each individual could pursue his or her own well-being. Since the legal system had developed from the sinister interests of past rulers and legislators, many areas of the law needed to be reformed or abolished. Bentham however, realised that sudden reform would cause significant immediate pain because it would undermine the system of expectations. Thus, the 'disappointment-preventing' principle was designed to reconcile reform with the maintenance of security and expectation, as legislators would factor the pain caused by disappointed expectations

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<sup>13</sup> Postema, *Bentham and the Common Law Tradition*, 210.

into the felicific calculus.<sup>14</sup> Kelly argues that the two principles of ‘security-providing’ and ‘disappointment-preventing’ were essential in the application of the principle of utility. Kelly asserts that the ‘security-providing’ principle ‘determines a distribution of rights and titles which provides the conditions for the maximum social well-being arising out of the pursuit of individual interests’, and the ‘disappointment-preventing’ principle ‘provides the means by which this distribution of rights and titles can be extended without violating existing expectations’.<sup>15</sup> Kelly argues that the role of the utilitarian legislator was to create a system of personal entitlements around the basic conditions of personal continuity and coherence; such entitlements were security for person, possessions, condition in life, and reputation. Both Postema and Kelly outline the integral role of security and expectation in Bentham’s utilitarian code. Law served as the primary source for regulating expectations, as expectations were dependent upon norms and rules governing social interactions. Expectation provided the conditions of personal continuity and coherence, and thus was the primary condition of interest formation.<sup>16</sup>

The principal object of the law was to create and preserve security in society, and hence, law created property and property established expectations. Bentham argued that everything an individual possessed, or ought to possess, he imagined to belong to him forever, unless he voluntarily alienated or exchanged it. In this way, possessions became the foundation of each individual’s expectations.<sup>17</sup> Every individual being secure in his or her expectations was central to Bentham’s legal theory. An attack made on an individual’s property spread alarm among all other propertied individuals. Bentham argued: ‘Every injury which happens to this sentiment [of property expectation] produces a distinct, a

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<sup>14</sup> P. J. Kelly, “Utilitarianism and Distributive Justice: The Civil Law and the Foundations of Bentham’s Economic Thought,” *Utilitas* 1, no. 1 (January 26, 2009): 76.

<sup>15</sup> *Ibid.*, 77.

<sup>16</sup> Bentham, “Principles of the Civil Code,” 307-308.

<sup>17</sup> *Ibid.*, 310.

peculiar evil, which may be called pain of disappointed expectation.’<sup>18</sup> If the government did not protect individual property, or if the government itself were to interfere with property, it would produce pain. There were four types of evil that resulted from attacks upon property: evil of non-possession, pain of loss, fear of loss, and destruction of industry. Bentham maintained that the former two were evils against the individual, while the latter two extended to society through alarm.<sup>19</sup>

Bentham argued that the goodness of a legislator’s laws partly depended on the conformity of his laws to the general expectations of individuals in a society. Accordingly, Bentham highlighted seven conditions that were necessary for the legislator to accomplish a harmony between laws and the general expectations of members of society. The first condition was that laws might be anterior to the formation of expectations. Bentham explained that if a legislator wished to impose a law that was in opposition to the established expectations of men, he would need to make it effective in the distant future. By having a law take effect in the future, the expectations of the present society would not be harmed, and the future generations would be prepared for the change. The second condition was that laws should be known. He argued that some laws were naturally more easily understood than others, such as ones that were more conformable to expectations, or conformed to expectations.<sup>20</sup> The third condition was that laws should be both consistent with themselves and with the general expectations developed in society. The fourth condition was that the principle of utility was the general point of union for all expectations. The plan that favoured the greatest number of interests could not fail to obtain

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<sup>18</sup> Ibid., 308.

<sup>19</sup> Ibid., 309-310. Alarm was the first part of the secondary mischief, the second being danger, that resulted from mischief. Alarm referred to the reaction of individuals to an offence committed towards another member of society. Alarm was the fear that the rest of society experienced at the chance that they too might experience the mischief committed. Danger was the actual chance that other members of society might experience such mischief. Bentham, *An Introduction to the Principles of Morals and Legislation*, 144-147.

<sup>20</sup> Bentham, “Principles of the Civil Code,” 323.

the greatest amount of support. Even a law that was at first resisted by the public would soon become familiar and its origins would be forgotten. The fifth condition was that there should be a method in the laws. Bentham argued that both the style and arrangement of the law ought to be simple. The law should be a manual of instruction for every individual. The more conformable laws were to the principle of utility, the simpler would be their arrangement. The sixth condition was that laws should be present to the mind and be certain to be executed.<sup>21</sup> The fear of punishment deterred individuals from committing actions that harmed society as a whole. If members of society were able to elude punishment after breaking a law, then the legal system would lose its force, and thus its ability to guarantee security and expectations. The seventh condition was that laws should be understood literally. Laws should be in a simple arrangement and use ordinary language comprehensible to every individual in society.<sup>22</sup>

Bentham finished his section on the seven conditions that were necessary for the legislator to accomplish a harmony between laws and the general expectations of the individuals in a society by stating that, ‘Innovations in the laws should be made with great caution. It is not well to destroy everything, upon pretence of reconstructing the whole: the fabric of the laws may be easily dilapidated, but is difficult to be repaired, and its alteration ought not to be entrusted to rash and ignorant operators’.<sup>23</sup> While Bentham wanted to replace the common law with a complete legal code, which he later termed the pannomion, based on the principle of utility, he understood that a clear deviation from the existing law would result in pain of disappointment in so far as established expectations were not fulfilled. For this reason, it was important that the legislator took into account the established expectations of the people. Bentham’s highlighting the conditions that were

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<sup>21</sup> Ibid., 323-324.

<sup>22</sup> Ibid., 325.

<sup>23</sup> Ibid., 326.

necessary for the legislator to accomplish a harmony between laws and the general expectations of society was in contrast to Blackstone labelling the characteristics that were essential in order for a custom to be considered good (which will be discussed below). The differences between Bentham's and Blackstone's approaches reveal how both writers viewed England's existing laws and the value of history. Both men outlined the conditions that made, in their opinions, good law, but Bentham described the factors that needed to be considered in order to legislate good new laws, and Blackstone described what validated the current law. Bentham focused on what the laws were and how they could become what they ought to be. For Bentham, the expectations individuals had from existing laws factored into his calculation to determine what the law ought to be. For Blackstone, the continued practice of existing laws in history was definitive proof of a law's legal validity and moral rightness, confirming that the existing law was what it ought to be.

### *Derivative Utility*

Bentham further argued for the importance of security of expectation when he discussed derivative utility and the pain caused by disappointed expectations. Bentham argued that the pleasures and pains that a person experienced were either 'original' or 'derivative'. Pleasures and pains that were 'original' were immediately experienced through perceptions from the real world. 'Derivative' pleasures and pains were not accompaniments of present perceptions but were derived from memory or from imagination, which was itself a product of past experience. A pleasure or pain of expectation occurred when an individual remembered a past pain or pleasure that had occurred as a result of a specific action, and expected the same outcome when the action was repeated. Bentham argued that every motive was founded on an expectation. An image of pleasure either resulted in an action, by creating a motive to repeat that pleasure, or it



was inert, in which case it amounted to a recollection or something imagined.<sup>24</sup> Bentham explained:

Thus, it is no otherwise than through the medium of the *imagination*, that any pleasure, or pain, is capable of operating in the character of a *motive*. It is only through the medium of these *derivative* representations that the past *original* can, in any shape, or in any part, be brought to view.<sup>25</sup>

If an expected pleasure was not in the event experienced, an individual experienced the pain of loss. Bentham provided the example of an act of robbery. The individual who was robbed experienced original pain; if the victim had intended to pay the money that had been taken to a second individual, this second individual would experience pain of loss from disappointed expectation. The loss endured by a victim of robbery would also be felt by other members of society, in the form of a derivative pain, through the fear that they might suffer a similar fate.<sup>26</sup> This feeling was similar to that felt by an individual who had expected to profit from a certain law or custom. If this law was altered or abolished, they would experience a pain of disappointment. Fear of loss – a derivative pain – would spread throughout society, because members of the community would feel less secure in their property and expectations. It was possible that these perceptions of fear and loss would lead to the juncture for resistance, as I will show in the following section.

### *Juncture for Resistance*

In *A Fragment on Government*, Bentham explained the connection between security, the principle of utility, and the point of rebellion. If the legislature enacted laws and policies that were not beneficial to society, that resulted in a predominance of pain over

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<sup>24</sup> Schofield, *Utility and Democracy The Political Thought of Jeremy Bentham*, 30-31.

<sup>25</sup> Jeremy Bentham, *Deontology; Together with A Table of the Springs of Action; and the Article on Utilitarianism*. The Collected Works of Jeremy Bentham (Oxford: Clarendon Press, 1983), 90.

<sup>26</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, 143.

pleasure, Bentham noted that the people would have reason to rebel. He termed the point at which individuals were prepared to revolt against government ‘the juncture for resistance’, and this juncture occurred when the probable mischiefs of resistance appeared to them to be less than the probable mischiefs of obedience.

Bentham’s arguments concerning the juncture for resistance were directed at Blackstone’s view that a law that was against the law of nature was void. Bentham argued that since the law of nature was a meaningless phrase, one could not know when an act was against it. Instead of using the law of nature to determine when a law was morally right, Bentham maintained that the principle of utility was the only means of identifying moral rightness because it was ultimately based on the ‘real entities’ of pleasure and pain, which were in turn capable of rational calculation. Bentham raised the question as to by what common sign the juncture for resistance could be known, and stated that the only answer was an individual’s ‘own internal persuasion of a balance of utility on the side of resistance’.<sup>27</sup>

Bentham opposed Blackstone’s idea that a law was void if it was against the law of nature. Natural law thinkers, like Blackstone, had blurred the distinction between law and morals. For Blackstone, the historical existence of laws proved both legal validity and moral rightness; if a law was morally right, it was legally valid; and a legally valid law was morally right. In contrast to Blackstone, Bentham asserted the need to distinguish between what is law and what ought to be law. H. L. A. Hart identifies Bentham’s two main criticisms of natural law thinkers concerning law and morals as follows: ‘first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of

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<sup>27</sup> Bentham, “A Fragment on Government,” 484.

law'.<sup>28</sup> For Bentham, laws, even if they were morally wrong, were still laws. He did not believe that laws were void when they were morally wrong, but argued that the principle of utility should be appealed to in order to determine whether laws were beneficial or pernicious, and if deemed bad, such a conclusion might lead to the juncture for resistance.<sup>29</sup>

Bentham explained that the difference between a free state and a despotic state came down to the ability of individuals to make their complaints and remonstrances known to the whole community. Individuals should have the security peacefully to communicate their sentiments without being punished by the executive power.<sup>30</sup> These views underscored Bentham's motto of a good citizen: 'to obey punctually; to censure freely'.<sup>31</sup> Thus, using the principle of utility, instead of adhering to past laws that had been shaped by the particular interests of past rulers, was more likely to result in laws that were beneficial for the entire community. By making this distinction between is and ought, Bentham aimed to bring about a better society through better laws. In addition, as has been seen, Bentham argued that it was important to include the established expectations of members of society when calculating the greatest happiness. If existing expectations were interfered with, members of society might fear for their security. This perception of fear, a derivative pain, might lead to the juncture for resistance and individuals might choose to revolt. Thus, security and expectation had to be considered in order to calculate accurately the greatest happiness of the greatest number. This view was captured by Bentham in 'Place and Time' where he argued that legislators would have to take into account differences of local prejudices – climate and custom – within different nations. It is important to note that John Wyon Burrow argues that there is a noticeable absence of any social evolutionary

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<sup>28</sup> H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (February 1958): 599.

<sup>29</sup> Bentham, "A Fragment on Government," 486.

<sup>30</sup> *Ibid.*, 485.

<sup>31</sup> *Ibid.*, 399.

framework, as Bentham was more concerned with the effect of place than with time.<sup>32</sup> This is the existing perception of Bentham's views that I am attempting to challenge with this chapter. While Bentham argued against placing value on past laws simply because of their ancient stature, he did contend that history should factor into a legislator's calculations. The existing customs of a specific nation were the direct product of past laws and development, and thus the expectations of security were directly dependent on these past laws.

The principle of utility was explained by its relationship to the real entities of pleasure and pain. Bentham argued that the principle of utility should be the guiding principle for policy and legislation; it was the legislator's duty to enact laws that ensured the greatest happiness of the greatest number. Using the felicific calculus, pleasure and pain could be quantified, and the most beneficial laws put in place. Bentham understood, however, that a drastic and abrupt reform of the legal system could lead to disappointed expectations and individuals feeling overall pain. The fear of loss, a derivative pain, could spread throughout society and members of society would not feel secure in their property and expectations. It is possible that this proliferation of pain could lead to the juncture for resistance. If the probable mischiefs of resistance appeared less than the probable mischiefs of obeying the government, individuals in a society would choose to revolt. Thus, it was important for the legislator to consider individual expectations and the security of society. Averting the juncture for resistance and achieving the greatest happiness could only be accomplished through a science of legislation based on the principle of utility. History however, was a contributing factor in calculating the greatest happiness because expectations were based on existing laws, which were the product of history. Thus, while history, more specifically the continued usage of laws, did not confer moral rightness on

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<sup>32</sup> John Wyon Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge: Cambridge University Press, 1970), 38-42.

laws, as Blackstone had argued, taking into account existing laws and calculating the cost-benefit, in terms of utility and overall happiness, of adhering to or abandoning these customs was essential for achieving the greatest happiness of the greatest number.

## **Section 2: Bentham's Views on History**

The essence of Bentham's view of history was captured in 'A Comment on the Commentaries', where he wrote that 'The past is of no value but by the influence it preserves over the present and the future'.<sup>33</sup> Bentham contended that England's past was the result of kings' and noblemen's particular interests, and, as a result, the existing laws rarely considered the utility of every member of society. Bentham advocated supplanting the existing legal system with a code based on the principle of utility. He argued that history was significant for understanding the present law and exposing the need for legal reform:

Let us reflect that our first concern is to learn, how the things that are in our power *ought* to be: that the knowledge of what they have been is of no further use, than as by pointing out the causes by the influence of which they have been brought to what they ought to be, in the few instances of ancient date in which they have been what they ought to be, and by which they have failed of being what they ought to be in the many instances in which they have *not* been what they ought to be, they lead us to the knowledge of the means by which they may be brought to what they ought to be in future: that in studying what they ought to be and how to bring them to it, we shall never be out of the most arduous indeed but noblest road our intellect can travel in: that while without any such views as these before us we employ ourselves in examining what they have been, there is only thus much to be said for us, that possibly we may smooth the approaches of those who mean to travel there.<sup>34</sup>

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<sup>33</sup> Bentham, "A Comment on the Commentaries," 314.

<sup>34</sup> *Ibid.*, 315.

As the above passage states, Bentham argued that we must understand the current state of law and society, how it had developed into this existing state, and what had hindered it from developing into what it ought to be. By exposing the role that the particular interests of sovereigns, judges, lawyers, and legislators had in the creation of the existing legal system and its laws, the need for legal reform would become evident. A full knowledge of political and legal history smoothed the way for the legislator to reform society and to achieve what ought to be by learning from past failures and triumphs.

While questions concerning when laws had originated were vital to Blackstone's and Kames's methods and theories, these questions were of no intrinsic importance for Bentham. Bentham stated that he did not need to know when tithes were instituted, but he was interested in when they would be abolished. Bentham explained that he was more interested in 'the day when they shall be abolished: converted into an equivalent but less burthensom provision, that the hand of exaction may no longer nip improvement in the bud, and that the pastor and his flock may feed in peace.'<sup>35</sup> Human beings and society had developed with the benefit of experience and thus it was important to create a legal code that reflected this experience. Bentham did not accord any authority to history, like Blackstone and Kames did, because how a law had originated and developed into its existing state, while it might reveal its corrupt origins, was inconsequential for his legal science. Instead of using history to support the existing legal system, like Blackstone, or to determine how to reform the law, like Kames, Bentham advocated the introduction of laws that would result in the greatest happiness of the greatest number. To achieve this aim, one first had to ascertain whether the existing laws could be altered or abolished without resulting in a loss that outweighed the benefit. The hedonic calculus highly valued expectation utilities because a pain of loss might result in alarm and fear of loss spreading

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<sup>35</sup> Ibid.

throughout society, and hence affecting the general feeling of security. Thus, Bentham argued that it was more rational and efficacious to consider existing practices and establishments when attempting legal reform instead of consulting laws valued because of their long usage. Similarly, Bentham contended that if a legislator wanted to introduce laws, they should be based on the present needs of society, and not on the model of ancient practices because an ‘adhesion to existing establishments is founded on a very different and much firmer basis’.<sup>36</sup> According to Bentham, the opinions and practices of ancestors should only be valued in so far as these practices shaped existing practices, and current legislators would be wiser than past rulers concerning the current needs of society.

Bentham’s views on history can be summarized in two principles. First, to insist on retaining a law made in the past because it was the product of ancestral wisdom was a fallacy. The fact that a law was established in the past was not in itself justification for its continuation. Second, experience was the mother of wisdom, and legislators and lawyers could learn from history. In this section, I will elucidate these principles by first focusing on Bentham’s view of history and how he challenged the ancestor-worshipper’s fallacy. By refuting the ancestor-worshipper’s fallacy, Bentham showed how legislators could learn from history and experience, instead of being constrained by the authority of ancient laws and writers. I will then look at Bentham’s critique of Blackstone’s understanding of history, specifically immemoriality and Blackstone’s belief that antiquity conferred moral rightness on existing laws. Bentham highlighted Blackstone’s failure to provide an accurate and consistent account of history on many occasions in the *Commentaries*. By doing so, Bentham undermined Blackstone’s connection between law and history, and thus cast further doubt on the cogency of Blackstone’s position. Finally, following Bentham’s

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<sup>36</sup> Jeremy Bentham, *The Book of Fallacies*, eds. Fred Rosen and Philip Schofield. The Collected Works of Jeremy Bentham Political Writings (Oxford: Oxford University Press, 2015), 172.

repudiation of Blackstone's improper use of history for law, I will provide examples where Bentham exemplified how the study of history could actually be used to benefit law and society. Bentham drew upon a variety of examples from history to support his moral and legal theory and to show how the legal and political structures of past societies were flawed. In doing so, Bentham showed how legislators could learn and advance society from the study of legal history, instead of being confined by the adherence to laws, whose moral rightness was based on long usage and, what Blackstone perceived to be, God's law.

### **Section 2.1. Experience vs. Antiquity**

As noted in Section 1, Bentham was adamant that long usage and antiquity did not determine moral rightness. Bentham's view on the relationship between antiquity and legal and moral authority, as also noted above, is captured in the following two principles: first, the historical and continued existence of laws did not prove moral rightness; and second, moral rightness did not confer legal validity, nor did legal validity confer moral rightness. As Bentham was convinced that long usage did not give moral value to existing laws, he did, however, acknowledge that 'Experience is the mother of wisdom',<sup>37</sup> and that legislators and lawyers could learn from history. This is not to say, as Kames contended, that history played an active role in determining ideas for legal reform. As discussed in Chapter Three, Kames argued that the moral sense continuously developed and thus laws should evolve in relation and in response to this development. Bentham, on the other hand, believed that one could learn from history because its study provided a wealth of examples of past laws and practices and revealed the interests from which laws emerged.

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<sup>37</sup> Ibid., 166.



In direct contrast with Blackstone's praise of antiquity, Bentham argued that new laws would benefit from the greater experience of observation of the past and thus would be more likely to promote the greatest happiness. Bentham noted:

Wisdom is the fruit of experience. Experience accumulates with age. The natural course of things, therefore (unless barred by violent and extraordinary revolutions of which the press has barred for ever the return) is for the world to increase in wisdom as it comes on in age. Upon tracing the history of any country backwards, we find ourselves constantly led on by insensible degrees to that situation of things universal at a period more or less remote throughout all the globe when the human race, except in form, was scarce distinguishable from the brutal creation. So far then as it is allowable to judge of a set of opinions not in detail from themselves, but in the lump by the persons who maintain them, our respect for them should naturally diminish as the period in which we find them taken up is, according to the common but delusive expression, of higher antiquity, but to speak more properly, is of earlier date.<sup>38</sup>

Bentham contended that wisdom came with age and experience, and that history had shown that knowledge improved over time. Hence, it was nonsensical to rely on ancient laws and to believe that laws received value from long usage. Ancient laws did not have the advantage of more modern advances in knowledge, and thus were not suited to answer more modern legal questions.

Bentham's views on the utility of history were consistent throughout his writing career. As quoted above, in 'A Comment on the Commentaries', written in the 1770s, Bentham stated that wisdom accumulated with age. As late as 1810, in *Book of Fallacies*, Bentham continued to emphasise the value of history and experience for legislators, while concurrently rejecting the belief that antiquity bestowed value on laws. Bentham explained the nature of 'The wisdom of our ancestors or Chinese argument':

This argument consists in stating a supposed repugnancy between the proposed measure and the opinions of men by

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<sup>38</sup> Bentham, "A Comment on the Commentaries," 212-213.

whom the country of those who are discussing the measure was inhabited in former times; these opinions being collected either from the express words of some writer living at the period of time in question, or from laws or institutions that were then in existence.<sup>39</sup>

Bentham observed that the ancestor-worshipper's fallacy was widely used by defenders of the English legal system. While specialists in every other department of human intelligence held that 'Experience is the mother of wisdom', English lawyers and writers misconstrued *young* and *early* laws as *old* laws, and tended to have a prejudice in favour of the dead.<sup>40</sup> While his views on the utility of the study of history were constant, his opinion on why rulers worshipped old laws ripened in his later years. In *Book of Fallacies*, Bentham remarked that the only explanation for this difference between legal writers and other writers was that in other fields of knowledge, 'no such sinister interest has place as that which is so unhappily combined with power in the persons of those few leading men from whose discourses their colleagues in power, not to speak of the people at large, are so unhappily disposed to take their conceptions of what is most beneficial to the interests of the whole'.<sup>41</sup> While other areas of study focused on the pursuit of knowledge, Bentham contended that rulers had no motive to change old and ancient laws, which had established them in their positions of power.

Bentham strengthened his argument against the ancestor-worshipper's fallacy by providing a brief historical survey, which exposed the inability of past governments to provide useful instruction on current issues. Bentham gave the example of Henry VIII's reign and contended that there existed at that time no book from which useful instruction – for example, on distributive law, penal law, ecclesiastical law, and political economy – could be derived. Moreover, the fact that James I enacted laws punishing the practices of

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<sup>39</sup> Bentham, *The Book of Fallacies*, 166.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, 171.

devils and witches, and that Lord Chief Justice Hale was unable to define the action of theft, were used by Bentham to further support his argument.<sup>42</sup> Bentham utilised these historical examples to demonstrate the irrationality of referring to older laws and ancient writers as authorities on existing laws and society.

Throughout his writing career, Bentham maintained that the fact that a law had been established in the past was not in itself justification for its continuation. In contrast to those of his contemporaries who used history to endorse conformity and traditionalism, Bentham utilised history to justify reform. Experience was the mother of wisdom, and legislators and lawyers could learn from history. History had proven that knowledge perfected over time, and thus current legislators had the benefit of more years of observation and experience and were more knowledgeable and better equipped than ancient men to legislate for contemporary society.

## **Section 2.2. Bentham, Blackstone, and Immemorial Usage: Undermining Blackstone's use of history.**

In many ways, Bentham's views on antiquity and experience developed as a response to the arguments championed by the advocates of common law and natural law. As Burns argues, most of Bentham's views on law and governance presented throughout his writings can be viewed as a continuation of his initial refutation of Blackstone's position in the *Commentaries*.<sup>43</sup> The idea that antiquity and long usage bestowed moral validity on laws was a major point of contention between Bentham and Blackstone. For example, in response to Blackstone's assertion that older law treatises and reports should be given greater authority in the law, Bentham questioned why it was that, when a book became old

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<sup>42</sup> Ibid., 176-177.

<sup>43</sup> Burns, "Bentham and Blackstone: A Lifetime's Dialectic," 22-24.

enough, it gained authority and merit?<sup>44</sup> Bentham argued that there was no exact date when a report or treatise was old enough to become authoritative.<sup>45</sup> Bentham challenged Blackstone's praise of antiquity, believing it led 'astray the judgment' and corrupted 'the taste of the younger class of readers'.<sup>46</sup> This view resonated with Bentham's argument in *Book of Fallacies*, that there were two causes of the propensity to be influenced by the wisdom of our ancestor fallacy. One cause was that lawyers had 'been trained up all along alike in the school of the English lawyers headed by Blackstone', and the other was their consequent inability to draw upon the principle of general utility.<sup>47</sup> Bentham argued that, as a result of common law teaching, following the lead of Blackstone, pupils learned to assign respect according to the antiquity of a writer or a law. In contrast, Bentham maintained that the age of a law, and whether or not prominent figures supported it, had absolutely no bearing on its utility.

A key feature of the connection between antiquity and common law for Blackstone, which Bentham completely rejected, was the significance of immemorial usage. Blackstone listed seven qualities that determined whether a custom was good. A custom had to be immemorial, continued, peaceable, reasonable, certain, compulsory, and consistent with existing customs.<sup>48</sup> Concerning his first characteristic, immemoriality, Blackstone contended that the authority of English customs 'rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the Common

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<sup>44</sup> According to Bentham, Blackstone explained that treatises referred to certain writers such as Bracton, Britton, Fleta, Littleton and Fitzherbert, and laid down general rules of law that had taken place or were likely to take place, while reports were the records of what occurred in a given case accompanied by specific reasons for the outcome. Bentham, "A Comment on the Commentaries," 206-215. Thomas de Littleton (c.1407-1481), Justice of Assize 1453, Justice of the Common Pleas 1466-1481: see his *Littleton's Tenures* (1481/2). Anthony Fitzherbert (1470-1538), Justice of the Common Pleas 1522-1538: see his *New Natura Brevium* (1534).

<sup>45</sup> Bentham, "A Comment on the Commentaries," 211.

<sup>46</sup> *Ibid.*, 212.

<sup>47</sup> Bentham, *The Book of Fallacies*, 175.

<sup>48</sup> Bentham, "A Comment on the Commentaries," 234-248; Blackstone, *Commentaries on the Laws of England*, vol. i, 76-78.

Law, is by shewing that it hath been always the custom to observe it'.<sup>49</sup> In the *Commentaries*, Blackstone supplied a list of 'fifteen branches' of customs that were present in English law and that received their authority from the fact they were 'of higher antiquity than memory of history can reach',<sup>50</sup> and thus relied on immemorial usage for their validity.<sup>51</sup> In 'A Comment on the Commentaries', Bentham presented his own historical analysis to show that Blackstone's fifteen branches and several of his other historical claims were riddled with contradictions and inconsistencies. By damaging Blackstone's credibility as an historian, Bentham undermined Blackstone's main objective, which was to show that antiquity and long usage provided legal, and hence moral, validity to existing laws. Similar to his method in *A Fragment on Government*, Bentham examined a particular area of text from the *Commentaries* to make a generalization about the whole work and its underlying theory. If Blackstone was unable to provide accurate evidence that certain customs had been in force since time immemorial, then he was likewise unable to claim they were morally right as a result of their ancient status. Bentham showed that these branches were not in use since time immemorial, but were still legal despite their age.

Bentham challenged a majority of Blackstone's branches by showing that they had known origins dating from after the Norman Conquest or by showing that the existing customs were very different to Saxon practices. By doing so, Bentham was demonstrating that they did not possess the quality of immemoriality. Both Blackstone's branch concerning the transference of property, and the branch stating that property could be transferred and acquired by writing, were shown by Bentham to have assignable origins dating from after the Norman Conquest. Bentham stated that in the eighteenth century the

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<sup>49</sup> Bentham, "A Comment on the Commentaries," 180; Blackstone, *Commentaries on the Laws of England*, vol. 1, 68.

<sup>50</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 67.

<sup>51</sup> *Ibid.*, 68.

transference of property was performed through a series of complicated conveyances. He argued that none of these procedures of conveyance bore any resemblance to the legal practice of Saxon times. Bentham, moreover, contended that the dates of origin of these conveyancing practices were known:

We know it to be in comparison of the Saxon times, very recent. Many of them we know to have taken their rise from Statutes; the dates of which we know to a year. Such are those of Lease and Release, Bargain and Sale, Wills of Land. Some from Statute and judicial determinations together of both of which we know pretty well the era. Such are those of Fine and Recovery. No – our Saxon Ancestors with all their misfortunes were not so unfortunate as to have been tormented with these detestable engines of chicane.<sup>52</sup>

The fact that the existing conveyance practices had originated at assignable dates was used by Bentham to show inconsistencies in Blackstone's historical accounts. Saxon inheritance practices were dissimilar to eighteenth-century practices, while aspects of the system of conveyancing in use in the eighteenth century had originated well after, and not before or during, the Norman Conquest.

While the date of origin was not always known for every custom mentioned by Blackstone, Bentham attested that certain customs had not been practised since time immemorial by simply showing that the Saxon laws were dissimilar to the existing eighteenth-century laws. This was the case for the custom of land descending by inheritance and for the claim that the eldest son was heir to his ancestor. Bentham used Blackstone's own historical account to prove that the practice of land descending to the eldest male was not an ancient custom. Blackstone had written that, in Saxon times, land descended to all male children equally.<sup>53</sup> Bentham pointed out that by Blackstone's own account, the custom of inheritance and land descending to the eldest son had not always

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<sup>52</sup> Bentham, "A Comment on the Commentaries," 167.

<sup>53</sup> *Ibid.*, 166.

been practised in English history. By highlighting the inconsistencies in Blackstone's accounts of inheritance practices, Bentham was undermining Blackstone's position that history and immemorial usage gave validity to law.

Blackstone also contended that 'the several species of temporal offences, with the manner and degree of punishment' were confirmed by ancient usage and immemoriality.<sup>54</sup> Bentham claimed that this was a 'branch of Law in which we see not near so much of Alfred or Edgar or Edward the Confessor, as we do of Lewis, or Frederic or Justinian'.<sup>55</sup> Bentham noted that many of the existing laws concerning temporal offences, and their manners and degrees of punishment, had been influenced by the civil law tradition that had been introduced into England after the Norman Conquest. Moreover, Bentham challenged this branch by stating that a majority of offences in the Saxon era had been punished with a fine. The sum of the fines had varied from king to king, but the mode had remained the same. Bentham stated that the details of these offences and punishments could be viewed in David Wilkins's *Leges Anglo-Saxonicae Ecclesiasticae et Civiles* (1721).<sup>56</sup> Bentham argued:

What advantages result from that variety it is not necessary here to specify. Many since the Saxon times have been even introduced and laid aside. Such are mutilation, emasculation, putting out of eyes. Some have been since introduced and are continued: such as branding. Not only punishments have changed for those that have always been offences, for the same reason that all the world over they must have been offences, but new offences in no small number (I am speaking of offences committable by men as they are men, not as they are of particular occupations) have since that Saxon period been introduced – Forgery, Personation, False pretences, and Threatening by letters, for example.<sup>57</sup>

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<sup>54</sup> Ibid., 175.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid., 176.

<sup>57</sup> Ibid.

The degrees and diverse manners of punishment had varied since Saxon times. Thus, Bentham argued that the history of the different modes and degrees of punishment in England showed that current practices of punishment could not receive authority from immemorial usage.

Another branch of the common law provided by Blackstone was that there should be four superior courts of record: the Chancery, the King's Bench, the Common Pleas, and the Exchequer. Bentham used Blackstone's account of the history of the courts to show that the Court of Common Pleas had been established by *Magna Carta* in 1215.<sup>58</sup> Thus, the date of the Court's creation was known and there was a time in written history in which the Court did not exist. Bentham often used Blackstone's own historical accounts, to show that the customs and practices had originated at assignable dates or that the existing legal practices were dissimilar to Anglo-Saxon legal practices. Bentham contended that customs with assignable origins meant they could not have been practised since time immemorial and thus the characteristic of time immemorial could not be utilised to justify and legitimate the existence of these laws.

In relation to two more of Blackstone's branches, the solemnities and obligation of contracts and the rules for the expounding of wills, Bentham argued that Blackstone did not provide any historical evidence of their origins.<sup>59</sup> Bentham noted that the existence of these two practices as early as Saxon times would be difficult to prove, and stated that the contrary would be much easier to show.<sup>60</sup> Another branch concerned the respective remedies for civil injuries. One remedy was a sum of money, which was a practice that existed in several societies throughout history. Thus Bentham saw no reason to believe that

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<sup>58</sup> Ibid.

<sup>59</sup> 'Solemnities' referred to the execution of the written document.

<sup>60</sup> Bentham, "A Comment on the Commentaries," 167-169.



this current practice existed due to the Saxons.<sup>61</sup> Another remedy was specific restitution, which the Normans had rejected. Bentham contended that this branch was similar to the two preceding branches, as it would also be incredibly difficult to discover whether it was practised during the Saxon era.<sup>62</sup> Furthermore, Bentham argued that the branch, which stipulated that a deed was not valid unless it was sealed and delivered, was historically inaccurate because the Saxons did not use seals.<sup>63</sup> Bentham challenged these above branches by arguing that Blackstone did not provide sufficient evidence that they had been immemorially practised. The lack of knowledge concerning their origins might support the view that they had been in force since time out of memory. However, the lack of an assignable date for a law's origin contributed to Bentham's demand for clarity and exactness in the law. Bentham did not attempt to provide an historical account for the origins of the customs that belonged to these branches, because whether these were immemorial laws or were introduced later in history, had no bearing on their utility. For Bentham, highlighting Blackstone's historical inconsistencies effectively undermined his position.

Bentham next accused Blackstone of deceiving the reader for the branch concerned with the rules observed in the expounding of deeds. Blackstone supplied six rules for the expounding of deeds and gave examples for each. Bentham argued that these examples, supposedly of a time in which a pre-existing law was being followed, were actually the first occurrences of the specific laws being used:

By the word "therefore" prefixed to every example our  
Author would fain induce us, indeed, to believe the contrary.  
But the practice of representing a decision as a consequence

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<sup>61</sup> The evidence that money was used as a remedy in various other societies would have been used by Blackstone to prove that the practice was consistent with natural law. Bentham, however, utilised the fact money was used as a remedy in other societies in order to argue that Blackstone contended that monetary fines was credited to Saxon practices to question the accuracy of Blackstone's historical accounts.

<sup>62</sup> Bentham, "A Comment on the Commentaries," 175.

<sup>63</sup> *Ibid.*, 177.

of the rule it really gave birth to, and of prefacing it by the word “therefore” to give colour to the deception, is a kind of logical anachronism than which nothing is more frequent with our Author.<sup>64</sup>

Instead of giving the reader an ancient English custom and providing examples of how it was still adhered to by the people and the courts, Blackstone gave the sources from which the law had originated.<sup>65</sup> Blackstone believed there was a necessary connection between law and morality, and thus the first time a custom was declared was the point at which the courts accepted and adopted an already existing natural and divine law. Bentham, on the other hand, argued that a law received legal validity from being declared and that its declaration did not determine the question of its moral value. Since Blackstone provided an example for when a law was first declared by a legal body to prove the continued adherence to a custom, Bentham believed that Blackstone was knowingly deceiving the reader into believing a new practice was an old custom that had been in force since time immemorial. By highlighting this deceit, Bentham was casting doubt upon the accuracy of Blackstone’s use of history, and hence upon his historical method.

Finally, Bentham questioned the historical accuracy of two branches mentioned by Blackstone, which centred on the ambiguity in their wording. Bentham questioned whether Blackstone’s branch, that money lent on bond was recoverable by an action of debt, referred to any legal act to recover debt, or if he specifically meant an ‘action of debt’. Bentham argued that if Blackstone meant that, where there existed written evidence of money lent, the money could legally be recovered, Blackstone could extend this law as far back as the Egyptians or the ancient Hebrews. If he specifically meant a bond was recoverable by a particular mode called an ‘action of debt’, ‘I doubt he must stop very far

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<sup>64</sup> Ibid., 175.

<sup>65</sup> Ibid., 177.

short of Saxon times'.<sup>66</sup> It was unclear which customs Blackstone was referring to and it was possible, if read in a certain way, that Blackstone's assertion was historically inaccurate. Concerning the final branch, that breaking the public peace was an offence punishable by fine and imprisonment, Blackstone contended that this offence was punished by the Saxons, but not 'by a fine discretionary and imprisonment'.<sup>67</sup> Bentham showed that Blackstone used imprecise language in the final two branches, and as a result, failed to ascertain that the customs received their authority from immemorial usage. It was unclear whether Blackstone was referring to an 'action of debt' or any legal act to recover debt, and Blackstone overlooked the fact that the fine for breaking the public peace was discretionary by the Saxons.

Bentham concluded his discussion on the 'fifteen branches' by stating, 'to what degree it must be antient, is what still remains to be settled before the word "immemorial" can be said to have a meaning'.<sup>68</sup> Blackstone argued that for a custom to be good it must 'have been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it, it is no good custom'.<sup>69</sup> Bentham understood Blackstone's interpretation of immemorial usage as time extending beyond the reach of memory. In order to disprove Blackstone's views, Bentham demonstrated how he had failed to provide evidence that any of the fifteen branches of customs had been practised since beyond the reach of memory. While Bentham's main argument against Blackstone and history was that history did not give value to a law, and thus the past existence of a law was irrelevant to its current moral worth, Bentham strengthened his critique by revealing the historical inaccuracy and inconsistency in Blackstone's accounts. By highlighting

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid., 179.

<sup>69</sup> Ibid.; Blackstone, *Commentaries on the Laws of England*, vol. i, 76.

Blackstone's failure to provide accurate and consistent historical accounts, Bentham undermined the connection between law and history relied on by Blackstone, and thus cast further doubt on Blackstone's defence of the common law. Bentham challenged Blackstone's historical methods, and might be said to be a more sophisticated historian than Blackstone, in that Bentham was seen to divorce history from polemics.

Blackstone's inconsistent historical accounts in the *Commentaries* were not limited to his section on the fifteen branches. Bentham also highlighted Blackstone's flawed reliance on history to validate law when he analysed Blackstone's statement that all statutes were either 'declaratory of the ancient common law or remedial of some defects therein'.<sup>70</sup> Blackstone used the Treason Act of 1351 as an example, stating that the statute did not create a new species of treason but enumerated already existing offences that were treason at law. One of the acts of treason stated by the statute was the killing of any judge sitting in the execution of his office. While Blackstone argued that this was not a new treason, Bentham disagreed:

A custom must have at least one act to constitute it: that demand surely is but moderate. The era of the erection of the Court of Common Pleas is known. The Catalogue of the Judges of that Court from that time to the present is in our hands: we have it in Dugdale's *Origines Judiciales* and other later publications. Let our Author look over this Catalogue and tell us, not what Judge of the Common Pleas any man had actually been punished for killing as for Treason: that were too much: but which one of those Judges any man could have been punished thus for killing: it being Treason we are to remember to kill such a Judge only when sitting in the execution of his office. Upon an event like that History could never have been silent.<sup>71</sup>

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<sup>70</sup> Bentham, "A Comment on the Commentaries," 132.

<sup>71</sup> *Ibid.*, 133. Sir William Dugdale (1605-1686), antiquary and herald: see his *Origines Judiciales*, which compiled notes from the Courts of Justice and from the Inns of Courts and Chancery, as well as notes from judges, chancellors, serjeants, attorneys, and solicitors.

Bentham utilised historical enquiry to undermine Blackstone's example of a custom that was a declaratory law by suggesting that no person had ever been punished for treason for killing a judge sitting in the execution of his office prior to the enactment of the Treason Act of 1351. The fact that there was no evidence of a person being punished for treason for killing a judge sitting in his office, and there was no declaration of this statute before the Treason Act meant, for Bentham, that it was not a law before the statute's establishment. Bentham contended that the statute was not declaratory, and instead, it was actually an example of common law having 'defects it was thought proper to supply, and excesses to correct, as well as uncertainties to fix'.<sup>72</sup>

On many occasions in 'A Comment on the Commentaries', Bentham challenged Blackstone's use of history in *Commentaries on the Laws of England*, or provided his own historical analysis to refute Blackstone's narratives. In doing so, Bentham continuously questioned Blackstone's attempt to align history and law. If laws received validity from history and qualities such as immemoriality, by continuously undermining Blackstone's historical narratives, Bentham was challenging what Blackstone believed to be the very foundation of the common law. All of which underscored Bentham's insistence that the fact a law had been practised in the past did not in itself justify its existence in the present. Bentham demonstrated that Blackstone had failed to provide accurate accounts of English legal history. If, as Blackstone claimed, the authority of the common law was derived from history, Blackstone needed to provide an accurate historical narrative. Bentham contended that there was a better, more beneficial way to use history and law, and this will be discussed in the following section.

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<sup>72</sup> Bentham, "A Comment on the Commentaries," 134.

### Section 2.3. Learning from history and experience

Bentham argued that historical knowledge of past societies and laws could aid in the process of legal reform. Hence he advocated the creation and maintenance of legal records and reports, as they were sources of history and could educate present legislators. Bentham pointed to a variety of examples from history in support of his legal and moral theory. Specifically, he emphasised the importance of property and the subordinate ends of utility by using examples of past societies that did not promote utility. Hence, legislators could learn from history, instead of being constrained by the history of ancient laws and writers.

In *Of the Limits of the Penal Branch of Jurisprudence* (1780-2), Bentham wrote:

The most common and most useful object of a history of jurisprudence, is to exhibit the circumstances that have attended the establishment of laws actually in force. But the exposition of the dead laws which have been superseded, is inseparably interwoven with that of the living ones which have superseded them. The great use of both these branches of *science*, is to furnish examples for the *art* of legislation.<sup>73</sup>

Bentham believed that studying both past and current laws was beneficial for the art of legislation. Investigating the circumstances surrounding the development of current laws tended to show the particular interests of sovereigns and legislators that had contributed to their creation and development. Studying dead laws, specifically laws that had led to suffering, revealed that a science of legislation based on the principle of utility was the only means of achieving the greatest happiness of the greatest number.

Bentham acknowledged that every individual and legislator could learn from history and experience, and thus he advocated the creation and maintenance of legal reporting and records. Bentham uncharacteristically commended Blackstone for his criticism of the state of English law reports. In the *Commentaries* Blackstone explained that from Edward I to

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<sup>73</sup> Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed. Philip Schofield. The Collected Works of Jeremy Bentham (Oxford: Oxford University Press, 2010), 20.

Henry VIII, the reports had been created by the chief scribes of the court and were known as Year Books. Although James I had appointed two reporters with a stipend to restore this practice, Bentham noted that from the reign of Henry VIII right through to the eighteenth century, this task had been undertaken by ‘private and contemporary hands’ and had resulted in ‘crude and imperfect’ accounts.<sup>74</sup> Bentham agreed with Blackstone that law reporting was necessary and beneficial to society. In addition to learning from past laws and experience, in order for the people to follow the laws, they needed to be informed of them. To strengthen his point, Bentham compared the lack of transparency in English law to the law under Caligula. Bentham explained how Caligula ensnared men by not completely publishing the laws by hanging them on a tablet too high for the people to read.<sup>75</sup> Bentham noted that at least Caligula displayed the laws, and stated that the practice of English lawyers was as, if not more, pernicious because they failed even to post the laws. Both Blackstone and Bentham agreed that law reports were important for legal clarity. While Blackstone believed that the state of the law reports should be improved in order better to reflect the common law, Bentham’s opinion of the law reports as crude and imperfect contributed to his view of the common law as lacking clarity and exemplifying England’s need for a complete legal code.<sup>76</sup>

In ‘A Comment on the Commentaries’, Bentham provided an historical example concerning security and the juncture for resistance to describe when he would take up arms against a bad law. Bentham’s views concerning the juncture for resistance and bad laws can

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<sup>74</sup> Bentham, “A Comment on the Commentaries,” 214.

<sup>75</sup> *Ibid.*, 215.

<sup>76</sup> Creating a digest of the common law was Bentham’s original solution for the confusion caused by the common law. A digest would increase knowledge of the law by making laws less verbose and more comprehensible. Bentham supported the idea to transform all common law into statute, which would increase the notoriety of the law, as statutes would be digested, systematized, and re-digested into codes. Bentham however, quickly scrapped the plan for a digest, and realised that the only answer would be a pannomion. His initial support for a digest reveals his commitment to legal transparency. Lieberman, *The Province of Legislation Determined*, 239-252.

be seen in large part as a direct response to Blackstone's argument that municipal laws were not laws if they did not conform to the pre-existing natural law.<sup>77</sup> Blackstone believed laws must be known to be right or wrong before being declared by the municipal law. Right was what the law of nature or the law of revelation commanded, and wrong was what the law of nature or the law of revelation prohibited. Bentham rejected Blackstone's view, claiming instead, that any law enacted by a sovereign legislature could not be said to be unlawful because its very enactment made it lawful. Bentham believed that 'nothing is unlawful that is the clear intent of the Legislature. Nothing can be void: neither on account of opposition to a pretended Law of Nature, nor on any other'.<sup>78</sup> While it was nonsense to say that a legislature could enact a law that was 'unlawful', Bentham argued that the legislature might enact laws that citizens found it inexpedient to obey.

Bentham argued that he would take up arms when laws were enacted that were contrary to utility and there was a good chance of establishing a better alternative. Bentham used an historical event as an example of when he would choose not to obey a law. Bentham explained that the English people had a constitution that supported their liberties and rights, and the Kings had boundaries to their authority. During the reign of Henry VIII, the legislature had given their whole power to the King alone, and, as a result, the constitution was destroyed. Bentham was referring to the Proclamation by the Crown Act of 1539, which had enabled Henry VIII to legislate by decree, in that royal proclamations were to be obeyed as if they were Acts of Parliament. Bentham utilised this example of a despotic measure to show when he would choose to revolt.<sup>79</sup> As J. H. Burns contends, the difference between Bentham's and Blackstone's junctures for resistance was that Blackstone's was revealed by divine law, while Bentham's was determined by a utilitarian

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<sup>77</sup> Bentham, "A Comment on the Commentaries," 53-54.

<sup>78</sup> *Ibid.*, 56.

<sup>79</sup> *Ibid.*, 56-57.



calculation of consequences.<sup>80</sup> A despotic state, for Bentham, would be an example of when the probable mischiefs of resistance appeared less to him than the probable mischiefs of submission.<sup>81</sup> Thus, utilizing an example from English history, Bentham illustrated an event in which he would have found it expedient to rebel.

In contrast to Blackstone's use of history to validate laws, Bentham believed that studying past legal systems and governments could reveal their faults and the existing legislature could learn from the benefit of experience. In *Book of Fallacies*, Bentham noted: 'It is from the folly of our ancestors that we have so much to learn, from their wisdom, if anything, so little. Yet it is to their wisdom, and not to their folly, that we are referred for our instruction by this fallacy: by the pretended wise men of our own times, who employ it.'<sup>82</sup> By studying the faults of past societies, governments, and laws, current society could improve.

Bentham used historical examples in *Principles of the Civil Code* to emphasise the importance of property and the subordinate ends. For example, Bentham utilised an historical example to demonstrate the evils of an attack on property. Bentham explained that places like Asia Minor, Greece, Egypt, and the coasts of Africa were rich in agriculture, commerce, and population when they were part of the Roman Empire. Under the despotic Turks, these areas had become 'wasted, barren, or almost abandoned'.<sup>83</sup> While these areas had been pillaged by civil wars, invasions, and scourges of nature, Bentham argued that they would recover if they had the security of property found during the Classical Roman period.

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<sup>80</sup> Burns, "Bentham and Blackstone: A Lifetime's Dialectic," 27.

<sup>81</sup> Bentham, "A Fragment on Government," 484.

<sup>82</sup> Bentham, *The Book of Fallacies*, 170.

<sup>83</sup> Bentham, "Principles of the Civil Code," 310.

Bentham provided an example from North American society to show the strong correlation between security and prosperity. He explained how North America was full of dangerous creatures, impenetrable forests, and barren lands. In addition, the men who lived there were in constant rivalry and regularly met in war. However, because of good government, parts of North America had become inhabitable and civilized, as cities had grown.<sup>84</sup> Bentham stated:

What has produced these wonders? what has renovated the surface of the earth? what has given to man this dominion over embellished, fruitful, and perfectionated nature? The benevolent genius is *Security*. It is security which has wrought out this great metamorphosis. How rapid have been its operations! It is scarcely two centuries since William Penn reached these savage wilds with a colony of true conquerors; for they were men of peace, who sullied not their establishment by force, and who made themselves respected only by acts of benevolence and justice.<sup>85</sup>

By contrasting the history of the lands then occupied by the Turkish Empire with the existing state of North America, Bentham demonstrated how a good government that nurtured security enhanced the lives of every member of society. The lands belonging to the Turks had a history of progressive civilization, but under Turkish rule, where property and security were not valued and guaranteed, they had become wasted, barren, and abandoned. North America's terrain and recent history made cultivation and civilization a challenge; however, with security, which included property, being guaranteed by their governments, great progress had been achieved. By comparing the history of the lands belonging to the Turkish Empire with the existing state of North America, Bentham was demonstrating the importance of security. This comparison also supported Bentham's argument, at least to the extent of general security, that what ought to be, at least in certain respects, was the same in every nation and in every time.

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<sup>84</sup> Ibid., 311.

<sup>85</sup> Ibid.

Bentham also provided historical examples to show that luxury should only be permitted when all necessities had been met. He utilised two examples of republics that disregarded the needs of the many in favour of the desires of the few. The first example was from ancient Athens. Bentham explained that the republic ignored the pleas of Demosthenes and the threats of King Philip II of Macedon, and instead of allocating money towards the defence of the realm, hoarded funds to be spent on a theatre. The second example was ancient Rome. Bentham explained that in order to captivate the rich, a proconsul held a fete in Rome at the expense of all the subjects. Bentham explained how ‘one hour of the glories of the circus threw a hundred thousand of the inhabitants of the provinces into despair’.<sup>86</sup> Both these examples depicted situations in which the desires and luxuries of the rich were considered to be more important than the basic necessities of the poor. These examples underscore Bentham’s argument that luxuries should only be provided once the basic needs of all had been secured. Although the benefits of a theatre and a party increased happiness among a certain sector of society, and reallocating funds from a theatre to defence might have resulted in the pain of disappointment among the affluent in Athens, on both occasions the result was overall a balance of pain over pleasure. Bentham utilised these two examples to reveal the importance of the subordinate ends, and to demonstrate the significance of security in a utilitarian calculation.

Bentham provided further examples of the danger of attacks upon security. He concurrently showed how it had been common among historians for acts to be labelled innocent and odious at the same time. For example, Bentham explained that when youth were taught the history of the Roman people, public acts of injustice were often coloured by eulogiums on Roman virtues. An example of this was the abolition of debts. Bentham argued that historians portrayed debtors, who had discharged their debts by bankruptcy, in a

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<sup>86</sup> Bentham, “Principles of the Civil Code,” 318.

positive light. Bentham believed that this positive view was wrong, as the debtors acted fraudulently and the abolition of debts had disastrous effects on usury, giving rise to exorbitant interest rates.<sup>87</sup> In addition to exorbitant interest rates, creditors would have experienced pain of loss from disappointed expectation. Bentham added that the foundation of the Roman colonies consisted in taking land from legitimate proprietors in a conquered country in order to redistribute it based on favour. The consequences were disastrous: ‘The Romans, accustomed to violate all the rights of property, knew not where to stop in this course. From hence arose that perpetual demand for a new division of the lands, which was the perpetual firebrand of the seditious, which contributed, under the Triumvirs, to a dreadful system of general confiscations.’<sup>88</sup> By confiscating land, the Romans caused pain to legitimate proprietors who would experience pain of loss and disappointed expectation. They also would cause members of society to feel insecure in their property, which could be confiscated on a whim to be redistributed based on favour. Bentham maintained that both abolishing debts and the Roman practice of confiscating land from owners in conquered nations had undermined the sense of security.

Bentham argued that these attacks upon security and equality were not seen as odious by historians. However, the same type of attack upon security carried out by rulers in the East was not similarly defended. Bentham argued that despotism by a single sultan or vizier was viewed negatively while despotism exercised by the multitude was viewed through the false image of the public good.<sup>89</sup> This demonstrated Bentham’s view that just because the majority benefitted from an action, it did not necessarily mean that the greatest happiness was achieved. The pain of the minority could outweigh the pleasure of the majority, and the action may negatively affect the four subordinate ends. With these

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

examples, Bentham demonstrated the relationship between morality and law by showing that acts that were unjust in morals could not be seen as innocent in politics. Although historians tended to view certain odious actions as politically right, they overlooked the fact that these actions had negative effects on society; most commonly, damaging the expectations of security.

These above examples exhibit three important arguments. First, Bentham demonstrated the importance of security in society, and how the happiness of the majority did not necessarily promote the most utility. His argument that despotism exercised by the multitude was falsely viewed as a public good emphasised that just because the happiness of the majority was achieved did not necessarily mean the greatest happiness was achieved. For example, if in the process of achieving the happiness of the majority, the expectations and security of the minority were harmed, this could lead to pain and alarm spreading throughout society when others feared that they too were not secure in their property and expectations, and might experience a similar loss. Second, Bentham exposed how historians tended to wrongfully interpret the morality of historical events or past legislation. This further emphasised Bentham's argument that antiquity and historical usage did not, and could not, validate the morality of existing laws. This relates to Bentham's arguments against Blackstone's flawed historical accounts in the *Commentaries*. Finally, these examples were also used to reveal that something that 'is called unjust in morals, cannot be innocent in politics'.<sup>90</sup> If a legal or political action did not conform to the principle of utility, that is it did not promote the greatest happiness of the greatest number, it could not be viewed as innocent or moral. Thus, odious acts carried out by the multitude in the past, and present, should not be seen as politically right based purely on their acceptance by the

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<sup>90</sup> Ibid., 318.

greater number. The moral value of legal and political actions in the past should be assessed based on the principle of utility.

In short, Bentham applied historical examples in *Principles of the Civil Code* to demonstrate the importance of security, property, and expectation. Bentham demonstrated how history could be employed to observe the pain and pleasure that had arisen from previous laws. He provided examples from Roman and Greek history to demonstrate the danger of enacting laws or making decisions that did not use a utilitarian calculation and resulted in a surplus of pain over pleasure. Furthermore, by utilizing a North American example in addition to Greek and Roman examples, Bentham demonstrated the importance of laws promoting the subordinate ends, and of security in particular. Through a utilitarian calculation incorporating securities and expectations, what ought to be could be achieved, without being influenced unduly by the particular interests that had produced past laws and continued to give support to them.

### ***Conclusion***

Bentham believed that the principle of utility should be the guiding principle for policy and legislation; it was the legislator's duty to ensure that laws promoted the greatest happiness of the greatest number. Bentham, however, understood that a drastic and abrupt reform of the legal system could lead to disappointed expectations and individuals feeling pain, and thus it was important not to undermine, without countervailing gains in utility, the expectations and security of each member of society. The enactment of laws that promoted the greatest happiness could only be accomplished through a science of legislation based on the principle of utility. Thus, the opinions and practices of past individuals and societies should only be valued and considered in so far as these practices generated expectations on the part of present members of society.

In Bentham's view, the fact that a law had been established in the past was not in itself justification for its continuation. Bentham rejected Blackstone's insistence that the characteristic of immemoriality bestowed both legal and moral validity on law. For Bentham, the historical existence and continuance of laws were evidence of legal validity, but did not confer moral rightness. Moral rightness and legal validity were independent from each other. By distinguishing between what the law is and what the law ought to be, Bentham aimed to bring about a better society with more beneficial laws. Bentham used examples from history to show how past societies and their laws had not promoted utility and had hindered law and society from becoming what it ought to be. In doing so, Bentham showed how legislators could learn and make progress from the study of history.

## **Chapter Five: Blackstone, Kames, and Bentham and the Role of History in Determining Eighteenth-Century Law**

### **Introduction**

As discussed in the three previous chapters, Blackstone, Kames, and Bentham all utilised historical analysis in their writings. Blackstone's and Kames's works incorporated detailed narratives recounting how the law had originated and developed into its existing state in eighteenth-century England and Scotland. Bentham differed from both Kames and Blackstone, in that he did not rely on a historical narrative. According to Bentham, the common law should be replaced with a legal code, and thus how and why the law had actually developed was irrelevant for determining the content of his legal science. The past was only of value in so far as existing practices and laws had created individual expectations and a general feeling of security in society. As discussed in Chapter Four, current laws were the product of the past and contributed to present expectations in society. Bentham contended that it was important to factor the expectations generated by current laws into a utilitarian calculation in order to prevent disappointment, a source of pain. Assessing the advantages and disadvantages of adhering to or abandoning existing legal practices was a central focus of Bentham's utilitarian calculus. History also provided examples of how past legal systems, which were not based on the principle of utility, were flawed and had led to despotism, and had prevented law and society from developing into what it ought to be. A comparison of the different approaches to history found in the writings of Blackstone, Kames, and Bentham is the subject of this chapter.

Blackstone and Kames both embraced divine providence as a significant influence on legal development. Blackstone emphasised the difference between adopting laws that were beneficial to society, in contrast to the laws that were invented using reason for self-



interest that perverted the natural progression of law and society.<sup>1</sup> As noted above, Kathryn Temple explains that while the first chapter of the *Commentaries* laid out the relationship between justice, law, and reason, ‘Blackstone never offers an enthusiastic endorsement of reason as the crystalline guide to right action that one might expect’.<sup>2</sup> Instead, Blackstone argued that reason could lead to corruption, and a conception that was replete with errors.<sup>3</sup> Kames reconciled reason and providence, arguing that reasoning was an important source for the reform and the evolution of society, and that divine providence led humans to ask the questions that would lead to the improvement of the existing laws and society. Kames contended that God directed humans by enforcing his moral laws through man’s inborn senses. As Jeffrey M. Suderman argues, ‘The purpose of philosophy, therefore, was to discover the providential design hidden beneath the apparent disorder and diversity of the world.’<sup>4</sup> For this task, both reason and the moral sense were essential to interpret what was true and false, and what was right and wrong.

Blackstone and Kames also had different methods of utilizing historical facts to form arguments. Frederic William Maitland argued that there was a distinction between how historians and lawyers treated ancient material.<sup>5</sup> Maitland explained that historians used the logic of evidence to reveal what a legal text meant by analysing the context in which it was written. Lawyers used the logic of authority to control how the text was read

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<sup>1</sup> Boorstin, *The Mysterious Science of the Law*, 48-53. The distinction between using reason for invention instead of for discovery was integral to Blackstone’s theory of natural law. Blackstone argued that God endued man with freewill, but also laid down certain immutable laws of human nature which regulated that freewill. God gave man the faculty of reason to discover the purport of these laws, and man could only create when nature failed to declare the law. In short, using reason for invention and self-interest, instead of discovery, resulted in straying from the natural law.

<sup>2</sup> Kathryn Temple, “Blackstone’s ‘Stutter’: The (Anti)Performance of the Commentaries,” in *Re-Interpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts*, ed. Wilfrid R. Prest (London: Bloomsbury Publishing, 2014), 4.

<sup>3</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 41.

<sup>4</sup> Jeffrey M. Suderman, “Religion and Philosophy,” in *Scottish Philosophy in the Eighteenth Century, Vol. I: Moral and Political Thought*, ed. Aaron Garrett, History of Scottish Philosophy (Oxford: Oxford University Press, 2015), 223.

<sup>5</sup> Frederic William Maitland (1850-1906), Downing Professor of the Laws Of England 1888-1907: see his *History of English Law before the Time of Edward I* (1899).

and applied by successive legal practitioners. In other words, while lawyers skewed historical materials to support a specific argument, historians attempted to interpret historical materials and develop an argument based on what an historical document actually communicated and the particular circumstances surrounding its conception.<sup>6</sup> Maitland's argument provides an insight into the approaches to history adopted by Blackstone, Kames, and Bentham. Maitland's distinction between the methods of historians and lawyers is comparable to the differences between Blackstone, who sought to justify and praise the current legal system, and Kames and Bentham, who sought to improve the system. Blackstone's historical accounts were developed to defend and elucidate the existing legal system. He provided specific historical events or explained the origin of certain laws in order to demonstrate that the current law was valid and logical. Kames, on the other hand, used historical examples and constructed a historical narrative to understand current society and to determine how the existing legal system might be improved. He attempted to collect as much empirical evidence in order to understand fully both present and past laws and moral attitudes. While Blackstone used the past as an authority to support his legal viewpoint, Kames analysed the past to develop his legal stance. Both methods however, were reliant on using history to understand the present and to determine the future.

Bentham's method was distinct from those of both Blackstone and Kames. Bentham did selectively choose past examples to strengthen the argument for his legal science. By providing examples of past legal systems that were despotic and resulted in suffering, Bentham furthered his argument for the creation of a legal system based on the principle of utility. He did this to show that while the common law legal system relied on history for authority, history also could be used to promote his views for legal reform. However,

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<sup>6</sup> Frederic William Maitland, "Why the History of English Law Is Not Written," in *The Collected Papers of Frederic William Maitland*, ed. H.A.L. Fisher, vol. i (Cambridge: Cambridge University Press, 1911), 491.

Bentham sought to interpret historical documents and events in a way similar to that adopted by Kames. Bentham argued that law should not rely on history for authority, and thus he examined history without being influenced by contemporary eighteenth-century issues. Bentham questioned the circumstances surrounding a document's creation, and understood, and warned readers about, a writer's ability to distort an historical event or document in order to support his or her own objective. Maitland's distinction between lawyers and historians demonstrated the influence that different objectives could have on a writer's methodology. Blackstone, Kames, and Bentham used historical sources differently and constructed dissimilar historical accounts because they were utilizing history with different objectives in mind. While Bentham provided specific examples that directly supported his argument for legal reform in the form of codification, he also sought to provide accurate and un-biased historical accounts. Bentham provided specific examples to demonstrate that the common law was corrupt and to reveal how Blackstone and common lawyers controlled how legal texts were read. By looking at the circumstances surrounding historical events, or the creation of a law or legal document, Bentham was revealing the prejudice inherent in the English legal system and the sinister interests that contributed to its development.

As discussed in the three previous chapters, Blackstone, Kames, and Bentham each utilised history in their writings and incorporated history into their legal and moral theories. Blackstone argued that history conferred value on existing laws. The fact that a law had been in force since time out of memory signalled its moral rightness, confirming that the law was what it ought to be. Kames and Bentham disagreed with Blackstone, arguing that legal reform was necessary, and thus their legal sciences were based on revealing what the

law ought to be.<sup>7</sup> While Blackstone traced the development of the English common law as a way of demonstrating its perfection, Kames's history was directed at 'those who are ignorant of the history of law, and in their notions are riveted to the present system of things'.<sup>8</sup> Kames wished to explain how laws, which seemed unsuited to existing society, had originated and developed. Kames's objective was to identify laws that were out-dated, with the hope that judges and legislators would enact legal reform, introducing new laws that were better suited to modern commercial-driven society. Bentham argued that the common law should be replaced with a system of legislation based on the principle of utility. For this project, history was important in so far as it informed the existing laws, as current laws were the direct product of the past. These existing laws had shaped individual expectations and affected the overall security of society. These differences in historical methodology can be seen through the sources and examples of history used by each author, their use of the Bible as an historical source, and their use of feudal history.

The first section of this chapter will examine the range of historical sources and examples that each man utilised in his writings. Blackstone had a very narrow and conservative view concerning what constituted an acceptable source of history. His historical methodology complemented his legal and moral theory, which emphasised the importance of authority from long usage and the significance of natural law. By tracing statutes and acts from the Anglo-Saxon era to the present, and using the standard historical narratives, Blackstone attempted to show that history confirmed that the common law was both legally valid and morally right. Kames, on the other hand, argued that it was important to develop a holistic account of history. Thus, he had a wider, more eclectic, definition of

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<sup>7</sup> As discussed above, in Chapter Two, Blackstone acknowledged the benefit of certain legal reforms that he believed were necessary by emphasizing that the laws prior to change had been inconsistent with natural law. These unjust laws were most likely the result of legislators and judges using reason to promote self-interested pursuits. Blackstone believed that these unjust laws could and should be reformed within the current English legal system.

<sup>8</sup> Home, *Historical Law Tracts*, vol. i, 154.

what constituted a source of history. Every society throughout history belonged to one of the four stages of development – hunter-gatherer, pastoral-nomadic, agricultural, and commercial society – and by understanding how societies advanced from one stage to the next, scholars and legislators could understand how further to develop and determine the reforms needed to ensure that laws reflected the moral development of society.<sup>9</sup> Bentham used a wide-range of historical examples, but failed to provide any source for most of his facts. He used history to demonstrate that just because a law had existed for a long time did not necessarily mean that it was good law, and to provide examples of past laws and legal systems that had not promoted utility and the suffering that had occurred as a result. Bentham applied his psychological theory to historical actors and to the historians who recorded their actions, and evaluated societies on whether or not they produced a balance of pleasure over pain. Thus Bentham was not necessarily interested in giving primary source references, though he would do so on occasion.

The second section of this chapter will compare Blackstone's, Kames's, and Bentham's use of the Bible as an historical source. Examining how each writer used the Bible will give greater insight into the role that history played within their legal and moral theories. For Blackstone, the goodness of an existing practice was confirmed by its historic usage. He drew on the Bible to show that certain laws and practices had been in use among the Hebrews. Biblical examples were most often used to support the foundational principles of English law, confirming that they were consistent with natural law. The reasoning behind the common law was consistent with Biblical laws and precepts. Thus, the fact that a custom or law had been practised or in force for a long time, or was similar to Biblical laws and precepts, signified that it was rational, morally right, beneficial to society, and

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<sup>9</sup> Home, *Sketches of the History of Man*. For more on Kames and his use of the four-stage theory, see pp. 125-129.

based on natural law. Kames consistently borrowed examples of past legal practices and moral principles from the Bible. Viewed in conjunction with examples from other societies throughout history, Biblical examples helped to demonstrate that laws and morals had been refined as society had progressed. Bentham utilised the Bible as an historical source to reinterpret Jesus's actions and teachings concerning asceticism and sexual morality. Bentham emphasised the flaws and inconsistencies in the Biblical accounts in order to question its reliability as an accurate historical source, thereby contributing to his wider argument against the use of history for the legal and moral validation of current laws.

The third and final section will examine the use of feudalism in each writer's historical accounts. The method by which each writer presented and incorporated feudalism into their arguments again revealed the role that history played within their particular legal and moral theories. Blackstone's opinion on the relationship between history and law is revealed by his account of legal development from the Anglo-Saxon era, through feudalism, to eighteenth-century England. Blackstone's historical narrative examined the continuity and progress of English society and its laws. Laws that had stood the test of time were deemed natural and just, and their perseverance made them authoritative. Kames attempted to explain how laws, which seemed unsuited to existing society, had originated and developed. By understanding how feudalism had originated in England and Scotland, and how the laws of property had developed and had been altered by feudalism, the modern day legislator was more able to understand where and how legal reform could take place. Because Bentham did not think that historical usage determined the moral rightness and legal validity of a law, there was no need for a narrative describing how the law had developed from its origin, through the feudal age, into the eighteenth century. However, there were plenty of occasions in which Bentham criticised the feudal system, using

feudalism as an example of a past social and legal system that did not promote the greatest happiness in a society.

Blackstone and Kames presented two rival methods in explaining how history could be used to evaluate existing law. History could validate the existing law or history could aid in identifying the best avenues for legal reform. Bentham's belief that history should not play an active role in validating or identifying current and future laws contributed to the reputation that his philosophy was ahistorical. This view of Bentham is incorrect. Bentham used historical examples to illustrate his arguments and had a sophisticated understanding of the flaws and problems inherent in historical analysis. From an examination of the sources and examples he used, the way he used the Bible, and the way in which feudalism was incorporated into his arguments, it can be argued that Bentham thought the use of history was beneficial to the extent that past experience was the basis of knowledge, but that he was also aware that history could be exploited by historians and legislators in order to further their own interests. Blackstone's method may have been more traditional, and Kames's method may have been more thorough and progressive, but Bentham was more aware of, or at least more transparent about, the pitfalls of studying and utilising history.

## **Section 1: Sources and Examples of History**

### **Section 1.1: Blackstone**

Blackstone used many different sources to support his historical narrative and legal and moral theory. Blackstone's legal and moral theory was greatly influenced by the writings of eminent legal writers, such as Thomas Littleton, Henry Spelman, Coke, Hale, and others, whom he regarded as having authority on the subject of English history and law. Blackstone utilised these authors' tracts specifically for their examination of legal

events, and to explain the nature of English law; in particular, the relationship between common law and natural law.<sup>10</sup> However, the focus of this section will be on the historical sources he drew upon to construct his historical narratives and to support his views on the common law. In his historical narratives, Blackstone relied on both primary and secondary sources. His primary sources consisted of manuscript material, chronicles, law books, treatises, and published statutes and acts. Blackstone used these sources to date historical events and to explain how certain areas of the law had emerged and developed throughout English history. For example, Blackstone provided specific Acts of Parliament to show how certain counties, cities, and towns had their own customs, which were not followed or enforced in the rest of the nation. He used primary sources, including *Magna Carta* and several statutes to confirm the existence of these rights.<sup>11</sup> Similarly, Blackstone claimed that Acts of Parliament confirmed that Londoners had their own special customs.<sup>12</sup> He used the Chronicle of Dunstaple in his history of the development of *Magna Carta* to confirm that the nobles rejected their allegiance to the King and were absolved of their oaths of fealty by one of the canons of Durham, and to contend that copies of the original charter were deposited in every diocese.<sup>13</sup> In ‘Of the Rise, Progress, and gradual Improvements, of the Laws of England’, Blackstone relied mainly on statutes and acts to explain the evolution of English law, occasionally citing the particular statutes that were passed during each sovereign’s reign, and noting whether they were beneficial or pernicious to society as a whole.<sup>14</sup>

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<sup>10</sup> For a more detailed analysis of Blackstone’s legal and moral theory see pp. 46-53.

<sup>11</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 74n. Examples of these statutes included: Franchises of Cities, etc. Act of 1327; Confirmation of Liberties Act of 1340; and Confirmation of Liberties Act of 1400.

<sup>12</sup> *Ibid.*, 75n., citing 8 Rep 126 and Cro. Car. 347.

<sup>13</sup> Blackstone, *The Great Charter and the Charter of the Forest*, xi-vii.

<sup>14</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 400-436.



Blackstone also supported his facts and arguments with treatises by Glanvill, Henry de Bracton, and Jean Domat, and the treatises *Fleta* and *Britton*, and by using law books, such as William Lambarde's *Archaionomia* (1568).<sup>15</sup> By using a variety of sources, Blackstone was attempting to provide an accurate historical account of legal development in England. In addition to using primary sources to date historical events and to trace the evolution of English laws and practices, Blackstone also relied heavily on standard historical narratives published by recognized writers, primarily Fortescue, Matthew Paris, Henry Spelman, Selden, Hale, and the sixty-five volume *Universal History*, contributed to by multiple scholars.<sup>16</sup> For example, in Blackstone's Introduction to the *Commentaries*, he relied on Fortescue to explain why common law was not taught in the universities,<sup>17</sup> and relied on Selden for the history of legal teaching in the monasteries.<sup>18</sup> His account of the history of the church and civil law in England was almost exclusively derived from the works of Selden and Spelman.<sup>19</sup> Moreover, most of his account of *Magna Carta* was taken from Paris's writings, while his 'Of the Rise, Progress, and gradual Improvements, of the Laws of England' was pieced together from statutes and acts, but relied heavily on Hale, as well as the works of Paris, Spelman, and the *Universal History*, to connect these laws into a historical narrative.

Blackstone, following in the footsteps of Fortescue and Spelman, argued that the customs of England were as old as the primitive Britons. Blackstone cited Fortescue,

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<sup>15</sup> Ibid., 403-432. Jean Domat (1625-1696), French legal writer: see his *Lois civiles dans leur ordre naturel* (1689). *Fleta* is the name given to a Latin treatise on English law written between 1290-1300 that updates and abridges an earlier treatise that has been ascribed to Bracton. *Britton* is an early summary of laws that was written by the command of Edward I. William Lambarde (1536-1601), MP for Aldborough 1563-1567 and antiquarian.

<sup>16</sup> Matthew Paris (c.1200-1259), historian, Benedictine monk, and polymath: see his *Historia Anglorum* (1250-1259). Henry Spelman (1563/4-1641), historian and antiquary: see his *Glossarium Archaiologicum* (finished and published by Dugdale in 1664).

<sup>17</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 16.

<sup>18</sup> Ibid., 17.

<sup>19</sup> Ibid., 20.

stating that these old customs ‘continued down, through the several mutations of government and inhabitants to the present time, unchanged and unadulterated’.<sup>20</sup>

Blackstone noted that Spelman added that this must be understood with caution, as it only signified that there was never a formal exchange of one system of laws for another.<sup>21</sup>

Spelman believed that the legal system might not have seen any drastic alteration, but argued that certain laws and practices had had a mixed origin among Picts, Danes, Normans, and Romans, and had then evolved into the Anglo-Saxon laws in the time of Alfred.

Occasionally the views of the authors conflicted or there were inconsistencies in the various primary sources. When these inconsistencies appeared, Blackstone noted the discrepancies and explained which interpretation was most probable. An example of this occurs in *The Great Charter and the Charter of the Forest*, where Blackstone questioned what had been ‘the immediate occasion of demanding a restitution and confirmation of... liberties’ once granted by Edward the Confessor.<sup>22</sup> Blackstone explained that Matthew Paris attributed the demands to the discovery of Henry I’s lost charter. However, the *Annals of Waverly* attributed them to the unworthy ascension of Peter Bishop of Winchester to chief justiciary during the absence of King John in France. Blackstone argued: ‘And this appears the more probable, because the nobility were from the first extremely disgusted at his promotion, taking it very ill that a foreigner should be preferred above them all’.<sup>23</sup> Blackstone further explained that in *Magna Carta*, the power of the justiciary had been greatly curbed, and there were inferences that officers of justice had lacked knowledge, at least in regard to the laws of the land. While he contended that the

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<sup>20</sup> *Ibid.*, 64.

<sup>21</sup> *Ibid.*

<sup>22</sup> Blackstone, *The Great Charter and the Charter of the Forest*, vii.

<sup>23</sup> *Ibid.*, viii.

reasoning found in the Annals of Waverly were most plausible, he noted that it was most likely that a combination of motives had resulted in the charter. By presenting the conflicting views and providing his own assessment, Blackstone was attempting to show that his aim was to provide an accurate and thorough historical account. However, by noting that it was most likely a combination of motives, and that both accounts were plausible, Blackstone demonstrated his deference to the authority of past writers.

Overall Blackstone had a very narrow, traditional, and conservative view concerning acceptable sources of history. His range of sources was limited, in that he relied solely on official documents and generally recognized writers and treatises. In this way, he reiterated the established account of English legal and constitutional historical development. Blackstone was not interested in reinterpreting history. He combined various official legal documents with the most reputable histories to produce a history of English law suitable for both lawyers and laymen.

## **Section 1.2: Kames**

Kames argued that the moral sense had evolved as society became more refined, and thus laws needed to progress in order to reflect a society's developing moral values. By using a wide range of examples and sources – incorporating a variety of eras and geographical locations – Kames illustrated the different stages of societal development, revealing social, moral, and legal progress. Like Blackstone, Kames used acts, statutes, treatises, and standard historical narratives to uncover the state of morality and law in the past. For example, in *Essays Upon Several Subjects Concerning British Antiquities*, Kames relied on *The Laws of King Malcolm Mackenneth* and the *Regiam Majestatem* to establish

an historical timeline for Scots law and feudal law.<sup>24</sup> He frequently utilised legal tracts and collections – including, but not limited to, the laws of William the Conqueror found in the Wilkins edition, Lambarde’s Collection, the Laws of the Visigoths, Roman law, and the Twelve Tables – and tracts by recognized historical writers, such as Spelman, the Comte de Buffon, and Bolingbroke, to uncover the history of different societies and their laws. For example, Kames relied on the above sources in his first tract of *Historical Law Tracts* to elucidate the history of criminal law in various societies.<sup>25</sup> What made Kames’s historical methodology distinct was the wider and more eclectic range of sources that he drew upon in addition to these widely accepted sources of history. For Kames, journals, plays, tragedies, novels, chronicles, and many other not commonly used sources could be of value in producing a more holistic account of history.

Both Blackstone and Kames relied on historical examples from other nations to support their views. Blackstone provided historical examples, mainly from Roman history and Greek history, in addition to English history, to demonstrate both continuity and progress from ancient time to the present. This continuity between the past and present indicated that common law was consistent with natural law. When Blackstone did make reference to other geographical locations in the present or in the past, it was most often to confirm that the laws of the places in question were similar to English laws, and thus further to demonstrate English law’s consistency with the natural law. Kames, instead, drew attention to the different morals and laws present in different historical eras and in various geographical locations to show that the moral sense had become more refined over

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<sup>24</sup> See pp. 115-118; Home, *Essays Upon Several Subjects Concerning British Antiquities*, 9-14.

<sup>25</sup> Home, *Historical Law Tracts*, vol. i, 1-89.

time. Kames argued that societies became wiser with experience.<sup>26</sup> Instead of highlighting continuity in English laws from the past to the present, Kames argued that,

A nation from its original savage state, grows to maturity like the individuals above described; and the progress of morality is the same in both. The savage state is the infancy of a nation, during which the moral sense is feeble, yielding to custom, to imitation, to passion. But a nation, like a member of a polished society, ripens gradually, and acquires a taste in the fine arts, with acuteness of sense in matters of right and wrong.<sup>27</sup>

Thus, Kames used historical examples from multiple eras and geographical locations to show that the moral sense and laws had evolved over time.

The distinction between Blackstone's and Kames's use of historical sources is shown by their contradictory uses of Cicero's work. While Blackstone used Cicero to show there was a harmony between Roman law and common law ethics and practices, Kames used the fact that Cicero had many beliefs that were unreasonable and harmful to the public good to demonstrate that ideas of morality had evolved since ancient Rome.<sup>28</sup> Cicero, who Kames acknowledged was 'the chief man for learning in the most enlightened period of the Roman republic, a celebrated moralist', had approved of the immoral practice of punishing the children and others related to an offender of a capital crime.<sup>29</sup> Kames added that this wicked practice had at one time been practised in England. Both the criminal and his entire clan would be punished for a murder, and this was called *deadly feud*. In the tenth century, during King Edmund's reign, a law was made prohibiting *deadly feud*, except between the

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<sup>26</sup> Home, *Sketches of the History of Man*, vol. iv, 86.

<sup>27</sup> Ibid.

<sup>28</sup> Blackstone, *Commentaries on the Laws of England*, vol. i. Blackstone relied on Cicero throughout the *Commentaries*. For example, in Book I, Cicero was cited to explain: the importance of every individual possessing knowledge of their own law (6; 13); the ability to understand the true meaning of a law by discovering the reason and spirit of it (61); the unjust nature of clauses which attempt to restrain the power of succeeding legislatures (90); and the principle that the Crown does not have the power of doing wrong, but merely the power of preventing wrong from being done (150).

<sup>29</sup> Home, *Sketches of the History of Man*, vol. iv, 94.

relations of the person murdered and the murderer himself.<sup>30</sup> Thus, contrary to Blackstone's arguments that highlighted continuity in morals from Roman times, Kames used historical examples from ancient Rome and England to argue that ideas of morality had changed over time.

Kames provided a variety of historical examples from various geographical locations and eras, because such a wide range of examples lent greater authority to the argument that the moral sense had developed from infancy to maturity in every civilized society. An example of Kames's method was his argument that, in the first stage of society, man rarely transgressed rules of morality. Since the moral sense was inherent in every man, individuals acted morally in the savage state. Kames explained: 'Savages accordingly, who have plenty of food, and are simple in habitation and clothing, seldom transgress the rules of morality within their own tribe.'<sup>31</sup> Kames used a survey of examples from around the world of communities where theft was rare and neighbours trusted one another. In Friesland, Holland, and other maritime provinces of the Netherlands, locks and keys were unknown until inhabitants became rich through commerce. This was similar to both the Laplanders, who, Kames argued, had no notion of theft and left their doors unlocked, and the custom in seventh-century England, during the reign of King Edwin, when children could travel with a purse of gold without hazard of robbery.<sup>32</sup> Kames contended that the Tartars also left their goods in the open and not locked away. Finally, Kames noted Johan von Strahlenberg's description of his journey in Russia, wherein Strahlenberg explained that he slept in the same boat with strangers who did not speak his language and he did not

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<sup>30</sup> Ibid., 95.

<sup>31</sup> Ibid., 88.

<sup>32</sup> Ibid., 86-88.

lose a single item of baggage.<sup>33</sup> Kames utilised a multitude of examples from history to show that man acted morally right in the first stage of society.

Due to luxury and the appetite for hoarding, Kames argued that morality sometimes declined in proportion as a nation became more refined, which resulted in incorrect notions of right and wrong.<sup>34</sup> He used this phenomenon to explain the depressed state of morality in the dark ages. His examples of the cruelty of the past were various and numerous. He often spoke of the brutality of the Roman Empire; he pointed out that during Clovis's reign as King of the Franks, he assassinated his nearest kinsman;<sup>35</sup> in the thirteenth century Ezzeliono de Aromano obtained the sovereignty of Padua by massacring 12,000 of his fellow citizens;<sup>36</sup> and Ferdinand, King of Aragon and Navarre, received the appellation of Great even after repeated assassinations and acts of perfidy.<sup>37</sup> Kames argued however, that providence brought order out of confusion.<sup>38</sup> Men realised, from experience, that they needed to restrain evil passions in order for society to continue. He contended: 'The necessity of fulfilling every moral duty was recognised: men listened to conscience, the voice of God in their hearts: and the moral sense was cordially submitted to, as the ultimate judge in all matters of right and wrong.'<sup>39</sup> As the moral sense was challenged by the negative effects of progress, such as the increased appetite for hoarding and luxury, the developed common sense became the standard of right and wrong. Kames contended that good government with rational laws were introduced to mend and control society because 'private conviction alone would not have been effectual'.<sup>40</sup>

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<sup>33</sup> Ibid., 89-90. Philip Johan von Strahlenberg (1676-1747), Swedish officer and geographer: see his *Description Historique de l'Empire Russien* (Historical Description of the Russian Empire) (1757).

<sup>34</sup> Home, *Sketches of the History of Man*, vol. iv, 105.

<sup>35</sup> Ibid., 92.

<sup>36</sup> Ibid., 93.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid., 107.

<sup>39</sup> Ibid., 107-108.

<sup>40</sup> Ibid., 108.

While Kames utilised conventional sources of history, treatises, statutes, acts, and histories written by recognized writers, he also included non-traditional sources of history, including documents such as journals, novels, tragedies, and plays. Two examples of these types of sources that Kames used were Strahlenberg's and Kolben's travel journals. Kames used Strahlenberg's description of Russia to determine the state of morality in Russian society.<sup>41</sup> Philip Peter Kolben's *The Present State of the Cape of Good Hope* portrayed South African life, including government, indigenous people, and fauna. Kames drew on Kolben's book to describe the practices of the Hottentots.<sup>42</sup> These more contemporary accounts aided Kames in determining the stage of development in remote locations, which could then be compared to England's and Scotland's development. Kames also used Greek literature in order better to understand the moral views of the society in which Homer was writing (believed to be near the end of the eighth century BC). Kames used Homer's *Illiad* to show that acts of impiety were common among the Greeks. He noted that the 'Greeks in Homer's time must have been strangely deformed in their morals, when such a story could be relished'.<sup>43</sup> Instead of simply repeating historical accounts of events and facts, Kames used historical sources in order to illustrate and evaluate the mores of the society in question. This method was a more sophisticated form of historical analysis than that attempted by Blackstone.

Kames argued that it was important to develop a holistic account of history. Thus, he had a wider, more eclectic, view of what constituted a source of history. Kames drew on historical narratives created by recognized historians, but also realised that they could be flawed, and thus it was important fully to research and uncover every detail of history that could be found. Every society throughout history belonged to one of the four stages, and by

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<sup>41</sup> Ibid., 90.

<sup>42</sup> Home, *Historical Law Tracts*, vol. i, 4.

<sup>43</sup> Home, *Sketches of the History of Man*, vol. iv, 100-101.



understanding how societies had developed from one stage to the next, scholars and legislators could understand how further to develop and determine the legal reforms needed to ensure laws reflected the moral development of individuals in a society. Thus, it was Kames's view that the greater the number of geographical locations and eras consulted, the greater one's understanding of legal and moral progress.

### **Section 1.3: Bentham**

Bentham did not provide an historical narrative, tracing the development or decline of morality and laws, but instead relied on specific historical examples, which supported his view that a science of legislation based on the principle of utility was the only system that was morally defensible. While primary sources aided Blackstone and Kames in dating historical practices, confirming long usage, or accurately tracing the consistency or progress of laws, for Bentham, these practices were irrelevant. Bentham had a vast knowledge of law and history, and drew on many examples of societies and their laws, but his use of history was focused on the following two points: first, refuting the view that long usage validated current law; and second, providing examples of past laws and legal systems that did not promote utility and illustrating the suffering that occurred as a result. To refute Blackstone's views on the importance of history and the argument that historical usage gave moral validity to law, Bentham emphasised the inconsistencies in Blackstone's writing. According to Bentham, however, the most benefit to be gained from a study of history by scholars and legislators was as a source of example.

While Joseph Priestley, David Hartley, David Hume, Cesare Beccaria, Claude Adrien Helvétius, Voltaire, and Montesquieu are credited as early influences on Bentham's

legal and moral theory,<sup>44</sup> a more in-depth study is needed to expose the sources Bentham drew on in relation to the history of England and its laws. Bentham used primary sources, such as statutes, acts, treatises, and court reports, to examine the state of common law in the past and in the present. For example, in ‘A Comment on the Commentaries’, Bentham demonstrated the confusing nature of the English legal system. He presented a variety of statutes, in addition to passages from Coke, Mathew Bacon, Edmund Plowden, and Geoffrey Gilbert,<sup>45</sup> to illustrate the unintelligibility of the distinction between public and private statutes, and how it was impossible to predict whether a judge would label a given statute private or public.<sup>46</sup> Bentham relied on primary sources to state what the given law was on a certain topic. For example, he acknowledged the statute that perjury was punishable by law, and that by the force of certain statutes it was punishable by transportation. Bentham was referring to the Perjury Act of 1728.<sup>47</sup> Bentham also relied on court reports to elucidate the status of the law. For example, he relied on James Burrow’s preface to his *Reports of Cases Argued and Adjudged in the Court of King's Bench* to show that it was punishable by law for anyone to publish or disseminate a decision of a court to the public that had been delivered *viva voce*.<sup>48</sup> While Bentham, similarly to Blackstone and Kames, used past statutes, court reports, and treatises to show what the law then was or had been, he in no way intended these accounts to have any influence in relation to what the law ought to be.

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<sup>44</sup> Schofield, *Bentham: A Guide for the Perplexed*, 3-4.

<sup>45</sup> Mathew Bacon (c.1700-1757), lawyer and legal writer: see his *A New Abridgment of the Law* (1736-1740). Edmund Plowden (1518-1585), law reporter: see his *Les commentaries, ou, Les reportes ... de divers cases ... en les temps des raignes le Roy Ed. le size, le Roigne Mary, le Roy & Roigne Philip & Mary, & le Roigne Elizabeth* (1571). Geoffrey Gilbert (1674-1726), Lord Chief Baron of the Exchequer 1725: see his *Law of Evidence* (1754).

<sup>46</sup> Bentham, “A Comment on the Commentaries,” 129-132. Bentham explained that if it was deemed public, the courts of law were bound to take notice. If it was deemed private, then judges were not bound to take notice unless formally shown and pleaded.

<sup>47</sup> Bentham, “A Comment on the Commentaries,” 219.

<sup>48</sup> *Ibid.*, 193; 214.

While Kames used an eclectic range of examples to show that morals and laws had developed through the four stages of society, Bentham used a wide range of examples from diverse geographical locations, because examples of various forms of legal systems and laws in different locations were helpful in showing the perniciousness of legal systems that were not based on the principle of utility. An example of Bentham's eclectic use of historical examples from various locations was discussed previously in Chapter Four.<sup>49</sup> In *Principles of the Civil Code*, Bentham used examples from the history of Asia Minor, Greece, Egypt, and the coast of Africa to argue for the universal importance of security in society. Bentham argued that these societies had flourished under the Roman Empire, where security existed, but had become wasted under the despotic Turkish rule.<sup>50</sup> North America was presented as a comparison: although the land was full of 'impenetrable forests or barren tracts, standing waters, noxious exhalations, venomous reptiles',<sup>51</sup> under a government that supported security, it had flourished. Examples from Ancient Athens and Rome illustrated the danger of placing the wants of the few above the needs of the many and of attacks upon security. These examples were further compared with violations of the public faith in France under the monarchy. A further example of an attack on security was the use of confiscation employed as a punishment. Bentham argued that, 'The Jews have often been the object of them: they were too rich not to be always culpable'.<sup>52</sup> When confiscation was permitted, the parties, as was the case in Rome, destroyed each other. By comparing a variety of geographical locations and eras, Bentham revealed the general benefit of enacting laws that safeguarded expectations and security and hence promoted the greatest happiness of the greatest number.

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<sup>49</sup> See pp. 166-174.

<sup>50</sup> How Bentham utilised historical examples in *Principles of the Civil Code* to emphasise the importance of property and the subordinate ends was previously discussed in Chapter Four, see pp. 169-173.

<sup>51</sup> Bentham, "Principles of the Civil Code," 310.

<sup>52</sup> *Ibid.*, 320.

A majority of Bentham's examples were drawn from his present or his very recent past. This was consistent with his legal science which incorporated the existing status of the law into the process of calculation. Bentham referred to the state of the American Indians to show that a society could move from a state of nature to a state of government and back again. Bentham explained that during wartime, the aborigines of America were completely subjected to a common chief. However, when war was over, they returned to independence.<sup>53</sup> Furthermore, Bentham also presented historical examples to question at what precise juncture a state became independent and separate from another nation. He used the Dutch provinces in respect to Spain as an example of a case in which a whole province had defected from a sovereign, and used Rome and Venice as examples of defection by individual fugitives within a state.<sup>54</sup> By illustrating his argument in this way, Bentham revealed a keen knowledge of both the history and the present condition of a wide range of societies. While Bentham argued that history should not be used to validate law, he often provided historical examples in explication of his legal and political views.

#### **Section 1.4: Comparison**

Blackstone tended to provide references for every source that he mentioned. He provided a very detailed account of English law. He cited the specific act or statute or named the source he relied on for the information. This can be explained by the fact that Blackstone's very argument necessitated historical references. He relied on the argument that laws gained authority and validity from long usage; thus, for Blackstone, evidence of the accuracy of these events was vital to his legal science. He was providing a much-needed institute of English law, and so he needed to explain when specific statutes and acts were

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<sup>53</sup> Bentham, "A Fragment on Government," 434.

<sup>54</sup> *Ibid.*, 435.

enacted. Kames blended law and society within his historical narratives, and thus, his accounts seemed to provide much more detail than Blackstone's. The added detail comes from that fact that he incorporated numerous non-legal sources within his work, in addition to the traditional legal sources Blackstone had also used. Kames regularly provided references for his sources, but there were instances where he did not provide citations. This was an inevitable consequence of a speculative history. Kames's theoretical and conjectural approach to history allowed him to utilise a wide range of sources. It was acceptable for him to assume things that were probable, without having definitive evidence, in the hope of uncovering a more holistic and suggestive account of history.<sup>55</sup> Bentham frequently did not provide references for the historical events to which he alluded, which can partly be explained by the fact that historical accuracy did not matter in the same way as it did to Blackstone and Kames. He used historical examples in order to achieve his wider philosophical aims.

The fact that Blackstone was providing an institute of English law explained why he used a much narrower range of sources in his historical narratives. His objective was to identify what the law was and when it was enacted. The primary sources and historical narratives from other writers provided evidence of legal validity, identifying when and how laws and practices began, and the fact that these laws were still in force led to a presumption that they were morally right. In this way, Blackstone blended legal and moral validity by an appeal to the past.<sup>56</sup> Blackstone did not need to investigate the moral views of the past for his legal science, because natural law was constant. Kames and Bentham understood that the legal practices and moral views of a society were two distinct areas of study. Using a wider range of sources meant that Kames and Bentham looked at whether

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<sup>55</sup> For an explanation of Kames's use of conjectural and theoretical history: see pp. 110-111.

<sup>56</sup> See pp. 146-147.

laws and practices were beneficial in promoting morality within a society. The wider range of historical sources used by Kames meant that he could show how a variety of societies had developed through the four-stages of history. This approach included both the study of past laws and the society in which they functioned. Bentham's broad range of sources revealed a great variety of political and legal systems that failed to promote the principle of utility. The despotic societies that Bentham identified supported his argument that the common law should be replaced with a code of laws based on the principle of utility. In addition to the range of sources and examples employed by Blackstone, Kames, and Bentham, their approach to handling a source was drastically different. These distinct approaches will be discussed in detail in the following section in relation to the Bible.

## **Section 2: The Bible as a Source of History**

Examining how Blackstone, Kames, and Bentham used the Bible will reveal each man's objectives and methods in relation to historical study, and give insight into the role that history played within their legal and moral theories. First, this section will examine how Blackstone used the Bible to demonstrate the historical existence of certain laws, in order to connect common law with natural law, and to argue that both common law and natural law had the same foundation in reason and human necessity. Second, this section will examine how Kames used the Bible to identify legal and moral practices under the Hebrews as part of an attempt to trace the development of society from savagery to civilization. Finally, this section will explore how Bentham used the Bible to understand Jesus's teachings, to determine the role Paul played in shaping the contemporary understanding of Christianity, and to question the reliability of the Bible as an accurate historical source. The questionable quality of the Bible as an accurate source of history and

its use in moral and legal theories, like Blackstone's and Kames's, supported Bentham's argument that history should not be used to validate or form the basis for law.

## **Section 2.1: Blackstone**

The Bible appears as a source of history many times in Blackstone's *Commentaries*. Throughout the *Commentaries*, Blackstone confirmed the benefit of an existing practice or law by proving its historical usage or by demonstrating that it was similar to laws that had developed in other societies in history. The fact that a custom or law had been practised in other societies proved it was rational, beneficial to society, and conformable to natural law. Blackstone used Biblical examples as evidence of the historical existence of many practices that were current in England in his own day. An example of one of these practices was the use of money in civilized nations. Blackstone argued that this practice was supported by the fact that Abraham paid for the field of Machpelah.<sup>57</sup> Blackstone also argued that the law of succession preferring males to females was shown to be valid by that fact that this was the practice among the Hebrews.<sup>58</sup> In addition, the use of seals as a mark of authority<sup>59</sup> and the symbolic delivery of possession were both practices found in the Bible, and this fact was used to justify their continuance in eighteenth-century England.<sup>60</sup> Blackstone also argued that the Hebrew practice of having justice administered in the gate of the city in order to be more speedy and public validated the English practice of having a lower, more expeditious court of justice.<sup>61</sup> For Blackstone, the existence of these practices during Biblical times provided evidence of their rational and beneficial nature and justified their continued existence under English law.

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<sup>57</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 446, citing Genesis 23:16.

<sup>58</sup> *Ibid.*, 213, citing Numbers 27.

<sup>59</sup> *Ibid.*, 305, citing Kings 21; Daniel 6; Esther 8.

<sup>60</sup> *Ibid.*, 313, citing Ruth 4:7.

<sup>61</sup> Blackstone, *Commentaries on the Laws of England*, vol. iii, 32, citing Ruth 4:7.

Furthermore, Biblical examples illustrating the existence of laws in the past were frequently used by Blackstone in order to reveal a connection between common law and natural law and to argue that both had similar foundations in reason and human necessity. According to Blackstone, the reasoning behind the common law was consistent with various ancient laws and beliefs. Thus Blackstone used four Biblical examples – concerning property, testaments, theft, and murder – illustrated below, to show that English legal principles were consistent with natural law. Blackstone used the book of Genesis to prove that property was a natural right and was established with its first occupant. Blackstone explained that exclusive property was established, ‘in the first digger or occupant, even in such places where the ground and herbage remained yet in common’.<sup>62</sup> Blackstone argued that Abraham asserted his right to a well because he was responsible for its excavation, and ninety years later, Isaac reclaimed his father’s property.<sup>63</sup> Property law, which affirmed that an item or land belonged to its occupier and creator, was revealed as a natural law from its endorsement in the Bible. Furthermore, the ability of the son of the original occupier to assert ownership confirmed that property and use-right were consistent with natural law.

Further to the right to property being a natural law, Blackstone also used the Bible to show the significance of testaments. Testaments were in use among the ancient Hebrews, and Blackstone stated that the example usually given was that of Abraham stating that if he had no children, his steward Eliezer of Damascus would be his heir.<sup>64</sup> Blackstone provided an example he found to be more suitable, that of Jacob bequeathing a portion of his inheritance to his son Joseph which was double the amount given to that of his other children. Blackstone argued that another direction of inheritance was ‘carried into

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<sup>62</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 5.

<sup>63</sup> *Ibid.*, 5-6, citing Genesis 21:30.

<sup>64</sup> *Ibid.*, 490, citing Genesis 15.



execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance'.<sup>65</sup> Testaments allowed the owner to bequeath land and moveables to chosen heirs, and the inheritance could be split into different portions instead of being equally dispersed or wholly descending to one person. Thus Blackstone argued that the use of testaments to govern the inheritance of land and moveables after death was a practice that had existed in Biblical times, and, as such, was conformable to natural law.

Blackstone used two Biblical examples to reveal that committing certain offences like theft and murder could never be seen as necessary or guilt-free. The extreme want of food or clothing did not justify stealing, and no one responsible for murder could be free of guilt. Pre-dating Cicero's view that extreme need did not justify theft, Blackstone argued that this principle was found in Jewish law during Biblical times. King Solomon declared, "if a thief steal to satisfy his soul when he is hungry, he shall restore sevenfold, and shall give all the substance of his house".<sup>66</sup> Blackstone stated that this was the ordinary punishment for theft under Solomon.<sup>67</sup> In addition, Blackstone argued that there was no private situation in which murder was committed where a culprit was rendered free of guilt. He stated that, according to common law, 'he who slays his neighbor, without an express warrant from the law so to do, shall in no case be absolutely free from guilt'.<sup>68</sup> To demonstrate that this English law was consistent with the natural law, Blackstone noted that it was also the law under the Hebrews. He continued: 'NOR is the law of England singular

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<sup>65</sup> Ibid., 491, citing Genesis 48.

<sup>66</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 31-32, citing Prov. vi, 30.

<sup>67</sup> Ibid., 32.

<sup>68</sup> Ibid., 187.

in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it.’<sup>69</sup> Blackstone further supported his view by explaining that under the Mosaic law, if a man accidentally killed another man, there were certain cities where he could live in refuge. It was clear that ‘he was not held wholly blameless, and more than in the English law; since the avenger of blood might slay him before he reached his asylum’.<sup>70</sup> Blackstone confirmed that the English principles that extreme need did not justify theft, and that murder could never be guilt free, were present in the Bible. For Blackstone, the consistency of these principles between Biblical times and the present denoted their rational and beneficial nature.

Blackstone’s use of Biblical examples was consistent with his objective to support the existing eighteenth-century political and legal system. In the *Commentaries*, Blackstone argued that the benefit of an existing practice was confirmed by its historic usage. The evidence that laws similar to those practised in England had existed in various societies in the past indicated that they were rational and beneficial, and consistent with natural law. Thus, Blackstone utilised Biblical examples to show that many English practices were identical to ancient Hebrew practices. When Blackstone discussed laws that were unique to England’s legal system and society, and not replicated in past societies and practices, the important point was that they had developed in response to English circumstances, yet remained consistent with natural law.

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid., citing Numbers 35; Deuteronomy 19.

## Section 2.2: Kames

Kames also used the Bible as a source of history on numerous occasions in his writings, for instance in *Sketches of the History of Man* in order to discover the legal and moral practices under the Hebrews. Unlike Blackstone, Kames did not use examples from the Bible to provide evidence of the legal validity and moral rightness of the current law, but simply to discover the status of law, society, and morality during Biblical times in an attempt to trace progress and development up to the present. Kames's *Sketches* traced the progress of various themes, including art, commerce, property, manners, the status of the female sex, the effects of luxury, government, and the military.

In *Sketches*, Kames's traced the rise and progress of the female sex, 'from their low state in savage tribes, to their elevated state in civilized nations'.<sup>71</sup> Kames argued that during savage times, a man could purchase a wife, in a similar fashion to the purchase of farm animals. He noted that women became slaves through marriage, and thus no man would give his daughter to be a slave without valuable consideration. Kames believed that this practice was universal in the first stages of society, and thus he provided examples from the Bible of women being purchased: Abraham bought Rebekkah as a wife for his son Isaac; Jacob served Laban for fourteen years in order to purchase his two wives; Sechem bought Jacob's daughter Dinah in marriage; and when David demanded Saul's daughter in marriage, Saul asked for a hundred foreskins of the Philistines in return.<sup>72</sup>

A major theme in Kames's *Sketches* was the advancement of morality from savagery to civilization. He argued that the Hebrews were not inferior to the ancient Greeks in cruelty and that the Old Testament was full of examples of cruel actions. Kames referred to the story in Samuel, in which David gathered his people and went to Rabbah, fought

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<sup>71</sup> Home, *Sketches of the History of Man*, vol. i, 181.

<sup>72</sup> *Ibid.*, 198, citing Genesis 24:53; Genesis 29; Genesis 34; 1 Samuel 12:29.

them, and stole their land. Kames explained that David then abused the people of Rabbah by placing ‘them under saws, and under harrows of iron, and under axes of iron, and made them pass through the brick-kiln: and thus did he unto all the cities of the children of Ammon’.<sup>73</sup> Again in *Sketches*, Kames argued that the Hebrews were ‘miserably defective in moral principles’.<sup>74</sup> He provided several examples from the Old Testament, including the story of Heber’s wife Jael who killed Sisera, general of the Canaanites, in his sleep and was then applauded by the prophetess Deborah for this ‘meritorious’ act. Kames also referred to the story of David vowing to destroy Nabal, his house, and family, for his refusal to supply David with provisions. Kames argued that examples of immoral actions by David were especially effective in illustrating the low state of morality in the Bible, as David was considered the best king that the Hebrews had.<sup>75</sup>

While Kames provided various examples demonstrating the low state of morality during Biblical times, he also praised the Hebrews for being the first people to have correct notions of morality in respect to the punishment of murder. In Deuteronomy, the Bible stated that every man should be put to death for their own sin, and that family members should not be punished for the sins of their father or their children. In Kings, the Bible admonished men not to slay the children of the murderer, and in Ezekiel it was said that only the soul that sinned should die.<sup>76</sup> Kames noted that there were obvious contradictions between the principles and practices of the Hebrews. These facts showed a certain stage of moral development in Biblical times in which reform was needed in order for practices and laws to reflect the moral principles in society. This example harmonized with Kames’s

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<sup>73</sup> Home, *Sketches of the History of Man*, vol. ii, 25, citing 2 Samuel 12:29.

<sup>74</sup> Home, *Sketches of the History of Man*, vol. iv, 102.

<sup>75</sup> *Ibid.*, 102-104, citing Judges 4:5.

<sup>76</sup> *Ibid.*, 95-96, citing Deuteronomy 24:16; Ezekiel 18.

views on eighteenth-century law and society: that the law needed to be refined in order to reflect progress in moral beliefs.

Kames argued that there were two errors that affected morality: one was that whether an action was judged right or wrong was dependent on the consequences and not upon the intention, and the other was that judges did not consider that the end could justify the means. Kames used three examples from the Bible to demonstrate the two errors. The first example was when Isaac, while imitating his father Abraham, had his own wife pretend to be his sister. Abimelech, the King of the Philistines, scolded Isaac because someone might have lain with his wife while she was disguised as his sister. The second example was when Jonathan was condemned to death for transgressing a prohibition he did not know existed. The first two examples show that in early society, judges did not consider intention when determining criminality and guilt. The third example was when Saul was defeated by the Philistines and attempted to fall on his own sword. Since the wound was not mortal, he asked an Amalekite to kill him. David, not considering the details of the affair, ordered the Amalekite to be punished for regicide.<sup>77</sup> This example showed that judges did not take into consideration whether the ends justified the means when determining criminality. Both these errors had since been recognized as such, and moral judgment in civilized society took account of a greater range of circumstances, including intentions and the consequences of an action.<sup>78</sup>

Kames's *Sketches* traced different themes from ancient times to the present – from savagery to civilization – and asked how they had evolved and whether reform was needed. Kames used the Bible to find examples of past legal practices and moral principles, which

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<sup>77</sup> Ibid., 120-121, citing Genesis 26; 1 Samuel 14:44; Book 3 of *Antiquities of the Jews* (c. 93-94AD) written by Flavius Josephus.

<sup>78</sup> Kames argued (see pp. 260-261) that the intentions of an offender and the consequences of actions would not be considered in a common law court. However, in a court of equity, a judge considered these two factors when making his final decision.

he viewed in conjunction with examples from other societies in the past, to show that laws and morals had become more refined as society had progressed over time. In addition, Kames used Biblical examples to demonstrate that the moral principles and the laws of a society could be at variance. Hence, Kames made the general point that laws would often need to be reformed in order to reflect moral beliefs.

### **Section 2.3: Bentham**

Bentham, like Blackstone and Kames, used the Bible as an historical source in his work. Bentham criticised organised religion in *Swear Not at All* (1817) and *Church-of-Englandism and Its Catechism Examined* (1818) and attempted to dispute the logic behind Christian beliefs in *Of the Influence of Natural Religion on the Temporal Happiness of Mankind* (1822). As James E. Crimmins argues, in order to understand Bentham's critique of religion, it must be viewed in relation to his greater political views and aims, in particular his objective to create a political and legal system based on the principle of utility.<sup>79</sup> Crimmins explains that Bentham believed that there was no common ground between the spiritual world of religion and the perceptible world of physical experience, thus he aimed for the elimination of religious beliefs as influential psychological factors in the human mind.<sup>80</sup> The greatest happiness of the greatest number was the measure of right and wrong, and happiness consisted in the real experience of pleasure, and not an adherence to theological dogma. Bentham viewed the Bible as an historical document, and like every other historical document, the Bible had been misinterpreted and misconstrued. The Bible

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<sup>79</sup> James E. Crimmins, "Bentham on Religion: Atheism and the Secular Society," *Journal of the History of Ideas* 47, no. 1 (March 1986): 95. For a more detailed study of Bentham's writings on religion see James E. Crimmins, *Secular Utilitarianism: Social Science and the Critique of Religion in the Thought of Jeremy Bentham* (Oxford: Oxford University Press, 1990).

<sup>80</sup> Crimmins, "Bentham on Religion: Atheism and the Secular Society," 105. See also Philip Schofield, "Political and Religious Radicalism in the Thought of Jeremy Bentham," *History of Political Thought* 20, no. 2 (February 1999): 272-291; James E. Crimmins, "Bentham's Religious Radicalism Revisited: A Response to Schofield," *History of Political Thought* 22, no. 3 (March 2001): 495-500.

had no more authority than any other collection of stories, and what authority had been derived from it had often been at odds with what morality – utility – dictated.

For the purposes of this chapter, I will focus on Bentham's work that challenged historical Christianity: *Not Paul, But Jesus* (1823). Unlike Blackstone and Kames, Bentham did not rely on legal and moral practices in the Bible to argue that there was a consistency with the present, or a progression from Biblical times to the present. Bentham's exegesis in *Not Paul, But Jesus* anticipated the works of the German philosophers Friedrich Schleiermacher and Wilhelm Dilthey who popularized the study of hermeneutics in the nineteenth century. Both Bentham and the hermeneutic philosophers advocated that understanding the past was both an epistemological and an ontological study. Human existence involved language and thus any theory of interpretation must deal with language. Hermeneutics was an approach to literary interpretation that focused on deciphering the human imprint on a work. Those who advocated protestant hermeneutics argued that one should base their beliefs on a reading of scripture and not impose pre-existing beliefs on to the text. In order to interpret a document accurately, it was important to examine who the writer was, what was the original intent, why they included certain facts, and what was the cultural and historical context of the period in which they were writing.<sup>81</sup> In contrast to Kames, and especially Blackstone, Bentham did not impose his own pre-existing beliefs on to the Bible, and instead tried to understand it as any other historical text, composed by human authors at a particular historical conjuncture. Thus Bentham provided a more sceptical approach to biblical exegesis, than Blackstone or Kames had done.

Bentham used the Bible to show that Jesus condemned the doctrine of asceticism, and to contend that it was actually Paul who had encouraged it. In addition, Paul was

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<sup>81</sup> Richard E. Palmer, "Introduction," in *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer*, 8<sup>th</sup> ed. Northwestern University Studies in Phenomenology and Existential Philosophy (Evanston: Northwestern University Press, 1988), 3-11.

responsible for merging the teachings concerning sexual morality that were found in the Mosaic law with the Christian tradition. These two points – that Bentham utilised the Bible to show that Jesus condemned the principle of asceticism, and that the rules of sexual morality usually attributed to Jesus were from the Mosaic law found in the Old Testament – furthered Bentham’s utilitarian agenda. The principle of asceticism was at odds with the principle of utility and consensual sexual activity was not prohibited by utility because it did not cause harm. As Schofield contends, these arguments were significant because the reason why many sexual practices were condemned, and many criminalized, was due to the fact that the prevalent sexual morality was derived from Biblical teachings.<sup>82</sup> Bentham used the Bible to reveal Jesus’s actual teachings, to determine the role that Paul had played in shaping Christianity, and to question the reliability of the Bible as an accurate source of history.

Bentham provided Biblical examples to illustrate Jesus’s rejection and condemnation of the principle of asceticism. As mentioned in Chapter Four, Bentham identified the principle of asceticism, as well as the principle of sympathy and antipathy, as the two divisions to which all other theories of morality apart from the principle of utility could be assigned. He argued that in order to prove these other principles wrong, one must simply explain how they were contrary to the principle of utility.<sup>83</sup> Much of the asceticism in the Bible first appeared in the Mosaic law. Bentham argued that Jesus condemned the entire Mosaic law as being man-made and thus, it did not represent the law of God: ‘in the eyes of Jesus, the law of Moses was but a mere human law, and a law so ill-adapted to the welfare of society, that on no occasion is it ever spoken of as coming under his cognizance without being taken by him more or less explicitly for the declared object of that scorn with

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<sup>82</sup> Philip Schofield, “Jeremy Bentham on Taste, Sex, and Religion,” in *Bentham’s Theory of Law and Public Opinion*, eds. Xiaobo Zhai and Michael Quinn (Cambridge: Cambridge University Press, 2014), 91.

<sup>83</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, 17.



which he ceased not to regard it'.<sup>84</sup> Bentham used Jesus's 'new wine into old wineskins' parable to illustrate the danger of continuing to adhere to the Mosaic law, when Jesus himself offered a new alternative:

Of the Mosaic law, an old bottle is now the archetype. Now, the Mosaic law is an old bottle. Now, of the putting of new wine into the old bottle, the consequence is that 'the bottles break, the wine runneth out, and the bottles perish.' Such is the effect of the adding more and more of the spirit of asceticism to the Mosaic law, supersaturated already with that pernicious gas: the consequence is that the whole system is blown to pieces and whatsoever good there was in it is scattered and lost.<sup>85</sup>

Bentham argued that Jesus believed that there was no place for the Mosaic law within his religion. The old rules of fire and brimstone had no place in, and were at odds with, Jesus's teachings.

Bentham highlighted two areas of asceticism that were preached by Moses, but were condemned by Jesus: the first was the abstinence from food<sup>86</sup> and the second was the abstinence from sexual acts outside of marriage.<sup>87</sup> As Schofield explains, Bentham argued that the modern ascetics focused most of their hostility against pleasures of the bed because it was not possible to abstain altogether from the pleasures that necessarily accompanied eating and drinking without suffering death.<sup>88</sup> Bentham argued that Jesus never condemned the 'pleasures of the bed'. He noted that there was no evidence in the Gospels that Jesus had 'cast any the slightest token of reprobation on the pleasures of the class here in question, in whatever shape and from whatever source derived'.<sup>89</sup> Bentham also contended that Jesus might have actually taken part in these pleasures himself. He examined the

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<sup>84</sup> Jeremy Bentham, *Not Paul, But Jesus Vol. III. Doctrine*, ed. Philip Schofield (London: The Bentham Project, UCL, 2013), 179-180.

<sup>85</sup> *Ibid.*, 95.

<sup>86</sup> *Ibid.*, 96-98.

<sup>87</sup> *Ibid.*, 150. Bentham wrote that Moses beheld uncleanness everywhere; especially at the table and in bed.

<sup>88</sup> Schofield, "Jeremy Bentham on Taste, Sex, and Religion," 102.

<sup>89</sup> Bentham, *Not Paul, But Jesus Vol. III. Doctrine*, 111.

relationships that Jesus had with Mary Magdalene, as well as his relationships with the ‘disciple whom he loved’, usually identified as John, and an unnamed stripling in a linen cloth,<sup>90</sup> and inferred that there was more evidence that he partook in these pleasures of the bed than that he condemned them.

Bentham argued that the reason it was generally accepted that Jesus condemned the pleasures of the bed was that Paul’s teachings were compounded with those of Jesus. He stated: ‘By Jesus and his religion, no gratification in any shape from this source had been placed in the catalogue of sins. By the industry of Paul indeed, and his religion, the deficiency had been supplied’.<sup>91</sup> Hence, views condemning pleasures of bed were wrongly attributed to Jesus, instead of their rightful proponent, Paul.

By using the Bible as an historical source, Bentham accentuated the problems inherent in using history as an authority for the present. The very idea that asceticism, and in particular related views concerning sexual morality, were not part of the religion of Jesus, and yet they had come to be central components of Christianity, reflected a common error in historical study. Bentham contended that a common mistake in the study of history was the tendency to intertwine texts and comments, different versions, and originals with their derivatives. After hundreds of years, it was difficult to distinguish between these different elements.<sup>92</sup> This error could explain how Paul’s views had become intertwined with those of Jesus, as it was through Paul’s writings that parts of Jesus’s teachings were

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<sup>90</sup> Ibid., 183-194. Bentham questioned why Mark found it necessary to include the account of a stripling within the story of Jesus’s arrest and noted that the stripling was the only person who stayed faithful to Jesus when the rest of his disciples fled (183-185). Bentham examined the relationship between Jesus and John. Bentham used the examples of John leaning on Jesus’s bosom, John being referred to, although not explicitly, as the ‘one whom Jesus loved’, and Jesus telling his mother before his death to behold John as his son, to argue that Jesus and John were intimately connected. On the relationship between Jesus and the stripling, Bentham cited the following: Mark 14:43; Mark 14:50; Mark 14:52. On the relationship between Jesus and John, Bentham cited: John 13:21-26; John 19:25-27; John 21:20-24.

<sup>91</sup> Ibid., 122.

<sup>92</sup> Ibid., 199.

received.<sup>93</sup> Bentham noted the tendency of writers to add their own views and biases to their account of history:

Thus it is, that, it being through the hands of Paul – of Paul alone – that those men of former times, by whom what we have of the religion of Jesus has been transmitted to us, it depended upon those same hands to add to it whatsoever it suited their purpose to annex to it: to add to it accordingly that which is to this day considered as forming part and parcel of the same whole.<sup>94</sup>

Bentham emphasised the difficulties associated with accurately recovering historical events and the views of historical figures. When reading history, one must always take into account the views and biases of the authors, editors, and scribes.

These common problems in historical accounts supported Bentham’s argument, presented in Chapter Four, that past laws should only be considered in so far as they affected and influenced current laws. If historical accounts were riddled with errors, it was impossible to understand what the actual practices of the past were, or what eminent figures of the past actually preached. Bentham understood that all humans had biases: modern writers had biases which influenced how they read and interpreted historical accounts, and past writers had biases which influenced the way they wrote their accounts and the details on which they focused. This argument harmonized with Bentham’s view of sinister interests and how they operated within law and politics.<sup>95</sup> Historians, like lawyers and judges, could interpret history and past laws in a way that promoted their own individual or group interests. For this reason, the past should not be used to validate current law. The only unbiased calculation was one based on the principle of utility.

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<sup>93</sup> Ibid., 200.

<sup>94</sup> Ibid., 201.

<sup>95</sup> For more on sinister interests see Philip Schofield, “The Emergence of Sinister Interest,” in *Utility and Democracy: The Political Thought of Jeremy Bentham*, 109-136.

Bentham acknowledged the problem inherent with bias when he made the astute point that the penitent of today may be the sinner of tomorrow.<sup>96</sup> Bentham explained, for instance, that the modern perception of Mary Magdalene as a prostitute could be false. Since we read the Bible in the present, our understanding is affected by modern perceptions, prejudices, and biases. Bentham noted that ‘the common conception by which she is considered as having been a courtesan by profession has no sufficient grounds’.<sup>97</sup> This exegesis by Bentham was a form of historical reconstruction. Bentham argued that, in the Gospels, there was one instance in which a sinner was brought to view who was a female. This was the scene in which a woman poured perfumed liquid on Jesus’s feet and he told her that her sins were forgiven. Bentham noted that her name was not given. However, as Bentham explained, ‘in another gospel and on another occasion and at a widely distant point of time, a female of the name of Mary is found occupied in the paying of the like homage’.<sup>98</sup> He pointed out that there were many Marys in the Bible, but all these separate characters were reckoned to be Mary Magdalene. Bentham continued: ‘And thus it is that, from signifying an inhabitant of the town of Magdala, a Magdalene came to signify a female who sought and who seeks in the sale of her sexual favours the means of sustenance.’<sup>99</sup> The belief that Mary was a prostitute and that these other characters named Mary were all the one and the same Mary Magdalene exemplified the fact that, as an historical source, the Bible was not sufficiently accurate to be reliable, leaving room for the imagination to jump to whatever conclusion it wished.

Furthermore, Bentham speculated about the identity of the stripling in the linen cloth, who was mentioned in Mark’s account of Jesus’s arrest. The inclusion of this

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<sup>96</sup> Bentham, *Not Paul, But Jesus Vol. III. Doctrine*, 115.

<sup>97</sup> *Ibid.*, 116.

<sup>98</sup> *Ibid.*, 123.

<sup>99</sup> *Ibid.*, 124.

character in the Gospels was intriguing to Bentham. Mark wrote that while the rest of Jesus's disciples fled during his arrest, the stripling remained with Jesus.<sup>100</sup> Bentham inferred that it was possible that the stripling was intimately connected to Jesus. Bentham argued that the existence of an intimate relationship between the two men could explain why the stripling was included in 'the account of a transaction of such vital importance as the arrestation which ended in the death of Jesus'.<sup>101</sup> While this incident is used by Bentham to support his view that Jesus himself might have had a male lover, it could also be used to support his argument against the use of history for authority.

That Bentham was able to suggest that the stripling was Jesus's lover, showed how details could be chosen from a historical account in order to give credence to one's own beliefs or to support to one's own biases. Bentham was showing that he could interpret Biblical accounts to give a very different view of Jesus's sexuality compared to the asexual being presented in standard Christian apologetics. This ability to skew history for one's own needs again highlighted the danger of using history to validate or create laws. As discussed in Chapter Four, the tendency of historians to use the past for their own purposes was noted by Bentham elsewhere in his writings. First, in 'A Comment on the Commentaries', Bentham derided Blackstone for his failure to provide accurate and consistent historical accounts, especially in his discussion of the fifteen branches of the common law.<sup>102</sup> Second, in *Principles of the Civil Code*, Bentham outlined how public acts of injustice were often coloured by eulogiums to Roman virtues, using the abolition of debts as an example.<sup>103</sup> By showing the failure of Blackstone to present accurate and consistent historical accounts, and the tendency to interpret historical events in a way that

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<sup>100</sup> Ibid., 191.

<sup>101</sup> Ibid., 190.

<sup>102</sup> See pp. 157-164.

<sup>103</sup> See pp. 171-172.

promoted the historian's own objectives, Bentham highlighted the dangers of using history as an authority for current law or for determining legal reform. Similarly, by questioning the accuracy of the Bible, Bentham questioned its reliability as an historical source.

Bentham's opposition to the Bible was similar to his views against natural law and divine law; the Bible was open to interpretation and thus should not be taken to be an authoritative source of law.

Bentham exposed the difficulties inherent in interpreting historical material. What was considered important at one time could be of no relevance at a later date. In addition, information that was currently sought by a reader might have been ignored by the scribes of history and thus was impossible to recover. Bentham's accounts of Jesus and his relationships with John and the stripling in the loincloth can be read as a critique of history, and a subtle argument against the use of history as an authority for the present. Just as Bentham's contemporaries could read the Bible to argue against adultery and sex before marriage, Bentham could just as easily selectively use examples from the Bible to show that Jesus partook in sexual acts with men and women outside of marriage. Bentham utilised the Bible as an historical source to recover Jesus's actions and sayings concerning asceticism and sexual morality, and to question the blind dependence on history for legal authority. If the understanding of history could be easily swayed by the biases and self-interests of past scribes and present interpreters, then history should not be considered a source of justification for current law or for constructing ideas for legal reform.

### **Section 3: The Study of the Feudal System and its Laws.**

Blackstone, Kames, and Bentham agreed that it was important to study feudal history in order to understand and accurately analyse the current legal system. Blackstone

argued that it was ‘impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate it’s landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law’.<sup>104</sup>

Eighteenth-century laws were deeply rooted in the feudal system and many of the existing practices were similar to feudal practices. Kames concurred with Blackstone concerning the importance of studying feudal history: ‘The feudal system is connected with the municipal law of this island, still more than with the law of nations. It formerly made the chief part of our municipal law, and in Scotland to this day makes some part’.<sup>105</sup> Kames focused on the way in which the feudal system reflected the society in which it operated, and how laws should have been altered since feudal times to mirror the needs of the new commercial society. Bentham repeatedly condemned the feudal system, denoting it as the ‘unfortunate system’, ‘feudal anarchy’,<sup>106</sup> and ‘feudal barbarism’.<sup>107</sup> Feudal laws and practices did not promote the greatest happiness of the greatest number. The methods each writer used to study feudal history and incorporate feudalism into their arguments once again sheds light on their opinions concerning the place of history within law and morality.

### **Section 3.1: Blackstone**

As discussed above, Blackstone’s historical narrative is a classic example of what Herbert Butterfield termed ‘the Whig interpretation of history’ – a style of history that saw the past in terms of a steady development towards the present, and in the English context, focused on the emergence of Parliament and its battle against the oppressive powers of

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<sup>104</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 44.

<sup>105</sup> Home, *Historical Law Tracts*, vol. i, viii.

<sup>106</sup> Jeremy Bentham, *Defence of Usury* (London: T. Payne and Son, 1787), 121.

<sup>107</sup> Jeremy Bentham, *Draught of a New Plan for the Organisation of the Judicial Establishment in France* (London, 1790), 2.

King and Church.<sup>108</sup> Blackstone followed this method of historical narrative throughout the *Commentaries on the Laws of England*, especially in relation to the development of law and society from their Saxon origins, through feudalism, to their existing state in the eighteenth century. To illuminate his approach, I will provide two examples from the *Commentaries* that employed historical narrative to strengthen the legitimacy and prestige of England's mixed form of government and its legal system.

The pre-eminence of eighteenth-century England was demonstrated by Blackstone through historical narratives that emphasised a balance between continuity and progress. In 'Of the Rise, Progress, and gradual Improvements, of the Laws of England', Blackstone separated the legal history of England into six specific eras to emphasise the rise and fall of various legal traditions, including the existence of feudal laws and tenures. In Book II, chapters 4 to 6, 'Of the Feodal System', 'Of the Ancient English Tenures', and 'Of the Modern English Tenures', Blackstone demonstrated continuity from the Anglo-Saxon era to the present, showing how land tenures had developed from feudal practices that had themselves originated in Saxon practices. Blackstone had to show the principles, as well as the later corruption, of feudal law, in order to justify what had remained. Blackstone's treatment of feudal history offers a window into his historical methodology, which was constructed with an eye to the present.

*'Of the Rise, Progress, and gradual Improvements, of the Laws of England'*

As previously discussed in Chapter Two, in 'Of the Rise, Progress, and gradual Improvements, of the Laws of England', Blackstone explained the rationale behind certain legal reforms that he believed had been necessary by showing that the belief that the then existing laws were unnatural or unjust. For example, Blackstone suggested that Alfred and

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<sup>108</sup> See pp. 54-56. Butterfield, *The Whig Interpretation of History*, v.



Edgar enacted their legal reforms during the Anglo-Saxon era because the legal systems prior to reform had been marked by confusion. Thus, both Alfred and Edgar had recognized that legal reform had been necessary. Blackstone also argued that these law reforms were significant as the laws introduced constituted the foundation of the common law. Likewise, Blackstone highlighted the unnatural and unjust laws enacted from Henry VII to Charles I that had been aimed at increasing revenue for the Crown. He believed that these sovereigns had acted in self-interest to the detriment of their subjects. Instituting or adopting laws for self-interested purposes was harmful to the development of English law. Blackstone emphasised the difference between adopting laws that were beneficial to society and inventing laws for self-interested reasons. Blackstone argued that the choices made by James I and Charles I had ultimately resulted in the overturning of the church and monarchy, and the trial and murder of Charles I.<sup>109</sup>

Blackstone contended that the Restoration of Charles II in 1660 marked the ‘complete restitution of English liberty, for the first time, since it’s total abolition at the conquest’.<sup>110</sup> With the Restoration, Blackstone argued that all the oppressive appendages of foreign dominion had been removed, and all liberties were then confirmed with the introduction of the Habeas Corpus Act in 1679, which formed a second *Magna Carta*. The final era Blackstone discussed focused on emphasizing the perfection of the existing English government and legal system. The Glorious Revolution of 1688 had ensured that the government and legal system had maintained the freedoms of the English people. Blackstone explained how the new constitutional monarchy had flourished since the Glorious Revolution and pointed to the many liberty-promoting bills that had been passed as a result.

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<sup>109</sup> For more detail concerning Blackstone’s five eras of legal development, as discussed in ‘*Of the Rise, Progress, and gradual Improvements, of the Laws of England*’, see pp. 81-89.

<sup>110</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 431.

Blackstone's account of feudalism occurred in the description of his second era of English legal development. Blackstone noted that, following the Norman Conquest, many of the laws that had been introduced had been unnatural. He explained: 'though the alteration of the former [i.e. the Norman Conquest] was effected rather by the consent of the people than any right of conquest, yet the consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.'<sup>111</sup> Blackstone stated that the most important of these consequences, for both civil and military institutions, had been the introduction of feudal tenure. Blackstone argued that feudalism

drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisin, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.<sup>112</sup>

In the *Commentaries*, Blackstone portrayed feudalism as destructive to the natural advancement of English society. However, it was important to note, because of the significance of the continuity of law from the Anglo-Saxon era, that feudalism had been technically consented to by the people and not forced on to them. Although Blackstone maintained that the people had permitted feudalism, he argued that it was unnatural and unjust:

The ultimate property of all lands, and a considerable share out of the present profits, were vested in the king, or by him granted out to his Norman favourites; who by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons.<sup>113</sup>

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<sup>111</sup> Ibid., 407-408.

<sup>112</sup> Ibid., 411.

<sup>113</sup> Ibid., 412.

The people had realised that parts of the law were unnatural and unjust, and eventually had decided to press King John to reinstate Anglo-Saxon laws. In the *Commentaries*, as well as in *Magna Carta and Charter of the Forests*, Blackstone affirmed that by adopting and upholding Norman laws, the Kings following the Norman Conquest had gone against the natural order of legal development in England. These Norman laws and practices had led the barons and earls in 1215 to force John into signing an agreement improving and safeguarding their rights.<sup>114</sup>

Blackstone's narrative 'Of the Rise, Progress, and gradual Improvements, of the Laws of England' was an historical review of the most remarkable changes that had occurred in English law. Blackstone showed how the Norman Conquest had introduced certain unnatural elements into English law and society. The most important of these elements was feudalism. Blackstone argued that the feudal system had been consented to by the people, but it had unjust and unnatural consequences. Blackstone argued that historical events, such as the granting of *Magna Carta* and the Restoration, occurred when men realised the unjust state of the current laws and attempted to restore English liberties and challenge despotism. Blackstone's narrative presented a broad chronological account, showing how English law developed through feudalism, to the existing legal and political system. Blackstone emphasised a balance between progress and continuity by showing how the earls and barons achieved progress by re-establishing the Anglo-Saxon laws that they believed were just and beneficial to England.

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<sup>114</sup> J.G.A. Pocock, "The Common-Law Mind: Custom and the Immemorial," in *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987), 40-44. Pocock explains that the common law writers before the sixteenth and seventeenth centuries tended to link the argument for immemorial usage with the argument that the laws were pre-conquest. Common law writers argued that there was no breach with the past at the Conquest. Pocock states that Coke argued that the kings after the Conquest swore to observe the ancient laws, which were subsequently summarized in *Magna Carta*. Blackstone's narrative that traced the law from Anglo-Saxon society through the Norman Conquest and feudal society to the present was influenced by these views presented by earlier common law writers, especially those expressed by Coke.

## *History of Land Tenures*

In Book II of the *Commentaries*, Blackstone provided an historical account of the evolution of the feudal land system and how it had first developed into ancient English tenures, and then finally modern English tenures. Chapter 4 'Of the Feodal System' focused on where the feudal system came from and how and why it had developed in England. Blackstone contended that the feudal system was not the result of a conquest, but an acquisition, as the feudal system had been adopted by a general assembly of the realm, due to a lack of, and need for, military defence. Although feudalism had been accepted by a general assembly, many had pined for the ancient Anglo-Saxon system. This desire for the Anglo-Saxon system had been indicated when Henry I promised a return to Edward the Confessor's laws. As Henry I's attempts had been unsuccessful, the people had impressed upon John the need to re-establish ancient liberties through the granting of *Magna Carta*. Blackstone noted the importance of John and Magna Carta, but contended that the changes under Charles were greater. Blackstone contended that

the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that antient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.<sup>115</sup>

Blackstone believed that the reestablishment of ancient liberties was linked to the reestablishment of the ancient constitution.

Blackstone described the development of feudal tenures into ancient land tenures by showing how the feudal system evolved from a military system into a civil establishment.

Land tenures were all feuds or of a feudal nature as ancient tenures of estates had developed

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<sup>115</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 52.

directly from the feudal regime. In ‘Of the Ancient English Tenures’, Blackstone explained that there were four species of land tenures: knight service, free socage, absolute or pure villeinage, and villein-socage. As an example, Blackstone showed that knight service had all the marks of a strict regular feud by showing that the seven fruits and consequences of knight service – aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat – derived directly from feudal practices. Blackstone made the argument that by the degeneration of knight-service into escuage the feudal constitution had been destroyed. Instead of a national militia bound by interest, honour, and oaths to the sovereign, it had become a system of tenures in order to raise money to pay for an army of occasional mercenaries.<sup>116</sup>

In ‘Of the Modern English Tenures’, Blackstone traced how the ancient land tenures had progressed into modern land tenures. Blackstone noted that with the Military Tenures Abolition Act (1660), the oppressive military part of the feudal constitution had been reduced to free and common socage. Blackstone contended that free socage had been absorbed and swallowed up by the existing land system. He stated:

And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that antient system; since it is that alone, to which we can recur to explain any seeming, or real, difficulties, that may arise in our present mode of tenure.<sup>117</sup>

To reassert the Saxon roots of the existing land tenures, Blackstone argued that socage tenures – a land tenure where a tenant lived on a lord’s land in exchange for agricultural produce or money rent – were relics of Saxon liberty. Robert Willman argues that Blackstone was claiming that feudalism was actually Anglo-Saxon in nature and had been merely perverted by the Normans. By claiming that there had been a continuous

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid., 78.

development of feudal institutions, Willman argues that Blackstone presented the ancient constitution as feudal in order to stress the continuity of English law and to protect the position of the aristocracy. On the other hand, Cairns believes that Blackstone asserted socage was Saxon in nature and part of the ancient constitution because ideas that were foreign were to be rejected, and thus if socage tenure was proven to be Norman, an important part of English law would be seen to be foreign.<sup>118</sup>

To prove that socage was Saxon in nature, Blackstone explained that a man could currently dispose of his tenements by will, which was not permitted after the Conquest until the reign of Henry VIII, but had been permitted in Saxon times. Blackstone contended that this was a 'pregnant proof that these liberties of socage tenure were fragments of Saxon liberty'.<sup>119</sup> Blackstone argued that free socage was feudal in nature, and probably had developed from the Saxon era, and that it was reasonable to imagine that socage tenure existed in much the same state before and after the Norman Conquest. Moreover, Blackstone also contended that manors were as ancient as the Saxon constitution and that copyhold at the will of the lord had descended lineally from pure villeinage.

Blackstone traced the history of England's land tenure system from the Saxon era, which included its progress through the feudal system, to show how the English legal system had progressed into its current state of perfection. The Conquest was seen to be an interruption to England's progress, but continuity was demonstrated through the idea that ancient liberties originated in Saxon practices. It was imperative for Blackstone to explain the place of the feudal system, because the current civil establishment had been once feudal in nature. He tried to present a lineal development of land tenures from Saxon times to the

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<sup>118</sup> John W. Cairns, "Blackstone, the Ancient Constitution and the Feudal Law," *The Historical Journal* 28, no. 3 (September 1985): 711-717.; Robert Willman, "Blackstone and the 'Theoretical Perfection' of English Law in the Reign of Charles II," *The Historical Journal* 26, no. 1 (1983): 39-70.

<sup>119</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 84.

present by showing how one practice developed from a previous practice and how each aspect of the ancient or modern tenures was derived from a practice that had originated prior to the Norman Conquest. In this way, Blackstone emphasised continuity from Anglo-Saxon times to the present, showing how land tenures had developed from feudal practices that in turn had originated in Saxon practices. It was important to demonstrate continuity from the Anglo-Saxon era, so that the foundation of the common law could be seen to lie in the laws of Edgar and Alfred.

Blackstone's opinion on the relationship between history and law is revealed through his account of legal development from the Anglo-Saxon era, through feudal society, to eighteenth-century England. Blackstone struck a delicate balance between continuity and progress. Progress was shown through Blackstone's emphasis on how Englishmen sought change when they saw that laws and society had become unjust and unnatural. Continuity was shown by Blackstone, first through the fact that the feudal system had been not the result of the conquest, but an acquisition, as the feudal system had been adopted by a general assembly of the realm, due to a lack of, and need for, military defence. Second, continuity was also shown through the fact that many English laws and practices drew their legitimacy and validation from their long and continued usage. Blackstone contended that English laws had been practised since time immemorial and argued that the foundation of the common law lay in the laws and legal reforms of Edgar and Alfred. For example, to reassert the Saxon roots of the existing land tenures, Blackstone argued that socage tenures were relics of Saxon liberty. Both continuity and progress were shown through Blackstone's tracing of how ancient land tenures had gradually developed into modern land tenures in England.

It is important to note that when Blackstone wrote about feudalism, he referred to ‘feudal tenures’ or ‘feudal laws’; he did not recognize ‘feudal society’ as an all-encompassing system influencing every facet of life. Blackstone’s method was to trace laws from their origin through to eighteenth-century society, and thus feudal customs and tenures were points of transition in the development of laws, and did not encompass a specific category or era of time in English history. This is in direct contrast to the stadial account of historical development used by Kames, which will be discussed in the next section. Instead of describing feudalism as a complete societal system, and questioning when the system had been introduced and subsequently abolished, Blackstone traced land tenures and civil establishments through their feudal form and how they had progressed into their existing state. This is highlighted by Blackstone’s insistence that practices similar to feudal customs and tenures had been in use in England prior to the Norman Conquest. However, Blackstone described how, through the consent of the people and the need for military defence, feudal land tenures had been adopted and imposed throughout England following the Norman Conquest. Thus, he viewed feudal tenures and customs simply as a primitive form of the existing land tenures and customs in eighteenth-century England.

Blackstone’s historical narratives traced the continuity and progress of laws and society in England, towards the perfection of the time at which Blackstone was writing. Progress and continuity, seemingly at odds, came together to perfect English law, because for Blackstone, if a law was unjust or unnatural, it would have been revealed to be so, and, as a result, would have been altered.<sup>120</sup> Thus, laws that had stood the test of time were natural and just and their perseverance made them authoritative.

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<sup>120</sup> Pocock, “The Common-Law Mind: Custom and the Immemorial,” 34.



### Section 3.2: Kames

Kames traced the development of different themes – arts, manners, luxury, government, property, and commerce, amongst others – through the four stages of society: hunter-gatherer, pastoral-nomadic, agriculture, and commercial society. There was, however, a sense of pessimism that persisted throughout Kames’s narratives of progress. An example of this pessimism was present in Kames’s account of the progress of property in *Sketches of the History of Man*. Kames argued that property was a double-edged sword: ‘In thy right hand, Industry, a cornucopia of plenty: in thy left, Avarice, a Pandora’s box of deadly poison.’<sup>121</sup> Despite the presence of cyclical history in his writing, and the inherent pessimism that underlined his histories of progress, Kames identified this progress as evidence of divine providence. For example, when luxury and selfishness had corrupted man, divine providence interceded through the establishment of law. Kames argued that law arose from the need to curb immoral actions caused by the rise of luxury and affluence. God informed man of the need for reform through his inborn senses. While societies developed through four consecutive stages of development – hunting, pasturage, agriculture, and commerce – certain themes such as manners or morals, while overall progressing, could be challenged by certain advancements, such as property.<sup>122</sup> This explains how morals could decline in the agricultural and commercial stages as a result of luxury and avarice, but would ultimately improve with the aid of laws based on the common sense of man.

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<sup>121</sup> Home, *Sketches of the History of Man*, vol. i, 73.

<sup>122</sup> Berry, *The Idea of Luxury: A Conceptual and Historical Investigation*, 176; Stocking Jr., “Scotland as the Model of Mankind: Lord Kames’ Philosophical Views of Civilization,” 80. Berry argues that this cyclicalism was a common feature of Renaissance and Classical thought and Stocking Jr. argues that by understanding human nature in relation to the cycles of history, Kames sought to uncover how society could remain in the state that came before luxury and decay. For more information on the idea of cyclicalism, see 112n on pp. 113.

Kames frequently remarked on the importance of understanding feudal history for the purpose of understanding current laws and discovering areas in need of legal reform. In the preface to *Historical Law Tracts*, Kames argued that, ‘The feudal customs ought to be the study of every man who proposes to reap instruction from the history of the modern European nations: because among these nations, publick transactions, not less than private property, were some centuries ago, regulated by the feudal system.’<sup>123</sup> The feudal system was connected with the municipal law of Scotland and many existing Scottish practices were derived from feudal practices.<sup>124</sup> Throughout Kames’s works, the feudal system met with condemnation, as he consistently referred to it as the ‘anarchy of the feudal system’.<sup>125</sup> It was at odds with the development of the arts, since under it every man was a soldier or a worker,<sup>126</sup> and it consistently ‘led to confusion and anarchy’, being ‘as little fitted for war as for peace’.<sup>127</sup> Not only were feudal armies less expensive, leading to more wars,<sup>128</sup> but also, since soldiers were not paid, plundering occurred more frequently.<sup>129</sup>

Much of Kames’s writing can be considered as an attempt to rescue Scottish law from its feudal ties and origins and to adapt it to the existing commercial society. For example, Kames consistently criticised entails, believing they obstructed commerce.<sup>130</sup> Entails, a practice rooted in the feudal system, were not suited to commercial society. Entails were an area of law that needed to be reformed in order to mirror current society. Accordingly, instead of casting a broad stroke across all histories and accepting historical accounts from established writers like Blackstone had, Kames saw the need to delve more deeply into historical phenomena, embracing a more holistic account of historical events.

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<sup>123</sup> Home, *Historical Law Tracts*, vol. i, vii.

<sup>124</sup> *Ibid.*, viii.

<sup>125</sup> Home, *Sketches of the History of Man*, vol. ii, 26; 158.

<sup>126</sup> Home, *Sketches of the History of Man*, vol. iii, 4.

<sup>127</sup> *Ibid.*, 8.

<sup>128</sup> *Ibid.*, 2.

<sup>129</sup> *Ibid.*, 8.

<sup>130</sup> Home, *Sketches of the History of Man*, vol. iv, 287.

This method can be seen through Kames's account of the feudal system's origins and development. In *Essays Upon Several Subjects Concerning British Antiquities*, Kames investigated how the feudal system had been introduced into England and Scotland and what circumstance allowed it to exist. In *Historical Law Tracts*, Kames examined the notion of property and its origin and development from feudal society to the present.

### *Essays Upon Several Subjects Concerning British Antiquities*

As previously discussed in Chapter Three, Kames dedicated his first essay in *Essays Upon Several Subjects Concerning British Antiquities* to investigating the origins of the feudal system in Scotland. Kames noted that the feudal law's origins were 'mentioned indeed by most of our Historians, but dryly and cursorily, as if it were an ordinary Incident'.<sup>131</sup> By combining established facts with conjectures concerning historical events and documents, such as *The Laws of King Malcolm Mackenneth*, the *Regiam Majestatem*, the Roman laws discovered at Amalfi, and the date of England's reception of Civil Law knowledge, Kames argued that feudal law must have been introduced into Scotland at a later date than previously accepted by historians.<sup>132</sup> He then investigated how and why feudal society had developed. Kames contended that while feudalism may have mirrored the needs of society at one point in history, feudal practices and remnant customs from feudalism had become out-dated and were not beneficial to eighteenth-century commercial society. Kames argued that the feudal system was contradictory to the nature of mankind, and thus it could only have been introduced by force. He argued that feudalism, a constitution 'so contradictory to all the Principles which govern Mankind can never be brought about, one should imagine, without Violence, whether Conquest from without, or

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<sup>131</sup> Home, *Essays Upon Several Subjects Concerning British Antiquities*, 1.

<sup>132</sup> For more information on Kames's account of the reception of feudalism in Scotland, see pp. 115-118.

military force within'.<sup>133</sup> While Kames noted that neither of these causes – conquest or military force – had been chosen to explain the introduction of feudalism by writers of English and Scottish histories, he maintained that, 'This Law was brought into England by a *Conqueror*, at least one who treated his new Subjects as a conquered People'.<sup>134</sup> There was a disagreement between Kames and Blackstone on this point. Blackstone contended that the feudal system had been not the result of a conquest, but an acquisition, as the feudal system had been adopted by a general assembly of the realm, due to a lack of, and need for, military defence. Blackstone contended that the feudal system's introduction 'was done at once, all over England, by the common consent of the nation'.<sup>135</sup> Kames disagreed, and argued that there was no means, other than force, that could bring people to submit to an 'Act so visibly prejudicial to them'.<sup>136</sup>

Kames believed that feudalism could have only been introduced into Britain by the force of the Normans. He contended that feudalism, like most Scottish laws and customs, came to Scotland from England and had been established gradually by degrees. Malcolm had laid the framework that had been further developed by subsequent sovereigns. In addition, Kames insisted that establishing the titles of earl and baron and the creations of charters to confer land upon people in place of occupancy had contributed to the establishment and continuation of feudal society. With land forfeitures, the kings succeeding Malcolm had continued to grant feudal land, and thus feudal society and feudal laws had extended gradually throughout Scotland. Kames explained:

In short, my Conjecture is, that the Feudal Law was not introduced all at once, as our Authors insinuate, but by Degrees. And what I have often heard, favours this Conjecture, that so late as the Reign of *James VI*, there were

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<sup>133</sup> Home, *Essays Upon Several Subjects Concerning British Antiquities*, 1-2.

<sup>134</sup> *Ibid.*, 17.

<sup>135</sup> Blackstone, *Commentaries on the Laws of England*, vol. ii, 50.

<sup>136</sup> Home, *Essays Upon Several Subjects Concerning British Antiquities*, 20.

Proprietors in *Scotland* who never had accepted of a Charter.<sup>137</sup>

Kames opposed the accepted view that feudalism had resulted from a ‘prevailing desire to support the dignity of the crown’.<sup>138</sup> He maintained that feudalism had been introduced into England by force by the Norman conquerors and then adopted into Scotland through the King’s desire for power and the attractive proffers of land grants and noble titles.

The disagreement between Kames and Blackstone concerning the introduction of feudalism into England can be explained by understanding what each writer aimed to prove or accomplish. Kames attempted to investigate events and discover what actually occurred. This was important to Kames because he believed that, as society and human beings had evolved, laws had progressed to reflect and adapt to these new circumstances in society. While Blackstone consistently derided the introduction of the feudal system for interrupting England’s natural, divinely inspired, progress, he also adamantly contended that many of the practices considered feudal had been rooted in Saxon customs. By arguing that the Normans had not forced the feudal system on to England, Blackstone was showing that it had been partly accepted by the English people, and thus not all the practices under feudal law were unjust. By stating that the English people had accepted feudal society, Blackstone was establishing a certain line of continuity, which justified his arguments for the significance of time immemorial and long-usage in validating law. Kames gave a greater role to the sovereigns of both Scotland and England. Kames argued that feudalism had been established in England by force on a conquered people, and in Scotland from a desire for greater crown power through the proffers of lands and titles.

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<sup>137</sup> *Ibid.*, 24.

<sup>138</sup> *Ibid.*

## *Property in Historical Law Tracts*

Feudal society was given further consideration by Kames in *Historical Law Tracts* where he discussed the origin of property and its alterations and development through the feudal system. Kames, like Blackstone, traced the development of property from the original use-right to the existing practice in commercial society. In *Historical Law Tracts*, Kames asserted that through corresponding degrees of improvement since their creation, property and government had ‘arrived at that stability and perfection which they enjoy at present’.<sup>139</sup> In *Sketches*, Kames maintained that, ‘Among the sense inherent in the nature of man, the sense of property is eminent’.<sup>140</sup> In accordance with his view of society progressing from savagery to civilization, Kames argued that the notion of property was at first ‘faint and obscure, requiring time to bring it to perfection’.<sup>141</sup> However, the development and resilience of entails was an area of Scots and English law that troubled Kames, as it was an example of a custom or law that was not suited to current society. Lieberman explains: ‘when entails were judged by the standards of social welfare, they appeared as a fundamental economic liability. And when they were judged in terms of historical development, they appeared as an antiquated relic of feudalism inappropriately maintained in a commercial society.’<sup>142</sup> Entails were a vestige of feudal society and a hindrance to Scottish improvement. Kames explained how the development of landed property and inheritance practices influenced the development of entails.

Kames noted that the idea of landed property was first introduced in the agricultural stage of society. Property was disjoined from possession as owners would leave on summer

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<sup>139</sup> Home, *Historical Law Tracts*, vol. i, 144.

<sup>140</sup> Home, *Sketches of the History of Man*, vol. i, 66.

<sup>141</sup> *Ibid.*

<sup>142</sup> Lieberman, *The Province of Legislation Determined*, 157.

expeditions or for foreign war, and yet would remain proprietors of their land.<sup>143</sup> Originally there was no law concerning the alienation of landed property and no power to will a transfer of property to take place after death. Land was transferred to children as they continued in possession and use of the land at the death of their parents.<sup>144</sup> Eventually, the power of alienating landed property became universally accepted and an essential element in the notion of property. Furthermore, the ability to will property to a chosen heir had gradually developed from three practices: first, the existence of donations, originally to the church; second, the practice of adopting a son to be one's successor when a man had no children;<sup>145</sup> and third, the pupillary substitution, where a proprietor with an underage son could name a substitute in case his son died before coming to age.<sup>146</sup> Thus, the ability to will property to be received after death was gradually introduced. Kames argued that there was no other means for collaterals to succeed where there were no descendants other than by the will of the deceased.

The understanding of the nature of landed property, and the ability to transfer and alienate land, and to direct one's succession, were drastically transformed during the feudal system with the creation of entails. Entails allowed a property owner to declare a series of heirs, who would take possession in that order, instead of any natural heirs. Entailed land placed limits on the heirs of the property, preventing them from alienating or contracting debt on the land. Kames contended that these limitations imposed on heirs followed from the very nature of vassal rights within the feudal system. Vassal rights, being a form of usufruct, gave no power to alien land. This right remained with the superior lord.<sup>147</sup> Under

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<sup>143</sup> Home, *Historical Law Tracts*, vol. i, 146.

<sup>144</sup> *Ibid.*, 149-154.

<sup>145</sup> *Ibid.*, 186.

<sup>146</sup> *Ibid.*, 192.

<sup>147</sup> A usufruct was the right to the product or fruits of something, while the ownership and property belonged to another.

feudal law, the grantor had the power to regulate the succession of the lessee. A grantor would choose a specific form of inheritance, such as the male descendants of the original vassal.<sup>148</sup> Kames contended that these feudal practices fostered the ambitious view, among Scottish and English men, of preserving ‘their names, families and possessions, in perpetual existence’.<sup>149</sup> These practices allowed for perpetual succession and averted the division of large estates.

Kames noted that, after the feudal system was overthrown, vassals purchased their independence, and superiors, no longer having a need for military tenants, sold their land.<sup>150</sup> This marks the transition into commercial society. Kames argued, however, that men began to ‘regret the never-ceasing flux of land-property from hand to hand; and, revolving the history of former times, to wish for that stability of land-property which the feudal law introduced, if it could be obtained without subjecting themselves to the slavish dependence of that law’.<sup>151</sup> Thus, in England, a statute had been enacted that deprived the heirs of landed-property from aliening. Moreover, if a man died without issue, the land would revert back to the ‘giver and his heirs’.<sup>152</sup> In Scotland there was no law authorizing entails until the Entail Act 1685, but there were plenty of entails in existence.<sup>153</sup> Kames argued that a great portion of land was exempted from being bought or sold as a result of the 1685 statute, and land was daily becoming ‘dead stock’ by the granting of new entails. In addition to being subversive to industry and commerce, Kames contended:

A snare they are to the thoughtless proprietor, who, even by a single act, may be entangled past hope of relief; to the cautious again they are a perpetual source of discontent, by subverting that liberty and independency, to which all men

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<sup>148</sup> Home, *Historical Law Tracts*, vol. i, 193-195.

<sup>149</sup> *Ibid.*, 197.

<sup>150</sup> *Ibid.*, 198.

<sup>151</sup> *Ibid.*, 199.

<sup>152</sup> *Ibid.*, 200.

<sup>153</sup> *Ibid.*, 201.



aspire, with respect to their possessions as well as their persons.<sup>154</sup>

Kames consistently viewed feudal history in a negative light, showing how the feudal system and its practices continued negatively to affect society. In the Appendix to *Sketches*, Kames again argued against the existence of entails. He examined how entails undermined industry and commerce, as well as social and political life in Britain. Large entailed estates threatened the economic position of men of moderate means. These men were vital for the advancement of art and science, and political society was dependent upon them.<sup>155</sup> As Lieberman concludes: 'Entails were thus an historical anachronism, an economic disaster and an ominous political hazard.'<sup>156</sup> Entails had originated in a feudal world, and were not beneficial to commercial society; this was an area of English and Scottish law that needed reform.

Kames presented a stadial history, viewing feudalism in terms of a specific stage in historical development. He referred to the society in which he was writing as a commercial society, while feudal society represented the agricultural stage. Feudalism was portrayed as a period of universal tyranny, existing prior to a state of commerce when men became linked by economic interdependence and experienced a greater distribution of wealth. When Kames considered the most recent progress of society, he considered it as an advancement from feudal and agricultural society into commercial society. He argued that many laws, which were well suited to a feudal society, were out-dated and in need of reform in commercial society. Kames's methodology was in direct contrast to Blackstone who never considered feudal society as a distinct stage of societal development. Laws had

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<sup>154</sup> Ibid., 219.

<sup>155</sup> Home, *Sketches of the History of Man*, vol. iv, 278-288.

<sup>156</sup> Lieberman, *The Province of Legislation Determined*, 158.

developed from or through feudalism into their existing state. This is an example of how Blackstone presented a mix between progress and continuity. For Blackstone, to have regarded feudalism as a separate stage of history would have contradicted his view that laws gained value from long continued usage. Thus feudal laws and tenures were part of the development of the current law, and were not an alien intrusion. Kames, with his stadial conjectural history, was not wedded to the idea of continuity. Thus, feudal society was a category used by him to signify the system of laws, customs, moral beliefs, and societal practices that existed before the onset of commercial society.

Kames method of stadial history was also in direct contrast with Blackstone's, to use Duncan Forbes's term, 'vulgar Whiggism'.<sup>157</sup> Blackstone and his fellow Whig historians of the eighteenth century tended to present history as a story about the restoration of the ancient Anglo-Saxon constitution. As previously discussed, beginning with the Norman Conquest, English liberty had been subject to various interruptions, but had been gradually re-established – for instance with *Magna Carta*, the Military Tenures Abolition Act, and the *Habeas Corpus Act* – culminating in the perfection of law in Blackstone's time. Kames, instead, presented a scientific Whig interpretation of history in which liberty was secured by modernization and progress.<sup>158</sup> For Kames, the origin of British liberty lay in the modern period and not in the ancient Anglo-Saxon constitution. Kames's theory of law was consistent with the development of society, as each stage gave rise to particular habits and ways of thinking. He argued that current laws should reflect current beliefs.

In short, Kames argued that it was important to understand feudal history in order fully to understand eighteenth-century law. The feudal system was connected with the municipal law of Scotland and many existing Scottish practices were derived from feudal

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<sup>157</sup> Forbes, *Hume's Philosophical Politics*, 139.

<sup>158</sup> See pp. 54-56.

practices. Entails were an example of an existing practice that originated in the feudal system and was not suited to commercial society. Kames's objective was to identify laws and practices that were out-dated, such as entails, with the hope that new laws could be created that were better suited to modern commercial-driven society. This method can be seen through Kames's account of the feudal system in *Essays Upon Several Subjects Concerning British Antiquities*, and his examination of the notion of property and its origin and development through feudal society to the present in *Historical Law Tracts*. By understanding how the feudal system originated and how property had developed and was altered by feudalism, modern-day lawyers and legislators would be more capable of determining where and how legal reform should take place.

### **Section 3.3: Bentham**

Bentham, similarly to Kames, argued that legal reform was necessary. However, Bentham argued that the common law should be replaced with a science of legislation based on the principle of utility. In calculating the greatest happiness, history was only important in so far as it had produced the existing law, because existing laws influenced individual expectations and affected the overall sense of security in society. History, however, was also useful in that it provided examples of how past legal systems, which were not based on the principle of utility, were flawed and might lead to despotism. Historical investigation demonstrated the disutility in the common law and the role that the particular interests of past sovereigns and legislators had played in influencing the legal system and as a result, the role they had played in hindering the law from becoming what it ought to be. Thus, as argued in Chapter Four, Bentham totally rejected Blackstone's assertion that historical longevity and usage conferred moral rightness on existing laws.

Because Bentham did not think historical usage determined the moral rightness and legal validity of a law, there was no need for a narrative describing how the law had developed from its origin, through the feudal age, to the present. However, there were numerous occasions when Bentham condemned the feudal system, on the grounds that it was an example of a past legal and social system that did not promote the greatest happiness in a society. In this section, I will discuss four occasions on which Bentham referred to feudal society in his writings. Bentham noted the many legal practices in eighteenth-century England that were vestiges of the feudal system. First, in *Principles of the Civil Code*, Bentham argued that the feudal system was intertwined with English property law, which made it difficult completely to eliminate all remnants of the feudal system without affecting the expectations of individuals in society. In *Defence of Usury*, Bentham used the laws against maintenance and champerty as examples of laws that had been useful when they had been created, but they were vestiges of the feudal system that needed to be abolished. Finally, in *Draught of a New Plan for the Organisation of the Judicial Establishment in France*, Bentham noted that France's National Assembly had successfully uprooted the feudal system. In addition, Bentham contended that the justices in eyre that existed during English feudal society were an example of a judicial practice that was admired because of its historical longevity, but had been initially created out of partial interests, with the objective of centralizing power under the King.

Bentham's opinion of the feudal system was best captured in *Principles of the Civil Code* when he responded to Montesquieu's likening the feudal system to an old and majestic oak. Bentham retorted:

We may rather compare it to that fatal tree, the manchineel tree, whose juices are poisons to man, and whose shade is

destructive to vegetation. This unfortunate system has infused in the laws confusion and complexity, from which it is difficult to deliver them. As it is every where interwoven with property, it requires much management to destroy the one without injuring the other.<sup>159</sup>

Bentham noted the pain and harm that had tended to result from feudal practices in the past. Feudalism, however, was deeply embedded within England's system of property, which meant that it was difficult fully to rid English society of feudal practices.

In *Principles of the Civil Code*, Bentham provided an example of how remnants of the feudal system were present within the system of property. Bentham explained that freehold land was worth more than copyhold because in copyhold there was a lord of the manor with certain rights, which created a relationship between the occupier and the principal proprietor. Bentham warned, however, 'it must not be thought that what is lost by the vassal is gained by the lord: the greater part falls into the hands of the lawyers, and is consumed in useless formalities or vexatious triflings. These are remnants of the feudal system'.<sup>160</sup> Bentham noted that the existence of copyhold was a vestige of the feudal system. The occupier owed services to the lord of the manor in a relationship reminiscent of the vassal-lord relationship in feudal society. Bentham contended, however, that the lawyer involved in managing this relationship took advantage of the situation by seizing a portion of the amount owing to the lord. This was also an example of how English legal practices, specifically the existence of lawyers, resulted in unbeneficial consequences for members of society more generally.

Bentham, like Kames, believed that many laws still in force in eighteenth-century England might have been useful at the time in which they were created, but were not suited to eighteenth-century society. This was the case with the laws against maintenance and

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<sup>159</sup> Bentham, "Principles of the Civil Code," 342.

<sup>160</sup> Ibid.

champerty, which Bentham discussed in *Defence of Usury*.<sup>161</sup> Champerty and maintenance were practices that were made punishable in common law in order to prevent frivolous litigation. Champerty was the process whereby a person bargained with a party in a lawsuit in order to acquire a share of the proceeds. Maintenance was the intermeddling of disinterested parties in lawsuits by supporting the litigation of strangers in exchange for a share of the profits. Bentham noted that penalties against champerty and maintenance were severe.<sup>162</sup> He went on:

Whether in the barbarous age which gave birth to these barbarous precautions, whether, even under the zenith of feudal anarchy, such fettering regulations could have had reason on their side, is a question of curiosity rather than use. My notion is, there that there never was a time, that there never could have been, or can be a time, when the pushing of suitors away from court with one hand while they are beckoned into it with another, would not be a policy equally faithless, inconsistent, and absurd. But, what every body must acknowledge, is, that, to the times which called forth these laws, and in which alone they have started up, the present are as opposite as light to darkness.<sup>163</sup>

Bentham acknowledged the harm caused by not allowing every citizen access to law and justice. However, Bentham noted that certain societies might have developed laws against champerty and maintenance because they were necessary. In earlier times, it was possible that rich men could have taken advantage of the system, buying into weak claims in the hope that they could use their power to strengthen them. He continued: ‘the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench.’<sup>164</sup> Bentham noted, however, that the eighteenth-century English legal system and its judges were powerful, and thus laws against champerty and

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<sup>161</sup> Bentham compiled a series of thirteen letters that argued for the abolition of legal restrictions against usury. Bentham believed that usury was beneficial and that restrictions on usury hindered inventiveness. These essays were direct attacks on writers, such as Adam Smith, who recommended legal limits on interest rates.

<sup>162</sup> Bentham, *Defence of Usury*, 118-119.

<sup>163</sup> *Ibid.*, 121-122.

<sup>164</sup> *Ibid.*, 122.

maintenance were no longer necessary. These laws, originally enacted to prevent injustice, now strengthened the position of the rich and powerful and prevented poorer and weaker members of society from seeking justice. These laws were no longer useful or beneficial and thus, Bentham argued, they should be abolished.

Bentham also considered the feudal system in France and commended the National Assembly in their attempts to uproot the remnants of feudalism. In *Draught of a New Plan for the Organization of the Judicial Establishment in France*, Bentham argued that, ‘The idea of the King’s being, as the lawyers term it, the fountain of justice, is a remnant of feudal barbarism; a branch of the poisonous tree, which the National Assembly have already, to their immortal honour, rooted up’.<sup>165</sup> Bentham acknowledged that, under feudalism in France, the natural and proper role of the King was to administer justice. The King sat as a judge because his rulings and decrees were more likely to be followed and respected than those laid down by any other member of society.<sup>166</sup> However, in the eighteenth century, Bentham argued that the only proper field of action for a monarch was the military department.<sup>167</sup> This reform in the French system was necessary, as it was no longer beneficial to have the King responsible for distributing justice.

Bentham acknowledged that England, like France, needed to abolish laws that were not beneficial to society: ‘The interest of the individual, or the moment, produces laws in a dark age: ingenuity finds uses for them in a more enlightened one.’<sup>168</sup> This quote could relate to the above arguments concerning modern lawyers taking advantage of the copyhold relationship between proprietor and occupier and the fact that the laws against champerty and maintenance had been used in the eighteenth century to strengthen the power of the

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<sup>165</sup> Bentham, *Draught of a New Plan for the Organisation of the Judicial Establishment in France*, 2.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*, 6.

<sup>168</sup> *Ibid.*, 21.

rich and to prevent the poor and weak from seeking justice. Bentham maintained that a law's value should be measured by its conformity to the principle of utility and not based on its antiquity. To further support this argument, Bentham noted that English judicial circuits had been originally created to strengthen the centralization of power under the King during feudal society by eliminating the power of the local rulers:

While the feudal tree was in full bloom, and castles sprung up like mushrooms, each castle enclosed a giant, who, growling treason at the King, sat banqueting on the favourite food of giants, the blood of the people. For this delicacy he was beholden to his dwarf, who with a lawyer's gown upon his back, sat squeezing the blood out, and conveying it into the monster's mouth. The arch-giant whose dwarfs, with all their squeezing, could not supply him fast enough, bethought himself at last of dispatching giants-errant to kill little giants, that he might get their share. As these hunting giants required to be fed till they could find game, it was only now and then that such hunting parties could be fitted out. At first it was once in seven years, and this was counted a "stupendous effort of magnanimity and benevolence," by the romancers of that time. At last it came to twice in one year, where it stands at present.<sup>169</sup>

Bentham argued that the traveling circuits were admired during his time partly because the courts were of use when created, but mostly because 'it is so old, that greatest of all merits in the eyes of lawyers'.<sup>170</sup> For Bentham, the merit of travelling courts, and the merit of all other legal practices, should depend on its overall benefit to society and not on its antiquity.

Bentham once again took the opportunity to censure the common law in *Draught*. He noted that the National Assembly had been derided for 'pulling down establishments'.<sup>171</sup> Bentham used the example of the local judicatures of the Baron's Court, which England had dismantled. Bentham was referring to the courts that conducted judicial

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<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.



and administrative duties at a local level.<sup>172</sup> Bentham argued that justice was available to all when local judicatories were in place. He further demonstrated the benefit of having local judicatories by arguing that the justices in eyre only travelled once every seven years, and that these local courts were capable of administering justice during this interim. However, sardonically Bentham argued that the movement for their restoration would not be successful if based on ‘weak’ arguments such as the fact that the courts granted universal access to justice or the fact that their restoration would end oppression. He noted that the strongest arguments for restoring the Baron’s court would be ‘for the pleasure of demolishing the work of innovation, and re-edifying that most exquisite of all structures, the old English Common Law’.<sup>173</sup> Thus, Bentham argued that the National Assembly should not be derided for ‘pulling down establishments’ if these old establishments had not promoted utility. Legal systems and practices should be evaluated based on their benefit to individuals and to society generally, and not valued because of their historical longevity. This example demonstrates Bentham’s two arguments concerning history and law: history could be used to show examples of past laws and legal systems that were either beneficial or harmful to society, and historical usage did not confer moral rightness on laws.

Bentham’s references to feudalism within his works revealed his opinion concerning the place of history within legal thought. History could show examples of past societies that did not promote the greatest happiness and show what had prevented laws from becoming what they ought to be. The existence of vestiges of the feudal system, and the difficulty of ridding society of these practices, was an example of why England needed a new legal system. The principle of utility should determine what the law ought to be rather than the authority of history. The failure of history to dictate morally right laws was

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<sup>172</sup> For more information on local courts in English history, see John Hamilton Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths LexisNexis, 2002), 7-9; 20-27.

<sup>173</sup> Bentham, *Draught of a New Plan for the Organisation of the Judicial Establishment in France*, 22.

demonstrated by past practices, which did not promote utility. Laws that may have once been beneficial to society, such as the proprietor-occupier relationship and laws against champerty and maintenance, were maintained because of their historic usage. Bentham's analysis of feudal practices supported his argument that history should not be used as a legal authority. Ridding England of the common law and establishing a science of legislation based on the principle of utility would end practices – many of which were established in feudal society – that continued to produce harm.

## **Conclusion**

In the writings of Blackstone and Kames, history featured prominently, as historical usage or the historical progress of laws directly influenced what the law was and what the law ought to be. Blackstone's objective was to teach the common law to both lawyers and laymen. The *Commentaries* were intended to glorify the current eighteenth-century English legal and political system. Blackstone's sources were limited to primary legal sources and accounts of legal development from recognized writers. In addition, he used the Bible to show a continuity in morality from Biblical times to the present, with the feudal system being seen as a point in history through which Anglo-Saxon laws passed in their transition into the existing laws and practices.

Kames's theoretical and conjectural history utilised a wider range of sources. The Bible was not used to justify current practices, but to discover the state of morality, law, and society during Biblical times. Kames's use of the Bible was similar to his use of feudalism in his historical narratives. He examined feudalism in order to understand how this stage of society influenced the development of law and morality in England and Scotland. Instead of simply describing and justifying the current law, Kames wished to

trace the history of the progress of morality and determine how such an account could help identify the most appropriate avenues for legal reform.

Bentham did not believe that historical usage should influence or determine current laws. He demonstrated the failure of past legal systems, like the feudal system, to promote the greatest happiness of the greatest number, and questioned the accuracy of historical sources, such as the Bible. He treated the Bible as a historical source like any other source, and not as a divinely inspired text. The Bible featured prominently in the moral and legal sciences of the eighteenth-century, and by emphasizing its inaccuracies and inconsistencies, Bentham questioned the entire method of using the Bible to validate legal and moral practices.

Blackstone's method of historical analysis was intended to produce a readable manual on English law. He did not attempt to reinterpret history; he accepted the received interpretation of the history of the common law derived from Hale; he wanted to describe the current law and the historical facts that had led to its perfection. Kames's conjectural history sought to uncover the development of laws and society in both England and Scotland. To do this, he included a wide variety of sources, and it was acceptable to assume things that were probable, without having infallible evidence, in order to attempt to uncover a more accurate and suggestive history.

Bentham used historical examples to illustrate his arguments and seemed to have a much better understanding than either Blackstone or Kames of the problems and pitfalls inherent in the study of history. Bentham's philosophy is often seen as ahistorical, yet an analysis of the sources and examples he used, the way he used the Bible, and his references to feudalism show a sophisticated appreciation of the uses of history and in particular its capacity for distortion by historians and legislators following their own interests. Bentham

argued that historic use should not automatically confer moral rightness on current laws, nor should historical narrative determine specific avenues for legal reform. The use of history should be limited to learning from the past, which included determining whether past laws were beneficial or burdensome for society, and observing what had prevented society, and its laws, from developing into what it ought to be.

## **Chapter Six: History, Utility, and Legal Reform: The ‘Rational Legal Sciences’ of Blackstone, Kames, and Bentham**

### **Introduction**

While their opinions and views clashed on many legal, political, and social topics, Blackstone, Kames, and Bentham each aspired to present a ‘rational legal science’ accessible to laymen, lawyers, and writers. Blackstone noted the previous attempts of those who came before him – most notably Matthew Hale, Henry Finch,<sup>1</sup> and Edward Coke – to provide a rational and methodical approach to English law. As Cristina S. Martinez and Carol Matthews have pointed out, Blackstone’s strength came in his visual, artistic, architectural approach, which greatly differed from, for example, Coke’s unsystematic exposition.<sup>2</sup> Blackstone is seen as the first writer who attempted to create a systematized account of English law grounded on general principles and presented in the classic Roman structure, and in the process created a new ‘science of law’.<sup>3</sup> Kames used an historical treatment of the law as the basis for a rational science suitable for every person who had an appetite for knowledge. His science revealed areas of law that needed to be reformed, and he contended that such reform could occur in a court of equity, where judges could determine cases using common sense and the principles of utility and justice. Bentham’s objective was to create a new system of law and politics based on the principle of utility. It was essential that this system should be simple, transparent, and accessible to all. This chapter will explain how each writer’s underlying philosophical and historical views and

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<sup>1</sup> Henry Finch (c. 1558-1625), author and lawyer: see his *Nomotexnia* (c. 1585).

<sup>2</sup> Cristina S. Martinez, “Blackstone as Draughtsman: Picturing the Law,” in *Re-Interpreting Blackstone’s Commentaries: A Seminal Text in National and International Contexts*, ed. Wilfrid R. Prest (Oxford: Hart Publishing, 2014), 31-58; Carol Matthews, “A ‘Model of the Old House’: Architecture in Blackstone’s Life and Commentaries,” in *Blackstone and His Commentaries Biography, Law, History*, ed. Wilfrid R. Prest (Oxford: Hart Publishing, 2009), 15-34.

<sup>3</sup> Lobban, “Blackstone and the Science of Law,” 311. For more on Blackstone’s contribution to the science of English law, see S. F. C. Milsom, “The Nature of Blackstone’s Achievement,” *Oxford Journal of Legal Studies* 1, no. 1 (Spring 1981): 1-12.

personal objectives influenced their ‘rational legal science’, and how legal reform would be achieved within the legal systems that they promoted.

In the ‘Preface’ of *A Fragment on Government*, Bentham wrote that those who studied the law belonged to one of two categories: the expositor or the censor. Bentham explained that, ‘To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is: to that of the Censor, to observe to us what he thinks it ought to be’.<sup>4</sup> For Bentham, the role of the expositor was to state what legislators and judges had done, while the role of the censor was to argue what legislators and judges ought to do in the future. While Blackstone’s apparent objective had been to play the role of the expositor and describe the laws of England, Bentham believed that Blackstone had actually assumed the role of the censor by attempting to justify the laws. According to Bentham, by both describing and praising the common law, Blackstone advocated its continuance in its current state.<sup>5</sup> In contrast, Bentham argued that reform was needed and thus he believed that the motto of a good citizen was, ‘To obey punctually; to censure freely’, because if a system were never to be censured, then it would never improve.<sup>6</sup> Furthermore, Bentham contended that if Blackstone were to assume the role of the censor, he needed not only to approve of the laws that were right, but also to condemn those that were wrong:

Of a piece with the discernment which enables a man to perceive, and with the courage which enables him to avow, the defects of a system of institutions, is that accuracy of conception which enables him to give a clear account of it. No wonder then, in a treatise partly of the *expository* class, and partly of the *censorial*, that if the latter department is filled with imbecility, symptoms of kindred weakness should characterize the former.<sup>7</sup>

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<sup>4</sup> Bentham, “A Fragment on Government,” 397.

<sup>5</sup> Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham*, 51-53; Burns, “Bentham and Blackstone: A Lifetime’s Dialectic,” 24-46.

<sup>6</sup> Bentham, “A Fragment on Government,” 399.

<sup>7</sup> *Ibid.*, 404.

By defending the current legal system, Blackstone's expository account of the law had become a censorial account, implying that the current law was perfect, and that what legislators and judges must do in the future was to continue what they historically had done.

Kames believed that the study of the law was only rational when it was traced historically 'from its first rudiments among savages, through successive changes, to its highest improvements in a civilized society'.<sup>8</sup> While Kames argued that this was the only way successfully to study law as a rational science, he noted that it was rarely performed in this way. Kames's reason for studying and tracing the historical evolution of the law was that Scotland and England had different laws, and he believed that they should be amalgamated. If a rational study was undertaken explaining how the law had developed in both Scotland and England, they could be compared and the most rational laws enacted for the whole of Britain.<sup>9</sup> In many ways, Bentham regarded Kames as a corrective to the apologetic work of Blackstone. While Bentham and Kames had different views concerning what ought to be law and what was the best method for enacting legal change, they agreed that the current system needed to be reformed.

Their individual views on the importance of history, and its connection with law, can be viewed through their contributions to historical scholarship. Both Blackstone and Kames produced textual historical scholarship for the improvement of legal study. Blackstone recreated *Magna Carta and the Charter of the Forest*, claiming that hitherto there had been no full and correct copy of the charter fit for general inspection. Every copy of the charters available in print had been taken, not from the original, but from a grant made by Edward I. Thus, Blackstone recreated the original documents, and included some

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<sup>8</sup> Home, *Historical Law Tracts*, vol. i, v.

<sup>9</sup> *Ibid.*, xvi.

auxiliary documents for further elucidation.<sup>10</sup> Kames also contributed to legal textual historical scholarship by promoting and partaking in collating, organizing, and publishing law books. As discussed in Chapter Three, Kames was responsible for the creation of legal dictionaries – *The Decisions of the Court of Session*, *The Statute Law of Scotland Abridged, with Historical Notes*, and *Select Decisions of the Court of Session, from 1752 to 1768*. Kames compiled legal decisions, making the current law more accessible for current and future lawyers, judges, and writers. Both Blackstone’s and Kames’s contributions to recovering legal-historical documents demonstrates the importance they both placed on history; more specifically, the important role of history in legal scholarship. In great contrast to Blackstone and Kames, Bentham never attempted to recreate a specific historical document. Although he did briefly entertain the idea of digesting the common law into statute, the difficulty of this task inspired Bentham to call for the abandonment of the common law and the creation of a complete legal code. The common law was unclear and incapable of being systematized, and thus should be discarded in favour of a code that was clear, straightforward, and accessible to all. This move encapsulated Bentham’s position on history and law: history should have no authority on present law, and was only useful as a source of example.

In order to present a ‘rational legal science’, the three writers each presented a method aimed at the following: first at determining what was law; second, in the case of Bentham and Kames, at determining what ought to be law; and third, at describing how the law should be administered, including how legal change should occur. At the heart of these methods was the acknowledgment that England and Scotland were societies that had undergone modernization. How the law reflected, resulted from, or persisted through this process of modernization was essential to each legal science. What were past laws? What

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<sup>10</sup> Blackstone, *The Great Charter and the Charter of the Forest*, i.



were the moral beliefs of the past? What were the laws and moral beliefs in eighteenth-century Britain? How did legislators or moralists determine what was right and wrong? How did and could legislators change laws? How did legislators and judges ensure laws remained current and relevant and evolved properly in the future? These were the types of questions that Blackstone, Kames, and Bentham attempted to answer. Thus, the objective was not simply to determine what was law or what should be law; more importantly, it was to understand the relationship between law and the society in which it functioned. For this reason, history played a key role in rational legal sciences. This chapter will first discuss the legal sciences that Blackstone, Kames, and Bentham developed and advocated. Integral to this discussion is the way in which historical study influenced their philosophies. Following this, I will examine each writer's stance on the social contract debate, and how history entered into the discussion. Finally, I will examine each writer's opinions on legal punishment. The social contract debate and ideas concerning punishment were two areas in which Bentham famously censured Blackstone's views. Moreover, examining Kames's views on these two subjects will add further insight into how his legal science and philosophy compared to those developed by Blackstone and Bentham. Their individual approaches to the social contract debate and their views on punishment were consistent with the philosophy and methodology present throughout the entirety of their legal sciences.

### **Section 1: The distinctive legal sciences developed by Blackstone, Kames, and Bentham**

This section will focus on the 'rational legal sciences' that Blackstone, Kames, and Bentham developed and supported. Integral to this study is identifying the way in which history played a key role and was seen to influence the law in the sorts of legal systems they advocated. After discussing how the legal system was to function and how history

instructed and constructed the law, I will examine how legal reform could take place within their respective systems. Essential to this study are the three agents of legal change discussed by Henry Maine: legal fictions, equity, and legislation.<sup>11</sup> Blackstone, Kames, and Bentham either directly or indirectly supported one or another of the three methods of legal change, and these methods were embedded within their legal sciences.

### **Section 1.1: Blackstone's Legal Science**

As has been argued by Lobban and Cairns, Blackstone attempted to create a coherent view of English law, outlining the theoretical background of the common law and presenting it in a Roman law framework.<sup>12</sup> Thus, the *Commentaries* were divided into four books: The Rights of Persons; The Rights of Things; Of Private Wrongs; and Of Public Wrongs. Blackstone explained that England had both unwritten law (*lex non scripta*) and written law (*lex scripta*). Unwritten laws were based on customary laws that received their legitimacy from long and continued usage. Specifically, Blackstone contended that 'the goodness of a custom depends upon it's having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary'.<sup>13</sup> In addition, good customs had to be immemorial, continued, peaceable, reasonable, certain, compulsory, and consistent.<sup>14</sup> Blackstone explained that written laws, which included statutes and legislation, were either declaratory of, or remedial of defects in, the common law, and that where common law and statute law conflicted, statute law would prevail. While unwritten and written laws may have received their authority from different

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<sup>11</sup> Maine, *Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas*, 25-28.

<sup>12</sup> Lobban, "Blackstone and the Science of Law," 317-319; Cairns, "Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State," 318-360.

<sup>13</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 67.

<sup>14</sup> *Ibid.*, 76-78.

sources – custom and legislation respectively – they should be both consistent with natural law, reason, and divine law, and enacted for the better maintenance and organization of society.

Blackstone argued that laws proven to be inconsistent with natural law, and contrary to reason and divine law, were not only bad law, but not law. When a law was found to be unreasonable, and thus inconsistent with natural law, it was the role of the judges to fix these past failures, by declaring what was and always had been the actual law. Blackstone contended:

But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.<sup>15</sup>

Since laws were validated by long and continued usage and consistency with natural law, there was uniformity between past and present laws. Similarly, since so-called laws that were proven to be unreasonable, immoral, and inconsistent with natural law were consequently condemned as invalid, principles of law and morality were one and the same. As Blackstone insisted, ‘what is not reason is not law’.<sup>16</sup>

Blackstone’s idea of legal development was to adapt the common law to the needs of society and re-establish the ideals of liberty fostered in the Anglo-Saxon constitution, which included identifying laws that had since been enacted which were contrary to natural law in order to remove them. Blackstone explained: ‘The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to

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<sup>15</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 70.

<sup>16</sup> *Ibid.*

suppose they acted wholly without consideration.’<sup>17</sup> Unless the precedent was completely absurd, the judge was required to follow it because it was to be assumed that it was reasonable, albeit the reason had become obscured through the passage of time. This idea was probably adopted from Coke who argued that the inability to remember the origin of, and reason for, a law did not warrant its abolition.<sup>18</sup> Blackstone argued that the very fact that a law existed was a presumption that it was beneficial and that it was consistent with natural law. Natural law had developed out of self-preservation and rational reflection, as man was empowered through the faculty of reason to discover God’s law. Blackstone argued that God created the world and implanted in every individual an ability to perceive and understand the natural law, and thus man knew when a law was unnatural and unjust. Thus, Blackstone’s views on law, morality, and reform were ultimately grounded in theology.

As discussed in Chapter Two, at points in the Introduction of the *Commentaries*, Blackstone contended that if legislation was found to be absurd and inconsistent with reason, it was the role of the judges to amend these unjust laws. Blackstone explained that ‘acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void’.<sup>19</sup> The judges were to conclude that the unjust consequences of the Act were not foreseen by Parliament, and thus were at liberty to disregard the Act, drawing on the principles of equity.<sup>20</sup> Wilfrid Prest asserts that, despite Bentham’s harsh treatment of Blackstone, they had similar goals for

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<sup>17</sup> Ibid.

<sup>18</sup> Lobban, “Blackstone and the Science of Law,” 315. For an overview of the historical thought predominant in seventeenth-century England, including the views of Coke, and the prevailing doctrines of immemorial usage, custom, and the ancient constitution, see Pocock, “The Common-Law Mind: Custom and the Immemorial,” 30-55.

<sup>19</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 91.

<sup>20</sup> Ibid.

reform, especially concerning criminal justice and the penal system. Blackstone criticised specific legal rules, including the game laws, the doctrine of corruption of blood, and the proliferation of capital offences.<sup>21</sup> These were English laws that were inconsistent with natural law, and thus the logic of Blackstone's position was that they were not law. However, these were examples of past legislative failures that Blackstone noted that Parliament would need to rectify.

For Blackstone, legal development and progress occurred when judges discovered the law. Blackstone wanted to remove the inconsistencies introduced into the law by legislation, and allow the law to develop in response to the needs of society. This view underlined his insistence on progress and continuity. Blackstone explained: 'how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice'.<sup>22</sup> Blackstone wrote that the judges were the 'living oracles of the land' and their knowledge came from experience and study.<sup>23</sup> Judges swore not to decide on their own private opinion, but rather according to the customs of the land. John Langbein notes that while Blackstone 'was alert to the danger of judicial arbitrariness', he was confident that the common law had developed appropriate safeguards in order to prevent this misuse of justice. While he argues that Blackstone overestimated these safeguards, Langbein provides an analysis of the limitations on judicial power detailed by Blackstone, which included legal doctrine, the jury system, judicial independence, and appellate review.<sup>24</sup>

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<sup>21</sup> Prest, *Blackstone and His Commentaries: Biography, Law, History*, 63.

<sup>22</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 69.

<sup>23</sup> Ibid.

<sup>24</sup> John H. Langbein, "Blackstone on Judging," in *Blackstone and His Commentaries Biography, Law, History*, 65-78. Langbein argues that Blackstone overestimated the four safeguards that he contended limited judicial powers. First, Blackstone was aware that judges had much room for discretion. Second, the jury system was not sufficient to safeguard against arbitrary judicial decisions because English trial judges frequently dominated juries. Third, judicial independence was non-existent, as the Crown retained many channels of influence in selecting and promoting judges. Fourth, appellate review was limited to discussing

Posner contends that the judge's responsibility, according to Blackstone, was to scrape away the Norman intrusions that had led England astray and to recover the original common law of the Anglo-Saxons: 'The Norman conquerors had submerged the old customs under the oppressive institutions of feudalism, and the task of the modern English judge was to scrape away the Norman incrustations with which the common law, that is, immemorial custom, had been overlaid, and restore it to its pristine Saxon form.'<sup>25</sup> Posner argues that this was Blackstone's attempt to justify judicial creativity in circumventing unreasonable legislation, and to adapt the common law to both the needs of society and the ideals of liberty that he ascribed to the Saxons.<sup>26</sup> Blackstone understood the role of the judges to be the 'depository of the laws; the living oracles', and thus to make decisions based on the custom of the land.<sup>27</sup> This included scraping away, not necessarily 'Norman intrusions', but more accurately, laws that were found to be contrary to reason and natural law.

As with earlier English legal writers, such as Hale and Coke, history was vital to Blackstone's view of the common law. The validity of the current law, which implied its consistency with natural law and divine law, could be demonstrated through history. It is evident that Blackstone connected history and law in two ways. In one sense, history was evidence of the law. The fact that current laws were also present in other societies in history, especially during Anglo-Saxon times, demonstrated that they were consistent with natural law. Thus, the current law was valid because of its consistency with natural law. In another sense, history constituted the law: the law was its history. The English law was the law because it consisted of customs that had been in force throughout English history. It

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questions of law, and did not include the reasonableness of the verdict, and the decision to reserve a point for appellate review was solely in the hands of the trial judge.

<sup>25</sup> Posner, *The Economics of Justice*, 25.

<sup>26</sup> *Ibid.*, 25-26.

<sup>27</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 69.

was historical practice that provided legal authority and the justification for these laws to continue to be practised. History worked in both ways to provide a rational understanding of what was law. History constituted English law, as historic usage gave authority to what was law. But historical usage was also evidence that the current law was moral, just, and consistent with natural law.

Thus, both history and natural law were vital for Blackstone's understanding of English law. Lobban argues that Blackstone's account of the common law was essentially empirical and historical, and that natural law was employed only as an external test of reasonableness.<sup>28</sup> However, Lobban's position downplays the importance of natural law to Blackstone's conception of common law. Natural law was also 'the light of reason'<sup>29</sup> that directed the development of common law. While laws and judicial decisions were founded on precedent, and judges were 'living oracles', whose role was to make decisions based on the custom of the land, these customs and laws were to be strictly followed by future judges, as long as they were consistent with natural law.<sup>30</sup> It was the presumed consent of the wider population that signalled a law's reasonableness. Customs received binding force from long and immemorial usage and universal reception, and these two factors signalled that a law was consistent with natural law.

While Blackstone never explicitly identified legal fiction as his chosen agent of legal change, the notion that a law was void if it conflicted with natural law and reason, and that the new law was actually always the law, was a form of legal fiction. Blackstone

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<sup>28</sup> Lobban, "Blackstone and the Science of Law," 333.

<sup>29</sup> As discussed above, Postema notes that natural law was not a 'higher law' standing in judgment on human law, but was 'the light of reason shining through the law'. Postema, *Bentham and the Common Law Tradition*, 37.

<sup>30</sup> Hart also downplays the actual importance of natural law in Blackstone's legal science. Hart contends that natural law was an empty test used to stifle criticism, as a positive law was proven to be lawful simply because it did not contradict any provisions of the natural law. Hart argues that the natural law test was 'a net through which virtually everything must fall'. H. L. A. Hart, "Blackstone's Use of the Law of Nature," *Butterworth's South African Law Review* (1956): 174.

asserted that it was the role of judges to advance the law by stating that such unjust commands had never been lawful. By believing that the law was unchanging, judges and legislatures advanced the law by discovering a more accurate form of words to express it. Where law had been long continued, its expression continued to be regarded as accurate, and the presumption was more likely to be correct. Maine argued that good law was expected not to change. This was in large part due to the belief that law was connected with God's will. God had given laws to humans, and it was the responsibility of all humans to preserve them. Maine contended that the law in fact did change, as common law judges altered the substance of the law, but the fiction was that it remained unaltered.<sup>31</sup> Thus, common law judges could affect legal change, but this change was veiled by the fact that the new law was considered always to have been the law. By assuming that the new law had always been the law, and that previous judges had been wrong in their assertions, common law judges introduced changes while claiming that they were doing no such thing – they claimed that the new law more accurately expressed the natural law that always existed.

## **Section 1.2: Kames's Legal Science**

Kames's legal science was aimed at reforming the law through the use of equity. Kames argued that law was only a rational study when treated historically, though this was not to say that law received authority and validation from historical usage. Historical study revealed what the current laws were and why they had developed, and reason was employed to determine which areas of the law needed to be reformed. Kames believed that a judge in a court of equity should apply common sense, utility, justice, and reason. In

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<sup>31</sup> Maine, *Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas*, 25-26.



*Principles of Equity* Kames attempted to show how equity decisions were made and how they could effect legal change.

The idea of modernization was central to Kames's legal science. As discussed in Chapter Three, he believed that both laws and morals progressed over time. In order for society to improve and modernize, Kames argued it was necessary to examine past laws and moral principles both in Britain and in various other societies throughout history. Collecting data concerning causes and effects from the history of man in different societies allowed one to form the conclusion that the progress of man was similar in every nation.<sup>32</sup>

In *Historical Law Tracts*, Kames explained his method:

In tracing the history of law through dark ages unprovided with records, or so slenderly provided, as not to afford any regular historical chain, we must endeavor, the best we can, to supply the broken links, by hints from poets and historians, by collateral facts, and by cautious conjectures drawn from the nature of the government, of the people, and of the times. If we use all the light that is afforded, and if the conjectural facts correspond with the few facts that are distinctly vouched, and join all in one regular chain, nothing further can be expected from human endeavours ... We must be satisfied with collecting the facts and circumstances as they may be gathered from the Laws of different countries: and if these put together make a regular system of causes and effect, we may rationally conclude, that the progress has been the same among all nations, in the capital circumstances at least; for accidents, or the singular nature of a people, or of a government, will always produce some peculiarities.<sup>33</sup>

Applying this historical method provided Kames with a variety of case studies in which he could create a standard model of how societies had modernized.

Kames noted the importance of fully understanding why past laws were originally enacted and came to be abolished. Kames quoted Bolingbroke as stating,

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<sup>32</sup> Berry, *Social Theory of the Scottish Enlightenment*, 61-69; Ross, *Lord Kames and the Scotland of His Day*, 203-204.

<sup>33</sup> Home, *Historical Law Tracts*, vol. i, 36-37.

“But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such anymore ... the profession of the law will scarce deserve to be ranked among the learned professions: and whenever it happens, one of the vantage grounds to which men must climb, is metaphysical, and the other, historical knowledge. They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws: and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced.”<sup>34</sup>

The use of this quote demonstrated Kames’s reliance on both metaphysical (moral philosophy) and historical study for understanding human nature and law. In order to understand the current laws, it was necessary first to discover how and why they originated and developed in history. Second, it was also necessary to understand how legal development reflected the evolution of society, especially in relation to morality.

In Kames’s view, an examination of the development of specific laws in England and Scotland was also important for legal reform. An example of Kames’s method of using historical analysis for legal reform was *Historical Law Tracts*, where Kames stated that his main objective was to demonstrate that England and Scotland should have one united legal system. Kames argued that having a holistic account of legal and moral development in England and Scotland would demonstrate which laws had proven to be most beneficial and had most accurately reflected the moral development of the British. Kames wrote that this could be achieved by,

establishing publick professors of both laws, and giving suitable encouragement for carrying on together the study of both. To unite both, in some such plan of education, will be less difficult than at first view may be apprehended; for the whole island originally was governed by the same law; and

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<sup>34</sup> Ibid., x-xii; Henry Bolingbroke, *Letters on the Study and Use of History*, vol. i (London: A. Millar, 1752), 186.

even at present the difference consists more in terms of art than in substance.<sup>35</sup>

Kames contended that the fundamental principles of law were similar in England and Scotland and it was only the process of legal adjudication that was different. If the past and current state of both English and Scottish laws were accurately elucidated, the way would be opened, Kames believed, for the introduction of a united legal system.

Legal reform could best occur in a court of equity, where judges used moral reasoning to determine cases in which the common law precedent was defective or exceeded just bounds. Kames believed that judges of the Court of Session should base their reasoning on the moral sense – both their intuitive perception of good and ill (moral sense) and the universal standard of right and wrong (common sense) that had refined as society had evolved. However, he believed that only through reasoning upon the moral sense and years of human experience and development could a more perfect standard of the common sense of mankind be cultivated.<sup>36</sup>

Kames's legal science had three steps: determining the state of morality in present society; determining whether this present morality was reflected in current law; and finally, if needed, changing the law to reflect this morality.<sup>37</sup> According to Kames, as Cairns argues, historical development constantly turned duties of beneficence into duties of justice, and thus, it was left to the judges to advance the law accordingly.<sup>38</sup> Kames maintained that laws ripened gradually with the human faculties, and as such, many duties that had previously been neglected by courts of justice, as they made no part of the common law, came

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<sup>35</sup> Home, *Historical Law Tracts*, vol. i, xiii.

<sup>36</sup> For a more in-depth analysis of Kames's moral sense and common sense theory, see pp. 95-110.

<sup>37</sup> One way that Kames suggested that the prevalence of moral views could be traced was through a statistical account of crimes committed and punished. Evidently, if a crime was continuously being committed, legal reform was needed to deter future culprits from acting.

<sup>38</sup> Cairns, "Legal Theory," 232.

naturally under the jurisdiction of a court of equity.<sup>39</sup> While the objective of an equity judge was to decide a case ‘according to what is just, equal, and salutary, taking in all circumstances’, Kames understood that men were liable to error and prejudice and thus he argued that there must be general rules.<sup>40</sup> The creation of equity rules would ensure expectations in the courts. This was the objective of Kames’s *Principles of Equity*: to create general rules for judicial reasoning in a court of equity.

### *Principles of Equity*

In *Principles of Equity*, Kames outlined the role of the Court of Session and attempted to reduce equity to a science. Where the custom or precedent was defective or it exceeded just bounds, the role of the court was to decide upon the principles of justice and utility and thereby to remedy the imperfections inherent in the common law.<sup>41</sup> Kames divided *Principles of Equity* into three sections: ‘Powers of a court of equity derived from the principle of justice’; ‘Powers of a court of equity founded on the principle of utility’; and ‘Application of the principles of equity and utility to several important subjects’. The first two sections were theoretical and the final section was practical, demonstrating how a court of equity might function. Taken as a whole, *Principles of Equity* was Kames’s attempt to elucidate how justice, utility, and the moral sense contributed to decision-making in a court of equity.<sup>42</sup>

In the first section, Kames provided a variety of examples of how the principle of justice was applied in a court of equity. One example concerned the consideration of intention by a judge when determining a case. Kames argued that intention was overlooked

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<sup>39</sup> Home, *Principles of Equity*, 2nd ed., 41.

<sup>40</sup> *Ibid.*, 46.

<sup>41</sup> *Ibid.*, 38.

<sup>42</sup> For a detailed analysis of Kames’s *Principles of Equity*, see: Lieberman, *The Province of Legislation Determined*, 166-175.

in common law, which considered an act in no other view than a legal exercise of a right. A court of equity, on the other hand, made a distinction between intentional and culpable wrongs, and held intention to be determinant in whether an action was right or wrong, and afforded reparation and punishment accordingly.<sup>43</sup> Another example concerned cases in which a victim claimed damages. In common law, compensation for certain loss was all that could be claimed. However, in equity, a person could sue for consequential loss.<sup>44</sup> Thus, the consideration of justice in a court of equity meant a more thorough investigation into the actions committed and ensured more equitable judicial decisions.

Kames finished the section on justice by outlining the many situations in which the principle of justice ought to be applied by a court of equity to remedy what was imperfect in the common law. The first was in respect to deeds and covenants, where the words or the intent were unclear.<sup>45</sup> The second was in respect to statutes. Examples of this were when the will of the legislature was not expressed clearly; where the means enacted fell short of the end intended; and where the means enacted reached beyond the end intended.<sup>46</sup> In these cases, and others, the common law was incapable of providing justice in terms of punishing wrong or rewarding right. Thus, by considering the principle of justice in a court of equity, the judge ensured that the final judgment was appropriate for the alleged action in question.

The second section of *Principles of Equity* dealt with the application of utility in a court of equity. Kames explained the difference between justice and utility as follows:

Justice is concerned in two things equally capital; one to make right effectual, and one to redress wrong. With respect to the former, utility coincides with justice: with respect to the latter, utility goes farther than justice. Wrong must be

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<sup>43</sup> Home, *Principles of Equity*, 2nd ed., 57-60.

<sup>44</sup> *Ibid.*, 96-98.

<sup>45</sup> *Ibid.*, 130-132.

<sup>46</sup> *Ibid.*, 177-188.

done before justice can interpose; but utility, having a more extensive view, lays down measures that are preventative of wrong. With respect to measures for the positive good of society, and for making men still more happy in a social state, these are reserved to the legislature. It is not necessary that such extensive powers be trusted with courts of law: the power of making right effectual, of redressing wrong, and of preventing mischief, are sufficient.<sup>47</sup>

While justice was concerned with making right effectual and redressing wrong, utility was concerned with a wider view that considered the effect of actions and decisions on both the current and future welfare of society. Kames argued that when justice and utility were in opposition, utility should prevail, as it was of greater benefit to society. Justice on the other hand, could only be employed retrospectively when a wrong had occurred, and thus did not have as great an impact on the welfare of society as did utility.<sup>48</sup>

Kames provided examples of acts, covenants, and claims that were seemingly innocent, but were prohibited in equity, because of their tendency to hurt society. Kames claimed that while statutes that were directed to promoting the positive good of society could only be created by the legislature, the power to extend statutes that were directed to the prevention of wrong was an objective of the court of equity.<sup>49</sup> Kames referred to usury and gaming statutes as examples of such extension. Usury was considered innocent, but it was prohibited by statute in order to prevent oppression. While gaming was not considered unjust, it was prevented by statute because it tended ‘to corrupt the morals’, and partaking in gaming proved ‘often ruinous to individuals’. Kames argued that these statutes could be extended by a court of equity ‘in order to complete the remedy intended by the

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<sup>47</sup> *Ibid.*, 249.

<sup>48</sup> It is important to note that Kames’s view was that utility and promoting the happiness and positive good of society was the role of the legislature. Although he never attempted to explain fully how a legislature acted to promote happiness and wellbeing, and never argued for the reform of the entire system of legislation as Bentham did, Kames did claim that it should be the role of the legislature to promote the happiness and wellbeing of society. Home, *Principles of Equity*, 2nd ed., 248-249.

<sup>49</sup> Home, *Principles of Equity*, 2nd ed., 261-263.

legislature'.<sup>50</sup> In these cases, and the others he mentioned, strictly relying on the common law and precedent would not produce the most beneficial and fairest outcome. Applying the notion of utility allowed the judge to consider a broader interpretation of the legal question being posed and, in this case, widen the scope of the law. Kames explained that there were cases where utility and justice worked together to enforce right against interest. Kames explained:

The principle of justice, though more extensive in its influence than that of utility, is in its nature more simple: it never looks beyond the parties engaged in the suit. The principle of utility, on the contrary, not only regards the parties engaged in the suit, but also the society in general; and comprehends many circumstances concerning both.<sup>51</sup>

Employing justice and utility in a court of equity ensured that the most beneficial decision would be made. Justice and utility together ensured that the legal decision was both morally correct and benefitted society as a whole.

The third section of *Principles of Equity* focused on the practical application of the principles of justice and utility in a court of equity. For example, Kames questioned what would happen if an obligee died and did not name an heir. Kames contended that a person who believed himself to be heir had no remedy in common law. However, a court of equity could remedy this situation by ruling that a bond for borrowed money, taken solely in the creditor's name, would go to the heirs even if the death occurred before the term of payment. Kames added that it was not necessary for the granting of property to an heir to be expressed in words, and that it was sufficient that it be made evident from circumstances.<sup>52</sup> Both justice and utility contributed to this decision. In this case, a strict reliance on common law would have resulted in the heir losing money that he was rightfully owed. It

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<sup>50</sup> Ibid., 262.

<sup>51</sup> Ibid., 266.

<sup>52</sup> Ibid., 286.

would be unjust for a debtor not to have to repay the creditor's heir, and it would have dangerous consequences on society because individuals would not feel secure in their creditor-debtor relations.

Through examining Kames's writings, it is evident that he incorporated history into his legal science in two ways. First, current laws were the direct result of past statutes and practices. It was important to study the current laws historically because one could only fully understand a current law if one knew why it had originated, what mischief it was originally meant to deter, and how and why it had developed into its current state. Kames did not accept that a law was morally right merely because of historical usage, as in Blackstone's legal theory, but history could be employed in order to understand why a current law was first introduced, and to determine whether the law was still useful or if it needed to be reformed. Second, common sense was a result of human development and experience. Common sense was the developed standard of right and wrong that had been refined through the ages. Kames's agent of legal change was equity, and in *Principles of Equity* he outlined how a court of equity could apply the principles of justice and utility to determine cases, which concurrently and effectively advanced the law. Both the current law and the moral standard by which legal improvement was determined were the product of historical development, observation, and experience. Historical study was important for legal improvement because society was continuously evolving, and to know to where society should progress, it was essential to know from where society had emerged.

### **Section 1.3: Bentham's Legal Science**

Unlike Blackstone and Kames, Bentham did not need a theory connecting history and law because what the laws or moral principles were in the past had no authority over



what the current or future laws ought to be. For Bentham, the important questions were: ‘what *is* the law?’ and ‘what *ought* to be the law?’ Thus, as previously stated, the history of the law was only significant for Bentham’s legal science in so far as the past laws influenced current laws and expectations. Bentham advocated the formation of a system of legislation based on the principle of utility that was clear, concise, and accessible to all.

As discussed in Chapter Four, the principle of utility was expounded by its relationship to the real entities of pleasure and pain. Bentham argued that the principle of utility should be the guiding principle for policy and legislation; it was the legislator’s duty to enact laws that promoted the greatest happiness of the greatest number. Bentham developed what has become known as the felicific calculus or the hedonistic calculus, as a means of determining the tendency of actions to produce an overall balance of pleasure or pain. Bentham maintained that only through the principle of utility and the felicific calculus, and not through inward reflection or divine inspiration, could the most beneficial laws be created.<sup>53</sup> While laws based on sentimentalism might frequently coincide with the dictates of utility, sympathy and antipathy often led to the promotion of a particular interest, that is the interest of some number less than the greatest number of those affected by an action. The principle of utility considered all those affected by an action. Bentham believed that one should predict the outcomes of rules by calculating the pleasures and pains that resulted from their observance or their breach. The principle of utility attempted to be rational and precise; a quality absent in its rival theories, which, according to Bentham, did not consider the whole number of people affected by an action.

An act became an offence, punishable by law, from its tendency to produce mischief. Thus, Bentham believed that where an act gave rise to no pain, there was no case for punishment. In Chapter XIII of *Introduction to the Principles of Morals and Legislation*

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<sup>53</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, 34-35.

(*IPML*), Bentham contended that punishment should not be inflicted when it was groundless, inefficacious, unprofitable, and needless.<sup>54</sup> There were, therefore, some areas in which proper conduct should not be enforced by the political sanction, but left instead to private ethics. Bentham noted that the rules of beneficence belonged to the jurisdiction of private ethics; as actions promoting benevolence were free and voluntary, and depended on sympathy, love of amity, or love of reputation.<sup>55</sup>

Further to this, in Chapter XVI of *IPML*, Bentham began to categorise and organise a division of offences. Lieberman explains: ‘The Division of Offences elaborated a detailed schema for a penal code, by classifying the social harms which this branch of the law was designed to prevent.’<sup>56</sup> The use of a natural arrangement of offences based on the harm and mischief caused by each action effectively organised the code in terms of its utilitarian purpose and provided the rationale behind each law.<sup>57</sup> While *IPML*, particularly Chapter XVI, are considered the starting point for Bentham’s complete code of law, he was aware of the inherent difficulties present in the calculation procedure. As Quinn argues, despite these difficulties, Bentham maintained that calculation was the only basis for a rational morality.<sup>58</sup> Calculation, using the real entities of pleasure and pain, was the only method capable of accurately and objectively determining laws that would benefit the community in question.

Bentham understood that a drastic and abrupt reform of the legal system could lead to disappointed expectations – in other words, to individuals feeling pain. Thus, the value of a legislator’s laws partly depended on the conformity of these laws to the general

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<sup>54</sup> *Ibid.*, 158-164.

<sup>55</sup> *Ibid.*, 284.

<sup>56</sup> David Lieberman, “Of the Limits and the Theory of Legislation,” in *The Legal Philosophy and Influence of Jeremy Bentham Essays on “Of the Limits of the Penal Branch of Jurisprudence,”* ed. Guillaume Tusseau (Hoboken: Taylor and Francis, 2014), 294-295.

<sup>57</sup> *Ibid.*, 295-300.

<sup>58</sup> Quinn, “Bentham on Mensuration: Calculation and Moral Reasoning,” 61-104.

expectations of individuals in a society. While Bentham argued that the common law system should be dismantled and replaced with a legal system based on the principle of utility, he understood that drastic changes often produced evil consequences. It was important to take into account the existing expectations of members in society and how new or altered laws and policies might lessen their happiness by undermining their expectations.

As argued above, history was of significance in a legislator's calculations only in so far as current expectations were the product of past laws and customs. In 'Place and Time', Bentham explained: 'Those sights, those discourses, which would give pain to the inhabitant of one country would not, in every instance, be productive [of] a similar sensation to the inhabitant of another.'<sup>59</sup> Bentham listed the several circumstances that influenced sensibilities as factors that influenced a utilitarian calculation. The primary circumstances influencing sensibility were moral, religious, sympathetic, and antipathetic biases and sensibilities.<sup>60</sup> These circumstances also included geographical and historical factors, and cultural beliefs. Using the principle of utility, without taking social and cultural contexts into the calculation process, could be detrimental. The perception of fear, a derivative pain, could lead to the juncture for resistance. Thus, taking account of security and expectation was essential to the accurate calculation of the greatest happiness of the greatest number. In short, Bentham's legal science resulted in the belief that a codified system of penal and civil law, based on the principle of utility and taking into consideration the specific circumstances of a society, should be introduced in every state.

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<sup>59</sup> Jeremy Bentham, *Selected Writings*, ed. Stephen G. Engelmann. Rethinking the Western Tradition (New Haven: Yale University Press, 2011), 159.

<sup>60</sup> Michael Quinn, "Popular Prejudices, Real Pains: What Is the Legislator to Do When the People Err in Assigning Mischief?" in *Bentham's Theory of Law and Public Opinion*, 71.

Bentham's chosen agent of legal change was legislation. Bentham believed that both direct legislation and indirect legislation were needed to promote the greatest happiness. Direct legislation consisted in the direct prohibition of the mischievous actions detailed in the code, which were accorded an appropriate degree of punishment in order to prevent their commission. The certainty of these punishments would deter potential offenders. Indirect legislation consisted in the policies that indirectly influenced people to act in the best interest of society. As Stephen Engelmann argues, one important aim of indirect legislation was to elevate and refine the moral sanction and the principle of benevolence. The force of the moral sanction was reliant on both the liberty of the press and the publicity of judicial proceedings.<sup>61</sup> Engelmann contends that 'Bentham's liberal government of indirect legislation relies ... on the active participation of its members in promoting and making use of publicity above all else: it is this that secures and promotes their individual and collective rights and interests'.<sup>62</sup> These indirect policies were more economical than direct legislation, and relied on mutual policing and self-policing. The policies indirectly influenced members of society to pursue interests that contributed to the well-being of all.

In addition to publicity and transparency increasing knowledge of the law throughout society, Bentham believed that they also constituted safeguards against the abuse of law. The Public Opinion Tribunal would ensure that society's interests were being pursued by the legislature, the Quasi-Jury would oversee the judge's conduct in civil and criminal trials, and freedom of the press would ensure transparency and public knowledge of legal and political decisions. Publicity threatened an official's reputation if he acted wrongly, forced judges to give reasons for their decisions, and opened up debate on current

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<sup>61</sup> Stephen G. Engelmann, "'Indirect Legislation': Bentham's Liberal Government," *Polity* 35, no. 3 (April 2003): 377.

<sup>62</sup> *Ibid.*, 381-382. See also James E. Crimmins, *On Bentham* (Toronto: Wadsworth, 2004), 62-64.

laws and their rationale. Creating a better-informed society was central to Bentham's legal science, as publicity and transparency ensured accountability and promoted security and expectation.<sup>63</sup>

While Bentham's codification scheme aimed to prevent judicial legislation, citizens would need to seek justice in a court of law. Bentham contended that the courts should adopt a natural procedure that mimicked fact-finding in the domestic setting. Individuals would not always, or even often, need professional intermediaries – lawyers – because attention would be directly focused on the dispute between the two parties. The two parties brought all their complaints to the judge, who narrowed complaints to specific offences and assumed a role similar to that of a head of a household in a domestic context. According to Postema, under Bentham's code, judges were empowered to make decisions which appealed directly to the principle of utility, with the judge balancing the utilities of the two parties before him. Postema contends that the judge's role was active and creative, instead of passive and mechanical.<sup>64</sup> Postema explains that, for Bentham, the ultimate defect in the common law was its inability to ensure security, as no one could predict how a judge would rule on a given case. Thus, Bentham sought to reconcile the conflicting demands of security and flexibility by creating a legal code that was clear and accessible to all, and an adjudicative process that was not rigid like the common law system.<sup>65</sup> According to Postema, Bentham's theory of adjudication can be characterized as follows: all law-making authority was to be located in the legislature; the comprehensive code must be simple and

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<sup>63</sup> Gerald J. Postema, "The Soul of Justice," in *Bentham's Theory of Law and Public Opinion*, 46-50. See also Judith Resnik and Dennis Court, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven: Yale University Press, 2011), 295-300.

<sup>64</sup> Postema, *Bentham and the Common Law Tradition*, 340-357.

<sup>65</sup> Bentham thought that the strictness and rigidity of the common law adjudicative process was part of its weakness. He noted that many cases were thrown out for arbitrary reasons. In contrast, Bentham thought that the procedure in a court should be more flexible and not follow strict rules of procedure. This change would ensure security and predictability in the courts. See William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985), 66-75.

public; the primary goal of the judge was to mediate, but if that failed, he would then apply a utilitarian calculation to decide on the merits of the case; the judge would use the code as a guide outlining important expectation utilities, but was not required to apply the fixed code mechanically; and no decision would have precedential effect. If a judge felt that the code needed to be amended, the rule would go through an ‘emendation process’ where the legislature would decide if the rule needed to be changed in order better to promote utility.<sup>66</sup> Thus, the process of introducing future reform was clearly embedded within Bentham’s ideal legal system.

In contrast to Postema’s direct utilitarian interpretation of judicial decision-making in Bentham’s pannonion, most Bentham scholars, led by Dinwiddy and Francesco Ferraro, have supported a rule utilitarian theory of decision-making, which means that judges were required to adjudicate by strictly applying the rules in the legal code that had been enacted by the legislator. According to this view, judges should never dispense with substantive law; however, if the judge believed that the current law conflicted with the greatest happiness principle, the judge could suspend the final judgment and propose emendations to the rule. If the proposal for emendation were approved by the legislature, it would be incorporated into the code and the judge’s final decision based on it accordingly. This process gave the judicial process flexibility without damaging security.<sup>67</sup> This disagreement as to act and rule-based judicial decision-making centres on whether the judge should apply a pre-determined code that had been developed by a utilitarian legislator in the instant case, or whether he should actively decide the case based on the principle of utility. Both

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<sup>66</sup> Postema, *Bentham and the Common Law Tradition*, 405-407.

<sup>67</sup> J. R. Dinwiddy, *Bentham: Selected Writings of John Dinwiddy*, Jurists-- Profiles in Legal Theory (Stanford: Stanford University Press, 2004), 65-69; Francesco Ferraro, “Direct and indirect utilitarianism in Bentham’s theory of adjudication,” *Journal of Bentham Studies* 12 (2010): 1-5. Both Dinwiddy and Ferraro note that Postema’s direct utilitarian interpretation of judicial decision-making lacks textual evidence. They contend that Postema has confused Bentham’s views on adjective law with those on substantive law.

scenarios, however, illustrate Bentham's view that the final determination in a court case should only have one objective in mind: promoting utility.

In short, Bentham's ambition was to create a complete legal system based on the principle of utility. Actions that tended to cause harm, understood in terms of pain, were labelled mischievous and were punishable. While a legislator began with a basic calculation of abstract pains and pleasures, in order to create a complete legal code fitted to a specific society, he modified general utilitarian principles to the particular sensibilities of his society. These sensibilities included religious, cultural, and moral beliefs, and geographical and historical influences. Transparency, accountability, and publicity were key to Bentham's legal science, as these three ideals formed safeguards against the abuse of law by the legislature and judiciary, and promoted universal knowledge of the law. Both direct and indirect legislation functioned together for the betterment of society. Direct legislation punished acts that were harmful and mischievous, and indirect legislation created policies aimed at promoting and securing individual and collective rights and interests by indirectly influencing the actions of individuals.

The objective of Bentham's system of legislation was to limit mischievous acts. A comprehensive code ensured security and expectations by clearly stating which actions were to be deemed offences and their corresponding punishments – punishments that were rationally calculated to prevent the commission of the offence. The certainty, and not the severity, of these punishments would deter individuals from committing offences. On the rule-based theory, the code was to be strictly adhered to by judges, unless a judge believed that a change in the specific law would better promote utility, whereupon he could propose an emendation. This process struck a balance between security and flexibility. Thus, Bentham's legal science promoted the creation of a legal code with laws that were

calculated to promote the greatest happiness in society, and created a process in which future reform could take place when needed.

#### **Section 1.4: Comparison**

While Blackstone depended on history to validate and authenticate current English law, and Kames argued that law could only be rationally understood if studied historically, history did not play any authoritative role in Bentham's legal science. Kames acknowledged that the historical development of law was significant for understanding the existing laws and for determining which areas were in need of legal reform. In addition, common sense was a standard of right and wrong uniform among all men. This common sense was a direct product of historical development, observation, and experience. Thus, for Kames, the current law and the measure upon which reform would be based, common sense, were both reliant on historical development. While existing expectations were the product of the past and contributed to Bentham's principle of utility, his legislative science was solely concerned with the future, that is a calculation of the tendency of actions to produce real perceptions of pleasures and pains. Whereas Blackstone endorsed the current legal system as it was, and Kames attempted to show how reform could be introduced through courts of equity, Bentham believed that a new system of legislation based on the principle of utility should replace the existing law.

While these three writers represented three major approaches to morality in the eighteenth-century – natural law, sentimentalism, and utility – they also promoted three different methods of legal reform. They conformed to what Henry Maine labelled the three agents of legal change: legal fictions, equity, and legislation. Under the auspices of legal fictions, legal change was hidden, while under equity and legislation it was open and



avowed. However, legislative advancements in the law were based on the prerogative of an external person or body, while the authority of equity was ‘on the special nature of its principles, to which it is alleged that all law ought to conform’.<sup>68</sup> Throughout the *Commentaries*, Blackstone argued that the common law was consistent with natural law. Thus, although legal change occurred, it was fictionally assumed that the law being altered was never actually law, and thus theoretically, no change occurred. Kames argued that legal change could occur in a court of equity and that such change should be based on utility, justice, and the moral sense. The principles of the common sense would direct judges to make determinations that ensured that law reflected the moral beliefs in society.

It is important to note that both Blackstone and Kames acknowledged one of the other agents of legal change within English law in their writings. Blackstone described the role of equity within the common law, but warned readers that ‘equitable light must not be indulged too far, left thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge’.<sup>69</sup> In addition, while Kames believed that the use of equity by judges might accomplish reform, he likewise acknowledged that legislators might introduce laws based on utility.<sup>70</sup> Nevertheless, Kames maintained that legal reform would best occur in equity courts. Bentham, however, believed that legislation alone was the best means, both publicly and transparently, of enacting legal reform. Bentham argued that laws and legal change should not be based on natural law and the moral sense because these principles were subjective and irrational, and nonsensical. In regard to legal fictions,

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<sup>68</sup> Maine, *Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas*, 26-28.

<sup>69</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 61-62; 91. Blackstone contended that when judges found a statute to be absurd or inconsistent with natural law, the judge was ‘to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound that statute by equity’. (91)

<sup>70</sup> Home, *Principles of Equity*, 2nd ed., 249. Kames contended: ‘With respect to measures for the positive good of society, and for making men still more happy in a social state, these are reserved to the legislature.’

Bentham wrote: ‘Fictions of use to justice? Exactly as swindling is to trade.’<sup>71</sup> Dinwiddy explains that, for Bentham, legal fictions were

a kind of “poison” which contaminated the system. By the use and acceptance of willful falsehoods, the practitioners of the law were inured to mendacity; whatever fictions had done to ameliorate legal practices could have been much more beneficially achieved by straightforward enactments involving nothing in the way of pretence.<sup>72</sup>

Legal change by the means of legal fictions lacked transparency, and change through legal fictions and equity lacked clarity because the decisions were based on a judge’s own innate moral sense, or view of natural law, and thus it was unclear how the judge would decide. Legislation, on the other hand, was clear and transparent, as every individual could know the law. In addition, the use of legal fictions and equity placed the role of law reform in the hands of judges instead of legislators. Legal fictions and equity acted within the current system of law; that is within the system which Bentham sought to replace with a codified system based on the principle of utility. The legal science which Bentham advocated was meant to be clear and accessible to all, and embedded an open, logical, and just method of reform. As Burns notes, Bentham’s ‘greatest achievements consisted in the devising of legal and institutional machinery, administrative and statistical methods, whereby desirable social objectives might be attained’.<sup>73</sup> Thus, Blackstone, Kames, and Bentham, represented three different approaches to legal change that will further be illustrated in the following two sections: first, through a discussion of the social contract debate; and second, through an examination of their views on punishment.

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<sup>71</sup> Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice*, ed. John Stuart Mill (London: Hunt and Clarke, 1827), 300.

<sup>72</sup> Dinwiddy, *Bentham: Selected Writings of John Dinwiddy*, 56.

<sup>73</sup> J. H. Burns, “Utilitarianism and Reform: Social Theory and Social Change, 1750-1800,” *Utilitas* 1 (1989): 219.

## Section 2: Social Contract vs. Habit of Obedience

A crucial distinction between the legal theories of Blackstone and Bentham lay in the adoption by the former of the theory of the social contract and of the latter of a habit of obedience as the foundation of political society. In order completely to understand each writer's legal science, it is helpful to understand how each understood the origin of society and the relationship between figures of authority and individual subjects in society. While Blackstone accepted that the social contract was a fiction, he believed that it was vital for understanding the structure of law and society. Bentham challenged Blackstone, arguing instead that a habit of obedience better explained the relationship of rules and subjects in society.<sup>74</sup> While Kames did not explicitly contribute to this debate, it is clear that he did not subscribe to the social contract theory. In *Historical Law Tracts*, Kames argued that mutual defence against a powerful neighbour was the chief and only motive for joining in society, and that individuals never thought of surrendering their natural rights to the public. In natural society, the privilege of maintaining their own property and avenging their own wrongs was reserved to individuals in full.<sup>75</sup> As David Hume advocated the notion of the habit of obedience, it is possible that Kames was influenced by his Scottish friend and colleague. Furthermore, as Bentham had read *Historical Law Tracts*, it is possible that Kames, as well as Hume, may have had some influence on the development of Bentham's theory. Thus, it is helpful to investigate and compare Blackstone's, Bentham's, and Kames's views on the debate.

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<sup>74</sup> See Burns, "Bentham and Blackstone: A Lifetime's Dialectic," 34-39.

<sup>75</sup> Home, *Historical Law Tracts*, vol. i, 28.

## Section 2.1: Blackstone and the Social Contract Theory

The social contract theory legitimized the authority of the state over the individual. The theory contended that individuals consented to surrender some of their freedoms to the ruler in exchange for the protection of their remaining rights; the people promised to obey, and the ruler promised to protect their rights. The social contract explained the transition from a state of nature to a state of society or political society. The theory was consistent with Blackstone's greater objective of justifying the power and legitimacy of the sovereign. In accordance with social contract theory, Blackstone argued that society had been formed out of individual weakness and fear, and political society had been formed as a result of a social contract which provided that individuals would obey laws in exchange for society's protection.

Blackstone admitted that the idea of the original contract was a fiction, and that there never was a time in history when people came together and made an explicit agreement setting out a social contract. Blackstone noted that there never was a state of nature: 'This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted; and besides, it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families'.<sup>76</sup> Blackstone argued that it was unlikely that a state of nature ever existed because a state of society began with single families. Blackstone explained: 'These formed the first society, among themselves; which every day extended it's limits, and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided

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<sup>76</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 47. Evidently, Blackstone was referring to Adam and Eve and then Noah and his family.

itself by various migrations into more.’<sup>77</sup> While Blackstone did not believe that there was ever an occasion where the people had come together and agreed to an actual social contract, he did believe that an implied original contract, indicated by the reciprocity between subjection and protection, was the legitimate foundation of political society.<sup>78</sup>

The social contract or original contract effectively defined the relationship between rulers and ruled. As Lobban argues, ‘Blackstone used the concept as a metaphorical tool to explain the rights and duties of individuals and government’.<sup>79</sup> Blackstone contended that

though society had not its formal beginning from any convention of individuals, actuated by their wants and fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together that demonstrate the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement of society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.<sup>80</sup>

Blackstone argued that a contract was implied by the very act of associating together; the community would guard the rights of each member and in return for this protection, individuals submitted to the laws, and a government instinctively developed. Hence, Blackstone noted that in every society there must be a ‘supreme, irresistible, absolute, uncontrolled authority’.<sup>81</sup>

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid., 226.

<sup>79</sup> Lobban, “Blackstone and the Science of Law,” 327.

<sup>80</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 47-48.

<sup>81</sup> Ibid., 49.

While Blackstone maintained that the idea of the social contract was theoretical and not actual, he contended that in ‘nature and reason’ it ‘must always be understood and implied’.<sup>82</sup> He relied on the contract to explain a variety of laws and events documented in the *Commentaries*. For example, he argued that James II broke the original contract by fleeing the throne and dropping the Great Seal into the Thames. It was this breaking of the original contract that effectively amounted to James II’s abdication of the throne.<sup>83</sup> As Lobban explains, it was difficult to justify William of Orange’s accession to the throne based on James II’s abdication alone; the Glorious Revolution also had to be justified by ‘accusing the king of breaching the original contract of government’.<sup>84</sup> Another occurrence of this example is found in ‘Of the King’s Duties’, where Blackstone explained that before the Glorious Revolution,

the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ; it was, after the revolution, judged proper to declare these duties expressly; and to reduce that contract to a plain certainty. So that, whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince, who hath reigned since the year 1688.<sup>85</sup>

Though the original contract was a fiction, Blackstone regularly treated the contract as an actual agreement between the ruler and the people. Thus, he used the contract to explain the events surrounding the Glorious Revolution. Furthermore, Blackstone noted that the understanding of the original contract was then expressly stated in the Coronation Oath, which by the Coronation Oath Act 1688, was to be administered to every succeeding king

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<sup>82</sup> *Ibid.*, 47.

<sup>83</sup> *Ibid.*, 204.

<sup>84</sup> Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900*, 96.

<sup>85</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 226.

and queen. The duties of the King to the people, as per the original contract, were articulated clearly: ‘to govern according to the law; to execute judgment in mercy; and to maintain the established religion’.<sup>86</sup> Blackstone maintained that after the Glorious Revolution, if ‘any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, [or] should violate the fundamental laws’, we are ‘now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant’.<sup>87</sup> As a result of the abdication by James II and the resulting Glorious Revolution, the notion of an original contract was firmly entrenched within the English constitution. The contract was used to explain and justify the events of 1688-9, and the event emphasised what actions by a king were tantamount to abdication and the breaking of the contract.

There was no historical event in which the people came together and agreed on an original or social contract. Political society had naturally developed from expanding families, and mutual obligation, outlined by the theory of social contract, had developed from a need to survive. This view of the relationship between ruler and ruled influenced the development of society and came to be represented in significant historical documents, first *Magna Carta*, and then the Petition of Rights, the Bill of Rights, and the Coronation Oath. For Blackstone and other social contract supporters, these historical documents demonstrated the significant role of social contract theory in justifying particular laws and events and explaining the legitimacy of English law.

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<sup>86</sup> Ibid., 228-229.

<sup>87</sup> Ibid., 238.

## Section 2.2: Bentham and the Habit of Obedience

The notion of the social contract was an idea that Bentham rejected in *A Fragment on Government*. Bentham analysed Blackstone's presentation of the social contract and questioned Blackstone's use of the terms 'society', 'government', 'state of nature', and 'original contract'. Bentham noted:

“*Society*”, in one place means the same thing as ‘*a state of nature*’ does: in another place it means the same as “*Government*”. Here, we are required to believe there *never was* such a state as a state of nature: there we are given to understand there *has been*. In like manner with respect to an *original contract* we are given to understand that such a thing never existed; that the notion of it is ridiculous: at the same time that there is no speaking nor stirring without supposing there was one.<sup>88</sup>

According to Bentham, in the *Commentaries*, Blackstone gave two meanings to the concept of society. First, it was equated with a state of nature, and stood opposed to government; and second, it was equated with a state of government, and stood opposed to a state of nature. Bentham attempted to clarify this confusion in Blackstone's account by demarcating two ideas: 'natural society' and 'political society'.<sup>89</sup>

Using the ideas of natural society and political society, Bentham introduced the idea of a habit of obedience. He explained the habit of obedience by stating that there was, in every society, a mixture of political and natural relationships. Whether a relationship was natural or political depended on whether there was a habit of obedience:

When a number of persons (whom we may style *subjects*) are supposed to be in the *habit* of paying *obedience* to a person, or an assemblage of persons, of a known and certain description (whom we may call *governor* or *governors*) such persons altogether (*subjects* and *governors*) are said to be in a state of *political SOCIETY*.<sup>90</sup>

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<sup>88</sup> Bentham, “A Fragment on Government,” 426.

<sup>89</sup> *Ibid.*, 428.

<sup>90</sup> *Ibid.*



In addition, Bentham contended that, ‘When a number of persons are supposed to be in the habit of *conversing* with each other, at the same time that they are not in any such habit as mentioned above, they are said to be in a state of *natural* society.’<sup>91</sup> Bentham noted the inconsistencies present in Blackstone’s social contract, and instead proposed the idea of a habit of obedience, which allowed for the existence at the same time of both natural and political relationships within a given society.<sup>92</sup>

Bentham noted that there was difficulty in drawing a line between natural and political society, and contended that there were few, if any, instances of the habit of obedience being perfectly absent, and no instances of it being perfectly present. However, Bentham explained that ‘The habit of obedience will be more or less perfect, in the ratio of the number of acts of obedience to those of disobedience.’<sup>93</sup> A habit of obedience was not an absolute concept, as members of society could be in a state of obedience to a variety of other persons or bodies of persons, and governors could be in a state of obedience to other entities. Moreover, the same person might be at different times governor and subject in respect to the same person. Thus, every community most likely contained a variety of relationships of superiority and subordination.<sup>94</sup> While the social contract was too limiting, only admitting two categories, ruler and ruled, the habit of obedience captured situations where there were a variety of political and natural relations and multiple sovereignties at the same time.

Bentham exemplified his argument that a society could vary in the habit of obedience and fluctuate between a political and a natural society by reference to American Indian society. He argued that obedience among the tribes only existed in times of war, and

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<sup>91</sup> *Ibid.*, 428-429.

<sup>92</sup> See J. H. Burns, “Nature and Natural Authority in Bentham,” *Utilitas* 5, no. 2 (November 1993): 209-219.

<sup>93</sup> Bentham, “A Fragment on Government,” 429-430.

<sup>94</sup> *Ibid.*, 432-433.

ceased in times of peace: ‘The necessity of acting in concert against a common enemy, subjects a whole tribe to the orders of a common Chief. On the return of peace each warrior resumes his pristine independence.’<sup>95</sup> This example led Bentham to question whether, within this continuum between political and natural society, there was a specific degree where one could ‘distinguish a society in which there is a habit of obedience’ as well as ‘the degree of perfection which is necessary to constitute a state of government, from a society in which there is not’.<sup>96</sup> Likewise, Bentham noted that when a new society formed from another, there was no specific juncture at which it could be said that the new society ceased to be in a state of political union in respect to the original society. This was similar to when individuals in a state defected. Bentham noted that there existed no precise juncture when the political union ceased and the individuals became independent and sovereign.<sup>97</sup> These were a few of the problems that, according to Bentham, resulted from the simplistic distinction between ruler and ruled that characterized social contract theory.

In short, Blackstone utilised the fiction of an original contract to explain political obligation and to justify the English constitution. However, according to Bentham, the social contract was too rigid, unable to accommodate the various relations, both natural and political, that existed within any society. Instead of relying on a fiction to understand how law and society functioned, Bentham instead relied on the social fact, as he saw it, of the habit of obedience. He saw that there existed various relations of subordination in society, all of which were founded on a broader natural disposition, which first formed between a child and a parent, and then was transformed into political obedience.<sup>98</sup>

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<sup>95</sup> Ibid., 434.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid., 435.

<sup>98</sup> Ibid., 429. As Postema contends, obedience given to any particular law rested on a general habit of obedience, which was founded in a broader natural disposition. Postema, *Bentham and the Common Law Tradition*, 218.

Bentham's understanding of the habit of obedience was based on his observation of society. This was in contrast to Blackstone who used the social contract to understand and explicate the nature of political obligation. Bentham observed that the habit of obedience was more perfect in his own society than it had been in Saxon times, and much more perfect than in the time of the ancient Britons. He noted that better digested laws would help to make the habit more perfect, but maintained that it could never be absolutely perfect. Bentham complimented Kames's work on the topic of the varying states of political and natural society when he wrote: 'A very ingenious and instructive view of the progress of nations, from the least perfect states of political union to that highly perfect state of it in which we live, may be found in LORD KAIMS'S *Historical Law Tracts*.'<sup>99</sup> It is possible that Bentham's understanding of a habit of obedience was influenced by the ideas Kames put forward in *Historical Law Tracts*; in particular, Bentham's notion concerning the varying degrees of political obedience. Bentham accepted Kames's explanation of how societies had developed from savagery to civilization. Kames's view of developing societies supported Bentham's view that different societies were more or less perfect in terms of the habit of obedience. It is Kames's position on the social contract and the habit of obedience debate that I will now discuss.

### **Section 2.3: Kames and the Habit of Obedience**

While Kames never explicitly supported either social contract theory or a habit of obedience, his views on the origin of society and his historical method of tracing the development of legal and political power were consistent with the latter. Contrary to Blackstone's understanding of the establishment of political society, Kames, in *Historical Law Tracts*, argued that,

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<sup>99</sup> Bentham, "A Fragment on Government," 430.

Society, originally, did not make a strict union among individuals. Mutual defence against a more powerful neighbour, being in early times the chief or sole motive for joining in society, individuals never thought of surrendering to the public, any of their natural rights that could be retained consistently with mutual defence. In particular, the privileges of maintaining their own property and of avenging their own wrongs, were reserved to individuals full and entire. In the dawn of society accordingly, we find no traces of a judge, properly so called, who hath power to interpose in differences, and to force persons at variance to submit to his opinion.<sup>100</sup>

While similarities can be drawn between Blackstone's and Kames's ideas concerning the first formation of society – the need for common defence against enemies and the existence of natural rights – Kames did not believe that individuals surrendered their personal rights to a leader, and thus did not accept that a social contract existed between subjects and rulers. Kames argued that in original society, individuals maintained their own property, avenged their own wrongs, and were not forced to submit to the decisions of a judge. Kames's description of original society had an absence of obedience, and thus it conformed to Bentham's understanding of natural society. Moreover, Kames contended that as society developed, it became increasingly more civilized, and as a result, it became more politically organised. These views were similar to those presented by Bentham, who noted that at any given time the habit of obedience could be more or less perfect. Bentham admitted that there were few, if any, instances of the habit of obedience being completely absent, and no instances of the habit of obedience being perfectly present.

Another revealing statement relating to the social contract debate made by Kames appears in Book II of *Principles of Equity*:

The relations in particular that imply subordination, make the corner-stone of government, and ripen men gradually for behaving properly in it. The reciprocal duties that arise from the relations of parent and child, of preceptor and scholar, of master and servant, of the high and low, of the rich and poor,

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<sup>100</sup> Home, *Historical Law Tracts*, vol. i, 20.

etc. pave the way to others that follow, and inure us to the duties both of rulers and of subjects.<sup>101</sup>

Kames compared the relationship between parent and child, preceptor and scholar, master and servant, high and low, and rich and poor, to the type of obedience that was shown between governor and governed. This passage shows that Kames supported the argument that the habit of obedience was formed between a child and a parent, and then was transformed into political obedience. Moreover, it shows that Kames understood that there could be different and various degrees of subjection in a society. For example, while a scholar was in a habit of paying obedience to a preceptor, both preceptor and scholar were in a habit of paying obedience to the state.

As previously noted, Bentham commended Kames's account of the progress of nations from the 'least perfect states of political union to that highly perfect state of it in which we live'.<sup>102</sup> Bentham applauded Kames for his studies that traced the development of society and identified the varying degrees of political subordination that had existed throughout history.<sup>103</sup> While Bentham's praise probably specifically related to the opening chapters of *Historical Law Tracts*, tracing the development of society and government was a consistent theme throughout Kames's works. In the Appendix of *Essays Upon Several Subjects Concerning British Antiquities*, published as early as 1747, Kames had argued that humans at first lived in scattered habitations until the development of agriculture necessitated mutual assistance, and from here governments emerged. He continued: 'The chief Magistrate therefore was originally no more but the chief Judge, whose Powers were gradually extended, as Cases occurred, which required the Interposition of a Superior or

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<sup>101</sup> Home, *Principles of Equity*, 2nd ed., 250.

<sup>102</sup> Bentham, "A Fragment on Government," 430.

<sup>103</sup> *Ibid.*

Governor'.<sup>104</sup> Kames's explanation of the development of government and society and the increasing strength of rulers was consistent with the views expressed by Bentham. These historical narratives, which traced the development of society and the increasing powers of government, were continued by Kames in his 1774 work *Sketches of the History of Man*.

While Kames never explicitly supported the social contract theory or the habit of obedience, his method of historically tracing legal developments – the transfer of punishment from private hands to the magistrate, the growth of political society, and the eventual need to move from third party arbiters to judges – was consistent with the idea of the natural transfer of obedience from child-parent to citizen-government and Bentham's understanding of the relationship between natural society and political society. The idea of surrendering one's natural rights to a superior in the form of a contract was not supported by Kames, while the idea of the gradual emergence of political society, based on need, was explicitly described by him. While Bentham founded political society on the habit of obedience and Blackstone appealed to the social contract theory, Kames traced the historical development and progress of legal and political power from a state of nature. Hence, Kames's historical method supported Hume's and Bentham's notions of a habit of obedience. It is possible that Kames was directly influenced by Hume, and that certain elements of Bentham's habit of obedience may have come from his early reading of *Historical Law Tracts*.

#### **Section 2.4: Comparison**

Blackstone utilised social contract theory to explain and justify the past and present legal and political system, and to support the legitimacy of the government. The habit of obedience was consistent with Bentham's and Kames's wish to examine the emergence of

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<sup>104</sup> Home, *Essays Upon Several Subjects Concerning British Antiquities*, 195-196.

society without any preconceived notions, since nothing significant rested on it. Both Bentham and Kames believed that law needed to be reformed, and acknowledged that there had existed different systems of law and political governance throughout history. Laws and morals were two distinct entities, and the role of the legislator or judges was openly and publicly to reform laws that did not accurately reflect morality – whether these morals were determined by developed common sense or an adherence to the principle of utility. Bentham’s and Kames’s observations confirmed that the relationship between law and society was malleable and changed with time, and thus they adhered to a theory of social relationships, characterized by a habit of obedience, that matched their dynamic view of law and could accommodate various forms of governance and subordination. Both theories, social contract and habit of obedience, attempted to explain the nature of political obligation – the former was justificatory, while the latter was descriptive. How these relationships of subordination were broken and could lead to reform will be discussed in the following section.

### **Section 2.5: The Juncture for Resistance and Reform**

Intricately linked to the social contract and habit of obedience debate was the question of resistance. Bentham’s explanation of the juncture for resistance was closely connected to his views concerning the bounds to supreme power and the nonsense of natural law. In *A Fragment on Government*, Bentham advocated the use of the principle of utility, in place of the nonsensical notion of natural law, as a measure for determining the juncture for resistance. Bentham’s arguments were directed at Blackstone’s view that a law that was against the law of nature was void. Bentham argued that since the law of nature

was a meaningless phrase, one could not know when an act was against it. Furthermore, laws, even if they were morally wrong, were still laws.

Bentham did not believe that laws were void even if they were morally wrong. Instead, he separated the question of legal validity from that of their moral value, applying the principle of utility to determine whether laws were beneficial or pernicious. Bad laws could justify resistance.<sup>105</sup> If the legislature enacted laws and policies that were not beneficial to society, that is they resulted in a predominance of pain over pleasure, Bentham argued that the people had reason to rebel. He termed the point at which individuals were prepared to revolt against government ‘the juncture for resistance’, and this juncture occurred when the probable mischiefs of resistance appeared less than the probable mischiefs of obedience.<sup>106</sup> Bentham raised the question as to by what common sign the juncture for resistance could be known, and argued that the only answer was an individual’s ‘own internal persuasion of a balance of utility on the side of resistance’.<sup>107</sup>

Kames had similar views to Bentham concerning the juncture for resistance and reform. Kames’s views may be inferred from the Appendix of *Essays Upon Several Subjects Concerning British Antiquities*, where he discussed the hereditary and indefeasible right of kings. Kames maintained throughout this tract that the best form of government was the one that ‘has a greater Tendency to promote its End, the Good of the Society’.<sup>108</sup> Kames explained that if a king’s actions ‘tend to Destruction, instead of Government, the People, who have no Judge to appeal to, may lawfully do themselves Right. *Salus populi*

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<sup>105</sup> Bentham, “A Fragment on Government,” 486.

<sup>106</sup> *Ibid.*, 481-483.

<sup>107</sup> *Ibid.*, 484.

<sup>108</sup> Home, *Essays Upon Several Subjects Concerning British Antiquities*, 196.



*est suprema lex* [let the good of the people be the supreme law]'.<sup>109</sup> Kames furthered this view later in the appendix, explaining,

I think we may with Certainty conclude, that such a Right must, upon every Occasion, give Place to the primary Rights of Nature, such as tend to our Preservation and Well-being: And therefore that any particular Heir may be safely set aside, when he becomes dangerous to the Society. For this is assuredly the Voice of God, That in every Conflict the weaker Right must yield to the stronger. Nay, we may go one Step further, that if the Good of the Society can be more promoted by a different form of Government, hereditary Right may be laid aside altogether without any Crime; since the Good of Society is an Object of much greater Importance than the Right of any particular Family can be.<sup>110</sup>

Kames insisted that hereditary right could be set aside if necessary, because the identity of the royal family was arbitrary. Kames argued: 'Whatever Rules are followed, we must see that they are in a great Measure arbitrary, the Offspring of Accident, and established by Custom only.'<sup>111</sup> Kames's candour concerning the right to discard a sovereign, if it was in the best interest of the people, was distinct from the views expressed by common law and social contract theorists.

Blackstone's use of the social contract to justify James II's abdication is an example of how common law and social contract theorists justified resistance and reform.

Blackstone, at numerous points in Book I of the *Commentaries*, argued that James II was set aside after he subverted the constitution 'by breaking the original contract, [and by] his violation of the fundamental laws, and his withdrawing himself out of the kingdom'.<sup>112</sup>

Common lawyers needed the fiction that James II broke a contract to justify his replacement with William and Mary of Orange. Furthermore, as noted above, Blackstone explained how James II's actions resulted in William and Mary agreeing to the Coronation

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<sup>109</sup> *Ibid.*, 202.

<sup>110</sup> *Ibid.*, 208.

<sup>111</sup> *Ibid.*, 206.

<sup>112</sup> Blackstone, *Commentaries on the Laws of England*, vol. i, 204.

Oath Act 1688. The act declared that the coronation oath would be given to every succeeding king and queen. Blackstone noted that this effectively entrenched the social contract into the English constitution. One of the terms laid out in the coronation oath was the promise to ‘maintain the laws of God’.<sup>113</sup> Blackstone explained that if any future prince should ‘endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom’, then these actions would constitute an abdication.<sup>114</sup> According to Blackstone, James II’s actions ensured that the people knew what amounted to the violation of the social contract. In particular, Blackstone emphasised that James II had violated the fundamental laws, and equated the breaking of the social contract to violating natural law. Thus, through the example of James II, Blackstone used the social contract to explain what constituted the conditions for justifiable resistance, while concurrently justifying the existing Hanoverian monarchy by explaining how James II’s actions amounted to abdication.

In contrast to Blackstone, Kames was more transparent in his views: James II was replaced because it was in the best interest of the people to do so. Both Kames and Bentham argued that if the current government was not promoting the greatest happiness, and another form of government would be more beneficial, the juncture for resistance was thereby met. As noted above, Kames wrote ‘If the Good of Society can be more promoted by a different Form of Government, hereditary Right may be laid aside altogether without any Crime’.<sup>115</sup> Kames’s emphasised that just because something had been practised in the past did not mean that it was beneficial and should continue to be practised. Studying the past elucidated the present, and allowed people to make better-informed decisions

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<sup>113</sup> Ibid., 227-228.

<sup>114</sup> Ibid., 238.

<sup>115</sup> Home, *Essays Upon Several Subjects Concerning British Antiquities*, 208.

concerning the future. While, according to social contract theory, the violation of the contract justified resistance, Bentham and Kames went one step further. They contended that the best form of government, and the one that should be obeyed, was the one that was most conducive to the good and happiness of society. If a different form of government could produce more happiness or well-being, the current government should be set aside. Blackstone, and the common lawyers, held that deference should be given to the current system of government, as its legitimacy was justified through history and practice, and it was only the violation of the contract that would justify resistance.

Kames's views on reform and resistance were situated closer to those of Bentham than to Blackstone. Kames believed that the best government was the one that had the greatest tendency to promote the good of society, and that the current government should be laid aside if another form of government better promoted this end. Similarly to Bentham, Kames's justification for reform was rational, transparent, and avowed, and based on utility; he did not rely on a fiction, such as the social contract, to justify resistance. Kames's juncture for resistance occurred when the ruler's actions tended to the destruction of society. While Kames's views seem utilitarian and consistent with Bentham's views, Kames did not locate the juncture for resistance in the calculation of a balance of utility on the side of resistance. Kames defined destructive acts of rulers as actions that were not only detrimental to the good of society, but also, similarly to Blackstone, as actions that were against the 'laws of the people' or 'God's laws'.<sup>116</sup> The fact that Kames's idea of utility resulted from an adherence to God's laws points to the fundamental similarities and differences between the three authors' stances. Blackstone adhered to the social contract and natural law and divine law, while Bentham promoted a rational calculation based on the principle of utility. Kames was situated between these two stances, though closer to

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<sup>116</sup> Ibid., 201-203.

Bentham. He relied on common sense and moral sense – sentimentalism – to achieve the best utilitarian outcome. Bentham and Kames had many similar views and opinions; but ultimately, Bentham divorced Kames’s utilitarian views from their sentimental and theological basis, and added a more objective and rational calculation process based on the sensations of pleasure and pain.

### **Section 3: Punishment**

Blackstone, Kames, and Bentham had many similar views on punishment, as Beccaria’s *On Crimes and Punishment* profoundly influenced all three men. However, in accordance with their underlying legal and moral theories, while Blackstone’s position on punishment was deeply influenced by natural law principles, both Bentham and Kames related their ideas on punishment to utility. Bentham and Kames viewed punishment in utilitarian terms, supported an economic model of punishment, and believed that pardons impeded certainty in the law. While both men considered intent in determining criminality, Kames argued that intent was the main determinant of guilt, and Bentham placed more emphasis on the consequences of an action.

#### **Section 3.1: Blackstone on punishment**

Blackstone, Kames, and Bentham argued that punishments should be commensurate to the crimes committed and agreed that certainty was a more effective deterrent than severity. While Blackstone argued that capital punishment was necessary in certain situations, he believed that too many crimes were punished by death in eighteenth-century England. Committed to his belief that natural law determined legal and moral validity, Blackstone argued that capital punishment for crimes against natural law were valid. He

argued that the proliferation of laws with capital sentences was the result of legislators and judges using self-interest and reason to invent laws.<sup>117</sup> Furthermore, while Blackstone believed that the rigidity of English law was beneficial, he concurrently praised the unfixed nature of pecuniary fines and magisterial pardons as examples of valuable practices that ensured flexibility and leniency in the law. Blackstone praised the English law for having certainty in the nature of the punishment, while also ensuring flexibility, with the quantity or degree of the punishment depending on the specific case.

Blackstone contended that punishment should be commensurate to the crime committed and the purpose it was meant to serve:

therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears *incorrigible*: which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment: and in such cases it would be cruelty to the public, to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villanies.<sup>118</sup>

Blackstone thus argued that severe punishments were warranted in many circumstances. Two examples of circumstances that warranted such severe punishments were when the criminal was a habitual offender or when certain offences grew more frequent.<sup>119</sup> If punishments were not suitable for the crime, the law would endanger every member of society, as punishments would not deter future offenders. Accordingly, Blackstone explained that there were certain situations in which capital punishment was merited.

Blackstone described the legal consequences of a sentence of capital punishment:

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the

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<sup>117</sup> See pp. 54-56 and 1n on pp. 177.

<sup>118</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 12.

<sup>119</sup> *Ibid.*, 9.

immediate inseparable consequence by the common law is *attainder*. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of it's protection, and takes no farther care of him than barely to see him executed.<sup>120</sup>

Blackstone explained that certain offenders were 'no longer of any credit or reputation' and were no longer worthy of living in society.<sup>121</sup> Thus, there were certain situations in which a death sentence was necessary for the greater benefit of society.

While Blackstone believed that there were instances in which capital punishment was necessary, he argued that too many crimes were punishable by death. According to Blackstone, there were 106 crimes deemed worthy of death under English law. He wrote:

Yet, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures.<sup>122</sup>

Blackstone believed that the proliferation of capital crimes in eighteenth-century England was regrettable. He did not think that so many crimes were deserving of a death sentence. Blackstone argued that this proliferation of laws with capital sentences was the result of legislators using self-interest and reason to invent laws that were not consistent with natural law.

The distinction, for Blackstone, between laws that merited capital punishment and those that did not, was based on natural law. Blackstone noted that certain crimes against natural law merited capital punishment. These crimes against natural law were ascertainable from revelation or from human reason. Quoting the Bible, Blackstone argued:

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<sup>120</sup> Ibid., 373.

<sup>121</sup> Ibid., 374.

<sup>122</sup> Ibid., 18.

‘With regard to offenses *mala in se*, capital punishments are in some instances inflicted by the immediate command of God himself to all mankind; as in the case of murder, by the precept delivered to Noah, their common ancestor and representative’.<sup>123</sup> Blackstone doubted whether human laws, positive laws created by human institutions, could merit capital punishment. An example of a human law that could be punished by death in eighteenth-century England was robbery. Blackstone noted that punishments associated with the infringement on property owed their legal origin to civil society, and not the law of nature.<sup>124</sup> Blackstone cited Hale as an authority on the subject of punishment of crimes that were not against natural law. In response to Hale’s argument that it was necessary for severe punishments, even death, to be inflicted when offences grew more frequent,<sup>125</sup> Blackstone argued:

To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.<sup>126</sup>

Blackstone’s opinion on the value and merit of capital punishment was based on his belief in the primacy of natural law. This distinction clarified Blackstone’s position on the relationship between English law and natural law. As has been stated above, in order for a law to be valid, it had to be consistent with, not necessarily identical to, natural law.

However, when it came to capital punishment, a law was only valid if it was identical to natural law and divine law. Based on Blackstone’s position on natural law and his views

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<sup>123</sup> *Ibid.*, 9.

<sup>124</sup> While Blackstone provided evidence of the existence of the notion of property in Biblical times to show that property was consistent with natural law and that the notion of property originated in natural law, Blackstone maintained that property rights were adopted and ultimately given legal force by their articulation in municipal laws.

<sup>125</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 9, citing Matthew Hale, *Historia placitorum coron. The history of the pleas of the crown* (London: E. and R. Nutt and R. Gosling, 1736), 13.

<sup>126</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 11.

concerning capital punishment, it can be inferred that only God had the right to command a life to be forfeited for a crime. All human legislation, not directly adopted from divine law, that gave the death penalty for a crime, was against natural law, and needed reform. This explains why Blackstone censured the proliferation of offences deemed worthy of death, and why he believed that these laws were the result of legislators or judges relying on self-interested reasons as the basis for law-making, instead of adhering to divine law and natural law. These laws, invented out of self-interest, that were inconsistent with natural law, would be the laws that Blackstone argued were in need of reform.

While Blackstone argued that certain criminal acts merited severe punishment, he argued that the threat of severe punishment was not the best deterrent. Blackstone maintained that punishments of unreasonable severity, particularly when they were indiscriminately inflicted, had less effect in preventing crimes than did the certainty of a punishment. Blackstone cited Montesquieu on this matter:

It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the excessive severity of laws (says Montesquieu) hinders their execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it.<sup>127</sup>

Blackstone agreed with Montesquieu that the certainty of a punishment was a more effective deterrent than the severity of a punishment. When punishments were too severe, juries and judges often elected not to enforce the intended punishment.

Blackstone believed that rigidity in the law was beneficial. Crimes had specific punishments, and no judge could alter the punishment assigned to a specific offence. While discretionary fines and lengths of imprisonment may have seemed like exceptions,

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<sup>127</sup> Ibid., 17., citing Montesquieu, *The Spirit of the Laws* b. 6 c. 13.



Blackstone asserted that this flexibility was another beneficial feature of the English legal system:

But the general nature of the punishment, *viz.* by fine or imprisonment, is in these cases fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances.<sup>128</sup>

Blackstone explained that pecuniary fines could not be fixed because the same monetary punishment would have dissimilar effects on different people.

In addition to flexibility in the degree and length of punishments, Blackstone also praised the existence of magisterial pardons:

This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he think it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons (according to some theorists) should be excluded in a perfect legislation, where punishments are mild but certain: for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter; or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment.<sup>129</sup>

Blackstone argued that the existence of pardons was beneficial, abating the law in areas in which it was too rigorous. In addition, the pardon operated as a check on judges.

Blackstone's position on punishment was in accordance with his legal science, with natural law in a central place. Blackstone noted that while certain crimes against natural law merited capital punishment, too many crimes had been deemed worthy of death in

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<sup>128</sup> *Ibid.*, 371.

<sup>129</sup> *Ibid.*, 390.

eighteenth-century England. These laws, created by legislators and judges, were not dictated by God or reason, but instead were the product of self-interest. Thus, these laws needed to be abolished; since God created human life, only he had a right to take it away. Blackstone also argued that certainty was a more effective deterrent than severity, but supported flexibility in fines and the use of the pardon. As punishments should be commensurate to the crime committed, only offences that God deemed worthy of death should be capital. Where there were other offences that the human legislature deemed capital, the punishment was too severe, and only led to more acquittals and thus less certainty in the law. In the present state of the law, pardons and flexibility in fines were necessary in order to abate this severity.

### **Section 3.2: Bentham and Kames on Punishment**

As Tony Draper argues, ‘Bentham’s use of the catalytic thinking of Beccaria, combined with his own rejection of the traditional concepts of common law and social contract, produced a profound break with the prevalent English understanding of law and punishment with which he was surrounded’.<sup>130</sup> Bentham contended that the best punishment was one that would dissuade an individual from repeating a crime, while at the same time deterring others from committing the crime in the future. Following in the footsteps of Beccaria, both Bentham and Kames argued for deterrence, proportionality, and certainty.<sup>131</sup> Bentham and Kames agreed with Blackstone that the certainty of a punishment was a better

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<sup>130</sup> Tony Draper, “An Introduction to Jeremy Bentham’s Theory of Punishment,” *Journal of Bentham Studies* 5 (2002): 6.

<sup>131</sup> For a detailed account of the relationship between Beccaria and Bentham, see H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), 40-52. Hart outlines the similarities between the theories of Beccaria and Bentham, which included: the importance of using the least punishment sufficient to exceed the advantage of the crime; the idea that punishment should be speedy and certain; the importance of an analogy between crime and punishment; and the proper functions of legislators and judges. See also Frederick Rosen, *Classical Utilitarianism from Hume to Mill*, Routledge Studies in Ethics and Moral Theory 2 (New York: Routledge, 2003), 147-156.

deterrent than its severity, and that punishments should be commensurate to the crime committed. However, in contrast to Blackstone, both Kames and Bentham focused on reform and what ought to be, and thus developed clearer and more coherent positions. Bentham and Kames, as noted above, viewed punishment in utilitarian terms, supported an economic model of punishment, and believed that pardons hindered the attempt to establish certainty in the law. Both Kames and Bentham also noted the importance of intent for determining the criminality of an offender. Kames however, argued that intent was the main determinant of guilt, while Bentham placed most emphasis on the consequences of an action.

Both Kames's and Bentham's views on punishment were structured in utilitarian terms. They agreed that punishment was an evil, but understood it as a necessary evil imposed for the benefit of society. Bentham argued: 'all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil'.<sup>132</sup> The objective of legislation and punishment was to secure safety and welfare, and promote the happiness, of every member of society. As Rosen notes, Bentham's utilitarianism held that the pain from punishment should ultimately be outweighed by the good produced by it. This would be accomplished by the following: the reformation and rehabilitation of the offender; the prevention of future offences; the satisfaction of the community in apprehending an offender; and the adjustment of punishments to the severity of the offence.<sup>133</sup> Kames agreed with Bentham that punishment was an evil. In 'On the Principles of Criminal Justice' Kames contended that, 'Every crime, say these reasoners, is an evil;

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<sup>132</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, 158.

<sup>133</sup> Rosen, *Classical Utilitarianism from Hume to Mill*, 214.

but punishment is likewise an evil to another'.<sup>134</sup> According to Kames, however, as the government became more powerful, it became more important that the public interest and security be protected. By all crimes, the public was injured, and 'by open rapine and violence the peace of society broke'.<sup>135</sup> Kames believed that offences that disturbed the peace of society should be severely punished, while offences that did not should be shown little regard.<sup>136</sup> This idea was comparable to Bentham's belief that victimless actions ought not to be deemed offences and should not be punished, and that the actions that should be punished most severely were those that affected society the greatest and produced the greatest amount of pain. Both men agreed that an action that caused no harm should not be punished.

Blackstone agreed that the crimes that should be the most severely punished were those that were most destructive of the public safety and happiness and those which an individual had the greatest opportunity to commit.<sup>137</sup> Blackstone, however, was willing to assign punishment to actions that, according to Bentham, were not harmful to society. For example, Chapter IV of Book IV of the *Commentaries* was dedicated to offences against God and religion. These offences included the following: apostacy; heresy; actions that affected the established church; swearing and cursing; witchcraft and sorcery; imitating a religious official; profanation of the lord's day (breaking Sabbath); drunkenness; bastardy; and lewdness.<sup>138</sup> While some of these offences could affect the well-being of society, as certain individuals would feel moderate pain from witnessing them, many were not harmful to society and were deemed criminal offences solely because they were prohibited by

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<sup>134</sup> Home and Woodhouselee, "Appendix No. X: 'On the Principles of Criminal Jurisprudence,'" in *Memoirs of the Life and Writings of the Honourable Henry Home of Kames: One of the Senators of the College of Justice, and One of the Lords Commissioners of Justiciary in Scotland*, vol. i, 94.

<sup>135</sup> Home, *Historical Law Tracts*, vol. i., 58.

<sup>136</sup> *Ibid.*, 74.

<sup>137</sup> Blackstone, *Commentaries on the Laws of England*, vol. iv, 16.

<sup>138</sup> *Ibid.*, 41-65.

religion. By promoting laws that received their authority from God's law, Blackstone consequently supported the existence of laws that punished offences that did not, in Bentham's view, harm society.

Both Kames and Bentham believed in an economic model of punishment that considered the value of a punishment against the profit of an offence. The best punishment produced the desired effect with the least amount of suffering.<sup>139</sup> Bentham contended: 'The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.'<sup>140</sup> In *The Rationale of Punishment*, Bentham argued against capital punishment on four grounds. First, it was *not convertible to profit*. Bentham stated that when capital punishment was used, 'In so far as compensation might be derived from the labour of the delinquent, the very source of the compensation is destroyed'.<sup>141</sup> Second, Bentham argued that it was not *frugal*, because with death there was no chance of reforming an individual who could potentially become useful to society. Bentham's third point was *equability*. He believed that there was less suffering in a quick death than with other punishments. Moreover, as death was the absence of pleasure and pain, if a person were to calculate pleasure and pain before committing a capital crime, death did not result in a strong enough deterrent. The fourth point was that capital punishment was *irremissible*.<sup>142</sup> Bentham argued that judges and courts were not 'exempted from the weaknesses of humanity' and as a result innocent people could be put to death.<sup>143</sup> There was no remedy for death if a person was found to be innocent at a later date.<sup>144</sup>

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<sup>139</sup> Rosen, *Classical Utilitarianism from Hume to Mill*, 153.

<sup>140</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, 166.

<sup>141</sup> Jeremy Bentham, *The Rationale of Punishment* (London: Heward, 1830), 180.

<sup>142</sup> *Ibid.*, 180-184.

<sup>143</sup> *Ibid.*, 189.

<sup>144</sup> Hugo Adam Bedau argues that no other philosopher advocated against the death penalty as 'steadily and soberly' as Bentham had in the eighteenth century. See Hugo Adam Bedau, "Bentham's Utilitarian Critique of the Death Penalty," *The Journal of Criminal Law and Criminology* 74, no. 3 (Autumn 1983): pp. 1033-1065.

Kames also presented an economic view of criminal punishment. He wrote: ‘If a man is murdered, society loses one citizen; if the murderer is put to death, society loses two.’ Kames further explained that, ‘The term citizen must be understood to mean a useful member of society; for it is only by the deprivation of such that society can suffer a loss’.<sup>145</sup> Although Kames was more sceptical concerning a criminal’s worth in society, he understood that there were circumstances in which a criminal could be put to beneficial use or at least not be a burden on society. For example, he argued that imprisonment could be either economically neutral or profitable: ‘It is well if these twenty men earn the value of their own subsistence, together with the expense of an establishment for their restraint. And thus, the balance of pecuniary loss and gain is equal.’<sup>146</sup> Furthermore, Kames understood that a punishment had to be commensurate to the crime. Kames agreed with Bentham that the legislator needed to find a balance between the mass of the crime and the mass of the punishment, stating, ‘for as the penalty in every instance where the crime is discovered, far exceeds the gain resulting from its commission, the extreme probability of that penalty taking place, and the small chance of escaping it, will always amount to a sufficient restraint’.<sup>147</sup> Both Kames and Bentham viewed punishment in utilitarian and economic terms. They agreed that the best punishments were those that were commensurate to the crime committed.

Both Kames and Bentham argued that certainty was a more effective deterrent than severity, and argued that the existence of pardons undermined the attempt to deter criminals from offending. As well as promoting certainty in punishment, they agreed that capital punishment was not the best deterrent. Bentham believed that the threat of suffering in prison was a much stronger deterrent than the chance of capital punishment. While Kames

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<sup>145</sup> Home and Woodhouselee, “Appendix No. X: ‘On the Principles of Criminal Jurisprudence,’” 94.

<sup>146</sup> *Ibid.*, 95.

<sup>147</sup> *Ibid.*, 102.

noted that death was the greatest punishment that could be employed, he argued that capital punishment was not suitable for most crimes, and contended that petty mischiefs should be controlled by increased vigilance in detection, and not by an increase in the severity of punishment.<sup>148</sup> According to Kames, with an increase in detection, appropriate punishments for offences became more certain, which was a stronger deterrent than the chance of capital punishment.

Closely connected to the argument for certainty over severity was the use of pardons, because the existence of pardons undermined expectation in society. In addition to the four points he had developed in *The Rationale of Punishment*, Bentham argued against the existence of capital punishment because of its indefinite nature due to the high probability of pardons. Bentham criticised pardons, commenting on their mischievous nature: ‘The power of pardoning is often said to be one of the brightest jewels in the Royal Crown: it is burdensome as it is bright, not only to those who submit to the Crown, but still more so to him also who wears it.’<sup>149</sup> Kames concurred that the King’s prerogative of pardoning arbitrarily was an irrational practice. Furthermore, Kames contended that if the pardon were limited in criminal as it was in civil cases, not for the purpose of giving relief, but where the strictness of the law needed equity, the King’s pardon would have a more rational foundation. Instead of completely pardoning an offender, through equity a judge could provide a punishment that was commensurate to the offence committed.<sup>150</sup> While Blackstone advocated the use of pardons as a valuable practice in English law, both Bentham and Kames contended that pardons promoted uncertainty in the law because it was arbitrary in its application.

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<sup>148</sup> Ibid.

<sup>149</sup> Bentham, *The Rationale of Punishment*, 429.

<sup>150</sup> Home, *Historical Law Tracts*, vol. i, 85-86.

Both Bentham and Kames understood that intention was important in determining criminality. Kames, however, argued that intention was the circumstance that determined whether an action was either criminal or innocent. He believed that barbarous nations ‘conclude an action to be right that happens to do good, and an action to be wrong that happens to do harm; without ever thinking of motives, of Will, of intention’.<sup>151</sup> For Bentham, the most significant quality for determining the criminality of an action was not intent, but the outcome. If an action tended to increase pain and decrease pleasure, it was potentially an offence. It is important to note that Bentham’s calculus included, in addition to consequences, ideas such as motive and will, because each could have a negative effect on society. As Draper argued, ‘Of crucial importance was Bentham’s insistence that any assessment of the extent of harm inflicted was dependent upon the motive, circumstances and intentions under the influence of which an act was carried out.’<sup>152</sup> Motives and intentions to cause harm, whether successful or not, had a negative effect on security. In *IPML*, Bentham explained, ‘Is an offence committed? it is the tendency which it has to destroy, in such or such persons, some of these pleasures, or to produce some of these pains, that constitutes the mischief of it, and the ground for punishing it’.<sup>153</sup> While not the most important determinant of criminality, intention mattered to the extent that certain intentions were more likely to lead to bad consequences. Mischievous acts also promoted danger and alarm, because members of society feared that they might be the victims of similar mischievous actions in the future. Moreover, the intention to commit a mischievous act might suggest that a person had a habitual tendency to harm others. While both Kames and Bentham acknowledged that it was important to consider intent in determining criminality,

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<sup>151</sup> Home, *Sketches of the History of Man*, vol. iv, 120.

<sup>152</sup> Draper, “An Introduction to Jeremy Bentham’s Theory of Punishment,” 10.

<sup>153</sup> Bentham, *An Introduction to the Principles of Morals and Legislation*, 49.



for Kames intent was the most important signifier of criminality, while for Bentham intent only mattered insofar as it might lead to evil consequences.

While both Bentham's and Kames's writings on punishment were influenced by Beccaria's *On Crimes and Punishment*,<sup>154</sup> Beccaria did not include the intent of the offender as contributing to criminality. Beccaria questioned whether it could ever be successfully gauged. The inclusion of intent and motivation was one way in which Kames's theory on punishment departed from Beccaria's theory. Kames argued for a comprehensive view of the various factors, which included intention, that determined whether an action was criminal or not. Bentham's felicific calculus incorporated motive or intention, insofar as it contributed to the overall impact that an action could have on society. The overall impact that an intention could have on society, the spread of fear and alarm, could be measured. This distinction between Kames and Bentham concerning intent is indicative of the broader divergence between their views. While Bentham and Kames both advocated legal reform and valued utility in their legal sciences, Bentham sought to create a rational legal system based on calculating the tendency of certain actions to promote pleasure and pain. Kames attempted to create a rational system, but his legal science included factors that were not subject to consequentialist calculation, such as intent and moral sense.

## **Conclusion**

Blackstone, Kames, and Bentham represented three prominent eighteenth-century moral theories – natural law, moral sense and common sense, and utilitarianism – and also promoted three different methods for legal change: legal fictions, equity, and legislation. Their particular moral sciences permeated their entire legal sciences. Blackstone endorsed the current legal system as it was, arguing that common law was consistent with natural

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<sup>154</sup> See H.L.A. Hart, "Introduction," in *An Introduction to the Principles of Morals and Legislation*, civ-cv.

law. He relied on legal fiction to promote the idea that law never changed, in that to change the law was to discover that the old law was void, based on its inconsistency with natural law, and to replace it with what was and always had been law. Blackstone utilised social contract theory to explain and justify the past and present legal and political system, and to contend that the juncture for resistance would occur when a ruler breached the contract. While his commitment to the social contract theory may seem inconsistent with natural law doctrine, by Blackstone, and the common lawyers, it was taken for granted that the King and Parliament would not enact laws that were injurious to society, because of the balance of the three estates: King, Lords, and Commons. Thus, as was argued in Chapter Two, one of the reasons why Blackstone wrote the *Commentaries* was to familiarize lawyers and MPs of the essential place of natural law within the English legal system. In accordance with this fact was Blackstone's notion that only natural law and divine law could deem an offence to be capital. As God gave human life, only he could take it away.

Both Kames and Bentham relied on utility in their legal sciences. Kames attempted to explain how the process of reform could best occur through courts of equity. He promoted the idea that adhering to the principles of utility and justice and the moral sense would aid judges in their final decisions. Bentham believed that a new system of legislation based on the principle of utility would allow reform to take place, both publicly and transparently, when necessary. For Bentham and Kames, the proper role of legal figures, whether legislators or judges, was openly and transparently to reform laws that did not accurately reflect morality – whether morality was determined by the developed common sense of society or an adherence to the principle of utility. Utility was a critical feature of legal modernization for both Kames and Bentham. However, as Lieberman explains, whereas Kames placed reform in the hands of 'enlightened judges', Bentham empowered

‘scientific legislators’.<sup>155</sup> Kames’s views were situated between the stances taken by Bentham and Blackstone. Bentham and Kames had many similar views and opinions; but Bentham divorced Kames’s utilitarian views from sentimentalism and added what to him was a more objective and rational calculation based on the real sensations of pleasure and pain.

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<sup>155</sup> Lieberman, *The Province of Legislation Determined*, 174-175.

## Chapter Seven: Conclusion

This thesis has sought to investigate how Blackstone, Kames, and Bentham each understood the significance of historical study in relation to legal development. Essential to this study was the fact that each writer was representative of a specific moral theory – natural law, moral sense and common sense, and utility – that permeated their entire legal sciences.

Blackstone argued that English law was consistent with natural law and contended that the continued and uninterrupted practice of laws and customs proved that they were necessary and suitable for civil society and increased social welfare. Kames instead advocated a holistic account of history. He noted that it was important to understand how the laws of England and Scotland had developed. By accurately tracing this development, judges and legislators could determine where reform was needed, and whether laws reflected the development of society. If they did not, reform could be introduced by courts of equity, through the employment of reason, the moral sense, and the principles of justice and utility, in place of relying on past authority or precedent. Bentham put forward the principle of utility as the basis of law and morality, and argued that the common law should be replaced with a system of legislation based on it.

Bentham used historical examples to illustrate his arguments and had a sophisticated understanding of the flaws and problems inherent in historical analysis. Bentham thought the use of history was beneficial to the extent that past experience was the basis of knowledge, but he was also aware that history could be exploited by historians and legislators pursuing their own particular interests. In comparison to Blackstone and Kames, Bentham was much more aware of, or at least more transparent about, the pitfalls of studying and utilizing history. Bentham's use of history was unbiased in comparison to

Blackstone and Kames, who tended to distort history in order to support their legal and moral theories. Because Bentham's legal science did not directly rely on history for validation or for determining legal reform, he was able to investigate and examine history at face value. Bentham aimed to create a legal system that was clear, transparent, public, and rationally calculated.

There are various fundamental disagreements between Blackstone and Bentham. An important explanation for their differences, as numerous historians have contended, was Blackstone's opposition to reform. It is true, as Prest has recently argued, that Blackstone did advocate reform in relation to certain laws and practices. However, Blackstone had an unwavering faith in the current legal system and the ideals for which it stood, while Bentham did not. According to Blackstone, if past laws were found to be unjust, it was because the legislator or judge who had introduced them had been led astray or misinformed. It was the role of judges and Parliament to remove these bad laws. Moreover, Blackstone believed that there were multiple safeguards put in place to keep judges from making unjust decisions.<sup>156</sup> While Prest is correct to contend that Blackstone was not anti-reform, Blackstone thought that reform should take place within the established system of legislation and procedure. According to Blackstone, the value of the current legal and political system was proven from its historical practice.

Bentham did not admire the legal and political system in England. He saw the influence of sinister interests in both the past and the present. This is why he advocated a system of law that was clear and precise, with little room for judicial interpretation. The question was not whether judges could be trusted not to enact a law that was harmful to society, but how a legal structure could be put in place to stop them. Past laws had proven

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<sup>156</sup> See 24n on pp. 250.

to be flawed, and that is why laws should be introduced which were based on the principle of utility.

Adding Kames to the Blackstone and Bentham debate has provided considerable insight into the approaches to studying law and history in Scotland and England in the eighteenth century. Throughout this thesis I have highlighted the many similarities between Kames and Bentham. Both men argued that legal reform was necessary, they both advocated the use of the principle of utility in their legal sciences, and they both noted that history was important for understanding the law, but in no way justified its continued practice. While similarities are present, it is important to note how Kames's views were not as progressive as were Bentham's. Kames may have advocated the use of the principle of utility, but concurrently, he promoted the use of sentimentalism, and thought legal reform should be in the hands of enlightened judges. By advocating the moral sense – a sense instilled in humans by God – and placing power in the hands of judges, Kames's legal science, while it did advocate for reform and attempted to be more certain, was not far enough removed from the irrationality, bias, and theological dogma that Bentham thought plagued the eighteenth-century legal system. While Kames and Bentham had the same goal – achieving the greatest happiness in society – they fundamentally disagreed on the correct means of reaching that goal.

In short, Bentham's legal science was consistent with his views on history. History, like common law, natural law, and divine law, was open to interpretation and could be skewed to prove the validity of any practice, law, or idea. History, like the common law, was a tool of the polemic and the politician. In his legal science, Bentham freed history from its subservience to politics and religion, just as he attempted to free England from political, religious, and legal tyranny.

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