Bentham, Courts and Democracy

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i. Introduction

The three-volume *Constitutional Code* comprised Bentham's most ambitious contribution to political theory and formed the major intellectual project of the final decade of his long career in law reform (1822-32). A striking, though neglected feature of his constitutional program was the amount of space and detail devoted to the judiciary. In ordering the component parts of his plan for government, Bentham adhered to a template found in many of the regional, national and federal constitutions composed over the previous half-century. He began with a robust statement of popular sovereignty, insisting that "sovereignty is in *the people*. It is reserved by and to them."[1] In elaborating the structure of government powers, he again proceeded conventionally, beginning with the Legislature; then turning to what was often treated as the Executive (here in the form of a Prime Minister, appointed by the elected legislative representatives, who oversaw a network of 13 administrative ministries); and then presenting his plan for the Judiciary. As was characteristic, Bentham took pains to develop an alternative terminology to delineate more accurately these public authorities. The sovereign people exercised the polity's "Constitutive authority". The Legislature, Prime Minister and the subordinate ministers together formed "the Government". The administrative ministries and the judiciary taken together comprised "the Executive". The Legislative and the Executive taken together formed "the Operative" authority, "as contra-distinguished from the Constitutive" authority of the people.[2]

` Bentham was equally unusual in the proportion of attention given to the institutions of justice. He devoted two chapters to the Legislature and the election of legislative representatives, and three chapters to the office of Prime Minister and the 13 sub-ministries under the Prime

Minister's supervision. In contrast, "the judiciary establishment", which dominated the discussion of the third and final volume of the *Code*, required 16 chapters.[3] The magnitude of this attention to the judicial branch (to use the more familiar language of modern constitutionalism) can be quickly illustrated through a comparison with the alternative and far-more influential example of the first constitution adopted by the National Assembly of France in 1791. Bentham, of course, was a close observer of French politics during the early revolutionary period, commenting extensively and critically on its leading legal and constitutional designs. As in the case of his own constitution, the French Constitution began with the statement of popular sovereignty and designed a system of representative government. The description of public powers started with the elected Legislature, presented in two lengthy chapters that were organized into 9 separate sections, totaling 72 articles. The office of the King, who exercised Executive power as constitutional monarch, occupied two chapters, organized into 7 sections and 67 articles. The Judicial Power, however, received a single chapter, undivided into separate sections and containing 27 articles.[4] Taking the constitutional article as the unit of measure, roughly 16% of France's 1791 Constitution addressed Judicial Power. Bentham's *Constitutional Code*, in contrast, devoted nearly one third of its content - roughly 31% - to the Judiciary. His account of public authority, in effect, reversed the distribution of institutional attention found in the famous French predecessor.[5]

The priority Bentham had come to ascribe to matters of courts and their procedures was nicely captured in a law reform polemic he authored at the time of the *Constitutional Code*. "On two achievements is based whatsoever can be done in the way of law reform," he maintained, "appropriate *codification* and appropriate *judiciary establishment*, with its system of procedure."[6] Unlike his democratic advocacy, Bentham's commitment to codification emerged in the 1770s,

at the very start of his writings on law reform. Why, however, should judiciary establishment have come to acquire such prominence in his reform program? Why should he have devoted such extensive attention to this area of public authority in his constitutional design? What did he understand as the specifically democratic dimensions of his plan for the courts and procedure?

ii. Courts and Law Reform

There are obvious and important biographical dimensions to this story. The 1820s in Britain witnessed renewed attention in Parliament and in the press on law reform.[7] A convenient marker of the development was provided by Henry Brougham's six-hour speech of 1828 the House of Commons, which identified for legislative attention reform of the superior courts of common law and of common law pleading; the need for inexpensive and accessible local courts; for reform of the laws governing debt, bankruptcy and tenures. Brougham's marathon oration, however, simply added to an ongoing discussion. Selective reform of the criminal law had been undertaken earlier in the decade under the skillful management of Sir Robert Peel. In 1824, a royal Commission was appointed to consider long-established complaints concerning the costs and abuses in the Court of Chancery. The publication of Abraham Hayward's 1831 translation of Savigny's famous *Zum Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* was symptomatic of a wider 1820s debate in England concerning the merits of legislative codification.[8] And these debates and parliamentary initiatives received further review and publicity in the prestigious political reviews - the Tory *Quarterly Review*, the Whig *Edinburgh Review*; and the radical *Westminster Review*, and in such recently launched elite law journals as the *Law Magazine*.

Bentham moved promptly to take advantage of the opportunities offered by these events.[9] He produced two lengthy and unforgiving critiques of the entrenched abuses in English courts and legal process, the 1825 *Indications Respecting Lord Eldon* in the 1829 *Justice and Codification Petitions*. His 1830 *Lord Brougham Displayed* set out a scathing condemnation of Brougham's, now Lord Chancellor, proposals for the reform of equity jurisprudence and the establishment of new bankruptcy courts. That same year, he also published his *Equity Dispatch Court Proposal*, designed to provide litigants with a cheap and speedy alternative to adjudication under England's equity courts. All these works enjoyed a close relationship to the *Constitutional Code*. Indeed, it is possible to read the law reform polemics as a comprehensive presentation of the abuses and failings that the *Constitutional Code's* alternative plan for the judiciary was designed to eradicate. Bentham himself drew attention to the various connections among these works. His attack on Chancery practice under Lord Eldon was later reissued in the 1830 collection of papers, *Official Aptitude Maximized, Expense Minimized*. The work's contents, Bentham explained at the outset, "take their common origin" in "an all-embracing system of proposed Constitutional Law, for the use of all nations professing liberal opinions."[10] *Indications Respecting Lord Eldon*, *Justice and Codification Petitions* and *Equity Dispatch Court Proposal* were each referenced in the *Constitutional Code*, along with earlier writings on court reform. The Justice Petitions contained a brief summary of the lengthy judiciary plan elaborated in the *Code*, which supplied the required replacement "dictated by a real and exclusive regard for the happiness of the community."[11] By the time of *Lord Brougham Displayed*, much of the Constitutional Code was already in print. Bentham invoked the *Code* directly for the institutional principles that served as the basis of his denunciation of the "sham

reform" measures proposed by Brougham. The harsh critique then concluded with lengthy extracts from the *Code*'s own treatment of "judiciaries collectively".[12]

If the law reform dynamics of the 1820s provided Bentham with extra incentive for devoting himself to courts and legal process, these specific interventions added to a well-developed portfolio of on-topic contributions. As early as the 1789 Preface to *An Introduction to the Principles of Morals and Legislation*, Bentham recognized that his codification program, initially focused on the composition of a penal code, now included "principles of legislation in matters of *procedure*." The "Procedure Code" reappeared in the preface to the published first volume of the *Constitutional Code*, where Bentham promised soon to publish "a Procedure Code Table" to accompany the constitutional plan.[13] No such Table actually appeared in his own lifetime, though he had already written the materials that would be posthumously published as "Principles of Judicial Procedure, with the Outlines of the Procedure Code".[14] Bentham's single most substantial contribution to the legal theory addressed the related topic of legal evidence. This was the five-volume *Rationale of Judicial Evidence*, which a young John Stuart Mill edited for publication in 1827.[15] The plan for judiciary establishment in the *Constitutional Code* thus drew upon a unique fund of reflection on courts and their appropriate operations. Indeed, if Bentham is placed within the company of other famous designers of and advocates for republican constitutions of his era, whose political theories drew his critical notice – such canonical figures as Rousseau, Sieyes, Paine, Condorcet, Madison, Godwin - he is exceptional in coming to constitutional creation following such prolonged engagement with this particular branch of public authority.

iii. Securing Justice

For Bentham, the general goal of the judiciary establishment was to secure justice for the entire community. Justice in this setting was understood in conventional terms, as the "execution and effect given to the ordinances of the main body of law," which secured "to every man alike, in so far as may be, the protection of the law, by means of the appropriate services of the functionaries of justice employed for that purpose." [16] Security was a prerequisite for the pursuit of individual well-being, and legal security was no less vital for the promotion of the community's happiness. In the case of legal disputes between members of the political community, justice was typically frustrated through two distinct kinds of institutional failure, "misdecision" (an incorrect determination of legal rights) and "nondecision" (a failure to vindicate legal rights). The avoidance of these failures, in turn, required the minimization of "expense, vexation, and delay". While these goals shaped Bentham's treatment of courts and court processes, they implicated large elements of his entire law reform project. Codification and the elimination of customary law advanced legal certainty and the understanding of legal rights and duties. New principles governing the treatment of evidence and reformed judicial procedures served to secure prompt and accurate adjudication of disputes. Official records registering property titles, contracts and bequests, as well as concerning births, marriages, deaths and heirs, settled authoritatively the kinds of factual questions often in dispute in legal contests. In this context, such official information formed a body of what Bentham termed, "pre-appointed evidence".[17] Given how many of these elements extended beyond constitutional arrangements, it is unsurprising that these chapters of the *Constitutional Code* presupposed and referenced the larger structure of Bentham's Pannomion and the projected codes of procedure, penal and civil law.

To secure the ends of justice Bentham designed a network of local courts, "immediate judicatories," operating under the authority of a Justice Minister appointed by the elected Legislature. As in the case of other contemporary constitutions, Bentham's *Code* specified the process of judicial selection, conditions of service, and procedures for removal from office. Unlike other constitutions, it did not contain lengthy provisions governing matters of jurisdiction and format: whether (as in the case of the North American states) there were to be courts of equity as well as law; whether (as in revolutionary France) different tribunals and process would govern civil and criminal causes; whether (as in Iberia and South America) there would be courts of special jurisdiction (merchant courts, military courts; church courts); how the number and distribution of courts would be shaped by political sub-unit (county, city; municipality, department, arrondissement); how the monetary value of disputes would determine the available legal forum; and so on.

These complexities were eliminated at a stroke. Judges in the immediate courts exercised what Bentham termed "universal jurisdiction", handling all the disputes that were brought before them, irrespective of their subject matter or monetary value. The immediate courts were publicly-financed tribunals, staffed by salaried officials, and available to the members of the community without charge or fees. They provided uninterrupted service; functioning, as circumstances required, at all times of day and night. Hospitals, Bentham reasoned, never closed their doors to those who needed medical assistance; courts should never close their doors to those in need of justice. And they were distributed in sufficient numbers so as to be accessible within a single day's journey by foot by each member of the community.[18] (In other contemporary writings, Bentham calculated that this required a local court within 12 miles distance of the individual.[19]) Allowing 6 hours for the completion of a typical case, Bentham

enthused that "a grown person, in a state of ordinary health and strength" could activate the court and secure judgment "in the course of any day of 24 hours, without sleeping elsewhere at home."

As important as the universality and proximity of these tribunals were the procedures and personnel through which they operated. Presiding over each court was a single appointed judge, an administrative arrangement that embodied the principle of "single-seatedness" which operated standardly through the *Code*. The immediate judge, moreover, exercised extensive investigatory powers and procedural discretion through a process of adjudication Bentham referred to as "natural" or "summary" procedure. Natural judicial procedure resembled the kind of informal adjudication found in domestic settings and in a variety of jurisdictions in the varied landscape of English law, such as hearings before an individual justice of the peace.[20] The individual judge took responsibility for collecting and receiving evidence and for interrogating litigants and witnesses. Information, arguments and responses were presented orally by litigants themselves and directly to the judge. Each court was furnished with a small number of salaried officials; among them, advocates representing the government as well as advocates to advise and assist suitors. However, the institution was purposely designed to eliminate the need for and costs of professional representation; and there were no restrictions on the kinds of evidence and testimony the court could receive. The direct participation of the litigants and the procedural discretion given to the judge, for Bentham, served the interests of speedy resolution as well as accurate decision.

The local immediate judicatory functioned as the workhorse of justice in Bentham's constitutional system. He also provided for a system of appellate judicatories that likewise enjoyed universal jurisdiction and exercised authority to review the decisions by the local courts. Overall, though, appellate review had limited impact on the envisaged structure. In the case of

England, Bentham believed that a single appellate court, located in the metropolis, would be sufficient. The appellate court was responsible for reviewing the immediate judge's ruling and the evidence presented at trial. No new evidence was gathered and the litigants themselves were freed from the burden of attendance.[21]

Given the multitude of the immediate courts and the procedural discretion enjoyed by the immediate judge, Bentham turned to the instrument of publicity to ensure the integrity and rectitude of the institution's processes and decisions. Publicity, of course, operated throughout the *Constitutional Code* as a general and critical resource against the abuse of power. In the case of the judiciary, however, Bentham believed that publicity functioned with special efficacy. One of the few redeeming features of English law was its system of open courts which enabled the public to monitor the performance of the highest judges. "Publicity is the very soul of justice," Bentham explained to the legislators of France in 1790, "It is the keenest spur to exertion, and the surest of all guards against improbity … It keeps the judge himself, while trying, under trial ... Without publicity, all other checks are fruitless: in comparison of publicity, all other checks are of small amount."[22]

Bentham reaffirmed these sentiments in the *Code*: "Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. Where there is no publicity, there is no justice." Accordingly, his goal for "every judicial proceeding" was that "publicity be maximized".[23] Single-seatedness, while reducing public costs in the form of judicial salaries, at the same time intensified the responsibility and the resulting accountability of each individual judge. With rare exception, the immediate courts operated as open tribunals, specifically designed to accommodate outside observers and government monitors. Judges were required to provide full accounts of the reasons behind their rulings; and their decisions were preserved in

detailed and standardized official records that would again be available for government and public inspection. The supervising Justice Minister produced an "Annual Judicial Service Calendar" identifying which judge and court officials staffed each of which immediate court throughout the polity. Official complaint books were maintained, available to all those who participated or casually observed court proceedings, as was the record of cases that received appellate review. The record of complaints was particularly important for determining "those petty mental and verbal injuries" often caused by those endowed with power and authority. Based on all these records, the performance and productivity of each judge was placed under routine and critical public surveillance.[24] As elsewhere in his plan for government, individualized responsibility and accountability, systematic record keeping, and the inspecting eye of a critical public operated as a check against corruption by officeholders and as a spur to honesty and diligence.

Among the many devices deployed to intensify publicity, Bentham created a novel institution he styled the "quasi-jury". The function of the quasi-jury followed from Bentham's analysis of the strengths and weaknesses of the common law petit jury. He had no patience for the conventional rhetoric extolling the jury as the glory of English liberties or the legal voice of the community custom. The jury, like much else in English law, was the product of a barbarous past and in no sense equipped to render authoritative legal decisions. Its large size and unanimity requirement actually functioned to reduce individual responsibility and limit dissent among its members. Current practices rendered it vulnerable to manipulation by the bench.[25] Nonetheless, the jury played a critical role under the present conditions of a defective law and corrupt adjudication. The common law jury hindered the application of bad law and resisted government's efforts to censure critics, as in case of seditious libel where the letter of the law

actually provided scant protections for press and public freedom. More constructively, the presence of a jury forced the judiciary to provide reasons in its decision-making and thus reveal itself and the law to the community.[26]

The quasi-jury represented a constructive distillation of this analysis. Comprehensive codification and the reformed system of judiciary establishment eliminated at source the kinds of abuses that the traditional jury functioned to obstruct. If "the principal use" of the common-law jury was "to undo what legislators and lawyers have done" in creating bad law, then in the opposite situation of laws "conducive to the greatest happiness of the greatest number," the obstructive function of the jury "cannot but be prejudicial."[27] The vital task that instead was left to the jury was to serve as a vehicle for publicity and as a tribunal of first instance for critical public opinion. Like the political press, the quasi-jury comprised an instantiation of democracy's Public Opinion Tribunal. Composed of three members, drawn locally from the large pool eligible voters, the quasi-jury had no power in determining verdicts. Instead, it functioned as a mandatory court observer, passing judgment on the conduct of cases and especially on the conduct of the judge. Quasi-jurors were paid for their service, which was required by law. The body operated through majority voting. Where the quasi-jury disagreed with the decision of the judge, such disagreement would immediately trigger a review procedure. Where one member of the quasi-jury disagreed with the decision of the judge, a report of the dissent was included in the official record of the court. The "main uses of the quasi-jury," Bentham maintained, were twofold: first, "serving as a check upon the power of the judge"; and second, furnishing "appropriate instruction" to the jurors themselves "as scholars in the Judicatory, in its character of a *school of justice*."[28]

Throughout the *Constitutional Code* Bentham's recommendations included frequent reminders of the prevailing abuses his designs served to eradicate. This was powerfully so in the case with regard to his program for courts and justice. Just as codification offered a systematic antidote to the pathologies of judge-made customary law, so the publicly-funded, single-seated judiciary utilizing natural procedure furnished a systematic remedy to the entrenched abuses of the existing "technical system of procedure."[29] Bentham delineated at length the opposition between the two court systems in many earlier writings. The 1808 *Scotch Reform*, for example, exhibited the stark contrasts between natural and technical processes, presented in two columns in terms of which the failings of the technical system were set against the corrections of the natural system. The dialectical relationship between the two systems was so tight, Bentham explained, that the principal elements of the natural system were themselves "chiefly of the negative cast; constituted by the absence of those devices, which constitute so many characteristic features of the technical system."[30]

For the purposes of the *Constitutional Code*, the law reform polemics Bentham composed in the 1820s` are particularly relevant and instructive. The 1829 *Justice and Codification Petitions* supplied the British public with draft petitions to Parliament in support of comprehensive law reform. As he insisted in the *Constitutional Code*, the key to the vices of the long-entrenched legal order was the practice of court and legal fees, which directly tied the power and material welfare of judges and lawyers to the costs and requirements of the legal process. Rather than aiming at justice, the technical system aimed at the wealth, power and corrupting sinister interests of "Judge & Co". "One thing is throughout intelligible," Bentham thundered, "at the bottom of everything are fees … The greater the quantity of gold in the shape of fees … the more cruelly will every one of us be … delivered over to be tormented" and "the

more insatiably squeezed for fees."[31] The ordering logic of fees cemented the shared interests of Judge and Co., as it coordinated the conduct of judges, court officials and legal professionals. "The more suits the one class gets, the more suits the other gets; and the more money the one gets, the more money the other gets," he explained. Those seeking justice "are taxed three times over: by payments to the judges, by payments to their subordinates, and by payments to the professional lawyers: the classes of whom are, for the same sinister purpose, multiplied without limit: and not only without use to, but greatly to the detriment of, truth and justice."[32]

The cumulative product of the fee-fed "Judge & Co." was a towering labyrinth of "expense, vexation and delay" that masqueraded as justice. The first and most extensive of the *Petitions for Justice*, a massive 207-page text in its original published form, thus set out in enraged detail, the systemic abuses of the technical system. Bentham described 14 distinct "Devices" that sustained and magnified the failings of the unreformed system. An unwritten and unknowable body of judge-made common law, arcane terminology, feigned legal actions, stylized legal pleadings and exacting court protocols, as well as extensive reliance on legal fictions, created an unintelligible legal order in which the vindication of legal right necessarily required the assistance of lawyers and court officials charging for their services. The search for fees and opportunities to charge litigants inflated the numbers of officials, courts, judges and jurisdictions, as well as the required stages and forms of legal process. Rules that barred litigants from presenting their own cases in court enabled and multiplied technical rules of evidence, which necessitated the submission of lengthy, costly and often duplicative documents, and which in turn created new opportunities for extracting fees. Restricted law terms and limited court sittings extended delays and thereby increased costs and vexation. The multiplication of tribunals, distinguished by both territorial and subject-matter jurisdictions, meant the same legal

dispute might be bandied from court to court; each court utilizing different procedures and rules of evidence and each requiring new submissions and pleadings; and every step adding further layers of expense and delay. A property dispute appearing before the courts of common law, Bentham reported, "under the most favorable circumstances" might cost "upwards of 30 pounds, while, in cases to a large extent, it amounts to hundreds of pounds." When a property dispute moved "by appeal from court to court", the cost was raised "to thousands of pounds". And when a case came before "the equity courts", the costs inflated "to little if anything short of tens of thousands of pounds." Had the case instead been treated according to a "mode of procedure really aiming at justice" - that is, the alternative natural procedure - "the suit would be heard and determined, without any expense in the shape of *money* and at an inconsiderable expense in the shape of *time*."[33]

For Bentham, the damage caused by the abuses of the unreformed legal order went well beyond the crippling, unnecessary and avoidable expense, vexation and delay it inflicted on those seeking justice. Two particular consequences received emphasis and regular condemnation. First, the costs of litigation turned the legal order into a weapon the wealthy could use against those lacking comparable resources. What determined whether to pursue litigation was less the merits of a legal claim than the resources that could be brought to bear against an opponent. Justice was thus "sold", and that at a truly "ruinous price."[34]. The legal order became "a graduated system of depredation and oppression" in which each social rank enjoyed "dominion" over those below it.[35] Second, the expense of litigation simply placed justice beyond the means of the vast majority of the population. The legal establishment conventionally measured the importance of a suit according to the monetary value of the property in question. In addition, the entry-costs of litigation were conventionally defended as useful discouragement to

litigiousness. Bentham, however, countered that the importance of the suit was relative to its value for the victim of the alleged injury, and that this value necessarily varied according to the material situation of the victim in question. For "the immense many" who could not afford to pursue a meritorious claim, justice remained simply unavailable. "Be the pay in each instance but a farthing," he insisted, "to all that cannot pay the farthing, justice is denied."[36]

iv. Courts and Democracy

Bentham's polemics against the legal establishment made vivid the institutional revolution encompassed by his constructive constitutional program. Summary procedure, currently associated with inferior tribunals and disputes of lesser consequence, were elevated as the model forum of justice. What were standardly regarded as the highest forms of adjudication and celebrated as practices maintaining the integrity of judgeship and preserving the liberty of subjects - courts boasting benches of senior judges, scrupulously maintaining procedural forms - were cast aside as the products of professional avarice and sinister interest.[37] "No system of judicature hitherto established," Bentham regularly insisted, "has justice for its object." His designs, in contrast, for the first time offered "to every man alike, in so far as may be, the protection of the law, by means of the appropriate services of the functionaries of justice employed for that purpose."[38]

This priority that the institutions of justice reach all the members of the community extended well beyond the geographic placement of local courts and the free and prompt adjudication these courts delivered. Bentham identified important, additional measures to support those to whom justice was previously denied. Litigants had available to them a new official, the "Eleemosynary Advocate", who provided legal advice and representation to those unable to

afford private counsel. Among the measures to ensure "justice for the helpless" was the creation of a publicly-financed "Equal Justice Fund" to assist with the expenses associated with litigation and court attendance, and to help mitigate the imbalance "between two litigants occupying different stations in the scale of opulence." Whereas existing abuses enabled the law to function as a weapon of wealth against the poor, Bentham in his constructive program proved remarkably attentive to the numerous and more subtle ways in which social and economic superiority could hamper the practice of equal justice. In contrast to the elaborate robes and wigs that adorned officials in the highest courts, Bentham specified modest "habiliments" for judges, designed to reduce rather than magnify the superiority of the individual judge.[39] Judges publicly declared "not [to] bestow less attention upon the causes of the poor than of the rich" and to recognize "that the importance" of an individual suit "depends not upon nominal value, but upon the proportion of the matter in dispute to the circumstances, and its relation to the feelings of the parties." At the same time, the judge affirmed that "among my sincere and constant cares" would be "to avoid wounding, by haughtiness of demeanor, the sensibility of such of my fellow citizens, whose business brings them into communication with me."[40]

Perhaps most intriguing were the efforts to insulate courts and judges from the corrupting influence of the legal profession. Bentham institutionally severed the professional connections between elite bar and bench by treating professional legal practice as disqualifying for judicial service. Repudiating the well-established English convention that distinction as a barrister provided the proper qualification for elevation to the bench, Bentham emphasized the very different tasks and values appropriate for each role. Talented lawyers inevitably sought employment from wealthy clients whose interests they were hired to advance. Effectiveness in this role required a distinct set of qualities: zeal, partiality, partisanship and a full commitment to

the client's cause. Or, in the characteristically tendentious expression of the *Constitutional Code*, successful "professional lawyers" were those "who have been for the longest time habituated to the practice of profit-seeking and profit-reaping mendacity."[41] The attributes that made for private wealth and professional eminence, however, were precisely the qualities that proved disastrous in the office of the judge. Here the commitment to justice and the general welfare of the entire community was paramount. Accordingly, Bentham explained of his program, that "every expedient that could be found" was embraced "for bringing the particular interests of the judge as near as possible to coincidence with the universal interest." In the antithetical case of the private lawyer, whose interest was aligned to the private party whose legal claims he was hired to advance, this kind of alignment between professional interest and universal interest was "absolutely impossible."[42]

In the language of modern law, Bentham's constitutional program gave overwhelming prominence to legal access, legal aid and equal justice. Or in the rhetorical flourish with which he introduced his *Petitions of Justice*, "Justice! Justice! Accessible justice! Justice, not for the few alone, but for all! No longer nominal, but at length real justice!"[43] This institutional priority is even more striking given that Bentham at the same time denied to the courts many of the functions now taken as key to constitutional democracy. The *Constitutional Code* did not contain a statement of fundamental rights that the judiciary was assigned to protect against violation. The Code did not authorize a distribution of public powers that the judiciary was assigned to police and preserve. Judges exercised a weak form of judicial review in that they had authority to identify particular legislative proposals or actions they believed violated the provisions or design of the constitutional system. Such judgments Bentham expected to have impact on public debate and on the electorate. Nonetheless, he was explicit that the courts had no authority to invalidate

any measures enacted by the legislature. "If, on any occasion, any ordinance, which to some shall appear repugnant to the principles of this Constitution, shall come to have been enacted by the Legislature, such ordinance is not on that account to be, by any judge, treated or spoken of, as being null and void."[44]

While Bentham was thus expansive and resolute concerning the goals and functions of judicial power in his plan of representative government, a critical question emerges concerning what was specifically *democratic* about this program? Present-day advocates for enhanced legal access and the better provision of legal services echo Bentham in making clear that the most frequent failures of justice are owing to the systemic impacts of economic disadvantage, power imbalances, the costs of legal process and the absence of effective legal representation. "Money often matters more than merit," an influential American scholar explains, "and equal protection principles are routinely subverted in practice." In this discussion, a "commitment to equal justice" is taken to be "central to the legitimacy of democratic processes" and an affirmation of "a respect for human dignity and procedural fairness that are core democratic ideals." Nonetheless, here as more generally, the emphasis rests on the easily demonstrated and pervasive failures of the legal system to fulfill these ideals and values, and to the far-reaching institutional changes required for their realization. The precise democratic nature and ramifications of access to justice are invoked rather than delineated.[45]

The question has particular poignancy in the light of Bentham's own intellectual development. The *Constitutional Code* furnished a setting for the constructive elaboration of the institutions of justice, but the plan itself built explicitly on materials that had been assembled earlier, usually in the decades well before he embraced the cause of democratic reform. At the very outset of his career, Bentham recognized that the arcane terminology and procedures of

England's unwritten law operated to the benefit of England's lawyers who naturally resisted law reform. The "grand and fundamental" blemish of William Blackstone's celebrated presentation of English law, he maintained in 1776, was its "antipathy to Reformation."[46] As Philip Schofield correctly observes, the "main features of the judicial establishment which Bentham proposed in the 1820s had been anticipated in 'Draught of a New Plan for the organization of the Judicial Establishment in France,'" composed some 30 years earlier.[47] Bentham's 1793 *Protest against Law Taxes* denounced the pernicious consequences for the poor of a legal system that charged litigants for the costs of obtaining justice, using arguments and indeed specific language that reappeared in the *Constitutional Code*.[48] The 1808 contributions to the debate on judicial reform in Scotland, elaborated the dramatic benefits of "summary procedure" and excoriated the costs, intricacies and delays of alternative methods of adjudication that so well served the "sinister interests" (now labeled as such) of the law's "Judge and Co." (now identified as such).[49] A full and detailed rehearsal of the case against England's legal institutions and processes was included in the massive *Rationale of Judicial Evidence*, based on manuscripts composed from 1802-12. The work devoted one of ten Books to a strident critique of the "English system of Technical Procedure." The discussion, Bentham's talented editor reported, "may appear not to be so intimately connected with the more limited design of the work which professes to treat of judicial evidence only." Nonetheless, the "parenthetical treatise" gave ample opportunity for exposing the abuses of the "technical system", explaining its "alliance between the sinister interests of judges and that of professional lawyers" and locating its foundational defect in the goal to promote "fee gathering" and not substantive justice.[50]

All of these "pre-radical" discussions of judicial establishment, legal procedure and judicial evidence were writings Bentham continued to invoke in his democratic constitutional

plans. These works explained at length the ways in which his advocated arrangements furthered the greatest happiness of the community. Nevertheless, the earlier contributions left unexplored precisely how these designs advanced democratic interests or the sovereignty of the people. Bentham, in fact, did see important democratic dimensions to the judiciary plan of the *Constitutional Code*. These connections, however, need some elaboration, as this was not an instance in which political radicalism led to a comprehensive revamping of a previously developed law reform program. As occurred in other instances, political radicalism did not transform the content of the program. Instead, radicalism led Bentham to recognize and emphasize the democratic promise in what was already there. This situation, I previously argued, obtained in the case of Bentham's advocacy for codification.[51] In the case of the institutions and practices of justice, the democratic features become plain when we turn to the fundamentals of Bentham's approach to democracy itself.

Like many of the democrats of his era, such as Sieyès and Paine, Bentham arrived at democracy through a critique of monarchy and aristocracy. All political systems, he maintained, divided the community between the "ruling few" and the "subject many".[52] In the unreformed states of Europe and their colonial outposts, the ruling few comprised entrenched elites that controlled the power and resources of the state to advance their own sectional interests at the expense of the general interest. It was the structured and pervasive sacrifice of the general interest of the community that rendered these forms of political rule a system of sinister interests. Democracy, Bentham recognized, likewise created a "ruling few" exercising government power over a "subject many". Crucially, however, democracy offered resources that might systematically combat the tendency for ruling few to act as a sinister interest against the interests of the community. Frequent popular elections based on a large and equal franchise provided one

such resource. But, as in the case of the judiciary, publicity and accountability were especially potent and critical, even in those settings, like the courts, where offices were held by appointment and not by suffrage.

The cumulative effects of sinister interest manifest themselves in the leading features of aristocratic and monarchic politics: large and expensive government structures; bloated military establishments and overseas empires; established churches furnishing official orthodoxies and obstructing public criticism. Governing through a system of "needless offices, useless offices, overpaid offices, and sinecure offices" provided ample scope for patronage and favoritism, while undermining accountability and responsibility.[53] Political conventions, comprising a mixture of "authority begotten prejudice" and "interest begotten prejudice", worked to mask the corruption and sinister of the ruling few.[54] Sinister interest equipped Bentham with a simplifying logic through which he could cut through the variation among existing states and reject established pieties concerning mixed and balanced constitutional forms. As he explained in his 1817 *Plan of Parliamentary Reform*, he would leave familiar descriptions of England's celebrated constitutional achievement to "Mother Goose and Mother Blackstone." In reality, England's political order, he reported in the *Constitutional Code*, by law comprised "monarchico-aristocratical despotism with a spice of anarchy."[55]

Bentham's emphasis that democracy was valuable as an antidote and cure for the destructive rule of entrenched elites frequently introduced ambiguity and no little sloppiness in his democratic advocacy. Arrangements that promoted the greatest happiness of the community, which naturally included both the ruling few and the subject many, for that reason embodied the "democratic" or "universal" interest, as opposed to the "sinister interest" of a powerful subgroup. Felicific programs of reforms that were absent and resisted in the current unreformed

aristocracies and monarchies of the world became "democratic" as a result. Nonetheless, this orientation was critical to Bentham's understanding of democracy itself. Bentham recognized that popular sovereignty operating through a large and equal democratic franchise did not in itself insure felicific laws and policies. And he took pains to clarify that the greatest happiness principle did not license a sacrifice of the interests of a minority to the preferences of the majority.[56] Still, his constitutional program excluded standard devices for protecting republican and democratic constitutions from the abuse of majority power: bicameral legislatures; declarations of individual rights; super-majoritarian requirements for constitutional change and innovations. For Bentham, the political challenge that representative government faced was emphatically the tyranny of the minority. His favored examples of political abuse tended to dramatize practices of this form of tyranny: Protestant ascendancy in Ireland; the East India Company's rule over millions of "Hindoos"; the government of the master over the slaves in North America; Judge and Co.'s hijacking of justice for the sake of their own wealth and power.

Indeed, courts and legal order supplied Bentham with his leading institutional instantiation of sinister interest and the tyranny of the minority. As we have seen, the leading defects of the law - its perpetuation in unwritten form, its fictions and unfathomable technicality, the expense, vexation and delay that attended its processes - could all be ascribed to the professional interests of judges and practitioners. Rather than implement justice for all members of the community, the legal order advanced the sinister interests of Judge and Co. Significantly, for Bentham, the elite professionals in question were both the beneficiaries and the products of the structures in which they operated. Under the incentives of the fee-gathering system, judges and lawyers had every incentive to maintain and amplify expense, vexation and delay, since such conduct was the route to wealth and power. To choose to abandon the technical system and

instead advance the goal of substantive justice required a sacrifice of wealth and power for the sake of the general welfare of the entire community. Such a sacrifice of personal interest was entirely possible at the individual level. Nonetheless, the failings of current law made evident the utter folly of relying on such sacrifice at the level of institutional design.[57] "Men," Bentham explained in his *Petitions for Justice*, "are the creatures of circumstances;" and although he excoriated against the cupidity of Judge and Co., he nonetheless acknowledged that "placed in the same circumstances," no one else could be confident that his own "conduct would have been other and better than that." Or, in the more generous language of his counsel to the reformers of the judicial establishment in France, "Here, as elsewhere, let us blame establishments, which alone, and not individuals, are justly blamable: for individuals are what the laws that made them."[58]

Bentham's court design and natural procedure, in contrast, created the structures through which the interests of those who dispensed justice were aligned with the interests of the entire community. Judges were separated professionally from the lawyers who served and advocated for the wealthiest clients. The elimination of fees deprived judges and court officials of the opportunity to use adjudication as a means to material profit. They were given the procedural tools to acquire necessary evidence and to resolve disputes quickly. Litigants faced no geographic or financial obstacles to pursue valid claims of legal right. In addition, the relentless mechanisms of intense publicity, direct accountability and the censorial eye of the quasi-jury gave every encouragement to the rectitude of decision-making. The judge preserved his office and enhanced his professional standing by extending justice and thereby, the securities provided by law and the happiness of the entire community.

Bentham's *Constitutional Code* and final set of law reform polemics thus supplied a democratic gloss on reforms that predated the embrace of political radicalism. A furthered democratic dimension was found in Bentham's increasing emphasis on how the sinister interest of Judge and Co. operated within the larger field of the unreformed British state. The benefits of England's large judicial establishment and technical system of procedure for political rulers received regular rehearsal. Stamp duties on legal documents raised revenue for the state, while the multitude of court offices created abundant opportunities for publicly-funded patronage of and rewards for relatives and supporters. The general rule, Bentham maintained, was to "*make the remuneration of all offices as large as the people will endure to see it made*" in order that "*noble and honorable younger sons, and the eldest son during the lives of their respective noble fathers … may be provided for as nobly as possible.*"[59] Britain's ruling elites clearly benefited from a legal order that rendered justice for the rich while neglecting the rights of the poor. However, the benefits came at terrific cost in the expense and professional expertise required to secure many of the basic legal needs of a governing class based on landed wealth: securing dynastic ownership across future generations; mortgaging property to raise funds for building, improvements and marital portions; securing dowries; establishing trusts and protecting minor heirs from waste and dilapidation; transferring title; and so on. Why should law reform not have appealed to the powerful who also suffered from avoidable "expense, vexation and delay"?

Part of Bentham's explanation was ideological. The "interest begotten" prejudices of Judge and Co. had become dominant orthodoxies among the governing elites. The Blackstonean formula that "everything is as it should be", which Bentham never tired of invoking, extended from the content of English law to its procedures and practitioners.[60] Coupled with this, comprehensive reform struggled against the fallacy of being thought "too good to be

practicable". "So general, not to say universal," Bentham maintained, "is the preference given to what is old and bad, how bad soever, to what is new and good, how good soever …"[61] But, Bentham's case equally rested on specific institutional arrangements that enabled Judge and Co. to exercise an outsize influence on state practices.

In this context, Bentham's fierce attack on Lord Chancellor Eldon, presented in the 1825 *Indications Respecting Lord Eldon*, is especially revealing. By the 1820s, the court of Chancery and English equity jurisprudence were well-established targets for reformers of English law. Eldon's long chancellorship was particularly associated with the endless delays and exorbitant costs of Chancery adjudication. By the mid-1820s, critics of Chancery increasingly focused their attacks on the person of Eldon. Bentham eagerly joined the chorus of detractors. He made ample use of such polemics in his *Indications*, particularly in detailing the notorious length and expense of suits for Chancery litigants. As he explained at the outset, "finding the practice of the Court of Chancery replete with fraud and extortion, Lord Eldon … formed and began to execute a plan for the screwing it up, for his own benefit, to the highest possible pitch."[62]

In his later *Equity Dispatch Court Proposal*, Bentham directly addressed the issue of costs and delays, offering litigants an interim solution to escape the equity courts and have their suits handled by a novel "Dispatch Court" that included elements of "natural" procedure.[63] *Indications Respecting Lord Eldon*, however, had a different target. This was to make clear the corrupt political processes that enabled Eldon to exploit so ruthlessly the power and material benefits of his office. In this, Eldon provided a perfect foil for Bentham's purposes. As Lord Chancellor, Eldon occupied the highest position in the hierarchy of England's central courts and local tribunals. At the same time, the chancellorship was a major political position, a ministerial official who presided over the House of Lords in both its legislative and judicial capacities. As

the member of a succession of ministries and cabinets, Eldon successfully helped to obstruct parliamentary proposals for political and legal reform through the 1810s and 1820s. When a royal commission was established in the mid-1820s to investigate Chancery and recommend improvements, Eldon was appointed its nominal head. As Bentham scathingly observed of the arrangements, "it was by Lord Eldon [that] his Majesty was advised to commission Lord Eldon to report upon the conduct of Lord Eldon."[64]

As we have seen, Bentham attributed the abuses and defects of justice in England to the foundation source of judicial fees. "Expense vexation and delay" were the cumulative products of the fee-fed judge and the fee-fed lawyer. Eldon's career provided clear and damning evidence of both the judiciary's relentless pursuit of its sinister interests and of the political failings that supported its realization. On several occasions from the bench, Eldon explicitly acknowledged that the fee increases introduced previously at the Court of Exchequer and in the Commission of Bankrupts were "contrary to the terms of an Order of the Court and sometimes contrary to an Act of Parliament." Notwithstanding their illicit origins, Eldon declared that he would not attempt to rectify what was now established practice. In the face of mounting complaints against oppressive court fees, the Chancellor simply "went to Parliament" and secured a statute that "got the Corruption established". The legislation in question, an act of 1822, gave authority to "the Judges of the several Courts of Record at Westminster to make regulations respecting the fees of the Officers, Clerks, and Ministers of the said Courts." Bentham maintained that the legislation gave retroactive parliamentary sanction to what previously occurred without legal authority. Parliamentary sanction of the judicial power to set fees meant that litigants were once more "delivered up bound, to be plundered in secret, without stint to control, by the hand of these same judges."[65] Whereas a British government would never dare to raise taxes without the authority of

Parliament, judges were authorized to tax suitors in the absence of public scrutiny. Bentham's earlier critique of "jury packing" showed how the judicial handling of the law of seditious libel protected Britain's governors from much-needed public criticism and dissent. *Indications respecting Lord Eldon*, in turn, displayed how Britain's governors returned the corruption and worked to preserve in the sinister interests of Judge and Co. This "one all-embracing and undeniable truth," Bentham insisted, "will serve as a key to every thing … From the Norman conquest down to the present time, diametrically opposite to the ends of justice, have been the actual ends of judicature … Suppose that … Judges would have for the end of action the happiness of suitors? - As well might you suppose that it is for the happiness of negroes that planters have all along been flogging negroes; for the good of Hindoos that the Leadenall Street Proprietors have all along been squeezing and excoriating the sixty or a hundred millions of Hindoos."[66]

V. Conclusion

Bentham's elaborate program for the "judiciary establishment" proves a singularly fruitful area of attention for understanding basic elements of his constitutional project. It displays particularly well the manner in which his strategy for *maximizing* the community's happiness worked through a process of *extension*. The momentous benefits of law and legal security for the first time would be enjoyed by the entire population and especially by those whose lack of wealth previously rendered them victims rather than beneficiaries of the fruits of justice. Here the increase in welfare was the product of a radical redistribution of the reach of justice throughout the community.

The judicial plan also provided Bentham with a singularly compelling example of the logic of democracy as an exercise in institutional design. "Throughout the whole course of my labours," Bentham explained in his polemic against Brougham, his "one rule" in addressing any "institution" was "never to engage in any such attempt is that of pulling it down, but for the purpose, and with the endeavor, to raise up something that to me seemed better, in the room of it."[67] In the case of the administration of justice, current arrangements magnified the abuses of "expense, vexation, and delay" and routinely produced injustice in the form of "misdecision" and "nondecision". Well before his embrace of political radicalism, Bentham had identified the foundational source for these abuses in the practice of financing justice through fees and taxes on litigants. Just as customary law enhanced the power and wealth of legal practitioners by forcing the community to require professional expertise in order to navigate a legal system of unwritten and (therefore, for Bentham) unknowable rules, so a hierarchical maze of duplicative tribunals utilizing arcane forms of action and evidentiary rules enhanced the power and wealth of judges, court officials and elite lawyers by multiplying the opportunities for fees and litigation. The corrupt structure Bentham styled "the technical system of English law" and the routine failures of justice were the natural results of the fee-fed judge and the fee-fed lawyer.

Bentham's cure for this pathology was a thoroughly reimagined structure of institutional justice comprising a nonhierarchical network of easily accessed local courts, headed by single judges, employing a small number of salaried officials and utilizing an unencumbered method of "natural procedure". These tribunals were organized to eliminate "expense, vexation and delay" and to remedy violations of legal right regardless of the social and economic condition of the litigant or the value of the alleged injury. Bentham's local judge enjoyed wide discretion and authority to investigate disputes and decide legal outcomes. However, the combination of

individual accountability and intense publicity operated to keep the judge a faithful executor of the law. Given this institutional structure, the judge maintained his office and salary, and enhanced his reputation by pursuing justice under law. And thanks to the concurrent operation of a comprehensive code of penal and civil law displaying "the dictates of utility in every title," securing justice advanced the greatest happiness of the entire community.

Bentham's embrace of representative government left in place this critical diagnosis and institutional antidote. Political radicalism supplied a political deepening of the analysis. The rent-seeking conduct of "Judge and Co." now figured as one of several privileged elites who commandeered the institutions of the state to enhance their wealth, power and "sinister interests". The advocated network of reformed court and reformed procedures, advancing the welfare of the entire community, were now understood to serve a universal and democratic interest. In addition, political radicalism sustained and enhanced a long lifetime's fury at the failings of current law. "Astonishment and indignation," Bentham instructed at the opening of his constitutional plan for the judiciary, "are the sentiments which the perusal of this chapter … can scarce failed to excite in the breast of every reader … the effect is certain: the cause is altogether simple."[68]

The goals of equal justice and legal access that Bentham emphasized in his constitutional program were, of course, scarcely novel. Bentham himself was fond of quoting Magna Carta to condemn the manner by which justice was routinely sold and denied by England's courts and rulers. The constitutions of his era standardly promised - here in the language of the 1780 Constitution of Massachusetts - that "every subject ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."[69] Yet if the goal of free and accessible justice was

unexceptional, the attention and care he gave to its institutional realization was quite exceptional. The exceptional size, specificity and detail of Bentham's plan for "judiciary establishment" in the *Constitutional Code* can be taken as evidence of the amount of public resource and political commitment he recognized equal and accessible justice so urgently to demand.

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[1] Bentham, *Constitutional Code: Volume 1* (F. Rosen and J.H. Burns (eds.) Clarendon Press, 1983) 25.

[2] Ibid, p. 27.

[3] Bentham refers to the "judiciary establishment" at Bowring 9:456. He also frequently use the term "judicatory" to refer to courts, not liking the monarchical associations of the latter term. Bentham organized the *Constitutional Code* into the three volumes; Volume 3 additionally covered arrangements for local government. Bentham's 3-volume organization of the Code was abandoned by Richard Doane in the version he edited for the Bowring edition. In what follows, I adhere to the 3-volume arrangement Bentham planned.

[4] See 1791 Constitution of France, Title III (Of Public Powers), chapters 1-5.

[5] The same contrast obtains respecting many other contemporary constitutions. The contrast is potentially misleading in that many constitutions left it to subsequent legislation to specify the institutional details for courts Bentham set out in his *Constitutional Code*. However, Bentham's insistence that these matters deserved inclusion in the constitutional document is itself revealing.

[6] Bentham, *Lord Brougham Displayed*, Bowring 5:609.

[7] These developments are most recently surveyed in the contributions by Michael Lobban and Patrick Polden to volume 11 of the *Oxford History of the Laws of England* (Oxford, 2010), which draws on their earlier and valuable research.

[8] Abraham Hayward, *On the Vocation of our Age for Legislation and Jurisprudence* (London, 1831). I consider the nature of this debate over codification in my, "Legislation in a Common Law Context", *Zeitschrift für Neuere Rechtsgeschichte*, volume 27, nos.1-2 (2005), 107-23.

[9] Schofield provides an insightful survey and assessment of these materials in *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford, 2006), pp.304-36. Additional background and important insights are provided by Chris Riley in "Jeremy Bentham and Equity: the Court of Chancery, Lord Eldon, and the Dispatch Court Plan", *Journal of Legal History* (2018) 39:29-57, and "The Hermit and the Boa Constrictor: Jeremy Bentham, Henry Brougham, and the Accessibility of Justice", *American Journal of Legal History* (2019) 1-26.

[10] *Official Aptitude Maximized, Expense Minimized* (1830), ed. Philip Schofield (Oxford, 1993), p. 5.

[11] *Justice and Codification Petitions*, Bowring 5: 498-504.

[12] *Lord Brougham Displayed*, Bowring 5: 610-12.

[13] *An Introduction to the Principles of Morals and Legislation*, eds., J.H. Burns and H.L.A. Hart (London, 1970), p. 6; *Constitutional Code* vol. 1, p. 4.

[14] Richard Doane, who edited these materials as well as the *Constitutional Code* for the Bowring edition, drew attention to these connections in his introduction to the writings on procedure; see Bowring 2:1.

[15] Mill was 18 when he embarked on the editing of the work. The material was first published in 1823 in the version edited by Etienne Dumont as *Traité des Preuves Judiciares*.

[16] *Constitutional Code* [Volume 3], Bowring 9: 463, 455. Bentham also treated "justice" in less institutional terms; see, for example, "The Article on Utilitarianism", in *Deontology*, ed. Amnon Goldworth (Oxford, 1983), 308-9.

[17] *Constitutional Code* [Volume 3], Bowring 9:626; and see *The Rationale of Judicial Evidence*, Book 4.

[18] *Constitutional Code* [Volume 3], Bowring 9: 515-21.

[19] *Justice and Codification Petitions*, Bowring 5: 498.

[20] Bentham's other examples of tribunals adopting natural procedure included statutory Courts of Requests (which adjudicated small debts), Commissions of Bankrupts, and Denmark's Conciliation Courts.

[21] See *Constitutional Code* [Volume 3], Bowring 9:470n, 473-4, 585-8.

[22] *Draught of a Code for the Organization of the Judicial Establishment in France*, Bowring 4: 306-7.

[23] *Constitutional Code* [Volume 3], Bowring 9: 493.

[24] Ibid, Bowring 9:493-4, 498-502.

[25] Bentham's fullest rehearsal of these abuses is found in his polemic against "jury packing", *The Elements of the Art of Packing, as Applied to Special Juries, particularly in Cases of Libel Law* (published 1821); see Bowring, 5: 61-186.

[26] *Constitutional Code* [Volume 3], Bowring 9: 554-6.

[27] Ibid, 554.

[28] Ibid, 558. The organization and functions of the quasi-jury is set out in Bowring 9:554-68.

[29] *Rationale of Judicial Evidence*, Book 8; Bowring 7:196-334.

[30] *Scotch Reform*, Bowring 5:8. Bentham drafted the work in response to a statement by Lord Grenville, then Prime Minister, to introduce legislation for the reform of civil justice in Scotland.

[31] *Justice and Codification Petitions*, Bowring 5:476.

[32] ibid, 535.

[33] ibid, 535-6. Bentham drafted three separate *Petitions for Justice*. The 207-page length of the first petition refers to the version first published in 1829. The Petitions concluded with a brief summary of the plan for the judiciary detailed in *Constitutional Code*.

[34] Ibid, 444.

[35] *Constitutional Code* [Volume 3], Bowring 9: 489 and see 474.

[36] *Justice and Codification Petitions*, Bowring 5:444.

[37] Bentham's *Constitutional Code* did include several "many seated" judicatories, such as the investigatory and penal tribunals conducted by the legislature. For relevant examples, see Bowring 9:457.

[38] *Constitutional Code* [Volume 3], Bowring 9: 455.

[39] Ibid, 577-9, 490, 540-1.

[40] Ibid, 534.

[41] Ibid, 595.

[42] Ibid, 592-5.

[43] *Justice and Codification Petitions*, Bowring 5: 444.

[44] *Constitutional Code Volume 1*, 45. I discuss Bentham's arguments against constitutional entrenchment in "Declaring Rights: Bentham and the Rights of Man," in Ian Hunter and Richard Whatmore (eds.) *Philosophy, Rights and Natural Law* (2018, Edinburgh University Press), pp.

[45] Deborah L. Rhode, *Access to Justice* (2004, Oxford), pp. 3, 9.

[46] *A Comment on the Commentaries and A Fragment on Government*, eds. J.H. Burns and H.L.A. Hart (London, 1977), p.394.

[47] *Utility and Democracy*, p. 306.

[48] *A Protest against Law Taxes*, in *Writings on Political Economy Volume 1*, ed. Michael Quinn (Oxford 2016), pp. 269-98.

[49] See *Scotch Reform*, Bowring 5:6-7, 35.

[50] *Rationale of Judicial Evidence*, Bowring 7:199, 201.

[51] See my "Bentham on Codification", in Stephen Engelmann (ed.), *Selected Writings of Jeremy Bentham* (Yale University Press, 2011), pp. 470-3.

[52] This following summary draws especially from Bentham's *First Principles Preparatory to Constitutional Code*, ed. Philip Schofield (Oxford, 1989). My characterization of Bentham's approach to democracy is heavily indebted to the account provided by Philip Schofield in *Utility and Democracy*.

[53] *Official Aptitude Maximized, Expense Minimized* (1830), ed. Philip Schofield (Oxford, 1993), p. 360.

[54] See, as a brief example, Bentham's discussion of the arguments supporting the idea of a "Second Chamber" in the organization of the legislature; *First Principles Preparatory to Constitutional Code*, pp. 106-10. A fuller general discussion appears in *The Book of Fallacies*, ed. Philip Schofield (Oxford, 2015), pp. 44-64.

[55] *Plan of Parliamentary Reform*, Bowring 3: 450; *Constitutional Code Volume 1*, p. 25.

[56] This issue led Bentham to abandon his original formulation of the greatest happiness principle - "the greatest happiness of the greatest number" - and replace it with, "greatest possible happiness"; see "Article on Utilitarianism", pp. 309-10.

[57] The need to design institutions and legislation on a presumption of human self-interest was a central tenant of Bentham's reform projects; see *Writings on the Poor Laws Volume 2*, ed. Michael Quinn (Oxford, 2010) ,pp.353, 373; and *Scotch Reform*, Bowring 5: 15.

[58] *Justice and Codification Petitions*, Bowring 5: 506; *Draught of a Code for the Organization of the Judicial Establishment in France*, Bowring 4:406n.

[59] *Lord Brougham Displayed*, Bowring 5: 587n.

[60] Bentham first deployed the phrase in 1776; see *Fragment on Government*, p.407.

[61] *Lord Brougham Displayed*, Bowring 5: 581.

[62] *Indications Respecting Lord Eldon*, in *Official Aptitude Maximized, Expense Minimized*, p. 205. In documenting the abuses in Chancery, Bentham relied heavily on William Vizard, *Letter to William Courtenay …* (London, 1824) and *Letter to Samuel Compton Cox, Esq. … respecting the practice of that Court* [Chancery], (London, 1824). The background to these attacks on Eldon and efforts to reform Chancery are reviewed by Patrick Polden in *Oxford History of the Laws of England*, 11:646-55.

[63] *Equity Dispatch Court Proposal*, Bowring 3:297-317.

[64] *Indications Respecting Lord Eldon*, p.237.

[65] Ibid, pp.225, 238-9.

[66] Ibid, p.254. The "Leadenhall Street Proprietors" referred to the stockholders of the East India Company.

[67] *Lord Brougham Displayed*, Bowring 5:553.

[68] *Constitutional Code* [Volume 3], Bowring 9: 454.

[69] Constitution of the Commonwealth of Massachusetts (1780), Declaration of the Rights of the Inhabitants, Article XI.