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BENTHAM  
ON GOVERNMENT  
*MONTAGUE*



**London**  
**HENRY FROWDE**



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A FRAGMENT  
ON GOVERNMENT

BY

JEREMY BENTHAM

EDITED

*WITH AN INTRODUCTION*

BY

F. C. MONTAGUE, M.A.

LATE FELLOW OF ORIEL COLLEGE

Oxford

AT THE CLARENDON PRESS

1891

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## EDITOR'S PREFACE.

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THE bulk of Bentham's writings has passed into not unjust oblivion. It would be impossible to renew the life of works so voluminous, so technical, and so frequently disfigured by oddities of thought and style. But it would be unfortunate if those works which most adequately represent Bentham's peculiar genius and which have left a mark upon speculation in England were to remain buried under the weight of dead, unprofitable matter. These works may the more easily be made available inasmuch as they are few and not of great length. Chief amongst them are the *Fragment on Government*, and the *Principles of Morals and Legislation*. The latter treatise has already been reprinted by the Clarendon Press. The *Fragment on Government*, which has long been out of print, is now offered to the public. The Introduction prefixed aims at shewing the place of Bentham in the history of thought, and the significance of the *Fragment* as a contribution to political philosophy.

F. C. M.

OXFORD: December, 1890.



# CONTENTS.

	PAGE
EDITOR'S INTRODUCTION . . . . .	I-90
I. Life of Bentham . . . . .	I
II. Characteristics . . . . .	14
III. Contributions to Theory of Legislation . . . . .	21
IV. The Fragment on Government . . . . .	58
—♦—	
BENTHAM'S FRAGMENT ON GOVERNMENT.	
PREFACE TO THE FRAGMENT . . . . .	93-125
Motives of the present undertaking . . . . .	93
History of it . . . . .	94
The business of the <i>Censor</i> distinguished from that of the <i>Ex-</i> <i>positor</i> . . . . .	98
The latter alone our Author's . . . . .	99
Laws ought to be scrutinized with freedom . . . . .	100
Our Author why attacked in the character of an <i>Expositor</i> . . . . .	106
Reprehensible passages from the work at large . . . . .	108
Its merits . . . . .	116
Idea of a <i>natural</i> arrangement . . . . .	118
Merits of the work resumed . . . . .	122
Manner in which the present Essay has been conducted . . . . .	123
INTRODUCTION . . . . .	127-130
I. Division of our Author's Introduction . . . . .	127
II. What part of it is here to be examined . . . . .	128
III. His definition of Law Municipal . . . . .	128
IV. A digression in the middle of it. Its general contents . . . . .	128
V. This digression the subject of the present examination . . . . .	129
VI. Our Author's sketch of the contents . . . . .	129
VII. Inadequate . . . . .	130
VIII. Division of the present Essay . . . . .	130
CHAPTER I. . . . .	131 163
I. Subject of the passage to be examined in the present chapter . . . . .	131
II. The passage recited . . . . .	131
III. Confusion among the leading terms of it . . . . .	133
IV. 'Society' put synonymous to a state of nature,—opposed to 'Government,'—and spoken of as having existed . . . . .	134
V. 'Society'—put synonymous to 'government' . . . . .	134
VI. A state of nature spoken of, as never having existed . . . . .	135
VII. <i>Original contract</i> , its reality denied— . . . . .	135

	PAGE
VIII. —asserted . . . . .	136
IX. Attempt to reconcile these contradictions—Society distinguished into natural and political . . . . .	136
X. Idea of <i>political</i> society . . . . .	137
XI. Idea of <i>natural</i> society . . . . .	137
XII. Difficulty of drawing the line between the two states . . . . .	137
1. <i>A habit</i> . . . . .	138
2. <i>A habit of obedience</i> . . . . .	138
3. <i>An act of obedience</i> . . . . .	138
4. <i>An act of political obedience</i> . . . . .	138
5. <i>An expression of will</i> . . . . .	138
6. <i>A parole expression of will</i> . . . . .	138
7. <i>A tacit expression of will</i> . . . . .	138
8. <i>A command</i> . . . . .	138
9. <i>A fictitious command</i> . . . . .	139
10. <i>Commands and quasi-commands</i> . . . . .	139
11. <i>Illustration—Statute Law, and Common Law</i> . . . . .	139
12. <i>Duty—point of duty</i> . . . . .	139
13. <i>Use of the above chain of definitions</i> . . . . .	139
14. <i>Habit of obedience—measure of its perfections</i> . . . . .	139
15. <i>Illustration</i> . . . . .	139
16. <i>Political union or connection</i> . . . . .	140
17. <i>Submission—subjection</i> . . . . .	140
18. <i>Submission and subjection</i> . . . . .	140
XIII. A perfect state of nature not more chimerical than a perfect state of government . . . . .	139
<i>It is not a family union, however perfect, that can constitute a political society—why</i> . . . . .	140
XIV. 'State of nature' a relative expression . . . . .	141
XV. Different degrees of subjection among governors . . . . .	142
XVI. The same person alternately in a state of political and natural society with respect to different societies . . . . .	142
XVII. In the same political society the same persons alternately governors and subjects, with respect to the same persons . . . . .	143
XVIII. Hints of several topics that must be passed by . . . . .	143
XIX. The same society alternately in a state of nature and a state of government . . . . .	144
XX. Instance the Aborigines of America . . . . .	144
XXI. Characteristic of political union . . . . .	144
XXII. Among persons already in a state of political union at what instant a new society can be said to be formed, by defection from a former . . . . .	145
XXIII. Firstly, in case of defection by whole bodies, instance the Dutch provinces . . . . .	146
XXIV. Secondly, in case of defection by individuals—instances. Rome—Venice . . . . .	146
XXV. A <i>revolt</i> , at what juncture it can be said to have taken place . . . . .	147
XXVI. <i>Disobediences</i> what do <i>not</i> amount to a revolt . . . . .	147
1. <i>Disobedience unconscious with respect to the fact</i> . . . . .	147
2. <i>Disobedience unconscious with respect to the Law</i> . . . . .	147
3. <i>Illustration</i> . . . . .	147
<i>Disobediences</i> fraudulent and forcible— <i>the difference, illustrated</i> . . . . .	148

*Contents.*

ix

	PAGE
XXVII. <i>Disobediences</i> what <i>do</i> amount to a revolt . . . . .	148
XXVIII. Unfinished state of the above hints . . . . .	149
XXIX. Our Author's proposition, 'That government results of course,' not true . . . . .	149
XXX. Ambiguity of the sentence . . . . .	149
XXXI. Darkness of the whole paragraph further shewn . . . . .	150
XXXII. Farther proofs of the darkness of the whole paragraph . . . . .	151
XXXIII. A general idea of its character . . . . .	152
XXXIV. Difficulty attending this examination . . . . .	152
XXXV. Use that may be made of it . . . . .	153
XXXVI. <i>Original Contract</i> , a fiction . . . . .	153
1. <i>Notion of the Original Contract</i> overthrown by Mr. HUME . . . . .	153
2. <i>History of a mind perplexed</i> by Fiction . . . . .	154
XXXVII. Fictions <i>in general</i> mischievous in the present state of things . . . . .	155
XXXVIII. <i>This</i> had a momentary use . . . . .	156
<i>A compact, or contract</i> . . . . .	156
XXXIX. Terms of the supposed contract stated . . . . .	157
XL. Stated thus generally, it could not dispense men from entering into the question of <i>utility</i> , as was intended . . . . .	157
XLI. Nor, if stated more particularly, could it answer what was designed by it . . . . .	158
XLII. Nor is it an original independent principle . . . . .	159
XLIII. Nor can it serve to prove anything, but what may be better proved without it . . . . .	160
XLIV. The <i>Coronation-oath</i> does not come up to the notion of it . . . . .	161
XLV. The obligation of a promise will not stand against that of utility : while that of utility will against that of a promise . . . . .	161
XLVI. A fallacy obviated . . . . .	162
XLVII. The obligation of a promise, were it even <i>independent</i> , would not be <i>extensive</i> enough for the purpose . . . . .	162
XLVIII. But the principle of UTILITY is all-sufficient . . . . .	163
CHAPTER II. . . . .	164-181
I. Subject of the present chapter . . . . .	164
II. Theological flourish of our Author . . . . .	164
III. Governors : celestial endowments found for them . . . . .	165
IV. The passage recited . . . . .	165
V. Theology on such an occasion as this impertinent . . . . .	166
VI. Difficulty it leads him into . . . . .	166
VII. Power, either natural or political . . . . .	167
VIII. In neither sense can it be attributed as he attributes it . . . . .	167
IX. What it is that may . . . . .	168
X. And for what reason . . . . .	168
XI. Heterogeneous contents of the next paragraph . . . . .	169
XII. The paragraph recited . . . . .	169
XIII. Paradoxical assertion in the latter part of it, as if all governments were the result of a free preference . . . . .	170



	PAGE
XIV. Reasons for supposing this to have been the meaning of it . . . . .	170
XV. The doctrine of it applied to particular instances . . . . .	171
XVI. General contents of the six remaining paragraphs relating to the subject of this chapter . . . . .	172
XVII. —of the First paragraph . . . . .	172
XVIII. —Second— . . . . .	172
XIX. —Third— . . . . .	173
XX. —Fourth— . . . . .	173
XXI. —Fifth— . . . . .	173
XXII. —Sixth— . . . . .	173
XXIII. Definitions of the three sorts of governments according to our Author . . . . .	173
XXIV. The paragraph recited . . . . .	174
XXV. And the next . . . . .	174
XXVI. How he assigns them their respective qualifications . . . . .	174
XXVII. All appearing equally eligible in his view of them . . . . .	175
XXVIII. —How to the British Constitution . . . . .	175
XXIX. Contradiction he falls into, in supposing other sorts of Government than these three, described as they are by him . . . . .	176
XXX. Governments the same as these under other names . . . . .	177
XXXI. Qualifications of the three forms, how allotted—the subject resumed . . . . .	177
XXXII. The paragraph recited . . . . .	178
XXXIII. And the next . . . . .	179
XXXIV. Democracy, as described by him, no Government at all . . . . .	179
XXXV. The qualification designed for it become vacant . . . . .	180
CHAPTER III. . . . .	182-199
I. Our Author's panegyric on the British Constitution . . . . .	182
II. The paragraph recited . . . . .	182
III. And that which follows it . . . . .	183
IV. Executive power—the mention of it incongruously introduced . . . . .	184
V. Difficulty of determining what it is as contra-distinct to legislative . . . . .	185
VI. Independence inaccurately attributed to the three branches of the Government . . . . .	187
VII. A happy discovery: merit inseparable from high station . . . . .	187
VIII. Supposed qualities of the three pretended forms of Government not applicable to our own . . . . .	189
IX. Wisdom: why likely to be <i>wanting</i> in the members of a Democracy— . . . . .	189
X. —and <i>present</i> in those of an Aristocracy . . . . .	190
XI. Why, according to our Author . . . . .	191
XII. Superiority of ' <i>experience</i> ' how far a proof of superiority of wisdom . . . . .	191
XIII. How far attributable to aristocracies in general . . . . .	192
XIV. How far to our House of Lords in particular . . . . .	192

*Contents.*

xi

	PAGE
XV. What is to be understood by the word ' <i>experience</i> ' . . .	193
XVI. Opportunity of experience not the sole cause of wisdom . . .	193
XVII. Mediatory caution not the peculiar province of the Lords . . . . .	195
XVIII. The Democratical branch of our Legislature upon our Author's principles, not distinguishable from the Aristocratical . . . . .	195
XIX. All perfection of the British Constitution mathematically demonstrated . . . . .	196
XX. The demonstration drawn up in form . . . . .	197
XXI. Conclusion of the Chapter . . . . .	198
CHAPTER IV. . . . .	200-229
I. Subject of the paragraph in question as stated by our Author . . . . .	200
II. Drift of it as conjectured . . . . .	200
III. The paragraph recited . . . . .	201
IV. The sense of it considered in itself . . . . .	202
V. The leading argument in it nugatory . . . . .	202
VI. The antecedent stated anew . . . . .	203
VII. The consequent new stated . . . . .	204
VIII. That it is identical with the antecedent . . . . .	204
IX. —or else nothing to the purpose . . . . .	205
X. The rest of the paragraph new stated—supposed drift of it . . . . .	206
XI. Weakness of it as a persuasive to obedience . . . . .	207
XII. A prior paragraph supposed to be relative to the object of this . . . . .	208
XIII. Another . . . . .	209
XIV. Agitation he betrays . . . . .	209
XV. Cause of it . . . . .	210
XVI. Resource he finds in obscurity . . . . .	210
XVII. Inconsistency of the present passage with a former . . . . .	212
XVIII. The former passage recited . . . . .	212
XIX. Dangerous tendency of it . . . . .	213
XX. The principle of <i>UTILITY</i> the only guide under these difficulties . . . . .	214
XXI. Juncture for resistance . . . . .	214
XXII. Not characterizable by any <i>common</i> sign . . . . .	215
XXIII. Freedom in a government depends not upon any limitation to the Supreme Power . . . . .	216
XXIV. Principal circumstances on which it <i>does</i> depend . . . . .	216
XXV. Freedom in a government how far favourable to resistance . . . . .	217
XXVI. The supreme power not limited in itself . . . . .	218
XXVII. Arguments that suppose it to be so, unsatisfactory— . . . . .	218
XXVIII. —and inapplicable to particulars . . . . .	218
XXIX. What they lead to is either an appeal to the body of the people— . . . . .	219
XXX. —or to the judicial power . . . . .	220
XXXI. What tends to give it a control over the legislative . . . . .	220
XXXII. Remedy worse than the disease . . . . .	221

	PAGE
XXXIII. But not so bad as some might represent it . . . . .	221
XXXIV. The supreme power limitable by convention . . . . .	222
XXXV. — So as the term of it be explicit . . . . .	223
XXXVI. Which furnishes what may be taken for a common signal of resistance . . . . .	223
XXXVII. A <i>salto</i> for reformation . . . . .	224
XXXVIII. Notion of a natural limit to the supreme power difficult to eradicate . . . . .	226
XXXIX. This not a mere affair of words . . . . .	226
XL. The above notion perpetuates wrangling . . . . .	227
	228

VIII. The manner in which it is here used <i>figurative</i> . . . . .	236
IX. The proposition acceded to in this last sense . . . . .	236
X. Obscured again by the next sentence—the <i>Censor's</i> part confounded with that of the <i>Historian</i> . . . . .	237
XI. —Fixed and particularised— <i>Promulgation</i> recom- mended . . . . .	238
XII. The recommendation enforced by our Author's con- cluding sentence . . . . .	239
XIII. Necessity and use of these verbal criticisms . . . . .	240

## INTRODUCTION.

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### I. LIFE OF BENTHAM.

JEREMY BENTHAM was born on the 15th of February, 1748, in Red Lion Street, Houndsditch, London. His father and grandfather were attorneys, and we are told that he came of a right Tory stock. His mother, whose maiden name was Alicia Grove, was the daughter of a shopkeeper in Andover. Jeremy was a feeble and puny child, of a very quiet temper and very studious in his disposition. When little more than three years old he began to learn Latin, and was a greedy reader of every book upon which he could lay his hands. Among these none made a deeper impression than Fénelon's romance of *Telemachus*, which he read at the age of seven years. 'In my own imagination,' he afterwards said, 'I identified my own personality with that of the hero, who seemed to me a model of perfect virtue.' 'That romance,' he added, 'may be regarded as the foundation-stone of my whole character; the starting-post from whence my career of life commenced. The first dawning in my mind of the principles of utility may, I think, be traced to it.'

The too early seriousness betrayed by this recollection was natural to Bentham. He wanted the robust health and overflowing spirits which make childhood delightful. He suffered from petty ailments and nervous terrors, but he was not unhappy, for his father and mother seem to have

been uniformly kind and affectionate. His father had no strong literary taste or clear insight into the child's character. Yet he renewed his Greek studies in order that he might himself act as his preceptor. The little boy contrived also to read novels and poems, which he enjoyed the more for their rarity. 'When I got hold of a novel, I identified myself with all the personages, and thought more of their affairs than of any affairs of my own. I have wept for hours over Richardson's "Clarissa"; in "Gil Blas," when very young, I took an intense interest; I was happy in the happiness, uneasy in the uneasiness, of everybody in it. I admired "Gulliver's Travels"; I would have vouched them to be all true; no romance, no rhodomontade, but everything painted exactly as it happened. The circumstance of his being condemned to death for saving the capital was excellent. I was very anxious in his behalf, particularly when chained down by the pigmies. I was sad when I saw the Laputans in such a condition; and I did not like to see my own species painted as Yahoos<sup>1</sup>.' Many other children have gone through like experiences, but few children would feel the grievance which little Bentham cherished against Molière and Johnson, that they afforded him no facts. Men of full age are apt to read back into childhood their matured qualities. Yet these childish impressions seem natural to one who in after-life was equally remarkable for affection and humanity on the one hand, and on the other for a lack of imagination which would not let him enjoy art or understand history.

When seven years of age Bentham was sent to Westminster School, where he remained five years. His was not an eventful school life. He was never flogged, and only once, by the kind offices of friends, was he brought to the point of fighting a schoolfellow. Little vexations and little misdoings rankled in the mind of the morbid little boy. He did not care for boyish sports. He was too weak to enjoy cricket, although he belonged to a cricket club in which Mitford,

<sup>1</sup> Bowring, 'Memoirs.'

the future historian of Greece, was an honoured member. He found nobody among the masters who understood his tastes or tried to develop his talents. In after-life he looked back to his school-days as little better than wasted time. Yet he wrote Greek and Latin verse so well that other boys often employed him to do their tasks. At the age of ten he was able to indite an epistle in Greek as well as Latin to Dr. Bentham, Sub-Dean of Christ Church, Oxford, and at the age of twelve he was considered fit to proceed to the University. He matriculated at Queen's College, Oxford, on the 28th of June, 1760.

If Bentham was unhappy at school he was hardly less so at College. His troubles began with his very matriculation; for he had to sign the Thirty-nine Articles, and he felt that he could not honestly do this unless he were satisfied of the truth of all that the Articles assert. He signed; but he signed with precocious indignation, and in works written many years later he recurred with intense bitterness to what he regarded as the enforcement of hypocrisy, or at least of indifference to truth. The troubles of matriculation might be got over. But Bentham's allowance was narrow and he could not live without getting into debt. Worse still, Bentham continued very diminutive and looked very singular in the short breeches and skirted coat of manhood. Nor did Bentham find either among the senior or the junior members of the University many persons whom he could like or esteem. Bentham hated his tutor, a certain Mr. Jefferson, 'whose only anxiety about his pupil was to prevent his having any amusement,' and who made him read again Tully's 'Orations,' which he knew by heart. Jefferson professed to give lectures in geography. 'This was one of his lectures—"Where is Constantinople?" and then he touched the part of the map where Constantinople is with a wand<sup>1</sup>.' The elements of logic Jefferson taught with the help of Sanderson and Watts. From Sanderson's book Bentham

<sup>1</sup> Bowring, 'Memoirs'.

owned that he had drawn some instruction ; Watts' book he regarded as 'old woman's logic.' But Jefferson took no pains to find what his pupils knew or what progress they made. Bentham took up the study of mathematics without his approval or even his knowledge. Jefferson's sullen temper was his own ; his apathy was general. The tutors mostly 'spent their mornings in useless routine, and their evenings in playing cards.' Bentham's conclusion respecting the senior members of the University generally was that some were profligate, others were morose, but most were insipid.

In his acquaintance with undergraduates Bentham was not more fortunate. Many were free livers and hard drinkers. Bentham tells us of a fellow-pupil called Crop whose evil courses incurred rebuke from their tutor Jefferson. Jefferson told the lad that he would bring down his father's grey hairs with sorrow to the grave. 'No, I shan't,' said the culprit, 'my father wears a wig.' A gentleman commoner asked Bentham to sup with him, and after a magnificent supper, waylaid him on his return home, assaulted him, and gave him a severe cut over the eye. After this specimen of wit we are not shocked to hear that another undergraduate used to take him by the heels and hold him head downwards, or that another and a gentler spirit insisted upon dressing his hair every morning. Mitford he met again in Queen's College ; but he thought Mitford commonplace. Almost the only person who won his regard at this time was a Reverend Mr. Darling, who was a curate near Andover. Despising the studies and disliking the persons of all around him, Bentham spent in Oxford a wretched unprofitable time, which he ever afterwards recalled, not with Gibbon's gay courtly malice but with dogged sullen indignation. 'Mendacity and insincerity—in these I found the effects—the sure and only sure effects of an English University education<sup>1</sup>.' Perhaps the University of Oxford has never sent out into the world another distinguished man who so heartily disliked her. This period of Bentham's

<sup>1</sup> 'Church of Englandism.'

life helped to confirm the peculiarities of his disposition. It confirmed the lesson taught at school, the lesson of indifference or contempt for old institutions, and of sanguine hope of possible reformation. Implanted by nature, but strengthened by education, these feelings gave a peculiar impress to all Bentham's thoughts and writings.

In 1763 Bentham entered at Lincoln's Inn, and took his seat as a student in the Court of King's Bench, where Lord Mansfield presided. Mansfield, whom he afterwards denounced as 'the great Ultra-Tory,' was then and for some years continued to be 'the god of his idolatry.' In the same year Bentham returned to Oxford and attended Blackstone's lectures on the laws of England. He tells us that even then he had discovered several of Blackstone's fallacies. In 1766 he proceeded Master of Arts, thus closing his University life. He was now eighteen years of age and therefore hardly older than the average freshman of to-day. He took up his abode in town and attended the courts, but had neither the passion to rise nor the overbearing energy of the successful advocate. The first and almost the only brief which he ever received was for some small cause in equity; and he advised his client to come to an arrangement with the party opposed, and thereby save the money at issue. But if careless of the practice he was studious of the theory of law. He was more and more impressed with the defects of English law as it then stood. He began to ask himself if there were any general test whereby to try the worth of every particular law. In reading Hume's 'Essays' he came upon the test which he wanted, the principle of utility. Hume taught that the characteristic quality of moral action was its tendency to produce happiness; but that men as social creatures derive pleasure from the happiness of others, and therefore ought to take for their end of action the pleasure as well of others as of themselves. This was the doctrine elaborated by Bentham into the utilitarian system of morals. It had not yet, however, assumed a precise form in his mind.



Bentham's first published writings dealt with things of less consequence. When about twenty-three years old he addressed two letters to the 'Gazetteer' in defence of Lord Mansfield, who had been assailed by some foolish scribbler. / Some years later, in 1776, he wrote to his father that he was at work upon a treatise entitled 'The Critical Elements of Jurisprudence,' the same which long afterwards appeared as | 'An Introduction to the Principles of Morals and Legislation.' | In the same year he published anonymously the 'Fragment on Government,' an essay called forth by certain propositions of Sir William Blackstone in the Introduction to his Commentaries on the Laws of England. Unknown as was the author, and tediously minute as are some of its criticisms, the Fragment achieved a considerable success. It was ascribed to more than one eminent man; to Lord Mansfield, to Lord Camden, and to Dunning, afterwards Lord Ashburton. Mansfield praised it, according to Bentham, because he disliked Blackstone. It brought Bentham a visit from Lord Shelburne, the accomplished statesman, and this visit was the beginning of a warm friendship which was broken only by Shelburne's death. Bentham frequently stayed at Shelburne's seat of Bowood in <sup>Wiltshire</sup> ~~the Lakes~~, where he was introduced to a wide circle of able men and charming women. 'Though not its existence,' he wrote long afterwards, 'my attachment to the great cause of mankind received its first development in the affections I found in that heart, and the company I found in that house.' The respectful regard of such a man as Shelburne would naturally be a spring of hope and confidence to the shy, nervous young man, who was so little fitted to impose himself upon the world. His making Shelburne's acquaintance was thus a turning-point in Bentham's career. About the same time he began to correspond with distinguished foreigners, such as Morellet and D'Alembert. Gradually he formed a circle of intimate friends who regarded him as a teacher. Among these early disciples were Lind, Wilson, and Romilly. In the year 1780 he had

completed and printed, but without publishing, the 'Principles of Morals and Legislation.' His own reflection as well as the criticism of friends detected various shortcomings, and he resolved to keep back the book until they had been made good. He had taken a copy of the unpublished treatise to Bowood, and could not hinder Shelburne from treating the ladies with it at the breakfast-table. Shelburne also showed the proofs to Camden and to Ashburton, who seem to have found it more abstruse than did the ladies.

Between 1785 and 1787 Bentham made a long tour on the Continent. His youngest brother Samuel, the distinguished naval architect and engineer, had been for some years in the employment of Catharine the Second of Russia. This circumstance led Bentham to visit Russia, whither he travelled by way of France, Italy, the Levant, and Constantinople. He lived in Russia for nearly two years, which he spent chiefly at his brother's establishment near the town of Crichoff. Whilst residing there he wrote his 'Defence of Usury,' the best known of his short tracts. But Bentham found little to interest or amuse him in Russia. The vision of a barbarous people civilized by the ukase of a philosophic empress grew fainter when looked into. The curiosity which engages students in the examination of primitive usages and ideas was entirely wanting to Bentham. He became weary of his long sojourn, so far from everything which he relished, and, as he said himself, stole out of the Russian dominions. He reached Berlin in December of 1787, and returned through Holland to his native country. It is characteristic of Bentham that the years of travel in which he made the circuit of Europe hardly appear to have affected his way of thinking, and have left hardly a trace on his published writings. He was all his life an analyst, not an observer.

Soon after his return to England, Bentham made the acquaintance of Dumont, who did so much to extend his fame and power. Dumont was a citizen of Geneva, who had been forced by political dissensions to become an exile. He

was introduced to Bentham by Romilly. Without being an original or profound thinker Dumont had a remarkably quick receptive genius, and that art of methodic yet lively exposition which belongs peculiarly to minds nourished upon the language and literature of France. Fame he could not have conquered for himself, but he justly partook of the celebrity of the two great men whom he served, Bentham and Mirabeau. In 1789, Bentham finally published his 'Introduction to the Principles of Morals and Legislation,' which he had meditated for fifteen years. The Preface announced that the Introduction was to be followed by a series of works treating in detail each of the principal branches of law. Although Bentham found a long life too short for the execution of the scheme suggested, the Introduction was itself sufficient to put his authority and reputation upon a sure footing. About this time the States-General of France began their ever-memorable sessions. Frenchmen were as yet warm with visions of a perfect state, and insatiable of projects of reform. Bentham readily entertained the hope that some of his favourite ideas of improvement might at length be executed upon a magnificent scale. Through Dumont Bentham's writings were made known to Mirabeau. Brissot made the personal acquaintance of Bentham, who received his flattery with paternal condescension. Bentham supplied his French correspondents with copies of several of his works, particularly a treatise on Political Tactics, or the Procedure of Legislative Assemblies. This work, already promised in the Preface to his 'Principles of Legislation and Morals,' might seem likely to be of especial use in France, where parliamentary inexperience was doing much to confound yet more the political chaos. Mirabeau and other competent critics praised the book, but it never had the chance of being received as a manual of practice. Sometime afterwards Bentham offered to the National Assembly his project for a model prison and poor-house, offering to assist in person and without reward both in its foundation and in its management. The project and the offer were

graciously acknowledged by a bestowal of French citizenship, but nothing more was done in the matter. Frenchmen were too much excited for such tame matters as a reform of prisons; Bentham was wise or lucky enough not to settle in France, and before long his hopes of peaceful reform were dashed by a reign of violence peculiarly abhorrent to his gentle disposition.

Shortly after publishing his 'Principles of Morals and Legislation' Bentham conceived a strong desire to enter Parliament. The subject had been discussed between him and Lord Lansdowne (then, Lord Shelburne), and Bentham had understood Lord Lansdowne to have offered him a pocket borough. Finding that no step was taken to carry out the supposed offer, he addressed to Lord Lansdowne a letter of remonstrance extending to sixty pages. Lansdowne wrote a friendly reply, explaining that he had not meant to make such an offer, and that he had not understood Bentham to desire a seat in the House. Bentham accepted the explanation and abandoned the thought of a political career. Perhaps he shrank on reflection from a step which might appear to compromise his independence. Perhaps instinct told him that as a writer he was powerful, whilst in the House of Commons he would have been powerless. Another project took possession of his mind and employed his industry for many years. This was the plan of a model prison, which he called the Panopticon. Its distinguishing feature was an internal arrangement so contrived as to make every part and every inmate visible to a person placed at the centre. With this ground plan, derived from the ingenuity of Samuel Bentham, were combined many improvements in details of construction and management. Bentham had originally meant his Panopticon to serve as a prison; but he thought that a similar plan might be adopted for workhouses and other public institutions. What he wrote to explain and recommend this invention forms a considerable part of his published writings. The plan was at first well received. In 1792 it was discussed

in Parliament. In 1794 a bill to establish a prison upon Bentham's model was passed into law; a spacious site was purchased and everything bade fair for the experiment when it was broken off, it is said, by the obstinate opposition of George the Third. Bentham received a large sum from the Treasury in recompense of his time and trouble spent on the project of the Panopticon, but this could not make amends for the disappointment which he had undergone. He had built extravagant hopes of public good upon the adoption of his plan, and when it had to be abandoned, he could not bear to look at his papers on the subject. 'It is like opening a drawer where devils are locked up,' he said, 'it is breaking into a haunted house.'

Bentham never married, and his father's death in 1792 left him in easy circumstances, free to push without interruption his labours for the improvement of law. His way of working was peculiar. He would attack a subject with intense energy, and persevere until he had provided all the materials for a treatise in form. Then the spirit of criticism would suggest new doubts and new refinements; the toil of composition would deter him from preparing the work for the printer; and the unfinished manuscript would be held back for years, often to be re-written three or four times, and in the end not published. Had Bentham depended upon his own efforts this way of working must have prejudiced both his influence and his reputation. But he found in Dumont an assistant who supplied his shortcomings. Dumont would take the rough papers, fill up the many large gaps in the argument, abridge the tedious analysis, simplify the intricate distinctions, drop the harsh unfamiliar terms, soften down the oddities of thought, impart a dash of sentiment, and present to the public a treatise wide in its scope, orderly in its exposition, and rhetorical in its style. What Bentham created, Dumont made popular. But Dumont wrote in French, and thus it came to pass that Bentham's ideas were better known and appreciated in foreign countries than at home. His

name was familiar both in America and in Europe. He had friends and admirers among the official class of Russia, among French, Spanish, and Portuguese Liberals, among the Americans as well of Southern as of Northern America. The Emperor, Alexander I, requested Bentham's assistance in reforming the Russian Codes. Bentham proffered assistance in a similar undertaking to the King of Bavaria. At a later date he addressed a denunciation of monarchy to the Greek insurgents, and tendered the draft of a constitution to Mehemet Ali. It would be hard to say what was the positive result of this interchange of civilities. But it served, at all events, to make Bentham feel that he was understood, and to sustain him in labours which brought no personal emolument.

In his own country he found less encouragement. He began to feel the effects of age, and conceived the desire of emigrating to a more genial climate. He sought permission from the Spanish government to settle in Mexico. Afterward he thought of taking up his abode in Venezuela. This gentle philosopher had a genius for running into places where chaos was going to prevail, but fortunately he never proceeded to carry out any of his schemes of emigration. He was not really unhappy in England. He retained health sufficient for the prosecution of his work. Although he hardly ever went into society, he kept up and increased the number of his friends. It is true that by Lord Lansdowne's death in 1805 he lost the powerful and faithful admirer who had first discovered and who never deserted him. But in 1808 he made the acquaintance of James Mill, next to Dumont the most effective of all his disciples. Mill and Bentham speedily became close friends, although their friendship was not unruffled. Mill was a poor proud Scotchman, conscious of high abilities and unwilling to be patronized. Bentham, whilst helpful and affectionate, was sensitive and hard to be humoured. He winced under Mill's austerity, and thought that if Mill was a democrat, it was less from love.

of the many than from hatred of the few. The friends found that it was better not to associate too constantly, and once or twice Mill seemed ready to break off the connection altogether. But matters never came to a downright quarrel.

Beyond the unwearied prosecution of his self-imposed labours, there was little to mark Bentham's later years. He became a partner in Robert Owen's establishment at New Lanark, which was intended to harmonize the well-being of the operative with the wealth of the employer. He persuaded some friends to help him in setting on foot a school of a new contrivance, which should impart useful as distinct from literary knowledge, and which he proposed to call the Chrestomathic School. But the Chrestomathic School never came into being. When Lord Sidmouth took office he consulted Bentham upon legal reforms, and Bentham replied with an offer to draw up a penal code. But nothing came of this correspondence. The course of public affairs had hardened the hearts of most English statesmen against large projects of improvement.

Disappointed by their obstinate conservatism Bentham next threw himself into the agitation for reform. He was for radical as opposed to whig reform of parliament, and all the radicals looked to him as to an oracle. He corresponded with Major Cartwright and Sir Francis Burdett, who replied in terms of extravagant adoration. He became the friend of O'Connell, who led the party of Catholic emancipation, and of Brougham, who busied himself with the reform of law. He does not seem, however, to have had any real influence upon the politics of the day. His eccentric way of expressing himself would alone have unfitted him for persuading the general public. The politicians who flattered him were not likely to take lessons from a recluse student. But his long labour for the amendment of the law began to bear fruit as the influence of Eldon waned. Brougham lent his untiring energy and florid eloquence to the cause of legal reform. Peel carried out extensive reforms in the criminal law.

That which was proposed, much more that which was enacted, seemed wretchedly inadequate to Bentham. The work of transforming the law of England then begun, has now gone on for more than sixty years, and is still so imperfect that what has been done looks little in comparison with what remains to do. Nevertheless, Bentham had the satisfaction, denied to so many reformers, of seeing his doctrine bear at least the firstfruits of practice.

In 1823 the 'Westminster Review' was founded at Bentham's expense, and with a staff almost entirely composed of his disciples. Bowring was editor for the political, and Southern for the literary, department. James Mill, and afterwards his son John, were frequent contributors. Next to Dumont's versions of Bentham's researches, the articles in the 'Westminster Review' were the chief means of spreading Benthamite doctrines among the general public. Bentham himself wrote little for the Review. Although remarkably vigorous for a man of seventy-five he was absorbed in the labour of an immense correspondence, which at this time embraced many of the most distinguished liberals in every part of the world, and in remodelling and issuing long-considered works upon legislation. His peculiar mode of working has already been described. In his old age he had numerous assistants in preparing his works for the press, and among these assistants was young John Mill, who edited the bulky treatise on the 'Rationale of Judicial Evidence.' Perhaps Bentham was at no time more happy or more influential than in these his latest years. When he visited Paris in 1825 he received the most flattering attentions. On one occasion when he entered a court of justice, all the barristers rose in sign of respect, and the president seated him at his right hand. General Foy introduced himself to Bentham with a true Gallic compliment: 'Vos mœurs et vos écrits sont peints sur votre visage.' So cheerful and affable was Bentham, that he had hardly a personal enemy, even among those who disliked or ridiculed his ideas or his language. He rarely lost a friend; yet some



years before his death he was alienated from Dumont. Dumont seems to have let slip some discourteous remarks, which Bentham so keenly resented, that when Dumont called at his house in April of 1827, Bentham refused to see him. He doubted Dumont's orthodoxy, detected in him symptoms of Whiggism, to abstract minds so much more abhorrent than Toryism, and said a little ungratefully, 'Dumont does not understand a word of my meaning.'

After completing his eightieth year Bentham began to experience a rapid decay. His sight had already become so weak that he feared total blindness; his memory was much impaired, and his other faculties suffered though in a less degree. For some months he had been expecting his end, when on the 6th of June, 1832, he expired without pain or struggle. One circumstance of his last hours is too characteristic to be left out. When he knew that death was near, he said to the friend who was watching him, 'I now feel that I am dying; our care must be to minimize the pain. Do not let any of the servants come into the room, and keep away the youths; it will be distressing to them and they can be of no service. Yet I must not be alone; you will remain with me and you only; and then we shall have reduced the pain to the least possible amount.'

Bentham was not buried. Agreeably to his own wish his body was embalmed and presented to University College, London. There it still remains, although it has long been screened from the eyes of the public.

## II. CHARACTERISTICS.

Before going on to speak particularly of Bentham's writings upon the subject of legislation, it may be well to note some of his most marked moral and intellectual characteristics. He was a man of calm and cheerful temperament. When once he had grown out of his sickly dwarfish boyhood into health and strength, he no longer suffered from gloomy or morbid

feeling, although he remained highly nervous and sensitive to physical pain. He preserved his vigour by extreme temperance, and by a habit of regular exercise. Although no sportsman he enjoyed life out of doors, and continued to be a brisk walker almost to the end of his life. He was so severe an economist of his time that he rarely went into society or read a criticism upon his own writings. During half a century he commonly wrought eight or ten hours a day. As soon as he was up he took pen in hand, and his average day's work varied from ten to fifteen folio pages of manuscript. A certain seclusion was necessary in order to maintain this rate of production, yet there was nothing really unsocial about Bentham. Bashful and awkward in intercourse with strangers, with those whom he knew well he was frank and expansive. As a host he was cordial and attentive, liking to see others enjoy themselves at his table, and taking particular pains to gratify the tastes of his company. He was warm in his friendships, if somewhat apt to take offence where none was intended. A little prone to self-conceit, he suffered in later years from the adoration of a few clever disciples, who screened him from independent criticism and fed him with coarse flattery. But his sterling worth and goodness were never deeply impaired.

Bentham was remarkably quick to pity and relieve suffering. The depth of his benevolence towards mankind is attested by his lively interest in everything which he thought conducive to their welfare, and by his prolonged labour in the cause of reform ; labour which brought him neither money nor preferment, whilst it exposed him to much ridicule and some abuse. But his tenderness extended itself almost equally to the lower animals. He once owned that he loved everything with four legs. Several cats enjoyed his peculiar regard. Among these a certain Sir John Langborn was cherished by Bentham as fondly as Hodge had been cherished by Johnson. Even mice would come to Bentham, when working, to be petted and to eat crumbs out of his lap. These little

traits may serve to show that Bentham was not a mere arid pedant, but a man distinguished for gentle feelings and for sympathy.

Sympathy, however, is an ambiguous term. In one sense it is much the same as humanity. This sort of sympathy is a moral virtue and has often been conspicuous in philanthropists, who were remarkable for the largeness of their hearts rather than of their heads. In another sense sympathy is much the same as insight into human nature. This sort of sympathy is an intellectual virtue, a species of imaginative reason which has been possessed in an eminent degree by certain ruthless statesmen and dissolute men of letters. Now Bentham's power of sympathy was rather of the first than of the second description. He abhorred cruelty and loved mercy. He rejoiced in the pleasures and grieved for the pains of his fellow-creatures. But he was deficient in the power which enables us to understand minds unlike our own. A symptom of this defect appears in his dislike of poetry, almost the only branch of literature which busies itself with representing men as they really are, untrimmed by decorum, and unshackled by formulas. A graver symptom was his utter failure to understand any ideas, any feelings, any customs or any institutions which were not conformable to the way of thinking prevalent in the eighteenth century. Thus he denounced the English procedure and English case-law with an undistinguishing and unmeasured violence. Thus he described the English constitution of his own day, a constitution faulty enough, yet the best which had ever prevailed for a long time among a great people, as never having been anything better than 'a cover for rascality.' The revolution of 1688, which gained for England the greatest advantages ever gained so cheaply, had in Bentham's opinion merely 'substituted Guelphs to Stuarts, and added corruption to force.' Extravagances of this kind are sure marks of an absence of intellectual sympathy, which is the only basis of rational criticism.

Another symptom of the same shortcoming appears in the harshness of the judgments passed by Bentham upon other men. Like most reformers of clear narrow mind, he saw certain abuses so vividly and resented them so fiercely that he judged every one who upheld the institutions in which these abuses occurred to be not only stupid and bigoted but also false and corrupt. He disliked judiciary law. Accordingly he asserted that the judges in making law were guilty of a deliberate usurpation of legislative power; a usurpation committed in order to satisfy the greed and ambition of lawyers. Yet it is certain that judiciary law is only one mode of that development of law by experts which takes place in every progressive community. It is also certain that judiciary law would have been much better than it is had judges been more ambitious of legislating and less timidly anxious to cover themselves with the authority of their predecessors. But not official classes only, eminent individuals as well felt the license of Bentham's invective. Dr. Johnson was 'the miserable and misery-propagating ascetic and instrument of despotism.' Burke was a madman, an incendiary, a caster of verbal filth, and possessed by the unqualified thirst for lucre. In some passages of this kind Bentham combines the worst faults of Burke and of Cobbett with a literary impotence to which they were never liable. For Bentham, in his most abusive fits, leaves the reader unmoved. His reckless denunciation of all who differed from him respecting moral and political questions had not the excuse of irritability and suffering which we may allow for Burke, nor the excuse of low birth and chance education which we may allow for Cobbett. It may best be excused by remembering that he had brooded over his ideas until they had got within him to a passion which was denied its vent by prejudice or indifference. Something may be pardoned to a defective sense of humour and something to a life of almost unnatural seclusion. Say what we will, this scurrilous temper gives deep offence

and helps to make Bentham's later writings extremely unreadable.

The same lack of imaginative insight which led Bentham to condemn without reserve led him to hope without sobriety. The passion of the eighteenth century, the passion for making all things new, was strong in Bentham. He was prepared to construct out of the resources of his own mind a totally new legal system and a totally new legal language. He was full of ingenious projects, and from their execution he expected the most astonishing results. It is hardly possible to read without laughter Bentham's exposition of the blessings which were to flow from the adoption of his prison model, the Panopticon. The right construction and management of prisons is a very important matter and has been much advanced by the writings of Bentham. But even with a perfect system of prisons the world would still be full of sin and misery. A sanguine temper is doubtless necessary to the reformer, whose task is always thankless. But the disposition to hope from mechanical improvements a new heaven and a new earth is the sure sign of a somewhat contracted mind.

Bentham's extravagant aversions and extravagant hopes show all the more oddly by contrast with his hard common sense, his logical power and his practical ingenuity. Compared with many of the reformers of the eighteenth century, Bentham amazes us by his shrewdness. He understood the force of the remark that the only possible way to go on loving mankind is to expect little from them. His theory of human nature is much more chargeable with meanness than with exaltation. He held that men can only pursue their own happiness; that each man's interest is the aim of all his endeavours. If he looked for something like a millennium he expected it not from an ecstasy of brotherly love, but from an ingenious social arrangement which should make the advantage of the individual coincide with the advantage of the public. Such an arrangement is not possible, and the perfect society which it would produce would be rather a shabby one.

But the philosopher who built his hope upon it could not be charged with ignoring human selfishness. Once at all events, namely in his *Anarchical Fallacies*, Bentham showed an insight into the frailty of men almost unparalleled among writers of his way of thinking.

'The things that people stand most in need of being reminded of are, one would think, their duties—for their rights, whatever they may be, they are apt enough to attend to of themselves<sup>1</sup>.' And in the same vein he elsewhere condemns all vague and indefinite declarations of rights as apt to excite passions that know no law. 'The great enemies of public peace are the selfish and dissocial passions—necessary as they are, the one to the very existence of each individual, the other to his security. On the part of these affections, a deficiency in point of strength is never to be apprehended; all that is to be apprehended in respect of them is to be apprehended on the side of their excess. Society is held together only by the sacrifices that men can be induced to make of the gratifications they demand; to obtain these sacrifices is the great difficulty, the perpetual task of government. What has been the object, the perpetual and palpable object, of this declaration of pretended rights? To add as much force as possible to these passions, already but too strong—to burst the cords that hold them in—to say to the selfish passions, there, everywhere is your prey! to the angry passions, there, everywhere is your enemy<sup>2</sup>.'

Burke himself could not have denounced with more fervour the mischief of proclamations so vague that they practically encourage every man to claim the right of doing whatever he pleases. It is true that Bentham occasionally falls into the error which he here denounces, the error of trusting too much to the passions of the natural man. The glorification of the natural man was a prevailing fallacy of the eighteenth century. It was natural to an age of spiritual revolt against the orthodox doctrine of original sin and of practical revolt

<sup>1</sup> Works, Vol. II. p. 511.

<sup>2</sup> Works, Vol. II. p. 497.

against the stupidity and harshness then so often noticeable in political institutions. Only experience could show, and not everybody could be taught by experience, that the natural man is, like any other animal, uniform only in the violence of his impulses, which are often genial, often cruel, sometimes means to his preservation and sometimes fatal to his existence. That Bentham should sometimes have lent himself to the illusions of the time is not surprising. More surprising is his general bent towards hard matter of fact. His most frequent mistake lay in supposing that men are uniformly guided by a clear view of their own interest. He did not allow enough for the influence either of generous virtue or of blind appetite.

With this prosaic common sense Bentham joined an unusual logical power. His distinguishing faculty was the faculty of sustained analysis. This contemner of old-fashioned learning had the intellect of a mediaeval schoolman. In reducing confused materials to methodic order, in exposing the vagueness of current formulas, in bringing to light fallacies of language, he was most persistent and most skilful. In distinction, definition, and classification he was inexhaustible. He saw every subject as it were in tabular form. All knowledge was for him an endless reproduction of the Porphyrian tree. Every intellectual process was for him a chain of syllogisms. The slenderness of his premisses and the copiousness of his reasoning are equally unmistakable. His bent of mind is as remote as possible from the half literary, half scientific bent of Bacon's mind towards observation and induction. His outlook is contracted and makes the reader feel the atmosphere of a model prison, commodious indeed and healthy, but still walled and moated. Nevertheless Bentham's rigid system-making mind has done for the reform of English law more than a larger mind might have accomplished. Bentham was the first English writer who viewed law as a whole or criticised English law as a system. He was the first to test English law by a logical standard. In his more laboured treatises, such as the Ra-

tionale of Judicial Evidence, he has brought whole branches of law under a criticism as methodical as it is microscopic. Every flaw is brought to light; every gap is pointed out; every redundancy is noted. Such treatises can never be readable and are seldom opened after they have accomplished their purpose of reform. But they remain available as lasting refutations of legislative error. The work which has been done in these treatises will never need to be done again.

To this dialectical aptitude Bentham joined another talent hardly less useful in his vocation; a talent of invention. He constructed a new technical language which has rightly been allowed to drop, but which has enriched living speech with some useful words, such as minimize, codification, international. He revelled in devising little, practical improvements in the economy of public institutions. This inventive turn was associated in him, as in many other men, with a taste for physical science, especially for chemistry. His brother Samuel displayed the same inventive talent in his profession of artillerist and shipbuilder.

### III. CONTRIBUTIONS TO THEORY OF LEGISLATION.

The life of Bentham affords a remarkable instance of the concentration of great powers upon a pursuit of no personal or selfish interest. The reform of law was the one object of all his labours. The study of the theory of legislation led him, indeed, to undertake researches in many other branches of political and moral science. It is hardly possible to define the aim and method of legislation without having formed clear and distinct ideas as to the nature of political society and of sovereignty. Upon this subject Bentham bestowed long meditation; and his principal conclusions are embodied in the work here republished, in his *Fragment on Government*. It is difficult to imagine a theory of legislation which does not rest upon some theory of social and individual well-being; and Bentham painfully elaborated a doctrine of



## 22 *Contributions to Theory of Legislation.*

morals, which has ever since been associated with his name, although its first premisses were derived from earlier and more strictly philosophical writers. It is impossible to perfect the law of crimes or of torts without first making a careful analysis of the various states of mind which issue in breaches of the law, without a precise definition of consciousness and motive, of intention and heedlessness, of negligence and malice. Accordingly Bentham was led into those minute psychological inquiries which take up a great part of his 'Principles of Morals and Legislation.' It is impossible to adapt law to the needs of commerce and of industry without having recourse to economic science; and Bentham wrote a 'Manual of Political Economy' and one or two economic essays. Lastly, the systematic exposition of law finds a potent instrument in formal logic; and on this account Bentham produced some studies of logic in its more formal aspect. But in all these inquiries, political, moral, psychological, economical and logical, Bentham was impelled chiefly by the wish to throw light upon the one true subject of his lifelong labour—upon the methodic reform of law. He is not to be regarded as strictly a moralist, a psychologist, an economist or a logician. He cannot be judged by the standard which we should apply to them. He must be judged as a theorist upon legislation.

The little sect of worshippers which gathered around Bentham in his later years described him as having at once discovered and perfected the philosophy of legislation. But this foolish and exorbitant flattery is only misleading. Bentham certainly did not perfect the philosophy of legislation; still less did he discover it. Not to speak of remote ages or of Greek Utopias, the theory of legislation was one of the favourite studies of the eighteenth century. The abatement of the religious warfare which had distracted the two previous centuries had left men at leisure to consider schemes of secular reform. The immense accumulation of old laws which had never undergone revision pressed with a stifling

weight upon the energies of a new age. Long before Bentham began to write, the theory of legislation had been actively canvassed on the Continent of Europe. It had been associated with names that are still famous; with the names of Montesquieu and of Beccaria. A criticism of Bentham would be incomplete without a brief reference to these great writers. For although Bentham borrowed little from them and made what he borrowed truly his own, yet he owed much to their inspiring zeal, and his own method can best be illustrated by comparison with the methods which they followed.

Charles Louis de Secondat, Baron de la Brède et de Montesquieu, was born in the January of 1689, almost exactly at the date of the English Revolution, and died in the February of 1755, when Bentham was yet a child. He was a noble, but he was also a lawyer. During ten years he held the office of *président à mortier* in the parliament of Bordeaux, and by subsequent writers he is often referred to as the President Montesquieu. His first influential work, the 'Lettres Persanes,' published in the year 1721, was a criticism of the religion, politics and morals of Europe, put into the mouth of a philosophical native of Persia who travels in order to acquire knowledge. In the year 1734 he published his 'Considerations on the Greatness and Decline of the Romans.' These works may still be read with interest. But the masterpiece which supports his fame, and which alone belongs to our subject, is the 'Esprit des Lois,' which was published in the year 1748. The 'Esprit des Lois,' though still criticised, is so seldom read that its scope and purport are almost forgotten. They are stated by the author in a passage so remarkable that it deserves to be quoted at length. It sounds the first note of historical inquiry into the nature of law.

'Law in general is human reason in so far as it governs all the peoples of the earth; and the political and civil laws of each nation ought to be only the particular cases to which this human reason is applied.'

24 *Contributions to Theory of Legislation.*

‘They ought to be so closely adapted to the people for which they are made, that it is very improbable that the laws of one nation can ever be suited to the wants of another nation.’

‘The laws must harmonize with the nature and the principle of the government which has been established or which it is desired to establish, whether they serve to constitute it as do political laws or to support it as do civil laws.’

‘The laws ought to be relative to the physical character of the country; to its climate, whether frozen, burning, or temperate; to the fertility of the land, to its situation and to its extent; to the prevailing mode of life among each people, accordingly as it is agricultural, pastoral, or employed in the chase; they ought to be relative to the degree of liberty which the constitution can bear; to the religion of the inhabitants, to their tastes, their riches, their numbers, their commerce, their morals and their manners. Finally, these laws are related mutually to each other; they are related to their origin, to the object contemplated by the legislator, to the order of things upon which they are founded. They must be considered in all these lights. To do this is my aim in the present work. I shall examine all the above relations; they form in their totality what may be styled the spirit of the Laws.’

{ The work thus described illustrates by contrast the works of Bentham upon legislation.

In the first place Montesquieu’s method is historical. Montesquieu recognizes truths which Bentham hardly grasped, that in each community the several laws must be relative to the entire political organization, and that the political organization must be relative to the character and circumstances of that community. ‘Laws,’ says Montesquieu, ‘ought to be so closely adapted to the people for which they are made that it is very improbable that the laws of one nation can ever be suited to the wants of another nation.’ This proposition is perhaps too strongly worded, but it expresses

a profound truth. The constitution of a state is not a matter of arbitrary choice; it is not a suit of clothes into which and out of which the nation can step as it pleases. It must express the character of the people for which it exists. If it has lasted long, we may be sure that it is or was in some way, however obscure, suited to the capacity and to the needs of that people. Further, since every society has a constitution of its own, each individual law must be fitted to this constitution. {Private law as well as public law must bear the stamp of national individuality}

By enforcing and illustrating these truths Montesquieu in some degree anticipated that method of historical inquiry which in recent times has enabled us to interpret the institutions of foreign peoples and of remote ages. Montesquieu's power of interpreting history is, for a writer of that time, little less than miraculous. This feeling for the lessons of history imparted a sobriety to his suggestions for reform. Something of his caution was inspired no doubt by fear of those penalties which in France awaited even the candid and moderate critic of established abuses. But in the main we may ascribe to it a nobler source. Montesquieu, with his generous experience of affairs enlarged by a wide historical survey, remembered how much that was valuable even the institutions of France contained. He would denounce particular abuses, but not an entire social fabric. He had hopes for the future, but not hopes of a millennium such as exalted the followers of Rousseau. This lucidity of mind lessened his immediate reputation and narrowed his immediate influence, but it has earned the admiration of all who understand the infinite difficulties of political creation.

In the second place Montesquieu's work lacks unity, coherence and thoroughness. In his use of the historical method he is often rash and unskilful. He is often credulous in admitting testimony and inaccurate in stating facts. Often he uses historical records to support a theory taken up almost at random, and in so applying wholly misinterprets the mean-

ing of these records. Often he forms excessively simple and symmetrical conceptions of the various types of society and government. Often misled by the passion for antithesis and epigram, he tries to distinguish things not distinct and to oppose to each other things not mutually opposite. He is always apt to stray beyond the bounds of his subject, and even when he keeps within those bounds follows no precise order. He is usually brilliant and suggestive, often unsatisfactory, and sometimes quite childish.

Alike by his merits and by his failings Montesquieu was led to blend the history with the criticism of institutions. He sometimes proposes, but oftener insinuates measures of legal reform. Many of his ideas have since found acceptance in France and elsewhere. But Montesquieu modified the course of subsequent legislation not so much by definite proposals as by infusing a new generation with his own spirit of free criticism and large humanity. What he accomplished for the reform of law is to be measured by the achievements of his disciples.

The best known among these disciples, and the next celebrated writer upon the Theory of Legislation, was Caesar-Bonesana, Marquis de Beccaria. Beccaria was born at Milan on the 15th of March 1738 and died on the 28th of November 1794. Although an Italian by birth and educated in the Jesuit College at Parma, he drew his first inspiration from Montesquieu's 'Lettres Persanes,' and in later life became a disciple of the Encyclopaedists. He wrote various works on legislation and political economy, but only one which we need notice, the 'Treatise of Crimes and Punishments.' As he ran some risk in criticising the institutions under which he lived, he first read this treatise in portions to a society of learned men in Milan and then by their request published it, but did not add his name. It came out in the year 1764. Its success was extraordinary. In eighteen months it went through six editions in Italian. It was translated into all the languages of Europe, including Greek. Catherine II of

Russia had the treatise transcribed into her Code. At the same time it raised a furious outcry among certain lawyers and divines which alarmed Beccaria, and perhaps deterred him from producing any other memorable work upon legislation.

Let us consider for a moment the famous 'Treatise of Crimes and Punishments.' At first sight we may be surprised at the fame which it acquired and the effect which it produced. It forms a small volume divided into many short chapters, with no pretence of logical method or exhaustive learning. But it had the merit of expressing boldly and freely the growing indignation against those absurdities and cruelties which then defaced every system of criminal law.

'If we look into history,' says Beccaria in his Introduction, 'we shall find that laws which are or ought to be conventions between men in a state of freedom have been for the most part the work of the passions of a few or the consequences of fortuitous or temporary necessity; not dictated by a cool examiner of human nature, who knew how to collect in one point the actions of a multitude and had this only end in view, *the greatest happiness of the greatest number.*' This sentence might have been prefixed to a collected edition of Bentham's writings, and its closing words were adopted by Bentham as the motto of his lifelong labour. Beccaria reverts to the same thought in a later passage. 'Good legislation is the art of conducting men to the maximum of happiness and to the minimum of misery, if we may apply this mathematical expression to the good and evil of life.' Here we have the suggestion of the calculus of pleasures and pains so minutely elaborated by Bentham. But the resemblance between these writers is still more striking in their particular proposals.

Beccaria proposes to form a scale of crimes; the first degree to include those crimes which immediately tend to the dissolution of society, and the last degree to exclude the smallest possible injustice done to any of its members. For

## 28 *Contributions to Theory of Legislation.*

crimes are to be measured only by the injury which they do to society. As the skeleton of such a classification Beccaria suggests the following :—

1. Crimes immediately destructive of society or its representative (i. e. the various forms of treason).
2. Crimes which attack the life, property or honour of individuals.
3. Crimes contrary to the laws which relate to the general good of the community. (Qu., regulations of health and police ?)

Beccaria then proposes to make a scale of punishments corresponding to the scale of crimes. His theory of punishment differs little from Bentham's. His first principles are the same. Pleasure and pain are the only springs of action in beings endowed with sensibility. Punishment is merely preventive and is effective in any given case, if the evil it occasions exceeds the good expected from the crime. Punishments should be so contrived as to produce, with the least possible pain to the culprit, the greatest possible effect upon other persons. In order to secure this advantage everything should be done to strengthen the association of ideas between the crime and the punishment. One means of effecting this is to make punishment certain. Another is to make the punishment follow as immediately as possible upon the offence. A third means is to make the character of the punishment imitate the character of the crime. Most readers will think that Beccaria made too much of the good effects of this analogy between crime and punishment. He did not indeed apply it to cases of murder ; for Beccaria, like Bentham, disapproved of capital punishment. But for crimes against the reputation of a citizen he proposes the penalty of infamy. For crimes against property he proposes amercements in money. Since however robbers seldom have property, the most proper punishment for them will be 'that kind of slavery which makes society for a time

absolute master of the person and labour of the criminal, in order to oblige him to repair by this dependance the unjust despotism which he usurped contrary to the social compact.' In this sentence we seem to trace the germ of systems of penal servitude. For robbery with violence Beccaria would inflict corporal punishment. The disturbance of public tranquillity he would visit with banishment. But the penalty of confiscation he condemns. He sums up his theory in these words: 'In order that a punishment may not be an act of violence of one or of many against a private member of society, it should be public, immediate and necessary; the least possible in the case given, proportioned to the crime and determined by the laws.'

Beccaria disapproves of a power of pardon vested in the sovereign, which may serve to palliate the mischief of bad laws, but can only impair the wholesome effect of good laws. In this doctrine we trace the same belief which appears everywhere in Bentham, that the law can be made equal to the needs of every particular case; a belief natural to merely theoretical writers upon law. Beccaria justly observes that the forgiveness of the injured party is no logical reason for letting the offender go unpunished. The lapse of a considerable time he would allow as a bar to prosecution for small offences, but not for great ones. Sanctuaries, which in his time were still numerous in Catholic countries, he thought pernicious to the general good. But he was inclined to allow the lawbreaker who fled the country the right of asylum in a neighbouring state. Conventions between states, for the mutual surrender of criminals, he thought of doubtful utility until their criminal law had been thoroughly reformed. The deeper the barbarism of a people, the greater he thought should be the severity of the criminal law.

Beccaria seems to have studied English institutions with some attention. He considers trial by jury an admirable institution and strongly approves the right of challenging jurors. He condemns secret accusations and secret trials,



even then unknown in England, although frequent on the Continent. He condemns the use of torture as a means of obtaining evidence.

Upon the functions of a judge and the credibility of witnesses he held the same views which were so perseveringly taught by Bentham. Judges, he held, had no right to interpret the laws, in the way of restrictive or expansive interpretation. 'In every criminal cause,' he writes, 'the judge should reason syllogistically. The major should be the general law; the minor the conformity of the action or its opposition to the laws; the conclusion liberty or punishment.' Here again we note the same belief as above in the possibility of an all-sufficing law. With respect to the credibility of witnesses he agreed with Bentham in the general principle that no witness should be absolutely excluded because of special circumstances affecting his credibility. The credibility of a witness should only diminish in proportion to the hatred, friendship or connexions subsisting between him and the accused. Beccaria held that the credibility of the witness becomes less the more atrocious the crime sought to be proved, for the greater the atrocity the greater the improbability. He also goes so far as to say that where the question relates to the words of an accused person the credibility of a witness is null. This maxim, like his other maxim that one witness is not sufficient to support a conviction, would tend rather to defeat than to ensure justice.

Montesquieu and Beccaria had thus called the attention of thinkers to the reform of law before Bentham had published anything on that subject. Bentham was of course familiar with their writings. Yet he is entitled to the honours of an original inquirer. With Montesquieu Bentham was really out of sympathy. Montesquieu's bent was towards the study of history; Bentham scarcely regarded history as anything better than an almanac out of date. In his *Essay on the Influence of Time and Place in Matters of Legislation* Bentham indeed recognizes the value of Montesquieu's

historical method. 'Before Montesquieu a man who had a distant country given him to make laws for, would have made short work of it. . . . Since Montesquieu, the number of documents which a legislator would require is considerably enlarged. "Send the people," he will say, "to me or me to the people; lay open to me the whole tenor of their life and conversation; paint to me the face and geography of the country; give me as close and minute a view as possible of their present laws, their manners and their religion<sup>1</sup>.'" Praise more judicious or better expressed could not have been given to Montesquieu. But in the *Essay on the Promulgation of the Laws*, Bentham passes upon Montesquieu a criticism of a very different kind and much more congenial to his own habits of thought. 'The science of legislation, though it has made but little progress, is much more simple than one would be led to believe after reading Montesquieu. The principle of utility directs all reasons to a single centre; the reasons which apply to the detail of arrangements are only subordinate views of utility<sup>2</sup>.' This passage expresses the ruling thought of Bentham's own writings; that the abstract maxim of utility is in almost every case a sufficient guide to the critic of institutions. It is the exact opposite of the thought which governs the treatise of Montesquieu.

By the opposite bent of their minds Bentham was drawn to the logical ideal just as Montesquieu was drawn to the historical fact. Bentham complains, not without reason, that 'Montesquieu sets out upon the censorial plan, but long before the conclusion, as if he had forgot his first design, he throws off the censor and puts on the antiquarian<sup>3</sup>.' This inconsistency Bentham did not commit. He too heartily despised existing systems to forget in describing them the perfect system which he firmly believed himself to have discovered. Bentham again saw that many of Montesquieu's explanations of strange institutions were quite arbitrary and fanciful. Indeed Montesquieu often exhausted inge-

<sup>1</sup> Works, I. 173 note.

<sup>2</sup> Works, I. 162.

<sup>3</sup> Works, I. 150 note.

nuity in explaining institutions which had never existed except in the imagination of confused, or credulous, or lying travellers.

With Beccaria, Bentham was in fuller sympathy, for Beccaria, like himself, was above all things a reformer. Beccaria's treatise Bentham described as 'the first of any account that is uniformly censorial.' To Beccaria Bentham was indebted in a great degree for his first principles and for his method of legislation. He honourably acknowledged this, like all his other intellectual debts. But we should wrong Bentham if we took advantage of his candour to disparage his originality. He was no mere copyist, no mere elaborator of little details left unfinished by his predecessors. Beccaria had indicated certain axioms with the light touch of an essayist; Bentham grasped them with astonishing firmness, gave them their sharpest definition, and developed them into numberless consequences. Beccaria had confined himself to the discussion of criminal law; Bentham embraced the whole of law in his projects of reform. The debt of Bentham to Beccaria was only that debt which every student, however capable, must acknowledge to students who have gone before him in his walk of science.

Now let us turn to Bentham's own work in the theory of legislation. His efforts were directed to the furtherance of two great reforms; reform in the substance of the law, reform in the shape of the law. The substance of the law he endeavoured to rectify by the application of his universal test of institutions; aptitude to produce the greatest happiness of the greatest number. The shape of the law he sought to reform by insisting upon codification. Two points then have to be considered by the critic of Bentham; one, the exact nature of the test described in general terms as the greatest happiness of the greatest number and its value for purposes of legislation; the other, the value of codification as understood by Bentham. The multifarious changes in detail suggested by Bentham cannot be dealt with in the limits of a brief essay.

The criterion of existing institutions and the norm of new ones was according to Bentham the principle of utility or of the greatest happiness. To him this was the ruling principle as well of ethics as of legislation. He never published a full statement of his moral theory, and his Deontology was edited by Bowring from papers which had come to him as Bentham's literary executor. Whether the Deontology is in all respects an exact representation of Bentham's views has been doubted and is not very important for us to determine. The first principles of his moral philosophy are known beyond all dispute. These alone are of consequence as axioms of legislation. And Bentham was in the first place a reformer of law ; only in the second place a moralist. The niceties, therefore, of his moral system, could they be precisely stated, would not concern us here.

Bentham's adoption of the test of utility has brought him much undeserved praise and much undeserved blame. He has been lauded as the discoverer of the principle of utility, but he certainly did not discover it. Since the world began utility or happiness has been a recognized aim both in public institutions and in private morals. He has been reviled as the teacher of a coarse theory of conduct. But he was not the first to lay down the axiom that happiness means the greatest possible amount of pleasure together with the least possible amount of pain. This axiom was fundamental with the whole English school of psychology. That man's only possible end of action is happiness was a truism with the whole English school of moral philosophy. From these premisses it follows that dispositions and actions are to be judged accordingly as they tend to produce pleasure or pain. Hume gave the name of utility to the tendency to produce happiness, and pointed out that men's social instincts lead them to judge the utility of a course of conduct by its effect upon the happiness of others as well as upon their own. Here we have all the elements of utilitarianism. Nothing remained for Bentham but to embody Hume's theory in

Beccaria's formula. The formula of the greatest happiness of the greatest number, which we have seen adopted by Beccaria<sup>1</sup>, was again employed by Priestley, in his Essay on Government, to describe the proper object of all political institutions. This pamphlet appeared in the year 1768. Bentham, who came up to Oxford in that year, to give his vote in the election of a member for the University, got a copy from a little circulating library attached to Harper's coffee-house, close by Queen's College. It made a lasting impression upon him. 'It was by that pamphlet and this phrase in it that my principles on the subject of morality public and private were determined. It was from that pamphlet and that page of it that I drew the phrase, the words and import of which have been so widely diffused over the civilized world. At the sight of it, I cried out as it were in an inward ecstasy, like Archimedes on the discovery of the fundamental principle of hydrostatics, *Εὕρηκα*. Little did I think of the corrections which within a few years on a closer scrutiny I found myself under the necessity of applying to it<sup>2</sup>.'

Bentham described his principle sometimes as the principle of the greatest happiness of the greatest number, and sometimes as the principle of the greatest happiness simply. He ended by preferring the latter formula. But he seems to have been guided in this preference rather by the desire of clearness in expression, than by any change in his first principles. Regarding happiness as the supreme good, he regarded the greatest amount of happiness as the true object of law and morality. That the greatest amount of happiness might take the form of an intense happiness enjoyed by a smaller as opposed to a diffused happiness enjoyed by a greater number, he would have admitted to be possible in the abstract; and in ceasing to talk of the greatest number, he seems to have been influenced by the thought of this abstract

<sup>1</sup> Mr. Bonar has pointed out to me that the phrase 'greatest happiness of the greatest number' had been already used by Hutcheson in his Enquiry into our Ideas of Beauty and Virtue, p. 185 (ed. 5, published 1753).

<sup>2</sup> Deontology, Vol. I. p. 300.

possibility. But he always held that in practice the greatest amount of happiness was attainable only by taking measures for the happiness of the greatest number. He must have thought therefore that for guidance in practical life the briefer formula and the fuller formula were equivalent. The fuller formula is certainly the one which has been oftenest repeated and has exercised most power. These considerations may justify us in using both interchangeably for the purpose of the present discussion.

In reality it is misleading to dwell so long upon Bentham's moral philosophy. His moral philosophy is in its essence neither more nor less than the current moral philosophy of the time. The ethics of that time present a composition at first sight inexplicable of selfishness and benevolence. They repeat in a thousand forms the frank avowal of Bentham in the Deontology: 'It is in fact very idle to talk about duties . . . because every man is thinking about interests.' Yet the same ethics earnestly insist upon kindness and generosity to our fellow-creatures. Every logical endeavour to overcome this inward contradiction is more or less strained and unsatisfactory. But systems of morals which gain a wide currency and exert a powerful influence upon affairs are never scientific. They are popular because they are superficial, and powerful because they express the strongest instincts of a particular time. In the eighteenth century the most active instinct was that of reaction against theological tyranny and against social injustice. Hence the fashionable moral theory was that which asserted, in the crudest form, the right of man to enjoy himself in this life and the right of every man to an equal chance of enjoyment. This doctrine, like those of earlier ages, produced its own prophets, martyrs, persecutors, and moral lunatics. With those doctrines it also may rest in peace. We need not abuse Bentham because, living when he did, he took it for granted.

In his writings upon legislation Bentham does not argue for the Utilitarian system of morals ; he assumes it as proved.

But the proposition that the legislator should aim at the greatest happiness of the greatest number is too vague to afford much practical guidance. It is necessary to have some means of calculating pleasures and pains. Bentham clearly saw that his theory was incomplete without the discovery of some such calculus. The endeavour to establish a moral calculus, an arithmetical computation of pleasures and pains, is far more characteristic of Bentham than any of his general statements about happiness as the end of action. Yet we have seen that in the attempt to form this calculus Bentham was not without forerunners.

'It was from Beccaria's little treatise on crimes and punishments that I drew as I well remember the first hint of this principle (i.e. of computing pleasures and pains) by which the precision and clearness and incontestableness of mathematical calculation are introduced for the first time into the field of morals—a field to which in its own nature they are applicable with a propriety no less incontestable, and when once brought to view manifest than that of physics, including its most elevated quarter, the field of mathematics<sup>1</sup>.' For this computation data are necessary, and these Bentham presents in the form of tables of pleasures and pains and of causes affecting sensibility. The idea of these tables seems to have been suggested by Hartley in his work on Man, published in the year 1749. But they have never been so elaborately worked out as by Bentham. For the purposes of his calculation Bentham takes account solely of the quantity as distinct from the quality of pleasures and pains. He avoids the inconsistency into which most utilitarians have fallen, the inconsistency of thinking that one pleasure is higher than another. What are called the higher pleasures often have a certain quantitative superiority. They are not injurious to body or mind, they do not breed remorse, they do not excite the hatred or contempt of our neighbours. Of these advantages Bentham might and did take account.

<sup>1</sup> Works, Vol. III. pp. 286-7.

But he did not refer pleasure, which in his system is the end of action, to a standard based upon considerations which have nothing to do with pleasure. Pleasure for pleasure, he said, push-pin is as good as poetry. By taking this view he rendered his calculus of pleasures and pains somewhat less impossible than it would otherwise have been.

But impossible any calculus of pleasures and pains in the strict sense must remain. No accurate results can be obtained by means of such a calculus, inasmuch as pleasures and pains do not admit of arithmetical valuation. They have nothing determinate or constant about them. They are never simple. Most of them are unspeakably complex. Not only are their elements manifold, but their composition is quite other than mechanical. Artists tell us that in flesh-colour red, white, and yellow are blended; but this statement would not give a lively idea of our complexion to an inhabitant of Saturn. Psychologists tell us that the pleasure of doing a kind act includes the gratification of tender emotion, of the desire of a good name, of the instinct to put forth power; but this information would be useless to enlighten a man without conscience or human feeling. The knowledge, meagre as it is, which we have of the feelings of our fellow-creatures, is not derivable from any computation of factors. It is drawn from the consciousness of our common nature, from the experience of life, from observation, from reading and from sympathetic reflection. It is a kind of tact partly inborn and partly developed by obscure processes which we cannot fully explain. Without this tact no man is competent to legislate upon a great scale. With this tact a man already possesses far more knowledge of human sensibility than any list of primary or of secondary influences, any lists of motives or any quantitative measures of feeling can supply. Such aids to legislation are at best subsidiary, mere memoranda, which may now and then avert an oversight or an exaggeration. There is no commendous method of being wise, and genius begins where computation ends.



Between the assertion of the maxim that the legislator ought to aim at ensuring the greatest happiness of the greatest number, and the correction of a subordinate rule in the law of contract or in the law of evidence, there remains a gap so wide, that to bridge it over for practical use is no easy matter. What effect the maxim will produce upon legislation depends largely upon the nature of the mediating principles which the legislator sees fit to adopt. Bentham adopts (for in this context we may regard Dumont's Theory of Legislation as expressing his views) the mediating principles of security and equality. The legislator who wishes to ensure happiness will do so by maintaining security and by favouring equality. Should the claims of security conflict with the claims of equality, the former, according to Bentham, are always to be preferred. Security is to Bentham the first, the all-important condition of human happiness. It is this profound sense of the need of security which in Bentham's writings to some extent makes good the lack of historical insight. This preserves him from the revolutionary spirit so natural to impatient logicians and philanthropists. This inclines him to prefer such new institutions as by their gradual working tend to remove what he considers injurious to the commonwealth. Thus Bentham trusted chiefly to freedom of acquisition and equal division upon the death of the proprietor to bring about that more equal distribution of wealth which he desired. Thus he condemned with emphasis many of the measures so clamorously demanded in our time, taxation intended less to supply the wants of the state than to impoverish certain classes of citizens, the confiscation of certain species of property, the suppression without any indemnity of offices and employments deemed no longer necessary. Such expedients he regarded as mischievous for two reasons; mischievous because the suffering endured by the individuals ruined far outweighs the happiness which the rest of the community may derive from a small abatement in their burthens; mischievous because you cannot infringe

the principle of security in any particular without weakening it in every particular, and when it is weakened, wealth and every other condition of happiness disappears. Security is absolutely necessary if man is to form any plan of life, or to undertake any labour which has not an immediate result. 'It is not enough to secure him from actual loss, but it is necessary also to guarantee him as far as possible against future loss. It is necessary to prolong the idea of his security through all the perspective which his imagination is capable of measuring.' Without security of expectation, as Bentham would call it, man will do nothing and make nothing. ]

When the law has once sanctioned expectations it is bound to uphold those expectations. If it sets them aside it is bound to indemnify the disappointed individual. Should an improved morality demand the abolition or restraint of any species of property, the whole society should share with the proprietors the loss of the reformation; for it is hypocrisy to punish men for not being better than the laws of their country. [Bentham's utterances leave no doubt that he approved of compensating the owners of slaves for the emancipation of their slaves by the State.] [Nor would Bentham have taken refuge in the paltry artifice that since the constitution of the State differs at different periods, the persons now invested with power have nothing to do with expectations arising out of laws passed by the persons who preceded them. This principle once admitted, it would follow that every change in any one of the innumerable particulars which go to make up the constitution of a State would justify the disregard of every expectation based upon the actual law at the moment of change. To punish men for not trying to ascertain who have the best claim to rule in a State ostensibly under its lawful and accepted government; to punish them for not coming to the conclusion justified by the test of success; to punish them for not being able to surmise what laws would be made by a government whose subsequent existence could hardly have been guessed; all this mixture

of cruelty and hypocrisy Bentham would have denounced as strongly as it could be denounced by the most interested Conservative.

To preserve and strengthen the feeling of security is therefore the first object of the Benthamite legislator. His second object is to further equality in so far as consistent with security. Everybody in the calculations of the legislator is to count for one and nobody for more than one. Bentham would not have maintained that men as a matter of fact are exactly equal; for he takes pains to enumerate the causes which increase or diminish sensibility to pleasure and pain. The operation of these causes must render one man more capable of happiness than another. Since men differ in the degree of happiness to which they can attain it is conceivable that a legislator who took particular care of sensitive people, might do more for the general felicity than a legislator who was rigorously impartial, just as a gardener who affords to his fuchsias and camelias the shelter which he refuses to his hollies and snowdrops does more for the general well-being of the garden than if he took all plants into the conservatory or exposed all plants to the weather. It may be doubted whether in all times and places equal laws would have been the best laws. It may be doubted whether, for instance, Athenian civilization would have been possible under the rule of equality. But these doubts did not perplex a writer who turned his back upon history. Bentham's concern was with the huge states of the modern world, in which the number of the citizens makes it impossible for the legislator to discriminate fairly between the sensibilities of individuals. 'Assume,' says Sir Henry Maine, 'assume a numerous and tolerably homogeneous community—assume a sovereign whose commands take a legislative shape—assume great energy, actual or potential, in this legislature, the only possible, the only conceivable principle which can guide legislation on a great scale is the greatest happiness of the greatest number<sup>1</sup>.'

<sup>1</sup> Early History of Institutions, p. 399.



Bentham could the more readily adopt equality as a ruling principle in legislation, because he strictly limited the sphere of the legislature. He did not, like Plato of old or like the Socialists of to-day, propose to regulate by positive law the education, the work, the amusements, the domestic life and the social intercourse of his fellow-citizens. He was prejudiced, if at all, in favour of letting things alone. As an Englishman, he had an instinctive liking for personal freedom. As a philosopher of the eighteenth century, he believed in nature's spontaneous tendency to perfect all things. Thus when he demanded equality it was not an equality of condition, but an equality of opportunity. It was such an equality as he saw realized in the United States of America. Not foreseeing the evil or the discontent which might exist side by side with such an equality, he did not seriously attempt to decide how far the State may wisely interfere with the free play of social forces.

Bentham, in his later years, became an eager partizan of absolute political equality. He then advocated a republican constitution with a single legislative chamber to be elected annually by universal suffrage; and this constitution he apparently thought suitable to almost any commonwealth from England to Mexico. To these opinions he seems to have been brought chiefly by discontent with the indolence and timidity, as he esteemed them, shewn by the British Parliament of his own time. In Great Britain, as elsewhere, the panic inspired by the Jacobin reign of terror had benumbed the desire of improvement, and a reformer like Bentham found that even the most judicious advice often failed of acceptance. In despair he adopted political principles which were not quite conformable to the caution of his temperament. But he never seems to have had any foresight of the results which would follow their adoption. Thus he did not foresee that political equality strengthens the demand for equality of possessions. He could not sufficiently express his scorn for the apprehension,

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that under a purely democratic constitution property would be insecure. [In order to prove that this fear was fanciful Bentham always referred to the example of the United States.] An objector might at that time have urged that most of these States had a restricted franchise, and that all had legislatures consisting of two Chambers and not renewed every year. With more force such an objector might have urged the futility of comparing little commonwealths of yeomen and shopkeepers scattered over a country of unspeakable natural riches, and nearly all professors of some strict religious creed, with the populous states of Europe, combining extremes of poverty and riches, agitated by a ceaseless struggle for existence on a stinted space, and including many citizens who cannot be said to have any rule of life whatsoever.] But objections of this kind never convince a zealot and would probably have made little impression upon Bentham.

Even after every effort has been made to give precision to such a canon of law as Bentham offers us in the principle of utility, the possibility of using it may be seriously disputed. Bentham sought to employ it in generating an ideal body of law. He did not content himself with piecemeal suggestions for the correction of this or that abuse in English law. He did not content himself even with going through English law systematically and noting every deviation from strict obedience to the principle of utility. He did indeed bestow much study upon the law of England. But he seems to have regarded that and all other systems in force as too defective for amendment. He devoted the best part of his life to the construction of ideal systems, derived, as he thought, directly and entirely from his ruling principle. Was he wise in taking this course? Did he realize his own ideal of a complete, consistent and rational body of law, and has he succeeded in supplanting, in whole or in part, any system which he found in existence?

Neither of these objects did Bentham attain. His own ideal system exists only in fragments, although these fragments

are so many and so large as to give us a perfectly adequate idea of what the whole would have been. Nor has Bentham supplanted, either in whole or in part, any historical and practical system. He has furnished many most valuable hints and amendments which have been or will be adopted into English law. But he has neither replaced nor even reconstructed English law as a whole.

The truth is that such a principle as the principle of utility is valuable not as a creative, but as a critical principle. It is valuable as a test, not as a germ. Its true potency is negative, a potency to lay bare injustice, to unravel sophistry, to cancel verbiage. For such purposes it is most efficacious. Is a law really and not merely apparently partial? is it an instrument for aggrandizing a class of citizens without any reference to the common weal? If so, it will not bear to be tried by a standard which requires the legislator to seek the happiness of the greatest number and of each individual equally with every other individual. Is a law incapable of being explained, or justified except by merely technical arguments, by professional *petitio principii* or professional pedantry? If so, it will not bear to be tried by a standard which makes happiness the object of all legislation. Is a law upheld merely by force of habit or tradition, irrespective of the needs of the present time? If so, neither will it bear the application of the standard of utility. This test of utility sweeps away much injustice and much absurdity, simply because it is a test which involves a recognition of the rights of every citizen and the recognition of a solid practical aim in legislation.

But for purposes of creation any single axiom, even the axiom of utility, is utterly inadequate. However fully convinced that he ought to aim at the greatest happiness of the greatest number, the legislator cannot advance a step without knowing wherein consists their happiness, and this knowledge he cannot obtain without a mature study of human nature generally and of the character of his own people in particular. Now the character of a particular people

is always an affair of history. What they will like, what they will dislike, cannot be divined by any process of abstract reasoning. By what process of abstract reasoning could any person ignorant of history have guessed that the Norseman would think it misery to die in bed, or that the Hindoo would think it damnation to die without leaving somebody qualified to perform the family rites? By what process of abstract reasoning could such a person divine the Englishman's preference for individual liberty or the Frenchman's preference for a vigorous administration? By what process of abstract reasoning could he realize the Irish peasant's appetite for land or the American's passion for adventurous speculation? Yet these differences in national character are all-important to the legislator. Were he to make laws solely to further happiness in the abstract, he would make his people very unhappy in the concrete.

As the legislator must get the content of his practical code chiefly from the circumstances of his commonwealth, so the theorist must get the content of his ideal chiefly from the moral and political notions current in his own day. In vain he tries to build upon some principle of abstract reason, always and everywhere unchangeable and self-evident; he can use this principle only in the form in which it is known to him; and in this form there is necessarily much that is local and transient, accidental and arbitrary. In vain does Bentham try to deduce each particular of his system from a consideration of the happiness sought after by all men. The happiness really present to his mind is happiness as conceived by an Englishman born in the eighteenth century and in the middle class, formed by a certain culture and possessed by certain ideas then new and fascinating. The happiness to which Bentham so often refers is not in all points the happiness which most men now desire. Still less would it satisfy a people penetrated by religious enthusiasm, like the Scotch at the period of the Covenant; or a people imbued with the love of arts and letters, like the Athenians of the age of Pericles;

or a people fired with the passion of victory and empire, like the Romans of the age of Caesar. And as Bentham's conception of happiness is not the conception necessarily formed by every human being, so the laws suggested by that conception are not applicable to every community. They would grate upon the religious enthusiasm of one people, the conquering energy of another, the romantic or splendid tastes of a third. But the reason of their restricted applicability is one with the reason of their practical influence. They have had influence upon their time because they were products of their time. Had they been less abstract, they would have been more powerful. Had they been more closely related to English ideas and institutions, they would have told more upon England. They are not, as Bentham seems to have thought, universally appropriate; but they are not so appropriate to the condition of any one commonwealth as they might have been.

Bentham misunderstood the scope of the theory of legislation because he misunderstood the lessons of history. He had little sense for the mysteries of organic life, little patience to watch the slow process of growth, little sympathy to adjust his new ideas to ancient prejudices. To Bentham nations were merely aggregates of men, and a man was a machine scarcely more complicated than a watch. Some watches are made in Geneva and others in London, but any competent craftsman in the one place can regulate any watch made in the other. What can be done to one watch can be done to a million of watches. But man is not a watch, he is a live animal, and an animal exhibiting every degree of conscious life from the lowest savagery to the highest culture. Nations are not mere aggregates of men, but subtly-fashioned organisms in which every member receives from the whole as much as he renders to the whole. Thus the peculiarities of a body politic are of its essence. These peculiarities, if it is not to suffer convulsions and perhaps death, can be changed only by degrees and by the blended action of many causes. *A priori* legislation upon a vast scale must always prove either im-



practicable or mischievous. What is both practicable and desirable is an unbroken process of amendment inspired by a scientific spirit. Bentham's misunderstanding upon this subject did not prevent him from accomplishing great results; but it led to his wasting a great deal of labour.

Similar to the problem just discussed, yet distinct from it, is the problem to what extent laws and institutions which are or have been in actual use in one community are capable of being usefully adopted in any other community. Were we to press to the utmost the conclusions above suggested, we might question the possibility, at least the advantage, of such adoption. We might repeat the sentence of Montesquieu already quoted: 'Law ought to be so closely adapted to the people for which it is made that it is very improbable that the laws of one nation can ever be suited to the wants of another nation.' But in maintaining the impossibility of naturalizing laws in any country in which they have not been originally developed, we should be obliged to deny some of the most memorable facts in history. Not that such a view is inconsistent with the violent revolution effected by a conquering race which crushes the conquered and extirpates their laws, if not their lineage. For in these cases there is no blending of institutions. Nor is such a view inconsistent with the occasional acceptance by one people of a legal rule invented by another people. For individual rules of law may turn upon considerations of convenience as universally valid as those which induce men of all races and creeds to make use of railways and telegraphs. But such a view is really inconsistent with the successful appropriation of vast masses of legal rules by peoples for whom they were not devised. Thus it is inconsistent with the acceptance of the revived civil law by the major part of Christendom. It is inconsistent with the successful attempts of several modern States to copy the constitutional law of England. It is inconsistent with the apparent facility of adopting so many institutes of English law which is observable among the civilized inhabitants of India.

These facts serve to show that the dictum of Montesquieu can be accepted only with certain weighty reservations.

The first of these reservations must be made in behalf of that power of free self-determination which is never totally wanting to a human society and grows with its growth, although it always remains more or less limited. It is only in their earliest years, whilst they are yet childlike and unconscious, that nations follow their instincts absolutely without thinking or yield themselves without reserve to the natural conditions around them. Conscious life gradually stirs in the nation as it stirs in the man : and with conscious life come new powers of criticism, of invention and of self-control. Like the individual, the commonwealth, or at least the thinking and ruling part thereof, begins at a certain stage of growth to conceive comprehensive ends of action and to contrive means for their fulfilment. This stage once gained, adaptation of foreign rules of law becomes possible. The ends of practical life are everywhere so similar as to suggest uniform modes of action for their attainment and uniform regulation of a uniform activity. Thus among nations standing in the same grade of industrial progress, commerce assumes a character much the same everywhere, and whole institutes of commercial law which have answered among one people, may often be beneficially copied by its neighbours.

A second reservation may be stated thus. Where a group of nations, in spite of many vital differences, are yet partakers in a common history and a common culture, they may have been prepared for a degree of uniformity in law which would otherwise have been out of the question. When the nations of Western Europe appropriated the private law of Rome, they had derived from Rome, and they had in common with each other, much besides legal formulas. They were scarcely foreigners to Rome, and they considered themselves more Roman than they really were. When the same nations appropriated the constitutional law of England, they were

borrowing from a people united to them by a common civilization, borrowing something whereof the rudiments had existed among themselves. But constitutional law savours more than does commercial law of the mysterious personality of a people. The limited monarchy of England was successfully imitated in Belgium and in Italy, but it could not be adapted to the circumstances of France, and in Prussia it took a form unknown to modern England. Beyond the circle of Christian nations, the incompatibility is still more glaring. No man of Bentham's talent and sincerity would now repeat Bentham's proffer of a constitution to an Eastern despot like Mehemet Ali. What we call the constitution is only the crowning story of the social structure ; and where the lower stages are utterly different the uppermost stages must also differ.

In reference to this subject the truth appears to be in a mean between those philosophers of the eighteenth century who are represented by Bentham and those philosophers of the nineteenth century who are represented by Spencer. As against Bentham it is true that every man and every commonwealth is a link in a chain of evolution. As against Spencer it is true that every man and every commonwealth is capable of consciousness and therefore capable of adaptation to an end conceived by reason as well as to conditions imposed by nature. The limitation and the freedom of mankind are alike attested by its history, but who shall say where precisely choice ends and necessity begins? Certainly the determination is not so simple that any general rule can be laid down to guide legislators in borrowing from the law of States other than their own. This is what practical men mean when they say that philosophy is useless in politics. But philosophy is a spirit of truth, not a rule of thumb. Those who seek for wisdom find it, and wisdom is justified of all her children.

Thus far we have been concerned with the method and the possible bounds of reform in the substance of a legal system.

But Bentham's suggestions for the improvement of law were not confined to its substance. The form of the law was to Bentham hardly less important. To Bentham law was imperfect until expressed in the form of a code. In his writings and in his correspondence the demand oftenest repeated is the demand for codification. Why was this so? What did Bentham understand by codification? What practical good did he expect from it? How far was he justified in his expectations? To what extent and with what success have actual systems been codified? Without an attempt to answer these questions a sketch of Bentham's treatment of legislation would be too grossly imperfect.

In order that the authoritative statement of any given body of law should form a code, in Bentham's sense of the term, it would have to satisfy the four following conditions. In the first place it must be complete, that is, it must set forth the whole of the law with such fulness as to need no supplement in the form of commentaries or of reported cases. In the second place it must consist of rules stated with the utmost generality attainable in each instance, or, to put the same thing in other words, of the fewest possible rules in which the whole of the law can be expressed. In the third place these rules must be enunciated in a rigorously logical order. Fourthly and lastly, these rules must be enunciated in a rigorously uniform terminology, affording one and only one term accurately defined for everything which there is occasion to name in the course of the work. An exposition of law which should meet these requirements would be a code in Bentham's sense. An exposition of law which falls short in one or more of these requirements would be but an imperfect approach to a code as understood by Bentham. No more need be said to show that hardly any extant codes approximate to Bentham's standard of perfection, whilst the great majority of codes mentioned in history fall so far short of it as hardly to deserve the name of code at all.

Bentham's ideal of codification, then, is hard of attainment.

The advantages of attaining it were in his opinion twofold; an advantage in assisting the study of the law and an advantage in assisting the administration of the law. First, as regards the study of the law, Bentham believed that law once codified would be brought within the grasp of laymen as well as of lawyers; that every person of sound mind would be able to understand and to remember the provisions of the law. Secondly, as regards the administration of the law, Bentham believed that law once codified could be administered with certainty, with speed and with economy, since there would be little for judges to do when the application of law had been made so simple, and less for lawyers to do when every man would be able to conduct his own case. Codification, therefore, would make the knowledge of the law attainable by all, and the remedy for wrong endured accessible to all, and thus in one word perfect the legal development of society.

Such an ideal offered to our hopes naturally provokes the question how far Bentham was justified in thinking it practicable. What would be gained by codification of English law is a question much debated ever since Bentham made it familiar and rarely answered in a spirit so confident as Bentham's. Here, as elsewhere, the truth appears to be in a dull insipid medium. To those who doubt or deny the usefulness of codification one or two concessions must certainly be made. It is the nature of reformers to overstate their case and Bentham in this respect was a true reformer. He overrated the degree of completeness possible in a code. No code can be framed so complete as to afford sure and easy answers to all the legal problems which occur even in the course of one year after it has been published. Far less can a code anticipate all the legal problems of the unbounded future. The best code that can be made must be imperfect with reference to the present and liable to be superseded in after ages. Since the best code must be incomplete, not even the best code will enable the public to do without lawyers by

profession. Since a code, however well arranged, however well expressed, can provide directly only for a certain proportion of the cases which arise in the administration of justice, provision must be made for the remainder by processes of analogy and inference which mediate between the general rule and the particular application. Now these processes of analogy and inference are in all but the simplest cases so much better performed by disciplined than by undisciplined reasoners, that, so long as mankind shall need law, there will always be some work which can be done only by professional lawyers. This conclusion is borne out by the experience of countries which have codified their law. The knowledge of a code may be widely diffused among the laity; but it is always somewhat superficial; and merely to have got by heart a number of general rules is quite another thing from correctly applying their principle to cases which they do not exactly cover.

What has been said thus far assumes that the only doubts which arise in the administration of justice are doubts as to the law. But doubts as to the facts are far more common. The business of the courts usually includes two distinct processes; the ascertainment of the truth as to the facts in dispute and the application of the law when the truth of fact has been ascertained. The second of these processes is performed with most ease and precision when the law has been put into the best possible form. But the first of these processes is left untouched by codification. And it is this process which oftenest presents grave difficulties and which constantly tends to become more difficult. For, with the progress of civilization, the intercourse of men takes forms more and more complex. In a great commercial cause, such as often occurs at the present day, the facts present an intricacy which could not have been conceived—I will not say by barbarians, but—even by the subjects of Edward the Third or of Elizabeth. In the decision of such a cause delay and expense are caused far less by the obscurity

of the law than by the obscurity of the facts. The obscurity of the facts implies crowds of witnesses, sheaves of affidavits, libraries of account books and the elaborate processes of skilled examination, cross-examination and presentment from opposite points of view which can be accomplished only by men of high natural ability and of prolonged technical training. If these men are to be employed they can command and they will require a very ample remuneration.

Codification, therefore, does not altogether forestall the occurrence of difficult questions of law. It has no tendency to forestall the occurrence of difficult questions of fact. These considerations limit its usefulness even to a society more or less stationary. But since no society is quite stationary and many pass through rapid processes of change, the usefulness of a code is still further limited by the probability, not to say the certainty, that in time it will become obsolete. This danger Bentham hardly realized, because he did not allow enough for the unstable character of all human association. He did not see that, even if a code such as he desired had been enacted in England, the course of English history would insensibly leave it behind the wants of later generations. Consideration of the changing wants of mankind forbids us to hope for a final code, just as consideration of the variety of legal problems forbids us to hope for a complete code, and the consideration of the perplexity of disputed facts forbids us to hope for a code uniformly certain and easy of application.

The hopes which Bentham built upon codification were therefore immoderate; but the advantages of codification are real and considerable. Codification well performed does assist the public to know the law; does assist judges and counsel in applying the law. It carries us a little way, although but a little way, towards the point of universal legal knowledge and immediate legal decision. In the ordinary course of things the growth of law is irregular. Most legislation is fragmentary, and what from time to time is added is

seldom nicely adjusted to that which already exists. Judicial decisions are given not necessarily on those points which are of most interest to the student of law, but on those points which litigants bring under the notice of the Courts. The series of decisions upon any given subject, as it lengthens itself out through centuries, is often qualified by so many changes in thought and in outward circumstances that its net result remains uncertain. New decisions limit, qualify, gradually undermine and at length altogether break down the force of old decisions. Many decisions preserved in the older reports become obsolete. Many which are not clearly obsolete are of doubtful validity. Many, if not actually doubtful, are certain to be restricted as much as possible in their application. Thus judge-made law admits of many degrees of authority, degrees which may be ascertained by the tact of the experienced lawyer, but cannot be safely computed by anybody else. Even that part of judge-made law which is of the most unquestionable authority is rendered excessively bulky and hard to be mastered by the implication of its general principles with the details of particular cases. These disadvantages attach, although in a far less degree, to law embodied in the writings of commentators. In their commentaries also we come across law which has become obsolete, law which is becoming obsolete, and law which is being restricted in its application. There also we find unnecessary amplitude and repetition in the statement of really valid law. But we find less of the lumber of facts and a more complete discussion of difficult questions.

Such are the defects of form attaching to a body of law which has never undergone methodic revision. A code tends to remedy these defects, partly by extracting the real law from the mass of doubtful or antiquated matter in which it lies buried; partly by stating this real law in a terse, clear and connected form. It thus assists the lawyer at once in grasping the law as a whole and in referring to a particular rule. Nor need the codification of law preclude its develop-



ment either by commentaries, by judicial decision or by legislation. As a code never can contain more than statements of principle, the detail of the law must after codification be developed by the same agencies as before. As a code cannot even state principles in a final form, its periodical revision by legislative authority is almost a necessity. Only a code intended to be unalterable and worshipped with superstitious veneration can really paralyse the growth of law. A code rightly conceived, and rated at no more than its actual worth, would rather assist that growth by ridding it of the encumbrance of dead matter. In England at the present day, as Professor Pollock has pointed out, the mass of undigested material is so unmanageable that few legal writers attempt more than a compilation of authorities.

As to the work of codification which has been accomplished in the various states of the Continent few possess enough legal learning to speak with authority and any adequate statement would run to a great length. Ever since the close of the middle ages essays in codification have been made by one or other among these states. When despotism had been firmly established upon the ruins of local liberties and feudal privileges, when the prince had become the commonwealth and the prince's word had got the force of law, then there had been evolved all the conditions necessary for direct legislation upon a vast scale. Very sweeping legislation was suggested by the rapid changes then going on in European society. Accordingly we find the Emperor Charles the Fifth publishing a criminal code, known ever since as the Caroline Constitution, and Lewis the Fourteenth at Colbert's suggestion publishing codes of some of the principal branches of French law. A fresh impulse to the enactment of codes was given by the new movement of thought which marked the eighteenth century. The growing disregard of usage and tradition, the taste for uniform method and logical exposition, above all the increased interest in the theory of institutions, helped to further the remodelling of law. To have issued

a code became as it were the badge of a philosophic ruler. Frederic the Second of Prussia, Maria Theresa of Austria, and Catherine the Second of Russia, with other sovereigns of inferior note, signalized their reigns by codifying great part of the laws of their respective states. In France the Revolution led to a re-casting of the law, which was accomplished by the famous Code of Napoleon. Its novelty, whether in general design or in particular details, and its intrinsic excellence, have sometimes been much over-rated. Yet it found warm acceptance in several of the adjoining regions conquered by the French, and it gave a powerful impulse to the codification of law in the other Latin states, in their colonies, and in the semi-civilized countries subject to their influence.

The Code of Napoleon may be described as the latest and most remarkable product of the spirit of legislative reform as manifested in the eighteenth century. With the opening of the nineteenth century that spirit became less aggressive and more critical. Swayed possibly by an instinct of antipathy to French influence, as well as by a strong historic feeling, Savigny, the greatest name in German legal literature, opposed himself to any abrupt codification of law in Germany. Since the time of Savigny, however, the German states have codified many branches of law, and some of the German codes have been highly commended by competent critics. The work of codification is now far advanced in every part of Christendom not occupied by English-speaking peoples. Bentham's ideas transfused into Dumont's writings have contributed something appreciable to this general remodelling of law in foreign countries. Among his own people and their offshoots his advocacy of codification has had but partial results. In England a draft criminal code never passed into law, a code of the rules relating to negotiable instruments, and a number of consolidation acts in bulk and elaboration approaching to codes, are all that we can boast. In our colonies and in the United States the chaos of laws is worse than it is here.

Only in British India has English law been largely codified. The circumstances of British India gave redoubled weight to Bentham's arguments in favour of codification. There at all events it was necessary that English law should be readily understood and readily applied. For it had been introduced into a great country inhabited by peoples to whom it was absolutely unfamiliar. It was in many cases administered by men who were not professional lawyers and had no access to libraries of professional books. And whilst there were peculiar reasons for attempting to codify the English law adopted in India, codification was made easy by the despotic character of the Indian government. It began with Macaulay's draft of a Penal Code, which was executed in the year 1837, and, with amendments, became law in the year 1860. Since then chapter after chapter of law has been codified, and the Anglo-Indian codes in Mr. Whitley Stokes' edition fill two handsome volumes. Here at least Bentham's teaching has borne fruit. Had Bentham done nothing more than point out the way in which the law of England could best be applied to the needs of India, he would have rendered a distinguished service to his country and to mankind.

In the history of the East, the Anglo-Indian codes may prove hardly less momentous than did Justinian's recension of Roman law in the history of the West. Like the Roman law in the West, the English law in the East presents itself to imperfectly civilized nations as an inexhaustible source of refined legal rules. Like the Roman law in the West, the English law in the East appears clothed with a majesty of empire which recommends its principles and its methods of reasoning even in cases where its specific dictates are not enforced by the arm of power. Like the Roman law in the West, the English law in the East offers itself with the charm of a new science to gifted races which are beginning to feel the first sharpness of scientific curiosity. Should the English empire in India prove durable, the

Indian codes will do much to transform Indian civilization. Even should that empire pass away, these codes will remain the first successful essays towards the recasting of English law.

[In summing up this incomplete criticism of Bentham's writings upon the theory of legislation, it may be said that they are highly characteristic of that remarkable age of thought which is commonly styled the eighteenth century, but which really extended from the cessation of the wars of religion to the outbreak of the wars of the French Revolution. They display all its most striking attributes; its immense hopefulness for the future joined with extravagant contempt for the past; its generous humanity alloyed with a somewhat sordid conception of human nature; its venturesome scientific spirit suffused with the most arrogant dogmatism; its grotesque pedantry blended with the shrewdest common sense. Their criticism of English institutions is often superficial or unfair.] 'Bentham,' as Mr. Justice Stephen observes, 'was too keen and bitter a critic to recognize the substantial merits of the system which he attacked; and it is obvious that he had not that mastery of the law itself which is unattainable by mere theoretical study.'

[But the law of England had been worshipped with so blind, so indiscriminating an idolatry, that only an audacious critic would have dared to censure it and only violent censure would have awakened the reason of its devotees.] In positive suggestion these writings are sometimes rash, impracticable, nay ridiculous. But against their few absurdities must be set an infinitely greater number of wise projects and ingenious expedients. Alike in their critical and in their positive aspects Bentham's writings upon legislation have stood the test of time and experience. When we recollect how much that Bentham condemned has since been abrogated, and how much that Bentham proposed has since been adopted, and when we consider how generally, in either instance, the results have justified his counsels, we must allow that for

industry, for acuteness, and for an enlarged love of his kind, he takes one of the highest places among those who have discussed the theory of legal reform.

#### IV. THE FRAGMENT ON GOVERNMENT.

The essay reprinted in this volume, the Fragment on Government, we owe to the publication of William Blackstone's Commentaries upon the Laws of England. Blackstone had been appointed in 1758 to the Vinerian Professorship in the Law of England, recently founded in the University of Oxford. The lectures which he gave as Professor formed the basis of his Commentaries, the first volume of which appeared in the year 1765. The Commentaries deserved and gained general applause. Hitherto the law of England had been accessible only in meagre reports or in crabbed treatises, written by men better acquainted with law than with their mother tongue. Now the law of England was presented in a moderate compass, and in an intelligible order, by an easy, elegant and perspicuous expositor. 'To Blackstone,' said Bentham, 'we owe such an arrangement of the elements of Jurisprudence as wants little perhaps of being the best that a technical nomenclature will admit of.' The same severe critic added that Blackstone 'first of all Institutional writers has taught Jurisprudence to speak the language of the scholar and the gentleman.' Such merits, joined with a very respectable knowledge of his subject, ensured the fortune of the author and the popularity of his work. But on one side, at least, Blackstone's work was open to attack. Blackstone was an able man and a sound lawyer, but he was not a historian or a philosopher. When he discussed speculative subjects, he was usually satisfied with the notions of the day and the optimism of his profession. His superficial turn betrays itself in the second part of his Introduction, wherein he examines the nature of laws in general. This second part provoked the polemic of Bentham,

who hated Blackstone as a dogmatist and sworn enemy of all reformation. [ To confute the second part of Blackstone's Introduction Bentham wrote his Fragment on Government. ]

The Fragment on Government is primarily a criticism. If it were nothing more, it would have no interest for later generations, which do not regard Blackstone as an authority upon speculative questions of politics or history, and therefore do not need to have Blackstone's theories corrected or disproved. [ But in criticising Blackstone's views, Bentham necessarily expounds his own. ] As Bentham is one of the few English writers of mark upon the theory of political institutions, and as his doctrine forms a link in the chain of English political philosophy, we still read the Fragment on Government in order to see, not how far Blackstone was wrong, but how far Bentham was right.

[ The true scope of the Fragment on Government may best be expressed by calling it an essay upon Sovereignty. The term sovereign is used in several senses, which may be distinguished as the courtly, the legal and the philosophical. In the courtly sense, the epithet of sovereign is applied only to an individual who holds for life the supreme rank in an independent state. ] To such an individual it is applied with no nice discrimination as to the degree of actual power enjoyed by him or as to the degree of actual independence enjoyed by the state over which he presides. It is applied to a constitutional as well as to an absolute monarch, and to the monarch of a few thousand square miles of territory as well as to the monarch of half a continent. But the epithet of sovereign is never bestowed on the temporary head of a state, however ample his authority or however great its consequence. Thus the courtly application of the term sovereign is arbitrary but clear. What persons ought in courtesy to be styled sovereign is neither a difficult nor a momentous question.

More difficult and more momentous is the application of the term sovereign in its legal sense. Lawyers give the desig-

nation of sovereign as well to an entire body politic as to its ruling part. Lawyers describe as sovereign every state which is not in permanent and formal subjection to some other state. With respect to states which have circumscribed their own independence by entering into a federal pact, lawyers seem to hesitate whether or no to allow them the style of sovereign. A corresponding hesitation may be traced in the language of lawyers respecting a federal body in its entirety. Whilst they continue to recognize the sovereignty of each member, they are somewhat slow to recognize the sovereignty of the whole. When they cease to insist upon the sovereignty of each member, they begin to conceive of the whole as sovereign. But lawyers would not allow the epithet of sovereign to a state which is in recognized dependence upon a power external to itself such as Bulgaria, which is a dependant of the Sultan, or the principalities of Rajputana, which are vassals of the British government in India.

When the whole body politic is sovereign in the legal acceptation, its ruling part is also sovereign in the legal acceptation. When the whole body politic is dependent upon some external power, then its ruling part is not sovereign. Thus sovereignty in the legal sense is an affair partly of fact and partly of form. Supreme power which has been recognized as lawful constitutes sovereignty as understood by lawyers. But it is clear that such power may have long to wait for formal recognition, and that such power once recognized may dwindle almost to nothing without being formally set aside. A people may have asserted its independence long before it has been acknowledged as independent by its seniors in the family of nations. A state long acknowledged as fully sovereign may sink into the most abject dependence upon some external power which asserts no explicit superiority. Similarly a person or body of persons may actually govern a commonwealth, although never acknowledged as rulers in the enactments of the legislature or in the decrees of the courts. A person or body of persons

acknowledged as legally supreme may be mere puppets of some power wholly unknown to the law. Thus legal sovereignty and actual supremacy may be partially or totally severed from each other. Seldom are they absolutely conjoined in the same hands. For the legal formula is rigid whilst the political fact is mutable. Things change fast whilst names change slowly. The two factors of legal sovereignty are united only to be separated anew. Thus the true seat of legal sovereignty must often be doubtful, and the language of lawyers respecting sovereignty must often be obscure or inconsistent.

Sovereignty in the philosophical sense is simply an affair of fact. The sovereign of political philosophy is the *de facto* governing power in the community. The titular sovereign may be in himself the governing power; or he may be one of the persons who jointly constitute that power, or he may be excluded from any place in that power. The Czar of Russia governs Russia in so far as the body and mind of one man are equal to such a task; the German Emperor is the most influential member of the body which governs Germany; the Doge of Venice was almost wholly excluded from the government of Venice. Again the sovereign recognized by law is generally the governing power in the community and therefore the sovereign recognized by political philosophy. The Czar of Russia is sovereign in both senses. The Imperial Parliament of the United Kingdom is sovereign in both senses. But law and political philosophy often differ in their analysis of a governing power acknowledged by both. Thus for the lawyer the three members of the Imperial Parliament, the King, the Lords and the Commons, whilst differing in their respective spheres, partake on equal terms of sovereign power. In so far as the law recognizes any disparity between them, it gives pre-eminence to the King. But for the political enquirer the King, the Lords and the Commons are not equally sovereign; for their shares of power are unequal, and the pre-eminence



rests with the Commons, for their share of power is the greatest.

At the same time the sovereign of political philosophy is always a determinate person or body of persons. A governing body may contain any number of persons or bear any numerical ratio to the entire community. Thus a body comprising all the males of full age and sound mind may be as truly sovereign as any smaller and more manageable body. But a determinate character, a qualification for membership and an organization of the members are necessary to a sovereign body, because without these it cannot have the unity which is indispensable for action. A sovereign body therefore must be distinguished from those confused multitudes which in times of anarchy sometimes give a new turn to public affairs. It must also be distinguished from that large but uncertain portion of the community which makes what is known as public opinion. Public opinion may control and a mob may overthrow the sovereign; but neither public opinion nor a mob can in the literal sense of the term govern. But a sovereign is simply a governing authority; and the theory of sovereignty is the theory of governments.

Thus far everybody would agree. A sovereign is an organ necessary to every political society, and there can be no political society without a sovereign. But in the further investigation as to the origin, the nature and the possible forms of sovereignty, either of two different methods may be adopted. The one method would begin by considering political society as a whole and would then proceed to consider the sovereign member of the body politic. On behalf of this method it may fairly be said that he who would understand the nature of the several parts must first have attained to an accurate conception of the entire organism. The other method would begin with isolating sovereignty from the other elements of social life, and would explain it by a comparison of the various known species of sovereignty. On behalf of this method it may fairly be said that for

purposes of study we must break up the whole into its parts and for a time consider each part out of relation to the others and to the whole. Both methods are in truth imperfect and each must be employed to correct the results given by the other. The method which insists upon the unity of the political organism may obscure the distinguishing attribute of the sovereign, namely the possession of power. The method which treats sovereignty as an ultimate fact will do full justice to this distinguishing attribute; but it is apt to turn away attention from every other attribute of a sovereign however momentous.

The latter of these methods has been adopted by most of the English writers who have discussed the theory of sovereignty, by Hobbes and by Locke, by Bentham and by Austin. These eminent men fixed their attention almost exclusively upon sovereignty in abstraction from the other facts of political and social organization. The reason why they did so may perhaps be found in the history of modern Europe, particularly in the history of England. When the middle ages closed, the ideas of corporate political life and civic freedom had been not obliterated but obscured by several potent influences. The religious doctrine that rulers are of Divine appointment, although capable of a rational interpretation, had been often construed in the despot's sense. Feudal morality had merged the idea of patriotism in the idea of loyalty, and had thus invested the prince with that sanctity which in other ages had attached to the commonwealth. Feudal law had given a proprietary character to political power, had blended the conception of a sovereign with the conception of a landowner, and had confused a kingdom with an estate. Finally the dissolution of mediaeval society had left all the material instruments of force in the hands of those rulers to whom religion, morality, and law had already given an ascendant over the minds of men. The mediaeval hierarchy of power made place for resistless sovereign sway. The king was exalted to an immeasurable

height above his people, and the contrast between sovereignty and subjection appeared in its most glaring colours.

But the age of personal government was also an age of audacious criticism. In England, at all events, the royal supremacy provoked a formidable reaction. Unwise rulers chafed the strongest instincts of human nature, the instinct of property and the instinct of religion. Unskilful endeavours after reconciliation were followed by a well-fought civil war, and from the civil war sprang a military despotism which ended in military anarchy. Such extraordinary revolutions could not fail to suggest reflection upon the grounds and the extent of sovereign authority. In the year 1651, shortly after the death of Charles I and the proclamation of the Commonwealth, appeared the first great English treatise on political philosophy, the *Leviathan* of Thomas Hobbes. Its aim was determined by the political crisis. Keenly alive to the mischief brought upon his native country by civil strife, and firmly convinced that this strife sprang from perverted ideas of morality and religion, Hobbes sought to convince mankind that all resistance to an established government must be wicked and must be absurd. To justify sovereignty and to explain its scope are thus the principal objects of the *Leviathan*. Sovereignty is justified by an audacious tissue of legal fictions combined to show that total subjection is perfect freedom, since the subject never suffers any evil from the sovereign but with his own full and free consent. Sovereignty is shown to be unlimited either by law or by morality, since the interpretation of law or of morality, if left to the subject, will virtually make his likings or his aversions the measure of his obedience, so as to make the very existence of society a mere matter of taste. Thus the assertion of the right of sovereignty is the burthen of the whole treatise. Its motive is the desire to strengthen authority. To the party of authority such a treatise might be welcome. But the party of resistance could not let it pass without a rejoinder. They also needed

a doctrine of sovereignty, and this was supplied by John Locke.

In his Treatise of Civil Government Locke did not seek for his theory of sovereignty a basis more substantial than the basis which had contented Hobbes. He accepted without question the doctrine of an original state of nature and the doctrine of a deliberate contract as the charter of political society. But he maintained that by the law of nature everybody seeks his own preservation or welfare and enters into political society for the better assurance which it affords; that sovereigns are established only in order to promote the good of the subject, and that when they repudiate their duty they may lawfully be resisted or even deposed. Locke does not assert that sovereignty is limited by positive law; but he does assert that sovereignty is limited by the moral law. Sovereignty he allows to include various functions legislative and executive; but the legislative function he regards as the highest and most truly sovereign. In substance his theory of sovereignty is not far removed from the theory suggested by Bentham and elaborated by Austin. But in expression it is obscured by the perpetual use of phrases suggested by a confused conception of nature and of natural law.

When the conflict between the English nation and its Stuart kings had ended, questions as to the limits of authority and the right of resistance lost much of their former interest. A new series of disquisitions upon the nature of sovereignty was opened by Montesquieu's doctrine of the divisibility of sovereign power and of the advantages arising from its division. In the sixth chapter of the eleventh book of the *Esprit des Lois* Montesquieu declared that the separation of the functions of sovereignty had been achieved in England and was the secret of English freedom. So great was the influence of this statement upon the development of political theory and political institutions that it deserves to be quoted in the words of the author.

'In every state there are three species of powers; the

legislative power, the power concerned in the execution of the matters comprised under the law of nations, and the power concerned in the execution of the matters comprised under the civil law. In virtue of the first of these powers the prince or the magistrate makes laws whether temporary or permanent, and amends or repeals those already made. In virtue of the second he makes peace or war, sends or receives embassies, establishes public safety and prevents invasions. In virtue of the third he punishes the crimes or decides the disputes of private persons. The last of these powers may be termed the judicial and the second simply the executive power.

‘Political liberty in the case of any particular citizen is that tranquillity of mind which springs from the belief that he is safe; and in order that he may enjoy this liberty the government must be so constructed that no one citizen can stand in fear of any other citizen.

‘When the legislative power is united with the executive power in the same person, or in the same body of magistrates, there is no liberty, because it may well be feared that the single ruler or the single senate will enact tyrannical laws in order to execute them in a tyrannical manner.

‘Again there is no liberty where the judicial power is not separated from the legislative and the executive power. Were the judicial joined with the legislative power, there would result an arbitrary control over the life and liberty of the citizens; for the judge would be the legislator. Were the judicial joined with the executive power, the judge might have the strength of an oppressor.

‘Everything would be lost, if the same man or the same body of rulers, nobles or populace, exercised all three powers, that of making the laws, that of executing the will of the state, and that of judging crimes or suits between private persons.’

‘In most of the kingdoms of Europe the government is

moderate, because the prince, whilst possessing the first and second of these powers, leaves to his subjects the exercise of the third. Among the Turks, where the Sultan unites all three, there prevails a terrible despotism. In the Italian republics, where all three are united, liberty exists less than in our monarchical states.

‘As in a free state, every man who is supposed to have a free spirit ought to be governed by himself; it would be necessary that the people collectively should enjoy the legislative power; but as this is impossible in large and involves many inconveniences in small states, it is necessary that the people should do by its representatives all that it cannot do by itself. . . .’  
‘There are always in a state persons distinguished by birth, riches or dignities; but if they were confounded with the people and had each but one voice like the others, the common liberty would be their servitude and they would have no interest in defending it, inasmuch as most of the resolutions taken would be unfavourable to them. The part which they have in the legislature should therefore be proportioned to the other advantages which they enjoy in the state; and this will be the case, if they form a body entitled to defeat the attempts of the people, as the people are entitled to defeat their attempts.’

‘Thus the legislative power will be entrusted to the body of the nobles and the body of representatives of the people, which will have their meetings and their deliberations apart and will have distinct views and interests. . . .’

‘The executive power ought to be in the hands of a monarch; because this part of the government, which nearly always requires to have an instantaneous action, is better administered by one than by many; whereas matters of legislation are often better ordered by many than by one. . . .’

‘If the executive power does not possess the right of defeating the attempts of the legislative body, the latter will be despotic; for being able to invest itself with every imaginable authority, it will annihilate every other power. . . .’

'This then is the fundamental constitution of the government which we are describing. The legislative body being composed of two distinct parts, they will limit each other by their mutual veto. Both will be restrained by the executive power, and this in its turn will be restrained by the legislative power. It is not my part to enquire whether or no the English actually enjoy this liberty. It is enough for me to say that this liberty is established by their laws, and I enquire no further.'

It is easy to see how Montesquieu was led to lay so much stress upon the separation of sovereign powers The arbitrary and oppressive methods of government then prevailing in most of the Continental states contrasted strongly with the reign of law and sense of personal freedom already assured in England. Most of the Continental states were subject to the absolute power either of a single person who was monarch both in title and in fact, or of a small and exclusive body of nobles. England enjoyed a constitutional monarchy, in which the titular monarch had to share his power with the two Houses of Parliament and to acknowledge the independence of the judges. That such a form of government was free from many of the worst abuses incidental to the unlimited sway of one or of a few could not be gainsaid. That it really involved a division of sovereign powers was, in the period following the Revolution of 1688, an extremely plausible hypothesis. For the king had ceased to claim, whilst the Commons had not yet begun to exercise, the plenitude of sovereignty. Nay this hypothesis does possess more truth than has been generally allowed by writers in revolt against old-fashioned theories of government. Once brilliantly expressed by Montesquieu, it rapidly found vogue in England. Blackstone adopted it, with some reservations regarding the omnipotence of the king in Parliament. What Montesquieu had asserted and Blackstone had approved was invested with the double authority of reason and of law. That the excellence of a constitution is to be measured by the skill with which it

separates and balances the supreme powers in the state became a commonplace in political literature and a truism with all educated men. The axiom thus generally received was put to a practical test by the founders of the American commonwealth. The American constitution was framed to satisfy its requirements; and the success of the American constitution may suggest that its first principle was not altogether erroneous.

We have now traced the discussion of sovereignty down to the time at which Bentham published his *Fragment on Government*. [The *Fragment*, we have said, takes the form of a minute dissection of a small part of Blackstone's *Commentaries*. It is in form a criticism minute, tedious, and often captious. This criticism need not be followed in detail. What is needful is to seize the doctrine of sovereignty expressed, or rather concealed, in this vexatious form. We want to know what Bentham thought regarding the nature, the origin and the possible forms of sovereign power. But this we can best do by abandoning the inconvenient order of inquiry which Bentham has adopted.

1. What is sovereignty? Bentham's answer to this question must be collected from several passages.

'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.'

'Let us avow then . . . . that [the authority of the supreme body cannot (unless where limited by express convention) be said to have any assignable, any certain bounds]—That to say there is any act they cannot do, to speak of anything of theirs as being illegal, as being void; to speak of their exceeding their authority (whatever be the phrase), their power, their right,—is, however common, an abuse of language.'

The proviso for the [case of a government limited by express



convention] Bentham explains to refer to the [case 'where one state has upon terms submitted itself to the government of another] or where the governing bodies of a number of states agree to take directions in certain specified cases from some body or other that is distinct from them all; consisting of members for instance appointed out of each.'

'To say,' he adds later, 'to say that not even by convention can any limitation be made to the power of that body in a state which in other respects is supreme . . . . would be saying that there is no such thing as government in the German Empire; nor in the Dutch provinces; nor in the Swiss Cantons; nor was of old in the Achaean league.'

From these passages we may collect the following conclusions. First, a sovereign is a person or set of persons of

1. a definite description to whom a number of other persons are in the habit of paying obedience. Secondly, the authority of

2. this sovereign is indefinite, unless restrained by an express convention whereby that sovereign agrees to submit to another sovereign, as when the sovereign of a beaten state agrees to terms imposed by the victorious state; or whereby that sovereign agrees to submit along with other sovereigns to a body distinct from all, as where the sovereigns of states desiring to form a federation agree to submit themselves to the federal council. [With these exceptions every sovereign, the sovereign of a free state no less than the sovereign of a despotic state, is unlimited by law.]

2a. [The distinction between free and despotic states turns not on the more or less of sovereign power, but 'on the manner in which that whole mass of power, which taken together is supreme, is in a free state distributed among the several ranks of persons that are sharers in it.]

Readers of Hobbes and of Austin will observe in this account of sovereignty points of resemblance as well as of difference with the theories of these writers. The sovereign power of Bentham in so far resembles the sovereign power of Hobbes that its authority is normally indefinite. It may be limited by express convention, but this convention must

apparently be either a treaty or a federal pact; [not merely a law binding on the members of the state ruled by the sovereign in question. The authority of the sovereign cannot be limited by law in the ordinary sense.] Moreover this unlimited authority belongs to the sovereign in a free as well as in a despotic state. Bentham therefore agrees with Hobbes that ~~sovereignty is unlimited by law~~; but he does not agree with Hobbes that ~~sovereignty is morally unlimited~~.

Bentham allows what Hobbes denies, that resistance to the sovereign may be morally right in certain cases; in those cases, namely, where it is agreeable to utility. Again the sovereign of Austin is defined by him in terms almost the same as those used by Bentham. Austin holds, like Bentham, that a sovereign authority cannot be limited by law, although it may be limited by treaty, with a foreign state, at least to the extent of paying obedience to the occasional commands of its sovereign. For all that Austin requires of his sovereign authority is that it should not be *in the habit of obedience* to any other power whilst itself the object of habitual obedience on the part of the bulk of its subjects. But Austin differs from Bentham in thinking that the obligation of a federal pact is inconsistent with the character of a sovereign. Sovereignty Austin thinks can be ascribed neither to the presiding authority in any one state of the federation nor to the federal authority in which all the states are represented, but only to the authority which can alter the terms of the federal pact. For only such an authority can modify law as it pleases; in other words, only such an authority has an indefinite power of issuing commands.

These attempts to define sovereignty are valuable chiefly as they serve to emphasize the distinction between sovereignty *de facto* and formal sovereignty. For the student of politics this distinction is essential. The real governing power in a state may differ widely from the sovereign so styled in etiquette, and even from the sovereign as described by law. But it is the real governing power which gives the

state its political individuality. [It is the presence of a *de facto* sovereign which distinguishes a body politic single and complete in itself from an assemblage of human beings which is part of some larger body politic, or which contains several bodies politic, or which is a mere swarm of individuals in a state of anarchy.] It is the character of the *de facto* sovereign which discriminates the several types of body politic, monarchy, aristocracy and democracy. Thus a clear conception of sovereignty in fact, as distinguished from sovereignty in courtesy or sovereignty in law, is requisite at every step in political and historical enquiry. ] But the conception of sovereignty embodied in these definitions, although clear, is abstract, so abstract that if not cautiously used, it may mislead us into looking for forms of political organization more simple and logical than have ever actually existed, or into ignoring differences of political organization which are not the less momentous because they are not at once apparent.

A. [Thus these definitions state and restate in various forms the one idea that a sovereign is that element in a political association which is in the habit of issuing commands and is not in the habit of receiving commands.] [The sovereign has an indefinite power of commanding and an indefinite immunity from obeying.] Now this indefinite power of command in practice is of the most variable compass. ] A sovereign may conceivably issue commands in the discharge of any one of the functions which are roughly distinguished as legislative, executive and judicial. But Maine has shown that whilst legislation is the paramount function of sovereigns in highly civilized states, sovereigns in less civilized states are almost altogether taken up with executive and judicial functions. In a half-developed society the needful guidance of individual action is afforded chiefly by rules of custom or rules of religion.

Moreover the position of the sovereign power, with respect to rules which it has not itself enacted, differs markedly in

successive periods of history. At one period the sovereign may have little to do even with enforcing these rules. If they have been developed by a group within the body politic, inferior to it in extent, but superior to it in antiquity, in firmness of structure and in moral energy, the ruling part of such a group will rarely need the assistance of the sovereign to enforce its peculiar law. A Highland chief of the fifteenth century would not have dreamt of calling to the support of his patriarchal jurisdiction the authority of the Scottish king and parliament. If such rules have been developed by a great religious body transcending the state in numbers and in vitality, the conscience of the faithful will often supply the ecclesiastical rulers with material strength sufficient to enforce them unaided by the secular arm. The laws of the Church in Gaul, after the breaking up of the Carlovingian Empire, or in England during the civil wars of Stephen and Matilda, certainly did not owe to the power of the civil ruler even such imperfect observance as they may still have found. In cases of this kind the sovereign does little more towards enforcing than towards enacting the rules which hold society together. In times less confused, the sovereign is called in to enforce such rules either immediately or in default of any other power to enforce them. It is then that the sovereign, in person or by deputy, holds what are known as the king's courts and administers what is known as royal justice. He who acts as supreme judge can scarcely help becoming a legislator. But when sovereigns begin to legislate they do little more than confirm customs already regarded as legally binding. They merely ratify, or at most amend, in this or that particular, the rules which they did not make. It is only in the height of sovereign power that rules not enacted by the sovereign pretend to no more than moral force, and rules enacted by the sovereign are acknowledged to have legal force merely because of that enactment. To blur all these shades of political development by the application of monotonous formulas, such as 'whatever rule the

sovereign enforces he enacts,' or still worse, 'whatever the sovereign permits he commands,' is merely to falsify history by ascribing our notions to all mankind.

So long as the sovereign can enforce the commands which he is in the habit of issuing he is truly sovereign. To take the instance given by Maine, Runjeet Singh within his narrower sphere was as truly sovereign as the Queen in Parliament within her wider sphere. The difference of a wide or narrow sphere is but a difference of degree. No sovereign authority attempts to control more than a fraction of men's lives. All the rest it leaves to individual conscience, prudence or taste. All sovereigns make a large allowance for custom, and all sovereigns fear to come in conflict with religion. All sovereigns know that some forms of oppression are safe and that some forms of improvement are dangerous. It is not so much the extent as the indeterminate boundary of the province of command which gives a special character to sovereign power. Sovereign power differs from subordinate power chiefly in the boundless possibility of expansion thus secured. Its actual expansion in any given age or country will be relative to the degree of political development attained. The more deeply a people feels its political unity, and the more clearly it conceives the objects of political action, the more active and powerful will its sovereign become.

As sovereigns differ widely in respect of the range of matters which they seek to regulate by their commands, so they differ widely in respect of the compliance which their commands obtain. As Bentham and Austin both allow, the most potent sovereign can boast of no more than habitual obedience paid by the bulk of the community Many persons occasionally, and some persons frequently, break the laws even of the best ordered state. In an ill-ordered state the proportion of hardened law-breakers may be great indeed, and may go on augmenting until the state dissolves into anarchy. Such dissolution has been observed frequently

in the East and at rare intervals in Europe. But it is impossible to say when precisely the disobedience of the subject amounts to the annihilation of the sovereign. This also is a matter of degree, which must be determined rather by impression than by arithmetic.

Similarly the sovereign's freedom from dependence upon any external authority admits of innumerable gradations. Most states have had to submit at one time or another to commands given by some stronger state. These commands have often prescribed not merely one action or forbearance, but a continuous course of conduct. It is impossible to determine the point at which such commands become so numerous and so comprehensive as to extinguish the independence of the state which receives them and to put an end to the authority of its sovereign. Most people would agree that the Sultan of Turkey, often as he has to comply with the will of the Czar of Russia, remains a sovereign. Everybody would agree that the native princes of India who have come under our suzerainty are no longer sovereign. But between these cases might be found many others admitting of endless debate. Who will venture to say whether the government of Servia is sufficiently independent of all external powers to merit the name of sovereign? The truth is that no definition which can be framed will supply a solution of these difficulties. Nor will any definition enable us to fix the exact point at which the restraints imposed on the members of a league or confederation amount to a deprivation of sovereignty. Sovereignty is a complex fact admitting of endless gradations; not a mathematical quantity admitting of definition at once abstract and useful.

These observations apply to the unity as well as to the extent of sovereign power. The definitions which we have been discussing suggest that sovereign power is indivisible. The sovereign of Hobbes is so unreservedly absolute as to imply a perfect singleness of authority. The sovereign of Bentham may be limited by express convention, but only by

express convention with other sovereigns.] The sovereign of Austin is legally no less absolute than the sovereign of Hobbes and is characterized by no less a degree of unity. But, as a matter of fact, the unity of sovereign power, like the extent of sovereign power, admits of many degrees. Its most perfect unity is seen in the government of an able and popular and well-served despot.] A unity less perfect but still striking is seen in the government of one compact, disciplined and homogeneous assembly. In singleness of purpose and contrivance such an assembly cannot equal an individual, but it surpasses the complex sovereign of a constitutional monarchy and the still more complex sovereign of a federal state. In these last forms of government the separation of powers is something more than a mere fiction of publicists. Although the ultimate supremacy may be lodged in the hands of some one person or body of persons, it may be a supremacy not recognized by law or a supremacy which does not admit of continuous enforcement. The ordinary work of government is performed by a machine composed of many parts, subject to much friction and liable to occasional stoppage. In such a machine the power is great but the movement is slow, because the work done is the product of a complex system of forces.

In a constitutional monarchy the sovereign powers are at least in appearance divided upon two distinct principles. First, there is an apparent division of legislative power between the monarch and each of the two houses of parliament. Secondly, there is an apparent separation between the legislative, the executive and the judicial authorities, respectively represented by the monarch with his parliament, the monarch with his ministers, and the highest courts of justice. This apparent division of authority was regarded in the last century as a momentous fact, nay more, a contrivance of the highest wisdom. In our own century its existence has very generally been denied. Those who consider the question for themselves may be disposed to allow that this division of

authority, although it cannot be carried very far, is to a certain degree possible and has considerable effects upon the course of political affairs. Thus in the United Kingdom although the House of Commons is generally certain of overcoming the resistance of the House of Lords, the House of Lords is not altogether powerless. In the first place, it has a constitutional right to take part in legislation, and this constitutional right is always a source of power to the party invested with it. In the second place, it may have the support of a party in the House of Commons or in the country. For although we talk of the will of the House of Commons as we might talk of the will of one man, the will of the House of Commons is merely the will of the majority, and a majority in the House does not always represent a majority in the constituencies. The minority in the House of Commons or their following in the country may find its account in an alliance with those whom the law recognizes as sharers in the sovereign power. Thus a small majority in the House of Commons will not be able to carry against the House of Lords measures which it might have carried through its own chamber. Even a considerable majority in the House of Commons will try to lessen opposition in the House of Lords by qualifying measures which it would otherwise have put in an extreme form. These admitted facts are enough to prove that the House of Lords has kept, although the Crown has lost, a share in legislation.

Similar observations apply to the supposed separation of the legislative, the executive and the judicial powers. The legislative and the executive functions are at present united as closely as is compatible with the proper discharge of either. But this intimate union dates only from the introduction of cabinet government, which enables the Commons to control, by means of persons whom they can trust, such public business as does not admit of collective execution. Before cabinet government had been established, the legislative and the executive authorities were really distinguish-



able. The king with the assistance of the Houses made laws; the king with the assistance of the Privy Council provided for their execution; and the Privy Council acted independently of the Houses, although it might by extraordinary misconduct provoke the Commons to withhold supplies or to threaten impeachment. The Houses could check or punish misgovernment; but they did not govern either directly or by their nominees. The executive authority then had a measure of real independence; the judicial authority has a measure of real independence still. The judges can be removed by the Crown in pursuance of an address by both Houses of Parliament; the Commons being the stronger House and the Crown being little more than the ministry which rests upon a majority in the Commons. Yet it would be absurd to regard the judges as liable to be dismissed by a vote of the Lower House. Not only is the legal and time-honoured procedure so elaborate as to give opportunity for argument and reflection, but the concurrence of many wills and of two assemblies not necessarily unanimous must be had before anything can be effected. As the dismissal of a judge is a matter of much difficulty, it has rarely been attempted without grave reason. Thus the feeling has grown up that to attempt it without grave reason is an offence against the commonwealth. Such a feeling encircles the judicial bench with a rampart even stronger than the rampart of constitutional forms. It has made the English judges virtually independent of the majority and the ministry of the day, and in this sense has severed the judicial from the legislative and executive powers.

What remains to the Crown and to the House of Lords is just enough to make it incorrect to say that the House of Commons is fully sovereign. But it must be remembered that the relative importance of these three powers has fluctuated incessantly through a long course of years. A constant competition for power has prevailed between them. Whichever element predominates in a constitutional

monarchy generally seeks to complete the subjection of the others. The Crown, which had gathered strength in the time of the Tudors, sought, in the time of the Stuarts, to break the power of the two Houses. The House of Commons having gained the upper hand in later times tends more and more to withdraw from the House of Lords and the Crown the remnants of their ancient authority. But this secular struggle, prompted rather by instinct than by calculation, has admitted of long periods of truce, marked by at least an apparent equilibrium of forces. It was in such a period, following upon the contests of the Revolution, that Montesquieu's doctrine was promulgated, and as applied to the facts of that period it was partially correct. Unequal as the sovereign powers were even then, they were far more equal than they are now.

But if the separation of sovereign powers has not yet lost every vestige of meaning in England; if it were once incomparably more real than we can suppose it now; there must be now, there must always have been a possibility of conflict between the partners in sovereignty; and in case of such a conflict, it may be asked, where could an arbiter be found? The only possible arbiter is the nation itself, or the most influential part of the nation. This then, it may be said, is the true, the ultimate sovereign. As a figure of speech, the expression may be allowed; but for purposes of accurate discussion it is inadmissible. An uncertain and varying proportion of the whole people, a crowd without unity, fixity or organization, cannot be sovereign either in the legal or in the practical sense. If the mere dread of its interposition move one of the parties legally invested with power to submit to the others, there need be no breach of formal law. If its actual interposition becomes necessary, this amounts to more than a breach of formal law; it amounts to a revolution. Sooner or later a new governing power, a new sovereign, whether a single person or a determinate body of persons, will emerge; but until its emergence

political society is dissolved, and the citizens are in a state of anarchy.

In a federal state the separation of sovereign powers is still more striking than in a constitutional monarchy. Under a written constitution, the sovereign powers may be divided into many parcels, and every parcel will be held by the same equal title. Thus in the United States, the Federal and the State governments are equal as regards their title, although unlike in the extent of their powers. Within the Federal government, the President, the Senate, the House of Representatives and the Supreme Court hold their prerogatives by the same charter and within their respective provinces are alike independent. But since these various authorities derive their jurisdiction from the written constitution, the authority which can modify the constitution may be regarded as the ultimate sovereign. It was thus that Austin reconciled the facts of the American polity with his axiom that sovereignty is indivisible. The unwieldy legislature which can amend the constitution of the United States corresponds, according to Austin, with the Parliament of the United Kingdom. In a certain sense this may be true; but in another sense it is misleading. The authority which can revise the constitution of the United States is an extraordinary authority, capable only of extraordinary acts. The Parliament of the United Kingdom is a standing authority which transacts the ordinary business of the State. In the United States the Federal and State authorities are supreme, until the extraordinary authority can be set in motion and as soon as it has ceased to move. They may disagree to any extent short of that which would call the dormant sovereign into action. In the United Kingdom every inferior authority is constantly reminded of its subordination to the Imperial Parliament. If two such authorities are legally entitled to counterwork each other, a new statute disposes of the difference at once. Within the Imperial Parliament such conflicts are also possible; but there they are less likely to occur, because the possible parties are so

few and less likely to be prolonged, because the possible parties are so unequal in point of strength.

Obscure as is the unity of the sovereign authority in a constitutional monarchy or in a federal state, it is still more obscure in such a body politic as the British Empire. The sovereign power of the Queen in Parliament legally comprises the whole Empire and certainly comprises the United Kingdom, India, and the Crown Colonies. Whether it practically comprises the self-governing colonies is a question which might tax all the resources of casuistry. If, for example, we consider the colony of Victoria we find that it obeys laws made by two different legislatures, by the Imperial Parliament and by the Victorian Parliament. Inasmuch as the Imperial Parliament created the Victorian Parliament and endowed it with the powers which it now enjoys, the Victorian Parliament might appear to be merely the delegate of the Imperial Parliament. But in fact it is much more than a delegate. It is obeyed by the Victorian people not because it represents the Imperial Parliament, but because it represents themselves. It would be obeyed by them even if its enactments were to clash with the enactments of the Imperial legislature. It would have their armed support if the dispute came to the arbitrament of force. Evidently the Victorian legislature and the ministers whom it appoints have a real and ample share of sovereign power. Full sovereign power they do not indeed possess. On some few subjects the law obeyed by Victoria is made by the Imperial legislature. For some few purposes the executive government of Victoria is in the hands of the British ministry of the day. But whilst Victoria is not altogether a sovereign state, neither is she a really subordinate community. The sovereign authority in Victoria is not actually the same with the sovereign authority in the United Kingdom.

When several self-governing colonies unite to form a federal body such as the Dominion of Canada, the problem

becomes still more complicated. To the difficulties which occur when we try to state the real political relations of two such communities as the United Kingdom and Victoria are added the difficulties which occur when we try to describe the political organisation of the United States. These difficulties have no weight for the lawyer who finds in his books that the Judicial Committee of the Privy Council and the Imperial Parliament are entitled to decide every constitutional question affecting the colonies. But they must have the greatest weight with the political enquirer who knows that a decision of the Judicial Committee which was unpalatable to the people of the Dominion would at once be overruled by an Act of Parliament, and that an Act of Parliament would not be obeyed by the people of the Dominion if it conflicted with the will of their own Legislature.

Here again we must repeat that the types of political, like the types of animal, organization are manifold and slide one into another. In every type of political organization a different degree of unity is achieved. In none can absolute unity be found, for absolute unity in the state would annul the diversity of individual wills. More or less of unity may be found in all, for even the laxest league causes or furthers joint action for certain objects. Thus political unity, the unity of sovereign power, is infinitely variable in mode and quantity. To seek to define it as one would define a straight line is to misconceive its nature. We may say that in discussing the unity, as in discussing the extent of sovereign power, Austin embarrassed himself as well as his readers by a method unsuitable to his matter. He took for his subject sovereignty in fact, not sovereignty in law, but he discussed it in the spirit of a lawyer. Legal conceptions may be treated by a method of rigorous dichotomy, by holding fast to unqualified Yea or Nay; but political facts cannot be treated by this abstract method; they can be described only by a series of balanced and mutually qualifying propositions.

(2) What is the origin of sovereignty? This question had

been often asked before Blackstone wrote his Commentaries. In the seventeenth century the usual answer had been to the effect that sovereignty had its origin in the social compact in the voluntary agreement of men, who had hitherto lived in a state of nature, to form a political society and therefore to acknowledge a sovereign. This answer, given in different forms by Hobbes and by Locke, had been rejected by Hume. Blackstone's passing reference to the subject shews discernment not acknowledged by Bentham. Blackstone had gone so far as to disbelieve in 'a wild unconnected state of nature' and in the formation of an express social contract. In his observation that the first societies were single families he anticipates a more rational theory which has since his time found brilliant advocates. He is right in saying that 'when society is once formed government results of course.' He thus avoids the mistake of supposing political organization to have followed immediately upon utter anarchy. His inaccuracies and inconsistencies of expression afford many small triumphs to Bentham. But in discussing the origin of political society Bentham is equally at a loss with Blackstone, for equally with Blackstone he writes a priori and has no sure foundation of historical knowledge.

[As to the origin of sovereignty Bentham can tell us only this, that it did not originate in an express pact.] If we press him for a positive statement he will say that political society was preceded by natural society. Natural society exists 'when a number of persons are supposed to be in the habit of conversing with each other' without paying habitual obedience to any one person or set of persons. [A natural society passes into a political society when its members begin to pay such obedience. But the line which parts natural from political society is according to Bentham invisible, because there are 'few if any instances of this habit being perfectly absent; certainly none at all of its being perfectly present.' If it becomes necessary to determine at any given time whether a given society be political or natural, the only



distinguishing mark is the establishment of certain names of office, 'the appearance of a certain man or set of men with a certain name, serving to mark them out as objects of obedience; such as king, sachem, cacique, burgo-master and the like.' [If we further inquire into the motive which leads to this change, Bentham would apparently answer that the motive was a desire of the advantages which government would produce, a sense of the utility of government.] At least this is the answer of his disciple Austin. [He would make an exception for the many cases in which the strong for their own good have established their authority over the weak.] But he does not really differ upon this head from Blackstone, who says that [it is the sense of their weakness and imperfection that keeps mankind together.]

[In this account of the origin of sovereignty we trace the last fading characters of the a priori philosophy which invented the social contract. Bentham rejects the idea of such a compact, but he retains the correlative idea of a state of nature in which all men were free.] He ridicules Blackstone's remark that 'when society is once formed, government results of course; as necessary to preserve and keep that society in order.' Nevertheless this remark is true. [The mere 'habit of conversing with one another' is not enough to form societies out of which states could be developed. Government does not begin with the formation of the societies which we term political; it is found more or less in all societies of a more primitive type and only disappears when we reach that level at which men can scarcely be discriminated from beasts.]

There we may find assemblages of human beings brought together like herds of cattle or shoals of herrings by mere gregarious and sexual instinct and destitute of government as of organization. Such assemblages are, however, so far remote from political associations that the student of politics may leave them entirely out of view. To oppose them to political societies under the title of natural societies, as does

Bentham, is altogether misleading; because this opposition drops out all the numberless grades of social life which intervene between the herd and the commonwealth. To oppose to political societies all these earlier forms of society under the one title of natural, as does Austin, is hardly less misleading. For in one sense of the word all forms of society, from the rudest tribe or village up to the best balanced freedom or the most ingenious tyranny, are alike natural, since all alike come out of the character and circumstances of mankind. In another sense no form of society is natural; for nothing more than chance herding would be possible without some constraint upon individual freedom; a constraint which implies the existence of some authority to constrain. The antithesis between natural and political perverts all that has been said by Bentham or by Austin upon the present subject. Whilst we may conveniently limit the term political to describe the highest forms of association and the term sovereign to describe the highest forms of government, we had better reject the term natural as misleading if applied to the lower forms, and unmeaning if applied to all forms of government and of society.

The only pregnant remark upon this subject with which we can credit Bentham is the denial of the existence of any definite division between the various types of society. The family shades into the village or the clan and these into the city or the canton, which in turn shade into states comprehending all who live in one country or speak the same language. Thus we cannot say what precise degree of extension entitles a society to the term political rather than domestic or tribal. Somewhere a dividing line must be drawn, for common sense agrees with Austin that it would be ridiculous to term a self-governing family a political society. Maine seems inclined to dispute this observation on the ground that the self-governed family has been in many instances the germ of the state. But even if we could be sure of this, we should rob the term state of all its usefulness by refining



it to that degree of abstraction in which it can be employed to denote as well a patriarchal family as the Roman Empire. Granting that the political association may often have grown out of the domestic association, the two things are so different that they had better be called by different names. Therefore it seems right to say that a society is not political unless it contains a considerable number of persons or at least several distinct households. Such a conception of the state does not exclude the smallest community which took part in Greek or Italian history, whilst it implies a necessary distinction between the family and the commonwealth.

In point of organization, as in point of bulk, the various forms of human association also meet and pass into one another. (As Bentham remarks, we cannot fix the exact moment at which society develops the organ known as the sovereign. A rudimentary sovereign power appears in the father, in the chieftain, in the village elders ; more distinct in its lineaments it appears in the kings of the heroic age or of the Eastern world ; but only in certain mature phases of Western civilization has it manifested itself in the fulness of strength. Yet here again we may make a rough but serviceable distinction. Authority is not truly political until it has ceased to be domestic. So long as the ruler is obeyed only as the father, the husband, or the master, he is not truly sovereign. He is truly sovereign only when distinct from, and superior to, the head of this or that household. As the state includes many households so the sovereign bears sway over many heads of families.

A further distinction between the domestic and the political association may be found in the circumstance that a fixed seat, a definite territory, is needful to the state, but not needful to the family. This necessity may no doubt be regarded as a figment of theorists. It may seem unreasonable to allow to some petty town of Ionia or Lombardy a political character denied to those nomads who have so

often overturned and founded empires. But a wandering tribe, however numerous, seems never to transcend the type of a patriarchal family. It is condemned to this social barbarism by its inevitable barbarism in other respects. It cannot go far in the division of labour, the accumulation of wealth, or the pursuit of knowledge. Its individual members are so much on a par, so like one another, that a refined organization is to it useless and impossible. It remains an enlarged family; it needs no more than a domestic authority. But once settled upon a definite territory, the tribe will almost necessarily become a state. It is the definition, not the extent of the territory, which is of consequence. For whilst there can be no true civilization without a fixed seat, an extremely high civilization may flourish upon a small tract of ground, and a high civilization at once supposes and furthers political organization. Where there is high culture there must be a genuine state. The sterile rock of Aegina and the shifting banks of Venice were enough to base communities as truly political as those which fill the wide extent of France or Germany. But we should vainly seek for a political community in the deserts traversed for so many ages by the Bedouin or Turcoman myriads.

(3) What are the possible forms of sovereignty? Upon this question Bentham says little in the Fragment, and what he says is chiefly negative. Blackstone had adopted the traditional classification of the possible forms of government into monarchy, aristocracy and democracy. Bentham cavils at his want of originality, but does not say whether or no he is wrong. Blackstone, following Montesquieu, had praised the English constitution as reconciling the regal, the aristocratic and the democratic principles, and guarding against the perversions of each by committing supreme authority to 'three distinct powers entirely independent of each other, the King, the Lords and the Commons.

Bentham had little difficulty in showing that the three

powers were not independent of each other, and did not represent distinct principles, but he did not attempt to give another and a more accurate account of the English constitution. In later life, he used to denounce it as aristocratic. But in the Fragment he merely suggests this conclusion, by showing that it is not a combination of aristocracy with monarchy and democracy. [The true commentary upon his remarks is to be found in Austin's doctrine that constitutions are to be classified primarily with reference to the number of those who possess some share of actual power. All governments, says Austin, are governments either of one or of a minority of the people. All governments are thus monarchical or aristocratical, but aristocracies differ according as they comprise a small, a considerable, or a very large minority and may be classified accordingly as oligarchies, aristocracies, in the popular sense, and democracies. They also differ accordingly as they are homogeneous or heterogeneous. That is to say, an aristocracy may be composed either of persons who all answer to the same general description, or of persons answering to different general descriptions. The possible varieties of heterogeneous sovereign bodies are numberless; but the most familiar example of such a body is the ruling part in a constitutional monarchy.]

The distinction between homogeneous and heterogeneous sovereign bodies is valuable because it lays stress upon the organization as well as upon the bulk of the sovereign. It is a distinction of quality and not merely of quantity. It throws light upon many historical facts, and in particular it illustrates the principal difference which parts the free constitutions of the middle ages from the free constitutions of to-day. A mediaeval parliament was composed of several descriptions of persons who represented not so much numbers as conditions, not so much individual citizens as bodies corporate. It represented the estates of the realm and the local communities. A modern Parliament tends to

reduce itself to one description of persons, each representing equal numbers of electors. The estates and the communities are more and more ground into their constituent atoms. The effects of such a change must be considerable, even apart from the effects produced by the extension of the franchise. But the attempt to estimate them lies beyond the scope of this introduction.

In point of elasticity again a heterogeneous sovereign body seems to have a marked advantage over a homogeneous sovereign body. Certainly the history of England points to this conclusion. As the sovereign authority stood in the eighteenth century it was distinctly aristocratic. Yet it never became an unqualified aristocracy, like the aristocracy of Venice. It always comprehended forces and gave effect to sentiments and ideas which a rigid aristocracy must have ignored. Of the three estates which formed the English Parliament, two were recruited in some degree by merit as well as by influence of rank or riches; and the third always maintained a composite character. It combined the elements of town and country, of numbers and of opulence. The representatives of great towns and shires spoke with a weight not measurable merely by the number of votes which they could bring to a division. The representatives of the few constituencies distinguished by a popular franchise could at least give utterance to griefs which they might not be able to redress. Thus it came to pass that the English constitution of the days of Blackstone was the largest and most liberal, as it has since proved the most flexible and expansive aristocratic system of which history makes mention.

So long, however, as we persist in regarding the sovereign apart from the entire society we shall never divine the extraordinary diversity of forms which it can assume. It is the character of the entire society which in normal circumstances determines the character of its government. Of political societies, as of individual men, it may truly be said that no two are really alike. What is true of the society

is true of its sovereign. Sovereign authorities may be roughly classified upon several principles, but none of these classifications will do more than suggest the general character of the objects classified. Everything else must be learnt from special study of particular constitutions. And even when the student has completed his analysis of a constitution he is far, very far, from having exhausted the catalogue of circumstances upon which depend its strength, its durability, its good or evil effects. For above and beyond the formal constitution either of a sovereign authority or of an entire community there is the political capacity, the intellectual and moral endowment of rulers and ruled, which sets the limit of their political achievement. A people endowed with political genius makes good political institutions. But good political institutions will not supply the want of political genius.

A  
FRAGMENT ON GOVERNMENT;

BEING

An EXAMINATION of what is delivered,

On the Subject of GOVERNMENT in General,

In the INTRODUCTION to

Sir *William Blackstone's* COMMENTARIES :

WITH A

P R E F A C E,

IN WHICH IS GIVEN

A CRITIQUE ON THE WORK AT LARGE.

Rien ne recule plus le progrès des connoissances, qu'un mauvais ouvrage d'un Auteur célèbre : parce qu'avant d'instruire, il faut commencer par détromper.

MONTESQUIEU, *Esprit des Loix*, L. XXX. Ch. XV.

NOTE:—The first edition of the Fragment on Government was published in 1776 without the author's name. It has been followed in the present reprint.





## PREFACE.

THE age we live in is a busy age ; in which knowledge is rapidly advancing towards perfection. In the natural world, in particular, every thing teems with discovery and with improvement. The most distant and recondite regions of the earth traversed and explored—the all-vivifying and subtle element of the air so recently analyzed and made known to us,—are striking evidences, were all others wanting, of this pleasing truth.

PREFACE.  
Motives of  
the present  
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Correspondent to *discovery* and *improvement* in the natural world, is *reformation* in the moral ; if that which seems a common notion be, indeed, a true one, that in the moral world there no longer remains any matter for *discovery*. Perhaps, however, this may not be the case : perhaps among such observations as would be best calculated to serve as grounds for reformation, are some which, being observations of matters of fact hitherto either incompletely noticed, or not at all would, when produced, appear capable of bearing the name of discoveries : with so little method and precision have the consequences of this fundamental axiom [*it is the greatest happiness of the greatest number that is the measure of right and wrong*] been as yet developed.

Be this as it may, if there be room for making, and if there be use in publishing, *discoveries* in the *natural* world, surely there is not much less room for making, nor much



## PREFACE.

less use in proposing, *reformation* in the *moral*. If it be a matter of importance and of use to us to be made acquainted with *distant* countries, surely it is not a matter of much less importance, nor of much less use to us, to be made better and better acquainted with the chief means of living happily in our *own*. If it be of importance and of use to us to know the principles of the element we breathe, surely it is not of much less importance nor of much less use to comprehend the principles, and endeavour at the improvement of those *laws*, by which alone we breathe it in security. If to this endeavour we should fancy any Author, especially any Author of great name, to *be*, and as far as could in such case be expected, to *avow himself* a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works: of a great part, at least, of the esteem and influence, which these works might under whatever title have acquired.

Such an enemy it has been my misfortune (and not mine only) to see, or fancy at least I saw, in the Author of the celebrated COMMENTARIES on the LAWS of ENGLAND; an Author whose works have had beyond comparison a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable) than any other writer who on that subject has ever yet appeared.

History  
of it.

It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work, particularly this grand and fundamental one, the antipathy to reformation; or rather, indeed, of laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole. For, indeed, such an ungenerous antipathy seemed of itself enough to promise a general vein of obscure and crooked reasoning, from whence no clear and sterling

knowledge could be derived ; so intimate is the connexion between some of the gifts of the understanding, and some of the affections of the heart. PREFACE.  
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It is in this view then that I took in hand that part of the first volume to which the Author has given the name of INTRODUCTION. It is in this part of the work that is contained whatever comes under the denomination of *general principles*. It is in this part of the work that are contained such preliminary views as it seemed proper to him to give of certain objects real or imaginary, which he found connected with his subject LAW by identity of name : two or three sorts of LAWS of *Nature*, the *revealed* LAW, and a certain LAW of *Nations*. It is in this part of the work that he has touched upon several topics which relate to all laws or institutions<sup>1</sup> in general, or at least to whole classes of institutions without relating to any one more than to another.

To speak more particularly, it is in this part of his work that he has given a definition, such as it is, of that whole branch of law which he had taken for his subject ; that branch, which some, considering it as a main stock, would term LAW without addition ; and which he, to distinguish it from those others its *condivident branches*<sup>2</sup>, terms law *municipal* :—an account, such as it is, of the nature and origin of *Natural* Society the mother, and of *Political* Society the daughter, of Law *municipal*, duly begotten in the bed of Metaphor :—a division, such as it is, of a law, individually considered, into what he fancies to be its *parts* :—an account, such as it is, of the method to be taken for *interpreting* any law that may occur.

In regard to the Law of England in particular, it is here that he gives an account of the division of it into its two branches (branches, however, that are no ways distinct in the purport of them, when once established, but only in

<sup>1</sup> I add here the word *institutions*, for the sake of including rules of *Common Law*, as well as portions of *Statute Law*.

<sup>2</sup> *Membra dividenda*.—SAUND. Log. I. L. c. 46.

**PREFACE.** respect of the source from whence their establishment took its rise) the *Statute* or *Written* law, as it is called, and the *Common* or *Unwritten* :—an account of what are called *General Customs*, or institutions in force throughout the whole empire, or at least the whole nation ;—of what are called *Particular Customs*, institutions of local extent established in particular districts ; and of such *adopted* institutions of a general extent, as are parcel of what are called the *Civil* and the *Canon* laws ; all three in the character of so many branches of what is called the *Common Law* :—in fine, a general account of *Equity*, that capricious and incomprehensible mistress of our fortunes, whose features neither our Author, nor perhaps any one is well able to delineate ;—of *Equity*, who having in the beginning been a rib of *Law*, but since in some dark age plucked from her side, when sleeping, by the hands not so much of God as of enterprizing Judges, now lords it over her parent sister :—

All this, I say, together with an account of the different districts of the empire over which different portions of the Law prevail, or over which the Law has different degrees of force, composes that part of our Author's work which he has styled the INTRODUCTION. His eloquent ' Discourse on the study of the Law,' with which, as being a discourse of the rhetorical kind rather than of the didactic, I proposed not to intermeddle, prefaces the whole.

It would have been in vain to have thought of travelling over the whole of so vast a work. My design, therefore, was to take such a portion of it, as might afford a fair and adequate specimen of the character and complexion of the whole. For this purpose the part here marked out would, I thought, abundantly suffice. This, however narrow in extent, was the most conspicuous, the most characteristic part of our Author's work, and that which was most his own. The rest was little more than compilation. Pursuing my examination thus far, I should pursue it, I thought, as

far as was necessary for my purpose : and I had little stomach to pursue a task at once so laborious and so invidious any farther. If *Hercules*, according to the old proverb, is to be known *ex pede* : much more thought I, is he to be known *ex capite*. PREFACE.  
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In these views it was that I proceeded as far as the middle of the definition of the Law *municipal*. It was there I found, not without surprise, the digression which makes the subject of the present Essay. This threw me at first into no small perplexity. To give no account of it at all ;—to pass wholly *sub silentio*, so large, and in itself so material a part of the work I was examining, would seem strange : at the same time I saw no possibility of entering into an examination of a passage so anomalous, without cutting in pieces the thread of the discourse. Under this doubt I determined at any rate, for the present, to pass it by ; the rather as I could not perceive any connection that it had with any thing that came before or after. I did so ; and continuing my examination of the definition from which it digressed, I travelled on to the end of the Introduction. It then became necessary to come to some definitive resolution concerning this excentric part of it : and the result was, that being loth to leave the enterprise I had begun in this respect, imperfect, I sat down to give what I intended should be a very slight and general survey of it. The farther, however, I proceeded in examining it, the more confused and unsatisfactory it appeared to me : and the greater difficulty I found in knowing what to make of it, the more words it cost me, I found, to say so. In this way, and by these means it was that the present Essay grew to the bulk in which the Reader sees it. When it was nearly completed, it occurred to me, that as the digression itself which I was examining was perfectly distinct from, and unconnected with the text from which it starts, so was, or so at least might be, the *critique* on that digression, from the *critique* on the text. The former was

PREFACE. by much too large to be engrafted into the latter: and since if it accompanied it at all, it could only be in the shape of an Appendix, there seemed no reason why the same publication should include them both. To the former, therefore, as being the least, I determined to give that finish which I was able, and which I thought was necessary: and to publish it in this detached manner, as the first, if not the only part of a work, the principal and remaining part of which may possibly see the light some time or other, under some such title as that of '*A COMMENT on the COMMENTARIES.*'

In the mean time that I may stand more fully justified, or excused at least, in an enterprise to most perhaps so extraordinary, and to many doubtless so unacceptable, it may be of use to endeavour to state with some degree of precision, the grounds of that war which, for the interests of true science, and of liberal improvement, I think myself bound to wage against this work. I shall therefore proceed to mark out and distinguish those points of view in which it seems principally reprehensible, not forgetting those in which it seems still entitled to our approbation and applause.

The business of the *Censor* distinguished from that of the *Expositor*.

There are two characters, one or other of which every man who finds any thing to say on the subject of Law, may be said to take upon him;—that of the *Expositor*, and that of the *Censor*. 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*. The former, therefore, is principally occupied in stating, or in enquiring after *facts*<sup>1</sup>: the latter, in dis-

<sup>1</sup> In practice, the question of *Law* has commonly been spoken of as opposed to that of *fact*: but this distinction is an accidental one. That a Law commanding or prohibiting such a *sort* of action, has been established, is as much a *fact*, as that an *individual* action of that sort has been committed. The establishment of a Law may be spoken of as a *fact*, at least for the purpose of distinguishing it from any consideration that may be offered as a *reason* for such Law.

cussing *reasons*. The *Expositor*, keeping within his sphere, has no concern with any other faculties of the mind than the *apprehension*, the *memory*, and the *judgment*: the latter, in virtue of those sentiments of pleasure or displeasure which he finds occasion to annex to the objects under his review, holds some intercourse with the *affections*. That which is Law, is, in different countries, widely different: while that which *ought to be*, is in all countries to a great degree the same. The *Expositor*, therefore, is always the citizen of this or that particular country: the *Censor* is, or ought to be the citizen of the world. To the *Expositor* it belongs to shew what the *Legislator* and his underworkman the *Judge* have done *already*: to the *Censor* it belongs to suggest what the *Legislator* ought to do *in future*. To the *Censor*, in short, it belongs to *teach* that *science*, which when by change of hands converted into an *art*, the LEGISLATOR practises.

PREFACE.

Let us now return to our Author. Of these two perfectly distinguishable functions, the latter alone is that which it fell necessarily within his province to discharge. His professed object was to explain to us what the Laws of England were. '*Ita lex scripta est,*' was the only motto which he stood engaged to keep in view. The work of *censure* (for to this word, in default of any other, I find it necessary to give a *neutral* sense) the work of *censure*, as it may be styled, or, in a certain sense, of *criticism*, was to him but a *parergon*—a work of supererogation: a work, indeed, which, if aptly executed, could not but be of great ornament to the principal one, and of great instruction as well as entertainment to the Reader, but from which our Author, as well as those that had gone before him on the same line, might, without being chargeable with any deficiency, have stood excused: a work which, when superadded to the principal, would lay the Author under additional obligations, and impose on him new duties: which, notwithstanding, whatever else it might differ in

The latter alone our Author's.

## PREFACE.

Laws  
ought to  
be scruti-  
nized with  
freedom.

from the principal one, agrees with it in this, that it ought to be executed with impartiality, or not at all.

If, on the one hand, a hasty and indiscriminating condemner of what is established, may expose himself to contempt; on the other hand, a bigoted or corrupt defender of the works of power, becomes guilty, in a manner, of the abuses which he supports: the more so if, by oblique glances and sophistical glosses, he studies to guard from reproach, or recommend to favour, what he knows not how, and dares not attempt, to justify. To a man who contents himself with simply stating an institution as he thinks it *is*, no share, it is plain, can justly be attributed (nor would any one think of attributing to him any share) of whatever reproach, any more than of whatever applause the institution may be thought to merit. But if not content with this humbler function, he takes upon him to give *reasons* in behalf of it, reasons whether *made* or *found* by him, it is far otherwise. Every false and sophistical reason that he contributes to circulate, he himself is chargeable with: nor ought he to be holden guiltless even of such as, in a work where *fact* not *reason* is the question, he delivers as from other writers without censure. By officiously adopting them he makes them his own, though delivered under the names of the respective Authors: not much less than if delivered under his own. For the very idea of a *reason* betokens approbation: so that to deliver a remark under that character, and that without censure, is to adopt it. A man will scarcely, therefore, without some note of disapprobation, be the instrument of introducing, in the guise of a reason, an argument which he does not really wish to see approved. Some method or other he will take to wash his hands of it: some method or other he will take to let men see that what he means to be understood to do, is merely to report the judgment of another, not to pass one of his own. Upon that other then he will lay the blame: at least he will take care to repel it

from himself. If he omits to do this, the most favourable cause that can be assigned to the omission is indifference : indifference to the public welfare—that indifference which is itself a crime. PREFACE.  
—♦—

It is wonderful how forward some have been to look upon it as a kind of presumption and ingratitude, and rebellion, and cruelty, and I know not what besides, not to allege only, nor to own, but to suffer any one so much as to imagine, that an old-established law could in any respect be a fit object of condemnation. Whether it has been a kind of *personification* that has been the cause of this, as if the Law were a living creature, or whether it has been the mechanical veneration for antiquity, or what other delusion of the fancy, I shall not here enquire. For my part, I know not for what good reason it is that the merit of justifying a law when right should have been thought greater, than that of censuring it when wrong. Under a government of Laws, what is the motto of a good citizen? *To obey punctually; to censure freely.*

Thus much is certain ; that a system that is never to be censured, will never be improved : that if nothing is ever to be found fault with, nothing will ever be mended : and that a resolution to justify every thing at any rate, and to disapprove of nothing, is a resolution which, pursued in future, must stand as an effectual bar to all the *additional* happiness we can ever hope for ; pursued hitherto would have robbed us of that share of happiness which we enjoy already.

Nor is a disposition to find 'every thing as it should be,' less at variance with itself, than with reason and utility. The common-place arguments in which it vents itself justify not what is established, in effect, any more than they condemn it : since whatever *now* is established, *once* was innovation.

Precipitate censure, cast on a political institution, does but recoil on the head of him who casts it. From such an



**PREFACE.** attack it is not the institution itself, if well grounded, that can suffer. What a man says against it either makes impression or makes none. If none, it is just as if nothing had been said about the matter: if it *does* make an impression, it naturally calls up some one or other in defence. For if the institution is in truth a beneficial one to the community in general, it cannot but have given an interest in its preservation to a number of individuals. By their industry, then, the reasons on which it is grounded are brought to light: from the observation of which those who acquiesced in it before upon trust, now embrace it upon conviction. Censure, therefore, though ill-founded, has no other effect upon an institution than to bring it to that test, by which the value of those, indeed, on which prejudice alone has stamped a currency, is cried down, but by which the credit of those of sterling utility is confirmed.

Nor is it by any means from passion and ill-humour, that censure, passed upon legal institutions, is apt to take its birth. When it is from passion and ill-humour that men speak, it is with *men* that they are in ill-humour, not with laws: it is men, not laws, that are the butt of 'arrogance'.

<sup>1</sup> 'Arrogance;' our Author calls it *the utmost arrogance*<sup>a</sup>, 'to censure what has, at least, a better chance to be right, than the singular notions of any particular man:' meaning thereby certain ecclesiastical institutions. Vibrating, as it should seem, between passion and discretion, he has thought it necessary, indeed, to insert in the sentence that, which being inserted, turns it into nothing: After the word 'censure,' 'with contempt' he adds, 'and rudeness:' as if there needed a professor to inform us, that to treat any thing with contempt and rudeness is arrogance. 'Indecency,' he had already called it, 'to set up private judgment in opposition to public:' and this without restriction, qualification, or reserve. This was in the first transport of a holy zeal, before discretion had come in to his assistance. This passage the Doctors *Priestley*<sup>b</sup> and *Furneaux*<sup>c</sup>, who, in quality of Dissenting Ministers, and champions of dissenting opinions, saw themselves particularly attacked in it, have not suffered to pass unnoticed; any more than has the celebrated Author of

<sup>a</sup> 4 Comm. p. 50.

<sup>b</sup> See Remarks, &c.

<sup>c</sup> See Letters to Mr. Justice Blackstone, 1771. Second Edition.

Spleen and turbulence may indeed prompt men to quarrel with living individuals : but when they make complaint of the dead letter of the Law, the work of departed lawgivers, against whom no personal antipathy can have subsisted, it is always from the observation, or from the belief at least, of some real grievance. The Law is no man's enemy: the Law is no man's rival. Ask the clamorous and unruly multitude—it is never the Law itself that is in the wrong: it is always some wicked interpreter of the Law that has corrupted and abused it <sup>1</sup>.

PREFACE.

the '*Remarks on the Acts of the 13th Parliament*'<sup>a</sup>, who found it adverse to his enterprize, for the same reason that it is hostile to every other liberal plan of political discussion.

My edition of the Commentaries happens to be the first: since the above paragraph was written I have been directed to a later. In this later edition the passage about 'indecenty' is, like the other about 'arrogance,' explained away into nothing. What we are now told is, that 'to set up private judgment in [*virulent and factious*] opposition to public *authority*' (he might have added—or to *private* either) is 'indecenty.' [See the 5th edit. 8vo. p. 59, as in the 1st.] This we owe, I think, to Dr. Furneaux. The Doctors Furneaux and Priestley, under whose well-applied correction our Author has smarted so severely, have a good deal to answer for: They have been the means of his adding a good deal of this kind of rhetorical lumber to the plentiful stock there was of it before. One passage, indeed, a passage deep-tinctured with religious gall, they have been the means of clearing away entirely <sup>b</sup>: and in this at least, they have done good service. They have made him sophisticate: they have made him even expunge: but all the Doctors in the world, I doubt, would not bring him to confession. See his answer to Dr. Priestley.

<sup>1</sup> There is only one way in which censure, cast upon the Laws, has a greater tendency to do harm than good; and that is when it sets itself to contest their validity: I mean, when abandoning the question of expediency, it sets itself to contest the right. But this is an attack to which old-established Laws are not so liable. As this is the last though but too common resource of passion and ill-humour; and what men scarce think of betaking themselves to, unless irritated by personal competitions, it is that to which recent Laws are most exposed. I speak of what are called *written* Laws: for as to *unwritten* institutions, as there is no such thing as any certain symbol by which their authority is attested, their validity, how deeply rooted soever, is what we see challenged without remorse. A radical weakness, interwoven into the very constitution of all *unwritten* Law.

<sup>a</sup> In the Preface.

<sup>b</sup> See Furneaux, Letter VII.

PREFACE.

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Thus destitute of foundation are the terrors, or pretended terrors, of those who shudder at the idea of a free censure of established institutions. So little does the peace of society require the aid of those lessons which teach men to accept of any thing as reason, and to yield the same abject and indiscriminating homage to the Laws here, which is paid to the despot elsewhere. The fruits of such tuition are visible enough in the character of that race of men who have always occupied too large a space in the circle of the profession: a passive and enervate race, ready to swallow any thing, and to acquiesce in any thing: with intellects incapable of distinguishing right from wrong, and with affections alike indifferent to either: insensible, short-sighted, obstinate: lethargic, yet liable to be driven into convulsions by false terrors: deaf to the voice of reason and public utility: obsequious only to the whisper of interest, and to the beck of power.

This head of mischief, perhaps, is no more than what may seem included under the former. For why is it an evil to a country that the minds of those who have the Law under their management should be thus enfeebled? It is because it finds them impotent to every enterprise of improvement.

Not that a race of lawyers and politicians of this enervate breed is much less dangerous to the duration of that share of felicity which the State possesses at any given period, than it is mortal to its chance of attaining to a greater. If the designs of a Minister are inimical to his country, what is the man of all others for him to make an instrument of or a dupe? Of all men, surely none so fit as that sort of man who is ever on his knees before the footstool of Authority, and who, when those *above* him, or *before* him, have pronounced, thinks it a crime to have an opinion of his own.

Those who duly consider upon what slight and trivial circumstances, even in the happiest times, the adoption or rejection of a Law so often turns; circumstances with which

the utility of it has no imaginable connection—those who consider the desolate and abject state of the human intellect, during the periods in which so great a part of the still subsisting mass of institutions had their birth—those who consider the backwardness there is in most men, unless when spurred by personal interests or resentments, to run a-tilt against the Colossus of authority—those, I say, who give these considerations their due weight, will not be quite so zealous, perhaps, as our Author has been to terrify men from setting up what is now ‘private judgment,’ against what once was ‘public’: nor to thunder down the harsh epithet of ‘arrogance’ on those, who, with whatever success, are occupied in bringing rude establishments to the test of polished reason. They will rather do what they can to cherish a disposition at once so useful and so rare<sup>2</sup>: which is so little connected with the causes that make popular discontentments dangerous, and which finds so little aliment in those propensities that govern the multitude of men. They will not be for giving such a turn to their discourses as to bespeak the whole of a man’s favour for the defenders of what is established: nor all his resentment for the assailants. They will acknowledge that if there be some institutions which it is ‘arrogance’ to attack, there may be others which it is effrontery to defend. TOURREIL<sup>3</sup> has defended torture: torture established by the ‘public

<sup>1</sup> See note, p. 102.

<sup>2</sup> One may well say *rare*. It is a matter of fact about which there can be no dispute. The truth of it may be seen in the multitude of *Expositors* which the Jurisprudence of every nation furnished, ere it afforded a single *Censor*. When Beccaria came, he was received by the intelligent as an Angel from heaven would be by the faithful. He may be styled the father of *Censorial Jurisprudence*. Montesquieu’s was a work of the mixed kind. Before Montesquieu all was unmixed barbarism. Grotius and Puffendorf were to Censorial Jurisprudence what the Schoolmen were to Natural Philosophy.

<sup>3</sup> A French Jurist of the last age, whose works had like celebrity, and in many respects much the same sort of merits as our Author’s. He was known to most advantage by a translation of Demosthenes. He is now forgotten.

**PREFACE.** judgment' of so many enlightened nations. BECCARIA  
 ('indecent' and 'arrogant' Beccaria!) has condemned it.  
 Of these two whose lot among men would one choose rather,  
 —the Apologist's or the Censor's?

Our  
 Author  
 why at-  
 tacked in  
 the charac-  
 ter of an  
*Expositor.*

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 *ensorial*, that if the latter department is filled with imbecility, symptoms of kindred weakness should characterize the former.

The former department, however, of our Author's work, is what, on its own account merely, I should scarce have found myself disposed to intermeddle with. The business of simple *exposition* is a harvest in which there seemed no likelihood of there being any want of labourers: and into which therefore I had little ambition to thrust my sickle.

At any rate, had I sat down to make a report of it in this character alone, it would have been with feelings very different from those of which I now am conscious, and in a tone very different from that which I perceive myself to have assumed. In determining what conduct to observe respecting it, I should have considered whether the taint of error seemed to confine itself to parts, or to diffuse itself through the whole. In the latter case, the least invidious, and considering the bulk of the work, the most beneficial course would have been to have taken no notice of it at all, but to have sat down and tried to give a better. If not the whole in general, but scattered positions only had appeared exceptionable, I should have sat down to rectify those positions with the same apathy with which they were advanced. To fall in an adverse way upon a work simply *expository*, if that were all there were of it, would have been alike ungenerous and unnecessary. In the involuntary errors of the *understanding* there can be little to excite, or

at least to justify, resentment. That which alone, in a manner, calls for rigid censure, is the sinister bias of the *affections*. If then I may still continue to mention as separate, parts which in the work itself are so intimately, and, indeed, undistinguishably blended, it is the *ensorial* part alone that has drawn from me that sort of animadversion I have been led to bestow indiscriminately on the whole. To lay open, and if possible supply, the imperfections of the *other*, is an operation that might indeed of itself do service ; but that which I thought would do still more service, was the weakening the authority of *this*.

Under the sanction of a great name every string of words however unmeaning, every opinion however erroneous, will have a certain currency. Reputation adds weight to sentiments from whence no part of it arose, and which had they stood alone might have drawn nothing, perhaps, but contempt. Popular fame enters not into nice distinctions. Merit in one department of letters affords a natural, and in a manner irrecusable presumption of merit in another, especially if the two departments be such between which there is apparently a close alliance.

Wonderful, in particular, is that influence which is gained over young minds, by the man who on account of whatever class of merit is esteemed in the character of a *preceptor*. Those who have derived, or fancy themselves to have derived knowledge from what he knows, or appears to know, will naturally be for judging as he judges : for reasoning as he reasons ; for approving as he approves ; for condemning as he condemns. On these accounts it is, that when the general complexion of a work is unsound, it may be of use to point an attack against the whole of it without distinction, although such parts of it as are noxious as well as unsound be only scattered here and there.

On these considerations then it may be of use to shew, that the work before us, in spite of the merits which recom-

**PREFACE.** mend it so powerfully to the imagination and to the ear, has no better title on one account than on another, to that influence which, were it to pass unnoticed, it might continue to exercise over the judgment.

The Introduction is the part to which, for reasons that have been already stated, it was always my intention to confine myself. It is but a part even of this Introduction that is the subject of the present Essay. What determined me to begin with this small part of it is, the facility I found in separating it from every thing that precedes or follows it. This is what will be more particularly spoken to in another place<sup>1</sup>.

It is not that this part is among those which seemed most open to animadversion. It is not that stronger traces are exhibited in this part than in another of that spirit in our Author which seems so hostile to Reformation, and to that Liberty which is Reformation's harbinger.

Repre-  
hensible  
passages  
from the  
work at  
large.

It is not here that he tramples on the right of private judgment, that basis of every thing that an Englishman holds dear<sup>2</sup>. It is not here, in particular, that he insults our understandings with nugatory reasons; stands forth the professed champion of religious intolerance; or openly sets his face against civil reformation.

It is not here, for example, he would persuade us, that a trader who occupies a booth at a fair is a *fool* for his pains; and on that account no fit object of the Law's protection<sup>3</sup>.

<sup>1</sup> See the ensuing Introduction.

<sup>2</sup> See note.

<sup>3</sup> 'Burglary<sup>a</sup>,' says our Author, 'cannot be committed in a tent or a booth erected in a market fair; though the owner may lodge therein: for the Law regards thus highly nothing but permanent edifices; a house, or church; the wall, or gate of a town; and it is the *folly* of the owner to lodge in so fragile a tenement.' To save himself from this charge of folly, it is not altogether clear which of two things the trader ought to do: quit his business and not go to the fair at all: or leave his goods without any body to take care of them.

<sup>a</sup> 4 Comm. Ch. XVI. p. 226.

It is not here that he gives the presence of *one* man at the *making* of a Law, as a *reason* why *ten thousand* others that are to *obey* it, need know nothing of the matter<sup>1</sup>. PREFACE.

It is not here, that after telling us, in express terms, there must be an 'actual breaking' to make burglary, he tells us, in the same breath, and in terms equally express, where burglary may be *without* actual breaking; and this *because* 'the Law will not suffer itself to be trifled with<sup>2</sup>.'

<sup>1</sup> Speaking of an Act of Parliament<sup>a</sup>, 'There needs,' he says, 'no formal promulgation to give it the force of a Law, as was necessary by the Civil Law with regard to the Emperor's Edicts: *because* every man in England is, *in judgment of Law*, party to the making of an Act of Parliament, being present thereat *by his representatives*.' This, for aught I know, may be good *judgment of Law*; because any thing may be called judgment of Law, that comes from a Lawyer, who has got a name: it seems, however, not much like any thing that can be called *judgment of common sense*. This notable piece of *astutia* was originally, I believe, judgment of Lord Coke: it from thence became judgment of our Author: and may have been judgment of more Lawyers than I know of before and since. What grieves me is, to find many men of the best affections to a cause which needs no sophistry, bewildered and bewildering others with the like jargon.

<sup>2</sup> His words are<sup>b</sup>, '*There must be an actual breaking*, not a mere legal *clausum fregit* (by leaping over invisible ideal boundaries, which may constitute a civil trespass) but a *substantial* and *forcible irruption*.' In the next sentence but two he goes on, and says,—'But to come down a chimney *is* held a burglarious entry; for that is as much closed as the nature of things will permit. So also to knock at a door, and upon opening it to rush in with a felonious intent; or under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; *all these entries have been adjudged burglarious, though there was no actual breaking*: for the Law will not suffer itself to be trifled with by such evasions.' . . . Can it be more egregiously trifled with than by such *reasons*?

I must own I have been ready to grow out of conceit with these useful little particles, *for, because, since*, and others of that fraternity, from seeing the drudgery they are continually put to in these Commentaries. The appearance of any of them is a sort of warning to me to prepare for some tautology, or some absurdity: for the same thing dished up over again in the shape of a reason for itself: or for a reason which, if a distinct one, is of the same stamp as those we have just seen. Other instances of the like hard treatment given to these poor particles will come under observation in the body of this Essay. As to reasons of the first-mentioned class, of them one might pick out enough to fill a volume.

<sup>a</sup> 1 Comm. Ch. II. p. 178.

<sup>b</sup> 4 Comm. Ch. XVI. p. 226.



## PREFACE.

It is not here, that after relating the Laws by which peaceable Christians are made punishable for worshipping God according to their consciences, he pronounces with equal peremptoriness and complacency, that every thing, yes, 'every thing is as it should be'.<sup>1</sup>

It is not here, that he commands us to believe, and that on pain of forfeiting all pretensions to either 'sense or probity,' that the system of our jurisprudence is, in the whole and every part of it, the very quintessence of perfection.<sup>2</sup>

<sup>1</sup> 'In what I have now said,' says he<sup>a</sup>, 'I would not be understood to derogate from the rights of the national Church, or to favour a loose latitude of propagating any crude undigested sentiments in religious matters. Of *propagating*, I say; for the bare entertaining them, without an endeavour to diffuse them, seems *hardly* cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. *Every thing is now as it should be*: unless, perhaps, that heresy ought to be more strictly defined, and no prosecution permitted, even in the Ecclesiastical Courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions it seems *necessary* for the support of the national religion,' (the national religion being such, we are to understand, as would not be able to support itself were any one at liberty to make objections to it) 'that the officers of the Church should have power to censure heretics, but not to exterminate or destroy them.'

Upon looking into a later edition (the fifth) I find this passage has undergone a modification. After '*Every thing is now as it should be*,' is added, '*with respect to the spiritual cognisance, and spiritual punishment of heresy*.' After '*the officers of the Church should have power to censure heretics*,' is added, '*but not to harass them with temporal penalties, much less to exterminate or destroy them*.'

How far the mischievousness of the original text has been cured by this amendment, may be seen from Dr. Furneaux, Lett. II. p. 30, 2nd edit.

<sup>2</sup> 1 Comm. 140. I would not be altogether positive, how far it was he meant this persuasion should extend itself in point of time: whether to those institutions only that happened to be in force at the individual instant of his writing: or whether to such opposite institutions also as, within any given distance of time from that instant, either *had* been in force, or were *about* to be.

His words are as follow: 'All these rights and liberties it is our birth-right to enjoy entire; unless where the Laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and

<sup>a</sup> 4 Comm. Ch. IV. p. 49.

It is not here that he assures us in point of fact, that there never *has* been an alteration made in the Law that men have not afterwards found reason to regret<sup>1</sup>. PREFACE.

moderate, as will appear upon further enquiry, that no man of *sense* or *probity* would wish to see them slackened. For *all* of us have it in our choice to do *every thing* that a *good* man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow citizens.'

If the Reader would know what these rights and liberties are, I answer him out of the same page, they are those, 'in opposition to one or other of which *every* species of compulsive tyranny and oppression must act, having no other object upon which it can *possibly* be employed.' The liberty, for example, of worshipping God without being obliged to declare a belief in the XXXIX Articles, is a liberty that no '*good man*,'—'no man of sense or probity,' 'would wish' for.

<sup>1</sup> 1 Comm. 70. If no reason can be found for an institution, we are to *suppose* one; and it is upon the strength of this supposed one we are to cry it up as reasonable; It is thus that the Law *is justified of her children*.

The words are—'Not that the particular reason of every rule in the Law can, at this distance of time, be always precisely assigned; but it is sufficient that there be nothing in the rule *flatly* contradictory to reason, and then the Law will *presume* it to be well founded. And it hath been an ancient observation in the Laws of England,' (he might with as good ground have added—*and in all other Laws*) 'That whenever a standing rule of Law, of which the reason, perhaps, could not be remembered or discerned, hath been [*wantonly*] broke in upon by *statutes* or *new resolutions*, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.'

When a sentiment is expressed, and whether from caution, or from confusion of ideas, a clause is put in by way of qualifying it that turns it into nothing, in this case if we would form a fair estimate of the tendency and probable effect of the whole passage, the way is, I take it, to consider it as if no such clause were there. Nor let this seem strange. Taking the qualification into the account, the sentiment would make no impression on the mind at all: if it makes any, the qualification is dropped, and the mind is affected in the same manner nearly as it would be were the sentiment to stand unqualified.

This, I think, we may conclude to be the case with the passage above mentioned. The word '*wantonly*' is, in pursuance of our Author's standing policy, put in by way of salvo. *With* it the sentiment is as much as comes to nothing. *Without* it, it would be extravagant. Yet in this extravagant form it is, probably, if in any, that it passes upon the Reader.

The pleasant part of the contrivance is, the mentioning of '*Statutes*' and '*Resolutions*' (Resolutions to wit, that is Decisions, of Courts of Justice) in the same breath; as if whether it were by the one of them or the other that a rule of Law was broke in upon, made no difference. By a

## PREFACE.

It is not here that he turns the Law into a Castle, for the purpose of opposing every idea of 'fundamental' reparation<sup>1</sup>.

*Resolution* indeed, a *new* Resolution, to break in upon a *standing* rule, is a practice that in good truth is big with mischief. But this mischief on what does it depend? Upon the rule's being a *reasonable* one? By no means: but upon its being a *standing*, an established one. Reasonable or not reasonable, is what makes comparatively but a trifling difference.

A new resolution made in the teeth of an old established rule is mischievous—on what account? In that it puts men's expectations universally to a fault, and shakes whatever confidence they may have in the stability of any rules of Law, reasonable or not reasonable: that stability on which every thing that is valuable to a man depends. Beneficial be it in ever so high a degree to the party in whose favour it is made, the benefit it is of to *him* can never be so great as to outweigh the mischief it is of to the community at large. Make the best of it, it is general evil for the sake of partial good. It is what Lord Bacon calls setting the whole house on fire, in order to roast one man's eggs.

Here then the *salvo* is not wanted: a 'new resolution can never be acknowledged to be contrary to a standing rule,' but it must on that very account be acknowledged to be '*wanton*.' Let such a resolution be made, and 'inconveniences' in abundance will sure enough ensue: and then will appear—what? not by any means 'the wisdom of the rule,' but, what is a very different thing, the folly of breaking in upon it.

It were almost superfluous to remark, that nothing of all this applies in general to a statute: though particular Statutes may be conceived that would thwart the course of expectation, and by that means produce mischief in the same way in which it is produced by irregular resolutions. A new statute, it is manifest, cannot, unless it be simply a declaratory one, be made in any case, but it must break in upon some standing rule of Law. With regard to a Statute then to tell us that a '*wanton*' one has produced 'inconveniences,' what is it but to tell us that a thing that has been mischievous has produced mischief?

Of this temper are the arguments of all those doting politicians, who, when out of humour with a particular innovation without being able to tell why, set themselves to declaim against *all* innovation, because it is innovation. It is the nature of owls to hate the light: and it is the nature of those politicians who are wise by rote, to detest every thing that forces them either to find (what, perhaps, is impossible) reasons for a favourite persuasion, or (what is not endurable) to discard it.

<sup>1</sup> 3 Comm. 268, at the end of Ch. XVII. which concludes with three pages against Reformation. Our Author had better, perhaps, on this occasion, have kept clear of allegories: he should have considered whether they might not be retorted on him with severe retaliation. He should have considered, that it is not easier to *him* to turn the Law into a Castle, than it is to the imaginations of impoverished suitors to people it with Harpies. He should have thought of the den of Cacus, to whose

It is not here that he turns with scorn upon those beneficent Legislators, whose care it has been to pluck the mask of Mystery from the face of Jurisprudence<sup>1</sup>. PREFACE.

enfeebled optics, to whose habits of dark and secret rapine, nothing was so hateful, nothing so dangerous, as the light of day.

<sup>1</sup> 3 Comm. 322. It is from the decisions of Courts of Justice that those rules of Law are framed, on the knowledge of which depend the life, the fortune, the liberty of every man in the nation. Of these decisions the Records are, according to our Author [1 Comm. 71] the most authentic histories. These Records were, till within these five-and-forty years, in Law-Latin: a language which, upon a high computation, about one man in a thousand used to fancy himself to understand. In this Law-Latin it is that our Author is satisfied they should have been continued, because the pyramids of Egypt have stood longer than the temples of Palmyra. He observes to us, that the Latin language could not express itself on the subject without borrowing a multitude of words from our own: which is to help to convince us that of the two the former is the fittest to be employed. He gives us to understand that, taking it altogether, there could be no room to complain of it, seeing it was not more unintelligible than the jargon of the schoolmen, some passages of which he instances; and then he goes on, 'This technical Latin continued in use from the time of its first introduction till the subversion of our ancient constitution under Cromwell; when, among many other innovations on the body of the Law, some for the better and some for the worse, the language of our Records was altered and turned into English. But at the Restoration of King Charles, this *novelty* was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the Proceedings at Law should be *done* into English, and it was accordingly so ordered by statute 4 Geo. II. c. 26.

'This was done (continues our Author) in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered; but am *apt to suspect* that the people are now, after many years' experience, *altogether* as ignorant in matters of law as before.'

In this scornful passage the words *novelty—done* into English—*apt to suspect—altogether* as ignorant—sufficiently speak the affection of the mind that dictated it. It is thus that our Author chuckles over the supposed defeat of the Legislature with a fond exultation which all his discretion could not persuade him to suppress.

The case is this. A large portion of the body of the Law was, by the bigotry or the artifice of Lawyers, locked up in an illegible character, and in a foreign tongue. The statute he mentions obliged them to give up their hieroglyphics, and to restore the native language to its rights.

This was doing much; but it was not doing every thing. Fiction,

## PREFACE.

If here<sup>1</sup>, as every where, he is eager to hold the cup of flattery to high station, he has stopt short, however, in this place, of idolatry<sup>2</sup>.

tautology, technicality, circuitry, irregularity, inconsistency remain. But above all the pestilential breath of Fiction poisons the sense of every instrument it comes near.

The consequence is, that the Law, and especially that part of it which comes under the topic of Procedure, *still* wants much of being generally intelligible. The fault then of the Legislature is their not having done *enough*. His quarrel with them is for having done any thing at all. In doing what they did, they set up a light, which, obscured by many remaining clouds, is still but too apt to prove an *ignis fatuus*: our Author, instead of calling for those clouds to be removed, deprecates all light, and pleads for total darkness.

Not content with representing the alteration as useless, he would persuade us to look upon it as mischievous. He speaks of 'inconveniences.' What these inconveniences are it is pleasant to observe.

In the first place, many young practisers, spoil by the indulgence of being permitted to carry on their business in their mother-tongue, know not how to read a Record upon the old plan. 'Many Clerks and Attornies,' says our Author, 'are hardly able to read, much less to understand a Record of so modern a date as the reign of George the First.'

What the mighty evil is here, that is to outweigh the mischief of almost universal ignorance, is not altogether clear: Whether it is, that certain Lawyers, in a case that happens very rarely, may be obliged to get assistance: or that the business in such a case may pass from those who do *not* understand it to those who do.

In the next place, he observes to us, 'it has much enhanced the expense of all legal proceedings: for since the practisers are confined (for the sake of the stamp-duties, which are thereby considerably increased) to write only a stated number of words in a sheet; and as the English language, through the multitude of its particles, is much more verbose than the Latin; it follows, that the number of sheets must be very much augmented by the change.'

I would fain persuade myself, were it possible, that this unhappy sophism could have passed upon the inventor. The sum actually levied on the public on that score is, upon the whole, either a proper sum or it is not. If it is, why mention it as an evil? If it is *not*, what more obvious remedy than to set the duties lower?

After all, what seems to be the real evil, notwithstanding our Author's unwillingness to believe it, is, that by means of this alteration, men at large are in a somewhat better way of knowing what their Lawyers are about: and that a disinterested and enterprising Legislator, should happily such an one arise, would now with somewhat less difficulty be able to see before him.

<sup>1</sup> V. *infra*, Ch. III. par. VII. p. 187.

<sup>2</sup> In the Seventh Chapter of the First Book. The King has '*attributes*<sup>a</sup>;' he possesses '*ubiquity*<sup>b</sup>;' he is '*all-perfect* and *immortal*<sup>c</sup>.'

<sup>a</sup> 1 Comm. 242.    <sup>b</sup> 1 Comm. Ch. VII. pp. 234, 238, 242, First Edition.

<sup>c</sup> 1 Comm. Ch. VII. p. 260, First Edition.

It is not then, I say, *this* part, it is not even any part of that Introduction, to which alone I have any thoughts of extending my examination, that is the principal seat of that poison, against which it was the purpose of this attempt to give an antidote. The subject handled in this part of the work is such, as admits not of much to be said in the person of the Censor. Employed, as we have seen, in settling matters of a preliminary nature—in drawing outlines, it is not in this part that there was occasion to enter into the details of any particular institution. If I chose the Introduction then in preference to any other part, it was on account of its affording the fairest specimen of the whole, and not on account of its affording the greatest scope for censure.

PREFACE.

These childish paradoxes, begotten upon servility by false wit, are not more adverse to manly sentiment, than to accurate apprehension. Far from contributing to place the institutions they are applied to in any clear point of view, they serve but to dazzle and confound, by giving to Reality the air of Fable. It is true, they are not altogether of our Author's invention : it is he, however, that has revived them, and that with improvements and additions.

One might be apt to suppose they were no more than so many transient flashes of ornament : it is quite otherwise. He dwells upon them in sober sadness. The attribute of '*ubiquity*,' in particular, he lays hold of, and makes it the basis of a chain of reasoning. He spins it out into consequences : he makes one thing '*follow*' from it, and another thing be so and so '*for the same reason* : ' and he uses emphatic terms, as if for fear he should not be thought to be in earnest. 'From the ubiquity,' says our Author [I Comm. p. 260] '*it follows*, that the King can never be nonsuit; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in Court.'—'For the same reason also the King is not said to appear by his Attorney, as other men do; for he always appears in contemplation of Law in his *own proper* person.'

This is the case so soon as you come to this last sentence of the paragraph. For so long as you are at the last but two, 'it is the regal office, and *not* the royal person, that is always present.' All this is so drily and so strictly true, that it serves as the groundwork of a metaphor that is brought in to embellish and enliven it. The King, we see, *is*, that is to say is *not*, present in Court. The King's Judges are present too. So far is plain downright truth. These Judges, then, speaking metaphorically, are so many looking-glasses, which have this singular property, that when a man looks at them, instead of seeing his own face in them, he sees the King's. 'His Judges,' says our Author, 'are the mirror by which the King's image is reflected.'

PREFACE.  
 ↳↳↳  
 Its merits.

Let us reverse the tablet. While with this freedom I expose our Author's ill deserts, let me not be backward in acknowledging and paying homage to his various merits: a justice due, not to him alone, but to that Public, which now for so many years has been dealing out to him (it cannot be supposed altogether without title) so large a measure of its applause.

Correct, elegant, unembarrassed, ornamented, the *style* is such, as could scarce fail to recommend a work still more vicious in point of *matter* to the multitude of readers.

He it is, in short, who, first of all institutional writers, has taught Jurisprudence to speak the language of the Scholar and the Gentleman: put a polish upon that rugged science: cleansed her from the dust and cobwebs of the office: and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage, from the toilette of classic erudition: enlivened her with metaphors and allusions: and sent her abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies.

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

The function of the Expositor may be conceived to divide itself into two branches: that of *history*, and that of simple *demonstration*. The business of history is to represent the Law in the state it *has* been in, in past periods of its existence: the business of simple demonstration in the sense in which I will take leave to use the word, is to represent the Law in the state it *is* in for the time being<sup>1</sup>.

<sup>1</sup> The word *demonstration* may here seem, at first sight, to be out of place. It will be easily perceived that the sense here put upon it is not

Again, to the head of demonstration belong the several businesses of *arrangement*, *narration* and *conjecture*. Matter of narration it may be called, where the Law is supposed to be explicit, clear, and settled: matter of conjecture or interpretation, where it is obscure, silent, or unsteady. It is matter of arrangement to *distribute* the several real or supposed institutions into different masses, for the purpose of a general survey; to determine the *order* in which those masses shall be brought to view; and to find for each of them a *name*. PREFACE. —♦—

The business of narration and interpretation are conversant chiefly about particular institutions. Into the details of particular institutions it has not been my purpose to descend. On these topics, then, I may say, in the language of procedure, *non sum informatus*. Viewing the work in this light, I have nothing to add to or to except against the public voice.

*History* is a branch of instruction which our Author, though not rigidly necessary to his design, called in, not without judgment, to cast light and ornament on the dull work of simple *demonstration*: this part he has executed with an elegance which strikes every one: with what fidelity, having not very particularly examined, I will not take upon me to pronounce.

Among the most difficult and the most important of the functions of the *demonstrator* is the business of *arrangement*. In this our Author has been thought, and not, I conceive, without justice, to excel; at least in comparison of any thing in that way that has hitherto appeared. 'Tis to him we owe such an arrangement of the elements of Jurisprudence, as wants little, perhaps, of being the best the same with that in which it is employed by Logicians and Mathematicians. In our own language, indeed, it is not very familiar in any other sense than theirs: but on the Continent it is currently employed in many other sciences. The French, for example, have their *demonstrateurs de botanique, d'anatomie, de physique expérimentale, &c.* I use it out of necessity; not knowing of any other that will suit the purpose.



PREFACE. that a technical nomenclature will admit of. A technical nomenclature, so long as it is admitted to mark out and denominate the principal heads, stands an invincible obstacle to every other than a technical arrangement. For to *denominate* in general terms, what is it but to arrange? and to arrange under heads, what is it but to *denominate* upon a large scale? A technical arrangement, governed then in this manner, by a technical nomenclature, can never be otherwise than *confused* and *unsatisfactory*. The reason will be sufficiently apparent, when we understand what sort of an arrangement that must be which can be properly termed a *natural* one.

Idea of  
a *natural*  
arrange-  
ment.

That arrangement of the materials of any science may, I take it, be termed a *natural* one, which takes such properties to characterize them by, as men in general are, by the common constitution of man's *nature*, disposed to attend to: such, in other words, as *naturally*, that is readily, engage, and firmly fix the attention of any one to whom they are pointed out. The materials, or elements here in question, are such actions as are the objects of what we call Laws or Institutions.

Now then, with respect to actions in general, there is no property in them that is calculated so readily to engage, and so firmly to fix the attention of an observer, as the *tendency* they may have *to*, or *divergency* (if one may so say) *from*, that which may be styled the common *end* of all of them. The end I mean is *Happiness*<sup>1</sup>: and this *tendency* in any act is what we style its *utility*: as this *divergency* is that to which we give the name of *mischievousness*. With respect then to such actions in particular as are among the objects of the Law, to point out to a man

<sup>1</sup> Let this be taken for a truth upon the authority of *Aristotle*: I mean by those, who like the authority of Aristotle better than that of their own experience. Πᾶσα τέχνη, says that philosopher, καὶ πᾶσα μέθοδος ὁμοίως δὲ πρᾶξις τε καὶ προαίρεσις, ἀγαθοῦ τινος ἐφίεσθαι δοκεῖ διὰ καλῶς ἀπεφήναντο τὰ γὰρ ὅν, οὐ πάντα ἐφίεται. Διαφορὰ δὲ τις φαίνεται τῶν (understand τοιούτων) ΤΕΛΩΝ.—Arist. Eth. ad Nic. L. I. c. 1.

the *utility* of them or the mischievousness, is the only way to make him see *clearly* that property of them which every man is in search of; the only way, in short, to give him *satisfaction*. PREFACE.  
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From *utility* then we may denominate a *principle*, that may serve to preside over and govern, as it were, such arrangement as shall be made of the several institutions or combinations of institutions that compose the matter of this science: and it is this principle, that by putting its stamp upon the several names given to those combinations, can alone render *satisfactory* and *clear* any arrangement that can be made of them.

Governed in this manner by a principle that is recognized by all men, the same arrangement that would serve for the jurisprudence of any one country, would serve with little variation for that of any other.

Yet more. The mischievousness of a bad Law would be detected, at least the utility of it would be rendered suspicious, by the difficulty of finding a place for it in such an arrangement: while, on the other hand, a *technical* arrangement is a sink that with equal facility will swallow any garbage that is thrown into it.

That this advantage may be possessed by a natural arrangement, is not difficult to conceive. Institutions would be characterized by it in the only universal way in which they can be characterized; by the nature of the several *modes of conduct* which, by prohibiting, they constitute *offences*<sup>1</sup>.

These offences would be collected into classes denominated by the various modes of their *divergency* from the common *end*; that is, as we have said, by their various

<sup>1</sup> Offences, the Reader will remember, may as well be offences of *omission* as of *commission*. I would avoid the embarrassment of making separate mention of such Laws as exert themselves in *commanding*. 'Tis on this account I use the phrase '*mode of conduct*,' which includes *omissions* or *forbearances*, as well as *acts*.

PREFACE. forms and degrees of *mischievousness*: in a word, by those properties which are *reasons* for their being made *offences*: and whether any such mode of conduct possesses any such property is a question of experience<sup>1</sup>. Now, a bad Law is that which prohibits a mode of conduct that is *not* mischievous<sup>2</sup>. Thus would it be found impracticable to place the mode of conduct prohibited by a bad law under any denomination of offence, without asserting such a matter of fact as is contradicted by experience. Thus cultivated, in short, the soil of Jurisprudence would be found to repel in a manner every evil institution; like that country which refuses, we are told, to harbour any thing venomous in its bosom.

The *synopsis* of such an arrangement would at once be a compendium of *expository* and of *ensorial* Jurisprudence: nor would it serve more effectually to instruct the *subject*, than it would to justify or reprove the *Legislator*.

Such a synopsis, in short, would be at once a map, and that an universal one, of Jurisprudence as it *is*, and a slight but comprehensive sketch of what it *ought to be*. For, the *reasons* of the several institutions comprised under it would stand expressed, we see, and that uniformly (as in our Author's synopsis they do in scattered instances) by the names given to the several classes under which those institutions are comprised. And what reasons? Not *technical* reasons, such as none but a Lawyer gives, nor any but a Lawyer would put up with<sup>3</sup>;

<sup>1</sup> See note 3, p. 122.

<sup>2</sup> See note, p. 119.

<sup>3</sup> *Technical* reasons: so called from the Greek τέχνη, which signifies an art, science, or profession.

Utility is that standard to which men in general (except in here and there an instance where they are deterred by prejudices of the religious class, or hurried away by the force of what is called *sentiment* or *feeling*). Utility, as we have said, is the standard to which they refer a Law or institution in judging of its title to approbation or disapprobation. Men of Law, corrupted by interests, or seduced by illusions, which it is not here our business to display, have deviated from it much more frequently, and

but reasons, such as were they in themselves what they might and ought to be, and expressed too in the manner they might and ought to be, any man might see the force of as well as he. PREFACE.  
—♦—

Nor in this is there any thing that need surprise us. The consequences of any Law, or of any act which is made the object of a Law, the only consequences that men are at all interested in, what are they but *pain* and *pleasure*? By some such words then as *pain* and *pleasure*, they may be expressed: and *pain* and *pleasure* at least, are words which a man has no need, we may hope, to go to a Lawyer to know the meaning of<sup>1</sup>. In the synopsis then of that sort of arrangement which alone deserves the name of a natural one, terms such as these, terms which if they can be said to belong to any science, belong rather to Ethics than to Jurisprudence, even than to universal Jurisprudence, will engross the most commanding stations.

What then is to be done with those names of classes that are purely technical?—With offences, for example, against prerogative, with misprisions, contempts, felonies, *præmunires*<sup>2</sup>? What relation is it that these mark out between the Laws that concern the sorts of acts they are respectively put to signify, and that *common end* we have been speaking of? Not any. In a natural arrangement what then would become of them? They would either be banished at once to the region of *quiddities* and *substantial forms*; or if, and in deference to attachments too inveterate

with much less reserve. Hence it is that such reasons as pass with Lawyers, and with no one else, have got the name of *technical* reasons; reasons peculiar to the *art*, peculiar to the profession.

<sup>1</sup> The *reason* of a Law, in short, is no other than the *good* produced by the mode of conduct which it enjoins, or (which comes to the same thing) the *mischief* produced by the mode of conduct which it prohibits. This *mischief* or this *good*, if they be real, cannot but shew themselves somewhere or other in the shape of *pain* or *pleasure*.

<sup>2</sup> See in the Synoptical Table prefixed to our Author's *Analysis*, the last page comprehending Book IV.

**PREFACE.** to be all at once dissolved, they were still to be indulged a place, they would be stationed in the corners and by-places of the Synopsis : stationed, not as now to *give* light, but to *receive* it. But more of this, perhaps, at some future time.

Merits of  
the work  
resumed.

To return to our Author. Embarrassed, as a man must needs be, by this blind and intractable nomenclature, he will be found, I conceive, to have done as much as could reasonably be expected of a writer so circumstanced ; and more and better than was ever done before by any one.

In one part, particularly, of his Synopsis<sup>1</sup>, several fragments of a sort of method which is, or at least comes near to, what may be termed a natural one<sup>2</sup>, are actually to be found. We there read of '*corporal injuries*;' of '*offences against peace*;' against '*health*;' against '*personal security*'<sup>3</sup>;' '*liberty*:'—'*property*:'—light is let in, though irregularly, at various places.

In an unequal imitation of this Synopsis that has lately been performed upon what is called the *Civil Law*, all is technical. All, in short, is darkness. Scarce a syllable by which a man would be led to suspect, that the affair in

<sup>1</sup> It is that which comprises his IVth Book, entitled PUBLIC WRONGS.

<sup>2</sup> *Fragmenta methodi naturalis.*—LINNÆI *Phil. Bot. Tit. Systemata*, par. 77.

<sup>3</sup> This title affords a pertinent instance to exemplify the use that a natural arrangement may be of in repelling an incompetent institution. What I mean is the sort of filthiness that is termed *unnatural*. This our Author has ranked in his class of *Offences against 'personal security'*, and, in a subdivision of it, intitled '*Corporal injuries*.' In so doing, then, he has asserted a fact: he has asserted that the offence in question is an offence against personal security; is a corporal injury; is, in short, productive of unhappiness *in that way*. Now this is what, in the case where the act is committed *by consent*, is manifestly not true. *Volenti non fit injuria*. If then the Law against the offence in question had no other title to a place in the system than what was founded on this *fact*, it is plain it would have none. It would be a bad Law altogether. The mischief the offence is of to the community in this case is in truth of quite another nature, and would come under quite another class. When *against consent*, there indeed it does belong really to this class: but then it would come under another name. It would come under that of *Rape*.

hand were an affair that happiness or unhappiness was at all concerned in<sup>1</sup>. PREFACE.

To return, once more, to our Author's Commentaries. Not even in a *ensorial* view would I be understood to deem them altogether without merit. For the institutions commented on, where they are capable of good reasons, good reasons are every now and then given: in which way, so far as it goes, one-half of the Censor's task is well accomplished. Nor is the dark side of the picture left absolutely untouched. Under the head of 'Trial by Jury,' are some very just and interesting remarks on the yet-remaining imperfections of that mode of trial<sup>2</sup>: and under that of 'Assurances by matter of Record,' on the lying and extortious jargon of *Recoveries*<sup>3</sup>. So little, however, are these particular remarks of a piece with the general disposition, that shews itself so strongly throughout the work, indeed so plainly adverse to the general maxims that we have seen, that I can scarce bring myself to attribute them to our Author. Not only disorder is announced by them, but remedies, well-imagined remedies, are pointed out. One would think some Angel had been sowing wheat among our Author's tares<sup>4</sup>.

Manner in which the present Essay has been conducted.

<sup>1</sup> I think it is Selden, somewhere in his *Table-talk*, that speaks of a whimsical notion he had hit upon when a school-boy, that with regard to *Cæsar* and *Justin*, and those other personages of antiquity that gave him so much trouble, there was not a syllable of truth in any thing they said, nor in fact were there ever really any such persons; but that the whole affair was a contrivance of parents to find employment for their children. Much the same sort of notion is that which these technical arrangements are calculated to give us of Jurisprudence: which in them stands represented rather as a game at *Crambo* for Lawyers to whet their wits at, than as that Science which holds in her hand the happiness of nations.

Let us, however, do no man wrong. Where the success has been worse, the difficulty was greater. That detestable chaos of institutions which the Analyst last-mentioned had to do with is still more embarrassed with a technical nomenclature than our own.

<sup>2</sup> 3 Comm. Ch. XXIII. p. 387.

<sup>3</sup> 2 Comm. Ch. XXI. p. 360.

<sup>4</sup> The difference between a generous and determined affection, and an occasional, and as it were forced contribution, to the cause of reformation, may be seen, I think, in these Commentaries, compared with another celebrated work on the subject of our Jurisprudence. Mr. Barrington,

PREFACE

With regard to this Essay itself, I have not much to say. The principal and professed purpose of it is, to expose the errors and insufficiencies of our Author. The business of it is therefore rather to *overthrow* than to *set up*; which latter task can seldom be performed to any great advantage where the former is the principal one.

To guard against the danger of misrepresentation, and to make sure of doing our Author no injustice, his own words are given all along: and, as scarce any sentence is left unnoticed, the whole comment wears the form of what is called a perpetual one. With regard to a discourse that is simply institutional, and in which the writer builds upon a plan of his own, a great part of the satisfaction it can be made to afford depends upon the order and connection that are established between the several parts of it. In a comment upon the work of another, no such connection, or at least no such order, can be established commodiously, if at all. The order of the comment is prescribed by the order, perhaps the disorder, of the text.

The chief employment of this Essay, as we have said, has necessarily been *to overthrow*. In the little, therefore, which has been done by it in the way of *setting up*, my view has been not so much to think for the Reader, as to put him upon thinking for himself. This I flatter myself with having done on several interesting topics; and this is all that at present I propose.

Among the few positions of my own which I have found occasion to advance, some I observe which promise to be far from popular. These it is likely may give rise to very

whose agreeable Miscellany has done so much towards opening men's eyes upon this subject; Mr. Barrington, like an active General in the service of the Public, storms the strongholds of chicane, wheresoever they present themselves, and particularly fictions, without reserve. Our Author, like an artful partizan in the service of the profession, sacrifices a few, as if it were to save the rest.

Deplorable, indeed, would have been the student's chance for salutary instruction, did not Mr. Barrington's work in so many instances, furnish the antidote to our Author's poisons.

warm objections : objections which in themselves I do not wonder at, and which in their motive I cannot but approve. The people are a set of masters whom it is not in a man's power in every instance fully to please, and at the same time faithfully to serve. He that is resolved to persevere without deviation in the line of truth and utility, must have learnt to prefer the still whisper of enduring approbation, to the short-lived bustle of tumultuous applause. PREFACE.  
—♦—

Other passages too there may be, of which some farther explanation may perhaps not unreasonably be demanded. But to give these explanations, and to obviate those objections, is a task which, if executed at all, must be referred to some other opportunity. Consistency forbid our expatiating so far as to lose sight of our Author: since it was the line of his course that marked the boundaries of ours.





A  
FRAGMENT ON GOVERNMENT.

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INTRODUCTION.

I.

THE subject of this examination, is a passage contained in that part of Sir W. BLACKSTONE'S COMMENTARIES on the LAWS of ENGLAND, which the Author has styled the INTRODUCTION. This Introduction of his stands divided into four Sections. The *first* contains his discourse '*On the STUDY of the LAW.*' The *second*, entitled '*Of the NATURE of LAWS in general,*' contains his speculations concerning the various objects, real or imaginary, that are in use to be mentioned under the common name of LAW. The *third*, entitled '*Of the LAWS of ENGLAND,*' contains such general observations, relative to these last mentioned Laws, as seemed proper to be premised before he entered into the details of any parts of them in particular. In the *fourth*, entitled, '*Of the COUNTRIES subject to the LAWS of ENGLAND,*' is given a statement of the different territorial extents of different branches of those Laws.

INTRO-  
DUCTION.

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I.

Division of  
our Au-  
thor's In-  
troduction.

INTRODUC-  
TION.

## II.

What part  
of it is here  
to be exam-  
ined.

'Tis in the *second* of these sections, that we shall find the passage proposed for examination. It occupies in the edition I happen to have before me, which is the *first* (and all the editions, I believe, are paged alike) the space of *seven* pages ; from the 47th, to the 53d, inclusive.

## III.

III.  
His defini-  
tion of  
Law muni-  
cipal.

After treating of 'LAW *in general*,' of the 'LAW of *Nature*,' 'LAW of *Revelation*,' and 'LAW of *Nations*,' branches of that imaginary whole, our Author comes at length to what he calls 'LAW *municipal*:' that sort of Law, to which men in their ordinary discourse would give the name of Law without addition ; the only sort perhaps of them all (unless it be that of *Revelation*) to which the name can, with strict propriety, be applied : in a word, that sort which we see made in each nation, to express the will of that body in it which governs. On this subject of LAW *Municipal* he sets out, as a man ought, with a *definition* of the phrase itself ; an important and fundamental phrase, which stood highly in need of a definition, and never so much as since our Author has defined it.

## IV.

IV.  
A digres-  
sion in the  
middle of  
it. Its  
general  
contents.

This definition is ushered in with no small display of accuracy. First, it is given entire : it is then taken to pieces, clause by clause ; and every clause by itself, justified and explained. In the very midst of these explanations, in the very midst of the definition, he makes a sudden stand. And now it bethinks him that it is a good time to give a dissertation, or rather a bundle of dissertations, upon various subjects—On the *manner* in which *Governments were* established—

On the different *forms* they assume when they are established—On the peculiar excellence of that form which is established in *this country*—On the *right*, which he thinks it necessary to tell us, the GOVERNMENT in every country has of making LAWS—On the *duty* of making LAWS ; which, he says, is also incumbent on the Government.—In stating these two last heads, I give, as near as possible, his own *words* ; thinking it premature to engage in discussions, and not daring to decide without discussion on the *sense*.

INTRODUC-  
TION.  
—→→→

## V.

The digression we are about to examine, is, as it happens, not at all involved with the body of the work from which it starts. No mutual references or allusions : no supports or illustrations communicated or received. It may be considered as one small work inserted into a large one ; the *containing* and the *contained*, having scarce any other connection than what the operations of the press have given them. It is this disconnection that will enable us the better to bestow on the latter a separate examination, without breaking in upon any thread of reasoning, or any principle of Order.

V.  
This dig-  
ression  
the subject  
of the pre-  
sent ex-  
amination.

## VI.

A general statement of the topics touched upon in the digression we are about to examine has been given above. It will be found, I trust, a faithful one. It will not be thought, however, much of a piece, perhaps, with the following, which our Author himself has given us. 'This,' (says he<sup>1</sup>, meaning an explanation he had been giving of a part of the definition above spoken of) 'will naturally lead us into a short enquiry into the nature of society and civil govern-

VI.  
Our Au-  
thor's  
sketch of  
the con-  
tents.

<sup>1</sup> 1 Comm. p. 47.

INTRODU-  
TION.  
—♦—  
ment<sup>1</sup>; and the natural inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing Laws.'

VII.  
made-  
uate.

### VII.

No very explicit mention here, we may observe, of the *manner* in which governments have been established, or of the different *forms* they assume when established: no very explicit intimation that these were among the topics to be discussed. None at all of the *duty* of government to make laws; none at all of the *British constitution*; though, of the four other topics we have mentioned, there is no one on which he has been near so copious as on this last. The *right* of Government to make laws, that delicate and invidious topic, as we shall find it when explained, is that which for the moment, seems to have swallowed up almost the whole of his attention.

### VIII.

VIII.  
Division of  
the present  
essay.

Be this as it may, the contents of the dissertation before us, taken as I have stated them, will furnish us with the matter of five chapters:—one, which I shall entitle 'FORMATION *of* GOVERNMENT'—a second, 'FORMS *of* GOVERNMENT'—a third, 'BRITISH CONSTITUTION'—a fourth, 'RIGHT *of the* SUPREME POWER *to make* LAWS'—a fifth, 'DUTY *of the* SUPREME POWER *to make* LAWS.'

<sup>1</sup> To make sure of doing our Author no injustice, and to shew what it is that he thought would 'naturally lead us into' this 'enquiry,' it may be proper to give the paragraph containing the explanation above mentioned. It is as follows:—'But farther: municipal law is a rule of civil conduct, prescribed *by the supreme power in a state.*' 'For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite, to the very essence of a law, that it be made' (he might have added, *or at least supported*) 'by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.' 1 Comm. p. 46.

## CHAPTER I.

### FORMATION OF GOVERNMENT.

#### I.

THE first object which our Author seems to have proposed to himself in the dissertation we are about to examine, is to give us an idea of the *manner* in which Governments were formed. This occupies the first paragraph, together with part of the second: for the *typographical* division does not seem to quadrate very exactly with the *intellectual*. As the examination of this passage will unavoidably turn in great measure upon the words, it will be proper the reader should have it under his eye.

CHAP.  
I.  
I.

Subject of the passage to be examined in the present chapter.

#### II.

'The only true and natural foundations of *society*,' (says our Author<sup>1</sup>) 'are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as *society*; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an *original contract*, and

II.  
The passage recited.

<sup>1</sup> 1 Comm. p. 47.

CHAP.

I.

chose the tallest man present to be their governor. 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. These formed the first *society*, among themselves; which every day extended its 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 itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent; and various tribes which had formerly separated, re-united again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though *society* had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the sense of their weakness and imperfection that keeps mankind together; that demonstrates 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.'

CHAP.  
I.  
—

'For when *society* is once formed, *government* results of course, as necessary to preserve and to keep that *society* in order. Unless some superior were constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a *state of nature*, without any judge upon earth to define their several rights, and redress their several wrongs.'—Thus far our Author.

### III.

When leading terms are made to chop and change their several significations ; sometimes meaning one thing, sometimes another, at the upshot perhaps nothing ; and this in the compass of a paragraph ; one may judge what will be the complexion of the whole context. This, we shall see, is the case with the chief of those we have been reading : for instance, with the words 'Society,'—'State of nature,'—'original contract,'—not to tire the reader with any more. '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.

III.  
Confusion  
among the  
leading  
terms of it.



CHAP.  
I.

IV.

IV.  
'Society'  
put syno-  
nymous  
to a state  
of nature  
—opposed  
to 'Govern-  
ment'—  
and spo-  
ken of as  
having ex-  
isted.

ist, Society means a *state of nature*. For if by '*a state of nature*' a man means any thing, it is the state, I take it, men are in or supposed to be in, before they are under *government*: the state men quit when they enter into a state of government; and in which were it not for government they would remain. But by the word '*society*' it is plain at one time that he means that state. First, according to him, comes *society*; then afterwards comes *government*. 'For when *society*,' says our Author, 'is once formed, *government* results of course; as necessary to preserve and keep that *society* in order.'—And again, immediately afterwards,—'A state in which a superior has been constituted, whose commands and decisions all the members are bound to obey,' he puts as an explanation (nor is it an inapt one) of a state of '*government*:' and 'unless' men were in a state of that description, they would still 'remain,' he says, 'as in a *state of nature*.' By *society*, therefore, he means, once more, the same as by a '*state of nature*:' he *opposes* it to *government*. And he speaks of it as a state which, in this sense, has actually existed.

V.

V.  
'Society'  
put syno-  
nymous to  
'govern-  
ment.'

2dly, This is what he tells us in the beginning of the *second* of the two paragraphs: but all the time the *first* paragraph lasted, *society* meant the same as *government*. In shifting then from one paragraph to another, it has changed its nature. 'Tis 'the foundations of *society*<sup>1</sup>, that he first began to speak of, and immediately he goes on to explain to us, after his manner of explaining, the foundations of

<sup>1</sup> 1 Comm. p. 47.

government, 'Tis of a 'formal beginning' of 'Society<sup>1</sup>,' that he speaks soon after; and by this formal beginning, he tells us immediately, that he means, 'the *original contract of society*<sup>2</sup>,' which contract entered into, 'a *state*<sup>3</sup>,' he gives us to understand, is thereby 'instituted,' and men have undertaken to 'submit to Laws<sup>4</sup>.' So long then as this first paragraph lasts, '*society*,' I think, it is plain cannot but have been meaning the same as '*government*.'

CHAP.  
I.

VI.

3dly, All this while too, this same '*state of nature*' to which we have seen '*Society*' (a state spoken of as existing) put synonymous, and in which were it not for *government*, men, he informs us, in the next page, would '*remain*<sup>5</sup>,' is a state in which they never were. So he expressly tells us. This 'notion,' says he, 'of an actually existing unconnected state of nature;' (that is, as he explains himself afterwards<sup>6</sup>, 'a state in which men have no judge to define their rights, and redress their wrongs,) is too wild to be seriously admitted<sup>7</sup>.' When he admits it then himself, as he does in his next page, we are to understand, it seems, that he is bantering us: and that the next paragraph is (what one should not otherwise have taken it for) a piece of pleasantry.

VI.  
A state of nature spoken of, as never having existed.

VII.

4thly, The *original contract* is a thing, we are to understand, that never had existence; perhaps not in any state: certainly therefore not in all. 'Perhaps,

VII.  
*Original contract*, its reality denied—

<sup>1</sup> 1 Comm. p. 47.

<sup>2</sup> 1 Comm. p. 47.

<sup>3</sup> 1 Comm. p. 47.

<sup>4</sup> 1 Comm. p. 48.

<sup>5</sup> 1 Comm. p. 48.

<sup>6</sup> 1 Comm. p. 48.

<sup>7</sup> 1 Comm. p. 47.

CHAP. in no instance,' says our Author, 'has it ever been  
I. formally expressed at the first institution of a state <sup>1</sup>.'

VIII.

VIII. *5thly*, Notwithstanding all this, we must suppose, it  
—asserted. seems, that it had in *every* state: 'yet in nature and reason,' says our Author, 'it must always be understood and implied <sup>2</sup>.' Growing bolder in the compass of four or five pages, where he is speaking of our own Government, he asserts roundly <sup>3</sup>, that such a Contract was actually made at the first formation of it. 'The legislature would be changed,' he says, 'from that which *was originally* set up by the general consent and fundamental act of the society.'

IX.

IX.  
Attempt to reconcile these contradictions—Society distinguished into natural and political.

Let us try whether it be not possible for something to be done towards drawing the import of these terms out of the mist in which our Author has involved them. The word 'SOCIETY,' I think it appears, is used by him, and that without notice, in two senses that are opposite. In the one, SOCIETY, or a STATE of SOCIETY, is put *synonymous* to a STATE of NATURE; and stands *opposed* to GOVERNMENT, or a STATE of GOVERNMENT: in this sense it may be styled, as it commonly is, *natural* SOCIETY. In the other, it is put *synonymous* to GOVERNMENT, or a STATE of GOVERNMENT; and stands *opposed* to a STATE of NATURE. In this sense it may be styled, as it commonly is, *political* SOCIETY. Of the difference between these two states, a tolerably distinct idea, I take it, may be given in a word or two.

<sup>1</sup> 1 Comm. p. 46.

<sup>2</sup> 1 Comm. p. 46.

<sup>3</sup> 1 Comm. p. 52.

CHAP.  
I.  
X.  
Idea of  
political  
society.

X.

✓ The idea of a natural society is a *negative* one. The idea of a political society is a *positive* one. 'Tis with the latter, therefore, we should begin.

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>1</sup>.

XI.

The idea of a state of *natural* SOCIETY is, as we have said, a *negative* one. 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.

XII.

¶ If we reflect a little, we shall perceive, that, between these two states, there is not that explicit separation which these names, and these definitions might teach one, at first sight, to expect. It is with them as with light and darkness: however distinct the ideas may be, that are, at first mention, suggested by those *names*, the *things* themselves have no determinate bound to separate them. The circumstance that has been spoken of as constituting the difference between these two states, is the presence or absence of an *habit of obedience*. This habit, accordingly, has been spoken of simply as *present* (that is as being

<sup>1</sup> V. infra, par. 12, note 1.

CHAP.  
I.  
—→

*perfectly* present) or, in other words, we have spoken as if there were a *perfect* habit of obedience, in the *one* case : it has been spoken of simply as *absent* (that is, as being *perfectly* absent) or, in other words, we have spoken as if there were *no* habit of obedience at all, in the *other*. [ But neither of these manners of speaking, perhaps, is strictly just. Few, in fact, if any, are the instances of this habit being perfectly *absent* ; certainly none at all, of its being perfectly *present*. ] Governments accordingly, in proportion as the habit of obedience is more perfect, recede from, in proportion as it is less perfect, approach to, a state of nature : and instances may present themselves in which it shall be difficult to say whether a habit, perfect, in the degree in which, to constitute a government, it is deemed necessary it *should* be perfect, *does* subsist or *not* <sup>1</sup>.

1. A habit. <sup>1</sup> 1. A *habit* is but an assemblage of *acts* : under which name I would also include, for the present, *voluntary forbearances*.
2. A habit of obedience. 2. A *habit of obedience* then is an assemblage of *acts of obedience*.
3. An act of obedience. 3. An *act of obedience* is any act done in pursuance of an *expression of will* on the part of some *superior*.
4. An act of political obedience. 4. An *act of POLITICAL obedience* (which is what is here meant) is any act done in pursuance of an expression of will on the part of a person governing.
5. An expression of will. 5. An *expression of will* is either *parole* or *tacit*.
6. A *parole* expression of will. 6. A *parole expression of will* is that which is conveyed by the *signs* called *words*.
7. A *tacit* expression of will. 7. A *tacit expression of will* is that which is conveyed by any other *signs* whatsoever : among which none are so efficacious as *acts of punishment* annexed in time past, to the non-performance of acts of the same sort with those that are the objects of the will that is in question.
8. A command. 8. A *parole* expression of the will of a superior is a *command*.



state of nature  
society perfectly political

XIII.

On these considerations, the supposition of a *perfect state of nature*, or, as it may be termed, a state of *society perfectly natural*, may, perhaps, be justly pronounced, what our Author for the moment seemed to think it, an extravagant supposition: but then that of a *government* in this sense *perfect*; or, as it may be termed, a state of *society perfectly political*, a state of *perfect political union*, a state of *perfect submission* in

XIII. A perfect state of nature not more chimerical than a perfect state of government.

- 9. When a *tacit* expression of the will of a superior is supposed to have been uttered, it may be styled a *fictitious command*. 9. A *fictitious* command.
  - 10. Were we at liberty to coin words after the manner of the Roman lawyers, we might say a *quasi-command*. 10. *Commands quasi-commands*.
  - 11. The *STATUTE LAW* is composed of *commands*. The *COMMON LAW*, of *quasi-commands*. 11. *Illustration—Statute Law, Common Law*.
  - 12. An act which is the object of a command actual or fictitious; such an act, considered before it is performed, is styled a *duty*, or a *point of duty*. 12. *Duty—point of duty*.
  - 13. These definitions premised, we are now in a condition to give such an idea, of what is meant by the *perfection* or *imperfection* of a *habit of obedience* in a society as may prove tolerably precise. 13. *Use of the above chain of definitions*.
  - 14. A *period* in the duration of the society; the number of *persons* it is composed of during that period; and the number of *points of duty* incumbent on each person being given;—the habit of obedience will be more or less *perfect*, in the ratio of the number of acts of *obedience* to those of *disobedience*. 14. *Habit of obedience—measure of its perfections*.
  - 15. The habit of obedience in this country appears to have been more perfect in the time of the Saxons than in that of the Britons: unquestionably it is more so now than in the time of the Saxons. It is not yet so perfect, as well contrived and well digested laws in time, it is to be hoped, may render it. But absolutely perfect, till man ceases to be man, it never *can* be. 15. *Illustration*.
- 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*.

CHAP. I. the *subject of perfect authority* in the *governor*, is no less so<sup>1</sup>.

16. Political union or connection. 16. For the convenience and accuracy of discourse it may be of use, in this place, to settle the signification of a few other expressions relative to the same subject. Persons who, with respect to each other, are in a state of *political society*, may be said also to be in a state of *political union* or *connection*.

17. Submission—subjection. 17. Such of them as are *subjects* may, accordingly, be said to be in a state of *submission*, or of *subjection*, with respect to *governors*: such as are *governors* in a state of *authority* with respect to *subjects*.

18. Submission—subjection. 18. When the subordination is considered as resulting originally from the *will*, or (it may be more proper to say) the *pleasure* of the party governed, we rather use the word '*submission*:' when from that of the party governing, the word '*subjection*.' On this account it is, that the term can scarcely be used without apology, unless with a note of disapprobation: especially in this country, where the habit of considering the *consent* of the persons governed as being in some sense or other involved in the notion of all *lawful*, that is, all *commendable* government, has gained so firm a ground. It is on this account, then, that the term '*subjection*,' excluding as it does, or, at least, not *including* such consent, is used commonly in what is called a *BAD* sense: that is, in such a sense as, together with the idea of the object in question, conveys the *accessary* idea of disapprobation. This *accessary* idea, however, annexed as it is to the *abstract* term '*subjection*,' does not extend itself to the *concrete* term '*subjects*'—a kind of inconsistency of which there are many instances in language.

It is not a *family union*, however perfect, that can constitute a *political society*—why.

<sup>1</sup> It is true that every person must, for some time, at least, after his birth, necessarily be in a state of subjection with respect to his parents, or those who stand in the place of parents to him; and that a perfect one, or at least as near to being a perfect one, as any that we see. But for all this, the sort of society that is constituted by a state of subjection thus circumstanced, does not come up to the idea that, I believe, is generally entertained by those who speak of a *political society*. To constitute what is meant in general by that phrase, a *greater number* of members is required, or, at least, a *duration* capable of a longer continuance. Indeed, for this purpose nothing less, I take it, than an *indefinite* duration is required. A society, to come within the notion of what is originally meant by a *political* one, must be such as, in its nature, is not incapable of continuing for ever in virtue of the principles which gave it birth. This, it is plain, is not the case with such a family society, of which a parent, or a pair of parents are at the head. In such a society, the only principle of union which is certain and uniform in its operation, is the natural weakness of those of its members that are in a state of subjection; that is, the children; a principle which has but a short and limited continuance. I question whether it be the case even with a family society, subsisting in virtue of *collateral* consanguinity; and that for the like reason. Not but that even in this case a habit of obedience, as perfect as any we see

## XIV.

CHAP.  
I.XIV.  
'State of  
nature' a  
relative ex-  
pression.

A remark there is, which, for the more thoroughly clearing up of our notions on this subject, it may be proper here to make. To some ears, the phrases, 'state of nature,' 'state of political society,' may carry the appearance of being *absolute* in their signification: as if the condition of a man, or a company of men, in one of these states, or in the other, were a matter that depended altogether upon themselves. [But this is not the case. To the expression 'state of nature,' no more than to the expression 'state of political society,' can any precise meaning be annexed, without reference to a party different from that one who is spoken of as being in the state in question. [This will readily be perceived. [The difference between the two states lies, as we have observed, in the *habit of obedience*.] With respect then to a habit of obedience, it can neither be understood as subsisting in any person, nor as not subsisting in any person, but with reference to some other person. For one party to *obey*, there must be another party that is obeyed. But this party who is obeyed, may at different times be different. Hence may one and the same party be conceived to obey and *not* to obey at the same time, so as it be with respect to different *persons*, or as we may say, to different *objects of obedience*. Hence it is, then, that one and the same party

examples of, may subsist for a time; to wit, in virtue of the same *moral* principles which may protract a habit of *filial* obedience beyond the continuance of the *physical* ones which gave birth to it: I mean affection, gratitude, awe, the force of habit, and the like. But it is not long, even in this case, before the bond of connection must either become imperceptible, or lose its influence by being too extended.

These considerations, therefore, it will be proper to bear in mind in applying the definition of political society above given [in par. 10] and in order to reconcile it with what is said further on [in par. 17].



CHAP.  
I.  
—

may be said to *be* in a state of nature, and *not* to be in a state of nature, and that at one and the same time, according as it is this or *that* party that is taken for the other object of comparison. The case is, that in common speech, when no particular object of comparison is specified, all persons in general are intended: so that when a number of persons are said simply to be in a state of nature, what is understood is, that they are so as well with reference to one another, as to all the world.

## XV.

XV.  
Different  
degrees of  
subjection  
among  
governors.

✓ In the same manner we may understand, how the same man, who is *governor* with respect to one man or set of men, may be *subject* with respect to another: how among governors some may be in a *perfect* state of *nature*, with respect to each other: as the KINGS of FRANCE and SPAIN: others, again, in a state of *perfect subjection*, as the HOSPODARS of WALACHIA and MOLDAVIA with respect to the GRAND SIGNIOR: others, again, in a state of manifest but *imperfect subjection*, as the GERMAN States with respect to the EMPEROR: others, again, in such a state in which it may be difficult to determine whether they are in a state of *imperfect subjection* or in a *perfect* state of *nature*: as the KING of NAPLES with respect to the POPE<sup>1</sup>.

## XVI.

XVI.  
The same  
person  
alternately  
in a state  
of political  
and natural  
society

✓ In the same manner, also, it may be conceived, without entering into details, how any single person, born, as all persons are, into a state of perfect subjection to his parents<sup>2</sup>, that is into a state of perfect

<sup>1</sup> The Kingdom of Naples is feudatory to the Papal See: and in token of fealty, the King, at his accession, presents the Holy Father with a white horse. The Royal vassal sometimes treats his Lord but cavalierly: but always sends him his white horse.

<sup>2</sup> V. *supra*, par. 13, note.

political society with respect to his parents, may from thence pass into a perfect state of nature; and from thence successively into any number of different states of political society more or less perfect, by passing into different societies.

CHAP.  
I.

with re-  
spect to  
different  
societies.

XVII.

In the same manner also it may be conceived how, in any political society, the same man may, with respect to the same individuals, be, at different periods, and on different occasions, alternately, in the state of governor and subject: to-day concurring, perhaps active, in the business of issuing a *general* command for the observance of the whole society, amongst the rest of another man in quality of *Judge*: to-morrow, punished, perhaps, by a *particular* command of that same Judge for not obeying the general command which he himself (I mean the person acting in character of governor) had issued. I need scarce remind the reader how happily this alternate state of *authority* and *submission* is exemplified among ourselves.

XVII.

In the  
same  
political  
society  
the same  
persons  
alternately  
governors  
and sub-  
jects, with  
respect to  
the same  
persons.

XVIII.

Here might be a place to state the different shares which different persons may have in the issuing of the same command: to explain the nature of *corporate action*: to enumerate and distinguish half a dozen or more different modes in which *subordination* between the same parties may subsist: to distinguish and explain the different senses of the words, '*consent*,' '*representation*,' and others of connected import: *consent* and *representation*, those interesting but perplexing words, sources of so much debate: and sources or pretexts of so much animosity. But the

XVIII.

Hints of  
several  
topics  
that must  
be passed  
by.

CHAP. I. limits of the present design will by no means admit of such protracted and intricate discussions.

XIX.

XIX. ✓ In the same manner, also, it may be conceived, how the same set of men considered among themselves, may at one time be in a state of nature, at another time in a state of government. For the habit of obedience, in whatever degree of perfection it be necessary it should subsist in order to constitute a government, may be conceived, it is plain, to suffer interruptions. At different junctures it may take place and cease.

The same society alternately in a state of nature and a state of government.

XX.

XX. Instances of this state of things appear not to be unfrequent. The sort of society that has been observed to subsist among the AMERICAN INDIANS may afford us one. According to the accounts we have of those people, in most of their tribes, if not in all, the habit we are speaking of appears to be taken up only in time of war. It ceases again in time 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.

Instance the Aborigines of America.

XXI.

XXI. One difficulty there is that still sticks by us. It has been started indeed, but not solved.—This is to find a note of distinction,—a characteristic mark, whereby to distinguish a society in which there *is* a habit of obedience, and that at the degree of perfection which is necessary to constitute a state of government, from a society in which there is *not*: a mark, I mean,

Characteristic of political union.

which shall have a visible determinate commencement; insomuch that the instant of its first appearance shall be distinguishable from the last at which it had not as yet appeared. 'Tis only by the help of such a mark that we can be in a condition to determine, at any given time, whether any given society is in a state of government, or in a state of nature. I can find no such mark, I must confess, any where, unless it be this; the establishment of names of office: the appearance of a certain man, or set of men, with a certain name, serving to mark them out as objects of obedience: such as King, Sachem, Cacique, Senator, Burgomaster, and the like. This, I think, may serve tolerably well to distinguish a set of men in a state of political union among *themselves* from the *same* set of men not yet in such a state.

✓

×

XXII.

✓ [But suppose an incontestable political society, and that a large one, formed; and from that a smaller body to break off: by this breach the smaller body ceases to be in a state of political union with respect to the larger: and has thereby placed itself, with respect to that larger body, in a state of nature— What means shall we find of ascertaining the precise juncture at which this change took place? What shall be taken for the *characteristic mark* in this case? The appointment, it may be said, of new governors with new names. But no such appointment, suppose, takes place. The subordinate governors, from whom alone the people at large were in use to receive their commands under the old government, are the same from whom they receive them under the new one. The habit of obedience which these subordinate

XXII.

Among persons already in a state of political union at what instant a new society can be said to be formed, by defection from a former.

CHAP. I.  
 —♦—  
 governors were in with respect to that single person, we will say, who was the supreme governor of the whole, is broken off insensibly and by degrees. The old names by which these subordinate governors were characterized, while they were subordinate, are continued now they are supreme. In this case it seems rather difficult to answer.

## XXIII.

XXIII.  
 1st, in case of defection by whole bodies, instance the Dutch provinces.

If an example be required, we may take that of the DUTCH provinces with respect to SPAIN. These provinces were once branches of the Spanish monarchy. They have now, for a long time, been universally spoken of as independent states: independent as well of that of Spain as of every other. They are now in a state of nature with respect to Spain. They were once in a state of political union with respect to Spain: namely, in a state of subjection to a single *governor*, a King, who was King of Spain. At what precise juncture did the dissolution of this political union take place? At what precise time did these provinces cease to be subject to the King of Spain? This, I doubt, will be rather difficult to agree upon <sup>1</sup>.

## XXIV.

XXIV.  
 2dly, in case of defection by individuals—instances. Rome—Venice:

Suppose the defection to have begun, not by entire provinces, as in the instance just mentioned, but by a handful of fugitives, this augmented by the accession of other fugitives, and so, by degrees, to a body of men too strong to be reduced, the difficulty will be increased still farther. At what precise juncture was

<sup>1</sup> Upon recollection, I have some doubt whether this example would be found historically exact. If not, that of the defection of the Nabobs of Hindostan may answer the purpose. My first choice fell upon the former; supposing it to be rather better known.

it that ancient ROME, or that modern VENICE, became an independent state?

CHAP.  
I.

XXV.

✓ In general then, at what precise juncture is it, that persons subject to a government, become, by disobedience, with respect to that government, in a state of nature? When is it, in short, that a *revolt* shall be deemed to have taken place; and when, again, is it, that that revolt shall be deemed to such a degree successful, as to have settled into *independence*?

XXV.  
A *revolt*, at what juncture it can be said to have taken place.

XXVI.

✓ [As it is the obedience of individuals that constitutes a state of submission, so is it their disobedience that must constitute a state of revolt. Is it then every act of disobedience that will do as much? The affirmative, certainly, is what can never be maintained: for then would there be no such thing as government to be found any where.] Here then a distinction or two obviously presents itself. [Disobedience may be distinguished into *conscious* or *unconscious*: and that, with respect as well to the *law* as to the *fact*<sup>1</sup>]

XXVI.  
*Disobedience* what do not amount to a revolt:

<sup>1</sup> 1. Disobedience may be said to be *unconscious with respect to the fact*, when the party is ignorant either of his having done the act itself, which is forbidden by the law, or else of his having done it in those *circumstances*, in which alone it is forbidden.

1. Disobedience unconscious with respect to the *fact*.

2. Disobedience may be said to be *unconscious*, with respect to the *law*; when although he may know of his having done the *act* that is in reality forbidden, and that, under the *circumstances* in which it is forbidden, he knows not of its being forbidden in these *circumstances*.

2. Disobedience unconscious with respect to the Law.

3. So long as the business of spreading abroad the knowledge of the law continues to lie in the neglect in which it has lain hitherto, instances of disobedience *unconscious with respect to the law*, can never be otherwise than abundant.

3. Illustration.

CHAP.  
I  
—

Disobedience that is unconscious with respect to either, will readily, I suppose, be acknowledged not to be a revolt. Disobedience again that is conscious with respect to *both*, may be distinguished into *secret* and *open*; or, in other words, into *fraudulent* and *forcible*<sup>1</sup>. Disobedience that is only fraudulent, will likewise, I suppose, be readily acknowledged not to amount to a revolt.

## XXVII.

XXVIII  
Disobedi-  
ence what  
do amount  
to a re-  
volt.

The difficulty that will remain will concern such disobedience only as is both *conscious*, (and that as well with respect to *law* as *fact*), and *forcible*. This disobedience, it should seem, is to be determined neither by *numbers* altogether (that is of the persons supposed to be disobedient) nor by *acts*, nor by *intentions*: all three may be fit to be taken into consideration. But having brought the difficulty to this point, at this point I must be content to leave it. To proceed any farther in the endeavour to solve it, would be to enter into a discussion of particular local jurisprudence. It would be entering upon the definition of Treason, as distinguished from Murder, Robbery, Riot, and other such crimes, as, in comparison with Treason, are spoken of as being of a more private nature. Suppose the definition of Treason settled, and the commission of an act of Treason is, as far as regards the person committing it, the characteristic mark we are in search of.

Disobedi-  
ences  
*fraudulent*  
and *forcible*  
- the dil-  
ferences,  
illustrated.

<sup>1</sup> If examples be thought necessary, Theft may serve for an example of *fraudulent* disobedience; Robbery of *forcible*. In Theft, the *person* of the disobedient party, and the *act* of disobedience, are both endeavoured to be kept secret. In Robbery, the *act* of disobedience, at least, if not the *person* of him who disobeys, is manifest and avowed.

XXVIII.

These remarks it were easy to extend to a much greater length. Indeed, it is what would be necessary, in order to give them a proper fulness, and method, and precision. But that could not be done without exceeding the limits of the present design. As they are, they may serve as hints to such as shall be disposed to give the subject a more exact and regular examination.

CHAP.  
I.

XXVIII.  
Unfinished  
state of  
the above  
hints.

XXIX.

From what has been said, however, we may judge what truth there is in our Author's observation, that 'when society' (understand *natural* society) 'is once formed, government' (that is political society) (whatever quantity or degree of Obedience is necessary to constitute political society) 'results of course; as necessary to preserve and to keep that society in order.' By the words, '*of course*,' is meant, I suppose, *constantly* and *immediately*: at least constantly. According to this, political society, in any sense of it, ought long ago to have been established all the world over. Whether this be the case, let any one judge from the instances of the Hottentots, of the Patagonians, and of so many other barbarous tribes, of which we hear from travellers and navigators.

XXIX.  
Our  
Author's  
proposi-  
tion, 'That  
govern-  
ment re-  
sults of  
course,'  
not true.

XXX.

It may be, after all, we have misunderstood his meaning. We have been supposing him to have been meaning to assert a *matter of fact*, and to have written, or at least begun, this sentence in the character of an *historical observer*: whereas, all he meant by it, perhaps, was to speak in the character of a

XXX.  
Ambiguity  
of the  
sentence.



CHAP.  
I.  
—

*Censor*, and on a case supposed, to express a *senti-ment of approbation*. In short, what he meant, perhaps, to persuade us of, was not that 'government' *does actually* 'result' from natural 'society;' but that it were better that it *should*, to wit, as being necessary to 'preserve and keep' men 'in that state of order,' in which it is of advantage to them that they should be. Which of the above-mentioned characters he meant to speak in, is a problem I must leave to be determined. The distinction, perhaps, is what never so much as occurred to him; and indeed the shifting insensibly, and without warning, from one of those characters to the other, is a failing that seems inveterate in our Author; and of which we shall probably have more instances than one to notice.

## XXXI.

XXXI.  
Darkness  
of the  
whole  
paragraph  
further  
shown.

To consider the whole paragraph (with its appendage) together, something, it may be seen, our Author struggles to overthrow, and something to establish. But *how* it is he would overthrow, or *what* it is he would establish, are questions I must confess myself unable to resolve. 'The preservation of mankind,' he observes, 'was effected by single families.' This is what upon the authority of the Holy Scriptures, he assumes; and from this it is that he would have us conclude the notion of an original contract (the same notion which he afterwards adopts) to be ridiculous. The force of this conclusion, I must own, I do not see. Mankind was preserved by single families—Be it so. What is there in this to hinder 'individuals' of those families, or of families descended from those families, from meeting together 'afterwards, in a large plain,' or any where else, 'entering into an *original* contract,' or any other

contract, 'and choosing the tallest man,' or any other man, 'present,' or absent, to be their Governor? The 'flat contradiction' our Author finds between this supposed transaction and the 'preservation of mankind by single families,' is what I must own myself unable to discover. As to the 'actually existing unconnected state of nature' he speaks of, 'the notion of which,' he says, 'is too wild to be seriously admitted,' whether this be the case with it, is what, as he has given us no notion of it at all, I cannot judge of.

CHAP.  
I.

XXXII.

Something positive, however, in one place, we seem to have. These 'single families,' by which the preservation of mankind was effected; these single families, he gives us to understand, 'formed the first society.' This is something to proceed upon. A society then of the one kind or the other; a natural society, or else a political society, was formed. I would here then put a case, and then propose a question. [In this society we will say no *contract* had as yet been entered into; no *habit of obedience* as yet formed. Was this then a *natural* society merely, or was it a *political* one?] For my part, according to my notion of the two kinds of society as above explained, I can have no difficulty. [It was a merely *natural* one.] But, according to our Author's notion, which was it? If it *was* already a *political* one, what notion would he give us of such an one as shall have been a *natural* one; and by what change should such precedent natural one have turned into *this* political one? If this was *not* a political one, then what sort of a society are we to understand any one to be which *is* political? By what mark are we

XXXII.  
Farther  
proofs of  
the dark-  
ness of the  
whole  
paragraph.

CHAP.  
I.  
—

to distinguish it from a natural one? To this, it is plain, our Author has not given any answer. At the same time, that to give an answer to it, was, if any thing, the professed purpose of the long paragraph before us.

## XXXIII.

XXIII.  
general  
a of its  
racter.

It is time this passage of our Author were dismissed—As among the expressions of it are some of the most striking of those which the vocabulary of the subject furnishes, and these ranged in the most harmonious order, on a distant glance nothing can look fairer: a prettier piece of tinsel-work one shall seldom see exhibited from the shew-glass of political erudition. Step close to it, and the delusion vanishes. It is then seen to consist partly of self-evident observations, and partly of contradictions; partly of what every one knows already, and partly of what no one can understand at all.

## XXXIV.

XXIV.  
fficulty  
ending  
s exami-  
tion.

Throughout the whole of it, what distresses me is, not the meeting with any positions, such as, thinking them false, I find a difficulty in proving so: but the not meeting with any positions, true, or false, (unless it be here and there a self-evident one,) that I can find a meaning for. If I can find nothing positive to accede to, no more can I to contradict. Of this latter kind of work, indeed, there is the less to do for any one else, our Author himself having executed it, as we have seen, so amply.

The whole of it is, I must confess, to me a riddle: more acute, by far, than I am, must be the Oedipus that can solve it. Happily it is not necessary, on account of any thing that follows, that it should be

solved. Nothing is concluded from it. For aught I can find, it has in itself no use, and none is made of it. There it is, and as well might it be any where else, or no where.

CHAP.

I.

XXXV.

Were it then possible, there would be no use in its being solved: but being, as I take it, *really* unsolvable, it were of use it should *be seen* to be so. Peace may by this means be restored to the breast of many a desponding student, who, now prepossessed with the hopes of a rich harvest of instruction, makes a crime to himself of his inability to reap what, in truth, his Author has not sown.

XXXV.  
Use that  
may be  
made of it.

XXXVI.

(As to the Original Contract, by turns embraced and ridiculed by our Author, a few pages, perhaps, may not be ill bestowed in endeavouring to come to a precise notion about its reality and use. The stress laid on it formerly, and still, perhaps, by some, is such as renders it an object not undeserving of attention. I was in hopes, however, till I observed the notice taken of it by our author, that this chimera had been effectually demolished by Mr. HUME<sup>1</sup>. I think

XXXVI.  
Original  
Contract, a  
fiction.

<sup>1</sup> I. In the third Volume of his TREATISE on HUMAN NATURE.

Our Author, one would think, had never so much as opened that celebrated book: of which the criminality in the eyes of some, and the merits in the eyes of others, have since been almost effaced by the splendour of more recent productions of the same pen. The magnanimity of our Author scorned, perhaps, or his circumspection feared, to derive instruction from an enemy: or, what is still more probable, he knew not that the subject had been so much as touched upon by that penetrating and acute metaphysician, whose works lie so much out of the beaten track of Academic reading. But here, as it happens, there is no matter for such fears. Those men, who are most alarmed at the dangers of a free enquiry; those who are most intimately convinced that the surest way to truth is by hearing nothing but on one side, will, I dare answer almost, find nothing of that which they deem poison in this third volume. I

I. Notion  
of the Ori-  
ginal Con-  
tract over-  
thrown by  
Mr. HUME.

we hear not so much of it now as formerly. The indestructible prerogatives of mankind have no need to be supported upon the sandy foundation of a fiction.

would not wish to send the Reader to any other than this, which, if I recollect aright, stands clear of the objections that have of late been urged, with so much vehemence, against the work in general<sup>a</sup>. As to the two first, the Author himself, I am inclined to think, is not ill disposed, at present, to join with those who are of opinion, that they might, without any great loss to the science of Human Nature, be dispensed with. The like might be said, perhaps, of a considerable part, even of this. But, after all retrenchments, there will still remain enough to have laid mankind under indelible obligations. That the foundations of all *virtue* are laid in *utility*, is there demonstrated, after a few exceptions made, with the strongest force of evidence: but I see not, any more than Helvetius saw, what need there was for the exceptions.

2. History of a mind perplexed by fiction.

2. For my own part, I well remember, no sooner had I read that part of the work which touches on this subject, than I felt as if scales had fallen from my eyes. I then, for the first time, learnt to call the cause of the people the cause of Virtue.

Perhaps a short sketch of the wanderings of a raw but well-intentioned mind, in its researches after moral truth, may, on this occasion, be not unuseful: for the history of one mind is the history of many. The writings of the honest, but prejudiced, Earl of Clarendon, to whose integrity nothing was wanting, and to whose wisdom little, but the fortune of living something later; and the contagion of a monkish atmosphere; these, and other concurrent causes, had lifted my infant affections on the side of despotism. The Genius of the place I dwelt in, the authority of the state, the voice of the Church in her solemn offices; all these taught me to call Charles a Martyr, and his opponents rebels. I saw innovation, where indeed innovation, but a glorious innovation, was, in their efforts to withstand him. I saw falsehood, where indeed falsehood was, in their disavowals of innovation. I saw selfishness, and an obedience to the call of passion, in the efforts of the oppressed to rescue themselves from oppression. I saw strong countenance lent in the sacred writings to monarchic government: and none to any other. I saw *passive obedience* deep stamped with the seal of the Christian Virtues of humility and self-denial.

Conversing with Lawyers, I found them full of the virtues of their Original Contract, as a recipe of sovereign efficacy for reconciling the accidental necessity of resistance with the general duty of submission. This drug of theirs they administered to me to calm my scruples. But my unpractised stomach revolted against their opiate. I bid them open to me that page of history in which the solemnization of this important contract was recorded. They shrunk from this challenge; nor could they, when thus pressed, do otherwise than our Author has done, confess

<sup>a</sup> By Dr. BEATTIE, in his *Essay on the Immutability of Truth*.

XXXVII.

CHAP.  
I.

With respect to this, and other fictions, there was once a time, perhaps, when they had their use. With instruments of this temper, I will not deny but that some political work may have been done, and that useful work, which, under the then circumstances of things, could hardly have been done with any other. But the season of *Fiction* is now over: insomuch, that what formerly might have been tolerated and countenanced under that name, would, if now attempted to be set on foot, be censured and stigmatized under the harsher appellations of *incroachment* or *imposture*. To attempt to introduce any *new* one, would be *now* a crime: for which reason there is much danger, without any use, in vaunting and propagating such as have been introduced already. In point of political discernment, the universal spread of learning has raised mankind in a manner to a level with each other, in comparison of what they have been in any former time: nor is any man now so far elevated above his fellows, as that he should be indulged in the dangerous licence of cheating them for their good.

XXXVII.  
Fictions in  
general  
mischie-  
vous in the  
present  
state of  
things.

✕

the whole to be a fiction. This, methought, looked ill. It seemed to me the acknowledgment of a bad cause, the bringing a fiction to support it. 'To prove fiction, indeed,' said I, 'there is need of fiction; but it is the characteristic of truth to need no proof but truth. Have you then really any such privilege as that of coining facts? You are spending argument to no purpose. Indulge yourselves in the licence of supposing that to be true which is not, and as well may you suppose that proposition itself to be true, which you wish to prove, as that other whereby you hope to prove it.' Thus continued I unsatisfying, and unsatisfied, till I learnt to see that *utility* was the test and measure of all virtue; of loyalty as much as any; and that the obligation to minister to general happiness, was an obligation paramount to and inclusive of every other. Having thus got the instruction I stood in need of, I sat down to make my profit of it. I bid adieu to the original contract: and I left it to those to amuse themselves with this rattle, who could think they needed it.

XXXVIII.  
This had a  
momentary  
use.

As to the fiction now before us, in the character of an *argumentum ad hominem* coming when it did, and managed as it was, it succeeded to admiration.

That compacts, by whomsoever entered into, *ought* to be kept;—that men are *bound* by compacts, are propositions which men, without knowing or enquiring why, were disposed universally to accede to. The observance of promises they had been accustomed to see pretty constantly enforced. They had been accustomed to see Kings, as well as others, behave themselves as if bound by them. This proposition, then, 'that men are bound by compacts;' and this other, 'that, if one party performs not his part, the other is released from his,' being propositions which no man disputed, were propositions which no man had any call to prove. In theory they were assumed for axioms: and in practice they were observed as rules<sup>1</sup>. If, on any occasion, it was thought proper to make a shew of proving them, it was rather for form's sake than for any thing else: and that, rather in the way of memento or instruction to acquiescing auditors, than in the way of proof against opponents. On such an occasion the common place retinue of phrases was at hand; *Justice*, *Right Reason* required it, the *Law of Nature* commanded it, and so forth; all which are but so many ways of intimating that a man is firmly persuaded of the truth of this or that moral proposition, though he either thinks he *need not*, or finds he *can't*, tell *why*.

A compact, or contract. <sup>1</sup> A compact or contract (for the two words on this occasion, at least, are used in the same sense) may, I think, be defined, a pair of promises, by two persons reciprocally given, the one promise in consideration of the other.

Men were too obviously and too generally interested in the observance of these rules to entertain doubts concerning the force of any arguments they saw employed in their support.—It is an old observation how Interest smooths the road to Faith.

CHAP.  
I.

XXXIX.

✓ A compact, then, it was said, was made by the King and people: the terms of it were to this effect. The people, on their part, promised to the King a general obedience. The King, on his part, promised to govern the people in such a particular manner always, as should be subservient to their happiness. I insist not on the words: I undertake only for the sense; as far as an imaginary engagement, so loosely and so variously worded by those who have imagined it, is capable of any decided signification. Assuming then, as a general rule, that promises, when made, ought to be observed; and, as a point of fact, that a promise to this effect in particular had been made by the party in question, men were more ready to deem themselves qualified to judge when it was such a promise was *broken*, than to decide directly and avowedly on the delicate question, when it was that a King acted so far in *opposition* to the happiness of his people, that it were better no longer to obey him.

XXXIX.  
Terms of the supposed contract stated.

XL.

It is manifest, on a very little consideration, that nothing was gained by this manœuvre after all: no difficulty removed by it. It was still necessary, and that as much as ever, that the question men studied to avoid should be determined, in order to determine the question they thought to substitute in its room.

✓ [It was still necessary to determine, whether the King

XL.  
Stated thus generally, it could not dispense men from entering into the question of utility, as was intended.



CHAP.  
I.

in question had, or had not acted so far in *opposition* to the happiness of his people, that it were better no longer to obey him ; in order to determine, whether the promise he was supposed to have made, had, or had not been broken. [For what was the supposed purport of this promise ?] It was no other than what has just been mentioned.

XLI.

XLI.  
Nor, if  
stated  
more par-  
ticularly,  
could it  
answer  
what was  
designed  
by it.

✓ Let it be said, that part at least of this promise was to govern in *subservience to Law*: that hereby a more precise rule was laid down for his conduct, by means of this supposal of a promise, than that other loose and general rule to govern in subservience to the *happiness of his people*: and that, by this means, it is the letter of the *Law* that forms the tenor of the rule.]  
 ✓ Now true it is, that the governing in opposition to *Law*, is *one* way of governing in opposition to the happiness of the people: the natural effect of such a contempt of the *Law* being, if not actually to destroy, at least to threaten with destruction, all those rights and privileges that are founded on it: rights and privileges on the enjoyment of which that happiness depends. [But still it is not this that can be safely taken for the entire purport of the promise here in question: and that for several reasons.] *First*, Because the most mischievous, and under certain constitutions the most feasible, method of governing in opposition to the happiness of the people, is, by setting the *Law* itself in opposition to their happiness. *Secondly*, Because it is a case very conceivable, that a *King* may, to a great degree, impair the happiness of his people without violating the letter of any single *Law*. *Thirdly*, Because extraordinary occasions may now and then occur, in which the happiness of the

people may be better promoted by acting, for the moment, in *opposition* to the Law, than in *subservience* to it. *Fourthly*, Because it is not any single violation of the Law, as such, that can properly be taken for a breach of his part of the contract, so as to be understood to have released the people from the obligation of performing theirs. For, to quit the fiction, and resume the language of plain truth, it is scarce ever any single violation of the Law that, by being *submitted to*, can produce so much mischief as shall surpass the probable mischief of *resisting it*. [If every single instance whatever of such a violation were to be deemed an entire dissolution of the contract, a man who reflects at all would scarce find anywhere, I believe, under the sun, that Government which he could allow to subsist for twenty years together.] It is plain, therefore, that to pass any sound decision upon the question which the inventors of this fiction substituted instead of the true one, the latter was still necessary to be decided. All they gained by their contrivance was, the convenience of deciding it obliquely, as it were, and by a side wind—that is, in a crude and hasty way, without any direct and steady examination.

CHAP.  
I.  
—+—

XLII.

But, after all, for what *reason* is it, that men *ought* to keep their promises? The moment any intelligible reason is given, it is this: that it is for the *advantage* of society they should keep them; and if they do not, that, as far as *punishment* will go, they should be *made* to keep them. It is for the advantage of the whole number that the promises of each individual should be kept: and, rather than they should not be kept, that such individuals as fail to keep them should be

XLII.  
Nor is it  
an original  
independ-  
ent prin-  
ciple.

Y  
t  
S  
C

CHAP.  
I.

punished. } If it be asked, how this appears? the answer is at hand:—Such is the benefit to gain, and mischief to avoid, by keeping them, as much more than compensates the mischief of so much punishment as is requisite to oblige men to it. Whether the dependence of *benefit* and *mischief* (that is, of *pleasure* and *pain*) upon men's conduct in this behalf, be as here stated, is a question of *fact*, to be decided, in the same manner that all other questions of fact are to be decided, by testimony, observation, and experience<sup>1</sup>.

## XLIII.

XLIII.  
Nor can it serve to prove anything, but what may be better proved without it.

This then, and no other, being the *reason* why men should be made to keep their promises, viz. that it is for the advantage of society that they should, is a reason that may as well be given at once, why *Kings*, on the one hand, in governing, should in general keep within established Laws, and (to speak universally) abstain from all such measures as tend to the unhappiness of their subjects: and, on the other hand, why *subjects* should obey Kings as long as they so conduct themselves, and no longer; [why they should obey in short so long as the probable mischiefs of obedience are less than the probable mischiefs of resistance: why, in a word, taking the whole body

<sup>1</sup> The importance which the observance of promises is of to the happiness of society, is placed in a very striking and satisfactory point of view, in a little apologue of MONTESQUIEU, entitled, *The History of the Troglodytes*\*. The Troglodytes are a people who pay no regard to promises. By the natural consequences of this disposition, they fall from one scene of misery into another; and are at last exterminated. The same Philosopher, in his *Spirit of Laws*, copying and refining upon the current jargon, feigns a Law for this and other purposes, after defining a Law to be a *relation*. How much more instructive on this head is the fable of the Troglodytes than the pseudo-metaphysical sophistry of the *Esprit des Loix*!

\* See the Collection of his Works.

together (it is their *duty* to obey, just so long as it is their *interest*, and no longer.) This being the case, what need of saying of the one, that *he* PROMISED SO to *govern*; of the other, that they PROMISED SO to *obey*, when the fact is otherwise?

CHAP.  
I.

XLIV.

True it is, that, in this country, according to ancient forms, some sort of vague promise of *good government* is made by Kings at the ceremony of their coronation: and let the acclamations, perhaps given, perhaps not given, by chance persons out of the surrounding multitude, be construed into a promise of *obedience* on the part of the *whole* multitude: that whole multitude itself, a small drop collected together by chance out of the ocean of the state: and let the two promises thus made be deemed to have formed a perfect *compact*:—not that either of them is declared to be the *consideration* of the other<sup>1</sup>.

XLIV.  
The *Coronation-oath* does not come up to the notion of it.

XLV.

Make the most of this concession, one experiment there is, by which every reflecting man may satisfy himself, I think, beyond a doubt, that it is the consideration of *utility*, and no other, that, secretly but unavoidably, has governed his judgment upon all these matters. The experiment is easy and decisive. It is but to reverse, in supposition, in the first place the import of the *particular* promise thus feigned; in the next place, the effect in point of *utility* of the observance of promises *in general*.—Suppose the King to promise that he would govern his subjects *not* according to Law; *not* in the view

XLV.  
The obligation of a promise will not stand against that of utility: while that of utility will gain that of a promise.

<sup>1</sup> V. supra. par. 38, note, p. 156.

CHAP. I. to promote their happiness:—would this be binding upon *him*? Suppose the people to promise they would obey him *at all events*, let him govern as he will; let him govern to their destruction. Would this be binding upon *them*? Suppose the constant and universal effect of an observance of promises were to produce *mischief*, would it *then* be men's *duty* to observe them? Would it *then* be *right* to make Laws, and apply punishment to *oblige* men to observe them?

## XLVI.

XLVI.  
fallacy  
evaded.

'No;'  
(it may perhaps be replied) 'but for this reason; among promises, some there are that, as every one allows, are void: now these you have been supposing, are unquestionably of the number. A promise that is in itself *void*, cannot, it is true, create any obligation. But allow the promise to be *valid*, and it is the promise itself that creates the obligation, and nothing else.' The fallacy of this argument it is easy to perceive. For what is it then that the promise depends on for its *validity*? what is it that being *present* makes it *valid*? what is it that being *wanting* makes it *void*? To acknowledge that any *one* promise may be void, is to acknowledge that if any *other* is *binding*, it is not merely because it is a promise. That circumstance then, whatever it be, on which the validity of a promise depends, that circumstance, I say, and not the promise itself must, it is plain, be the cause of the obligation on which a promise is apt in general to carry with it.

## XLVII.

XLVII.  
the obligation of a promise,

But farther. Allow, for argument sake, what we have disproved: allow that the obligation of a promise

is independent of every other : allow that a promise is binding *propria vi*—Binding then on whom ? On him certainly who makes it. Admit this : For what reason is the same individual promise to be binding on those who *never* made it ? The King, *fifty years ago*, promised my *Great-Grandfather* to govern him according to Law : my *Great-Grandfather*, *fifty years ago*, promised the King to obey him according to Law. The King, *just now*, promised my *neighbour* to govern him according to Law : my *neighbour*, *just now*, promised the King to obey him according to Law.—Be it so—What are these promises, all or any of them, to *me* ? To make answer to this question, some other principle, it is manifest, must be resorted to, than that of the *intrinsic* obligation of promises upon those who make them.

CHAP.

I.

were it even independent, would not be extensive enough for the purpose.

XLVIII.

\* ( Now this *other* principle that still recurs upon us, what other can it be than the *principle of UTILITY* ? The principle which furnishes us with that *reason*, which alone depends not upon any higher reason, but which is itself the sole and all-sufficient reason for every point of practice whatsoever. )

XLVIII.

But the principle of UTILITY is all-sufficient.

## CHAPTER II.

### FORMS OF GOVERNMENT.

CHAP.  
II.  
—♦—  
I.  
Subject  
of the  
present  
chapter.

#### I.

THE contents of the whole digression we are examining, were distributed, we may remember, at the outset of this Essay, into five divisions. The first, relative to the manner in which Government in general was formed, has already been examined in the preceding chapter. The next, relative to the different *species* or *forms* it may assume, comes now to be considered.

#### II.

II.  
Theo-  
logical  
flourish  
of our  
Author.

The first object that strikes us in this division of our subject is the theological flourish it sets out with. In God may be said, though in a peculiar sense, to be our Author's strength. In theology he has found a not unfrequent source, of ornament to divert us, of authority to overawe us, from sounding into the shallowness of his doctrine <sup>1</sup>.

<sup>1</sup> This is what there would be occasion to shew at large, were what he says of LAW in *general*, and of the LAWS of *nature*, and *revelation* in particular, to be examined.

## III.

That governors, of some sort or other, we must have, is what he has been shewing in the manner we have seen in the last chapter. Now for *endowments* to qualify them for the exercise of their function. These endowments then, as if it were to make them shew the brighter, and to keep them, as much as possible, from being soiled by the rough hands of impertinent speculators, he has chosen should be of æthereal texture, and has fetched them from the clouds.

III.  
Governors :  
celestial  
endowments  
found for  
them.

‘All mankind<sup>1</sup>,’ he says, ‘will agree that government should be reposed in such persons in whom those qualities are most likely to be found, the perfection of which are among the attributes of Him who is emphatically styled the Supreme Being: the three great requisites, I mean, of wisdom, of goodness, and of power.’

But let us see the whole passage as it stands—

## IV.

‘But as all the members of Society,’ (meaning *natural* Society) ‘are naturally EQUAL,’ (i. e. I suppose, with respect to *political* power, of which none of them as yet have any) ‘it may be asked,’ (continues he) ‘in whose hands are the reins of government to be intrusted? To this the general answer is easy; but the application of it to particular cases, has occasioned one half of those mischiefs which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons in whom those qualities are most

IV.  
The pas-  
sage re-  
cited.

<sup>1</sup> 1 Comm. p. 48.



CHAP.  
II.

likely to be found, the perfection of which are among the attributes of Him who is emphatically styled the Supreme Being ; the three grand requisites, I mean, of wisdom, goodness, and of power : wisdom, to discern the real interest of the community ; goodness, to endeavour always to pursue that real interest ; and strength or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.'

V.

V.  
Theology  
in such an  
occasion as  
is imper-  
nent.

Every thing in its place. Theology in a sermon, or a catechism. But in this place, the flourish we have seen, might, for every purpose of instruction, have much better, it should seem, been spared. What purpose the idea of that tremendous and incomprehensible Being thus unnecessarily introduced can answer, I cannot see, unless it were to bewilder and entrance the reader ; as it seems to have bewildered and entranced the writer. Beginning thus, is beginning at the wrong end : it is explaining *ignotum per ignotius*. It is not from the attributes of the Deity, that an idea is to be had of any qualities in men : on the contrary, it is from what we see of the qualities of men, that we obtain the feeble idea we can frame to ourselves, of the attributes of the Deity.

VI.

VI.  
Difficulty  
leads  
him into.

We shall soon see whether it be light or darkness our Author has brought back from this excursion to the clouds. The qualifications he has pitched upon for those in whose hands Government is to be reposed we see are *three* : wisdom, goodness, and power.

Now of these three, one there is which, I doubt, will give him some trouble to know what to do with. I mean that of *Power*: which, looking upon it as a jewel, it should seem, that would give a lustre to the royal diadem, he was for importing from the celestial regions. In heaven, indeed, we shall not dispute its being to be found; and that at all junctures alike. But the parallel, I doubt, already fails. In the earthly governors in question, or, to speak more properly, candidates for government, by the very supposition there can not, at the juncture he supposes, be any such thing. *Power* is that very quality which, in consideration of these other qualities, which, it is supposed, are possessed by them already, they are now waiting to receive.

CHAP.  
II.

## VII.

By Power in this place, I, for my part, mean *political* power: the only sort of power our Author could mean: the only sort of power that is here in question. A little farther on we shall find him speaking of this endowment as being possessed, and that in the highest degree, by a King, a single person. *Natural* power therefore, mere organical power, the faculty of giving the hardest blows, can never, it is plain, be that which he meant to number among the attributes of this godlike personage.

VII.  
Power,  
either  
natural or  
political.

## VIII.

We see then the dilemma our Author's theology has brought him into, by putting him upon reckoning *power* among the qualifications of his candidates. Power is either natural or political. *Political* power is what they cannot have by the supposition: for that is the very thing that is to be created, and which,

VIII.  
In neither  
sense can  
it be attri-  
buted as he  
attributes

CHAP.  
II.

by the establishment of Government, men are going to confer on them.] If any, then, it must be *natural* power; the natural strength that a man possesses of himself without the help of Government. But of this, then, if this be it, there is more, if we may believe our Author, in a single member of a society, than in that member and all the rest of the society put together<sup>1</sup>.

## IX.

IX.  
What it is  
that may.

This difficulty, if possible, one should be glad to see cleared up. The truth is, I take it, that in what our Author has said of power, he has been speaking, as it were, by anticipation: and that what he means by it, is not any power of either kind actually possessed by any man, or body of men, at the juncture he supposes, but only [a *capacity*, if one may call it so, of *retaining* and *putting* into action political power, whensoever it shall have been conferred.] Now, of actual power, the quantity that is possessed is, in every case, one and the same: for it is neither more nor less than the supreme power. [But as to the capacity above spoken of, there do seem, indeed, to be good grounds for supposing it to subsist in a higher degree in a *single* man than in a *body*.]

## X.

X.  
And for  
what rea-  
son.

These grounds it will not be expected that I should display at large: a slight sketch will be sufficient.—  
The efficacy of power is, in part at least, in proportion to the promptitude of obedience: the promptitude of obedience is, in part, in proportion to the promptitude of command:—command is an expression of will: a

<sup>1</sup> V. infra, par. 32, p. 178. Monarchy, which is the government of *one*, 'is the most powerful form of government,' he says, 'of any:' more so than Democracy, which he describes as being the Government of *all*.

will is sooner formed by one than many.] And this, or something like it, I take to be the plain English of our Author's metaphor, where he tells us<sup>1</sup>, as we shall see a little farther on<sup>2</sup>, that [a monarchy is the most powerful' [form of government] 'of any, all the sinews of government being knit together, and united in the hands of the prince.]

CHAP.  
II.

### XI.

The next paragraph, short as it is, contains variety of matter. The first two sentences of it are to let us know, that with regard to the manner in which each of the *particular* governments that we know of have been formed, he thinks proper to pass it by. A third is to intimate, for the second time, that all governments must be absolute in some hands or other. In the fourth and last, he favours us with a very comfortable piece of intelligence; the truth of which, but for his averment, few of us perhaps would have suspected. This is, that the qualifications mentioned by the last paragraph as *requisite* to be possessed by all Governors of states are, or at least once upon a time were, *actually* possessed by them: i. e. according to the opinion of somebody; but of what somebody is not altogether clear: whether in the opinion of these Governors themselves, or of the persons governed by them.

XI.  
Heterogeneous contents of the next paragraph.

### XII.

'How the several forms of government we now see in the world at first actually began,' says our Author, 'is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they

XII.  
The paragraph recited.

<sup>1</sup> Comm. p. 50.

<sup>2</sup> Par. 32.

CHAP.  
II.

---

began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the OPINION of the FOUNDERS of such respective states, either expressly given or collected from their *tacit* APPROBATION) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.'

## XIII.

XIII.  
Paradoxical assertion in the latter part of it, as if all governments were the result of a free preference.

Who those persons are whom our Author means here by the word *founders*; whether those who became the *Governors* of the states in question, or those who became the *governed*, or both together, is what I would not take upon me to determine. For aught I know he may have meant neither the one nor the other, but some third person. And, indeed, what I am vehemently inclined to suspect is, that, in our Author's large conception, the mighty and extensive domains of ATHENS and SPARTA, of which we read so much at school and at college, consisting each of several score of miles square, represented, at the time this paragraph was writing, the whole universe: and the respective æras of *Solon* and *Lycurgus*, the whole period of the history of those states.

## XIV.

XIV.  
Reasons for supposing this to have been the meaning of it.

The words 'founders,'—'opinion,'—'approbation,'—in short the whole complexion of the sentence is such as brings to one's view a system of government utterly different from the generality of those we have before our eyes; a system in which one would think neither caprice, nor violence, nor accident, nor pre-

judice, nor passion, had any share: a system uniform, comprehensive, and simultaneous; planned with phlegmatic deliberation; established by full and general assent: such, in short, as, according to common imagination, were the systems laid down by the two sages above-mentioned. If this be the case, the object he had in mind when he said *Founders*, might be neither *Governors* nor *governed*, but some *neutral* person: such as those sages, chosen as they were in a manner as umpires, might be considered with regard to the persons who, under the prior constitution, whatever it was, had stood respectively in those two relations.

CHAP.  
II.

## XV.

All this, however, is but conjecture: In the position itself neither this, nor any other restriction is expressed. It is delivered explicitly and emphatically in the character of an universal one. 'In ALL OF THEM,' he assures us, 'this authority,' (the supreme authority) 'is placed in those hands, wherein, according to the *opinion* of the *founders* of such respective states, these "qualities of wisdom, goodness, and power," are the most likely to be found.' In this character it cannot but throw a singular light on history. I can see no end, indeed, to the discoveries it leads to, all of them equally new and edifying. When the Spaniards, for example, became masters of the empire of Mexico, a vulgar politician might suppose it was because such of the Mexicans as remained unexterminated, could not help it. No such thing—It was because the Spaniards were of 'opinion' or the Mexicans themselves were of 'opinion' (which of the two is not altogether clear) that in Charles Vth, and his successors, more goodness (of which they had

XV.  
The doctrine of it applied to particular instances.

Applied to particular instances.

CHAP.  
II.

such abundant proofs) as well as wisdom, was likely to be found, than in all the Mexicans put together. The same persuasion obtained between Charlemagne and the German Saxons with respect to the goodness and wisdom of Charlemagne :—between William the Norman and the English Saxons :—between Mahomet II and the subjects of John Paleologus :—between Odoacer and those of Augustulus :—between the Tartar Gingiskan and the Chinese of his time :—between the Tartars Chang-ti and Cam-ghi, and the Chinese of their times :—between the Protector Cromwell and the Scotch :—between William III and the Irish Papists :—between Cæsar and the Gauls :—in short, between the Thirty Tyrants, so called, and the Athenians, whom our Author seems to have had in view :—to mention these examples only, out of as many hundred as might be required. All this, if we may trust our Author, he has the ‘goodness’ to believe: and by such lessons is the penetration of students to be sharpened for piercing into the depths of politics.

XVI.  
General contents of the six remaining paragraphs relating to the subject of this chapter.

XVI.

So much for the introductory paragraph.—The main part of the subject is treated of in six others: the general contents of which are as follow.

XVII.

XVII.  
Of the first paragraph.

In the first he tells us how many different forms of government there are according to the division of the ancients: which division he adopts. These are three: Monarchy, Aristocracy, and Democracy.

XVIII.

XVIII.  
Second.

The next is to tell us, that by the *sovereign* POWER he means that of ‘making laws.’

XIX.

In a third he gives us the advantages and disadvantages of these three different forms of government.

XIX.  
Third.

XX.

In a fourth he tell us that these are all the ancients would allow of.

XX.  
Fourth.

XXI.

A fifth is to tell us that the British form of government is different from each of them; being a combination of all, and possessing the advantages of all.

XXI.  
Fifth.

XXII.

In the sixth, and last, he shews us that it could not possess these advantages, if, instead of being what it is, it were either of those others: and tells us what it is that may destroy it. These two last it will be sufficient here to mention: to examine them will be the task of our next chapter.

XXII.  
Sixth.

XXIII.

Monarchy is that form of Government in which the power of making Laws is lodged in the hands of a *single* member of the state in question. Aristocracy is that form of Government in which the power of making laws is lodged in the hands of *several* members. Democracy is that form of government in which the power of making laws is lodged in the hands of '*all*' of them put together. These, according to our Author, are the definitions of the ancients; and these, therefore, without difficulty, are the definitions of our Author.

XXIII.  
Definitions of the three sorts of governments according to our Author.



CHAP.  
II.

## XXIV.

XXIV.  
The para-  
graph re-  
cited.

‘The political writers of antiquity,’ says he, ‘will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly, consisting of all the members of a community, which is called a Democracy; the second, when it is lodged in a council composed of select members, and then it is styled an Aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a Monarchy. All other species of government they say are either corruptions of, or reducible to these three.’

## XXV.

XXV.  
And the  
next.

‘By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; and all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end.’

## XXVI.

XXVI.  
How he  
assigns  
them their  
respective  
qualifica-  
tions.

Having thus got three regular simple forms of Government (this anomalous complex one of our own out of the question) and just as many qualifications to divide among them; of each of which, by what he told us a while ago, each form of Government must have some share, it is easy to see how their allotments will be made out. Each form of Government will

possess one of these qualities in perfection, taking its chance, if one may say so, for its share in the two others.

CHAP.  
II.

## XXVII.

Among these three different forms of Government then, it should seem according to our Author's account of them, there is not much to choose. Each of them has a *qualification*, an *endowment*, to itself.

XXVII.  
All appearing equally eligible in his view of them.

Each of them is completely characterized by this qualification. No intimation is given of any pre-eminence among these qualifications, one above another. Should there be any dispute concerning the preference to be given to any of these forms of government, as proper a method as any of settling it, to judge from this view of them, is that of cross and pile. Hence we may infer, that all the governments that ever were, or will be (except a very particular one that we shall come to presently, that is to say our own) are upon a par: that of ATHENS with that of PERSIA; that of GENEVA with that of MOROCCO: since they are all of them, he tells us, 'corruptions of, or reducible to,' one of these. This is happy. A legislator cannot do amiss. He may save himself the expense of thinking. The choice of a king was once determined, we are told, by the neighing of a horse. The choice of a form of Government might be determined so as well.

## XXVIII.

As to our own form of government, however, this, it is plain, being that which it seemed good to take for the theme of his panegyric, and being made out of the other three, will possess the advantages of all of them put together; and that without any of the

XXVIII.  
How to the British Constitution.

disadvantages; the disadvantages vanishing at the word of command, or even without it, as not being suitable to the purpose.

## XXIX.

XXIX.  
Contra-  
diction he  
falls into,  
in sup-  
posing ✓  
other sorts  
of govern-  
ment than  
these  
three,  
described  
as they are  
by him.

At the end of the paragraph which gives us the above definitions, one observation there is that is a little puzzling. [‘Other species of government,’ we are given to understand, there are besides these; but then those others, if not ‘reducible to,’ are but ‘corruptions of these.’] Now, what there is in any of these to be corrupted, is not so easy to understand. [The essence of these several forms of government, we must always remember, is placed by him, solely and entirely, in the article of *number*: in the ratio of the number of the *Governors*, (for so for shortness we will style those in whose hands is lodged this ‘power of making laws’) to that of the *governed*. If the number of the former be, to that of the latter, as *one* to *all*, then is the form of Government a Monarchy: if as *all* to *all*, then is it a Democracy: if as some number *between one and all* to *all*, then is it an Aristocracy. Now then, if we can conceive a fourth number, which not being more than all, is neither one nor all, nor any thing between one and all, we can conceive a form of Government, which, upon due proof, may appear to be a corruption of some one or other of these three.] If not, we must look for the corruption somewhere else: Suppose it were in our Author’s *reason* <sup>2</sup>.

<sup>1</sup> By the laws of GERMANY, such and such states are to furnish so many men to the general army of the empire: some of them so many men and one half; others, so many and one third; others again, if I mistake not, so many and one fourth. One of these half, third-part, or quarter-men, suppose, possesses himself of the Government: here then we have a kind of corruption of a Monarchy. Is this what our Author had in view?

<sup>2</sup> A more suitable place to look for *corruption* in, if we may take his own word for it, there cannot be. ‘Every man’s reason,’ he assures

## XXX.

Not but that we may meet, indeed, with several other hard-worded names for forms of Government: but these names were only so many names for one or other of those three. We hear often of a *Tyranny*: but this is neither more nor less than the name a man gives to our Author's Monarchy, when out of humour with it. It is still the government of number *one*. We hear now and then, too, of a sort of Government called an *Oligarchy*: but this is neither more nor less than the name a man gives to our Author's Aristocracy, in the same case. It is still the Government of some number or other, *between one and all*. In fine, we hear now and then of a sort of government fit to break one's teeth, called an *Ochlocracy*: but this is neither more nor less than the name a man gives to a Democracy in the same case. It is still that sort of government, which, according to our Author, is the Government of *all*.

XXX.  
Governments the same as these under other names.

## XXXI.

Let us now see how he has disposed of his three qualifications among his three sorts or forms of Government. Upon Monarchy, we shall find, he has bestowed the perfection of power; on Aristocracy, of wisdom; on Democracy, of goodness; each of these forms having just enough, we may suppose, of the two remaining qualifications besides its own peculiar one to make up the necessary complement of 'quali-

XXXI.  
Qualifications of the three forms, how allotted—the subject resumed.

us', 'is corrupt;' and not only that, but 'his understanding full of ignorance and error.' With regard to others, it were as well not to be too positive: but with regard to a man's self, what he tells us from experience, it would be ill manners to dispute with him.

\* 1 Comm p. 41.

ties requisite for supremacy.' Kings are, (nay were before they were Kings, since it was this qualification determined their subjects to make them Kings<sup>1</sup>), as strong as so many Hercules's; but then, as to their wisdom, or their goodness, there is not much to say. The members of an Aristocracy are so many Solomons: but then they are not such sturdy folks as your Kings; nor, if the truth is to be spoken, have they much more honesty than their neighbours. As to the members of a Democracy, they are the best sort of people in the world; but then they are but a puny sort of gentry, as to strength, put them all together; and are apt to be a little defective in point of understanding.

XXXII.  
The para-  
graph re-  
cited.

## XXXII.

'In a democracy,' says he, 'where the right of making laws resides in the people at large, public virtue or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found than in the other frames of Government; being composed, or intended to be composed, of the most experienced citizens; but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any, all the sinews of government being knit together and united in the hand of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes.'

<sup>1</sup> Comm. p. 48.

## XXXIII.

{ Thus these three species of government have all of them their several perfections and imperfections. } XXXIII. And the next.  
 Democracies are usually the best calculated to direct the end of a law ; aristocracies to invent the means by which that end shall be obtained ; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three ; for though Cicero declares himself of opinion, *esse optimé constitutam rempublicam, quae ex tribus generibus illis, regali, optimo, et populari sit modicé confusa* ; yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim ; and one, that if effected, could never be lasting or secure.'

## XXXIV.

In the midst of this fine-spun ratiocination, an accident has happened, of which our Author seems not to be aware. One of his accidents, as a logician would say, has lost its subject: one of the qualifications he has been telling us of, is, somehow or other, become vacant: the form of Government he designed it for, having unluckily slipped through his fingers in the handling. I mean Democracy; which he, and, according to him, the Ancients, make out to be the Government of all. Now 'all' is a great many; so many that, I much doubt, it will be rather a difficult matter to find these high and mighty personages power enough, so much as to make a decent figure with. The members of this redoubtable Commonwealth will be still worse off, I doubt, in point of subjects, than *Trinculo* in the play, or than the

XXXIV.  
Democracy, as described by him, no Government at all.

potentates, whom some late navigators found lording it, with might and main, 'κρατέρηφι βίηφι,' over a Spanish settlement: there were three members of the Government; and they had one subject among them all<sup>1</sup>. Let him examine it a little, and it will turn out, I take it, to be precisely that sort of Government, and no other, which one can conceive to obtain, where there is no Government at all. Our Author, we may remember, had shrewd doubts about the existence of a *state of nature*<sup>2</sup>: grant him his Democracy, and it exists in his Democracy<sup>3</sup>.

## XXXV.

XXXV.  
The qualification  
designed  
for it be-  
come va-  
cant.

The qualification of *goodness*, I think it was, that belonged to the Government of *all*, while there was such a Government. This having taken its flight, as we have seen, to the region of nonentities, the qualification that was designed for it remains upon his hands: he is at liberty, therefore, to make a compli-

<sup>1</sup> See HAWKESWORTH'S *Voyages*.

The condition of these imaginary sovereigns puts one in mind of the story of, I forget what King's Fool. The Fool had stuck himself up one day, with great gravity, in the King's throne, with a stick, by way of a sceptre, in one hand, and a ball in the other: being asked what he was doing, he answered, '*reigning*.' Much the same sort of reign, I take it, would be that of the members of our Author's Democracy.

<sup>2</sup> V. *supra*, ch. I. par. VI.

<sup>3</sup> What is curious is, that the same persons who tell you (having read as much) that Democracy is a form of Government under which the supreme power is vested in all the members of a state, will also tell you (having also read as much) that the Athenian Commonwealth was a Democracy. Now the truth is, that in the Athenian Commonwealth, upon the most moderate computation, it is not one tenth part of the inhabitants of the Athenian state that ever at a time partook of the supreme power: women, children, and slaves, being taken into the account<sup>a</sup>. Civil Lawyers, indeed, will tell you, with a grave face, that a slave is *nobody*; as Common Lawyers will, that a bastard is the *son of nobody*. But, to an unprejudiced eye, the condition of a state is the condition of all the individuals, without distinction, that compose it.

<sup>a</sup> See, among Mr. HUME'S *Essays*, that on the *populousness of ancient nations*.

ment of it to Aristocracy or to Monarchy, which best suits him. Perhaps it were as well to give it to Monarchy; the title of that form of Government to its own peculiar qualification, *power*, being, as we have seen, rather an equivocal one: or else, which, perhaps, is as good a way of settling matters as any, he may set them to cast lots.

CHAP.  
II.



## CHAPTER III.

### BRITISH CONSTITUTION.

CHAP.  
III.

#### I.

I.  
Our Au-  
thor's  
panegyric  
on the  
British  
Constitu-  
tion.

WITH a set of *data*, such as we have seen in the last chapter, we may judge whether our Author can meet with any difficulty in proving the British Constitution to be the best of all possible governments, or indeed any thing else that he has a mind. In his paragraph on this subject there are several things that lay claim to our attention. But it is necessary we should have it under our eye.

#### II.

II.  
The para-  
graph re-  
cited.

'But happily for us in this island the British Constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch that are to be found in the most absolute monarchy: and, as the legislature of the kingdom is entrusted to three distinct powers entirely independent of each other; first, the King; secondly, the Lords Spiritual and Temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their

wisdom, their valour, or their property; and thirdly, the House of Commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British Parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous.'

CHAP.  
III.

III.

'Here then is lodged the sovereignty of the British Constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of Government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the King and House of Lords, our laws might be providently made and well executed, but they might not always have the good of the people in view: if lodged in the King and Commons, we should want that circumspection and mediatory caution, which the wisdom of the Peers is to afford: if the supreme rights of legislature were lodged in the two Houses only, and the King had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the

III.  
And that  
which fol-  
lows it.

CHAP.  
III.

kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But ~~the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest.~~ For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed from that which was originally set up by the general consent and fundamental act of the society; and such a change, however effected, is, according to Mr. Locke (who perhaps carries his theory too far) at once an entire dissolution of the bands of Government, and the people would be reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.'

## IV.

IV.  
Executive  
power—  
is men-  
tion of it  
incongru-  
ously in-  
troduced.

In considering the first of these two paragraphs, in the first place, the phenomenon we should little expect to see from any thing that goes before, is a certain *executive power*, that now, for the first time, bolts out upon us without warning or introduction.

The power, the only power our Author has been speaking of all along till now, is the *legislative*. 'Tis to this, and this alone, that he has given the name of '*sovereign power*.' 'Tis this power, the different distributions of which he makes the characteristics of his three different forms of government. 'Tis with these different distributions, distributions made of the legislative power, that, according to his account, are connected the several qualifications laid down by him, 'as

requisites for supremacy:’ qualifications in the possession of which consist all the advantages which can belong to any form of Government. Coming now then to the British Constitution, it is in the superior degree in which these qualifications of the legislative body are possessed by it, that its peculiar excellence is to consist. It is by possessing the qualification of strength, that it possesses the advantage of a monarchy. But how is it then that, by his account, it possesses the qualification of strength? By any disposition made of the legislative power? By the legislative power’s being lodged in the hands of a single person, as in the case of a monarchy? No; but to a disposition made of a new power, which comes in, as it were, in a parenthesis, a new power which we now hear of for the first time, a power which has not, by any description given of it, been distinguished from the legislative, an *executive*.

CHAP.  
III.

V.

What then is this same executive power? I doubt our Author would not find it a very easy matter to inform us. ‘Why not?’ says an objector—‘is it not that power which in this country the King has in addition to his share in the legislative?’ Be it so: the difficulty for a moment is staved off. But that it is far enough from being solved, a few questions will soon shew us. This power, is it that only which the King really *has*, or is it all that he is said to have? Is it that only which he really has, and which he exercises, or is it that also, which although he be said to have it, he neither does exercise, nor may exercise? Does it include judiciary power or not? If it does, does it include the power of making as well *particular* decisions and orders, as *general*, *per-*

V.  
Difficulty  
of deter-  
mining  
what it is  
as contra-  
distinct  
to legisla-  
tive.

*manent, spontaneous* regulations of procedure, such as are some of those we see made by judges? Doth it include supreme military power, and that as well in ordinary as in a time of martial law? Doth it include the supreme *fiscal* power<sup>1</sup>; and, in general, that power which, extending as well over the public money as over every other article of public property, may be styled the *dispensatorial*<sup>2</sup>? Doth it include the power of granting patents for inventions, and charters of incorporation? Doth it include the right of making bye-laws in corporations? And is the right of making bye-laws in corporations the superior right to that of conferring the power to make them, or is it that there is an executive power that is superior to a legislative? This *executive* again, doth it include the right of substituting the laws of war to the laws of peace; and *vice versâ*, the laws of peace to the laws of war? Doth it include the right of restraining the trade of subjects by treaties with foreign powers? Doth it include the right of delivering over, by virtue of the like treaties, large bodies of subjects to foreign laws? —He that would understand what power is executive and not legislative, and what legislative and not

<sup>1</sup> By *fiscal* power I mean that which in this country is exercised by what is called the Board of Treasury.

<sup>2</sup> By *dispensatorial* power I mean as well that which is exercised by the Board of Treasury, as those others which are executed in the several offices styled with us the War Office, Admiralty Board, Navy Board, Board of Ordnance, and Board of Works: excepting from the business of all these offices, the power of appointing persons to fill other subordinate offices: a power which seems to be of a distinct nature from that of making disposition of any article of public property.

[Power, political power, is either over *persons* or over *things*. The powers, then, that have been mentioned above, in as far as they concern *things*, are powers over such *things* as are the property of the public: powers which differ in this from those which constitute private ownership, in that the former are, in the main, not *beneficial* (that is, to the possessors themselves) and *indiscriminate*; but *fiduciary*, and *limited* in their exercise to such *acts* as are conducive to the *special* purposes of *public* benefit and security.]

executive, he that would mark out and delineate the different species of constitutional powers, he that would describe either what *is*, or what *ought to be* the constitution of a country, and particularly of this country, let him *think of these things*.

CHAP.  
III.

VI.

In the next place we are told in a parenthesis (it being a matter so plain as to be taken for granted) that 'each of these branches of the Legislature is *independent*,'—yes, '*entirely independent*,' of the two others.—Is this then really the case? Those who consider the influence which the King and so many of the Lords have in the election of members of the House of Commons; the power which the King has, at a minute's warning, of putting an end to the existence of any House of Commons; those who consider the influence which the King has over both Houses, by offices of dignity and profit given and taken away again at pleasure; those who consider that the King, on the other hand, depends for his daily bread on both Houses, but more particularly on the House of Commons; not to mention a variety of other circumstances that might be noticed in the same view, will judge what degree of precision there was in our Author's meaning, when he so roundly asserted the affirmative.

VI.  
Independence inaccurately attributed to the three branches of the Government.

VII.

One parenthesis more: for this sentence teems with parenthesis within parenthesis. To this we are indebted for a very interesting piece of intelligence: nothing less than a full and true account of the personal merits of the members of the House of Lords for the time being. This he is enabled to do by means of a contrivance of his own, no less simple

VII.  
A happy discovery: merit inseparable from high station.

than it is ingenious: to wit, that of looking at their titles. It is by looking at men's titles that he perceives, not merely that they *ought* to possess certain merits, not that there is reason to *wish* they may possess them, but that they do *actually* possess them, and that it is by possessing those merits that they came to possess these titles. Seeing that some are bishops, he knows that they are pious: seeing that some are peers, he knows that they are wise, rich, valiant<sup>1</sup>.

<sup>1</sup> 'The Lords spiritual and temporal, [p. 50] which,' says our Author, 'is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property.'

I have distributed, I think, these endowments, as our Author could not but intend they should be distributed. Birth, to such of the members of that assembly as have their seat in it by *descent*: and, as to those who may chance from time to time to sit there by *creation*, wisdom, valour, and property in *common* among the temporal peers; and piety, singly but entirely, among my Lords the Bishops. As to the other three endowments, if there were any of them to which these right reverend persons could lay any decent claim, it would be wisdom: but since worldly wisdom is what it would be an ill compliment to attribute to them, and the wisdom which is from above is fairly included under piety, I conclude that, when secured in the exclusive possession of this grand virtue, they have all that was intended them. There is a remarkable period in our history, at which, measuring by our Author's scale, these three virtues seem to have been at the boiling point. It was in Queen Anne's reign, not long after the time of the hard frost. I mean in the year 1711. In that auspicious year, these three virtues issued forth, it seems, with such exuberance, as to furnish merit enough to stock no fewer than a dozen respectable persons, who, upon the strength of it, were all made Barons in a day. Unhappily indeed, so little read was a right reverend and contemporary historian<sup>a</sup>, in our Author's method of 'discerning of spirits,' as to fancy, it was neither more nor less than the necessity of making a majority that introduced so large a body of new members thus suddenly into the house. But I leave it to those who are read in the history of that time, to judge of the ground there can be for so romantic an imagination. As to piety, the peculiar endowment of the mitre, the stock there is of that virtue, should, to judge by the like standard, be, at all times, pretty much upon a level: at all times, without question, at a *maximum*. This is what we can make the less doubt of, since, with regard to ecclesiastical matters, in general, our Author, as in another place he assures us, has had the happiness to find, that 'every thing is as it should be'<sup>b</sup>.

<sup>a</sup> See Bishop Burnet's History of his own Times. Vol. 2.

<sup>b</sup> Vol. 4. Chap. IV. p. 49.

## VIII.

## VIII.

The more we consider the application he makes of the common-place notions concerning the three forms of Government to our own, the more we shall see the wide difference there is between reading and reflecting. Our own he finds to be a combination of these three. It has a Monarchical branch, an Aristocratical, and a Democratical. The Aristocratical is the House of Lords; the Democratical is the House of Commons. Much had our Author read, at school, doubtless, and at college, of the wisdom and gravity of the Spartan senate: something, probably, in Montesquieu, and elsewhere, about the Venetian. He had read of the turbulence and extravagance of the Athenian mob. Full of these ideas, the House of Lords were to be our Spartans or Venetians; the House of Commons, our Athenians. With respect then to the point of wisdom, (for that of honesty we will pass by) the consequence is obvious. The House of Commons, however excellent in point of honesty, is an assembly of less *wisdom* than that of the House of Lords. This is what our Author makes no scruple of assuring us. A Duke's son gets a seat in the House of Commons. There needs no more to make him the very model of an Athenian cobbler.

Supposed qualities of the three pretended forms of Government not applicable to our own.

## IX.

## IX.

Let us find out, if we can, whence this notion of the want of wisdom in the members of a Democracy, and of the abundance of it in those of an Aristocracy, could have had its rise. We shall then see with what degree of propriety such a notion can be transferred to our Houses of Lords and Commons.

Wisdom: why likely to be wanting in the members of a Democracy —

In the members of a Democracy in particular, there



is likely to be a want of wisdom—Why? The greater part being poor, are, when they begin to take upon them the management of affairs, uneducated: being uneducated, they are illiterate: being illiterate, they are ignorant. [Ignorant, therefore, and *unwise*, if that be what is meant by ignorant, they *begin*.] Depending for their daily bread on the profits of some petty traffic, or the labour of some manual occupation, they are nailed to the work-board, or the counter. In the business of Government, it is only by fits and starts that they have leisure so much as to *act*: they have no leisure to *reflect*. [Ignorant therefore they *continue*.—But in what degree is this the case with the members of our House of Commons?

## X.

X.  
—and present  
in those of  
an Aristoc-  
racy.

On the other hand, the members of an Aristocracy, being few, are rich: either they are members of the Aristocracy, because they are rich; or they are rich, because they are members of the Aristocracy. Being rich, they are educated: being educated, they are learned: being learned, they are knowing. [They are at leisure to *reflect*, as well as *act*.] They may therefore naturally be expected to become more knowing, that is more wise, as they persevere. In what degree is this the case with the members of the House of Lords more than with those of the House of Commons? The fact is, as every body sees, that either the members of the House of Commons are as much at leisure as those of the House of Lords; or, if occupied, occupied in such a way as tends to give them a more than ordinary insight into some particular department of Government. In whom shall we expect to find so much knowledge of Law as in a professed Lawyer? of Trade, as in a Merchant?

## XI.

But hold—Our Author, when he attributes to the members of an Aristocracy more wisdom than to those of a Democracy, has a reason of his own.

XI.  
Why, according to our Author.

Let us endeavour to understand it, and then apply it, as we have applied the others. In Aristocratical bodies, we are to understand there is more experience;

at least it is intended by some body or other there *should be*: which, it seems, answers the same purpose as if there *was*. 'In Aristocracies,' says our Author, 'there is more wisdom to be found, than in the other frames of Government; being composed,' continues he, 'or intended to be composed, of the most experienced citizens<sup>1</sup>.' On this ground then it is, that we are to take for granted, that the members of the House of Lords have more wisdom among them, than those of the House of Commons. It is this article of *experience* that, being a qualification possessed by the members of an Aristocratical body, as such, in a superior degree to that in which it can be possessed by a democratical body, is to afford us a particular ground for attributing a greater share of wisdom to the members of the upper house, than to those of the lower.

## XII.

How it is that a member of an aristocracy, as such, is, of all things, to have attained more *experience* than the member of a democracy, our Author has not told us; nor what it is this experience is to consist of. Is it experience of things *preparatory* to, but different from, the business of governing? This should rather go by the name of *knowledge*. Is it experience of the

XII.  
Superiority of 'experience,' how far a proof of superiority of wisdom.

<sup>1</sup> P. 50.

CHAP.  
III.

business itself of governing? Let us see. For the member of the one body, as of the other, there must be a time when he first enters upon this business. They both enter upon it, suppose on the same day. Now then is it on that same day that one is more experienced in it than the other? or is it on that day ten years?

## XIII.

XIII.  
How far  
attributa-  
ble to aris-  
tocracies  
in general.

Those indeed who recollect what we observed but now<sup>1</sup>, may answer without hesitation,—on that day ten years. The reason was there given. It is neither more nor less, than that want of leisure which the bulk of the numerous members of a Democracy must necessarily labour under, more than those of an Aristocracy. But of this, what intimation is there to be collected, from any thing that has been suggested by our Author?

## XIV.

XIV.  
How far  
to our  
House of  
Lords in  
particular.

So much with respect to Aristocracies in general. It happens also by accident, that that particular branch of our *own* government to which he has given the name of the Aristocratical,—the House of Lords,—has actually greater opportunities of acquiring the qualification of experience, than that other branch, the House of Commons, to which he has given the name of the democratical. But to what is this owing? not to any thing in the characteristic natures of those two bodies, not to the one's being Aristocratical, and the other Democratical; but to a circumstance, entirely foreign and accidental, which we shall see presently. But let us observe his reasoning. The House of Lords, he says, is an assembly that behoves

<sup>1</sup> V. *supra*, par. 9.

to have more wisdom in it, than the House of Commons. This is the proposition. Now for the proof. The first is an Aristocratical assembly; the second a Democratical. An Aristocratical assembly has more experience than a Democratical; and on that account more wisdom. Therefore the House of Lords, as was to be proved, has more wisdom than the House of Commons. [Now, what the whole of the argument rests upon, we may observe, is this fact, that an Aristocratical assembly, as such, has more experience than a Democratical one; but this, with Aristocratical assemblies in general, we see, is not, for any reason that our Author has given us, the case. At the same time with respect to our House of Lords in particular, in comparison with the House of Commons, it does happen to be the case, owing to this simple circumstance: the members of the House of Lords, when once they begin to sit, sit on for life: those of the House of Commons only from seven years to seven years, or it may happen, less.

## XV.

[ In speaking, however, in this place, of experience, I would rather be understood to mean opportunity of acquiring experience, than experience itself. For actual experience depends upon other concurrent causes.

XV.  
What is to be understood by the word 'experience.'

## XVI.

[ It is, however, from superiority of experience alone, that our Author derives superiority of wisdom. He has, indeed, the proverb in his favour: 'Experience, it has been said of old, 'is the Mother of Wisdom: ' be it so;—but then Interest is the Father. There is even an Interest that is the Father of Experience.

XVI.  
Opportunity of experience not the sole cause of wisdom.

Among the members of the House of Commons, though none so poor as to be illiterate, are many whose fortunes, according to the common phrase, are yet to make. [The fortunes of those of the House of Lords (I speak in general) are made already. The members of the House of Commons may hope to be members of the House of Lords.] The members of the House of Lords have no higher House of Lords to rise to. [Is it natural for those to be most active who have the *least*, or those who have the *most* interest to be so?] Are the experienced those who are the least, or those who are the most active? Does experience come to men when asleep, or when awake? Is it the members of the House of Lords that are the most active, or of the House of Commons? To speak plain, is it in the House of Lords that there is most business done, or in the House of Commons? Was it *after* the *fish* was caught that the successor of St. Peter used the *net*, or was it *before* <sup>1</sup>? [In a word is there most wisdom ordinarily where there is least, or where there is most to gain by being wise <sup>2</sup>]

<sup>1</sup> Every body has heard the story of him who, from a fisherman, was made Archbishop, and then Pope. While Archbishop, it was his custom every day, after dinner, to have a fishing net spread upon his table, by way of a memento, as he used to say, of the meanness of his original. This farcical ostentation of humility was what, in those days, contributed not a little to the increase of his reputation. Soon after his exaltation to St. Peter's chair, one of his intimates was taking notice to him, one day, when dinner was over, of the table's not being decked as usual. 'Peace,' answered the Holy Father, 'when the fish is caught, there is no occasion for the net.'

<sup>2</sup> In the House of Commons itself, is it by the opulent and independent Country gentlemen that the chief business of the House is transacted, or by aspiring, and perhaps needy Courtiers? The man who would persevere in the toil of Government, without any other reward than the favour of the people, is certainly the man for the people to make choice of. But such men are at best but rare. Were it not for those children of Corruption we have been speaking of, the business of the state, I doubt, would stagnate

XVII.

CHAP.  
III.

XVII.

A word or two more with respect to the characteristic qualifications, as our Author states them, of the higher assembly of our legislature. Experience is, in virtue of their being an aristocratical assembly, to afford them wisdom: thus far we were arrived before. But he now pushes the deduction a step farther.—Wisdom is to afford them ‘circumspection and mediatory caution;’ qualifications which it seems as if we should see nothing of, were it not for them. Let us now put a case. The business, indeed, that originates in the House of Lords is, as things stand, so little, that our Author seems to forget that there is any. However, some there is. A bill then originates with the Lords, and is sent down to the Commons.—As to ‘circumspection’ I say nothing: *that*, let us hope, is not wanting to either House. But whose province is ‘mediatory caution,’ now?

Mediatory caution not the peculiar province of the Lords.

XVIII.

Thus much concerning these two branches of our legislature, so long as they continue what, according to our Author’s principles, they are at present: the House of Lords the Aristocratical branch: the House of Commons the Democratical. A little while and we shall see them so; but again a little while, perhaps, and we shall not see them so. By what characteristic does our Author distinguish an Aristocratical legislative body from a Democratical one? By that of *number*: by the number of the persons that compose them: by that, and that alone: for no other has he given.] Now, therefore, to judge by that, the House of Lords, at present, indeed, *is* the Aristocratical branch: the House of Commons in comparison at

XVIII.  
The Democratical branch of our Legislature, upon our Author’s principles, not distinguishable from the Aristocratical.

CHAP.  
III.

least with the other, the Democratical. Thus far is well. But should the list of nobility swell at the rate we have sometimes seen it, there is an assignable period, and that, perhaps, at no very enormous distance, at which the assembly of the Lords will be more numerous than that of the Commons. Which will then be the Aristocratical branch of our Legislature? Upon our Author's principles, the House of Commons. Which the Democratical? The House of Lords.

## XIX.

XIX.  
All-perfection of the British Constitution mathematically demonstrated.

The final cause we are to observe, and finishing exploit, the '*portus et sabbatum*,' as Lord Bacon might perhaps have called it<sup>1</sup>, of this sublime and edifying dissertation, is this demonstration, he has been giving us, of the perfection of the British Form of Government. This demonstration (for by no less a title ought it to be called) is founded, we may have observed, altogether upon the properties of *numbers*: properties, newly discovered indeed, and of an extraordinary complexion, *moral* properties; but properties, however, so it seems, of numbers<sup>2</sup>. 'Tis in the nature then of numbers we shall find these characteristic properties of the three Forms of Government, if anywhere. Now the properties of numbers are universally allowed to be the proper subject of that mode of demonstration which is called *mathematical*. The proof our Author has given has therefore already in it the *essence* of such a demonstration. To be complete at all points, it wants nothing but the *form*. This deficiency is no other than what an under-rate workman might easily supply. A mere technical

<sup>1</sup> It is what he says of Theology with respect to the Sciences.—V. Augm. Scient. L. VIII. c. III. p. 97.

<sup>2</sup> V. supra, ch. II. pars. 24, 32, pp. 174, 178.



operation does the business. That humble task it shall be my endeavour to perform. The substantial honour I ascribe wholly to our Author, to whom only it is most due.

CHAP.  
III.

XX.

PROPOSITION.

THEOREM.

The British Government is all-perfect.

XX.  
The demonstration drawn up in form.

DEMONSTRATION.

By definition,	1	The British Government = Monarchy + Aristocracy + Democracy.
Again, by definition,	2	Monarchy = the Government of 1.
Also,	3	Democracy = the Government of <i>all</i> .
Also,	4	Aristocracy = the Government of some number between 1 and <i>all</i> .
Put	5	<i>All</i> = 1,000,000.
Put also	6	The number of governors in an Aristocracy = 1,000.
Now then, by assumption,	7	1 has + strength – wisdom – honesty.
Also,	8	1 000 has + wisdom – strength – honesty.
Also,	9	1 000,000 has + honesty – strength – wisdom.
Rejecting – wisdom – honesty <sup>1</sup> in [7]	10	1 has + strength.
Also rejecting – strength – wisdom in [8]	11	1,000 has + wisdom.

<sup>1</sup> Which is done without any sort of ceremony, the quantities marked in the step with the negative sign, being as so many *fluents*, which are at a *maximum*, or a *minimum*, just as happens to be most convenient.



CHAP.  
III.  
—♦—

Also rejecting	12	1,000,000 has + honesty.
— strength —		
wisdom in [9]		
Putting together the expressions [10], [11], and [12],	13	1 + 1 000 + 1,000,000 has strength + wisdom + honesty.
But by the definitions [1], [2], [3], [4], and the suppositions [5], [6],	14	The British Government = 1 + 1,000 + 1,000,000.
Therefore, by [13]	15	The British Government has + strength + wisdom + honesty.
Changing the expression,	16	The British Government is all-powerful + all-wise + all-honest.
But by definition	17	All-powerful + all-wise + all-honest = all-perfect.
Therefore, by [16] and [17]	18	The British Government is all-perfect, Q. E. D.

☞ SCHOLIUM. After the same manner it may be proved to be *all-weak*, *all-foolish*, and *all-knavish*.

XXI.

XXI.  
Conclusion of the  
Chapter.

Thus much for the British Constitution ; and for the grounds of that pre-eminence which it boasts, I trust, indeed, not without reason, above all others that are known: Such is the idea our Author gives us of those grounds.—‘ You are not satisfied with it then,’ says some one.—‘ Not perfectly.—‘ What is then your own ?’—In truth this is more than I have yet quite settled. I may have settled it with myself, and not think it worth the giving: but if ever I do think it

worth the giving, it will hardly be in the form of a comment on a digression stuffed into the belly of a definition. At any rate it is not likely to be much wished for, by those, who have read what has been given us on this subject by an ingenious foreigner: since it is to a foreigner we were destined to owe the best idea that has yet been given of a subject so much our own. Our Author has copied: but Mr. DE LOLME has thought.

The topic which our Author has thus brought upon the carpet (let any one judge with what necessity) is in respect to some parts of it that we have seen, rather of an invidious nature. Since, however, it *has* been brought upon the carpet, I have treated it with that plainness with which an Englishman of all others is bound to treat it, because an Englishman may thus treat it and be safe. I have said what the subject seemed to demand, without any fear indeed, but without any wish, to give offence: resolving not to permit myself to consider how this or that man might chance to take it. I have spoken without sycophantical respects indeed, yet I hope not without decency: certainly without any party spleen. I chose rather to leave it to our Author to compliment men in the lump: and to stand aghast with admiration at the virtues of men unknown<sup>1</sup>. Our Author will do as shall seem meet to him. For my part, if ever I stand forth and sing the song of eulogy to great men, it shall be not because they *occupy* their station, but because they *deserve* it.

<sup>1</sup> V. *supra*, par. 7.

## CHAPTER IV.

### RIGHT OF THE SUPREME POWER TO MAKE LAWS.

CHAP.

IV.

I.

Subject of  
the para-  
graph in  
question  
as stated  
by our  
Author.

I.

WE now come to the third topic touched upon in the digression; namely, [the *right*, as our Author phrases it, which the Supreme Power has of making laws.] And this topic occupies one pretty long paragraph. The title here given to it is the same which in the next succeeding paragraph he has found for it himself. This is fortunate: for, to have been obliged to find a title for it myself, is what would have been to the last degree distressing. To *entitle* a discourse, is to represent the drift of it. But, to represent the drift of this, is a task which, so long at least as I confine my consideration to the paragraph itself, bids defiance to my utmost efforts.

II.

II.  
Drift of it,  
as con-  
jectured.

'Tis to another passage or two, a passage or two that we have already seen starting up in distant parts of this digression, that I am indebted for such conjectures as I have been able to make up.

These conjectures, however, I could not have ventured so far to rely on, as on the strength of them to have furnished the paragraph with a title of my own

framing. The danger of misrepresentation was too great; a kind of danger which a man cannot but lie imminently exposed to, who ventures to put a precise meaning upon a discourse which in itself has none. That I may just mention, however, in this place, the result of them; what he is really aiming at, I take it, is, to inculcate a persuasion that in every state there must subsist, in some hands or other, a power that is *absolute*. I mention it thus prematurely, that the reader may have some clue to guide him in his progress through the paragraph; which it is now time I should recite.

CHAP.  
IV.  
—♦♦—

III.

‘Having,’ says our Author, ‘thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, to prescribe the rule of civil action. And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But in as much as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political*

III.  
The paragraph recited.

CHAP.  
IV.  
—♦—♦—

union ; by the consent of all persons to submit their own private wills to the will of one man, or of one, or more assemblies of men, to whom the supreme authority is entrusted : and this will of that one man, or assemblage of men is, in different states, according to their different constitutions, understood to be law.'

## IV.

IV.  
The sense  
of it con-  
sidered in  
itself.

The other passages which suggested to me the construction I have ventured to put upon this, shall be mentioned by and by. First, let us try what is to be made of it by itself.

## V.

V.  
The lead-  
ing argu-  
ment in it  
is sugatory.

The obscurity in which the first sentence of this paragraph is enveloped, is such, that I know not how to go about bringing it to light, without borrowing a word or two of logicians. Laying aside the preamble, the body of it, viz. 'as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws,' may be considered as constituting that sort of syllogism which logicians call an *enthymeme*. An *enthymeme* consists of two *propositions*; a *consequent* and an *antecedent*. 'The power of making laws,' says our Author, 'constitutes the supreme authority.' This is his *antecedent*. From hence it is he concludes, that 'wherever the supreme authority in any state resides, it is the right of that authority to make laws.' This then is his *consequent*.

Now so it is, that this *antecedent*, and this *consequent*, for any difference at least that I can possibly perceive in them, would turn out, were they but correctly worded, to mean precisely the same thing: for, after

saying that 'the power of making laws constitutes the supreme authority,' to tell us that, for that reason, 'the supreme authority' is (or has) the power (or the right) of making laws, is giving us, I take it, much the same sort of information, as it would be to us to be told that a thing is so, *because* it is so : a sort of a truth which there seems to be no very great occasion to send us upon 'discovering, in the end and institution of civil states.' That by the 'sovereign power,' he meant 'the power of making laws;' this, or something like it, is no more indeed than what he had told us over and over, and over again, with singular energy and anxiety, in his 46th page, in his 49th, and in, I know not how many, pages besides: always taking care, for precision's sake, to give a little variety to the expression: the words '*power*' and '*authority*,' sometimes, seemingly put for the same idea; sometimes seemingly opposed to each other: both of them sometimes denoting the *fictitious* being, the *abstract quality*; sometimes the *real* being or beings, the *person* or *persons* supposed to *possess* that *quality*.— Let us disentangle the sense from these ambiguities; let us learn to speak distinctly of the *persons*, and of the *quality* we attribute to them; and then let us make another effort to find a meaning for this perplexing passage.

VI.

By the 'supreme authority' then, (we may suppose our Author to say) 'I mean the same thing as when I say the power of making laws.' This is the proposition we took notice of above, under the name of the *antecedent*. This antecedent then, we may observe, is a definition: a definition, to wit, of the phrase 'supreme authority.' Now to define a phrase is, to translate it

VI.  
The antecedent stated anew.

CHAP.  
IV.

into another phrase, supposed to be better understood, and expressive of the same ideas. The supposition here then is, that the reader was already, of himself, tolerably well acquainted with the import of the phrase 'power of making laws:' that he was not at all, or was however less acquainted with the import of the phrase 'supreme authority.' Upon this supposition then, it is, that in order to his being made clearly to understand the latter, he is informed of its being synonymous to the former. Let us now introduce the mention of the *person*: let us add the word '*person*' to the definition; it will be the same definition still in substance, only a little more fully and precisely worded. *For a person to possess* the supreme authority, is *for a person to possess* the power of making laws. This then is what in substance has been already laid down in the *antecedent*.

## VII.

VII.  
The consequent new stated.

Now let us consider the *consequent*; which, when detached from the context, may be spoken of as making a sentence of itself. ['Wherever,' says he, 'the supreme authority in any state resides, it is the *right* of that authority to make Laws.'—By '*wherever*' I take it for granted, he means, '*in whatever persons*:' by '*authority*,' in the former part of the sentence,—*power*; by the same word, '*authority*,' in the latter part of the sentence,—*persons*.] [Corrected therefore, the sentence will stand thus: [*In whatever persons in any state the supreme power resides, it is the right of those persons to make Laws*.]

## VIII.

VIII.  
That it is identical with the antecedent:

The only word now remaining undisposed of, is the word '*right*.' And what to think of this, indeed

I know not: whether our Author had a meaning in it, or whether he had none. It is inserted, we may observe, in the latter part only of the sentence: it appears not in the former. Concerning this omission, two conjectures here present themselves: it may have happened by accident; or it may have been made by design. If by accident, then the case is, that the idea annexed to the word '*right*' is no other than what was meant to be included in the former part of the sentence, in which it is *not* expressed, as well as in the latter, in which it *is*. In this case it may, without any change in the signification, be expressed in both. [Let it then be expressed, and the sentence, take it altogether, will stand thus: *In whatever persons the right of exercising supreme power in any state resides, it is the right of those persons to make Laws.*] If this conjecture be the true one, and I am apt to think it is, we see once more, and, I trust, beyond all doubt, that the *consequent* in this *enthymeme* is but a repetition of the *antecedent*. We may judge then, whether it is from any such consideration as that of 'the end and institution of civil states,' or any other consideration that we are likely to gain any further conviction of the truth of this *conclusion*, than it presents us of itself. We may also form some judgment beforehand, what use or meaning there is likely to be in the assemblage of words that is to follow. ✓

IX.

What is possible, notwithstanding, however improbable, is, that the omission we have been speaking of was *designed*. In this case, what we are to understand is, that the word '*right*' was meant to introduce a new idea into this latter part of the sen-

IX.  
—or else  
nothing to  
the pur-  
pose.



CHAP.  
IV.

tence, over and above any that was meant to be suggested by the former. 'Right' then, according to this construction, in the one place, is to be considered as put in contradistinction to *fact* in the other. The sense is then, that *whatever persons* do actually *exercise supreme power*, (or what, according to the *antecedent* of the *enthymeme*, is the same thing, *the power of making laws*) *those persons* have the right to *exercise it*. But, in this case, neither does what is given as a *consequence* in any respect follow from the *antecedent*, nor can *any thing be* made of it, but what is altogether foreign to the rest of the discourse. So much indeed, that it seems more consonant to probability, as well as more favourable to our Author, to conclude that he had no meaning at all, than that he had this.

## X.

X.  
The rest of  
the para-  
graph new  
stated—  
supposed  
drift of it.

Let us now try what we can make of the remainder of the paragraph. Being ushered in by the word '*for*,' it seems to lay claim to the appellation of an argument. This argument, setting out, as we have seen, without an object, seems however to have found something like one at last, as if it had picked it up by the way. [This object, if I mistake it not, is to persuade men, that the *supreme power*, (that is the *person* or *persons* in use to exercise the supreme power in a state) ought, in all points without exception, to be obeyed.] What men intend, he says, to do when they are in a state, is to act, as if they were but 'one man.' But one man has but one will belonging to him. What they intend therefore, or what they *ought* to intend, (a slight difference which our Author seems not to be well aware of) is, to act as if they had but one will. To act as if they had but

one will, the way is, for them to 'join' all their wills 'together.' To do this, the most obvious way would be to join them '*naturally*:' but, as *wills* will not splice and dovetail like deal boards, the only feasible way is to join them '*politically*.' [Now the only way for men to join their wills together *politically*, is for them all to consent to submit their wills to the will of one. This one will, to which all others are to be submitted, is the will of those persons who are in use to exercise the supreme power;] whose wills again, when there happens to be many of them, have, by a process of which our Author has said nothing, been reduced (as we must suppose) into *one* already. So far our Author's argument. The above is the substance of it fairly given; not altogether with so much ornament, indeed, as he has given it, but, I trust, with somewhat more precision. The whole concludes, we may observe, with our Author's favourite identical proposition, or something like it, now for the twentieth time repeated.

CHAP.  
IV.  
—♦—  
The rest of  
the para-  
graph new  
stated.

XI.

Taking it altogether, it is, without question, a very ingenious argument: nor can any thing in the world answer the purpose better, except just in the case where it happens to be wanted. Not but that a veteran antagonist, trained up in the regular and accustomed discipline of legal fencing, such an one, indeed, *might* contrive perhaps, with due management, to give our Author the honour of the field. But should some undisciplined blunderer, like the Commissary's landlady, thrust in *quart*, when he should have thrust in *tierce*, I doubt much whether he might not get within our Author's *guard*.—I 'intend?'—I 'consent?'—I 'submit' myself?—'Who are you, I wonder, that

XI.  
Weakness  
of it as a  
persuasive  
to obedi-  
ence.

CHAP.  
IV.

✓ should know what I do better than I do myself? [As to "submitting my will" to the wills of the people who made this law you are speaking of,—what I know is, that I never "intended" any such thing: I abominate them, I tell you, and all they ever did, and have always *said* so: and as to my 'consent,' so far have I been from giving it to their law, that from the first to the last, I have protested against it with all my might.' So much for our refractory disputant.—What I should say to him I know: but what our Author could find to answer to him, is more than I can imagine<sup>1</sup>.

## XII.

XII.  
A prior paragraph supposed to be relative to the object of this.

Let us now return and pick up those other passages which we supposed to have a respect to the same design that seems to be in view in this. First comes the short introductory paragraph that ushers in the whole digression: a paragraph which, however short, and however imperfect with respect to the purpose of giving a general view of the contents of those which follow it, was, in despite of method, to expatiate upon this subject. Upon this subject, indeed, he does expatiate with a force of argument and energy of expression which nothing can withstand. 'This,' it begins, 'will necessarily lead us into a short enquiry concerning the nature of society and civil government<sup>2</sup>.'—

<sup>1</sup> One thing in the paragraph we are considering is observable; it is the concluding sentence, in which he brings together the ideas of *law* and *will*. Here then, in the tail of a digression, he comes nearer in fact, though without being aware of it, to the giving a just and precise idea of a law, than in any part of the definition itself from whence he is digressing. If, instead of saying that a law is a *will*, he had called it the *expression* of a *will*, and that sort of expression of a will which goes by the name of a *command*, his definition would, so far as this goes, have been clear as well as right. As it is, it is neither the one nor the other. But of this more, if at all, in another place. The definition of law is a matter of too much nicety and importance to be dispatched in a note.

<sup>2</sup> 1 Comm. 47.

This is all the intimation it gives of the contents of those paragraphs we have examined. Upon *this* before us it touches in energetic terms ; but more energetic than precise.—‘And the *natural*’ (it continues) ‘and *inherent* right that belongs to the sovereignty of a state,’ (*natural* right, observe, that belongs to the sovereignty of a *political* society) ‘wherever that sovereignty be lodged, of making and enforcing laws.’

CHAP.  
IV.



### XIII.

This is not all. The most emphatical passage is yet behind. It is a passage in that short paragraph<sup>1</sup> which we found to contain such a variety of matter. He is there speaking of the several forms of government now in being. [‘However they began,’ says he, ‘or by what right soever they subsist, there is and *must be* in all of them a *supreme, irresistible, absolute, uncontrolled* authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.]

XIII.  
Another.

### XIV.

The vehemence, the *δευότης*, of this passage is remarkable. He ransacks the language: he piles up, one upon another, four of the most tremendous epithets he can find ; he heaps Ossa upon Pelion : and, as if the English tongue did not furnish expressions strong or imposing enough, he tops the whole with a piece of formidable Latinity. From all this agitation, it is plain, I think, there is a something which he has very much at heart ; which he wishes, but fears, perhaps, to bring out undisguised ; which in several places, notwithstanding, bursts out involuntarily, as it were, before he is well ready for it ; and which, a

XIV.  
Agitation  
he betrays.

<sup>1</sup> 1 Comm. p. 48, supra, ch. II. par. 11.

CHAP.  
IV.

certain discretion, getting at last the upper hand of propensity, forces, as we have seen, to dribble away in a string of obscure sophisms. Thus oddly enough it happens, that that passage of them all, which, if I mistake not, is the only one that was meant to be dedicated expressly to the subject, is the least explicit on it <sup>1</sup>.

## XV.

XV.  
cause of it.

A courage much stauncher than our Author's might have wavered here. A task of no less intricacy was here to be travelled through, than that of adjusting the claims of those two jealous antagonists, Liberty and Government. A more invidious ground is scarcely to be found any where within the field of politics. Enemies encompass the traveller on every side. He can scarce stir but he must expect to be assaulted with the war-whoop of political heresy from one quarter or another. Difficult enough is the situation of him, who, in these defiles, feels himself impelled one way by fear, and another by affection.

## XVI.

XVI.  
resource  
e finds in  
obscurity.

To return to the paragraph which it was the more immediate business of this chapter to examine:— Were the path of obscurity less familiar to our Author, one should be tempted to imagine he had struck into it on the particular occasion before us, in the view of extricating himself from this dilemma. A discourse thus prudently indeterminate might express enough to keep fair with the rulers of the earth, without setting itself in direct array against the prejudices

<sup>1</sup> Another passage or two there is which might seem to glance the same way: but these I pass over as less material, after those which we have seen.

of the people. Viewed by different persons, it might present different aspects : to men in power it might recommend itself, and that from the first, under the character of a practical lesson of obedience for the use of the people ; while among the people themselves it might pass muster, for a time at least, in quality of a string of abstract scientific propositions of jurisprudence. It is not till some occasion for making application of it should occur, that its true use and efficacy would be brought to light. The people, no matter on what occasion, begin to murmur, and concert measures of resistance. Now then is the time for the latent virtues of this passage to be called forth. The book is to be opened to them, and in this passage they are to be shewn, what of themselves, perhaps, they would never have observed, a set of arguments curiously strung together and wrapped up, [in proof of the universal expedience, or rather *necessity*, of submission : a necessity which is to arise, not out of the reflection that *the probable mischiefs of resistance are greater than the probable mischiefs of obedience*] not out of any such debateable consideration ; but out of a something that is to be much more cogent and effectual : to wit, a certain *metaphysico-legal* impotence, which is to beget in them the sentiment, and answer all the purposes of a natural one. Armed, and full of indignation, our malcontents are making their way to the royal palace. In vain. A certain *estoppel* being made to bolt out upon them, in the manner we have seen, by the force of our Author's legal engineering, their arms are to fall, as it were by enchantment, from their hands. To disagree, to clamour, to oppose, to take back, in short, their wills again, is now, they are told, too late : it is what *cannot* be done : their wills have been put in *hotchpot* along

CHAP.  
IV.  
—♦—

with the rest: they *have* 'united,'—they *have* 'consented,'—they *have* 'submitted.'—Our Author having thus *put his hook into their nose*, they are to go back as they came, and all is peace. An ingenious contrivance this enough: but popular passion is not to be fooled, I doubt, so easily. Now and then, it is true, one error may be driven out, for a time, by an opposite error: one piece of nonsense by another piece of nonsense: but for barring the door effectually and for ever against all error and all nonsense, there is nothing like the simple truth.

## XVII.

XVII.  
Inconsistency of the present passage with a former.

[After all these pains taken to inculcate unreserved submission, would any one have expected to see our Author himself among the most eager to excite men to disobedience?] and that, perhaps, upon the most frivolous pretences? in short, upon any pretence whatsoever? Such, however, upon looking back a little, we shall find him. I say, among the most eager; for other men, at least the most enlightened advocates for liberty, are content with leaving it to subjects to resist, for their own sakes, on the footing of *permission*: this will not content our Author, but he must be forcing it upon them as a point of *duty*.

## XVIII.

XVIII.  
The former passage recited.

'Tis in a passage antecedent to the digression we are examining, but in the same section, that, speaking of the [pretended law of Nature, and of the law of revelation, 'no human laws,' he says, 'should be *suffered* to contradict these<sup>1</sup>.] The expression is remarkable. [It is not that no human laws should

<sup>1</sup> 1 Comm. p. 42.

contradict them: but that no human laws should be  
SUFFERED to contradict them.] He then proceeds  
to give us an example. This example, one might  
think, would be such as should have the effect of  
softening the dangerous tendency of the rule:—on  
the contrary, it is such as cannot but enhance it<sup>1</sup>;  
and, in the application of it to the rule, the substance  
of the latter is again repeated in still more explicit  
and energetic terms. ‘Nay,’ says he, speaking of the  
act he instances, ‘if any human law should allow  
or enjoin us to commit it, we are BOUND TO TRANS-  
GRESS that human law, or else we must offend both  
the natural and the divine.’

CHAP.  
IV.  
—♦—♦—♦—

### XIX.

The propriety of this dangerous maxim, so far  
as the Divine Law is concerned, is what I must refer  
to a future occasion for more particular consideration<sup>2</sup>.  
As to the *Law of Nature*, if (as I trust it will appear)  
it be nothing but a phrase<sup>3</sup>; if there be no other  
medium for proving any act to be an offence against

XIX.  
Dangerous  
tendency  
of it.

<sup>1</sup> It is that of murder. In the word here chosen there lurks a fallacy which makes the proposition the more dangerous as it is the more plausible. It is too important to be altogether past over: at the same time that a slight hint of it, in this place, is all that can be given. Murder is *killing* under certain *circumstances*.—Is the human law then to be allowed to define, in *dernier ressort*, what shall be those *circumstances*, or is it not? If yes, the case of a ‘human law allowing or enjoining us to commit it,’ is a case that is not so much as supposable: if *no*, adieu to all human laws: to the fire with our Statutes at large, our Reports, our Institutes, and all that we have hitherto been used to call our law books; our law books, the only law books we can be safe in trusting to, are Puffendorf and the Bible.

<sup>2</sup> According to our Author, indeed, it should be to no purpose to make any separate mention of the two laws; since the Divine Law, he tells us, is but ‘a part of’ that of Nature<sup>4</sup>. Of consequence, with respect to that part, at least, which is common to both, to be contrary to the one, is, of course, to be contrary to the other.

<sup>3</sup> This is what there would be occasion to shew more at large in examining some former parts of this section.

<sup>4</sup> 1 Comm. p. 42.



CHAP.  
IV.

it, than the mischievous tendency of such act ; if there be no other medium for proving a law of the *state* to be contrary to it, than the *inexpediency* of such law, unless the bare unfounded disapprobation of any one who thinks of it be called a proof [if a test for distinguishing such laws as would be *contrary* to the *LAW of Nature* from such as, *without* being contrary to it, are simply *inexpedient*, be that which neither our Author, nor any man else, so much as pretended ever to give] if, in a word, there be scarce any law whatever but what those who have not liked it have found, on some account or another, to be repugnant to some text of scripture ; [I see no remedy but that the natural tendency of such doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like.] What sort of government it is that can consist with such a disposition, I must leave to our Author to inform us.

## XX.

XX.  
The principle of UTILITY the only guide under these difficulties.

[It is the principle of *utility*, accurately apprehended and steadily applied, that affords the only clue to guide a man through these straits. It is for that, if any, and for that alone to furnish a decision which neither party shall dare in *theory* to disavow.] It is something to reconcile men even in theory. They are at least, *something* nearer to an effectual union, than when at variance as well in respect of theory as of practice.

## XXI.

XXI.  
Juncture for resistance.

[In speaking of the supposed contract between King and people<sup>1</sup>, I have already had occasion to give the description, and, as it appears to me, the

<sup>1</sup> Ch. I.

only *general* description that *can* be given, of that juncture at which, and not before, resistance to government becomes *commendable* } or, in other words, reconcilable to just notions, whether of *legal* or not, at least of *moral*, and, if there be any difference, *religious* duty<sup>1</sup>. What was there said was spoken, at the time, with reference to that particular branch of government which was then in question; the branch that in this country is administered by the King. But if it was just, as applied to *that* branch of government, and in *this* country, it could only be for the same reason that it is so when applied to the *whole* of government, and that in *any* country whatsoever. [It is *then*, we may say, and not till then, allowable to, if not incumbent on, every man, as well on the score of *duty* as of *interest*, to enter into measures of resistance ] [when, according to the best calculation he is able to make, *the probable mischiefs of resistance* (speaking with respect to the community in general) *appear less to him than the probable mischiefs of submission*. This then is to him, that is to each man in particular, the *juncture for resistance*.]

x  
|  
x

XXII.

[A natural question here is—by what *sign* shall this juncture be known? By what *common* signal alike conspicuous and perceptible to all? A question which is readily enough started, but to which, I hope, it will be almost as readily perceived that it is impossible to find an answer. *Common* sign for such a purpose, I, for my part, know of none: he must be more than a prophet, I think, that can shew us one. For that which shall serve a

XXII.  
Not characterizable by any common sign.  
x

<sup>1</sup> See Ch. V. par. 7, note 1.

CHAP.  
IV.

particular person, I have already given one—his own internal persuasion of a balance of *utility* on the side of resistance.]

## XXIII.

XXIII.  
Freedom  
in a gov-  
ernment  
depends  
not upon  
any limita-  
tion to the  
Supreme  
Power.

Unless such a sign then, which I think impossible, can be shewn [the *field*, if one may say so, of the supreme governor's authority, though not *infinite*, must unavoidably, I think, *unless where limited by express convention*<sup>1</sup>, be allowed to be *indefinite*.] Nor can I see any narrower, or other bounds to it, under this constitution, or under any other yet *freer* constitution, if there be one, than under the most *despotic*. Before the juncture I have been describing were arrived, resistance, even in a country like this, would come too soon: were the juncture arrived *already*, the time for resistance would be come already, under such a government even as any one should call *despotic*.

## XXIV.

XXIV.  
Principal  
circum-  
stances on  
which it  
does de-  
pend.

[In regard to a government that is *free*, and one that is *despotic*, wherein is it then that the difference consists?] Is it that those persons in whose hands that power is lodged which is acknowledged to be supreme, have less power in the one than in the other, when it is from custom that they derive it? By no means. Is it not that the power of one any more than of the other has any certain bounds to it? The distinction turns upon circumstances of a very different complexion:—on the *manner* in which that whole mass of power, which, taken together, is

<sup>1</sup> This respects the case where one state has, upon *terms*, submitted itself to the government of another: or where the governing bodies of a number of states agree to take directions in certain specified cases, from some *body* or other that is distinct from all of them: consisting of members, for instance, appointed out of each.

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

XXV.

[True then, it may be, that, owing to this last circumstance in particular, in a state thus circumstanced, the road to a revolution, if a revolution be necessary, is to appearance shorter; certainly more smooth and easy.] More likelihood, certainly there is of its being such a revolution as shall be the work of a number; and in which, therefore, the interests of a number are likely to be consulted. [Grant then, that by reason of these facilitating circumstances, the juncture itself may arrive sooner, and upon less provocation, under what is called a *free* government, than under what is called an *absolute* one] grant this;—yet till it *be* arrived, resistance is as much too soon under one of them as under the other.

XXV.  
Freedom  
in a gov-  
ernment—  
how far  
favourable  
to resist-  
ance.

CHAP.  
IV.

## XXVI.

XXVI.  
The su-  
preme  
power not  
limited in  
itself.

Let us avow then, in short, steadily but calmly, what our Author hazards with anxiety and agitation, that the authority of the supreme body cannot, *unless where limited by express convention*, be said to have any assignable, any certain bounds.—That to say there is any act they *cannot* do,—to speak of any thing of their's as being *illegal*,—as being *void*;—to speak of their exceeding their *authority* (whatever be the phrase)—their *power*, their *right*,—is, however common, an abuse of language.

## XXVII.

XXVII.  
Arguments  
that sup-  
pose it to  
be so un-  
satisfac-  
tory—

The legislature *cannot* do it? The legislature *cannot* make a law to this effect? Why cannot? What is there that should hinder them? Why not this, as well as so many other laws murmured at, perhaps, as inexpedient, yet submitted to without any question of the *right*? With men of the same party, with men whose affections are already lifted against the law in question, any thing will go down: any rubbish is good that will add fuel to the flame. But with regard to an impartial bystander, it is plain that it is not denying the right of the legislature, their *authority*, their *power*, or whatever be the word—it is not denying that they *can* do what is in question—it is not that, I say, or any discourse verging that way than can tend to give *him* the smallest satisfaction.

## XXVIII.

XXVIII.  
... and in-  
applicable  
to particu-  
lars.

Grant even the proposition in general:—What are we the nearer? Grant that there *are* certain bounds to the *authority* of the legislature:—Of what use is it to say so, when these bounds are what no body has

ever attempted to mark out to any useful purpose; that is, in any such manner whereby it might be known beforehand what description a law must be of to fall *within*, and what to fall *beyond* them? Grant that there *are* things which the legislature *cannot* do;—grant that there *are* laws which exceed the *power* of the legislature to establish. What rule does this sort of discourse furnish us for determining whether any one that is in question is, or is not of the number? As far as I can discover, none. Either the discourse goes on in the confusion it began; either all rests in vague assertions, and no intelligible argument at all is offered; or if any, such arguments as are drawn from the principle of *utility*: arguments which, in whatever variety of words expressed, come at last to neither more nor less than this; that the tendency of the law is, to a greater or a less degree, pernicious. If this then be the result of the argument, why not come home to it at once? Why turn aside into a wilderness of sophistry, when the path of plain reason is straight before us?

Any law  
may be held  
in violation

XXIX.

What practical inferences those who maintain this language mean should be deduced from it, is not altogether clear; nor, perhaps, does every one mean the same. Some who speak of a law as being *void* (for to this expression, not to travel through the whole list, I shall confine myself) would persuade us to look upon the authors of it as having thereby *forfeited*, as the phrase is, their *whole* power: as well that of giving force to the particular law in question, as to any other. These are they who, had they arrived at the same practical conclusion through the principle of utility, would have spoken of the law as

XXIX.  
What they  
lead to is  
either an  
appeal to  
the body  
of the  
people—

CHAP.  
IV.  
—♦—♦—♦—

being to such a degree pernicious, as that, were the bulk of the community to see it in its true light, *the probable mischief of resisting it would be less than the probable mischief of submitting to it.* These point, in the first instance, at *hostile* opposition.

## XXX.

XXX.  
—or to the  
udicial  
power.

Those who say nothing about forfeiture are commonly less violent in their views. These are they who, were they to ground themselves on the principle of utility, and, to use our language, would have spoken of the law as being mischievous indeed, but without speaking of it as being mischievous to the degree that has been just mentioned. The mode of opposition which they point to is one which passes under the appellation of a *legal* one.

## XXXI.

XXXI.  
Which  
tends to  
give it a  
control  
over the  
legislative.

Admit then the law to be void in their sense, and mark the consequences. The idea annexed to the epithet *void* is obtained from those instances in which we see it applied to a private instrument. The consequence of a *private* instrument's being void is, that all persons concerned are to act as if no such instrument had existed. The consequence, accordingly, of a *law's* being void must be, that people shall act as if there were no such law about the matter: and therefore that if any person in virtue of the mandate of the law should do anything in coercion of another person, which without such law he would be punishable for doing, he would still be punishable; to wit, by appointment of the judicial power. Let the law for instance, be a law imposing a tax: a man who should go about to levy the tax by force would be punishable as a trespasser: should he chance to be killed in the

attempt, the person killing him would *not* be punishable as for murder: should he kill, he himself *would*, perhaps, be punishable as for murder. To whose office does it appertain to do those acts in virtue of which such punishment would be inflicted? To that of the Judges. Applied to practice then, the effect of this language is, by an appeal made to the Judges, to confer on those magistrates a controlling power over the acts of the legislature.

CHAP.  
IV.  
—+—

XXXII.

By this management a *particular* purpose might perhaps, by chance be answered: and let this be supposed a good one. Still what benefit would, from the *general* tendency of such a doctrine, and such a practice in conformity to it, accrue to the body of the people is more than I can conceive. A Parliament, let it be supposed, is too much under the influence of the Crown: pays too little regard to the sentiments and the interests of the people. Be it so. The people at any rate, if not so great a share as they might and ought to have, have had, at least, *some* share in choosing it. Give to the Judges a power of annulling its acts; and you transfer a portion of the supreme power from an assembly which the people have had *some* share, at least, in choosing, to a set of men in the choice of whom they have not the least imaginable share: to a set of men appointed solely by the Crown: appointed *solely*, and avowedly and *constantly*, by that very magistrate whose partial and occasional influence is the very grievance you seek to remedy.

XXXII.  
Remedy  
worse than  
the dis-  
ease.

XXXIII.

In the heat of debate, some, perhaps, would be for saying of this management that it was transferring at

XXXIII.  
But not so  
bad as  
some might  
represent  
it.



once the supreme authority from the legislative power to the judicial. But this would be going too far on the other side. [There is a wide difference between a *positive* and a *negative* part in legislation. There is a wide difference again between a negative upon *reasons* given, and a negative without any. The power of *repealing* a law even for reasons given is a great power: too great indeed for Judges: but still very distinguishable from, and much inferior to that of *making* one<sup>1</sup>.]

## XXXIV.

XXXIV.  
The supreme  
power  
limitable  
by convention.

Let us now go back a little. [In denying the existence of any assignable bounds to the supreme power, I added<sup>2</sup>, 'unless where limited by express convention'] for this exception I could not but subjoin. Our Author indeed, in that passage in which, short as it is, he is the most explicit, leaves, we may observe, no room for it. 'However they began,' says he (speaking of the several forms of government) 'however they began, and by what right soever they subsist, there is and must be in ALL of them an authority that is absolute.'—To say this, however, of *all* governments without exception;—to say that *no* assemblage of men can subsist in a state of government, without being subject to some *one* body whose authority stands

<sup>1</sup> Notwithstanding what has been said, it would be in vain to dissemble, but that, upon occasion, an appeal of this sort may very well answer, and has, indeed, in general, a tendency to answer, in some sort, the purposes of those who espouse, or profess to espouse, the interests of the people. A public and authorised debate on the propriety of the law is by this means brought on. The artillery of the tongue is played off against the law, under cover of the law itself. An opportunity is gained of impressing sentiments unfavourable to it, upon a numerous and attentive audience. As to any other effects from such an appeal, let us believe that in the instances in which we have seen it made, it is the certainty of miscarriage that has been the encouragement to the attempt.

<sup>2</sup> V. *supra*, par. 26.

unlimited so much as by convention ; [to say, in short, that not even by convention can any limitation be made to the power of that body in a state which in other respects is supreme, would be saying, I take it, rather too much]: it would be saying that there is no such thing as government in the German Empire ; nor in the Dutch Provinces ; nor in the Swiss Cantons ; nor was of old in the Achaean league.

CHAP.  
IV.  
\*\*\*

XXXV.

In this mode of limitation I see not what there is that need surprise us. [By what is it that any degree of power (meaning *political power*) is established] [It is neither more nor less, as we have already had occasion to observe<sup>1</sup>, than a habit of, and disposition to obedience : *habit*, speaking with respect to *past* acts ; *disposition*, with respect to *future*.] This disposition it is as easy, or I am much mistaken, to conceive as being absent with regard to one sort of acts ; as present with regard to other. [For a body then, which is in other respects supreme, to be conceived as being with respect to a certain sort of acts, limited, all that is necessary is, that this sort of acts be in its description distinguishable from every other]

XXXV.  
—So as  
the term of  
it be ex-  
plicit.

XXXVI.

[By means of a convention then we are furnished with that common signal which, in other cases, we despaired of finding]<sup>2</sup>. A certain act is in the instrument of convention specified, with respect to which the government is therein precluded from issuing a law to a certain effect : whether to the effect of commanding the act, of permitting it, or of forbidding it.

XXXVI.  
Which fur-  
nishes  
what may  
be taken  
for a com-  
mon signal  
of resist-  
ance.

<sup>1</sup> V. supra, ch. I. par. 13, note.

<sup>2</sup> V. supra, par. 22.

CHAP.  
IV.

A law is issued to that effect notwithstanding. The issuing then of such a law (the sense of it, and likewise the sense of that part of the convention which provides against it being supposed clear) is a fact notorious and visible to all [in the issuing then of such a law we have a fact which is *capable* of being taken for that common signal we have been speaking of.] [These bounds the supreme body in question has marked out to its authority: of such a demarcation then what is the effect? either none at all, or this: that the disposition to obedience confines itself within these bounds. Beyond them the disposition is stopped from extending: beyond them the subject is no more prepared to obey the governing body of his own state, than that of any other. What difficulty, I say, there should be in conceiving a state of things to subsist in which the supreme authority is thus limited,—what greater difficulty in conceiving it with this limitation, than without any, I cannot see. The two states are, I must confess, to me alike conceivable: whether alike expedient,—alike conducive to the happiness of the people, is another question.

## XXXVII.

XXXVII.  
A *salvo* for  
reforma-  
tion.

[God forbid, that from any thing here said it should be concluded that in any society any convention is or can be made, which shall have the effect of setting up an insuperable bar to that which the parties affected shall deem a reformation]: [God forbid that any disease in the constitution of a state should be without its remedy.] Such might by some be thought to be the case, where that supreme body which in such a convention, was one of the contracting parties, having incorporated itself with that which was the other, no

longer subsists to give any new modification to the engagement. Many ways might however be found to make the requisite alteration, without any departure from the spirit of the engagement. Although that body itself which contracted the engagement be no more, a *larger body*, from whence the first is understood to have derived its title, may still subsist. Let this larger body be consulted. Various are the ways that might be conceived of doing this, and that without any disparagement to the dignity of the subsisting legislature : of doing it, I mean to such effect, as that, should the sense of such *larger body* be favourable to the alteration, it may be made by a law, which, in this case, neither ought to be, nor probably would be, regarded by the body of the people as a breach of the convention <sup>1</sup>.

<sup>1</sup> In Great Britain, for instance, suppose it were deemed necessary to make an alteration in the Act of Union. If in an article stipulated in favour of England, there need be no difficulty; so that there were a majority for the alteration among the English members, without reckoning the Scotch. The only difficulty would be with respect to an article stipulated in favour of Scotland; on account, to wit, of the small number of the Scotch members, in comparison with the English. In such a case, it would be highly expedient, to say no more, for the sake of preserving the public faith, and to avoid irritating the body of the nation, to take some method for making the establishment of the new law, depend upon their sentiments. One such method might be as follows. Let the new law in question be enacted in the common form. But let its commencement be deferred to a distant period, suppose a year or two: let it then, at the end of that period, be in force, unless petitioned against, by persons of such a description, and in such a number as might be supposed fairly to represent the sentiments of the people in general: persons, for instance, of the description of those who at the time of the Union, constituted the body of electors. To put the validity of the law out of dispute, it would be necessary the fact upon which it was made ultimately to depend, should be in its nature too notorious to be controverted. To determine therefore, whether the conditions upon which the invalidation of it was made to depend, had been complied with, is what must be left to the simple declaration of some person or persons; for instance the King. I offer this only as a general idea: and as one amongst many that perhaps might be offered in the same view. It will not be expected that I should here answer objections, or enter into details.

## XXXVIII.

XXXVIII.  
Notion of  
a natural  
limit to the  
supreme  
power,  
difficult to  
eradicate.

To return for a moment to the language used by those who speak of the supreme power as being limited in its own nature. One thing I would wish to have remembered. What is here said of the impropriety, and evil influence of that kind of discourse, is not intended to convey the smallest censure on those who use it, as if intentionally accessory to the ill effects it has a tendency to produce. It is rather a misfortune in the language, than a fault of any person in particular. The original of it is lost in the darkness of antiquity. We inherited it from our fathers, and, maugre all its inconveniencies, are likely, I doubt, to transmit it to our children.

## XXXIX.

XXXIX.  
This not a  
mere affair  
of words.

I cannot look upon this as a mere dispute of words. I cannot help persuading myself, that the disputes between contending parties—between the defenders of a law and the opposers of it, would stand a much better chance of being adjusted than at present, were they but explicitly and constantly referred at once to the principle of UTILITY. [The footing on which this principle rests every dispute, is that of matter of fact; that is, future fact—the probability of certain future contingencies.] Were the debate then conducted under the auspices of this principle, one of two things would happen: either men would come to an agreement concerning that probability, or they would see at length, after due discussion of the real grounds of the dispute, that no agreement was to be hoped for. They would at any rate see clearly and ex-

plicity, the point on which the disagreement turned. The discontented party would then take their resolution to resist or to submit, upon just grounds, according as it should appear to them worth their while—according to what should appear to them, the importance of the matter in dispute—according to what should appear to them the probability or improbability of success—*according, in short, as the mischiefs of submission should appear to bear a less, or a greater ratio to the mischiefs of resistance.* But the door to reconciliation would be much more open, when they saw that it might be not a mere affair of passion, but a difference of judgment, and that, for any thing they could know to the contrary, a sincere one, that was the ground of quarrel.

CHAP.  
IV.

XL.

All else is but womanish scolding and childish altercation, which is sure to irritate, and which never can persuade.—‘*I say, the legislature cannot do this—I say, that it can. I say, that to do this, exceeds the bounds of its authority—I say, it does not.*’—It is evident, that a pair of disputants setting out in this manner, may go on irritating and perplexing one another for everlasting, without the smallest chance of ever coming to an agreement. It is no more than announcing, and that in an obscure and at the same time, a peremptory and captious manner, their opposite persuasions, or rather affections, on a question of which neither of them sets himself to discuss the grounds. The question of utility, all this while, most probably, is never so much as at all brought upon the carpet: if it be, the language in which it is discussed is sure to be warped and clouded to make it match

XL.  
The above  
notion per-  
petuates  
wrangling.

CHAP. IV.  
—♦—  
with the obscure and entangled pattern we have seen.

## XLI.

XLI.  
The prin-  
ciple of  
UTILITY  
puts an  
end to it.

On the other hand, had the debate been originally and avowedly instituted on the footing of utility, the parties might at length have come to an agreement; or at least to a visible and explicit issue.—‘*I* say, that the mischiefs of the measure in question are to *such* an amount.—*I* say, *not* so, but to a *less*.—*I* say, the benefits of it are only to *such* an amount.—*I* say, *not* so, but to a *greater*.’—This, we see, is a ground of controversy very different from the former. The question is now manifestly a question of conjecture concerning so many future contingent matters of fact: to solve it, both parties then are naturally directed to support their respective persuasions by the only evidence the nature of the case admits of;—the evidence of such *past* matters of fact as appear to be analogous to those contingent *future* ones. Now these *past* facts are almost always numerous: so numerous, that till brought into view for the purpose of the debate, a great proportion of them are what may very fairly have escaped the observation of one of the parties: and it is owing, perhaps, to this and nothing else, that that party is of the persuasion which sets it at variance with the other. Here, then, we have a plain and open road, perhaps, to present reconciliation: at the worst to an intelligible and explicit issue,—that is, to such a ground of difference as may, when thoroughly trodden and explored, be found to lead on to reconciliation at the last. Men, let them but once clearly understand one another, will not be long ere they agree. It is the perplexity of ambiguous and sophistical discourse that, while it

distracts and eludes the apprehension, stimulates and inflames the passions.

But it is now high time we should return to our Author, from whose text we have been insensibly led astray, by the nicety and intricacy of the question it seemed to offer to our view.



## CHAPTER V.

### DUTY OF THE SUPREME POWER TO MAKE LAWS.

CHAP.  
V.

—♦♦—  
I.

Subject of  
the para-  
graph ex-  
amined in  
the present  
chapter.

I.

WE now come to the last topic touched upon in this digression: a certain '*duty*,' which, according to our Author's account, the supreme power lies under: —the *duty of making laws*.

II.

II.  
The para-  
graph re-  
cited.

'Thus far,' says he, 'as to the *right* of the supreme power to make laws; but farther, it is its *duty* likewise. *For since* the respective members are bound to conform themselves to the will of the state, it is expedient that they *receive directions* from the state declaratory of that its will. *But since* it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, therefore the state establishes general rules for the perpetual information and direction of all persons, in all points, whether of positive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent;

what degree every man retains of his natural liberty ; what he has given up as the price of the benefits of society ; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.'

CHAP.  
V.  
—♦—

III.

Still as obscure, still as ambiguous as ever. The 'supreme power' we may remember, according to the definition so lately given of it by our Author, and so often spoken of, is neither more nor less than the *power to make laws*. Of this power we are now told that it is its 'duty' to make laws. Hence we learn—what?—that it is its 'duty' to do what it does ; to be, in short, what it is. This then is what the paragraph now before us, with its apparatus of '*fors,*' and '*buts,*' and '*sinces,*' is designed to prove to us. Of this stamp is that meaning, at least, of the initial sentence, which is apparent upon the face of it.

III.  
The first  
sentence  
examined.  
The most  
obvious  
sense of it  
nugatory.

IV.

Complete the sense of the phrase, '*to make laws ;*' add to it, in this place, what it wants in order to be an adequate expression of the import which the preceding paragraph seemed to annex to it ; you have now, for what is mentioned as the object of the '*duty,*' another sense indeed, but a sense still more untenable than the foregoing. 'Thus far,' says our Author (recapitulating what he had been saying before) 'as to the *right* of the supreme power to make laws.'—By this '*right*' we saw, in the preceding chapter, was meant, a right to make laws *in all cases whatsoever*. 'But further,' he now adds, 'it is its *duty* likewise.' Its

IV.  
The next  
most obvi-  
ous extrav-  
agant.

CHAP.  
V

*duty* then to do—what? to do the same thing that it was before asserted to be its *right* to do—to make laws in all cases whatsoever: or (to use another word, and that our Author's own, and that applied to the same purpose) that it is its duty to be '*absolute*'<sup>1</sup>. A sort of duty this which will probably be thought rather a singular one.

## V.

V.  
third  
use pro-  
ved.

Mean time the observation which, if I conjecture right, he really had in view to make, is one which seems very just indeed, and of no mean importance, but which is very obscurely expressed, and not very obviously connected with the purport of what goes before. The duty he here means is a duty, which respects, I take it, not so much the actual *making* of laws, as the taking of proper measures to *spread abroad* the knowledge of whatever laws happen to *have been* made: a duty which (to adopt some of our Author's own words) is conversant, not so much about *issuing* 'directions,' as about providing that such as *are* issued shall be '*received*.'

## VI.

VI.  
jection  
the use  
the  
rd  
uty' on  
s occa-  
n.

Mean time to speak of the *duties* of a supreme power;—of a *legislature*, meaning a *supreme* legislature;—of a set of men acknowledged to be absolute;—is what, I must own, I am not very fond of. Not that I would wish the subordinate part of the community to be a whit less watchful over their governors, or more disposed to unlimited submission in point of *conduct*, than if I were to talk with ever so much peremptoriness of the '*duties*' of these latter, and of

<sup>1</sup> 1 Comm. p. 49.

the *rights* which the former have against them<sup>1</sup>: what I am afraid of is, running into solecism and confusion in *discourse*.

<sup>1</sup> With this note let no man trouble himself who is not used, or does not intend to use himself, to what are called *metaphysical* speculations: in whose estimation the benefit of understanding clearly what he is speaking of, is not worth the labour.

1. That may be said to be my *duty* to do (understand political duty) 1. Duty which you (or some other person or persons) have a *right* to have me made to do. I then have a *DUTY towards* you: you have a *RIGHT against* me. (political).

2. What you have a right to have me made to do (understand a political right) is that which I am liable, according to law, upon a requisition made on your behalf, to be *punished* for not doing. 2. Right (political). Punishment a fundamental idea.

3. I say *punished*: for without the notion of punishment (that is of *pain* annexed to an act, and accruing on a certain *account*, and from a certain source) no notion can we have of either *right* or *duty*. 3. Punishment a fundamental idea.

4. Now the idea belonging to the word *pain* is a simple one. To *define* or rather (to speak more generally) to *expound* a word, is to resolve, or to make a progress towards resolving, the idea belonging to it into simple ones. 4. To *define* or *expound*.

5. For expounding the words *duty*, *right*, *power*, *title*, and those other terms of the same stamp that abound so much in ethics and jurisprudence, either I am much deceived, or the only method by which any instruction can be conveyed, is that which is here exemplified. An exposition framed after this method I would term *paraphrasis*. 5. Words not to be expounded but by *paraphrasis*.

6. A word may be said to be expounded by *paraphrasis*, when not that word alone is translated into other words, but some whole sentence which it forms a part is translated into another sentence; the words of which latter are expressive of such ideas as are *simple*, or are more immediately resolvable into simple ones than those of the former. Such are those expressive of *substances* and *simple modes*, in respect of such *abstract* terms as are expressive of what LOCKE has called *mixed modes*. This, in short, is the only method in which any abstract terms can, at the long run, be expounded to any instructive purpose: that is in terms calculated to raise *images* either of *substances* perceived, or of *emotions*;—sources, one or other of which every idea must be drawn from, to be a clear one. 6. *Paraphrasis* what.

7. The common method of defining—the method *per genus et differentiam*, as logicians call it, will, in many cases, not at all answer the purpose. Among abstract terms we soon come to such as have no *superior genus*. A definition, *per genus et differentiam*, when applied to these, it is manifest, can make no advance: it must either stop short, or turn back, as it were, upon itself, in a *circulate* or a *repented*. 7. Definition *per genus et differentiam*, not universally applicable.

CHAP.  
V.

## VII.

VII.  
be proper  
use of it.

I understand, I think, pretty well, what is meant by the word *duty* (political duty) when applied to myself; and I could not persuade myself, I think, to apply it in the same sense in a regular didactic discourse to those whom I am speaking of as my supreme governors. That is my *duty* to do, which I am liable to be *punished*, according to law, if I do not do: this is the original, ordinary, and proper sense of the word *duty*<sup>1</sup>. Have these supreme governors any such

Further  
examples;  
-disposi-  
on,—es-  
tle,—in-  
rest,—  
ower.

8. 'Fortitude is a virtue:—Very well:—but what is a virtue? 'A virtue is a disposition:—Good again:—but what is a *disposition*? 'A *disposition* is a . . .;' and there we stop. The fact is, a *disposition* has no *superior genus*: a *disposition* is not a . . ., any thing:—this is not the way to give us any notion of what is meant by it. 'A *power*,' again 'is a *right*:' and what is a *right*? It is a *power*.—An *estate* is an *interest*, says our Author somewhere; where he begins defining an *estate*:—as well might he have said an *interest* was an *estate*. As well, in short, were it to define in this manner, a conjunction or a preposition. As well were it to say of the preposition *through*, or the conjunction *because*; a *through* is a . . ., or a *because* is a . . ., and so go on defining them.

An im-  
perfection  
requent  
in our  
Author's  
method.

9. Of this stamp, by the bye, are some of his most fundamental definitions: of consequence they must leave the reader where they found him. But of this, perhaps, more fully and methodically on some future occasion. In the mean time I have thrown out these loose hints for the consideration of the curious.

Duties,  
three sorts.

1. One may conceive three sorts of duties; *political*, *moral*, and *religious*; correspondent to the three sorts of *sanctions* by which they are enforced: or the same point of conduct may be a man's duty on these three several accounts. After speaking of the one of these to put the change upon the reader, and without warning begin speaking of another, or not to let it be seen from the first which of them one is speaking of, cannot but be productive of confusion.

1. *Political*  
duty.

2. Political duty is created by punishment: or at least by the will of persons who have punishment in their hands; persons stated and *certain*,—political superiors.

1. *Religious*  
duty.

3. Religious duty is also created by punishment: by punishment expected at the hands of a person *certain*,—the Supreme Being.

1. *Moral*  
duty—  
be proper  
sense of it.

4. Moral duty is created by a kind of motive, which from the *uncertainty* of the *persons* to apply it, and of the *species* and *degree* in which it will be applied, has hardly yet got the name of punishment: by various mortifications resulting from the ill-will of persons *uncertain* and

duty? No: for if they are at all liable to punishment according to law, whether it be for *not* doing any

CHAP.  
V.



variable,—the community in general: that is, such individuals of that community as he, whose duty is in question, shall happen to be connected with.

5. When in any of these three senses a man asserts a point of conduct to be a duty, what he asserts is the existence, actual or probable, of an *external* event: viz. of a punishment issuing from one or other of these sources in consequence of a contravention of the duty: an event *extrinsic* to, and distinct from, as well the conduct of the party spoken of, as the sentiment of him who speaks. If he persists in asserting it to be a duty, but without meaning it should be understood that it is on any one of these three accounts that he looks upon it as such; all he then asserts is his own internal *sentiment*: all he means then is, that he feels himself *pleased* or *displeased* at the thoughts of the point of conduct in question, but without being able to tell *why*. In this case he should e'en say so: and not seek to give an undue influence to his own single suffrage, by delivering it in terms that purport to declare the voice either of God, or of the law, or of the people.

5. Difference between these senses and a fourth which is figurative and *improper*.

6. Now which of all these senses of the word our Author had in mind; in which of them all he meant to assert that it was the duty of supreme governors to make laws, I know not. *Political* duty is what they cannot be subject to<sup>a</sup>: and to say that a duty even of the *moral* or *religious* kind to this effect is incumbent on them, seems rather a precipitate assertion.

6. *Duty* not applicable here in any *proper* sense.

In truth what he meant was neither more nor less, I suppose, than that he should be glad to see them do what he is speaking of; to wit, '*make laws*:' that is, as he explains himself, spread abroad the knowledge of them. Would he so? So indeed should I; and if asked why, what answer our Author would give I know not; but I, for my part, have no difficulty. I answer,—because I am persuaded that it is for the benefit of the community that they (its governors) should do so. This would be enough to warrant me in my own opinion for saying that they *ought* to do it. For all this, I should not at any rate say that it was their *duty* in a *political* sense. No more should I venture to say it was in a *moral* or *religious* sense, till I were satisfied whether they themselves *thought* the measures useful and feasible, and whether they were generally *supposed* to think so.

Were I satisfied that they *themselves* thought so, God then, I might say, knows they do. God, we are to suppose, will punish them if they neglect pursuing it. It is then their *religious* duty. Were I satisfied that the *people* supposed they thought so: the people, I might say, in case of such neglect,—the people, by various manifestations of its ill-will, will also punish them. It is then their *moral* duty.

In any of these senses it must be observed, there can be no more propriety in averring it to be the duty of the supreme power to pursue the measure in question, than in averring it to be their duty to pursue any

<sup>a</sup> See the note following.

CHAP.  
V.

thing, or for *doing*, then are they not, what they are supposed to be, supreme governors<sup>1</sup>: those are the supreme governors, by whose appointment the former are liable to be punished.

VIII.

VIII.  
That in  
which it is  
are used  
figurative.

The word duty, then, if applied to persons spoken of as supreme governors, is evidently applied to them in a sense which is figurative and improper: nor therefore are the same conclusions to be drawn from any propositions in which it is used in this sense, as might be drawn from them if it were used in the other sense, which is its proper one.

IX.

IX.  
The propo-  
tion ac-  
cused to in  
his last  
sense.

This explanation, then, being premised;—understanding myself to be using the word *duty* in its improper sense, the proposition that it is the duty of the legislature to spread abroad, as much as possible, the knowledge of their will among the people, is a proposition I am disposed most unreservedly to accede to. If this be our Author's meaning, I join myself to him heart and voice.

other supposable measure equally beneficial to the community. To usher in the proposal of a measure in this peremptory and assuming guise, may be pardonable in a loose rhetorical harangue, but can never be justifiable in an exact didactic composition. Modes of *private moral* conduct there are indeed many, the tendency whereof is so well known and so generally acknowledged, that the observance of them may well be styled a duty. But to apply the same term to the particular details of *legislative* conduct, especially newly proposed ones, is going, I think, too far, and tends only to confusion.

governors  
1 what  
may sub-  
ject to po-  
tical duties  
otwith-  
standing  
their being  
supreme.

<sup>1</sup> I mean for what they do, or omit to do, when *acting in a body*: in that body in which, when acting, they are supreme. Because for any thing any of them do separately, or acting in bodies that are subordinate, they may any of them be punished without any disparagement to their supremacy. Not only any *may* be, but many *are*: it is what we see examples of every day.

X.

CHAP.  
V.

X.

What particular institutions our Author wished to see established in this view—what *particular* duties he would have found for the legislature under this *general* head of duty, is not very apparent: though it is what should have appeared more precisely than it does, ere his meaning could be apprehended to any purpose. What increases still the difficulty of apprehending it, is a practice which we have already had more than once occasion to detect him in<sup>1</sup>,—a kind of versatility, than which nothing can be more vexatious to a reader who makes a point of entering into the sentiments of his Author. He sets out with the word *duty* in his mouth; and, in the character of a *Censor*, with all due gravity begins talking to us of what *ought* to be. 'Tis in the midst of this lecture that our *Proteus* slips aside; puts on the *historian*; gives an insensible turn to the discourse; and, without any warning of the change, finishes with telling us what *is*. Between these two points, indeed, the *is*, and the *ought to be*, so opposite as they frequently are in the eyes of other men, that spirit of obsequious *quietism* that seems constitutional in our Author, will scarce ever let him recognise a difference. 'Tis in the second sentence of the paragraph that he observes that 'it is *expedient* that they' (the people) 'receive directions from the state' (meaning the governing body) 'declaratory of that its will.' 'Tis in the very next sentence that we learn from him, that what it is thus '*expedient*' that the state *should* do, it *does* do. 'But since it is impossible in so great a multitude, to give particular injunctions to every particular man relative to each particular action, therefore,' says he

Obscured again by the next sentence—the *Censor's* part confounded with that of the *Historian*.

<sup>1</sup> V. *supra*, ch. II. par. 11, ch. III. par. 7, ch. IV. par. 10.



CHAP.  
V.  
—♦—

‘ the state establishes ’ (does *actually* establish) ‘ general rules ’ (*the* state generally, *any* state, that is to say, that one can mention, all states, in short, whatever *do* establish) ‘ general rules for the perpetual information and direction of *all* persons in *all* points, whether of positive or of negative duty.’ Thus far our Author; so that, for aught appears, whatever he could *wish* to see done in this view *is* done. Neither this state of our own, nor any other, does he wish to see do any thing more in the matter than he sees done already; nay, nor than what is sure to be done at all events: so that happily the duty he is here so forward to lay on his superiors will not sit on them very heavy. Thus far is he from having any determinate instructive meaning in that part of the paragraph in which, to appearance, and by accident, he comes nearest to it.

### XI.

XI.  
Fixed  
and par-  
ticularised.  
*Promulga-*  
*tion* recom-  
mended.

Not that the passage however is absolutely so remote from meaning, but that the inventive complaisance of a commentator of the admiring breed might find it pregnant with a good deal of useful matter. The design of disseminating the knowledge of the laws is glanced at by it at least, with a show of approbation. Were our Author’s writings then as sacred as they are mysterious; and were they in the number of those which stamp the seal of authority on whatever doctrines can be fastened on them; what we have read might serve as a text, from which the obligation of adopting as many measures as a man should deem subservient to that design, might, without any unexampled violence, be deduced. In this oracular passage I might find inculcated, if not *totidem syllabis*, at least *totidem literis*, as many points of legislative duty as should seem subservient to the

purposes of *digestion* and *promulgation*. Thus fortified, I might press upon the legislature, and that on the score of '*duty*,' to carry into execution, and that without delay, many a busy project as yet either unthought of or unheeded. I might call them with a tone of authority to their work: I might bid them go make provision forthwith for the bringing to light such scattered materials as can be found of the judicial decisions of time past,—sole and neglected materials of common law;—for the registering and publishing of all future ones as they arise;—for transforming, by a digest, the body of the common law thus completed, into statute-law;—for breaking down the whole together into *codes* or parcels, as many as there are classes of persons distinguishably concerned in it;—for introducing to the notice and possession of every person his respective code:—works which public necessity cries aloud for, at which professional interest shudders, and at which legislative indolence stands aghast.

## XII.

All these leading points, I say, of legislative economy, with as many points of detail subservient to each as a meditation not unassiduous has suggested, I might enforce, were it necessary, by our Author's oracular authority. For nothing less than what has been mentioned, I trust, is necessary, in order that every man may be made to know, in the degree in which he *might* and *ought* to be made to know, what (in our Author's words) 'to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has

XII.  
Therecom-  
mendation  
enforced  
by our Au-  
thor's con-  
cluding  
sentence.

CHAP.  
V.

given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.' In taking my leave of our Author, I finish gladly with this pleasing peroration: a scrutinizing judgment, perhaps, would not be altogether satisfied with it; but the ear is soothed by it, and the heart is warmed.

### XIII.

XIII.  
Necessity  
and use of  
these ver-  
bal criti-  
cisms.

I now put an end to the tedious and intricate war of words that has subsisted, in a more particular manner during the course of these two last chapters: a logomachy, wearisome enough, perhaps, and insipid to the reader, but beyond description laborious and irksome to the writer. What remedy? Had there been sense, I should have attached myself to the sense: finding nothing but words; to the words I was to attach myself, or to nothing. Had the doctrine been but *false*, the task of exposing it would have been comparatively an easy one: but it was what is worse, *unmeaning*; and thence it came to require all these pains which I have been here bestowing on it: to what profit let the reader judge.

'Well then,'—(cries an objector)—'the task you have set yourself is at an end; and the subject of it after all, according to your own representation, teaches nothing;—according to your own shewing it is not worth attending to.—Why then bestow on it so much attention?'

In this view—To do something to instruct, but more to undeceive, the timid and admiring student:—to excite him to place more confidence in his own strength, and less in the infallibility of great names:

—to help him to emancipate his judgment from the shackles of authority:—to let him see that the not understanding a discourse may as well be the writer's fault as the reader's:—to teach him to distinguish between showy language and sound sense:—to warn him not to pay himself with words:—to shew him that what may tickle the ear, or dazzle the imagination, will not always inform the judgment:—to shew him what it is our Author can do, and has done: and what it is he has not done, and cannot do:—to dispose him rather to fast on ignorance than feed himself with error: to let him see that with regard to an expositor of the law, our Author is not *he that should come*, but that we may be still *looking for another*. —'Who then,' says my objector, 'shall be that other? Yourself?'—No verily.—My mission is at an end, when I have *prepared the way before him*.

THE END.



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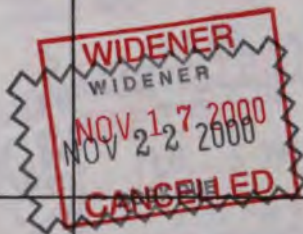


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