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# Jeremy Bentham's Departure from Whig Networks: A Case Study of his Relationship with Samuel Romilly, c. 1790–1818

*Cheng Li*

## Abstract

This article examines the utilitarian reformer Jeremy Bentham's relationship with the Whig reformer Samuel Romilly between 1788 and 1818. For many years Bentham relied on Romilly's assistance in promoting schemes of law reform, and viewed him as a fellow utilitarian. However, a series of events during the French Revolution and wars widened their political difference. After 1815 Bentham was more involved in radical politics and expected Romilly's collaboration. Romilly's indifference further stimulated Bentham's breach with the Whigs. A study of their relationship casts new light on Bentham's transition to democracy and the state of the Whig reformism during the period.

**Keywords:** Bentham; Romilly; law reform; utilitarian; Whig reformism

## Introduction

Samuel Romilly first met Jeremy Bentham in 1784 when both were young and reform-minded barristers and resided in the Inns of Court.<sup>1</sup> Their friendship deepened when Bentham returned from his journey to Russia in early 1788 and they were invited by the former Prime Minister Lord Lansdowne to his salons. Here the regular guests included innovative writers and scientists, such as Joseph Priestley and Richard Price, and reforming Whig politicians, such as Charles James Fox and Richard Brinsley Sheridan.<sup>2</sup> Lansdowne had been impressed by Bentham's *Fragment on Government* (1776) and Romilly's *Observations on a Late Publication entitled Thoughts on Executive Justice* (1786).<sup>3</sup>

In August 1788 Louis XVI's agreement to summon the Estates General excited Lansdowne's network. As Emanuelle de Champs points out, Lansdowne was 'a noted Francophile and a diplomat with extensive connections'.<sup>4</sup> He facilitated Romilly's travel in France in the summers of 1788 and 1789, recommending the young lawyer to French politicians and writers. In November 1789 Lansdowne invited Bentham to join Romilly in 'a weekly meeting club proposed to be formed of the friends of the new principles', discussing French events.<sup>5</sup> Both Bentham and Romilly were asked to write an introductory guidebook to British parliamentary procedure for members of the National Assembly. Literary and political activities strengthened their friendship. They exchanged opinions of each other's work and Romilly corrected Bentham's written French; he also recommended Étienne Dumont, tutor of Lansdowne's eldest son Lord Wycombe, to edit Bentham's writings. From then on Romilly became a much-trusted literary adviser to Bentham.

During the French Revolution and war, Romilly largely succeeded in restraining Bentham from making overt public displays of political radicalism; for example, stopping the publication of his criticism of William Pitt's government, the common law and jury system. After 1815, however, the domestic political environment encouraged Bentham to choose a bolder publication strategy and to place himself on the front line of public debates about institutional reforms. The political differences between Bentham and Romilly were highlighted in 1818 when Bentham publicly criticised Romilly during the election campaign. In private Bentham was much upset by Romilly's review of *Papers relative to Codification* (1817) in the *Edinburgh Review*, and formed the opinion that as a Whig lawyer Romilly could not be a democrat. A study of their relationship uncovers the Whig element in the politics of law reform within Bentham's epistolary

networks. Romilly's opinions revealed to Bentham the failings of the Whig approach to reform. Romilly and many Whig reformers became disillusioned about the prospect of a radical change in the British constitution after the French Revolution. In terms of law reform, they resisted radical changes to the common law.

Previous studies have not reached a consensus about their relationship. Élie Halévy and Patrick Medd incline to see Romilly as having been more influenced by Bentham, not the other way around, and interpret Romilly's writing and speeches as simplified versions of Bentham's legal ideas.<sup>6</sup> William Thomas has emphasised Romilly's independence in politics and jurisprudence, and Bentham's inability to understand real politicking.<sup>7</sup> Richard Follett adds more details to support Thomas, and summarises Romilly's activities in spreading Bentham's ideas and assisting in attempting to bring to fruition his Panopticon prison scheme.<sup>8</sup> Of Romilly's intermediary role in connecting Bentham with the political world, Anne Brunon-Ernst provides a case study on how Romilly facilitated the circulation of Bentham's ideas on democracy to Australia.<sup>9</sup>

This article aims to provide a fuller account of Bentham's relationship with Romilly and to explain why Bentham departed from Whig networks in the late 1810s. The following four sections will approach this topic in roughly chronological order. The first discusses the Panopticon prison scheme, for which Bentham sought the government's approval. During the negotiations Romilly was a conduit for and representative of Bentham's interest. Bentham requested Romilly to press government lawyers harder, but finally recognised that neither he nor Romilly possessed the necessary political connections to realise his plan. The second section discusses the codification of Scottish laws. In 1808 Bentham developed an idea to write a code of all Scottish laws, and asked Romilly to recommend this idea in a petition to the House of Commons. However, Romilly explicitly declined Bentham's request for help. The third section discusses libel law. From 1792 to 1810, in a series of works, Bentham critically reviewed the common law, the practice of jury-packing and the history of the Panopticon. He consulted Romilly about publication. Romilly's responses and Bentham's decisions will be analysed to demonstrate the growth of their political differences and why Bentham became more impatient of Romilly's Whig allegiance. The fourth section focuses on Romilly's review of Bentham's *Papers relative to Codification* in the *Edinburgh Review*. This document, and Bentham's comments in response to it, reveal the breakdown of a loose alliance in the politics of reform between Bentham and the Whigs.

It will be concluded that Bentham's departure from Whig networks was the result of a history of disappointment about the failures of utilitarian projects, along with a growing belief that Whigs were ineffective in promoting radical changes of the law. This departure stimulated Bentham to announce his radical political identity in public. Meanwhile, the diminishing prospect of a reforming government sapped Bentham's enthusiasm for lobbying British elites; he instead shifted his attention to lobby radical networks abroad.

## 1. Panopticon Prison

Richard Follett did not clarify Romilly's attempts to negotiate with the government lawyers in support of Bentham's prison scheme, and nor does Janet Semple in her thorough study.<sup>10</sup> Based on the two men's correspondence, and Romilly's memoirs, this section seeks to identify Romilly's role in and attitude towards Bentham's prison campaign, and to see whether Bentham did indeed become frustrated with Romilly, as claimed by Follett, during the period.

From 1786 Bentham developed the Panopticon idea and sought opportunities for its application. In 1793 he managed to get Henry Dundas and William Pitt to attend his home to see a model of a Panopticon; the visitors' informal indication of support for the scheme led Bentham to expect the government's support for it in the House of Commons. Bentham needed a new law to authorise the scheme because under the current law (the 1779 Penitentiary Act) only public officers were qualified to administer a prison, and Bentham neither held office nor intended to seek one. The Panopticon prison was also viewed by government lawyers as Bentham's private concern.<sup>11</sup> However, in early August 1793 Bentham was optimistic. He discussed the matter with Evan Nepean, Under Secretary of the Home Office, and was told that the government would bring a new Penitentiary bill in the House of Commons next session. Bentham expected that there an act would be passed to authorise him to act as the prison manager and to purchase land on which to build the prison.<sup>12</sup> In order to make sure that the new law would be useful, Bentham wrote several versions of a Panopticon bill, and sent them to Nepean and Pitt. However, by April 1794 William Lowndes, Parliamentary Counsel to the Treasury, was advising against adopting Bentham's drafts on the grounds that they were unconventional regarding parliamentary practice.<sup>13</sup> Bentham meanwhile became more anxious that the government

would bring a very different bill, and that the legal obstacles, such as purchasing the land, would continue to exist. It was in this context that Bentham anxiously asked Romilly's advice.

Romilly had read Bentham's draft, and on 9 March he suggested to Bentham that the bill was too innovative for the conservative-minded parliament and that Bentham appeared to overrate the government's interest in philosophy.<sup>14</sup> As Semple points out, government lawyers lacked the interest and patience to accept a very innovative bill, and Romilly's suggestion displayed a much clearer understanding of the politics of the time.<sup>15</sup> However, due to their friendship and a genuine appreciation of Bentham's talent and public spirit, Romilly offered sincere support. Bentham noted that on 21 February Romilly was very occupied with work, but managed to find time to read the draft carefully in 16 days.<sup>16</sup> Bentham's draft contains 15 sections and 257 clauses, totalling about 50,000 words – much longer than the 1779 Penitentiary Act (about 13,500 words). Semple describes the draft as 'elephantine'.<sup>17</sup>

William Thomas and Follett underestimate Romilly's interest in Bentham's ideas, neglecting the fact that Romilly was willing to take the difficult tasks Bentham assigned to him and often gave critical but supportive feedback. In terms of Bentham's Panopticon bill, Romilly wrote, 'I have read with great Attention', and found that there 'is a great deal too much merit in the bill'.<sup>18</sup> Romilly also used his legal connection to mobilise support for Bentham. In July 1794, for instance, Romilly recommended to Bentham a legal ally called John Anstruther: a Scottish Whig lawyer, Chief Justice of the North Wales Great Sessions and Solicitor General to the Prince of Wales. Intellectually Anstruther shared with Bentham a common interest in Enlightenment ideas. He had been a student of John Millar at the University of Glasgow in the early 1770s. Millar was Regius Professor of Civil Law from 1761 to 1800, and his work *Observations Concerning the Distinction of Ranks in Society* influenced Scottish jurisprudence greatly. These factors indicate that Anstruther lived in an intellectual environment open to innovative ideas. He might well have spoken to Bentham at Lansdowne's salon or at a Whig dinner club, and he expressed an interest in the Panopticon to Romilly. As Romilly wrote to Bentham, 'I told him [Anstruther] I would use my Interest with you to procure him a sight of it [a Panopticon model]'.<sup>19</sup> Moreover, Romilly shrewdly added that Anstruther 'is very intimate with the [Lord] Chancellor and has considerable influence on him'.<sup>20</sup> The then Chancellor was Alexander Wedderburn, another Scot and politically a moderate Whig who had in January 1793 followed the Duke of Portland in joining Pitt's wartime

cabinet. Intellectually Wedderburn had been an active member of Edinburgh's club life, advocating a series of social improvement measures, and even once speaking for the radical John Wilkes in the House of Commons. Romilly must have known Wedderburn's history and formed the opinion that he could be an ally.

However, the connection with Anstruther and Wedderburn appears not to have been effective enough to circumvent the Attorney General John Scott's obstruction of Panopticon. In September 1796 Bentham found suitable land in Tothill Fields, Westminster and attempted many times to contact the Treasury to discuss legal matters pertaining to drawing up a bill for acquiring the land there. Since January 1797 government lawyers had delayed giving a definite answer to Bentham's request. Noting Bentham's limited influence, on 26 April 1797 Romilly discerned Scott's attitude to Bentham's draft bill: 'He says it is the most unlike an Act of Parliament he ever saw'.<sup>21</sup> Several days later, on 1 May, Romilly wrote, 'I have attempted several times but in vain to speak to the Atty. and Solr. Genl. I will renew my Attempts tomorrow'.<sup>22</sup> Eventually Romilly learned the exact legal reason why the bill was rejected from the Solicitor General John Mitford, who stated that 'the bill was general and that a general bill might in particular Cases be productive of great Injustice'.<sup>23</sup>

However, this information did not help to advance the Panopticon scheme. In December 1797 Romilly learned that Scott was too busy to read Bentham's draft bill. This time Romilly felt his own influence was limited as well, and suggested that Charles Butler, an influential Roman Catholic conveyancer, might be a better negotiator. His reason was that Butler and Scott had studied the law in Lincoln's Inn under the same tutor, Matthew Duane, and Scott had been friendly with Butler and Duane for many years.<sup>24</sup> On 5 March 1798 Scott finally conceded that the bill must be regarded as an enclosure bill, meaning that Bentham would have to wait until the next parliamentary session.<sup>25</sup> Irritated by the continued delays, Bentham grumbled that the Treasury and law officers were forcing him to quit his scheme by the threat of financial ruin.<sup>26</sup>

Romilly noticed on 2 May 1798 that Scott and Mitford had not yet read Bentham's draft of the enclosure bill. He pressed them to allow Bentham to see the revised draft before it was transmitted to the Treasury, but this request was rejected. Romilly also enquired whether they had promised Bentham a reply to the draft bill, to which the answer was 'no recollection of it'. This attitude upset Romilly, who admitted that he 'could make nothing of' these officers.<sup>27</sup> Afterwards Romilly continued to support the Panopticon scheme. This turned out to be a more complex

struggle from August 1802, when Bentham started a campaign arguing that the system of penal colonisation of New South Wales was unconstitutional and that the new government, led by Henry Addington, should recognise the point and then support the Panopticon prison.

On 3 February 1801 Addington had replaced Pitt to become Prime Minister. Bentham hoped that the change of government would produce a positive impact on the Panopticon scheme. However, on 24 March 1801 he was informed by Charles Long, junior secretary at Pitt's Treasury and about to be replaced by Addington's man Nicholas Vansittart on 9 April, that the government might decide not to build a new prison at all.<sup>28</sup> Four days later, in a letter to Addington, Bentham protested this decision as extremely unfair to his many years' effort and contradictory to previous parliamentary decisions.<sup>29</sup> On 27 June 1801 to Hiley Addington, senior secretary at the Treasury and Henry Addington's brother, Bentham associated the declining interest of the previous ministry in the Panopticon prison with its preference for penal transportation.<sup>30</sup>

In order to persuade the new government to recognise the superiority of the Panopticon prison, from March 1802 Bentham wrote two 'Letters to Lord Pelham' and 'A Plea for the Constitution' (published in 1812 as *Panopticon versus New South Wales*). In these writings Bentham developed the idea that penal transportation was not only a misguided policy, but also a serious violation of Englishmen's constitutional rights.<sup>31</sup> Bentham consulted Romilly on this latter point; he debated with the lawyer about the nature of the British Constitution, and whether it had been abused by Pitt's despotism when establishing New South Wales, as well as whether the present parliament and government would rectify the abuse. On 27 August 1802, in a letter to Romilly, Bentham concluded that Pelham was his enemy. On 20 August Bentham had received a copy of Pelham's letter to Charles Bunbury, which stated Pelham's hostile attitude to Bentham's papers, including some selected contents of his writings on New South Wales.<sup>32</sup> Then Bentham printed several copies of Pelham's letter and sent one to Romilly with the comment:

[T]he 'papers' there spoken of, are papers breathing fire and flame, full of scorn and menace. No small part of the spirit which animated them was extracted from a former opinion of yours.<sup>33</sup>

Here Bentham emphasised Romilly's agreement with the view that the administration in New South Wales was unconstitutional, and how it boosted his confidence for a legal battle against the current government.



Bentham had communicated Romilly's views to Bunbury on 9 August 1802.<sup>34</sup> It seems that Bentham had discussed this matter with Romilly in person before August, and then sent part of 'A Plea for the Constitution' to Romilly for further confirmation. On 28 August 1802 Romilly replied to Bentham that he found 'the law upon the subject to be exactly as you have stated it'.<sup>35</sup> Moreover, Bentham revised the work according to Romilly's suggestion, including amending its title ('A Plea for the Constitution' was originally titled by Bentham 'The True Bastile') and adding a preface headed 'The British Constitution conquered in New South Wales'.<sup>36</sup> On 15 February 1803 Romilly criticised the title as 'too tragic' and the preface 'too comic'. He also disliked the use of the word 'conquest' to describe the administration of New South Wales and wrote:

[T]he truth is that notwithstanding what has been done at Botany bay the Brit Constint is not conquered but still remains as it did. It has been disregarded or violated if you please but because Ministers have done what is illegal and nobody but yourself yet knows.<sup>37</sup>

The Attorney General in Addington's ministry, Spencer Perceval, read a copy of the revised title and preface, presumably shown to him by Romilly. Perceval was an old friend of Romilly from 1786, when they worked together on the Midland Circuit. In his memoir Romilly described their friendship as 'strong and lasting'.<sup>38</sup> On 3 March 1803 Perceval expressed sympathy for Bentham's efforts on the Panopticon scheme in a conversation with Romilly, who then reported Perceval's words to Bentham. Perceval said, as Romilly recollected:

If I were disposed to interest myself to have the Panopticon established and to have him [Bentham] placed at the head of it and I should really be glad to do it if I saw a proper Opportunities how could I recommend to a Secretary of State to place in such a situation a Person who had written such things of him or his predecessors.<sup>39</sup>

Romilly's letter stimulated a sceptical Bentham to make swift plans to test Perceval's commitment. On 7 March 1803 Bentham sent two letters to Romilly, revealing both his emotion and strategy at the moment. Bentham thought that Perceval had been corrupted and his hint about recommending was insincere – rather a strategy of quieting Bentham for the interest of his superiors. Meanwhile Bentham supplied information and arguments for Romilly to enlighten and mobilise Perceval if possible,

and at Romilly's discretion. For example, Bentham enclosed his letter to his half-brother Charles Abbot, Speaker of the House of Commons, of 3 September 1802. This listed arguments and evidence of the illegality of the penal colony of New South Wales, as well as the governments' irresponsible management and unfair treatment of Bentham.<sup>40</sup>

Bentham seems to have assumed that there was a distinction between Perceval as an individual and as an officer. He speculated that, although the office of Attorney General was a part of the corrupted establishment, Perceval as an individual, and perhaps more importantly as Romilly's friend, might be persuaded to serve public interest. According to this logic, Bentham expected Romilly to be more active and 'to see a proper opportunity' to convert Perceval to be a supporter of the Panopticon prison.<sup>41</sup> A straightforward approach to this end, as Bentham planned, was to ask Perceval to clarify his words. Perceval had mentioned that he was shocked by the title and preface of 'A Plea for the Constitution', but did not explain his reasons why. Bentham expected Romilly to find out Perceval's reason. This was also an aggressive method to test the friendship between himself and Romilly, and also between Romilly and Perceval. If Perceval failed to justify his words, it would be another reminder to Romilly to witness the sinister interest at work in government – because Bentham believed that the ministry could not provide any persuasive reason to argue that transportation to New South Wales was superior to the Panopticon prison or that the treatment of convicts in, and the foundation of, the colonial government of New South Wales was not unconstitutional. If Perceval sided with his predecessors to deny or neglect Bentham's arguments, therefore, his words must surely be deceptive and Romilly should be aware of the fact.

On 8 March 1803 Bentham wrote more explicitly to Romilly that he should quickly detect Perceval's intentions in relation to the Panopticon. Even if Perceval had certain good intentions, he might be very likely to be misled by a damaging interpretation of the Panopticon prison from Addington and Pelham. If Perceval and Romilly chose to support Bentham, they should, Bentham suggested, join with Bunbury in the House of Commons to attack the government on the subject of prison hulks.<sup>42</sup> Here Bentham viewed the House of Commons as a battlefield between utilitarians and sinister interests, and political actors such as Romilly were pressed to choose a side.

Some Whigs were less cautious than Romilly in agreeing with Bentham's inflammatory description of the system of New South Wales. 'A Plea for the Constitution', under its original title as 'The True Bastille'

with the preface ‘The British Constitution conquered in New South Wales’, was praised by Samuel Parr, a famous Whig political writer nicknamed ‘the Whig Samuel Johnson’. On 8 February 1803 Parr wrote to Bentham that the work should be revised and published, though he marked the passages which seemed to him objectionable and gave suggestions on how to strengthen the point that the system in New South Wales was unconstitutional.<sup>43</sup> According to Parr, Fox appeared to support ‘The True Bastille’ as well.<sup>44</sup> On 13 February Romilly reported to Bentham that Parr

is so eager in his praise of you to all the world ... He had had a long Conversation about you with Cha[rles] Fox so that you see he has formed a party for you.<sup>45</sup>

Although Bentham was sceptical about whether Fox’s attitude would produce any substantial result in legislation, he continued to mobilise MPs and lobby Pelham until June 1803, when he learned of the government’s explicit refusal to proceed with the scheme.<sup>46</sup>

Meanwhile Romilly continued to act as conduit between Bentham and the Whigs. One important contact Romilly made for Bentham was Dumont. As mentioned above, Romilly had recommended Dumont to edit and translate Bentham’s manuscripts on the science of legislation; this emerged as a turning point in Bentham’s literary career when Dumont produced *Traité de législation civile et pénale* (hereafter *Traité*) in Paris in 1802. Through Romilly and Dumont, Bentham’s theory of legislation acquired a certain popularity in France. In September 1802 Bentham visited Paris to see what kind of ‘impact’ *Traité* had made, and whether there would be a good chance for the French government, then under Napoleon’s rule, to adopt utilitarianism. During the visit Bentham was accompanied by Romilly and Dumont, and the private social dinners Bentham attended were entirely arranged by Dumont. Moreover, *Traité* was reviewed favourably by Dumont’s friend Jean-Antoine Gallois, a politician in the circle of Napoleon’s chief diplomat Charles Maurice de Talleyrand. Bentham’s ideas were recommended to nations interested in improvement through reforming legislation; as Gallois wrote:

[W]e think the publication of such a book will be regarded as a blessing for mankind.<sup>47</sup>

*Traité* steadily became a bestseller, and in April 1803 a copy was formally presented to the *Corps législatif* in Paris.

## 2. Codification of Scottish laws

While the Panopticon project was in dire straits, there was some promising news for Bentham: the formation of the Grenville–Fox ministry in February 1806, following the death of Pitt on 23 January 1806. Two of Bentham's old acquaintances, Romilly and Lord Henry Petty (Lansdowne's second surviving son), were appointed, respectively, as the Solicitor General and Chancellor of the Exchequer. The new Whig ministry was eager to embrace the idea of reform and to distinguish itself from Pitt's. It was thought that extensive law reform in Scotland would be an excellent showcase of the Foxite Whigs' fitness to govern. The new government's opinion on Scottish affairs captured Bentham's attention instantly. On 18 June 1806, in the House of Lords, Grenville moved 15 resolutions to reform the Court of Session. Soon Bentham acquired a copy of Grenville's speech from Romilly.<sup>48</sup>

During a visit to Scotland in autumn 1806, Romilly kept Bentham informed about the inner situation at the Scottish bar. Many young lawyers felt optimistic about reforming the Court of Session, though they awaited some kind of publication which could provide intellectual guidance for reform. Romilly encouraged Bentham to write such a guide, though he also sought to restrain Bentham's enthusiasm for fear that his old friend might ignore possible political realities once again. Romilly understood that the bitter experience of the Panopticon had radicalised Bentham's attitude in regard to lawyerly interference and politicians' hypocrisy. Though Bentham had perhaps raised his expectations too high after Pitt's informal approval of the Panopticon scheme in 1793, and had subsequently been incautious in evaluating the circumstances, Romilly had himself witnessed how government lawyers, ministers and civil servants had treated Bentham. He thus advised Bentham to be more sensitive this time, warning that

The Lord Advocate tells me, that the project is universally popular; but from other quarters, I have heard a very different account. The old lawyers [...] do not at all relish it.<sup>49</sup>

On 12 September 1806 Romilly provided Bentham with more information about the proposed project. On 12 July a meeting of the Faculty of Advocates had debated Grenville's resolutions. The lawyers opposed to reform proposed a motion to form a committee to investigate the resolutions, declaring that

It was settled that if the Motion should be carried the Persons to be named as the Committee should be those who it was known were most adverse to any Reform or as they express it to any Innovation.<sup>50</sup>

The friends of reform managed to bring about the adjournment of the meeting until November, with the adjournment carried by a majority of about 80 to 50. However, Romilly continued to emphasise to Bentham the principal difficulty faced by the reforming lawyers: Grenville's resolutions aimed to introduce the English jury system to Scotland in civil causes.<sup>51</sup> According to J. Smyth and A. KcKinley, the Court of Session 'sat as a body in the French style, and all fifteen judges [...] deliberated on cases and gave their judgements without the inconvenience of a jury'.<sup>52</sup> The introduction of juries would not only involve a check upon the power of judges, but also a change in pleading. Scottish lawyers were not sure how far their existing forms of pleading would be changed, nor what kind of facts would have to be presented to the jury. In other words, they were disputing whether to assimilate the English jury procedures completely or partially. In addition, the Act of Union of 1707 protected the existing rules of the Court of Session, which Romilly thought that the opponents of reform would use as an argument against the introduction of juries.<sup>53</sup>

At the same time Romilly was actively promoting Bentham's ideas in Whig circles. Romilly was a role model to young Whig lawyers, especially those who had travelled to London from Scotland in search of professional success, such as Henry Brougham and Francis Horner. Brougham and Horner had also founded the *Edinburgh Review* in 1802, which quickly became a successful 'press agent' for the Whigs. In London they often visited Romilly's house, discussing intellectual and political topics in front of a bust of Bentham, sculpted by Peter Turnerelli in 1804.<sup>54</sup> Romilly arranged Bentham's first meeting with them at Holland House, the social centre of the Whigs.<sup>55</sup> In March 1807 Bentham believed that this bust in Romilly's house produced an effect of consolidating his political alliance with the Whigs during the visit of another *Edinburgh Reviewer*, Francis Jeffrey.<sup>56</sup> In January Jeffrey had published an article in the *Edinburgh Review* calling for law reform in Scotland, praising Bentham as 'by far the most profound and original thinker who has yet been formed in that [i.e. English] school of jurisprudence' and expressing the hope that his ideas might facilitate the Scottish law reform.<sup>57</sup> Then in February Lord Holland, the then Lord Privy Seal, offered Bentham a pension to honour his public services and Lord Henry Petty offered to introduce Bentham to Grenville to discuss Scottish law reform. In May Bentham was asked

by Romilly to attend a Whig social dinner to mingle with politicians, journalists, celebrities and merchants.<sup>58</sup> In August Romilly again invited Bentham to a smaller Whig dinner, where the famous Whig conversation-  
alists John Whishaw and Richard Sharp were expecting the philosopher.<sup>59</sup> By profession, Whishaw was a lawyer and Sharp was a merchant. They were popular among the Whigs and Whishaw had even acquired the nickname of the 'Pope' of Holland House. Later Whishaw became Bentham's arbitrator in negotiations with the Treasury for compensation for losses sustained on the failed Panopticon scheme. Whishaw also acted as the executor of Romilly's will and as guardian to his children.

However, in late March 1807 Grenville's government was dismissed and Romilly resigned the position of Solicitor General. Bentham had not been able to produce a workable plan for the Court of Session until June; he then asked Romilly to transmit it to Grenville, expecting a supportive speech in the House of Lords.<sup>60</sup> This plan, later published as *Scotch Reform*, was a response to Romilly's question of 27 May: 'Why have not your Letters to Ld. Grenville appeared?'<sup>61</sup> In other words, Bentham may well have discussed privately with Romilly the strategy of writing public letters to influence public/political opinion. In April Bentham wrote to his brother, 'Romilly and Dumont have both seen' *Scotch Reform*, noting that 'both [were] much pleased with it: Romilly more especially'.<sup>62</sup> In August *Scotch Reform* was one of the few books that Romilly took on vacation.<sup>63</sup> It discussed a series of topics about judicial procedure, including the appeal process, pleading, the role of juries and the value of written and oral testimony.<sup>64</sup> However, Romilly's interest in *Scotch Reform* appeared to be merely intellectual; it was not sufficient to motivate him to speak in favour of it in Parliament.

Romilly's hesitation prompted Bentham to press him to support a radical plan that would codify Scottish law. On 14 May 1808 Bentham sent Romilly a document headed 'Propositions designed to serve as a basis for an offer proposed to be made in the form of a Petition to the House of Commons'<sup>65</sup> to support a new Scottish legal code. If Romilly thought there was a chance of persuading Parliament, Bentham would devote himself to writing the code. Bentham also invited Romilly for a private meeting at which:

I could have full time for consulting you about the requisite papers, and the plan of intrigue. Friends I should hope might not be altogether wanting for such a purpose.<sup>66</sup>

It was the first time Bentham had used the strategy of petitioning; he appeared to be unfamiliar with the related conventions and parliamentary procedure, hence his request for Romilly's advice. Bentham also expected Romilly to summon some supportive MP friends. Bentham then introduced the structure of the intended petition. The first part would contain the reasons in favour of the code, or why codification was the best solution to the forms of pleading and jury trial.

Bentham further explained the nature of his offer by comparing it with the official plan to establish a commission to review the Court of Session. This plan was proposed by Lord Chancellor Eldon on 10 August 1807 and passed into law on 4 July 1808 as the Court of Session Act (48 Geo. III, c. 151). Bentham did not want to be appointed to the commission and asked Romilly not to lobby for this outcome.

To be one of them, I have neither expectation nor desire. The task for which I wish to offer myself is of a very different kind. In offering myself for it, especially the terms considered, I certainly do not attempt to stand in any body's way.<sup>67</sup>

Instead Bentham wanted Parliament to accept his personal offer through Romilly's petition. However, there was no precedent for such an unconventional style of petitioning. It was also unusual for an Englishman to recommend himself to draft a body of laws for Scotland. Nevertheless, Bentham trusted in Romilly's support and was confident that he would be persuaded by the utilitarian reasoning in the document and by a private conversation:

This I make no doubt of your thinking: this I make as little doubt of your being ready and willing to say in the House, if in and by saying it you saw any prospect of success.<sup>68</sup>

Bentham also welcomed others contributing to the code. He thought that such a reform should be discussed openly in the press so that the code could receive more critical reviews than any selected official commission.

Bentham knew that his strategy was unconventional and that Romilly's personal commitment was unlikely to be enough to persuade other MPs to support it at that stage. He therefore added a more practical reason, namely that if Romilly's motion were rejected 'by the influence of the present Administration, still it might be not altogether without fruit'.<sup>69</sup>

If the next government were more supportive, then Romilly's motion might act as a precedent preparing way for future endeavour. Bentham planned to enlist Francis Horner to support Romilly's motion. Horner was MP for Wendover in Buckinghamshire, but 'being a Scotchman, should stand up and say' that he supported Bentham's codification proposal as the best means of regulating jury trials and providing an accessible and fair judicial service for the public. Codification was described by Bentham as a method to increase both professional and public checks on the power of judges.<sup>70</sup> Speaking of codifiers, Horner would be encouraged to emphasise Bentham's personal experience in jurisprudence and public spiritedness:

A man who, though to be sure he has not yet prepared any such work, having never had any encouragement so to do, has however for these four and forty years been preparing himself for preparing it: and for his encouragement, neither wanting nor choosing to accept of money, wants nothing but such assurance as the House may be disposed to give.<sup>71</sup>

Bentham expected Parliament to accept his voluntary offer; in terms of his credibility as a legislator, the endorsement of Horner and Romilly would, he hoped, be sufficient. Bentham hoped that Horner's speech would highlight the point that Romilly, as an eminent working lawyer, fully believed in the merits and feasibility of Bentham's code. The intended effect was to persuade other lawyer MPs that the code was realistic. Moreover, Bentham argued that his reform would not reduce the business of 'the most eminent among the lawyers'. In other words, Bentham thought that codification could build a meritocratic system in the profession.

Romilly was not convinced by Bentham's arguments. He explained to Bentham on 20 May 1808 that because the code had not been written he could not review it to give an opinion.<sup>72</sup> On the same day Bentham replied to Romilly to ask for a clarification as to why the arguments in the 'Propositions designed to serve as a basis for an offer proposed to be made in the form of a Petition to the House of Commons' were not sufficient. Bentham compared his offer with the task of the Court of Session commission. Both were merely proposing to complete the task in the future. Bentham could not believe that Romilly would doubt his expertise:

Now this work, is a work, for the execution of which I have been endeavouring to qualify myself any time these 40 years, and which



no other person that you know of, qualified or unqualified, is so much as *disposed* to execute.<sup>73</sup>

Bentham reminded Romilly of his previous complaint that the commissioners were ill-qualified and asked for an explanation as to why he could not express this criticism in Parliament. Moreover, Bentham emphasised the voluntary nature of his offer. Why were Romilly and Parliament willing to pay the commissioners, while objecting to pay Bentham? In late May 1808 Romilly replied, and suggested that Bentham's request was simply too unconventional: 'a step totally different from the usual course of parliamentary proceedings'. Romilly also explained:

Petitions complaining of grievances are laid on the table of the House, but as to plans for the public advantage, they must be the subject of some specific motion [...] by some member proposing that they should be the subject of a law.

Furthermore, Romilly stated that he was not persuaded to support codification and thus objected to proposing such a motion on Bentham's behalf. Moreover, the idea of transforming all laws into a code seemed beyond Romilly's imagination; as he told Bentham, 'If anybody can execute such an enterprise as you project [...] I believe it is you; but I do doubt whether even you can execute it'.<sup>74</sup>

### 3. Libel law

Romilly thought that Bentham's views of the law and government tended to be counter-productive not only because they were so acutely critical, but also because they were expressed in an antagonistic manner. This section will analyse Romilly's role in dissuading Bentham from publishing *Truth versus Ashhurst* (1793), 'A Picture of the Treasury' (1802) and *The Elements of the Art of Packing* (1810). Bentham incorporated Romilly's suggestions about all three writings and delayed the publication of *Truth versus Ashhurst* and *The Elements of the Art of Packing* until the arrival of a more favourable publishing climate in the 1820s. 'A Picture of the Treasury', meanwhile, was never finished or printed.<sup>75</sup> On the other hand, through private communications, Bentham continued to reveal problems of law and government to Romilly, expecting the latter to admit the necessity of radical reform.

*Truth versus Ashhurst* was related to the French Revolution and its impact on political debates in Britain. The title referred to William Henry Ashhurst, a justice of King's Bench. On 19 November 1792 Ashhurst delivered a charge to a Middlesex Grand Jury, denouncing the French Revolution and its English admirers. After the September Massacres of 1792 in France, the idea of reform became repulsive to many Englishmen. Ashhurst took the opportunity to respond to popular feeling, telling the jury that the common law, especially the jury trial, was a blessing to Englishmen: 'Gentlemen, there is no Nation in the world that can boast of a better System of Government than that under which we have the happiness to live.'<sup>76</sup> Ashhurst's charge was soon printed by many loyalist societies such as the Constitutional Association and 'circulated with no small industry', as Bentham wrote.<sup>77</sup> Bentham analysed Ashhurst's arguments one by one, pointing out how deceptive they were. For example, Ashhurst declared that 'No man is so low as not to be within the law's protection'. In response, Bentham suggested that the truth was totally different. The poor were excluded from access to justice and, as the law was so uncertain and complex, the rich were at the mercy of lawyers. How 'comes this?' asked Bentham. 'From extortion, monopoly, useless formalities, law-gibberish, and law-taxes'.<sup>78</sup>

After Bentham prepared the manuscript, he sent it to Romilly for advice on publication. In January 1793 Romilly replied, 'the publication of it is not likely to do good, and may do harm. The praise given to the French would, I have no doubt, throw discredit on all the truth it contains'.<sup>79</sup> *Truth versus Ashhurst* did contain some positive comments on French law and its reform. Refuting Ashhurst's claim that the English law was intelligible to every man, Bentham mentioned the French practice of transforming the unwritten laws, traditions and customs 'into *statute law*'. Bentham approved of this codification programme and wrote 'The French have done many abominable things, but is this one of them?' Bentham also praised the French statutes as being concise and accurate, 'with no more words than necessary: not like' English statutes

in which I have seen a single sentence take up thirteen such pages as would fill a reasonable volume, and not finished after all: and which are suffered with repetitions and words that are of no use, that the lawyers who draw them may be the better paid for them.<sup>80</sup> This was an attack upon both the intellect and morality of those drafting legislation.

Bentham accepted Romilly's advice and did not at this time publish *Truth versus Ashhurst*. In any case, Bentham's time was instead devoted to the Panopticon scheme and he could not afford a public debate against Ashhurst. Furthermore, Romilly's warning was realistic. Had *Truth versus Ashhurst* been published, Bentham may have been prosecuted for libel during a time of anti-French sentiment and repression of dissent. As Bentham had himself observed in *Truth versus Ashhurst*, printed after the massacres of September 1792, 'Lawyers are very busy just now in prosecuting men for *libels*', but what no judge 'has ever done, or ever will do, is to teach us how we are to know what *is*, from what is *not*, a *libel*'. Bentham also complained of politicians and lawyers using the law as a discriminative weapon against their opponents:

Oh, my dear countrymen, I fear this paper is a sad libel, there is so much truth in it.<sup>81</sup>

There was some truth to Bentham's observation. In 1792 the Attorney General Archibald Macdonald issued 19 *ex officio* prosecutions for libel. Anti-French and anti-reform sentiments could be easily mobilised to agitate loyalist jurors. Besides, the Libel Act of 1792 allowed judges and lawyers to lead the jury by interpreting the evidence unfavourably to the accused. Thus, in political libel trials, 'the odds were often stacked in favour of the prosecution'.<sup>82</sup>

Libel law may have deterred Bentham from publishing criticism of the government, but it did not deter him from writing it. From 1801 Bentham started working on 'A Picture of the Treasury' in the hope of exposing Pitt's government's ill-treatment of Bentham and his prison scheme (and it was from this project that the 'Letters to Lord Pelham' and 'A Plea for the Constitution' arose).<sup>83</sup> He completed a section of the work 'On the Dispensing power exercised by the Duke of Portland and his confederates' in May 1802<sup>84</sup> and sent part of it to Romilly for his views on 1 November 1802, to which Romilly replied, 'I see no objection to any part of them, but their violence, and the very strong expressions'.<sup>85</sup> Romilly concluded that Bentham's writing, if published, would be prosecuted as a libel on Portland. On 2 November Bentham replied that he agreed with Romilly's concern about the libellous language, but insisted that there was a conspiracy at the heart of Portland's penal policy which was thwarting the Panopticon scheme. In support of this view Bentham sent a parcel of materials relating to 'On the Dispensing power' to Romilly.<sup>86</sup>

The key evidence in the parcel supporting Bentham's claims of a conspiracy was Portland's letter, dated 14 October 1799, to the Lords Commissioners of the Treasury. According to Tim Causer, the letter was interpreted by Bentham as evidence of political corruption and patronage in Portland's Home Office.<sup>87</sup> In the letter, Portland interpreted the Penitentiary Acts of 1779 and 1794 as ancillary methods to facilitate penal transportation, which convinced neither Bentham nor Romilly. Romilly wrote:

I think it is hardly possible that he could have understood the Act of Parliament as he says he understood it; but yet I do not think that it is a case to talk of a conspiracy formed to assume a legislative power, etc.<sup>88</sup>

Bentham was much angrier and more radical on this point. He argued that Portland deliberately thought 'of such conspiracy, that the execution of that Act has hitherto been prevented'.<sup>89</sup> By 'preventing Parliament from putting Convicts where Parliament chose to have them put [...] he [Portland] must put them into places of his own choice, where Parliament chose not to have them put'.<sup>90</sup> Bentham sensed an element of despotism in Portland's letter and thus described his administrative power as 'dispensing', linking it to Stuart tyranny.

However, Bentham did not choose to distribute 'On the Dispensing power' to other people. In fact, according to Causer, Romilly was the only person to whom Bentham showed the work. Bentham took Romilly's warning of libel prosecution seriously as he wrote 'The word *libel*, from your pen, alarms me into a further communication'. Bentham hoped that Romilly could read the new material and give feedback in a short time; he claimed that if Romilly declined to read it he must publish it, no matter the risk of prosecution.

I must take my chance for seeing the inside of the King's Bench, for I cannot delay it many days longer, without much prejudice to the object of it.<sup>91</sup>

There was no surviving letter to indicate Romilly's further attitude to the topic. Perhaps a conversation between them in either one's house cautioned Bentham. However, Romilly's reluctance to start a legal battle might have stimulated Bentham to examine the judicial procedures relating to libel.

Bentham wrote *The Elements of the Art of Packing* in responding to the libel trials of the winter of 1808–9. Portland's government had prosecuted 26 printers and publishers for libel against the reputation of the British army and its Commander-in-Chief, the Duke of York. Such a large number of prosecutions created fear among journalists, who lamented the erosion of the freedom of speech by unfair trials, especially through manipulated selection of jury, namely 'jury-packing'. In the summer of 1809 Bentham was planning to expose this corrupt practice with his journalist friend James Mill, thereby hoping to mobilise public opinion to press the government to arrange more transparent and fair trials. On 25 July 1809 Mill wrote to Bentham:

As to 'Elements', for the outcoming of which I appear to be far more impatient than you [...] it must be [...] *published* in six weeks.<sup>92</sup>

Bentham was clearly encouraged, writing in the same year that 'public opinion has been turned against the Ministry, or rather against all Ministries, and in favour of Parliamentary Reform as the only remedy'.<sup>93</sup>

Why were Bentham and Mill so confident? The reason primarily derived from the damage done to the credibility of Portland's government by the Duke of York scandal. In the summer of 1808 the Duke of York's former mistress, Mary Anne Clarke, had spread rumours in the press that the Duke had allowed her to sell army commissions. In January 1809 Parliament started an inquiry lasting 12 parliamentary days, which 'became a piece of public theatre, with the pert and saucy Mrs. Clarke, who cheerfully admitted all the charges and implicated the duke, the star attraction'.<sup>94</sup> Meanwhile, outside Parliament, large protest meetings were organised in Glasgow, Cardiff, Huddersfield, Westminster, Sheffield and elsewhere in the country. The Westminster meeting was attended by 10,000 people and that in Sheffield by 5,000, demanding the ending of corruption in high offices.<sup>95</sup>

*The Elements of the Art of Packing* begins with an analysis of a report (20 February 1809) by *The Times* on the prosecution of the 26 printers and publishers. *The Times* argued that those printers and publishers had been misled by Denis Hogan, a former military officer who wrote a pamphlet first accusing the Duke of corruption. Hogan claimed that 'he had been passed over for promotion because he had refused to meet Mrs. Clarke's demands'.<sup>96</sup> However, *The Times* dismissed Hogan's allegations:

[W]hat is the origin of these men's offences? An error common to them with the prosecutor – a belief in the respectability of Hogan's character.<sup>97</sup>

This agitated Bentham, who argued that without a critical examination of Hogan's evidence it was unfair to make such a judgement of character. Bentham appealed for a critical examination by which the public might be informed whether it was a lie or not. If Hogan's claim proved to be authentic then there was no libel, and the government should withdraw the prosecutions.

Furthermore, Bentham criticised the existing procedure of libel prosecution: 'Libel law as it stands, or rather as it floats, is incompatible with English liberties.'<sup>98</sup> The Libel Act of 1792 did not give a clear definition of libel, but authorised the jury to decide whether a publication was libellous. Such an arrangement produced the possibility that the jury's opinion could be manipulated by the government prosecutor. In the event '[m]ost prosecutions were commenced by the Attorney General's ex officio information, thereby eliminating the twin filters of preliminary and Grand Jury hearings; consequently, at trial defendants would have no prior detailed knowledge of the prosecution's case'.<sup>99</sup> Moreover, the jury could be 'packed', and the process of packing was the topic that *The Elements of the Art of Packing* exhaustively analysed.

Bentham argued that special jurors had been a political tool of the government since the Stuart dynasty. In his view they comprised

a *standing* body of assessors, instruments tenanted in common by the leading members of administration, by the judges, and by the other crown-lawyers – troops enlisted, trained, and paid by the crown-lawyers – liable to be cashiered.<sup>100</sup>

The special jurors were wrongly believed to be more professional and trustworthy than ordinary jurors in checking the power of judges. In fact, according to Bentham, the institution of special jury was created to deceive the public better. Bentham described special juries as 'a special engine of Corruption'.<sup>101</sup> He also provided detailed evidence of how the corruption occurred from reformist sheriffs such as Richard Philips.<sup>102</sup> Philips's letter to the Lord Chief Baron of the Exchequer on 4 April 1808 was cited and critically reviewed. For example, Philips observed that the same individuals were selected as special jurors

in every trial and argued that this was caused by official negligence. Bentham, however, interpreted Philips's observation as evidence of the existence of a secret payroll which listed those employed by the government; he argued that the situation was not caused by negligence but by the deliberate policy of managing trials.<sup>103</sup> Bentham concluded that a packed jury was a product of secretive cooperation between the sheriffs and the Home Office. In theory, a sheriff organised the jury pool of 48 candidates randomly from all the eligible freeholders within his jurisdiction, so that no party could determine the political sentiments of the candidates. In practice, the jury-selection process was, according to Bentham, corrupt at every step. The sheriff's book of all eligible freeholders received no public examination and was easily subject to political manipulation. Some special jurors were selected from a government payroll. These individuals:

earned at least a guinea a week for regularly serving [...] the master of the crown office who presided over the selection process worked hard to ensure that a small crew of trading special jurors [...] would tilt jury sentiment in favour of the government.<sup>104</sup>

On 31 January 1810 Romilly advised Bentham not to publish *The Elements of the Art of Packing*:

I have not the least doubt that Gibbs would prosecute both the author and the printer [...] you will hardly, I think, reconcile to yourself the involving your printer in the same calamity.<sup>105</sup>

Vicary Gibbs was the Attorney General who had prosecuted the 26 printers and publishers and was a much more aggressive prosecutor than previous Attorneys General. Between 1808 and 1810 he filed 42 *ex officio* informations for libel, in contrast to the 14 filed by his predecessors between 1800 and 1807.<sup>106</sup> Romilly might have told Bentham on an earlier occasion about Gibbs's tough attitude towards seditious publication. On 9 June 1809 Romilly had had a conversation with Gibbs in the House of Commons. On that day Gibbs had planned to bring in a bill to strengthen the government's power of suppressing seditious activities. Romilly, who viewed Gibbs's bill as 'a most insidious attack upon the liberties of the people',<sup>107</sup> had managed to prevent his introduction of it. Now, however, if Bentham had published *The Elements of the Art of Packing* Romilly would surely have felt powerless to stop Gibbs from prosecuting Bentham.

Bentham accepted Romilly's advice and did not publish *The Elements of the Art of Packing* at the time.

Taking into account *Truth versus Ashhurst*, which would be published in 1823, Bentham produced several subversive writings about law and government, including writings on New South Wales, which were not immediately published – and only circulated in private networks – because of Romilly's advice. This confirms William Thomas's observation that Romilly's prudence successfully restrained Bentham's radicalism.<sup>108</sup> However, Romilly became less active in politics after the collapse of the Whig government in 1807 and seemed to have lost interest in reforming politics. In August 1807 Romilly wrote to Dumont, '[w]hat is passing abroad, and what is passing at home, affords us but a melancholy prospect'.<sup>109</sup> War and the tightening restrictions on discussion greatly discouraged moderate reformers. The shadow of the extremism of the French Revolution troubled them, instilling doubts about Enlightenment ideals.

Romilly's hesitation to commit to radical reform might have produced an opposite effect which intensified Bentham's impatience with the Whigs. During the French Revolution and the Whig government of 1806–7, Bentham's politics were largely in line with those of the Whigs. In the context of the end of Greenville's government, which expressed most interest in law reform during Pitt's era, in early 1807, Bentham lamented the event and described the government as 'our Ministry' in a letter to his brother.<sup>110</sup> However, circumstances rendered the Whigs' politics more difficult to make compatible with Bentham's utilitarianism. In 1817 in *Plan of Parliamentary Reform*, he openly attacked the Whigs as being unfit to lead the people. During the election in Westminster in 1818, Bentham wrote a handbill stating that 'being a lawyer, a Whig, and a friend only to moderate reform', Romilly was unfit to be elected.<sup>111</sup> In his last years Bentham dismissed Romilly's approach to reform as 'little miniature', and deplored his deference to aristocrats and established lawyers.<sup>112</sup>

#### 4. Codification in the *Edinburgh Review*

In November 1817 the *Edinburgh Review* published Romilly's anonymous review of Bentham's *Papers relative to Codification*. The review expressed Romilly's cautious attitude towards codification, which had also been a feature of his rejection of Bentham's codification offer to Scotland in 1808. Romilly recommended that his readers should observe the experimental implementation of Bentham's ideas in Geneva and, should they be



successful, consider their application in England. This was a reference to Dumont's recent activity in the Genevan Representative Council. In May 1817 Dumont had been appointed a member of the commission for the preparation of a new penal code and had advocated the application of Bentham's ideas.<sup>113</sup> Although sceptical of Bentham's optimism concerning the immediate application of codification in England, Romilly did not discourage further public discussion:

The question, whether the common, or unwritten law, be better calculated than a written code, to provide effectually for the security of men's persons and properties, in a state as far advanced as England is in civilization and refinement, is one of very great public interest.<sup>114</sup>

Romilly's attitude lay somewhere between the Whig lawyer James Mackintosh's praise of the common law and Bentham's rejection. Romilly criticised the common law, but by Bentham's standard his criticism was mild. His hesitation in accepting codification was to Bentham evidence that, being a lawyer, Romilly prioritised professional over public interest.

Romilly complained that the common law was too uncertain to act as a positive rule of conduct. Unlike statutory laws, the common law had no fixed form and rule. Statutes expressed their commands in direct and positive terms, but in the common law 'we can arrive at a knowledge of it only through its interpreters and oracles – the Judges'.<sup>115</sup> If the judges' discretionary power were unregulated, the common law would be a disorganised collection of the private opinions of individual judges. This situation caused delay of justice whenever a new question confused judges who 'profess themselves unqualified immediately to decide'.<sup>116</sup> Delayed process forced litigants to spend more time and money, drawing into question the cost and efficiency of legal proceedings. Romilly also admitted that the people had no control over the common law, which was a violation of the British constitutional principle that 'we are to be governed by no laws but those to which the people have, by their representatives, given their consent'; the common law judges were 'not the representatives of our choice, but the servile instruments of our monarchs'.<sup>117</sup>

However, such objections to the common law were not sufficient to persuade Romilly to accept codification. In the *Edinburgh Review* he claimed that Bentham exaggerated and misrepresented the problems of the common law. He also attacked Bentham's manner of expression: 'Nothing, in our opinion, can be more injudicious than the manner in

which he [Bentham] has, in his various writings, combated existing evils.<sup>118</sup> On the other hand, Romilly gave a concise opinion as to why English lawyers were unable to transform the common law into a code. Legal education under the common law system cultivated a particularistic mindset. To survive and prosper, a lawyer felt compelled to focus on a few branches. Narrow-minded legal experts found it difficult to understand their colleagues from a different branch of law. Romilly argued that if ‘the task of compiling a complete code of laws were now to be undertaken, the subject would probably be divided into its different branches, and each would be assigned to those’ acknowledged experts. However, there was no centralised leadership in England that could supervise a project like codification that required so much rational deductive planning. Moreover, such a logic of planning was very different from conventional legislation. After all, Romilly argued, ‘it is chance, not the qualifications of the legislator, which determines upon what he shall legislate’.<sup>119</sup> Furthermore, Romilly did not support Bentham’s view that there was such a thing as legislative science. In his view, British MPs were ill-qualified legislators, creating legal language that was equally as ‘uncertain, intricate, obscure, perplexed, [and] inconsistent’ as the common law.<sup>120</sup> Nor did he share Bentham’s optimistic view that MPs could become sufficiently enlightened to replace lawyers and become scientific legislators.

On 7 January 1818 Bentham noticed Romilly’s review.<sup>121</sup> A week later he commented that it was a calculated response from the Whig party to Bentham’s public support for radical parliamentary reform. The critical part of Romilly’s review:

contains a confession – not the less conclusive for being *express* – of the truth of the picture given in *Plan. Cat.* [*Plan of Parliamentary Reform, in the Form of a Catechism*] of the Whigs. *Church cat.* [*Church of Englandism and its Catechism Examined*] follows up the blow given in *Plan Cat.*: it goes to the destroying of the whole mass of that matter of corruption which while the Tories feed upon in possession, the Whigs feed upon, and will continue feeding upon while they are anything, in expectancy [...] As to Romilly when he came to the part in which *Sinecures* and the overpay of overpaid Offices, with all the other parts of the *Mammon* of unrighteousness, which he toils to have his share in the disposal of are rolled in the kennel, not improbably, being galled and alarmed, and hence foreseeing more vexation than amusement he stopped there.<sup>122</sup>

Bentham had expressed his criticism of Romilly's motivation to John Herbert Koe, Bentham's literary assistant, in a private letter. Bentham chose not to criticise Romilly publicly. However, in private networks, to his close friends of radical political disposition, Bentham interpreted Romilly's review as evidence of the Whig party's decline and corruption, insisting that the Whigs could not be trusted as the friends of the people. As an old friend, Bentham knew Romilly's moral integrity and intellectual power well; this made him even more shocked and upset about Romilly's criticism that Bentham was 'injudicious' in attacking the common law.

The immediate explanation that occurred to Bentham was that Romilly had been corrupted by sinister interests. In other words, in Bentham's view, Romilly's personal interest as a shareholder in the legal profession was a more important force than his commitment to reform and the public interest. If even Romilly could be corrupted, those Whigs whose moral integrity and intellectual power were inferior were even more likely to succumb to corruption. On 14 January 1818 Bentham wrote to the radical organiser Francis Place

[W]hat leisure time he [Romilly] had he found it more expedient to employ not improbably after consultation with brother Whigs, in the manner that you know of.<sup>123</sup>

Formerly, although Bentham was upset by Romilly's growing conservatism, he had still been confident of Romilly's democratic spirit, stating that Romilly was 'more democratic than the Whigs'.<sup>124</sup> After reading the review, however, Bentham was convinced that although Romilly was sentimentally a democrat, he was trapped in Whig politics. Bentham wrote on 6 December 1818, shortly after Romilly's death:

His sentiment in favour of the cause of the people went as far as ours. By avowing them in public, he should do harm (he said) to himself, and no good to the cause.<sup>125</sup>

In March 1819, in responding to Thomas Erskine's *Defence of the Whigs*, a work written in the context of the Westminster election of 1818 to refute the criticism of the Whigs, Bentham named Romilly as an example of the party's harm to a man of integrity as well as to the rights of voters. In unpublished manuscripts written in the form of letters to Erskine, Bentham emphasised that Romilly 'was labouring under a mistake' and

'did not know what his own principles were'; he also commented that his 'unblemished' character was used by the Whigs to deceive the voters.<sup>126</sup>

Bentham's comments suggest that the growth of democratic sentiment hastened his separation from the Whig party. On the other hand, the Whigs made further public statements against Bentham's radicalism. After Romilly's criticism of Bentham's legal thinking, the *Edinburgh Review* launched an attack on Bentham's political thinking in 1818. Written anonymously by Mackintosh, the review of Bentham's *Plan of Parliamentary Reform* further publicised the Whig party's strategy of distancing themselves from the democrats. Mackintosh interpreted Bentham's proposal of universal suffrage as a road leading to the tyranny of the majority, arguing: 'That the majority of a people may be a tyrant as much as one or a few, is most apparent in the cases where a state is divided, by conspicuous marks, into a permanent majority and minority', such as in Ireland.<sup>127</sup>

Mackintosh's review and Bentham's speculation that *Plan of Parliamentary Reform* stimulated Romilly's criticism of codification indicate the extent to which Bentham and the Whigs had grown dissatisfied with each other's approach to reform. Specifically in 1817 Bentham could no longer restrain his disapproval of the Whigs' hesitation and divisions over parliamentary reform. The Whig campaign for parliamentary reform in 1816 and 1817 lacked unified leadership. Within the party members were divided on the direction and content of reform, disagreeing over what the proper scope of civil liberties should be. The Spa Fields riot in November and December 1816 and the attack on the Prince Regent on 28 January 1817 interrupted the Whig leaders' unity, as 'Grenville's concerns about threats to public order led him to favour a repressive approach at odds with the traditionally libertarian Foxite view'.<sup>128</sup> The left-wing leaders Brougham and Grey were alarmed by the party split, publicly objecting to the radical programme proposed by John Cartwright, Henry Hunt and other radical leaders. In this polarised atmosphere, Bentham joined with the radicals in attacking the Whigs.

The Introduction of *Plan of Parliamentary Reform*, written in 1816–17, argued that the country and the constitution were in an alarming state.<sup>129</sup> Individual liberties were limited by a series of repressive policies which Bentham termed 'Gagging Bills'; among them were the Habeas Corpus Suspension Act of 1817 and the Seditious Meetings Act of 1817, both passed in March that year. Bentham interpreted these laws as evidence of an ineffective constitution, the solution to which was radical parliamentary reform: 'Long had this sole possible remedy against the otherwise mortal disease of misrule been regarded by me as the

country's only hope.<sup>130</sup> Bentham sarcastically analysed the logic of those who claimed that the British constitution was perfect, or that any reform proposal was a conspiracy of those allying with the French in order to enslave the British. The anti-reformers created a popular fear

with the sacred name of reform on their lips, and nothing better than riot or pillage in their hearts [...] let but a dozen or a score of obscure desperadoes concert mischief in a garret or an alehouse, fear will be pretended – prudence and wisdom mimicked – honest cowards will be made to acquiesce and to cooperate by feigned cowardice [...] [by] our own Matchless Constitution – matchless in rotten boroughs and sinecures!<sup>131</sup>

Bentham also thought that a radical solution was necessary because the Whigs were bogus reformers. Bentham claimed that he had once thought the Whigs could be the friends of the people, but recent events suggested that 'on no occasion [...] can the people receive any the slightest chance' of assistance from the parliamentary Whigs.<sup>132</sup> The arguments repudiating the Whigs' moderate reform have been analysed in detail by Philip Schofield. As he suggests, the pamphlet reminded readers that

the key to political conduct [...] would be found in the state of interests, and not in professions and protestations. It was possible that a particular individual would not conform to the general rule, due to 'the unconjecturable play of individual idiosyncrasies', but there could be no doubt that a group of men, and particularly a political party 'the motives of which are in so great a degree open to universal observation', would act according to their interests.<sup>133</sup>

Following this logic, it makes sense to review the Whigs' professions of support for reform to see whether their party interest was prioritised over the public interest.

*Plan of Parliamentary Reform* did not discuss the common law, apart from an observation that the rule of common law was an imagined rule.<sup>134</sup> Bentham had privately criticised Mackintosh's theory of the common law. In 1799, after the publication of *A Discourse on the Law of Nature and Nations*, Mackintosh had been invited to deliver lectures at Lincoln's Inn. He had argued that the substance of common law required no major revision because it had already grown into a 'true philosophy' over the years.<sup>135</sup> Moreover, in terms of reform, Mackintosh had highlighted the

importance of traditional wisdom and intellectual elites in restraining radicalism.<sup>136</sup> Bentham had attended the lectures and had been introduced to Mackintosh personally. However, he disapproved of Mackintosh's theory. In 1808 Bentham wrote a letter to Mackintosh and claimed that his justification for the common law was 'a waste of talents'. Further, Bentham argued that lawyers had made use of his lectures to empower their 'sophisms', 'in readiness to be employed in the service of right or wrong, whichever happened to be the first to present the retaining fee'.<sup>137</sup>

The common law was an important element of Whig justifications of the liberal character of the British constitution in the eighteenth century. In political debates the Whigs argued that the constitution was in constant danger of being corrupted by the Crown and Tories, and that it was their historical role to correct this tendency – as they had successfully done during the Glorious Revolution of 1688. Accordingly, they felt comfortable about William Blackstone's account of the British constitution, which placed the common law at its centre.<sup>138</sup> Legal writers who identified themselves as the supporters of Whig values, for example, Romilly, concentrated on reforming the statutes. As David Lemmings observes, Romilly's main concern was to correct

a growing culture of positive government which challenged and ultimately supplanted older expectations about citizenship and *active* consent for the rule of law derived from popular participation in juridical processes and the cultural legacy of the common law.<sup>139</sup>

## Conclusion

From the 1780s to 1818 Romilly played a key role in maintaining the loose intellectual alliance between Bentham and Whig reformers. However, unlike Bentham, Romilly restrained his philosophical passion and in parliamentary debates he spoke in moderate and cautious language. To Bentham this delicate strategy of speaking politely, appropriately and even deferentially was exhausting. Romilly constantly suffered the pain involved in questioning his own moral and intellectual integrity whenever the oppressiveness of the bar conflicted with his egalitarian and humanitarian ideals, as his memoirs suggest.<sup>140</sup> In practice Romilly always chose to compromise, which attracted sarcastic comments from Bentham.

To radical reformers such as Bentham, Romilly's self-imposed restraint was viewed as a sign of weakness in pursuing liberal causes.

While Romilly and some Whig reformers were promoting criminal law reform, their moderate approach did not attract Bentham. In terms of law reform, because he felt strong resistance in Britain, Bentham shifted his attention abroad, through his transnational networks, offering to codify for American, Russian and Genevan leaders.<sup>141</sup> After Romilly's death in 1818 Mackintosh took the leadership among parliamentary Whigs on the issue of criminal law reform.<sup>142</sup> But Bentham did not show the same interest in allying with him as he had done with Romilly. Meanwhile the diminishing prospect of a reforming government sapped Bentham's enthusiasm for lobbying British elites for radical law reform. Bentham turned to his social network of radicals and enriched his resources in public spheres by funding the *Westminster Review*, further distinguishing himself from the Whigs.

On the other hand, law reform ceased to be an exclusively Whig cause when Robert Peel became Home Secretary from 1822. He skilfully made the topic part of the government's agenda, displaying an interest in and capability to deliver large-scale reform. In this context, from 1826 Bentham started to lobby Peel on topics such as codification and judicial remuneration. Bentham also attempted to work with Whigs, with Brougham being a key example in the end of 1827. However, in February 1828 both Brougham and Peel failed to meet Bentham's expectation in the House of Commons. On 7 February 1828 Bentham's advice went unheeded by Brougham when making his famous six-hour law reform speech.<sup>143</sup> On 29 February Peel attacked Bentham for being both unrealistic and pro-French in law reform.<sup>144</sup> But Bentham continued to act tactically in responding to opportunities or correspondents over specific reform projects. When Daniel O'Connell announced interest in law reform in July 1828, Bentham quickly contacted him and started a law reform campaign with petitioning to Parliament as the chief strategy.<sup>145</sup>

Romilly is a special factor in Bentham's departure from Whig politics and embrace of democracy. Romilly's review of *Papers relative to Codification* not only stimulated Bentham to confirm his observation of the Whigs as shareholders of the existing sinister ruling interests in *Plan of Parliament Reform*, but also led him to speculate that the Whig reformism was deeply deceptive. Bentham argued that Romilly should depart from the Whigs to join with him as radical reformers. He maintained this view in his unpublished, systematic analysis of the fallacies of Erskine's *Defence of the Whigs*. Moreover, Bentham appeared to be more willing to limit his disagreements with the rising young Whig writers Jeffrey, Mackintosh and Brougham to a manageable scale, leaving a door open

for collaboration.<sup>146</sup> But these Whig writers never supported Bentham to the degree that Romilly did, illustrated by Brougham's falling out with Bentham after February 1828. In this sense, Romilly's death irreversibly cooled Bentham's relationship with the Whigs.

## Declarations and conflicts of interest

### *Research ethics statement*

Not applicable to this article.

### *Consent for publication statement*

Not applicable to this article.

### *Conflicts of interest statement*

The author declares no conflicts of interest with this work.

## Notes

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- 11 John Reeves to Evan Nepean, 5 Aug. 1793, in the Home Office files (H.O. 42/26, fo. 10), quoted from *The Correspondence of Jeremy Bentham*, vol. 4, ed. A.T. Milne, London, 2017, 438, n. 1.
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- 13 Bentham to Charles Abbot, 15 Apr. 1794, *Correspondence*, vol. 5, ed. A.T. Milne, London, 2017, 27–8.
- 14 *Correspondence*, vol. 5, 17–8.
- 15 J. Semple, *Bentham's Prison*, 173.
- 16 Bentham to Samuel Bentham, 21 February 1794, *Correspondence*, vol. 5, 16.
- 17 J. Semple, *Bentham's Prison*, 172.
- 18 Romilly to Bentham, 9 Mar. 1794, *Correspondence*, vol. 5, 17–8.



- 19 Romilly to Bentham, 27 Jun. 1794, *ibid.*, 49–50.
- 20 Romilly to Bentham, 27 Jun. 1794, *ibid.*, 50.
- 21 Romilly to Bentham, 26 Apr. 1797, *ibid.*, 365.
- 22 Romilly to Bentham, 1 May 1797, *ibid.*, 366.
- 23 Romilly to Bentham, 19 May 1797, *ibid.*, 368.
- 24 Duane taught Scott for six months without charge. Scott described this help as having ‘taken a great load of uneasiness off my mind, as in fact our profession is so exceedingly expensive, that I almost sink under it’. Quoted in R. Melikan, *John Scott, Lord Eldon, 1751–1838: The duty of loyalty*, Cambridge, 1999, 3.
- 25 Before any petition for enclosing land could be presented to the Commons, written notice had to be fixed on the church door of the relevant area for three Sundays in the months of August and September immediately preceding the parliamentary session in which the petition was to be presented. S. Lambert, *Bills and Acts: Legislative procedure in eighteenth-century England*, Cambridge, 1971, 129–49.
- 26 Bentham to George Rose, 23 February 1798, *Correspondence*, vol. 6, ed. J.R. Dinwiddy, Oxford, 1984, 7.
- 27 Romilly to Bentham, 2 May 1798, *Correspondence*, vol. 6, 26.
- 28 *Ibid.*, 382–3.
- 29 *Ibid.*, 383–5.
- 30 *Ibid.*, 406–8.
- 31 Bentham to Bunbury, 9 Aug. 1802, *Correspondence*, vol. 7, 72. For a more detailed analysis, see *Panopticon versus New South Wales and other writings on Australia*, eds T. Causer and P. Schofield, xlii.
- 32 Bunbury to Bentham, 20 Aug. 1802, *Correspondence*, vol. 7, 79n. Of Bentham’s papers sent to Lord Pelham, see Bunbury to Bentham, 13 Aug. 1802, *Correspondence*, vol. 7, 77.
- 33 Bentham to Romilly, 27 Aug. 1802, *ibid.*, 91.
- 34 Bentham to Bunbury, 9 Aug. 1802, *ibid.*, 73.
- 35 Romilly to Bentham, 28 Aug. 1802, *ibid.*, 92.
- 36 Samuel Parr to Bentham, 8 Feb. 1802, *ibid.*, 197n. The full title of ‘A Plea’ is *A Plea for the Constitution: shewing the enormities committed to the oppression of British subjects, innocent as well as guilty, in breach of Magna Charta, the Petition of Right, the Habeas Corpus Act and the Bill of Rights: as likewise of the several transportation acts; in and by the design, foundation and government of the penal colony of New South Wales: including an inquiry into the right of the Crown to legislate without Parliament in Trinidad, and other British colonies.*
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- 41 Bentham to Romilly, 7 Mar. 1803, *Correspondence*, vol. 7, 209.
- 42 *Ibid.*, 216.
- 43 *Ibid.*, 197–8.
- 44 Bentham to Dumont, 9 Feb. 1803, *ibid.*, 199–200.
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- 46 *Panopticon versus New South Wales and other writings on Australia*, lxxxix.
- 47 Champs, *Enlightenment and Utility*, 155, 157–8.
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- 50 Romilly to Bentham, 12 Sep. 1806, *ibid.*, 374.
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- 53 Romilly to Bentham, 12 Sep. 1806, *Correspondence*, vol. 7, 375.
- 54 [Bust by Peter Turnerelli | Bentham Project – UCL, University College London.](#)
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- 63 *Memoirs of the Life of Sir Samuel Romilly*, vol. 2, 234.
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- 66 *Ibid.*, 484.
- 67 *Ibid.*
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- 71 *Ibid.*, 485.
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- 73 *Ibid.*, 489.
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- 93 Bentham to John Mulford, 1809, *ibid.*, 60.
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