

Articles

Bentham's Fictions: Canon and Idolatry in the Genealogy of Law

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"The case is this. A large portion of the body of the Law was, by the bigotry or artifice of lawyers, locked up in an illegible character, and in a foreign tongue. The statute [Blackstone] 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 everything. Fiction, tautology, technicality, circuitry, irregularity, inconsistency remain. But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near."¹

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1. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 411 (J.H. Burns & H.L.A. Hart eds., 1977).

"I have been mainly concerned here with the subject of fictions. Properly understood, are they not a telling illustration of the fact that knowledge—the fullest possible awareness—of the nature of law is the true way of escape from its shackles?"²

INTRODUCTION: TOWARD A GENEALOGY OF LEGAL ICONOCLASM

Positivists contend that law is separate from other domains of culture, including especially morals and religion.³ The canon of the law is supposed to be self-contained. Whatever exists outside its margins is not law. The authority of this canon consists, in significant part, of the impossibility of confusion or commingling with other, lesser norms. Already in its exclusiveness, however, law betrays a kinship with other domains of culture, especially religion, which shares a predilection for canon.⁴ The historian of religion Jonathan Z. Smith argues that "the radical and arbitrary reduction represented by the notion of canon and the ingenuity represented by the rule-governed exegetical enterprise of applying the canon to every dimension of human life is that most characteristic, persistent, and obsessive religious activity."⁵ Recognizing that the impulse toward canon is also distinctive of many legal traditions, Smith suggests that in the future, "students of religion might find as their most congenial colleagues those concerned with . . . legal studies."⁶ In modernity, the most common form of legal canon is the "code"—the reduction of the law to a set of written statutes that is, ideally, complete, concise, and unambiguous. This poses a paradox: If law and religion coincide precisely at the point at which each claims to be most distinctive—namely, in its embodiment in a clearly delimited canon—then perhaps they are more alike than legal positivists care to admit?

Canon embodies the dream of a fully self-present discourse that is, impossibly, both complete and closed. Although Smith emphasizes the freedom enabled by the creative exegesis of a canon, the impulse toward canon can become virulently restrictive. Not only the words of the canon, but the permissible interpretations of these words may be limited in such a way as to exclude metaphorical or non-literal meaning. By purging

2. Owen Barfield, *Poetic Diction and Legal Fiction*, in *THE REDISCOVERY OF MEANING, AND OTHER ESSAYS* 44, 64 (1977).

3. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 596-97, 616 (1958) (quoting John Austin on the separation of law from religion).

4. See, e.g., *AUTHORITY, ANXIETY, AND CANON: ESSAYS IN VEDIC INTERPRETATION* (Laurie L. Patton ed., 1994); WILLIAM GRAHAM, *BEYOND THE WRITTEN WORD: ORAL ASPECTS OF SCRIPTURE IN THE HISTORY OF RELIGION* (1987); *RETHINKING SCRIPTURE: ESSAYS FROM A COMPARATIVE PERSPECTIVE* (Miriam Levering ed., 1989).

5. JONATHAN Z. SMITH, *IMAGINING RELIGION* 43 (1982).

6. *Id.*

themselves of linguistic uncertainties, law and religion often aspire to be transparent and perfect languages. Modern law, like certain forms of religious fundamentalism, has established its authority as a form of literalism, in opposition to literature and other aesthetic discourses.⁷ This strategic exclusion reinforces the status of law as not merely a language of command, but a metalanguage, a discourse that rules over other discourses.⁸

The present essay explores what is at stake in the impulse toward canon, and simultaneously calls into question the separation between law and religion, through a study of the English utilitarian philosopher and legal reformer Jeremy Bentham (1748-1832). Bentham's proposal for the "codification" of the law, a term he invented,⁹ was closely connected with his critique of linguistic "fictions" that were to be expelled from the legal code, or even from language itself. His goal was to fix the meaning of terms and produce a language that was not only unambiguous, but also devoid of synonyms. Not only must every word have a single meaning, but every idea must be represented by one and only one word: "Identity of nomenclature is certificate of identity of nature: diversity of diversity:—how absurd, how inconsistent to make the certificate a false one!"¹⁰ The same goal informed his ideal of a legal code, or "Pannomion," which was to contain the whole law and nothing but the law.¹¹

These proposals were heavily influenced by Protestant theology. During the Reformation, Protestants located religion increasingly in the literal interpretation of a canon of scripture, as opposed to the "idolatrous" customs of the Catholic Church. Bentham's proposal for the codification of the still largely customary English common law marked a similar relocation of the legal tradition. However, it was in his critique of fictions, including the common law itself, that the structural and historical connections with Protestant theology were most evident. Bentham labeled these illusions of language as forms of verbal "idolatry." His linguistic iconoclasm was not without precedent. During the Reformation, Protestant theologians had applied the prohibition against idolatry to language, extending this charge beyond its scriptural intendment. British

7. See LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW (Costas Douzinas & Lynda Nead eds., 1999).

8. Cf. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 820 (Richard Terdiman trans., 1987).

9. See The Bentham Project, *Neologisms of Jeremy Bentham*, at <http://www.ucl.ac.uk/Bentham-Project/Faqs/neo-c.htm> (last visited Mar. 4, 2005).

10. 3 JEREMY BENTHAM, *A Manual of Political Economy*, in THE WORKS OF JEREMY BENTHAM 30, 73 (John Bowring ed., Edinburgh, William Tait 1843) [hereinafter *Political Economy*]; cf. 3 JEREMY BENTHAM, *A General View of a Complete Code of Laws*, in THE WORKS OF JEREMY BENTHAM, *supra*, at 155, 209 [hereinafter *A General View*].

11. 3 BENTHAM, *A General View*, *supra* note 10, at 205, 211.

philosophers before Bentham, including Francis Bacon (1561-1626), Thomas Hobbes (1588-1679), and John Locke (1632-1704), had further developed such applications, especially by condemning the reification or personification of words in terms often borrowed from theologians. Bentham himself drew directly from scripture and theology in extending these criticisms of verbal idolatry.

In Bentham's case, the structural analogy between law and religion suggested by their mutual dependence on canon turns out to signal a deeper, genealogical relation of law to religious iconoclasm. Moreover, his case was not idiosyncratic. Peter Goodrich has shown that the common law in sixteenth- and seventeenth-century England established its authority through an "antirrhetic," an attack on the power of images that borrowed from Reformation iconoclasm.¹² Polemics originally directed against Catholic ritual were applied to purify the language of the law. Law defined itself against an excluded, idolatrous Other. Costas Douzinas and Lynda Nead concur that "after the Reformation and the fusion of secular and ecclesiastical jurisdictions, iconophobic ideas became the explicit foundation upon which the common law was established."¹³ The critique of idolatry was transposed to the domain of language and became an "internalization of iconoclasm to the text."¹⁴ The law sealed itself off, both hermetically and hermeneutically, from other domains of culture, while paradoxically presenting itself as a universal language that had the power to translate every other discourse into its own idiom. The claim of law to constitute a perfect language was made possible by an exclusion or repression of verbal images.¹⁵ Other critical legal scholars have argued similarly, though without specific reference to religious iconoclasm, that law constitutes a special mode of rhetoric, the distinguishing characteristic of which is that it denies or represses its own rhetorical nature in order to establish its superiority to other, more obvious forms of rhetoric. Stanley Fish states that "the law is at once thoroughly rhetorical and engaged in the effacing of its own rhetoricity."¹⁶ Peter Fitzpatrick refers to law as a "mythology" or even, borrowing Jacques Derrida's term, a "white mythology,"¹⁷ a mode of rhetoric that erases or obscures its own nature as such. To counteract such mythologies, Goodrich calls for a genealogy

12. PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW* (1995).

13. Costas Douzinas & Lynda Nead, *Introduction to LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW*, *supra* note 7, at 1, 8-9.

14. *Id.* at 9.

15. *Id.* at 3-4.

16. Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THE FATE OF LAW* 159, 195 (Austin Sarat & Thomas R. Kearns eds., 1991).

17. PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 32-33 (1992); cf. JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 207 (Alan Bass trans., 1982) (defining the concept of a "white mythology").

“that is cognizant of a poetics repressed within institutional prose, of an affectivity harbored in its science, a power in its reason, an image in its logic, a justice in its law.”¹⁸

Taking the lead from such prior scholarship, my analysis of Bentham contributes to a genealogy of law that points to the origins of modern, “secular” law in an earlier, religious opposition between canon and idolatry. Although best known as a radical reformer of the common-law tradition, who insisted on replacing its customary law with a written code, Bentham represented a further development of the repression of images that Goodrich identifies at an earlier stage of that tradition. Bentham turned the critique of idolatry against the common law itself. This brings us one step closer to modern law, and suggests that, behind the mask of legal reason, there may lie the image of another god whose disciples we lawyers remain. Given Bentham’s influence on modern law, as both the leading proponent of codification and one of the founding figures of Utilitarianism and legal positivism, the recovery of such neglected religious influences on his jurisprudence is of vital importance.

The question of whether modern, secular law is “religious,” though it may be unanswerable, can be approached through a reconsideration of Bentham’s own religion. Arguably an atheist, Bentham worked hard to separate law from religion. Early in his career, he declared that “utility,” the only rational basis for law, was not only occasionally but eternally opposed to “asceticism,” which pursued pain for its own sake, or rather for the sake of outmoded religious ideals.¹⁹ Throughout his writings, he consistently sought to reform the law to replace the “religious sanction,” which in his view had ceased to become effective as a ground of law.²⁰ These positions represented a radical departure from, and indeed a direct assault upon, Sir William Blackstone’s (1723-80) view that “Christianity is part of the laws of England.”²¹ Following Bentham, John Austin (1790-1859) rejected Blackstone’s view that laws that conflicted with divine law were not valid.²² In the last century, Herbert Hart (1907-1992) quoted this argument of Austin in the course of making his own claim that law is

18. GOODRICH, *supra* note 12, at 30.

19. 1 JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 1, 4-6.

20. PHILIP BEAUCHAMP [JEREMY BENTHAM AND GEORGE GROTE], *AN ANALYSIS OF THE INFLUENCE OF NATURAL RELIGION ON THE TEMPORAL HAPPINESS OF MANKIND* (London, R. Carlile 1822), *republished as* *THE INFLUENCE OF NATURAL RELIGION ON THE TEMPORAL HAPPINESS OF MANKIND* 82-94 (Prometheus Books 2003). The term “religious sanction” is defined in 1 BENTHAM, *supra* note 19, at 14-15.

21. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *59.

22. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184-85 (Library of Ideas 1954) (1832).

separate from morals.²³ Such denials of a connection between law and religion help to maintain the self-image of law as "secular" and rational. However, a recovery of the historical influence of religion on Bentham's jurisprudence, precisely at the point of separation of law in a self-contained code, calls into question the positivists' autobiography and family history of modern law as "secular." The separation of law from religion appears to have roots deep in the Reformation opposition between canon and idolatry.

My argument will proceed in several stages. First, I will provide some historical background on Bentham's codification proposal, and explain what he meant by "fictions" of both the specifically legal and the more broadly linguistic variety. Then I will summarize the history of the religious opposition of canon to idolatry and describe how such ideas were applied to language, initially by Protestant theologians and subsequently by an ostensibly secular philosophical tradition. Next I will show how Bentham drew on such religious and secular traditions for his critique of fictions. Then I will use several of Bentham's writings on religion to raise again the question of whether he was "religious" or an "atheist." I will conclude by suggesting the function of iconoclasm in an economy of representation, and the implications for the broader question of whether and in what sense modern law may be called "religious."

THE FRICTION WITH FICTIONS

In seventeenth-century England, a number of proposals sought to replace common law with a simple code derived, in some cases, from the Bible.²⁴ Barbara Shapiro notes that such "radical" movements, prominent during the Revolution and Protectorate (1640-1660), subsequently diminished.²⁵ Unlike some of these earlier reformers, Bentham did not propose to turn to religion as a source of law. Indeed, he disapproved of the code developed in the Massachusetts Bay Colony in the 1630s and 1640s, which borrowed from Biblical law, most notably by using the Ten Commandments as a framework for defining capital crimes.²⁶ However, Gerald Postema's analogy between Bentham's codification proposal and that of the radical Levellers is apposite.²⁷ Just as some earlier movements

23. See Hart, *supra* note 3.

24. Barbara Shapiro, *Codification of the Laws in Seventeenth Century England*, 1974 Wis. L. REV. 428, 430, 449-50, 455 (1974).

25. *Id.* at 430.

26. Cf. BENTHAM, *supra* note 1, at 25-27, 200. See, for the code in question, THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS (facsimile ed., The Huntington Library 1975) (1648). See generally GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1960) for a comprehensive account of these developments.

27. Cf. GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 425 (1986).

had done, Bentham depicted his project as an extension of the religious Reformation. The Protestant emphasis on a written canon of scripture to the exclusion of unwritten custom, combined with the translation of that canon into the vernacular and an emphasis on its literal meaning, had made religion more democratic. Bentham hoped to do the same for the law. Postema explains that Bentham “prided himself on being the ‘Luther of Jurisprudence’ and it was precisely at this point that his jurisprudential Protestantism is most pronounced. Just as access to God was not to be mediated by priests, so too access to the law was not to be mediated by professional lawyers.”²⁸ Bentham also made a “comparison between the mysteries of the law and lawyer craft and those of religion and priest craft.”²⁹ The remedy for both “Jurisprudential and Ecclesiastical Superstition[s]” was to be found in codification, or “the forming a Digest of the Law,” which was “to Lawyers, what the making a translation of the Bible was to Church men.”³⁰ Such translations had put religion into the hands of individuals. Similarly, Bentham hoped through codification to make “every man his own lawyer.”³¹ Otherwise, the real legislator of the common law would be the person who reduced its principles to a written compilation,³² just as the bookbinder might usurp the authorship of the Bible by adding to Jesus’s own words.³³ Of course, there were important differences between Bentham’s codification proposal and the Reformation idea of a scriptural canon, one of the most obvious of which was that Protestants had attempted, albeit unsuccessfully, to fix religion in a timeless and unalterable form ostensibly dictated by God and subject to no amendments, whereas Bentham placed great emphasis on the continual improvement of the law by the legislature. His code was supposed to be comprehensive and authoritative, but not eternal.

28. *Id.* at 425; see also H.L.A. HART, *ESSAYS ON BENTHAM* 29 (1982). The phrase “Luther of Jurisprudence” appears at 7 JEREMY BENTHAM, *Rationale of Judicial Evidence*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 1, 270.

29. HART, *supra* note 28, at 29; see also JEREMY BENTHAM, *CHURCH-OF-ENGLANDISM AND ITS CATECHISM EXAMINED*, Introduction, 229-30 (London, Effingham Wilson 1818); 6 JEREMY BENTHAM, *Introductory View of the Rationale of Evidence*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 1, 11; 7 BENTHAM, *supra* note 28, at 210; 8 JEREMY BENTHAM, *A Fragment on Ontology*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 193, 199.

30. Jeremy Bentham, *University College Manuscript Collection*, at xcvi.94-95, xxvii.124, *quoted in* DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 253 (1989).

31. 4 JEREMY BENTHAM, *Bentham’s Draught for the Organization of Judicial Establishments*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 305, 332; see also JEREMY BENTHAM, *Auto-Icon; or, Farther Uses of the Dead to the Living*, in *BENTHAM’S AUTO-ICON AND RELATED WRITINGS* 2 (James Crimmins ed., 2002); 5 JEREMY BENTHAM, *Truth Versus Ashhurst*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 231, 236; 7 BENTHAM, *supra* note 28, at 189.

32. 4 JEREMY BENTHAM, *Jeremy Bentham to His Fellow-Citizens of France, on Houses of Peers and Senates*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 419, 484.

33. BENTHAM, *supra* note 29, at 9-10.

This parallel between Bentham's legal reforms and the earlier religious Reformation highlights their common dependence on the growth of printing and literacy that came with the technological innovation of movable type. The shared emphasis on writing, and corresponding attack on unwritten custom, was to this extent a reflection of developments in material culture. However, the literalism advocated by Bentham and earlier Protestants was more than an emphasis on letters: It constituted nothing less than a theology of the book, which opposed a written canon to idolatrous custom. In this respect, Bentham's codification proposal and critique of fictions resembled the common law's earlier polemic against images, which Goodrich similarly attributed to the rise of print culture.³⁴

At the time Bentham advocated his reforms, the common law was still a disorganized and only partly written tradition, couched in an arcane terminology taken from Latin and Norman French. He proposed codification as a remedy for the ills of the common law, including especially its traditionalism, lack of system, uncertainty, secrecy, and unintelligibility. The quote from Bentham appended as an epigraph at the beginning of this essay refers to a statute requiring the use of English as the language of the law. This was actually a process that began in 1362 with the Statute of Pleading, which required proceedings to be conducted in English, but provided for records to be made in Latin.³⁵ Cromwell's requirement to use English as the language of the records, reversed under Charles II, was again enforced by George II.³⁶ Blackstone summarized this history, and expressed ambivalence regarding the abandonment of Latin and other elements of the lawyer's technical language.³⁷ For Bentham, however, even the adoption of English as the language of the law did not go far enough, as it left in place the reliance on custom and the use of "fictions." Fictions were the disease for which codification would provide the cure. A number of scholars have provided illuminating interpretations of Bentham's concept of fictions,³⁸ although none has previously noted the

34. GOODRICH, *supra* note 12, at 11, 44, 65, 103 n.146. See, for a broader consideration of the influence of print culture on law, Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520-1640*, 146 U. PA. L. REV. 323 (1998); Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640*, 10 YALE J.L. & HUMAN. 229 (1998).

35. 36 Edw. 3 c.15 (1326).

36. 4 Geo. 2 c.26 (1731).

37. 3 BLACKSTONE, *supra* note 21, at *317-23.

38. See LON FULLER, *LEGAL FICTIONS* (1967); HART, *supra* note 28, at 21-39; MARY MACK, *JEREMY BENTHAM: AN ODYSSEY OF IDEAS* 151-203 (1963); CHARLES K. OGDEN, *BENTHAM'S THEORY OF FICTIONS* (1932); JAMES STEINTRAGER, *BENTHAM* 20-43 (1977); Bernard Jackson, *Bentham, Truth and the Semiotics of Law*, 51 CURRENT LEGAL PROBS. 493 (1998); Gerald Postema, *Fact, Fictions, and Law: Bentham on the Foundations of Evidence*, in *FACTS IN LAW* 37 (William Twining ed., 1983); Nomi Maya Stolzenberg, *Bentham's Theory of Fictions: A "Curious Double Language"*, 11 CARDOZO J. LAW & LIT. 223 (1999).

extent of its religious dimensions. “Fiction” had both narrower and broader meanings for Bentham—as applied to jurisprudence (“legal fictions” or “the fictions of lawyers”) and as applied to language in general (“fictions”). Each of these meanings will be taken up in turn.

“Fiction” as a term of art in jurisprudence goes back to classical Roman law.³⁹ This ancient meaning was summed up by Henry Maine (1822-88): “*Fictio*, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse. . . .”⁴⁰ Fictions were false statements made to fit a case within prescribed forms of pleading, or within the jurisdiction of a particular court. For example, if a plaintiff wanted to try a case in the Court of King’s Bench rather than that of Common Pleas, he had to assert that the defendant was in the custody of the Marshall of the King’s Bench Prison—whether or not such was the case.⁴¹ Another fiction arose in response to the requirement that, before a trial could proceed, a plaintiff must guarantee his ability to pay if judgment went against him. This could be done by having others act as guarantors. The fiction was to claim that the non-existent persons “John Doe” and “Richard Roe” had agreed to act in this capacity⁴²—an averment that involved winks, nudges, and the greasing of palms. Often such devices had arisen as a means of accommodating changes in the law without altering the traditional forms of legal process. The absence of systematic statutory reform meant that changes in the law had accommodated to these traditional forms, resulting in a kind of patchwork or crazy-quilt rent by numerous holes. Maine, who defended fictions as an historically important mechanism of legal reform, defined them as follows:

But now I employ the expression “Legal Fiction” to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. . . . The *fact* is . . . that the law has been wholly changed; the *fiction* is that it remains what it always was.⁴³

Bentham extrapolated from such traditional devices to a broader concept of legal fiction that encompassed any case in which there was a gap between the reality and the language of the law. He included in this concept such devices as *pro forma* notice, judicial oaths (in which the

39. See, e.g., QUINTILIAN, INSTITUTIO ORATORIA 5.10.95-99, translated in THE ORATOR’S EDUCATION 415-17 (Loeb Classical Library 2001).

40. HENRY SUMNER MAINE, ANCIENT LAW 24 (Beacon Press 1963) (1861).

41. See John Hill Burton, *Introduction to the Study of Bentham’s Works*, in 1 BENTHAM, in THE WORKS OF JEREMY BENTHAM, *supra* note 10, at 5, 41.

42. 7 BENTHAM, *supra* note 28, at 284.

43. MAINE, *supra* note 40, at 25-26.

swearers no longer believed), and laws that had become so badly outdated that they were respected in name only. John Hill Burton summed up Bentham's view that "a Fiction of Law may be defined in general as the saying something exists which does not exist, and acting as if it existed; or *vice versa*."⁴⁴

Although Bentham reviled the mindless continuance of legal traditions, he objected even more to the usurpation of the authority of the legislature by the courts that occurred when the letter of the law was disregarded: "A fiction of law may be defined a wilful falsehood, having for its object the stealing legislative power"⁴⁵ Bentham's critique of fictions brought him into opposition not only with particular abuses of law by the courts, but also with the whole judge-made tradition of common law. Maine followed Bentham in terming case law in its entirety a "fiction," though without the same pejorative sense.⁴⁶ The analogical extension of precedent, in the form of largely unwritten principles of custom, to new fact scenarios inevitably involved a kind of fiction, a stretching if not a breaking of the language of the law. Bentham argued that if change was needed in the law, then it should occur explicitly through legislation. Otherwise, anyone could bend the law to suit his own interests, and no person would ever know what the law actually was, which would defeat its function as a guide to conduct. The solution lay in continual reform of the law by the legislature, especially through codification, or the reduction of the law to a set of explicit written principles unequivocal in meaning. Fictions were a pathology of the law that could be cured through codification, which would fix the law in a written text, while at the same time allowing the flexibility of changing it.

For Bentham, the term "fiction" also had a broader meaning beyond jurisprudence. This meaning was elaborated in his writings on language and logic. He argued that "[i]n language the words which present themselves, and are employed in the character of *names*, are, some of them, names of real entities,—others, names of fictitious entities; and to one or other of these classes may all words which are employed in the character of *names* be referred."⁴⁷ Bentham subscribed to a nominalist philosophy according to which words that were not fictions referred to individual existing things. Abstract terms were derived from concrete ones, and class terms were fictions abstracted from individual members, as "Church" meant in reality only the members of the clergy.⁴⁸ Bentham

44. Burton, *supra* note 41, at 41.

45. 3 BENTHAM, *A General View*, *supra* note 10, at 509.

46. MAINE, *supra* note 40, at 26.

47. 8 BENTHAM, *supra* note 29, at 198.

48. 2 JEREMY BENTHAM, *The Book of Fallacies*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 373, 448-49; cf. 8 JEREMY BENTHAM, *Essay on Logic*, in *THE WORKS OF JEREMY*

acknowledged the utility, indeed the necessity, of some fictions in logic and language: “[B]ut for . . . fiction, the language of *man* could not have risen above the language of *brutes*.”⁴⁹ Fictions served as a kind of shorthand and could enrich language through figuration.⁵⁰ However, in certain circumstances their use was pernicious. Lawyers in particular used fictions to serve their own interests:

By the priest and the lawyer, in whatsoever shape fiction has been employed, it has had for its object or effect, or both, to deceive, and, by deception, to govern, and, by governing, to promote the interest, real or supposed, of the party addressing, at the expense of the party addressed.⁵¹

The antidote for fictions was to trace them back to their ultimate basis in reality, if such existed: For example, instead of “Church,” say “clergy.” This eventually led Bentham to adopt “the substantive-preferring principle,” a preference for the use of nouns over verbs, which meant replacing many complex verbs with simpler verbs such as “have” or “take,” combined with noun phrases.⁵²

In his attempt to classify and purify language, Bentham followed a British philosophical tradition that extended back to Bacon, and that is represented in modern times by analytical philosophers, some of whom acknowledge Bentham’s contribution to their endeavors.⁵³ This tradition was united by the effort to produce a perfect, universal, or fully rational language through the elimination of logical errors. A late representative of this tradition, Charles K. Ogden (1889-1957), snatched Bentham’s theory of fictions from the dustbin of history⁵⁴ in order to give philosophical support to his proposal for a “Basic English” consisting only of the most common and useful terms, shorn of redundancy and ambiguity.⁵⁵ Within this tradition, Bentham expressed his debt to Locke, John Horne Tooke (1736-1812), and, for the idea of “fictitious beings,” the encyclopedist Jean Le Rond D’Alembert (1717-83).⁵⁶ Among these figures, Locke was

BENTHAM, *supra* note 10, at 212, 250.

49. 8 JEREMY BENTHAM, *Chrestomathia*, in THE WORKS OF JEREMY BENTHAM, *supra* note 10, at 4, 119; see also 8 BENTHAM, *supra* note 29, at 198.

50. See 8 JEREMY BENTHAM, *Essay on Language*, in THE WORKS OF JEREMY BENTHAM, *supra* note 10, at 295, 318-19.

51. 8 BENTHAM, *supra* note 29, at 199; see also L.J. Hume, *The Political Functions of Bentham’s Theory of Fictions*, THE BENTHAM NEWSLETTER, Dec. 1979, at 18, 19.

52. See MACK, *supra* note 38, at 196.

53. E.g., WILLARD VAN ORMAN QUINE, *FROM A LOGICAL POINT OF VIEW* 39, 42 (2d ed. 1980).

54. OGDEN, *supra* note 38.

55. CHARLES K. OGDEN, *BASIC ENGLISH: A GENERAL INTRODUCTION WITH RULES AND GRAMMAR* (1930).

56. See Emmanuelle de Champs, *The Place of Jeremy Bentham’s Theory of Fictions in Eighteenth-Century Linguistic Thought*, 2 J. BENTHAM STUD. (1999), at <http://www.ucl.ac.uk/Bentham-Project/journal/nldechmp.htm> (last visited Mar. 4, 2005), for a

perhaps the most important and influential precedent. His empiricism, which traced all ideas back to sensory impressions and ultimately to perceptible entities, led Locke to excoriate abuses of language occasioned by the use of abstract or metaphysical terms and to suggest the desirability of a dictionary consisting only of those terms, the really existing correlates of which could be verified by experience.⁵⁷ Bentham also evinced the hope that one might arrive at such a dictionary.⁵⁸ He proposed first to analyze words into simple ideas, then to classify these through a method of bifurcation or division modeled on Linnaean classification.⁵⁹ The first division of this classification was that which separated real entities from fictitious ones.

The location of Bentham in this apparently secular philosophical tradition identifies him as a representative, within the field of law, of the Enlightenment. However, Bentham's proposal for a legal code, or beyond that a rationalized language, was influenced also by the Reformation emphasis on the literal interpretation of a canon of scripture. British philosophers, beginning with Bacon and especially Hobbes, applied the religious prohibition against idolatry to certain habits of language, particularly the reification or personification of words. Bentham's complaint against fictions extended this tradition, combining it with scripture and theology to label the common law a form of verbal idolatry.

STATUTES V. STATUES

To show how this happened, it will be necessary, especially for those unfamiliar with the Reformation, to provide some historical background. The prohibition against idolatry goes back to the Ten Commandments, which were supposedly given by God to Moses on Mount Sinai.⁶⁰ These laws stated in part:

You shall have no other gods before me. You shall not make for yourself a graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; you shall not bow down to them or serve them, for I the Lord your God am a jealous god. . . .⁶¹

Idolatry, which strictly referred to the making and worship of images, also implied the repudiation of monotheism, or of the worship of the one true

discussion of Bentham's dependence on these authors.

57. 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 163 (Dover 1959) (1690).

58. 8 BENTHAM, *supra* note 49, at 106-07.

59. 8 *id.* at 121-26; *see also* LIEBERMAN, *supra* note 30, at 263; POSTEMA, *supra* note 27, at 433.

60. *Exodus* 20.

61. *Exodus* 20:3-5 (Revised Standard).

God, and the embrace of “strange gods”⁶² or even polytheism.⁶³ The importance of the prohibition against idolatry was signaled by its placement near the beginning of the Ten Commandments. These were supposedly inscribed by the hand of God Himself, and therefore in a sense already embodied the opposition between canon and idolatry.

Christians inherited the prohibition against idolatry from Judaism and interpreted it in ways that allowed such practices as the making of images of Jesus Christ or of the saints. Although images (called “icons” in Greek) could not be the focus of worship (*latría*, as in “idolatry”), they could, according to their defenders, be objects of a lesser degree of reverence (*dulia*).⁶⁴ Disputes over the permissibility of such images motivated the iconoclastic (“icon-breaking”) controversy in the Byzantine church in the eighth century.⁶⁵ During the Reformation that began in sixteenth-century Europe, Protestants applied a more restrictive interpretation of the scriptural prohibition against idolatry, leveled the charge of idolatry against certain ceremonies of the Catholic Church, and destroyed many images of saints and other appurtenances of ritual.⁶⁶

Although Judaism and Christianity had long emphasized the importance of a canon of scripture, the Reformation deepened this emphasis with the doctrine of *sola scriptura* or scripture alone as the source of religious authority, to the exclusion of the customs of the Catholic Church. In this context, what scripture said assumed greater importance; and increasing weight was placed both on translating the Bible into the vernacular and on interpreting its words literally. For Protestants, the Bible was supposed to be transparent in meaning, or at least could be made so through scholarly interpretation and translation. The Catholic Church was no longer needed as custodian, messenger, and interpreter of God’s word. As previously mentioned, these developments were largely a result of the ascendancy of the printed book. However, there were also theological factors underlying these developments. Protestants deepened the structural opposition between canon and idolatry, and increasingly applied this opposition to different types of language. As canon came to mean not merely a corpus of writings, but also a mode of literalism or “plain style,”⁶⁷ idolatry was increasingly taken to include figurative speech, verbal images, and unwritten customs, all of which lacked the certainty of scripture.

62. *Exodus* 20:3 (Douay-Rheims).

63. See MOSHE HALBERTAL & AVISHAI MARGALIT, *IDOLATRY* (Naomi Goldblum trans., 1992) for an excellent analysis of the meaning of idolatry within the Jewish tradition and beyond.

64. OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 430 (2d ed. 1974).

65. D. J. SAHA, *ICON AND LOGOS: SOURCES IN EIGHTH-CENTURY ICONOCLASM* (1988).

66. CARLOS M.N. EIRE, *WAR AGAINST THE IDOLS: THE REFORMATION OF WORSHIP FROM ERASMUS TO CALVIN* (1986).

67. PETER AUKSI, *CHRISTIAN PLAIN STYLE: THE EVOLUTION OF A SPIRITUAL IDEAL* (1995).

Protestant literalism rested in part on a sharpened distinction between literal and metaphorical meaning. The Catholic doctrine of transubstantiation held that the bread and wine of the Eucharist were transformed into Christ's flesh and blood. In opposition to this doctrine, the Swiss Reformer Ulrich Zwingli (1484-1531) insisted that Christ's statement, "This is my body," at the Last Supper, could not have been literally true and must therefore be taken in a symbolical or metaphorical sense.⁶⁸ Many Protestants argued that taking this statement literally led to the "idolatry" of the Eucharistic meal. Archbishop Thomas Cranmer's (1489-1556) catechism of the Ten Commandments identified several other forms of verbal idolatry. Some said that kneeling before an image was not the same as kneeling to it, but he dismissed this as a merely semantic distinction, "painted words" rather than "painted colours."⁶⁹ Other forms of verbal idolatry depended on an extension of the commandment against taking the Lord's name in vain⁷⁰ to such practices as giving the name of "God" to things which are not God, such as the sun, moon, and stars.⁷¹ Richard Greenham similarly included swearing by false gods in this prohibition.⁷² The predilection for the so-called "plain style" coordinated with a translation of the liturgy into the vernacular and a streamlining or reduction of its rhetorical flourishes.⁷³ Drawing on Matthew 6:7, Puritans proscribed certain forms of prayer as "vain repetitions" associated with rhetoric, magic, and idolatry.⁷⁴ The crime of image-worship was extended from plastic to verbal images.

These theological debates and distinctions did not simply disappear with the decline of traditional religion. As Moshe Halbertal and Avishai Margalit suggest, the prohibition against idolatry was further developed by the philosophers of the Enlightenment:

Our discussion of the causes of error in this chapter and of other aspects of error in the next two chapters is based on an important conceptual chain composed of the following links: the criticism of

68. ULRICH ZWINGLI, *Eine klare underrichtung vom nachtmal Christi* (1526), in 4 HULDRYCH ZWINGLI'S SÄMTLICHE WERKE [HULDRYCH ZWINGLI ALL WORKS] 773 (E. Egli et al. eds., 1905).

69. THOMAS CRANMER, *Catechismus; that is to say, A short Instruction into the Christian Religion*, WRITINGS OF THE REV. DR. THOMAS CRANMER 101, 113 (London, Religious Tract Soc'y 1860).

70. *Exodus* 20:7.

71. CRANMER, *supra* note 69, at 122; *cf. id.* at 80.

72. RICHARD GREENHAM, *A Short Forme of Catechising*, THE WORKS OF THE REVEREND AND FAITHFULL SERVANT OF JESUS CHRIST M. RICHARD GREENHAM 401, 411 (1599).

73. See THOMAS CRANMER, *Introduction to THE BOOK OF COMMON PRAYER* (1549).

74. JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, ch. XX, § 29, at 138 (John Allen trans., 7th ed. 1947); Thomas Manton, *Introduction to the Exposition of the Lord's Prayer*, in THE COMPLETE WORKS OF THOMAS MANTON (London, 1870); John Whitgift, *The Defence of the Answer to the Admonition, Against the Reply of Thomas Cartwright*, in THE WORKS OF JOHN WHITGIFT 3:513-17 (John Ayre ed., Cambridge, 1853).

folk religion by the monotheistic religions, the criticism of idolatry by the monotheistic religions, the criticism of folk religion by the religious Enlightenment, the criticism of religion in general by the secular Enlightenment, and finally the criticism of ideology. The claim is that at every link of this chain the same intellectual moves were made.⁷⁵

They give as an example Bacon's complaint against different categories of cognitive error he termed "idols of the mind."⁷⁶

A consideration of the philosophical critique of specifically linguistic errors supports Halbertal's and Margalit's suggestion. Among Bacon's "idols" were the "Idols of the Marketplace,"⁷⁷ linguistic errors including "names of things which do not exist . . . to which nothing in reality corresponds."⁷⁸ Hobbes, in his *Leviathan*, developed such criticisms of language much further. He insisted that all talk of "incorporeall substance[s]," such as one heard from the scholastic theologians, was a contradiction in terms.⁷⁹ If such ideas did not translate from Latin into clear English, there was a good reason, namely that they were nonsensical. He connected such abuses of words, including especially the reification or turning into noun substantives of qualitative or adjectival terms, with the false doctrine of transubstantiation that held that the bread of the Eucharist was literally transformed into Christ's body.⁸⁰ Hobbes criticized the overactive imaginations of the Gentiles that had populated nature with innumerable spirits of different varieties, all of which were "Idols . . . of the braine."⁸¹ He argued that originally in scripture the word "spirit" meant only breath, and the word "angel" meant a messenger.⁸² Taking these terms to signify incorporeal beings deprived them of all sense. Similarly, the terms Satan and Devil were actually "Appellatives" meaning "Enemy" and "Destroyer," which, when left untranslated, gave the false impression that they were "the proper names of *Daemons*."⁸³ Foreshadowing Bentham's later analysis of the word "church," Hobbes argued that this word could be taken legitimately to mean one body or

75. HALBERTAL & MARGALIT, *supra* note 63, at 112.

76. *Id.* at 242-43.

77. FRANCIS BACON, *THE NEW ORGANON* 56 (Fulton H. Anderson ed., Prentice Hall 1960) (1620).

78. *Id.* at 57.

79. THOMAS HOBBS, *LEVIATHAN* ch. 4, at 30 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) (emphasis omitted).

80. *Id.* chs. 8, 44.

81. *Id.* ch. 44, at 418; *see also id.* ch. 45; *cf. id.* ch. 12. *See generally id.* ch. 45, "Of Daemonology, and Other Reliques of the Religion of the Gentiles," for an extended discussion of idolatry.

82. *Id.* ch. 34 (entitled "Of the Signification of Spirit, Angel, and Inspiration in the Books of Holy Scripture").

83. *Id.* ch. 38, at 314.

person only if there were a company of members united under one sovereign. As there was no universal sovereign, there could be no single, universal Church.⁸⁴ Such impersonations needed to be stripped of authority to make way for the other, legitimate artificial person of the sovereign, represented by the Biblical image of the Leviathan. Therefore, all (other) idols needed to be dethroned: "Idols cannot be Authors: for an Idol is nothing."⁸⁵ Hobbes's empirical, etymological reduction called the Bible's authority into question, although he argued that he was faithful to the text. However, as A. P. Martinich has argued, Hobbes's disenchantment of nature, and of scripture, does not fit neatly into the label of "atheism."⁸⁶ His concern with theology, especially in parts 3 and 4 of *Leviathan*, showed instead a profound continuity with Protestant criticisms of certain forms of religion. His insistence on the political importance of language bore a striking resemblance to Bentham's.

Following Hobbes's earlier etymologies of the same terms, Locke observed that "*spirit*, in its primary signification, is breath; *angel*, a messenger."⁸⁷ Horne Tooke greatly expanded such etymological analyses, adding that terms such as "Heaven, Hell, . . . Fiend, Angel, Apostle, Saint, Spirit" were not even true nouns, but

Participles and Adjectives, not understood as such, [which] have caused a metaphysical jargon and a false morality, which can only be dissipated by etymology. And, when they come to be examined, you will find that the ridicule which Dr. Conyers Middleton has justly bestowed upon the Papists for their absurd coinage of Saints, is equally applicable to ourselves and to all other metaphysicians; whose moral deities . . . are not less ridiculously coined and imposed upon their followers.⁸⁸

Bentham, who had also read the Protestant theologian Conyers Middleton (1683-1750) and embraced his project of returning to an original Christianity by removing illegitimate additions thereto,⁸⁹ continued the etymological tradition: "[T]hat spirit means originally breath . . . is sufficiently notorious. In so far as any origin at all can be found for it, it is in a material import that the origin of the import of every

84. *Id.* ch. 39.

85. *Id.* ch. 16, at 114.

86. A.P. MARTINICH, *THE TWO GODS OF LEVIATHAN: THOMAS HOBBS ON RELIGION AND POLITICS* (1992).

87. 2 LOCKE, *supra* note 57, at 5.

88. 2 JOHN HORNE TOOKE, *EPEA PTEROENTA; OR, THE DIVERSIONS OF PURLEY* 18 (Menston, Yorkshire, The Scolar Press 1968) (1805); *cf.* 2 *id.* at 20.

89. GAMALIEL SMITH [JEREMY BENTHAM AND FRANCIS PLACE], *NOT PAUL, BUT JESUS*, at iii (London, John Hunt 1823).

word is to be found.”⁹⁰ The particular terms chosen for such etymological analyses suggest that one of the goals of this tradition was to debunk the belief in the existence of supernatural beings. This could, of course, lead to atheism. However, Bentham officially declared God not a fictitious but a real being, of the inferential rather than the perceptible variety.⁹¹ He exhibited no such scruple when it came to the Devil: “Exists there any where any real being to which this name is applicable?”⁹² In the same vein, he mocked depictions of the Holy Ghost as a dove, which he called a “pigeon,” and of the other persons of the Trinity as an “old man” and a “young man.”⁹³

Locke applied such criticisms beyond scripture and the names of supernatural beings to language in general. He criticized especially the habit of “taking words for things,” or believing that they necessarily reflect reality.⁹⁴ Bentham shared his predecessor’s general complaint against the habit of reifying language: “[S]o close a union has habit connected between words and things, that we take one for the other.”⁹⁵ Like Locke,⁹⁶ he argued that, in Aristotle’s time, people were led by the patterns of grammar to believe that a name or noun substantive implied the existence of the thing it named.⁹⁷ This error continued into the present:

Wherever there is a word, there is a thing; so says the common notion—the result of the association of ideas. Wherever there is a word, there is a thing; hence the almost universal practice of confounding *fictitious* entities with *real* ones—corresponding names of fictitious entities with *real* ones. Hence, common law, mind, soul, virtue, vice.⁹⁸

Bentham occasionally depicted this error of reifying language as a kind of personification or anthropomorphism:

Beholding at a distance, in the dress of a man, sitting and playing upon an organ, an automaton figure, constructed for that purpose by the ingenuity of the mechanist, to take this creature of human art for a real man, is a sort of mistake which, at a certain distance, might happen for a time to be made by the most acute observer. In like manner, beholding a part of speech cast in the same mould with the

90. 8 BENTHAM, *supra* note 50, at 329; cf. de Champs, *supra* note 56.

91. 8 BENTHAM, *supra* note 29, at 196.

92. BENTHAM, *supra* note 29, at 9.

93. *Id.* at 22.

94. 2 LOCKE, *supra* note 57, at 132.

95. 10 JEREMY BENTHAM, *Memoirs and Correspondence*, in THE WORKS OF JEREMY BENTHAM, *supra* note 10, at 3, 75.

96. 2 LOCKE, *supra* note 57, at 132; cf. HOBBS, *supra* note 79, ch. 46 (criticizing the Aristotelians’ use of “empty names”).

97. 8 BENTHAM, *supra* note 48, at 238-39.

98. 10 BENTHAM, *supra* note 95, at 73.

name of a real entity, a really existing substance, no wonder if, on a variety of occasions, to the mental eye of a very acute observer, this fictitious entity thus accoutred should present itself in the character of, and be regarded and treated as if it were a real one.⁹⁹

Elsewhere Bentham used a similar analogy to refer to the opposite process of abstracting from things to words, a process he called "spiritualization or psychologization . . . the psychological object being modelled from the physical archetype, as a bust in clay from any part of the human figure."¹⁰⁰ As these passages make clear, there was a dark side to the theory of empiricism: The path that illuminated language by connecting words back to things also led to the shadow of fictions. Whereas all legitimate (non-fictional) language proceeded from things to words, permitting the process to be reversed without error, the same was not true in the case of fictions. This was at the heart of what made fictions so pernicious. Bentham's association of fictions with a process of personification resonated with his own attack on the lawyer's invocation of non-existent persons such as "John Doe," with earlier philosophers' criticisms of linguistic "idols," and with religious complaints against idolatry.

Bentham frequently applied the critique of personification specifically to legal language, including the very phrase "Common Law." These applications often explicitly invoked religious criticisms of idolatry. Beginning already in the early *A Fragment on Government* (1776), he suggested that the reverence of his opponent William Blackstone (1723-1780) for the common law was "a kind of *personification* . . . as if the Law were a living creature."¹⁰¹ Only statute law is real, as it exists on the printed page.¹⁰² The "Law of Nature" is "a *word* . . . ripened into a *tangible substance*,"¹⁰³ and the common law, although granted priority by lawyers, is actually the "Shadow of the Statute Law," as it was only from the existence of statutes that the word "law" could have been abstracted in the first place.¹⁰⁴ Common Law, or the Law of Nature with which Blackstone paired it, described a fiction—a "set of imaginary objects,"¹⁰⁵ a

99. 8 BENTHAM, *supra* note 49, at 129.

100. 8 BENTHAM, *supra* note 50, at 318-19. The analogies employed in these passages may have owed something to Bentham's reading of James Harris, who argued that "[w]e may either behold Speech, as divided into its constituent Parts, as a Statue may be divided into its several Limbs; or else, as resolved into its Matter and Form, as the same Statue may be resolved into its Marble and Figure." JAMES HARRIS, *HERMES* 2 (Menston, Yorkshire, The Scholar Press 1968) (1751); see also LIEBERMAN, *supra* note 30, at 220 n.3, 263 n.32.

101. BENTHAM, *supra* note 1, at 399.

102. *Id.* at 7; cf. *id.* at 162.

103. *Id.* at 21.

104. *Id.* at 119.

105. *Id.* at 11.

“metaphorical personage,”¹⁰⁶ a “non-entity,”¹⁰⁷ a “mask . . . varnished,”¹⁰⁸ personified as Blackstone’s “Divinity the Common Law”¹⁰⁹—which made his discourse a “theological grimgribber.”¹¹⁰ Bentham expanded this analogy between the common law and idolatry:

The Common Law, in order to make it the fitter for adoration, was to be turned into an abstruse and invisible quiddity and which like certain Tyrants of the earth, was never to show itself in public: like them it was to make its existence perceivable only by means of its delegates: these judicial decisions, which whenever the Common Law was asked for were to be produced *corum* [sic] *populo* [in public], as the ostensible images of its person, not as themselves being that thing, but as evidences of there being such a thing somewhere. Thus, to use our Author’s [Blackstone’s] own apposite similitude, the Oracles were not the words of the Pythia that spake them, but her words were the evidence of an *Apollo* whose oracles they were.¹¹¹

In affirming the validity of *lex non scripta*, or unwritten laws, Blackstone had acknowledged the problem of how such laws are to be known and recognized as valid. His answer to this problem was that “the judges . . . are the depositaries of the laws; the living oracles, who must decide in all cases of doubt.”¹¹² Bentham now used Blackstone’s analogy against him. The common law was an idol, although an invisible one which, by implication, did not exist. Lawyers disguised their self-serving proclamations as the oracles of this non-existent deity.¹¹³ Similarly, Blackstone was guilty of “idolatry” of both the king as the authority underwriting the common law,¹¹⁴ and Lord Coke, Blackstone’s predecessor as expositor of the law.¹¹⁵

In his later writings on language and logic, Bentham returned to such themes. He repeated the assertions that Reason,¹¹⁶ Nature,¹¹⁷ Religion,¹¹⁸

106. *Id.* at 216.

107. *Id.* at 20.

108. *Id.* at 124.

109. *Id.* at 228.

110. *Id.* at 10.

111. *Id.* at 195.

112. 1 BLACKSTONE, *supra* note 21, at *69.

113. Bentham here shifts to a different meaning of “oracle”—not the one who speaks the words of the deity, but the words themselves. See 10 OXFORD ENGLISH DICTIONARY 884 (2d ed. 1989).

114. BENTHAM, *supra* note 1, at 122; see also *id.* at 412.

115. *Id.* at 174; cf. 2 BENTHAM, *supra* note 48, at 400 (“Lord Chief Justice Hale (to the present hour chief god of the man of law’s idolatry) . . .”).

116. 8 BENTHAM, *supra* note 49, at 77.

117. 8 *id.* at 125; see also 2 JEREMY BENTHAM, *Three Tracts Relative to Spanish and Portuguese Affairs*, in THE WORKS OF JEREMY BENTHAM, *supra* note 10, at 464, 501.

118. 8 BENTHAM, *supra* note 49, at 77.

and Church¹¹⁹ are words that denote “goddesses” or fictitious persons of the female gender. Law, like the Church, was an “allegorical idol.”¹²⁰ He called dependence on the authority of tradition a “species of idolatry” shared especially by law and religion that, if followed strictly, would return authority over England to the Catholic Church.¹²¹ A letter dated 1817 included in Bentham’s *Papers on Codification* shows the continuity of such ideas in his jurisprudence, as well as the extent of their connection with religion:

To be known, an object must have *existence*. But *not* to have existence—to be a mere non-entity—in this case, my friends, is a portion—nay, by far the largest portion—of that which is passed upon you for *law*. I speak of *common law*, as the phrase is: of the whole of common law. When men say to you, the *common law does this*—the *common law does that*—for whatsoever there is of reality, look not beyond the two *words* that are thus employed. In these words you have a name, pretended to be the name of a really existing object: look for any such existing object—look for it till doomsday, no such object will you find. *Great is Diana of the Ephesians!* cried the priests of the Ephesian temple, by whom Diana was passed upon the people as the name of a really existing goddess: Diana a goddess: and of that goddess, the statue, if not the very person, at any rate the express image. *Great is Minerva of the Athenians!* cried at that same time—you need not doubt of it—the priests of the Temple of Minerva at Athens: that Athens at which St. Paul made known, for the first time, the unknown God. The priests of Athens had their goddess of wisdom: it was this *Minerva*. The lawyers of the English School have her twin sister, their Goddess of Reason. *The law* (meaning the *common law*): “*The law*” (says one of her chief priests, Blackstone) “*is the perfection of reason.*” By the author of the book on Ecclesiastical Polity, Hooker,—for between lawyercraft and priestcraft there has always been the closest alliance—the law had long before been discovered to be a supernatural person, and that person of the feminine gender. Yes: exactly as much of reality was there, and is there, corresponding to the word *Minerva*,—as there is, or ever has been, corresponding to the compound appellative *common law*. Would you wish to know what a law—a real law—is? Open the statute-book: in every statute you have a real law: behold in that the really existing object: the genuine object, of which the counterfeit, and pretended counterpart, is endeavoured to be put off upon you by a lawyer, as often as in any discourse of his the word

119. 2 BENTHAM, *supra* note 48, at 448-49; see also 8 BENTHAM, *supra* note 48, at 249-50.

120. 2 BENTHAM, *supra* note 48, at 448.

121. 2 *id.* at 392-93.

common law is to be found.¹²²

The line "Great is Diana of the Ephesians" and the reference to the Athenians worshipping an "unknown God" come from passages in the *Acts of the Apostles* depicting Paul's preaching of the Gospel among idolaters.¹²³ The same line was quoted by the Presbyterian reformer John Knox in 1550, at the beginning of a famous sermon characterizing the Catholic Mass as idolatry.¹²⁴ Bentham refers disparagingly to Richard Hooker (1554-1600) who, in his *Laws of Ecclesiastical Polity*, had defended the Church of England against the Puritans.¹²⁵ Bentham took up where the Puritans had left off, condemning the Church for its idolatry. With such references, he made explicit his own appropriation of Protestant polemics, and placed himself in the role of a new Paul, preacher of a Gospel of written law opposed to the unwritten law of idolaters. Under the influence of empiricism, which insisted that all real entities were individuals, Bentham argued that the (singular) term "*a law*" had meaning only when applied to a statute law, which was discrete, existed on the printed page, and could be pointed to.¹²⁶ He apparently referred to this passage one year later, in *Church-of-Englandism and its Catechism Examined* (1818), where he mentioned his "papers on codification" and once again called the common law the "goddess of so many idolatries."¹²⁷ Later in the same work, he repeated the criticism that legal "fictions" were the oracles of the "grim Idol, to which, day by day, under the name of *Common Law*, so many lives and fortunes are sacrificed."¹²⁸ The frauds of priests and lawyers were the same; both "number [Precedent] among [their] Gods."¹²⁹

The specific charge Bentham made against common lawyers closely resembled the one Conyers Middleton made against the Catholic Church in a well-known letter recounting a journey to Rome, during which he encountered all manners of "idolatry" that the Catholics had continued from pagan times.¹³⁰ Jonathan Z. Smith summarizes Middleton's explanation for this corruption of God's word:

122. 10 BENTHAM, *supra* note 95, at 483.

123. *Acts* 19:28, 19:34, 17:23.

124. John Knox, *A Vindication of the Doctrine that the Sacrifice of the Mass is Idolatry*, in 3 *THE WORKS OF JOHN KNOX* 29 (David Laing ed., Edinburgh, Johnstone & Hunter 1854).

125. RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* (J. M. Dent, 1907) (1593).

126. 10 BENTHAM, *supra* note 95, at 483-84.

127. BENTHAM, *supra* note 29, at xli-xlii.

128. *Id.* at 230.

129. *Id.* at 231.

130. CONYERS MIDDLETON, *A LETTER FROM ROME SHEWING AN EXACT CONFORMITY BETWEEN POPERY AND PAGANISM* (London, Richard Manby, 5th ed. 1742). For specific references to "idolatry," see *id.* at 131, 159, 163.

What had occurred, Middleton believes, was a process of linguistic sleight of hand. He returns to this theme insistently. The present ritual activities are but "verbal Translations of the old Originals of Heathenism." "By a Change only of Name they have found the means to return to the Thing." They have "changed the Name rather than the Object of their Worship."¹³¹

This is precisely what Bentham argued half a century and more after Middleton. Whereas the Ephesians named their idol Diana, and the Athenians named her Minerva, English lawyers of the present day called her the "Common Law." By any name, this was idolatry.

Bentham's persistent identifications of the common law and other fictitious entities as idols of the feminine variety established an opposition, not only between canon and idolatry, but also between male and female. This curious feature of his jurisprudence requires some comment. One factor in these associations was likely the traditional identification of the true God as male. Goodrich has also noted that the earlier common-law tradition opposed itself to the misleading and seductive power of images that were, more frequently than not, conceived as feminine.¹³² By excluding both images and the feminine, the law in this way symbolically overdetermined its specific difference from its multiple Others, and reinforced the male hierarchy of legal practitioners.

Bentham's appropriation of such religious polemics was neither superficial nor haphazard. Instead, it shows the depth of influence of Protestant thinking on general culture. The same influences affected thinking on language well into the second half of the nineteenth century, if not beyond. The Sanskritist and historian of religion Friedrich Max Müller (1823-1900) was influenced by the same philosophical tradition that influenced Bentham. Müller's theory of myth as a "disease of language" debunked the process by which language becomes reified and, ultimately, deified, in terms that recalled earlier religious attacks on idolatry: "[N]ames have a tendency to become things, *nomina* [names] grow into *numina* [spirits], *ideas* into *idols*"¹³³ It is, therefore, not very surprising that Lon Fuller, in his analysis of legal fictions, quoted the by-then-already-obscure Müller on the manner in which abstract terms are derived from concrete ones through a process of metaphor.¹³⁴ Fuller stated: "That original sin of human reasoning—hypostatization—is a failure to drop the fictions out of the final reckoning."¹³⁵ The

131. JONATHAN Z. SMITH, *TO TAKE PLACE* 98 (1987) (quoting MIDDLETON, *supra* note 130).

132. GOODRICH, *supra* note 12, at 108-80.

133. 2 FRIEDRICH MAX MÜLLER, *LECTURES ON THE SCIENCE OF LANGUAGE* 466 (Scribner, Armstrong, London 1874).

134. FULLER, *supra* note 38, at 15.

135. *Id.* at 118.

condemnation of the “original sin” of idolatry links not only law and religion, but also legal studies and religious studies.

AN ICONOCLAST TO THE END: REVISITING BENTHAM’S “ATHEISM”

This brings to a conclusion the analysis of Bentham’s critique of fictions and its connections with earlier attacks on idolatry. Now it is time to address several broader questions that were raised by this analysis. What are we to make of Bentham’s borrowings of religious terminology, and of the parallels between his jurisprudence and the religious opposition of canon and idolatry? Do these convergences make his jurisprudence “religious,” and if so, in what sense? Does his particular case tell us anything about the status of modern, secular law as a “religion”? These broader questions, especially the last one, cannot be resolved here. However, in light of the earlier analysis it would be irresponsible not to raise them.

To attempt answers to these questions, we shall first have to revisit Bentham’s views on religion. Scholars until recently have been discouraged from examining these views for a number of reasons. The first is the assumption that the “rational” theory of Utilitarianism can have little to do with “irrational” systems of thought such as religion—despite the fact that religious versions of Utilitarianism, such as that of William Paley (1743-1805), preceded and were, for a time, more popular than Bentham’s own version.¹³⁶ Another reason is Bentham’s overt hostility to religion. As previously noted, he was a strident critic of traditional religion, and sought to separate law from its influence. Moreover, his critique of fictions evinced a skepticism regarding the existence of supernatural beings that could easily lead to atheism, even if he officially classified God as an “inferential” rather than a “fictitious” entity.¹³⁷ The third reason is the suppression of Bentham’s voluminous writings on religion.¹³⁸

During his lifetime, Bentham published several major writings on religion: *Church-of-Englandism and its Catechism Examined* (1818); *An Analysis of the Influence of Natural Religion on the Temporal Happiness of Mankind* (1822), with George Grote; and *Not Paul, But Jesus* (1823), with Francis Place.¹³⁹ The second and third were published under the pseudonyms Philip Beauchamp and Gamaliel Smith, respectively,

136. See UTILITARIANS AND RELIGION (James E. Crimmins ed., 1998).

137. 8 BENTHAM, *supra* note 29, at 196.

138. See JAMES CRIMMINS, SECULAR UTILITARIANISM: SOCIAL SCIENCE AND THE CRITIQUE OF RELIGION IN THE THOUGHT OF JEREMY BENTHAM 1-5 (1990); MACK, *supra* note 38, at 305.

139. BENTHAM, *supra* note 29; BEAUCHAMP, *supra* note 20; SMITH, *supra* note 89.

presumably to avoid public criticism and a potential blasphemy charge. Bentham had also tried, without success, to publish *Church-of-Englandism* anonymously. Also noteworthy among Bentham's writings on religion is the satirical pamphlet "Auto-Icon" discussed below. None of these writings appeared in the collected edition of Bentham's works published in 1843 by his disciple and executor, John Bowring, a circumstance that has hindered the proper appreciation of Bentham's ideas on religion.

Recently, especially through the efforts of James Crimmins, some of these writings have been republished and reinterpreted.¹⁴⁰ Bentham's writings on religion are at least apparently either a continuation or an extension of a standard Protestant project to purify Christianity by removing illegitimate accretions to the words of Jesus. *Church-of-Englandism* argued for the removal of any additions to the Gospel made by the Church, including the 39 articles of faith sworn to by adherents. No interpretation, including the distillation represented by the catechism, should be allowed to take the place of a direct engagement with scripture. *Not Paul, But Jesus* argued for the illegitimacy of any additions made to Jesus's own words by the apostle Paul. *The Analysis of Natural Religion* made a characteristically Utilitarian argument against religion. However, its criticisms were limited to "natural religion," which, as opposed to "revealed religion," lacked the support of scripture.¹⁴¹ "Revelation alone communicates a known and authoritative code, with which the actual conduct of believers may be compared and the points of conformity or separation ascertained."¹⁴² Of course, this distinction avoided a direct confrontation with Christianity, which was likely Bentham's real target. He came close in this work to advocating atheism, but stopped just short of doing so.¹⁴³ There was at least one point on which Bentham's arguments regarding religion agreed with his jurisprudence—on the location of authority in a written canon delimited through the paring away of all unauthorized additions thereto made by custom or otherwise.

Bentham's life ended on a bizarre note, one relevant to the issue of whether his Utilitarianism was a form of secular religion. Against prevailing prejudices, he willed his body to medical science for dissection and the advancement of anatomical knowledge. This showed an absolute consistency to find practical usage for every last scrap of matter. However, his further instructions for the disposition of the corpse were less obviously rational. He directed that his body be preserved, then displayed

140. See UTILITARIANS AND RELIGION, *supra* note 136; BENTHAM, *supra* note 31.

141. BEAUCHAMP, *supra* note 20, at 20-21.

142. *Id.* at 88.

143. *Id.* at 124.

in perpetuity in University College, London, where it indeed stands to this day. (The original head was replaced with a wax one owing to the deleterious effects of the embalming process on the original's features.) He called this figure an "Auto-Icon," and authored a short satirical essay with that title that remained unpublished until 2002, although a few copies had been distributed after Bentham's death. Several themes in this essay are of interest. Bentham proposed that Auto-Icons become the standard treatment for the dead, and that they be displayed in churches attended by phrenologists in preference to priests. He explicitly invoked the theme of "every man his own lawyer," adding that "now may *every man* be *his own statue*."¹⁴⁴ Henceforth stone statues could be dispensed with, as "What resemblance, what painting, what statue of a human being can be so like him, as, in the character of an Auto-Icon, he or she will be to himself or herself. Is not identity preferable to similitude?"¹⁴⁵ The same theory of representation or signification informing his concept of a code, namely that, so far as possible, there should be an identity between a thing and its verbal image, informed his argument for the Auto-Icon as an analogue of autobiography, or rather "auto-thanatography"¹⁴⁶: "Names may be invented—can be forged; and the existence of persons bearing them can be asserted . . . But Auto-Icons cannot be invented, cannot be forged."¹⁴⁷ There was also an element of illusion at play here. Bentham suggested that famous Auto-Icons be made to move and discourse in a theatrical tableau reminiscent of the Hall of Presidents at Disneyland. This recalls his use of the image of the piano-playing automaton to illustrate the personification of language.

Like its verbal counterpart, the code, the Auto-Icon was a critique of false images and a mode of iconoclasm. The intention was, in part, to parody the religious practice of image-worship, as well as burial practices that, as Bentham argued (echoing Puritan theologians¹⁴⁸), were not sanctioned by any words of Jesus, but were designed solely for priestly enrichment.¹⁴⁹ Earlier, Bentham had stated: "Another cause of delusion . . . is the reigning prejudice in favour of the dead—a prejudice which in former times contributed more than anything else to the practice of idolatry: the dead were speedily elevated to the rank of divinities; the superstitious invoked them, and ascribed a miraculous efficacy to their relics."¹⁵⁰ Despite such reservations, or with tongue firmly in cheek, he

144. BENTHAM, *supra* note 31, at 2.

145. *Id.* at 3.

146. *Id.* at 2.

147. *Id.* at 5.

148. See, e.g., 2 HOOKER, *supra* note 125, at 405 (addressing such Puritan objections).

149. BENTHAM, *supra* note 31, at 16.

150. 2 BENTHAM, *supra* note 48, at 399.

proposed a ceremonial use for the Auto-Icons, a kind of secular replacement for religion: "On certain days the Auto-Icons might be exhibited, and their exhibition associated with religious observances."¹⁵¹ He referred to the possibility that pilgrimages might be made to his own "quasi sacred Auto-Icon (if by the adverb, the attribute sacred may be rendered enduring)."¹⁵² This echoed a dream he once had, in which he saw himself as the "founder of a sect."¹⁵³

How are we to understand such utterances? The "Auto-Icon" was surely a parody or satire of traditional religion, even though its recommendations were partly followed in the case of Bentham's corpse. This supports a more subversive reading of his other writings on religion. Crimmins argues that Bentham was an atheist, whose ultimate intent was to undermine all religion.¹⁵⁴ As it was dangerous to criticize the Church directly, he directed his arguments against various substitutes or straw men—the Catechism, the apostle Paul, and "natural religion." Crimmins calls these arguments "devices" or "tactics,"¹⁵⁵ like "the Devil quoting scripture":¹⁵⁶ "Bentham knew his Bible well and rarely missed an opportunity to quote from it whenever it might embarrass the Church or contradict its teaching."¹⁵⁷ Yet Crimmins also acknowledges that "it is obvious that Bentham found it almost impossible to divorce his train of thought from the practices of conventional religion."¹⁵⁸

Crimmins argues that Bentham's religion—his atheism—was integral to his thought. Philip Schofield has countered that Bentham's theory of logic and language was integral to his thought, whereas his religious views were not.¹⁵⁹ Consequently,

[W]hether or not one concludes that Bentham was an atheist of some sort, . . . Bentham's views in relation to the existence of God were derived from his theory of logic and language. . . . Bentham did not have a theology because, according to his theory of logic and language, there was none to be had

. . . Bentham was "secular" not in the sense that his starting point was a rejection of religious belief, but in that his starting point was

151. BENTHAM, *supra* note 31, at 3.

152. *Id.* at 15.

153. See CRIMMINS, *supra* note 138, at 287.

154. See *id.* at 205, 211, 282.

155. *Id.* at 174, 205, 230.

156. *Id.* at 174.

157. *Id.* at 134.

158. *Id.* at 299.

159. Philip Schofield, *Political and Religious Radicalism in the Thought of Jeremy Bentham*, 20 HIST. POL. THOUGHT 272, 276 (1999). For a response, see James Crimmins, *Bentham's Religious Radicalism Revisited: A Response to Schofield*, 22 HIST. POL. THOUGHT 494 (2001).

independent of religious belief.¹⁶⁰

On balance, I would have to agree with Crimmins. The earlier analysis of Bentham's theory of fictions indicates that his views on language were deeply influenced by religious criticisms of idolatry, which were taken partly from scripture and theology, and partly from a philosophical tradition that condemned the personification of words. It appears increasingly anachronistic to call this philosophical tradition "secular" in the modern sense of the term. In fact, the long-standing engagement of this tradition with religion lends greater significance to Bentham's own appropriation of religious terminology. It is possible to argue that his use of theological idioms was a rhetorical device, designed to communicate and popularize covertly and essentially "secular" conceptions of language. However, it now appears more likely that religion contributed to the basic structure of Bentham's thought concerning language, and especially the language of the law. This fundamental structure borrowed from the opposition between canon and idolatry. Whereas other, non-religious influences also informed Bentham's linguistic and jurisprudential theories, it is the religious influences that have been most neglected by scholarship. Ironically, this neglect was reinforced by Bentham's overt hostility to religion, despite the fact that this hostility itself now appears to have deep affinities with Reformation polemics.

Bentham's jurisprudence was "religious" in a fundamental and not a superficial sense. He may well have been, as Crimmins argues, an atheist, if by this we mean an opponent of traditional religion who believes that God is a fiction. Yet Bentham's opposition to religion shared in several important characteristics of the religious Reformation—its devotion to the printed book, its democratizing tendencies, and its hostility to certain customs or habits of thought and language, regarded as idolatry. If "atheist" means someone who simply lacks religious belief, then a more accurate term for Bentham is "iconoclast." This places him in an historical line of development that led from religion to secularism. The disappearance of God began with the prohibition against idolatry in the Ten Commandments, and with God's refusal to let even Moses see him face-to-face: "[Y]ou cannot see my face; for man shall not see me and live."¹⁶¹ For his proposition that God is an inferential entity, Bentham cited the New Testament statement that "no man hath seen God at any time."¹⁶² Such views led directly to the iconoclasm of the Reformation.

160. Schofield, *supra* note 159, at 280-81, 291.

161. *Exodus* 33:20 (Revised Standard).

162. 8 BENTHAM, *supra* note 29, at 196. Although Bentham attributes this statement to St. Paul, who says something quite similar at 1 *Timothy* 6:16, the statement itself is actually found at *John* 1:18 (King James).

Bentham was neither the first person, nor even the first lawyer, to build his canon on the foundation of iconoclasm. However, he may have taken iconoclasm to its logical endpoint, by banishing the face of God from both law and language.

The more important issue is not whether we should label Bentham “religious” or “secular,” but what a study of religion contributes to our understanding of his jurisprudence and later developments in the law. As Goodrich and Douzinas argue, religious iconoclasm facilitated the construction of the law as an ostensibly purified, perfected, universal language. Bentham’s case sharply illuminates the contributions of monotheism and the prohibition of idolatry to this linguistic project.¹⁶³ The verbal analogue of monotheism is the monologue of a univocal language, one that fixes the relation between the word and the world. And the integrity of such a language depends on the exclusion of polyphony, ambiguity, and distortion, the verbal analogues of polytheism. As Bentham argued, “Identity of nomenclature is certificate of identity of nature: diversity of diversity:—how absurd, how inconsistent to make the certificate a false one!”¹⁶⁴ Moreover, for absolute clarity and consistency in the code, “every draught [should] . . . be from beginning to end, if possible, the work of a single hand. *Hands not more than one.*”¹⁶⁵ This is, if you like, monotheism without religion. Bentham represented an extreme or nodal point of this monologic, a point at which religion vanished into secularism.

The secularization thesis, or the standard historical account of how law gradually disentangled itself from religion in its onward progress toward modernity, has achieved the status of a charter myth, a monologue by and for the law. However, there are already visible cracks in this monolith, gaps that disclose the extent to which law is a development that occurred within religion itself, through an increasing restriction of the sphere of the sacred. If we characterize the Secular simply as a movement critical of the Sacred, that is, of religion, then where in this bipolar or dichotomous classification do we locate the Reformation and the prohibition of idolatry? Criticism of religion is, as we have seen, not necessarily the opposite of religion. The Protestant attack on idolatry, which opposed “true” religion to “false,” is a case in point. Throughout history, some of the most potent criticisms of religion have been developed by religion itself; and some of these remain, half-buried and mostly forgotten, within

163. See Robert A. Yelle, *Images of Law and its Others: Canon and Idolatry in the Discourses of British India*, 6 *CULTURE AND RELIGION* 181 (2005) (describing the application in colonial India of Bentham’s idea of a code as a universal language).

164. 10 BENTHAM, *supra* note 95, at 73.

165. 4 JEREMY BENTHAM, *Codification Proposal*, in *THE WORKS OF JEREMY BENTHAM*, *supra* note 10, at 534, 554.

the text of modern law.

Autobiography is a genre of fiction. So too is monologue. That is why we need a Comparative Jurisprudence engaged in dialogue with other disciplines, including religious studies. Jurisprudence is too important to be left to those whose object is to “save the appearances” of law and especially the integrity of its verbal pronouncements, in the mode of theologians of an earlier age.

