DOI: 10.5281/zenodo.11484037
Original Scientific Article
Received: March 26, 2024; Accepted: May 17, 2024

Lisa Haber-Thomson*

Summoning Up the Past: Detecting Legal Change Through Architecture's Evidence

ABSTRACT: This essay puts on the table the following question: how has architecture helped catalyze legal change? I use as a specific illustration a debate regarding the codification of English common law that took place between Jeremy Bentham and William Blackstone in the late eighteenth century. Bentham and Blackstone's competing architectural metaphors provided vivid illustrations of perceived dangers that they saw underlying proposed changes in law. The debate shows not only how powerful architectural metaphors were in constructing legal reform. It also demonstrates how novel architectural ideas can mask the lack of substantive changes in legal practice.

KEYWORDS: architectural history, law, legal change

* Lisa Haber-Thomson: Graduate School of Design, Harvard University; lhaberth@gsd.harvard.edu.

Introduction: A House with Many Rooms

Not long ago, I was reading about the legal principle of "estoppel," which is essentially a bar that limits certain kinds of statements in the courtroom.[1] The meaning of estoppel, like many English legal words, has evolved over time. In his *Commentaries on Littleton* Sir Edward Coke explained that it was brought over by the Normans. In Coke's time it still meant, quite simply (as the word itself suggests), "to stop up" or "to close;" specifically in law, estoppel prohibited someone from making a legal claim that contradicted a prior statement.[2] While this definition still captures the essence of the term, since the seventeenth century the principle of estoppel has become considerably more complex, as evocatively described by Justice Tom Denning in his 1980 judgment *Hunter v Chief Constable of the West Midlands:*

> For the word "estoppel" only means stopped. From that simple origin there has been built up over the centuries in our law a big house with many rooms. It is the house called Estoppel. In Coke's time it was a small house with only three rooms [...]. But by our time we have so many rooms that we are apt to get confused between them. [...] These several rooms have this much in common: They are all under one roof.[3]

And Denning goes on, in the following paragraphs of his judgment, to describe in detail how each of the various "rooms" in this house differ from one another, and how they are all connected through the circulatory apparatus of this "house called Estoppel." Estoppel is a legal term, and a technical one at that. So why is this judge talking about a house? Or rather, what is an imagined house doing in this legal judgement? Here, the metaphor illustrates the incremental and additive ways that

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1 Estoppel is a bar that prevents "one from asserting a claim or right that contradicts what one has said before [...] or has been legally established as true." B. Garner, H. Black, *Black's Law Dictionary*, 11th edition, Thomson Reuters, St. Paul, 2019, p. 691.

2 "Estoppel, ie, a Conclusion, because a mans own act, or acceptance, stoppeth or closeth up his mouth to allege or plead the truth." E. Coke, *An abridgement of the Lord Coke's commentary on Littleton*..., London, 1651, Sect. *667.* Fol. *352.* a., p. 390.

3 *Hunter* v *Chief Constable of the West Midlands*, 1980 WL 149511 (1980). With thanks to Simon Stern for sending me this wonderful passage.

law changes over time, allowing Justice Denning to frame the historical development of a technical point in law in a manner that feels tangible.[4]

This is not the first time I have been struck by architectural or spatial metaphors in legal writing, especially when jurists are describing how the law changes over time. To give another example: Edward Coke described his own legal treatise—one of the earliest written compendiums of English law—as valuable because it allowed for "all the high [...] courts of justice [...]. Be drawn together, as it were, in one map, or table, that the admirable benefit, beauty, and delectable clarity thereof might be [...] beholden."[5] This visual metaphor of a map suggests that being able to "picture" the law might have been an important component of sovereign jurisdiction in the seventeenth century. Recently a prominent historian of property law highlighted and expanded on Coke's metaphor; in the essay "English Liberties outside England: Floors, Doors, Windows, and Ceilings in the Legal Architecture of Empire" we do not encounter any doors or windows as architectural historians might describe them.[6] Rather, the author shows how seventeenth century legal language allowed jurists to justify sovereignty claims beyond the shores of England. This trend continues apace, as evidenced by a steady stream of academic articles with reoccurring variations on the title "law as architecture."[7]

Though law is still often seen as a text-based discipline, architecture appears to be a longstanding part of the furniture of the mind in English legal thought.[8] This essay puts on the table the following questions: how has architecture helped illustrate legal change through metaphor? How

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[4] This is particularly striking as the judge is writing for an audience of other judges, not for a lay audience (where we might expect the use of a metaphor to illustrate a technical legal point).

[5] E. Coke, *An abridgement of the Lord Coke's commentary on Littleton*..., London, 1651, Introduction, p. 4.

[6] D. Hulsebosch, "English Liberties Outside England: Floors, Doors, Windows, and Ceilings in the Legal Architecture of Empire," in L. Hutson (ed.), *The Oxford Handbook of English Law and Literature, 1500–1700*, Oxford University Press, Oxford, 2017.

[7] To give just two examples: D. Rohde, N. Parra-Herrera, "Law as Architecture: Mapping Contingency and Autonomy in Twentieth-Century Legal Historiography," *Journal of Law and Political Economy*, 3, 3, 2023; or J. Ramsfield, *The Law as Architecture: Building Legal Documents*, West Group, St. Paul, 2000.

[8] Of course, architecture affects law beyond lending figures of speech. There are also many examples where we can see architecture very directly affecting change in legal practice—most overtly, in the designs of prisons and courtrooms. The principle of estoppel was relevant to Denning's judgment, above, because certain witnesses in the case had made statements in the courtroom that contradicted previous statements that they had made in the police station. The point in law had to do not only with what was said by the witnesses, but *where* those witnesses spoke.

have these architectural figures of speech contributed to (or prohibited) this change? And finally, a bit more speculatively: how has this cross-disciplinary borrowing been reflected back from law to affect architectural history? I will use as a specific illustration a debate regarding the codification of English common law that took place between Jeremy Bentham and William Blackstone in the late eighteenth century. Bentham and Blackstone's competing architectural metaphors provided vivid illustrations of perceived dangers that they saw underlying proposed changes in law. The debate shows not only how powerful architectural metaphors were in constructing legal reform. It also demonstrates how novel architectural ideas can mask the lack of substantive changes in legal practice.

Legal Change and Architectural Metaphors

Jeremy Bentham and William Blackstone disagreed on most things. Not least of all was how to account for the processes by which law changes. Questions of legal change played a prominent role in public discourse in the second half of the eighteenth century. In England in particular, an important question had to do with whether or not common law practice needed a systematic overhaul. Could—and should—English law be codified?

According to Bentham, a champion for legal codification, England would be well served by looking towards her counterparts across the Channel. There, experiments in legal modernization were taking the form of law codes promulgated by self-styled modern rulers.[9] These new codes were closely modeled on the Byzantine emperor Justinian I's own compilation of Roman law—a compendium which itself had been "rediscovered" in the eleventh century and used as an authoritative reference across Europe for legal principles since.[10] For Bentham, the advantages of codification were obvious. Not only could the law be deliberately shaped to better suit the changing social circumstances of the eighteenth century.

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[9] The late eighteenth century was a time of several big codifications in Europe, exemplified by the *Code Civil des Français*, promulgated by Napoleon in 1804. Most legal systems of the European continent are codified, as are their imperial descendants. For a general discussion of codification in Western legal systems, and how the subsequent practice of codification itself was leveraged by the new nations of postcolonial Latin America and Africa to assert standing on a global stage, see R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford, 1996.

[10] For an introduction to early medieval law revivals, see S. Kuttner, *Harmony from Dissonance: An Interpretation of Medieval Canon Law*, Archabbey Press, Latrobe, Pa., 1960, and P. Vinogradoff, F. De Zulueta, *Roman Law in Medieval Europe,* Oxford University Press, Oxford, 1961.

Equally important, a law code publicly set forth a set of ideal principles: legal principles which were outlined directly, stated clearly and without confusion, a definitive authority for all to follow.[11] For Bentham, this approach was clearly superior to English common law as it was then practiced, in which legal authority was given over to individual judges who came to their decisions by comparing the case at hand with previous ones. In this judge-made (or precedent-based) legal system, essential principles were rarely articulated. For Bentham, this had troubling consequences: a law that had no clear set of principles was no law at all.

But codifying the English law would not be an easy sell. Bentham had been a student at Oxford when William Blackstone was finessing his famous lectures on English law, and the subsequent publications of these lectures as *Commentaries on the Laws of England* had established Blackstone as one of the most important English jurists of the time.[12] This book—considered the first comprehensive treatise on English law since Coke's—had already done a good job building an argument that the (uncodified) English common law had no need for a wholesale overhaul.

But this did not mean that Blackstone saw English law as static. Here, as across Europe, the eighteenth century saw changes in many spheres of life, not least of which were the ones defined and regulated by legal transactions. Feudal methods of conveying property or of bringing a personal action had become outmoded by modern commercial transactions; laws related to wrongdoing and trespass were being reframed alongside rapid processes of urbanization.[13] How best to update law in response? Writing a new code, as endorsed by Blackstone's Continental counterparts (and later by Bentham), was one method to accommodate such changes. However, in Blackstone's view, this approach was both difficult and dangerous. It required an absolutist government: legislators to take on the "Herculean" task of "formulating a concise, and perhaps uniform, plan

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[11] For a discussion on Bentham's arguments in favor of codification, see P. Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham*, Oxford University Press, Oxford, 2006.

[12] Blackstone's most famous achievement was his 4-part *Commentaries on the Laws of England*, (published, in 5 volumes, between 1765–1769), which was based directly on the lectures he delivered at Oxford while he was Vinerian Chair at All Souls College. For a detailed biography of Blackstone see W. Prest, *Blackstone and His Commentaries: Biography, Law, History*, Hart Publishing, Oxford, 2009.

[13] For a good introduction to English legal history, see J. Baker, *Introduction to English Legal History*, 5th ed., Oxford University Press, Oxford, 2019.

of justice," along with an enterprising sovereign with the power to instill fear in the "presumptuous subject who questions its wisdom or utility."[14]

Even if these obstacles were to be overcome, the real danger in new laws lay in the unforeseen future consequences of their promulgation. Perceiving these dangers, English jurists had "wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee."[15] Rather than embark on the challenging task of writing new laws that might be suited to the present moment, but at an unforeseen expense to a future one, better to leave intact an outdated structure that allowed for renovations as required. Therein lay precisely the strength of English law. The architectural metaphor, here, is not mine. Blackstone continues:

> Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.

With a deliberate comparison between a "native" legal practice and a "native" architectural form, Blackstone presents a clear picture of an authoritative past that fundamentally structures the principles of English law. The Gothic castle—antiquated but recently en vogue; an architectural form that was being scripted as visibly "English"—was a perfect metaphor to insist on the continued validity of an already-existing system of law.

More, while grounded in the past, this structure was readily adaptable to the present, by allowing for remedies appropriate to the specific legal problems of the day (the cheerful and commodious apartments). This retrofit was made possible by the use of legal loopholes, contrivances used to smuggle in modern remedies within older procedural methods of law (winding and difficult approaches).[16] These labyrinthine paths

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[14] W. Blackstone, S. Warren, *Blackstone's Commentaries: Systematically Abridged and Adapted to the Existing State of the Law and Constitution, with Great Additions*, Blackwood & Sons, London, 1855 [1765–1769], p. 267. Hereafter W. Blackstone, *Commentaries.*

[15] W. Blackstone, *Commentaries*, p. 267.

[16] More specifically, this worked through the widespread us of legal fictions—or the contrived use of details in a legal argument that contradicted the actions that led to the suit. Legal fictions were (and still are) both widespread in use and commonly accepted in practice,

allowed one to navigate between past and present, without any explicit indication of change. From the outside, the Gothic castle—the English legal system—appeared unchanged, solidly grounded in an authoritative vision of England's past.

This was precisely the problem for Jeremy Bentham. Bentham denounced the English common law, as Blackstone had described, as nothing but "dog-law"; without an explicit acknowledgement of the changes necessary to keep legal practice relevant to modern circumstances, the entire system (and, by proxy, the entirety of English governance) risked obsolescence. And he argued back with his own metaphor: "The indestructible prerogatives of mankind [English law] have no need to be supported upon the sandy foundation of a fiction."[17] For Bentham, the English law needed to be figuratively rebuilt from scratch from the ground-up, lest its 'unstable foundation' risked the whole thing collapsing. For him, the advantage of a law code was its straightforward relationship between a statement of principles and the enforcement of rules. In codified systems, legal judgement happens through the application of the appropriate rule—taken from a fixed, predetermined set—to the given facts of the case. Here, the articulation of a theory behind any given legal judgement precedes the practice and implementation of the law.

What better place to illustrate the benefits of codification than the laws of crime and punishment? Bentham's most well-known contribution to legal architecture, the panoptic penitentiary, was billed as a brand-new building type.[18] Marking a sharp break from what was understood

allowing for modifications in law without evidence of explicit change. On legal fiction see J. H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History,* Oxford University Press, Oxford, 2001.

[17] For Bentham, the problem with the Common Law as it was practiced stemmed from the fact that it was authorless; this lack of clear authority produced a set of rules that followed no pattern of rational or logical reasoning. J. Bentham, *The Works of Jeremy Bentham*, vol 5, "Petition for Codification," J. Bowring (ed.), London, 1838–1843, p. 546.

[18] Today we are familiar with Bentham's panopticon project in parge part because of another philosopher's writing on it, who dematerialized this project altogether to construct a broad (and abstract) theory of power: "The panopticon must not be understood as a dream building: it is the diagram of a mechanism of power reduced to its ideal form; its functioning, abstracted from any obstacle, resistance or friction, must be represented as a pure architectural and optical system: it is in fact a figure of political technology that may and must be detached from any specific use." This is Michel Foucault, of course, and for him an image of a building is (once again) mobilized as a metaphor in service of legal theory. For Bentham, the panopticon project was very much to be understood as a real building, used for the implementation of very real law. M. Foucault, *Discipline and Punish: The Birth of the Prison*, Vintage Books, New York, 1995 [1977], p. 205.

by Bentham as an unfairly punitive and arbitrary criminal law, the legal sanction of imprisonment—a fixed term confined within this purpose-built building—was framed by him as an ideal form of punishment. Influenced by Enlightenment philosophers who were arguing in more general terms for more gentile attitudes towards punishment, Bentham's legal architecture was, for him, both a perfect illustration of law's potential for rationality, as well as an imminently practical solution to an immediate problem. With capital punishment falling out of favor, and transportation to overseas colonies abruptly halted after the outbreak of the American war, jurists and social reformers were looking for alternative methods of legal sanction. The prison sentence, like a schedule of fines, was intended to be graduated in accordance with the severity of offence: the ability to objectively parcel punishment in this way was a major reason the penitentiary became a focus for Bentham and other penal reformers who advocated for methods of legal punishment that could be applied fairly to the petty thief as to the murderer.[19] The clarity of the panopticon drawings which accompanied Bentham's text was testament to the project's novelty, and to its clear-eyed objectivity.[20]

However, an easy translation that Bentham assumed the prison building would allow—between severity of offence and length of sentence—was, and remains, a fiction carefully crafted by the geometric regularity of the penitentiary's architectural plans.[21] A continued faith in these fictions has had the perhaps unintentional effect of making it difficult to examine how practices of imprisonment have actually changed over time. In this sense, Bentham's panopticon drawings are closer in kind to Blackstone's Gothic castle—a figure of speech, intended to convince an audience of the values of a codified legal system—than a mark of substantive changes in penal practice.

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[19] M. Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850*, Pantheon Books, New York, 1978.

[20] Especially in the wake of Foucault's influential account of Bentham's project, architectural historians have since taken the originality of the proposal at face value, and interpreted the sudden interest in prison design as evidence that architects played a fundamental role in shaping legal reform. R. Evans, *The Fabrication of Virtue: English Prison Architecture, 1750–1840*, Cambridge University Press, Cambridge, 1982.

[21] Bentham very much saw the panopticon as a proposal for a real building, and remained disappointed when it was never built to his specifications.

Legal Change and Architecture's Materiality: Missing Assumptions and Other Mistakes

In the end, of course, Blackstone won. The English common law remains famously uncodified. That is, legal authority rests in the interpretation of past decisions rather than on a set table of rules. In English law, like in architecture, judgment rests on interpreting precedent. This means that change continues to take place slowly, incrementally: primarily through daily practice, rather than through definitive declaratory statements. We renovate instead of built anew.

Where does this then leave Bentham's panopticon project, which, to be sure, has greatly influenced modern theories of punishment? To architectural historians who have relied on drawings as primary evidence of architectural change, the modern penitentiary certainly appears novel: a clear break from the past, wherein images of carcerality were rare, and dominated by sensationalist stories of danger and vice. Without a consistent form or associated architectural typology, medieval prisons occupied a wide range of buildings—from purpose-built jails (like the Fleet), to repurposed castle towers or town gates (Newcastle and Liverpool; Newgate) to far more modest town jails, which might have occupied a single room adjoining the keeper's residence (as per the many examples described by John Howard in his late 18th century survey of existing English jails).[22] In this context the modern penitentiary jumps almost ex nihilo from the philosopher's drafting board, replacing a miscellaneous collection of ordinary buildings with a singularly clear image of legal architecture.

But despite the lack of architect-designed prison projects, imprisonment had long played an important role in legal practice throughout England. Jails were used selectively as a sanction; they were used to hold people prior to trial and while awaiting their sentence; they were used to detain debtors.[23] Each of these roles was specific to a particular from of legal procedure. And while a comprehensive "national" approach to

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[22] J. Howard, *The State of the Prisons in England and Wales: With Preliminary Observations and an Account of Some Foreign Prisons and Hospitals*, W. Eyres, Warrington, 1777. See also R. B. Pugh, "Maintenance of Prison Buildings," and "The Structure and Contents of Prison Buildings," in *Imprisonment in Medieval England*, Cambridge University Press, 1968, pp. 338–346, 347–373; and S. Webb, B. Webb, *English Prisons under Local Government*, Routledge, London, 1922.

[23] For historical accounts of these uses, see J. Innes, "Prisons for the Poor: English Bridewells 1555–1800," in F. Snyder, D. Hay (eds.), *Labour, Law, and Crime: An Historical Perspective*, Tavistock Publications, London, 1987; J. H. Baker, "Criminal Courts and Procedure at Common Law 1550–1800," in J. S. Cockburn (ed.), *Crime in England, 1550–1800*, Princeton

imprisonment was yet far in the future, we have evidence that the construction and maintenance of even local jails could warrant attention from Westminster.[24] In *this* context, the penitentiary looks like one more variant of carcerality, a form of legal space that had a well-established role in common law practice. In this context, architecture's role in shifting legal concepts of punishment appears much more tenuous; while legal philosophy—specifically, Bentham's calculating objectivity—continues to shape architectural theory.

In an essay entitled "History and lost assumptions," the late historian of English law S.F.C. Milsom points to a fundamental difficulty in interpreting legal change. Although law is transmitted through writing, its textual archives lay potential traps:

> People do not formulate their assumptions for themselves, let alone spell them out for the benefit of future historians, and in the case of the law there is never occasion to write down what everybody knows. And when everybody has forgotten what everybody once knew, when the assumptions are beyond recall, there is nothing to put the historian on his guard.[25]

Milsom reminds us that missing evidence—the assumptions that no one bothers to write down because they are commonly assumed by everyone—should not be mistaken for proof that something was not happening. He is referring here directly to words, written on a page: the primary

University Press, Princeton, 1977; P. King, "Rituals of Punishment," in *Crime, Justice, and Discretion in England, 1740–1820*, Oxford University Press, Oxford, 2000, pp. 334–352.

[24] See, for example, the Gaols Act of 1532, which recognized the need for financing the building and upkeep of local jails—although the statute did little to ensure that these buildings would be actually managed as per its dictates. See R. B. Pugh "Maintenance of Prison Buildings," pp. 343–345, for the multiple reasons that this Act might have been deficient. For an account of a national approach, see S. Devereaux, "The Making of the Penitentiary Act, 1775–1779," *The Historical Journal*, 42, 2, 1999, pp. 405–433. See also J. Semple, "A View of the Hard Labour Bill and the Penitentiary Act of 1779," in *Bentham's Prison: A Study of the Panopticon Penitentiary*, Oxford University Press, Oxford, 1993, pp. 42–61. And for an account of the (unbuilt) projects of the architectural competition that was held shortly after the Penitentiary Act, see P. du Prey, "The competition for the first Howardian Penitentiaries," in *John Soane: The Making of an Architect*, University of Chicago Press, Chicago, 1982, pp. 197–218.

[25] S. F. C. Milsom, *A Natural History of the Common Law*, Columbia University Press, New York, 2003, p. 76.

medium through which the law is known, transmitted and enforced.[26] But we would do well to heed this warning when accounting for architectural change as well. Did Bentham's panopticon project catalyze a shift in legal practices of imprisonment? Perhaps not concretely, in the moment—though its powerful image certainly changed how we talk about architecture's role in punishment.

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[26] Apart from a small body of scholarly literature devoted to legal emblems and seals, for the most part legal history is known through interpreting the written records of the court and its ancillaries. See P. Goodrich, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance*, Cambridge University Press, New York, 2014. See also Baker's *The Law's Two Bodies* on evidential problems in legal history, more generally.

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