Philip Schofield

Utility and Democracy: Summary

The main theme of *Utility and Democracy* is that it was the emergence of sinister interest that eventually produced Bentham's "transition" to political radicalism. Instead of ascribing the problems which, in his youth, he had identified in the law to a lack of knowledge or judgment on the part of legislators and lawyers, he realized that they were the product of deliberate policy. When, for instance, he had written *An Introduction to the Principles of Morals and Legislation*, he had assumed that it was the desire of rulers to promote the happiness of the communities over which they ruled. By the time that he began to draft material on parliamentary reform in 1809, he had come to appreciate that it was the desire of rulers to promote their own interest in whatever way they could, no matter how detrimental to the happiness of the community in general. Having recognized the true nature of the problem, he saw that the only effective solution lay in bringing about an identification of the interest of rulers with that of subjects. This was the task of constitutional law, a task which would be achieved by maximizing official aptitude and minimizing government expense.

The increasingly politicized and radicalized nature of Bentham's later work should not obscure the fact that the fundamental principles of his thought remained constant throughout his career. His starting point, both logically and chronologically, was his understanding of the distinction between the real and the imaginary, and his division of nouns substantive into the names of real entities and the names of fictitious entities. If any proposition, no matter how abstract it appeared, was to make sense, it had ultimately to be related to its "real source", that is to some object or objects – to some "substance" – which existed in the physical world. In this respect there was no distinction between a proposition which

purported to be a factual one about the natural sciences, and a proposition which purported to be an evaluative one about what was valuable or desirable. When properly expounded, the latter proposition was just as much a factual one as the former, and morality was just as much a science as physics or chemistry. The entity represented by the phrase the principle of utility was fictitious, but to talk about the principle of utility made sense because it could be expounded by reference to its "real source" in the physical world – namely feelings of pain and pleasure experienced by sentient creatures. All other pretended foundations for the science of morality were either nonsensical because non-existent, or a camouflage for the selfish desires of the persons who articulated them. It was the mistake of the partisan of natural law, and of other non-utilitarian moral standards, to claim that he had knowledge of right and wrong without any reference to facts.

The principle of utility, as conceived by Bentham, involved a commitment to a form of political equality. Bentham took it as axiomatic that one person's happiness was worth the same as an equal amount of happiness experienced by any other person. This was not, in itself, decisive in terms of justifying an equal right to participate in the political process – indeed, there were good reasons to the contrary, for instance where a person was incapable of judging for himself what would contribute to his own happiness. What it did justify was the right of everyone to have equal consideration given to their interest. A further argument was needed to justify democracy. Now, Bentham always accepted that the best form of government – and by this he meant that which best promoted the happiness of the community, and that in turn meant taking the interest of each individual in the community into account – was that in which the rulers were dependent on subjects. Hence, when he first turned his attention, albeit fleetingly, to constitutional design at the time of the French Revolution, he rejected the theory of the division of power (a term he used to include the theories both of the balance of powers and the separation of powers) on the grounds that it did not, except accidentally, secure such dependence. Bentham's proposed constitution for France, put forward in the autumn of 1789, was characterized not by a division of power, but by the dependence of the National Assembly, wielding supreme legislative power, on the people as electors. He rejected the need, in these circumstances, to impose any limitation on the legislative power of the National Assembly. This was, in essence, the structure of government which he would later adopt in the constitutional code. It was when Bentham recognized that the dependence of rulers on subjects, and thence the equal consideration of interests, would not be achieved except under a democratic form of government that the utilitarian justification for democracy was complete.

In the autumn of 1789, and in the wake of the Declaration of Rights which committed the French state to political equality, Bentham did propose a democratic franchise for France, including female suffrage, and was led to consider wide-

ranging electoral reform for Britain. His enthusiasm for reform was short-lived. It was not long afterwards that Bentham was opposing any measure of political reform in Britain, and arguing against popular participation in politics – arguments which he continued to deploy until the late 1790s and possibly beyond. The crucial turning-point in Bentham's political thought was, as noted above, the emergence in his thought of sinister interest. Bentham became totally disenchanted with the successive ministries of Pitt and Addington following the effective rejection of his panopticon prison scheme in 1803 (the scheme was half-heartedly revived in 1810, but finally laid to rest in 1812). It seems plausible to suggest that his reflection on the causes of the rejection of the scheme – notably the self-interest of landowning aristocrats who did not want their estates blighted by a neighbouring prison – led him to discover the existence of sinister interest. A particular interest which was in opposition to the general interest was a sinister interest. From the perspective of his psychological theory, this discovery led to a deepening of his understanding of the motives of those who wielded power. Rather than possessing a desire to promote the interests of the community in general, rulers in fact possessed a desire to promote their own selfish or particular interests, whatever detriment this might cause to the general interest. Hitherto, Bentham had assumed that he could work within the existing political system in order to introduce the reforms he thought desirable. Henceforward, he recognized that since such reform would undermine the interests of rulers, they would bitterly oppose it, and stoutly defend all existing abuses.

Having given up hope of building the panopticon prison, Bentham had, in the late spring of 1803, turned his attention to the reform of judicial procedure and evidence. By the summer of 1804 he had worked out in detail the way in which sinister interest operated in this context. He argued that the appalling state of the English system of judicial procedure was not, as he had previously tended to assume, the result of intellectual deficiency on the part of lawyers, but the product of a steady and systematic policy on the part of the legal profession, and particularly the judges. The lawyers wished to maximize their income, which they primarily received in the form of fees, whatever the expense to suitors, and thence to the community in general. The lawyers had formed a "law partnership" in order to extract the maximum amount of profit possible from suitors. The law partnership, and in particular the judges, had not only established the existing system of legal procedure in order to benefit themselves, they had also managed to convince legislators and the community generally that the system was excellent in all respects. By their use of technical language, they had prevented non-lawyers from investigating the state of the law, and thereby thwarted any attempts to introduce reform. In short, the existence of the sinister interest of the law partnership explained how things had got into the disastrous state in which they then existed, and why lawyers were adamantly opposed to reform.

Bentham's attribution of a sinister interest to the law partnership first appeared in print in *Scotch Reform* in 1807 (published in 1808), which drew on the more general material on judicial procedure and evidence on which he had been working since 1803. Bentham composed *Scotch Reform* in response to a proposal announced by government for the reform of the law of civil procedure in Scotland, and in the hope that he would be asked to codify for Scotland. In this work he was extremely critical of the law partnership, arguing that no meaningful reform would result if things were left to the lawyers. He did not, as yet, implicate Parliament in the partnership. The politicians, like the people, had been deluded by the lawyers on the question of the desirability and feasibility of law reform. He soon came to think differently. By the first half of 1809, when he composed the text later published as *Elements of the Art of Packing*, he had come to realize that sinister interest was a feature of both the legal and political establishments: it was Parliament which permitted the continuation of the fees which judges had imposed for the benefit of the law partnership. Bentham's immediate concern in the work was with the danger posed to the liberty of the press by prosecutions for libel, and by the appointment in these cases of special juries, which were packed with men subservient to the will of the judge. Both the legal and political establishments had an interest in destroying the liberty of the press, for it offered the greatest threat to their position. By exposing the abuses from which they profited, a free press would provide a check to misrule. So all who benefited from abuse – and this included all members of the legal and political establishments – were united in their desire to destroy the freedom of the press, for in achieving that end, they safeguarded the abuses from which they derived so much profit.

With the insight that every aspect of the state was permeated by sinister interest, Bentham was in a position to launch a sustained and detailed attack on the English establishment – an onslaught which he carried on unremittingly until his death in 1832. It is clearly inappropriate to argue that he was "converted" or underwent a "transition" to political radicalism in 1809. The elements of his political radicalism were already in place when he began to write on parliamentary reform in the middle of 1809, stimulated as he was into doing so by a speech delivered by his step-brother, Charles Abbot, to the House of Commons on 1st June 1809. It would not, however, be misleading to say that Bentham underwent a "transition» to political radicalism between 1803 and 1809, as he applied his notion of sinister interest ever more generally to the English establishment. By June 1809, when he began to write on parliamentary reform, he was already a political radical. The work he eventually published as *Plan of Parliamentary Reform* in 1817 contained a "Catechism" written in 1809-10, and a long "Introduction" written in 1816-17. His aim in both was to secure "democratic ascendancy" within the existing institutions of the British polity. The House of Commons would be made genuinely

representative of the people, and it would be freed from any corruptive influence exercised by the King and the House of Lords. This would be achieved in large part by an extensive reform of the electoral system, which would be characterized by universal manhood suffrage, annual elections, equal electoral districts, and the secret ballot. The key proposal was the secret ballot. The secret ballot would enable each man to vote for the candidate whom he considered would best promote his own interest, for the universal interest was no more than the aggregate of the interests of the individuals who composed the community. The secret ballot would exclude the baleful effects of the influence traditionally exercised over voters by the wealthy and privileged within the local community. There would be no point, for instance, in offering a bribe, if the briber had no way of knowing whether the person he had bribed had voted as directed or not. Bentham never wavered from his commitment to the secret ballot, despite pressure on occasion to do so for tactical reasons. Without the secret ballot, the rest of the reforms would, in his view, have been ineffective; on the other hand, the introduction of the secret ballot alone would have paved the way to further reform.

Having recognized the existence of sinister interest in the legal and political establishments, Bentham extended his investigation to the ecclesiastical establishment. He had always argued that theology should not have any influence over morals and legislation, but had not hitherto attacked religious belief on the grounds of its pernicious effects on human happiness. He now saw that religious belief was used to further the sinister interest of the priesthood and those linked with it. As far as constitutional law was concerned, his main recommendation was that there should be no religious establishment. In Britain, the Anglican Church was merely another instrument in the hands of rulers to oppress and extort resources from subjects. The clergy extracted large sums of money from the population generally, in order to provide income for members of the ruling few, without having to provide any service or labour in return. The state supported the Church with its coercive force, while the Church manufactured delusive arguments in support of the state. Indeed, the scale of abuse in the Church was not only greater than that in the political and legal establishments, but acted as a bulwark against reform elsewhere. Bentham was particularly critical of the role of the Church in education, both in schools and in the Universities of Oxford and Cambridge. In relation to the poor, its policy was to exclude from the benefits of education those unwilling to declare their belief in Anglican doctrine, and to pervert the morals and intellects of those who were willing. Bentham never overcame his resentment at being forced to subscribe to the Thirty-nine Articles while a student at Oxford, and it was this experience which led him to insist that the provision of education should not be linked to the profession of belief. As far as the Anglican Church in general was concerned, Bentham recommended its "euthanasia", whereby, as livings and other

offices became vacant, they would be abolished. The present possessors would retain their incomes and thereby not suffer the pain of disappointment, while the expense of the religious establishment to the state, and thus to the people generally, would gradually diminish, and the additional income derived from the sale of its assets would be used to reduce taxation. Those people who wished to receive religious instruction could continue to do so at their own expense.

Bentham's writings on parliamentary reform, while focusing on the reform of the House of Commons in order to render it dependent on the people, assumed the continuing existence of the King and the House of Lords. It was only in 1818 that Bentham appears to have committed himself to republicanism, by which he meant a representative democracy which did not include a monarchy or an aristocracy. This development in his thought was linked, perhaps, to his experience in attempting to persuade a "constituted authority" to accept his services as a codifier. As we have seen, he had first offered to draw up a code for Scotland in 1808, but his campaign had begun in earnest in 1811 when he had offered to draw up civil and penal codes for the United States of America. He had assumed that penal and civil codes of the sort he advocated might be introduced under any system of constitutional law. By 1818, perhaps because of the rejection of his offer by Alexander I of Russia, he had come to the view that it was only under a representative democracy that rulers would countenance the introduction of an all-comprehensive and rationalized code of law. It was necessary first to introduce a representative democracy in order to achieve utilitarian reform in other areas of law. Political reform was henceforward Bentham's central concern. When at last in April 1822 he received an acceptance of his offer to draw up penal, civil, and constitutional codes from the Portuguese Cortes, it was to the constitutional code that he immediately turned his attention, and which dominated the final decade of his life.

For Bentham the key principle of constitutional design was to ensure the dependence of rulers on subjects, hence his rejection of the division of power, whether in the form of the balance of powers or the separation of powers, on account if its unsuitability in this respect. Instead he proposed chains of superordination and subordination, based on the capacity of the superior to appoint and dismiss (in Bentham's terminology to locate and dislocate) the inferior, and to subject the inferior to punishment and other forms of vexation. The supreme power or sovereignty in the state would be vested in the people, who would hold the constitutive power. Immediately subordinate to the people would be the legislature, elected by universal manhood suffrage, and subordinate to the legislature would be the administrative and judicial powers. The system of representative democracy was not an end in itself – the end was the greatest happiness – but it was an indispensable means to that end, in that it was only under such a system of

government that effective measures could be implemented to secure the appropriate aptitude of officials and minimize the expense of government. The securities for official aptitude – otherwise termed securities against misrule – included the exclusion of factitious dignities (or titles of honour), the economical auction, subjection to punishment at the hands of the legal tribunals of the state, and the need to pass an examination, but the most important was publicity. Bentham went to great lengths to ensure that government would be open to public scrutiny, and thence subject to the force of the moral or popular sanction operating through the public opinion tribunal, which consisted of all those who commented on political matters, and of whom newspaper editors were the most important members. Bentham saw the freedom of the press as a vital bulwark against misrule, and therefore his attempt to encourage the diffusion of literacy by linking a reading and writing qualification to the suffrage. The main difficulty which had to be overcome was the propensity of rulers to make the sinister sacrifice, that is to sacrifice the interest of the community to their own particular and sinister interest. All these measures would ensure that, instead of an opposition of interest between ruler and subject, there would be an identification of interest: in other words, the ruler would be placed in such a situation that the only way of promoting his own interest would be through the promotion of the general interest. Bentham's commitment to democratic government had a further consequence for his thought. The tension between the role of the legislator in promoting the happiness of the community and his insistence that the individual was, in general, the best judge of his own interest, was resolved by a representative democracy. With sovereignty placed in the people, those who were the best judge of their interests were given the power (through their deputies in the legislature) to pursue them effectively.

Francesco Ferraro

Moral aptitude and the moral sanction in Bentham's institutional architecture: Is there any room for non-egoistic motivation?

Among the many achievements of Schofield's *Utility and Democracy*, one of the most important is the convincing settling of the question regarding the time of the democratic turn in Bentham's thought, its origin and its theoretical roots. Scholars disagree as to the moment of Bentham's "conversion" to representative democracy with universal male franchise; but there seems to be little doubt that the events following the French Revolution deeply scared him and delayed such a conversion, thereby halting his work on plans of electoral reform in Britain.[1] Schofield traces the democratic turn back to the emergence in Bentham's thought of the notion of *sinister interest.* The phrase "sinister interest" first appears in 1797 in Bentham's writings on the poor laws,[2] to indicate a personal or class interest the maximization of which does not add to, but rather subtracts from, general happiness. In other words, sinister interest stands in the way of the general interest's stream. Since, for Bentham, every human action is driven by the agent's conception of his/her

[1] See E. Halévy, *The Growth of Philosophic Radicalism*, Faber and Faber, London 1972, pp. 147 et seq.; M.P. Mack, *Jeremy Bentham. An Odyssey of Ideas 1748-1792*, Heinemann, London 1962, pp. 410-441; J.H. Burns, *Bentham and the French Revolution*, «Royal Historical Society Transactions», 16, 1966, pp. 95-114; J. Dinwiddy, *Bentham's Transition to Political Radicalism*, "Journal of the History of Ideas", 36 1975, reprinted in W.L. Twining (ed.), *Bentham: Selected Writings By John Dinwiddy*, Stanford University Press, Stanford 2004; J. Steintrager, *Bentham*, Ithaca, New York 1977, pp. 57-58; M. James, *Bentham's Political Writings 1788-'95*, "The Bentham Newsletter", 4, 1980, pp. 22-24; D.G. Long, *Censorial Jurisprudence and Political Radicalism: A Reconsideration of the Early Bentham*, "The Bentham Newsletter", 12, 1988, pp. 4-23; P. Schofield, *Jeremy Bentham, the French Revolution and Political Radicalism*, "History of European Ideas", 30, 2004, pp. 381-401.

[2] See P. Schofield, *Utility and Democracy. The Political Thought of Jeremy Bentham*, Oxford University Press, Oxford 2006, p. 109.

interest, and no act can be, strictly speaking, disinterested,[3] sinister interest is the product of "a certain propensity universal in human nature. This propensity in the breast of each individual is the propensity to sacrifice all other interests to that which at each moment appears to him to be his own preponderant interest."[4] As Schofield explains, it is most likely that Bentham's disappointment at the failure of the Panopticon project was the cause which made him focus on sinister interest. He became convinced that the building of the Panopticon had been blocked by the "sinister influence" of the Grosvenor family, whose residence stood close to the site he had chosen for the prison. The notion of sinister interest was subsequently employed by Bentham in his writings on judicial procedure and the law of evidence, from 1803 on.[5] While in *A Comment on the Commentaries* Bentham still ascribed to mere ignorance and prejudice the lawyers' hostility to necessary legal reform, the idea that this was rather due to their class interest only began to show from his denouncement of the excessive costs of litigation in *Truth versus Ashhurst*. A full-fledged attack on the lawyers' interests as the cause of unacceptable shortcomings in the administration of justice was finally contained in Bentham's *Scotch Reform* writings, partially printed and published in 1807-1808.[6] The occasion for such writings was offered by the discussion of reform proposals for civil justice in Scotland. Bentham saw the procedures in English courts as pursuing not the *ends of justice*, but the *ends of judicature*. This meant that judicial procedure was not subservient to the utilitarian purpose of maximizing enforcement of the legislator's will, with the minimum of attached delay, vexation and expense for the suitors (and, more generally, for all those involved in the suit). On the contrary, the slowness and inefficiency of judicial procedure allowed the maximization of profit and ease for the members of the "law partnership", which Bentham also called "Judge & Co.": judges, lawyers and mala fide suitors. These were the ends of judicature, and for Bentham they were the main cause of the malfunctions of justice administration in England. Since judges had been "left with power to pay themselves by fees,"[7] instead of being paid by salaries, in order to increase their profits they had multiplied "the occasions of extracting fees", thus

[3] For Bentham, "*disinterestedness* […] must be understood to denote […] not the absence of *all* interest, a state of things which, consistently with voluntary action, is not possible, but only the absence of all interest of the *self-regarding* class. […] the most *disinterested* of men is not less under the dominion of *interest* than the most *interested*" (*Deontology together with a Table of the Springs of Action and Article on Utilitarianism*, edited by A. Goldworth, Clarendon Press, Oxford 1983, p. 100).

[4] J. Bentham, *First Principles Preparatory to the Constitutional Code*, edited by P. Schofield, Clarendon Press, Oxford 1989, p. 13.

[5] Ibid., pp. 109-111.

[6] See A.J. Draper, *"Corruptions in the Administration of Justice": Bentham's Critique of Civil Procedure, 1806-1811*, "Journal of Bentham Studies", 7, 2004.

[7] J. Bentham, *Letters on Scotch Reform*, in J. Bowring (ed.), *The Complete Works of Jeremy Bentham*, Tait, London-Edinburgh 1838-1843 (hereafter *Works*), vol. V, p. 5.

causing "factitious complication, obscurity, unintelligibility, uncognoscibility, in the system of procedure."[8] The interests of the members of the "law partnership" offered an example of sinister interest, since their maximization was neither beneficial, nor even innocuous: by augmenting the wealth and ease of a restricted class of citizens, it damaged the great majority of the people. Suitors conscious of being in the wrong knew that judicial procedures would provide them with means "for staving off, and oftentimes finally eluding, compliance with the just demands on the other side" (in the quality of defendants), or "for forcing compliance with unjust demands" (in the quality of plaintiffs).[9] All that was requisite was money enough to endure the length of the suit and to pay all the fees. As an obvious result, then, "justice [was] thus denied to the poor, to the labouring classes, to the great majority of the people, as being unable to pay the fees."[10]

As Schofield explains, it was only after the Scotch Reform writings that Bentham came to see that not only the members of the legal, but also those of the political establishment shared a common sinister interest.[11] He realized the existence of a constant and natural opposition of interests between the "subject many" and the "ruling few", which sprang from the principle of self-preference.[12] Public officials were always at risk of performing the "sinister interest", that is, to sacrifice the whole community's interest to their own personal or class interest. Identification of interests, then, between political and judicial functionaries on the one hand, and the whole community on the other hand, was artificial and had to be pursued by putting the rulers under control of the ruled. For Bentham, this could be attained by placing every action of rulers and officials under scrutiny of the public opinion, which gave voice to the interests of the great majority of the people, thence corresponding (at least by and large) to the dictates of utility. The "Public Opinion Tribunal", as Bentham called it, was to be endowed with full control of the functionaries' behaviour. This required, of

[8] Ibid. Such a causal nexus must have been something more than a mere Benthamic illation: due to the general dissatisfaction with the administration of justice, from 1816 on a number of parliamentary commissions were appointed to investigate into the duties and emoluments of the higher courts' officials; in 1851, the Common Law Commission finally recommended that all judicial officials be paid only by fixed salaries. See M.I. Zagday, "Bentham on Civil Procedure", in G.W. Keeton and G. Schwarzenberger (eds.), *Jeremy Bentham and the Law. A Symposium*, Stevens & Sons, London 1948, pp. 68-78.

[9] Ibid., pp. 5-6.

[10] Ibid., p. 5.

[11] See P. Schofield, *Utility and Democracy*, as above, pp. 120-121 and 132-135.

[12] Such a principle claims that the action of self-regarding interest is generally stronger and more constant than that of social, other-regarding motives, such as benevolence. For Bentham, the prevalence of egoistic affections is even required for the preservation of the individuals and of the human species. See for instance J. Bentham, *First Principles Preparatory to the Constitutional Code*, edited by P. Schofield, Clarendon Press, Oxford 1989, pp. 27 and 58; Id., *An Introductory View of the Rationale of Evidence*, in *Works*, VI, p. 11; Id., *Principles of Judicial Procedure*, in *Works*, II, p. 120. See also R. Harrison, *Bentham*, Routledge & Kegan Paul, London 1983, pp. 140-147.

course, full publicity of the officials' actions, together with freedom of speech and of the press. Together with publicity, also individual responsibility was requisite, since "a *board* [...] is a *screen*"[13] and ascribing official acts to abstract, collective entities allowed their members to feel secure from the people's judgment.

From the public opinion's judgment issued what Bentham called the "moral sanction" at least since *A Comment on the Commentaries.* This was a "source of pain and pleasure" issuing from "such *chance* persons in the community, as the party in question may happen in the course of his life to have concerns with, according to each man's spontaneous disposition, and not according to any settled or concerted rule."[14] It is an informal social sanction, expressing the approbation or disapprobation of the public at large and the casual, non-organized punishments and rewards attached to the people's judgment. As Bentham explains, the moral sanction is especially effective on "men of rank and opulence and education", much more than "common people", who "are not to derive such large advantages from a reputation, nor to suffer such large inconveniences from the loss of it."[15]

In politics, by the way, Bentham eventually convinced himself that only representative democracy would allow to employ the full power of the moral sanction, in order to avoid the bringing about of the "sinister sacrifice". Under every other form of government, rulers and officials would eventually succeed in limiting the free circulation of information and the publicity given to their acts, so to exercise their power free from responsibility.[16] As stated in the title of *Utility and Democracy*'s eleventh chapter, the antidote to the sinister interest of rulers and functionaries was what Bentham called "official aptitude". Aptitude on the part of officials was the sum of those qualities required of them for exercising their functions in the best possible manner, that is, that which most contributed to maximizing the community's interest. Bentham divided official aptitude into moral, intellectual and active aptitude; the first two were properties of the mind (respectively, of the will and of the understanding), while the last was a property of the body. With regard to the contrasting of the sinister interest, the branch of aptitude directly concerned was moral aptitude, which Bentham had earlier named also "probity". This was a "negative quality [...] constituted by the absence, in so far as possible, of a certain propensity universal in human nature": the propensity to pursue the sinister sacrifice of the general interest to that of the individual, due to the self-preference principle.[17]

[13] *Works*, V, p. 17.

[14] J. Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by J.H. Burns and H.L.A. Hart, II ed. with a new Introduction by F. Rosen, Oxford University Press, Oxford 1996, hereafter *IPML*, p. 35.

[15] J. Bentham, *A Comment on the Commentaries and A Fragment on Government*, as above, pp. 322-323.

[16] See P. Schofield, *Utility and Democracy*, as above, p. 271.

[17] *First Principles Preparatory to the Constitutional Code*, as above, p. 13.

As Schofield explains, Bentham eventually came to regard representative democracy as the only form of government which would allow maximization of moral aptitude on the political functionaries' part. With the appropriate institutional arrangements, responsibility to the people at large would be maximized, so that the Public Opinion Tribunal would be empowered to judge and punish those who pursued an interest opposite to that of the community. The moral sanction, then, would offer a security for maximizing moral aptitude. Moreover, in Schofield's interpretation the officials' moral aptitude seems to be seen by Bentham not as the prevailing of an internal impulse to probity over self-regarding affections, but rather as springing from the awareness that the pursuing of sinister interest is, simply, impossible. The effect of institutional securities would be such that improbity would be disadvantageous on purely self-regarding grounds; "the individual was presumed to act on grounds of self-preference, and so arrangements were devised which allowed him to pursue his own self-interest in no other way than through his share in the universal interest."[18] By calculating which conduct would best promote his/her self-interest, every functionary would realize that the best course of action would be one which contributed to the general interest, thereby maximizing also his/her share in it. No social motives like sympathy and benevolence on the functionaries' part were relied on by Bentham, but only self-regarding ones.[19]

Bentham displays the same concern for the applying of the moral sanction to the judges' conduct as to political representatives and administrative functionaries. Although the moral sanction is less predictable and reliable than the legal or political sanction (that is, the source of pains and pleasures issuing from the decisions of judges, in accordance with the legislator's will),[20] nonetheless the former is much more effective than the latter when it comes to applying a check to the judges' power: "in other cases the power of the moral sanction is comparatively needless and besides that it is comparatively weak. Here it is supremely necessary and the force of it herculean. […] [The] Judge is a man of honour: he has a rich fund of reputation to preserve and to improve."[21] Of such a passage, anyway, Gerald Postema seems to give an interpretation which sharply contrasts with Schofield's view of Bentham's reliance on mere self-regarding calculation. For Postema, "the informal sanction works well here, because the judge's sense of professional integrity is at stake, and that, says Bentham, is a much more powerful incentive to moral aptitude than threats of punishment, which are bound to lack credibility."[22] Here Postema seems to hold that

[18] Ibid., p. 296.
[19] See ibid., p. 297.
[20] See *IPML*, p. 35.
[21] U.C. LVII, 9, in G. Postema, *Bentham and the Common Law Tradition*, Clarendon Press, Oxford 1986, p. 368.
[22] Ibid.

the moral sanction acts deeply on those subject to it, in a way that transcends sheer fear of punishment at the hands of the people in general. On this interpretation, the judges would suffer from, or rejoice at, other people's bad or good opinion of them, without calculating the possibility of purely self-regarding pain and pleasure.

With regard to the passage in question, Postema's interpretation seems mistaken. The "fund of reputation" which Bentham is referring to in this passage from the 1770s is most likely the same as the "good-will fund", a notion that he introduces in *Deontology*:

> By every act of virtuous beneficence which a man exercises, he contributes to a sort of fund – a sort of Saving Bank – a sort of fund of general Good-will, out of which services of all sorts may be looked for as about to flow on occasion out of other hands into his. If not positive services, at any rate negative services, services consisting in the forbearance to vex him by annoyances with which he might otherwise have been vexed.[23]

Here, then, honour and reputation are not linked to any internal sense of integrity and respectability on the part of the judges: just like other officials, they simply calculate that their self-regarding interest will be best served by acquiring a reputation of probity, which will increase the probability of self-regarding pleasures and decrease the probability of self-regarding pains.

Moreover, Postema holds that

> the moral aptitude, […] in its positive form must be identified with the virtue or sentiment of benevolence […] it is the disposition *to be moved* to do what one judges to be in the universal interest. It is not enough consistently to *act* in such a way as to maximize community welfare (regardless of the motive); for one's moral aptitude is well developed only if one acts *on the motive* of benevolence. Thus, the moral aptitude is directly linked to the motive (Bentham calls it a "sanction") of *sympathy.*[24]

Postema seems to take an "internalized" view of moral aptitude which does not ascribe it to the sheer effect of external sanctions, "for if one acts out of fear of sanctions one does not act out of sympathy or benevolence, and so moral aptitude seems to be unnecessary, as long as constitutional structures and the enforcement of them are effective".[25] But this interpretation seems at odds with Bentham's claim that moral aptitude is no more than a kind of "practical innoxiousness" originating from the functionary's impotence to pursue his/her sinister interest.[26] Since "no propensity,

[23] *Deontology*, as above, p. 184.
[24] G. Postema, *Bentham and the Common Law Tradition*, as above, p. 361.
[25] Ibid., p. 362.
[26] See *First Principles Preparatory to the Constitutional Code*, as above, p. 15.

no desire […] can have place in any considerable force without some admixture of correspondent hope",[27] under appropriate institutional arrangements the officials would also lose their tendency to pursue their sinister interest; but that would be all with regard to internal dispositions, and no social motives like sympathy would be requisite. This makes more plausible Schofield's view that Bentham placed no reliance on the social motives to secure good behaviour on the officials' part. Schofield also quotes a passage in which Bentham denies the relevance of the sympathetic sanction as an "inducement" to moral aptitude in public functionaries, since its influence on their conduct cannot always be ascertained and its strength cannot be measured anyway.[28]

However, there may still be room for an interpretation of Bentham's thought that allows for non-egoistic motives to play a role in the officials' desired conduct, contrary to Schofield's view. For Schofield, Bentham's institutional architecture relied only on the pure self-regarding interest of the functionaries. Appropriate institutional arrangements would secure that their self-regarding interest could be pursued only as a part of the universal interest. It is true that Bentham saw the prevalence of egoistic motives in the officials as a strategic assumption, as acknowledged also by Postema:[29] the constant prevalence of egoism must be assumed as a political maxim, because, even if it is not true as a theoretical assumption, it must be acted upon in devising a utilitarian institutional architecture. Bentham probably inherited this view from Hume, who had claimed that "it is […] a just *political* maxim, *that every man must be supposed a knave:* Though at the same time, it appears somewhat strange, that a maxim should be true in *politics*, which is false in *fact*".[30] But once every inducement to the sinister sacrifice has been removed, and the functionaries can maximize their self-regarding interest only through the increase given to the whole community's interest, it is doubtful whether their pursuance of purely egoistic ends is the only incentive left to their action. Postema has a point in attributing to Bentham the view that the setting at naught of sinister interest would leave

> a motivational void to be filled with proper, other-regarding motives. […] Bentham's constitutional strategy […] was to neutralize, immobilize, and eventually destroy sinister, private interests and limited sympathies, and at the

[27] Ibid., p. 13.

[28] See J. Bentham, *Securities Against Misrule and other Constitutional Writings for Tripoli and Greece*, edited by P. Schofield, pp. 272-273, and P. Schofield, *Utility and Democracy*, as above, p. 297.

[29] See G. Postema, *Bentham and the Common Law Tradition*, as above, pp. 385-393.

[30] D. Hume, *Of the independency of Parliament*, in Id., *Political Essays*, edited by K. Haakonssen, Cambridge University Press, Cambridge 1994, p. 24; see also G. Postema, *Bentham and the Common Law Tradition*, as above, pp. 385-386.

same time to cultivate and liberate the widest sympathy and concern for the common good.[31]

In the *Constitutional Code*, after having stated the prevalence of self-regarding over other-regarding motives, Bentham explains that

> to give increase to the influence of sympathy at the expense of that of self-regard, and of sympathy for the greater number at the expense of sympathy for the lesser number – is the constant and arduous task, as of every moralist, so of every legislator who deserves to be so. But, in regard to sympathy, the less the proportion of it is, the natural and actual existence of which he assumes as and for the basis of his arrangement, the greater will be the success of whatever endeavours he uses to give increase to it.[32]

The sympathetic sanction – which Bentham added in 1814 to the physical, the political or legal, the moral or popular, and the religious sanction –[33] is a source of pleasures and pains springing from self-identification with fellow humans or other sentient beings. Although sympathy cannot be trusted for the contrasting of sinister interest, since it is unpredictable and, moreover, the self-preference principle makes it subordinate to egoistic affections, nonetheless there may be plenty of room left for it in Bentham's institutional architecture, provided that sinister self-regarding motives are contrasted by other self-regarding motives, like fear of punishment at the hands of the moral or the legal sanction. It may even be doubted that the people's representatives would be able to perform the most active part of their duties, without a genuine feeling of benevolence and sympathy towards the interest of their fellow citizens and of the community as a whole. On the part of a political representative, "appropriate probity [i.e. moral aptitude] consists in his pursuing that line of conduct, which, in his own sincere opinion, […] is most conducive to the general good of the whole community for which he serves".[34] Arguably, it is difficult to imagine anyone doing so with the purely self-regarding, egoistic purpose of trying to maximize his/her personal interest as a part of the community's interest. Something more seems to be required, maybe a form of self-identification with other people's pains and pleasures – that is, sympathy or benevolence.

Moreover, the popular or moral sanction seems to influence action not merely as a promise of future tangible rewards, or as a threat of future tangible punishments.

[31] G. Postema, *Bentham and the Common Law Tradition*, as above, p. 391.

[32] J. Bentham, *Constitutional Code*, in *Works*, IX, p. 192.

[33] See A. Goldworth, "Editorial Introduction", in *Deontology*, as above, p. XXI; see also M.P. Mack, *Jeremy Bentham: An Odyssey of Ideas 1748-1792*, Heinmann, London 1962, p. 242. Bentham, by the way, had recognized the importance of sympathetic motivation at least since chapter V of *IPML*, where he speaks of the pleasures and pains of benevolence or sympathy.

[34] J. Bentham, *Catechism of Parliamentary Reform*, in *Works*, III, p. 539.

There is an "internal" aspect of the motivation provided by this sanction, which relates to what Bentham called the "semi-social" motive of the love of reputation.[35] As Schofield himself recognizes, for Bentham respect and disrespect are a source of services and disservices, but also of pleasure and pain in themselves:[36] this involves that they can motivate also apart from the expectation of concrete rewards and punishments at the hands of the popular or moral sanction. Pride and vanity are motives springing from the moral sanction[37] and they are both forms of the desire for esteem.[38] Although they are self-regarding affections and, as such, they must be distinguished from those purely social motives springing form sympathy,[39] nonetheless they display a semi-social nature in that they involve self-identification with others. Pride and vanity make us rejoice or grow sad at the thought of what other people think of us, even apart from any expectation of those external events – that is, other pleasures and pains – that their opinion will bring about.

It would be very strange if Bentham did not take into account the role that social and semi-social motives play in the functionaries' actions, once the self-regarding motives have been tamed and the moral aptitude has been secured. An extensive survey of Bentham's views regarding this matter has not been attempted yet and would make a very interesting subject for inquiry.

[35] See J. Bentham, *Of the Limits of the Penal Branch of Legislation*, edited by P. Schofield, Clarendon Press, Oxford 2010.

[36] See P. Schofield, *Utility and Democracy*, as above, p. 294.

[37] See *A Table of the Springs of Action*, as above, p. 83.

[38] See *Deontology*, as above, p. 234.

[39] Ibid., p. 237.

Michael Quinn

Counting Pleasures and Pains, and Counting Heads

This book performs an enormous service to Bentham studies, distilling as it does the knowledge and insights accrued in two decades of intimate engagement with Bentham's thought, as presented in both printed works and in the 75,000 manuscript sheets which are preserved in UCL library and the British Library. If he had not written this book, Philip Schofield could still have reflected upon an outstanding contribution in terms of volumes produced, and of method, having effectively invented, refined, and then shared with colleagues, the set of practices and techniques essential for the transformation of a disordered mass of manuscripts into a published volume in the critical edition of Bentham's collected works. With *Utility and Democracy*, however, he has also established himself as a leading interpreter of Bentham's thought, who is just as much as ease in discussing philosophical methods and concepts as in extracting readable and coherent texts at the editorial coalface.

The single greatest virtue of this book is that it begins in the right place, with Bentham's logic, which forms "the foundation upon which the whole account is constructed,"[1] and constitutes the intellectual underpinning for Bentham's entire enterprise. As Schofield has argued consistently since his inaugural lecture,[2] Bentham was a self-consciously naturalistic philosopher, and it is in his ontology – and specifically in the distinction between real and fictitious entities – that the foundation of his epistemology, and thereby the basis of the superiority of the

[1] P. Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham*, Oxford University Press, Oxford 2006, p. 29.

[2] "Jeremy Bentham, the Principle of Utility, and Legal Positivism", in M.D.A. Freeman (ed.), *Current Legal Problems 2003*, vol. 56, Oxford University Press, Oxford 2004, pp. 1-39.

principle of utility over its opponents (the principles of asceticism and of sympathy and antipathy) lies. From this indispensable foundation, the discussion in *Utility and Democracy* proceeds logically to the principle of utility itself, and to the major variants of the principle of sympathy and antipathy (now, as then, natural law and natural rights), before assessing the impact of the French Revolution on Bentham's thought, tracing the development of the concept of sinister interest (and all that followed from it in terms of Parliamentary and legal Reform, and Bentham's attitude to the Church of England), and finally turning to final decade of Bentham's life, and to works on which Schofield cut his editorial teeth, with their focus on the best method of uniting official aptitude with frugality.

This brief discussion is obliged to omit many interesting topics, for the sake of raising two issues which seem ripe for further investigation. The first concerns the central question of the extent to which Bentham seriously intended the legislator or rule-maker to apply a felicific calculus in his decision-making. As Schofield notes, "Bentham appears to have believed that the human mind was, so to speak, programmed to operate as a calculating device for pleasure and pain."[3] For Bentham, this process of cost benefit analysis was the only rational method for decision-making, or for the evaluation of actions, principles or states of affairs. To resile from calculation was to bid farewell to facts and to real entities, and thereby to the exchange of sense, and to be left with the barren resort of the declamation of one's sympathies and antipathies. Commentators since Halevy have noted Bentham's emphasis on calculation, but recent interpretations of Bentham have downplayed its importance. Indeed, in Paul Kelly's subtle and sympathetic reconstruction of Bentham's project, the legislator, conscious that he cannot know the idiosyncrasies of his subjects, must eschew direct utilitarian calculation, and instead proceed indirectly, by establishing the necessary "conditions of interest satisfaction".[4] Rather than pursue overall well-being directly, "the legislator's task is the institution of a principle of right which embodies the equal distribution of a sphere of personal inviolability."[5] The conditions for the formation and pursuit of interest, or, in other words, objective human interests, consist in the subordinate ends of legislation: subsistence, security, abundance and equality.

On this reading, informational constraints oblige the legislator to apply a rationality, a decision procedure, which differs from that used by individuals in ordering their own actions. This rationality derives from empirical generalizations regarding human behaviour, termed by Bentham axioms of mental pathology. Given

[3] *Utility and Democracy*, as above, p. 43.

[4] *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*, Oxford University Press, Oxford, 1990, p. 36.

[5] Ibid., p. 138.

the role of security of expectations in permitting individuals to form and pursue plans of life,[6] the legislator secures existing entitlements to property in a way which rules out their invasion in pursuit of marginal gains in overall utility. Indeed, the business of the legislator is not concerned with global utility calculations, since his primary task is precisely to provide the stability within which complex goals may be adopted and pursued. In other words, the legislator's direct calculation of utilities extended only to assessment of the binary opposition between the benefits of order and the mischiefs of chaos.

Schofield notes in passing that "However satisfactory as a reconstruction of Bentham's utilitarianism, the distinction between public and private decision making was expressly rejected by Bentham himself."[7] The reader might regret the omission of a fuller discussion of this interpretative difference, since it goes to the very heart of Bentham's thought.[8] Without pretending to possess a resolution of the issue, it might be permissible to raise some issues relating to the option between the direct calculation of utilities – by estimation of the pleasures and pains consequent upon an action or a rule – and the indirect pursuit of overall well-being through the medium of the subordinate ends. Bentham notes explicitly not only that the demands of the competing subordinate ends conflict, but that a single subordinate end can give rise to conflicting injunctions.[9] In "Institute of Political Economy", Bentham offers the following advice to the legislator faced with these conflicting demands: "he has no other enquiry to make than which of those four subordinate objects it is, the pursuit of which will lead him by the shortest and surest track, and in the most perfect degree, to the attainment of the one supreme and general end abovementioned."[10] Since that general end is the maximum of happiness, it seems that Bentham's protocol for resolving conflicts between the subordinate ends is either meaningless, or does in fact involve the attempt to calculate directly the pains and pleasures consequent upon the adoption of one rule rather than another: how else is the legislator to identify *the degree* to which the maximization of utility is likely to be attained?

Kelly himself recognizes that in cases of approaching social catastrophe, "where some direct action is necessary to prevent the overthrow of the system of secured expectations,"[11] the legislator is permitted to breach the inviolability of his utilitarian system of right, and undertake some emergency redistribution of property. In such

[6] The expression was Benthamic before it was Rawlsian: see "Principles of the Civil Code", Bowring, I, 310.

[7] *Utility and Democracy*, as above, p. 41.

[8] Schofield himself identifies a detailed account of the subordinate ends of legislation as one of the lacunae consequent upon the restraints of space: see ibid., p. VI.

[9] "Principles of the Civil Code", Bowring, I, 302-303.

[10] UC, XVII, 173 (W. Stark (ed.), *Jeremy Bentham's Economic Writings*, 3 vols., Allen & Unwin, London 1952-54, III, 308).

[11] *Utilitarianism and Distributive Justice*, as above, p. 187.

circumstances, he must weigh the pains of disappointment arising from the attack on security of property, against the pains of disappointment likely to arise from the destruction of the predictable social order, and all the expectations that go with it. However, for Kelly, the legislator is able to undertake this calculation because "he balances like considerations"; that is, the elements of the calculation are homogenous and commensurable, being all modifications of the single currency of "disappointment". Now disappointment is simply "expectation thwarted",[12] but surely simply ignoring all other species of pain and pleasure means that the calculation is likely to be erroneous. In order to homogenize the variables, this calculation omits all pleasures. But, while it is true that the legislator's primary focus is the avoidance of pains, it seems simply arbitrary to exclude negative pleasures, that is, exemptions from pain (in the shape, for instance, of relief to starvation) from the balance sheet in this way. Likewise, restricting the relevant variables to pains of disappointment omits other sorts of relevant pains, in particular those arising from the secondary mischief of alarm.

In the calculations which Bentham does share with us, there are two trump cards which tend to carry the day. The first of these relates to the variable of extent. When Bentham instructs the legislator in calculating the mischiefs of offences, the primary mischiefs, that is the pains felt by the particular victim and her near connections, tend to be swamped by the secondary mischiefs of danger (i.e. the chance of suffering a similar pain) and alarm (i.e. the subjective pain of apprehension that we might so suffer). However intense the primary mischiefs, they extend only narrowly, whereas a modest degree of alarm, by extending throughout the community, may generate a much bigger pain. The second trump relates to the variable of duration, and allows Bentham to argue that significant short-term gains can be outweighed by permanent costs. Thus in discussing state support for ailing industries, it is the multiplication of the financial costs of such support by an indefinite number of years which leads Bentham to conclude that "Measures of relief taken for the support of branches of industry labouring under a temporary decline ought never to be any other than temporary."[13]

Further, Kelly cautions that the legislator is only justified in breaching personal entitlements "where the cost of not acting is indisputable,"[14] but how does the legislator, or any else, know that the point of approaching catastrophe has been

[12] *Supply without Burthen; or Escheat vice Taxation*, Debrett, London 1795, p. 28 (*Jeremy Bentham's Economic Writings*, I, 290).

[13] UC XVII 17, "Manual of Political Economy" (*Jeremy Bentham's Economic Writings*, I, 244 n.). See also "Institute of Political Economy", UC, XVII, 234 (*Jeremy Bentham's Economic Writings*, III,, 333), and "Observations on the Restrictive and Prohibitory Commercial System; especially with a reference to the Decree of the Spanish Cortes of July 1820", in *Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramaria and other writings on Spain and Spanish America*, edited by P. Schofield, Oxford 1995 (*CW*), p. 369.

[14] *Utilitarianism and Distributive Justice*, as above, p. 188.

reached, unless a global utility calculation informs him that the costs of not acting have exceeded the costs of acting? Given that the legislator is bound to provide a rationale for his laws, he is going to have to share with the public the justification for the adoption of the subordinate ends of legislation, while that justification itself can only be framed in terms of their contribution to maximizing happiness. In emergency situations, however, the legislator must alter the terms of his argument, and appeal directly to utilitarian calculation, and to the urgent need for action to avoid massive, and immediately impending, pains. Once that rationale enters the public domain, a degree of alarm on the part of all those property holders who have believed themselves secure in possession of inviolable rights would seem inevitable. Indeed, will it not be difficult for the legislator, who up to this point has been mounting an argument concerning the benefits of stability of expectations as the ground of inviolable rights, suddenly to switch his discourse into the direct utilitarian language of expropriating available surpluses to meet acute need?

In 1794, while reviewing the possible sources of funding for government expenditure, Bentham proposed that government engage in the banking trade as a means of raising revenue, and noted that the permanence and longevity of government gave it advantages over private individuals as a banker. Added to these was "the advantage of making use of it [i.e. the depositor's cash] in an occasion of extreme necessity for the common good of the whole."[15] In response to a possible objection that such action would constitute a breach of faith, Bentham responded:

> this is one of those cases of extreme necessity where it may be of more advantage that an engagement should be departed from for the moment than that it should be adhered to: and as the promise of subjection on the part of the subject to the sovereign may receive its dispensation from the extremity of tyranny, so may the promise of fidelity and protection for the portion of property on the part of the sovereign towards the subject find a dispensation from the extreme of disloyalty on the part of the subject, or the extreme of distress on the part of the whole state. Happiness, it must not be forgotten, is the only ultimate end, as of individual action so of political establishment: fidelity to engagements, justice, in a word, in all its branches, is *but* as a means to that end, how important an article soever in the catalogue of means. [16]

Again, in extreme necessity, justice gives way to utility. For a utilitarian, indeed, how could it be otherwise? And also again, how is the legislator to recognize extreme necessity when it arises, unless the potential appeal thereto is constantly available, and unless the global utility calculation, albeit by no means fine-grained, is that which, for the most part, justifies the maintenance of existing rights to property.

[15] "Money Traffic Resource", UC, CLXVI, 66, (*Jeremy Bentham's Economic Writings*, II, 127).
[16] Ibid.

It seems that Bentham was well aware of the difficulties facing the legislator in any effort to make global utility calculations, and indeed, it is tempting to view the introduction of the subordinate ends as, in part, a response to precisely the difficulties involved in any felicific calculus, and, in particular, a response to his rejection of the notion that money could provide a systematic proxy for the value of pains and pleasures. Bentham was attracted to the stability offered by the subordinate ends, and the buttress they provided against the sacrifice of basic interests for the sake of marginal gains in utility. However, he maintained throughout his life that only utility was relevant, and was also attracted to the flexibility which a direct utilitarianism offered. In the same way, Bentham combined abstract reasoning about human psychology, which issued in the formal security-providing principle, and its logical concomitant, the equalization of property, with sensitivity to the manner in which human beings are born into, and develop conceptions of themselves only in, particular, typically unequal, social contexts, wherein the centrality of established expectations to social stability rendered the legislative pursuit of equality an illegitimate goal. His desire is to combine the historicity of Hume with the criticality of Helvetius, and the tensions between the two approaches, continually threatens to derail his project.

A second lacuna in *Utility and Democracy* relates to the process by which the scales fell progressively from Bentham's eyes in relation to the sinister interest of the legal and political establishment. It has always seemed paradoxical that the Bentham of *Fragment on Government* had assembled all the conceptual tools with which he would later develop the first sustained elaboration of the theory of a representative democratic state, but failed to put them together as he did later to such brilliant effect. Thus the psychological premise on the self-interested nature of human motivation is indeed less developed in *Fragment* than in *IPML*, but it is there. The juncture of resistance is determined by interest: "why, in a word, taking the whole body together, it is their *duty* to obey, just so long as it is their interest, and no longer."[17] Indeed, at one point, what looks very like interest-begotten prejudice males an appearance: "It is an old observation how Interest smooths the road to Faith."[18] And yet, if men tend to be governed by self-interest, are not governors men? And do they not have means to oppress others, in addition to motive? Bentham admits in a footnote that members of parliament, at least, resemble the rest of us, and drops his future self a hint on the dynamic way in which his constitutional code would seek to harness individual self-interest to the service of public benefit: "The man who would persevere in the toil of Government, without any other reward than the favour of the people, is certainly the man for the people to make choice of. But such men are at best but rare."[19]

[17] *A Comment on the Commentaries and a Fragment on Government*, edited by J.H. Burns and H.L.A. Hart, Athlone, London 1977 (*CW*), p. 444.

[18] Ibid., p. 442.

[19] Ibid., pp. 469-470 n.

In *Fragment*, Bentham presents a summary of the works necessary to codify, and thus clarify, English law, and comments: "works which public necessity cries aloud for, at which *professional interest* shudders, and at which *legislative indolence* stands aghast."[20] Despite the explicit recognition of the professional interest of lawyers in complexity, Bentham did not, in the 1770s, attribute the situation to a systematic conspiracy on their part, but rather to "the ignorance, and allied to that the deference to authority, of English lawyers, together with their interest in maintaining their income."[21] In relation to the legislature, Bentham attributes their lack of enthusiasm for reform not to sinister interest, but to the benefits derived by country gentlemen from a quiet life![22] In *Fragment*, Bentham was prepared to admit only rhetorically that a Minister might have designs "inimical to his country",[23] while his faith in their good intentions in general is unfailing. As Schofield painstakingly sets out, even after Bentham had detected the sinister interest of Judge and Co, he retained a faith in the commitment of legislators to the public welfare until 1809.[24]

Schofield is surely correct in arguing that one consequence of the French revolution was to delay political reform in Britain "by delaying the creation and propagation of the utilitarian case for democracy."[25] The September massacres turned Bentham into an opponent of any political reform, and two things were necessary to overcome his opposition. First, Bentham had to draw the logical inference from his own premises, and recognize the dangers of misrule. The central part of *Utility and Democracy* provides an original and ground-breaking account of the discovery of sinister interest, the conceptual tool which allowed the inference to be drawn. On a point of detail, recent editorial work has pushed Bentham's first use of the expression sinister interest back from late 1797 to the autumn of 1794. In proposing that government should engage in profitable money-traffic as a source of revenue, Bentham noted that Adam Smith had criticised governments as inefficient spendthrifts as compared with private individuals, on the basis that the agents of government, the disposers of public money, possessed no direct interest in keeping down costs. Bentham continued:

> As a general proposition, I mean not to dispute it: in comparison of individual management on individual account, the interest is weak: the ground favourable to the growth of a sinister and partial interest opposite to that which coincides with duty: the

[20] Ibid., p. 499 (emphasis added).

[21] *Utility and Democracy*, as above, p. 115.

[22] In 1822, of course, Bentham added the following note: "Had I seen in those days what every body has seen since, instead of *indolence* I should have put *corruption*." (*A Comment on the Commentaries and a Fragment on Government*, as above, p. 499 n.)

[23] Ibid., p. 402.

[24] *Utility and Democracy*, as above, pp. 114-136.

[25] Ibid., p. 108.

> business exposed to perplexity and delay in proportion to the number of the persons whose opinions must be heard, and their inclinations queried[?].[26]

Having pointed out that even Smith admitted that government could handle some business efficiently, Bentham reflects, perhaps with the first germination of that bitterness at the fate of the panopticon penitentiary which would eventually drive the scales from his eyes in regard to sinister interest, that doing business with agents of government was frustrating: "Attend an Agent for Government, and think whether any thing in private life can equal the indifference with which he treats your business, although, or rather because, it is the public business, even when he is best disposed towards it." [27]

Schofield pays less attention to the second necessary condition for Bentham's conversion to democracy. Ironically, at least a part of the explanation for Bentham's failure in 1776 to draw democratic conclusions from his psychological premises lies in a concern, which Blackstone himself would have echoed, that democratic systems placed power in the hands of ignorance. As Schofield astutely notes, even in 1789, during Bentham's flirtation with democracy in the first blush of the French Revolution, he remained concerned about this issue,[28] while it features prominently in the arguments of the Tory Bentham of the 1790s. Even in *Fragment*, however, the concern was present:

> In the members of a Democracy in particular, there is likely to be a want of wisdom – Why? The greater part being poor, are when they begin to take upon them the management of affairs, uneducated: being uneducated, they are illiterate: being illiterate, they are ignorant. Ignorant, therefore, and *unwise*, if that be what is meant by ignorant, they *begin*. Depending for their daily bread on the profits of some petty traffic, or the labour of some manual occupation, they are nailed to the work-board, or the counter.[29]

Also in *Fragment*, Bentham hints at a Whiggish sympathy for the extension of the franchise, noting in relation to the power of electing the legislature: "The people at any rate, if not so great a share as they might and ought to have, have had, at least, *some* share in chusing it."[30] The making of good legislative decisions, like the making

[26] "Money Traffic Resource", UC, CLXI, 159. The manuscript is undated, but a short brouillon for the essay at UC, CLXVI, 32 is dated 24 October 1794.

[27] Ibid., UC, CLXI, 163 (*Jeremy Bentham's Economic Writings*, II 147).

[28] *Utility and Democracy*, as avove, p. 83-94.

[29] *A Comment on the Commentaries and a Fragment on Government*, p. 466.

[30] Ibid., p. 488. Bentham also responds to the absence in his critique of any positive description of, or prescription for the reform of, the British constitution, and the demand that he should present one: "In truth this is more than I have quite settled. I may have settled it with myself, and think it not worth the giving" (ibid., pp. 472-473).

of good decisions in general, depended upon the correct calculation of all the interests at stake. Given Bentham's belief in the power of self-interested motives, the limitation of the franchise entailed the exclusion of some interests from the calculation, in that the interests of those excluded could not be expected to motivate the legislators, since they were not accountable to those so excluded. In 1787, in *Defence of Usury*, Bentham had written of the poor man, in comparison of his more opulent fellows: "He knows what is his interest as well as they do, and is as well disposed and able to pursue it as they are."[31] What then, was the specific danger which prevented Bentham from embracing democracy?

Schofield notes that in his writings at the time of the French Revolution, Bentham argued that inequality in the franchise "would only be justified if it avoided the dangers which would arise under a system of equality,"[32] and that the preservation of the propertied against a majority of non-proprietors constituted such a danger. The fear of the ignorance of the poor, and its exploitation by rabble-rousing agitators goes a long way to explaining Bentham's refusal to endorse democracy before 1809. In answer to the question, "What changed to make democracy not merely acceptable to him, but the necessary precondition for any effective reform?," Schofield offers the discovery of sinister interest. There is much to be said for this argument, and Schofield's analysis is a real advance in our knowledge of Bentham's thought, but an equally critical analysis of Bentham's change of mind on the threat posed by the uninformed or misinformed poor would also have been valuable. Democracy was the only solution to the problem of sinister interest, but democracy, because of the enfranchisement of ignorance, itself presented a threat to social order and established property rights. The conclusion to a brief discussion of an excellent book on Bentham's political thought is hardly the appropriate location for speculation on the factors which reduced Bentham's fear of the mob, but the contribution of his relationship with James Mill, which began in 1808, might go some way to reconciling Schofield's account with that of Dinwiddy.[33] Schofield muses that if he had not begun work at the Bentham Project he would probably be sweeping Preston station:[34] railway hygiene's minor loss has been Bentham scholarship's immense gain!

[31] *Defence of Usury; Shewing the Impolicy of the Present Legal Restraints on the terms of Pecuniary Bargains*, Payne, London 1787, p. 33.

[32] *Utility and Democracy*, as above, p. 89.

[33] J.R. Dinwiddy, *Bentham's Transition to Political Radicalism*, "Journal of the History of Ideas", 35, 1975, 683-700.

[34] *Utility and Democracy*, as above, p. VII.

Xiaobo Zhai

Legal positivism: emotivistic or naturalistic?

As the greatest English legal philosopher,[1] Jeremy Bentham's universal expository jurisprudence (hereafter UEJ) has been undergoing various conflicting interpretations. Herbert Hart hailed him as the founding father and a prime exponent of legal positivism.[2] Starting from Bentham's utilitarian social and political theory, Gerald Postema indicated that "normative jurisprudence" was the right approach to adopt to understanding Bentham's "utilitarian positivism".[3] Recently, in his book *Utility and Democracy* and related articles,[4] Philip Schofield tried to create a radically different image of Bentham's UEJ. He argued rather provocatively that "Bentham was not a legal positivist in the senses in which Hart understood that notion." [5] Despite his claim that his reading, in contrast to a philosophical *reconstruction*, was an attempt to recover the historical Bentham, Schofield's narrative "on [Bentham's] own terms"[6] is, in fact, a philosophical *representation*, because, as he demonstrates convincingly,[7] the philosophical advancement of Bentham's thought

[1] H.L.A. Hart and D. Sugarman, *Hart Interviewed*, "Journal of Law and Society", 32, 2005, p. 287.

[2] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford 1983, pp. 147-148. See also *Essays on Bentham*, Clarendon Press, Oxford 1982, p. 17, p. 53.

[3] G. Postema, *Bentham and the Common Law Tradition*, Clarendon Press, Oxford 1986, p. 303, p. 331.

[4] P. Schofield, *Utility and Democracy*, Oxford University Press, Oxford 2006; "Jeremy Bentham, the Principle of Utility, and Legal Positivism", in M. Freeman (ed.), *Current Legal Problems*, 56, Oxford University Press, Oxford 2003, pp. 1-39; *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, "Jurisprudence", 1, 2010, pp. 147-167.

[5] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 150.

[6] P. Schofield, *Utility and Democracy*, as above, p. v.

[7] In chapter 1 of *Utility and Democracy*, Schofield, by means of detailed historical account, established that Bentham's inkling of his theory of entities preceded his formulation of the priciple of utility.

corresponds largely to its historical development. The whole thesis of *Utility and Democracy* is structured around Schofield's belief in the agreement between the philosophical and historical order of Bentham's theory. Encouraged by the acute awareness of this agreement, and inspired by Bentham's self-assessment that "J.B.'s new ideas derived from Logic,"[8] Schofield argues that a closer look at Bentham's ontology and its associated theory of language would provide a more plausible way of interpreting Bentham's project. Instead of legal positivism, he illuminatingly declares that, a framework based on Bentham's theory of entities would produce a better understanding of Bentham's UEJ, and of its potential contribution to contemporary debates in legal philosophy.[9] Unlike Hart, who started from legal positivism, and Postema, who started from utilitarianism, Schofield's starting point is Bentham's naturalistic ontology.

G.E. Moore famously convicted Bentham of a "naturalistic fallacy", on the ground that the latter defined a non-natural quality "good itself" as "pleasure maximizing", which is a natural property.[10] Following W.K. Frankena's distinction, Schofield pointed out that Moore's so-called naturalistic fallacy is in fact a definist fallacy. When Bentham is charged with a naturalistic fallacy, another thing meant by this mantra is the attempt to derive an "ought" from an "is", for which Schofield reserved the label of "the so-called naturalistic fallacy."[11] Of the principle of utility, compared with A.J. Ayer's emotivist reconstruction in terms of prescription and preference satisfaction,[12] and P. Kelly's re-categorization as a meta-ethical principle,[13] Schofield, by means of detailed exposition of Bentham's ontology, argues that, first, the charge of a definist fallacy is indefensible, because Bentham did not treat "good" as synonymous with "pleasure", but rather only explicated "good" in terms of pleasure; Secondly, the accusation of a naturalistic fallacy misses the point, because a naturalistic basis, for Bentham, is the only foundation on which ethics can make real sense, rather than make honeyed but fraudulent sound.[14]

For Bentham, all objects that ever were or ever can be present to any faculty of the human frame can be comprehended under two denominations, i.e. real entities and fictitious entities.[15] Real entities, i.e., substances or physical objects, are "the only

[8] P. Schofield, *Bentham*, Continuum, London 2009, p. 17.

[9] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 167.

[10] G.E. Moore, *Principia Ethica*, Cambridge University Press, Cambridge 1993, pp. 91-93.

[11] P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, pp. 3-4.

[12] A.J. Ayer, "The Principle of Utility", in G.W. Keeton and G. Schwarzenberger (eds.), *Jeremy Bentham and the Law*, Stevens & Sons, London 1948, pp. 245-48.

[13] P.J. Kelly, *Utilitarianism and Distributive Justice*, Clarendon Press, Oxford 1990, pp. 44-49.

[14] P. Schofield, *Utility and Democracy*, pp. 1-50; "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, pp. 5 -28.

[15] J. Bentham, *De l'ontologie*, edited by P. Schofield, J.P. Clero and C. Laval, Seuil, Paris 1997, p. 80.

objects that really exist."[16] "Language, in order to make sense, ha[s] to refer, either directly or indirectly, to real entities."[17] Fictitious entities, although unreal, are absolutely necessary for language and thought to be carried on, and "must for the purposes of discourse be spoken of as existing."[18] The words that "abound so much in ethics and jurisprudence," including principle, duty, power, etc., are fictitious entities, which, in order to make sense, have to be explained by demonstrating their relationship to the words representing real entities. Human psychology and morality share the same foundation or real source, i.e., the real entities of perceptions of pleasure and pain, which are the "only objects possessed of intrinsic and independent value."[19] Schofield asserts that "Bentham did not accept any ultimate ontological distinction between statements of fact and statements of value." Any statement of value, including the moral vocabulary, such as the words ought, right and wrong, in order to be meaningful, has to be capable of being expounded as a particular sort of factual statement. "Properties, including moral properties, do not exist independently of the physical world. There is no such thing as a non-physical moral property."[20] In Schofield's view, Bentham's ethics is one kind of naturalism. However, there is nothing fallacious in it; on the contrary, only by being naturalistic can it make sense, become truth-apt, and avoid being nonsensical.

Armed with this new insight into Bentham's ontology, Schofield sets out to challenge Hart's influential interpretation of Bentham. Hart claimed to find in Bentham's writings the insistence on a morally neutral vocabulary in the discussion of law and politics, and the insistence on the distinction between law as it is and as it ought to be, and declared that these ideas had opened the positivistic tradition of jurisprudence, and established Bentham as the founder and the most important early representative of legal positivism.[21] Borrowing Stephen Perry's conceptual distinction,[22] Schofield argues that "neither methodological legal positivism nor substantive legal positivism […] can be attributed to Bentham."[23] The critical examinations unfolded in Schofield's writings are grand and sophisticated, and improve significantly our understanding of Bentham's legal theory, and of the

[16] UC lxix, 241, cited from P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, p. 13.

[17] P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, p. 12.

[18] J. Bentham, *De l'ontologie*, as above, p. 86-87.

[19] J. Bentham, cited from P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", as above, p. 20.

[20] Ibid., p. 12.

[21] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, *as above,* pp. 147-148. See also *Essays on Bentham*, p. 17, p. 53.

[22] S.R. Perry, "Hart's Methodological Positivism", in J. Coleman (ed.), *Hart's Postscript*, Oxford University Press, Oxford 2001, pp. 311-313.

[23] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 159.

traditon of legal positivism. The many significant but long neglected differences between Bentham and Hart revealed and stressed by Schofield help us realize that their intellectual relation is much more complex and subtle than conventionally imagined. However one issue on which I feel unsure that I fully understand his analysis, but incline to disagree with him, is whether these differences are sufficient to warrant his conclusion that "Bentham was not a legal positivist in the senses in which Hart understood that notion." Schofield's arguments are manifold, which can not be discussed here comprehensively. The argument that I would like to take issue with is Schofield's proposition that the 20th century distinction between fact and value is "an essential element and crucial underlying assumption of contemporary Hartian legal positivism", and that Bentham, as a naturalist rejecting such distinction, is not a legal positivist.[24]

It is doubtless that Hart was entirely familiar with and did accept the 20th century fact/value distinction. We even can reasonably conjecture that Hart's project of legal positivism was initially inspired and boosted by the 20th century ethical theory based on this distinction. Hart himself, however, did not think the 20th century version of fact/value distinction is "an essential element and crucial underlying assumption" of his legal positivism. As to the nature of moral judgment, Hart's own theory is some kind of emotivism or non-cognitivism, which Hart was very clear that Bentham would not countenance. Hart's rejoinder to Schofield's criticism would be that he has confused the insistence upon the distinction between law as it is and as it ought to be, on the one hand, and the non-cognitivistic moral theory on the other hand. This confusion is just what "most troubles those who react strongly against legal positivism."[25] These anti-positivistic theorists stick to the opinion that the emphasis on the distinction between law as it is and law as it ought to be depends upon or entails moral emotivism or non-cognitivism, which Hart dismissed as irrelevant to the distinction between law as it is and law as it ought to be:

> Let us now suppose that we accept this rejection of non-cognitive theories of morality and this denial of the drastic distinction in type between statements of what is and what ought to be, and that moral judgments are as rationally defensible as any other kind of judgments. What would follow from this as to the nature of the connection between law as it is and law as it ought to be? Surely, from this alone, nothing. Laws, however morally iniquitous, would still (so far as this point is concerned) be laws. The only difference which the acceptance of this view of the nature of moral judgments would make would be that the moral iniquity of such laws would be something that could be demonstrated.[26]

[24] Ibid.
[25] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, as above, p. 82.
[26] Ibid., pp. 83-84.

In Hart's view, the rejection of moral emotivism or non-cognitivism "leaves untouched the fact that there are laws which may have any degree of iniquity or stupidity and still be laws."[27] In fact, Schofield recognizes this. He mentions in a footnote[28] that "Hart warns against confusing the is/ought distinction of legal positivism with the is/ought distinction associated with the so-called naturalistic fallacy. […] And points out that whether one rejects or accepts any sharp distinctions between is/ought, fact/value, means/ends, and cognitive/non-cognitive, this does not undermine the legal positivist distinction between law as it is and law as it ought to be." Schofield's criticism would have been more compelling if he had established that the denial of the is/ought distinction associated with the so-called naturalistic fallacy would necessarily undermine the distinction between law as it is and law as it ought to be.

Nevertheless, this seems an impossible mission, because the bigger problem is that Bentham's naturalism seems perfectly compatible with the is/ought distinction, which can be completely independent of moral emotivism. Schofield successfully dismissed Ayer's emotivistic interpretation of Bentham, and illuminatingly pointed out that Bentham

> was a "naturalist" in the sense that value was determined by the existence of certain events or states of affairs in the physical world, namely the experience of pleasure and pain by sentient beings. Hence, just as what the law is constituted a matter of fact, so what the law ought to be constituted a matter of fact.[29]

However, it is exactly in Schofield's own account that we can find that statements of fact and those of value are two different kinds of statements, despite the fact that both of them share, in real entities, the same ontological foundation. Both of them are naturalistic statements in that they, in order to make true sense, have to be expounded in terms of real entities, and translated into factual statements about real entities, especially pleasure and pain. "Psychology and morality shared a common foundation in the perceptions of pleasure and pain.[30] However, as Schofield said, perhaps in passing, statements of value are "a particular sort of factual statement".[31] They are particular in that: first, they take into consideration the circumstance of "extent". One of Schofield's brilliant contributions is that he highlighted the centrality of "extent" to Bentham's exposition of the principle of utility as a moral principle:

> A moral judgment was produced by taking into account all the pleasures and pains expected to be produced "in all breasts that seem likely to be in any way affected" by the

[27] Ibid.

[28] P. Schofield, *Jeremy Bentham, the Principle of Utility, and Legal Positivism*, as above, p. 28.

[29] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 158.

[30] P. Schofield, *Utility and Democracy*, as above, p. 29.

[31] P. Schofield, *Jeremy Bentham, the Principle of Utility, and Legal Positivism*, as above, p. 12.

> act in question. Once the final "circumstance" by which the quantity or value of a pain or pleasure was to be measured-namely that of extent-had been taken into account, a statement of psychological fact was transformed into a statement of moral value. [32]

Bentham later preferred the phrase "the greatest happiness principle" to "the principle of utility", partly because the latter cannot sufficiently indicate the circumstance of extent involved in moral judgement, and can be easily confused with a psychological statement. Secondly, the principle of utility, as a moral principle, is one kind of statement of fact, however, it is the statement of "future fact – the probability of future certain contingencies",[33] namely "a prediction about the pleasure and pain that would be experienced by sentient creatures should an alternative arrangement of the legal system be introduced."[34] When discussing the function of expositor and censor, Bentham asserted that the former explains the facts of "what the legislator and his underworkman the Judge have done already," while the latter occupies himself with "what the legislator ought to do in future," [35] which comes from a better felicific calculation than that on which "what the legislator and his underworkman the judge have done already" was based.

It is seen that, at the ontological level, statements of value are ultimately statements of facts. However, they are statements of the pleasures or pains which, "in all breasts that seem likely to be in any way affected" by any proposed act, "seem liable and likely, in the opposite cases of the act's being done and of its being left undone, to take place."[36] The dimensions of "future" and "extent" bestow double identities upon such statements of facts, and distinguish them from the statements of past or existing facts. In a word, Bentham's naturalism does not exclude the value/fact distinction, which is as basic a theme as naturalism in Bentham's thought. As Ross Harrison demonstrated with a wealth of textual evidence, this distinction is "of cardinal importance" in the tradition from Francis Bacon to David Hume with which Bentham identified, and constitutes "the key to the central point of Bentham's attack on natural rights."[37] The whole field of ethics must be "a labyrinth without a clue" if it refuses this distinction, which "allows criticism and change of the laws" and itself "should on every occasion, be clearly perceived, is […] the interest of the great bulk of mankind."[38] Gerald Postema argued that "while Bentham insists on a sharp

[32] *Utility and Democracy*, as above, p. 36. See Inaugural, p. 25.

[33] P. Schofield, *Jeremy Bentham, the Principle of Utility, and Legal Positivism*, as above, p. 27.

[34] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, as above, p. 158.

[35] J. Bentham, *A Fragment on Government*, edited by R. Harrison, Cambridge University Press, Cambridge 1988, p. 8.

[36] J. Bentham, *Deontology*, edited by A. Goldworth, Clarendon Press, Oxford 1983, p. 168.

[37] R. Harrison, *Bentham*, Routledge, London 1983, p. 100.

[38] J. Bentham, *Chrestomathia*, cited from R. Harrison, ibid., p. 204.

distinction between is and ought, validity and merit, and the functions of expositor and censor at the level of particular laws, his distinction is much less sharp at other levels, especially at the level of general reflection on the nature and proper form of laws."[39] This view can be formulated the other way around without changing its substantive idea: namely, while the distinction between value and fact is not very sharp at the level of general reflection on the nature and proper form of morals and law, the distinction between is and ought, validity and merit, and the functions of expositor and censor is really much more sharp at the level of particular laws.

However, all this does not mean that Hart's interpretation of Bentham is without flaws. Although his argument that Bentham's ontology manifests itself in his denial of is/ought distinction is open to further discussion, Schofield was completely right when he said that "it is […] the different ontological theories of Bentham and Hart that is at issue." [40] In his *Postscript* to *The Concept of Law*, Hart claimed that his theory is

> [a] theory of what law is which is both general and descriptive. […] My account is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.[41]

Hart attributed this morally neutral description to Bentham when he wrote that

> [a]mong Bentham's many claims to be an innovator none is better founded nor, I think, more important than his insistence on a precise and so far as possible a morally neutral vocabulary for use in the discussion of law and politics. This insistence, though it may seem a merely linguistic matter, was the very centre, and I would say the sane and healthy centre, of legal positivism of which Bentham may be regarded as the founder.[42]

The problem with Hart's attribution is that Bentham's UEJ is by no means "morally neutral". Bentham's UEJ should be carried out in terms of utilitarian language of pleasure and pain, should serve the project of utilitarian legal reform, and can help to repel incompetent and evil institutions. It should, however, limit itself to the "humbler function" of "simply stating an institution as he thinks it is," since condemning or defending, guarding from reproach or recommending to favour are

[39] G. Postema, *Bentham and the Common Law Tradition*, as above, p. 308.

[40] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence*, as above, p. 162.

[41] H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford 1994, pp. 239-240.

[42] H.L.A. Hart, *Essays on Bentham*, Clarendon Press, Oxford 1982, p. 27.

the functions of censor.[43] Nevertheless, Bentham did indeed insist that we should use as "neutral" a vocabulary as we can. For him, a "neutral" vocabulary requires expositors to avoid emotive terms, including eulogistic and dyslogistic words, which exist for the purpose of "excitation" and are passion-kindling, hence question-begging and fallacious.[44] Bentham's "neutral" can be reasonably dubbed as "emotively neutral". For Bentham, utilitarian description can be, and should be, carried out in emotively neutral language, which for him is one of the ways avoiding question-begging fallacy. Bentham, who was very cautious about words and language, never used the phrase "morally neutral description" to portray his UEJ, because, UEJ, as we have seen, strictly speaking, is morally utilitarian. However, Bentham did declare explicitly that his vocabulary is neutral, i.e., emotively neutral. There is nothing self-contradictory in Bentham's methodology, because, for him, moral judgment, as Hart said, is a "verifiable proposition about utility",[45] and a matter of calculation of pleasure and pain according to seven circumstances (intensity, duration, certainty, propinquity, fecundity, purity, and extent), whereas emotion is a state of mind produced by transient pleasure and pain,[46] which often represents some prejudice or delusion. Longing for some independent rational foundation for ethical thought, Hart was highly skeptical of objective moral facts. He required legal theory to "avoid commitment to controversial philosophical theories of the general status of moral judgments" and to leave open the general question of whether they have objective standing.[47] P.M.S. Hacker thought Hart was "an ethical pluralist",[48] and Sylvie Delacroix regarded him as a moral agnostic.[49] Hart seems to subscribe to some kind of noncognitivism concerning the nature of moral judgment. For him, moral judgment is a matter of attitude, feeling and emotion, and, therefore, Bentham's emotively neutral description is equated by him with a morally neutral description.That's why, first, he wrongly asserted that his theory is morally neutral description, although he did start his theory from particular moral concerns and from the moral truth that he longed for but could not prove; secondly, he wrongly attributed a morally neutral description to Bentham when he found an emotively neutral description in Bentham's UEJ. So the mistake of Hart is not that he erroneously ascribed the positivistic is/ought distinction to Bentham, but that he wrongly attributed his emotivistic is/ought distinction to Bentham, whose is/ought

[43] J. Bentham, *A Fragment on Government*, as above, p. 9.

[44] J. Bentham, *The Works of Jeremy Bentham*,V, 2, edited by J. Bowring, Tait, Edinburgh 1837, p. 436.

[45] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, as above, p. 82.

[46] J. Bentham, *The Works of Jeremy Bentham*, as above, V, 10, p. 509.

[47] H.L.A.Hart, *The Concept of Law*,as above, pp. 253-254.

[48] P.M.S. Hacker, "Hart's Philosophy of Law", in P.M.S. Hacker and J. Raz (eds.), *Law, Morality, and Society*, Clarendon Press, Oxford 1977, p. 8, note 12.

distinction is naturalistic. Hart and Bentham share the *prima facie* same distinction between is and ought. If this distinction is the ID card of legal positivism, we have to say, Bentham's and Hart's legal positivisms are ontologically different. Hart's emotivistic legal positivism does not belong to the "utilitarian tradition in jurisprudence" founded and represented by Bentham. On the contrary, this tradition, at its beginning and in its classical form, is naturalistic legal positivism. The root cause of its positiveness is naturalism. As Schofield says, "Bentham was not a legal positivist in the senses in which Hart understood that notion." However, the senses here have nothing to do with Hart's is/ought distinction, but everything to do with Hart's emotivistism.

[49] S. Delacroix, *Meth-Ethical Agnoticism in Legal Theory*, "Jurisprudence", 1, 2010, pp. 225-226.

Philip Schofield

Utility and Democracy: A Comment on the Commentators

It is gratifying that the three commentators, Francesco Ferraro, Michael Quinn, and Xiaobo Zhai, accept the general framework for the development of Bentham's political thought advanced in *Utility and Democracy*, and in particular take seriously the theory of real and fictitious entities that I argue should be placed at the centre of any account of Bentham's philosophy. There is much, much more to be said about Bentham's thought in all sorts of areas, including his political thought, and hopefully more will be said, and said more definitively, as new and better texts come to be made available in the authoritative edition of *The Collected Works of Jeremy Bentham*. In the meantime, I hope that the story I try to outline in *Utility and Democracy* will provide some orientation, both for non-specialists who have a tangential interest in Bentham, and for specialists who will be able both to expand and revise, and also to fill the many gaps in, my account. I will take this opportunity to respond only to those points made by the present commentators that tend to contradict the conclusions reached in *Utility and Democracy*, but which I still hold to be valid.

Ferraro on self-interest and sympathy

Ferraro draws attention to the different accounts offered by Postema and me in relation to the motivations that Bentham relied upon in order to produce good behaviour on the part of government officials or functionaries. The issue centred on the nature of moral aptitude. Postema's account appeared in *Bentham and the Common Law Tradition* published in 1986,[1] and he did not, therefore, have the

[1] G.J. Postema, *Bentham and the Common Law Tradition*, Clarendon Press, Oxford, 1986.

benefit of Bentham's most important exposition of the various branches of aptitude – moral, intellectual, and active – which appeared in the essay *Economy as applied to Office*, first published in 1989.[2] I responded to Postema in an article entitled *Bentham on the Identification of Interests*,[3] in which I showed that, for Bentham, moral aptitude, as a personal quality of the functionary, consisted in the absence of sinister interest, and it this was secured by a number of institutional arrangements.[4] Hence, as Ferraro, points out, I emphasized Bentham's reliance on the functionary's (self-interested) share in the universal interest as his motive for promoting that wider interest. Bentham was not prepared to rely on the social motives to produce good government. The point was that everyone had a share in the universal interest, and so had some motive to promote it; not everyone could be relied on to act out of sympathy for their fellow human beings.

Indeed, sympathy was not, for Bentham, a force that necessarily promoted the universal interest. On the contrary, sympathy was essential for the effective operation of sinister interest. Sinister interest was particularly effective when operating amongst a small class who had the ability to exercise power of various sorts – in other words, an aristocracy. Sympathetic fellow-feeling, for instance amongst Judge and Co., welded together their individual sinister interests into a much stronger combined force.[5] Hence, reliance on sympathy was not only not enough to promote the general interest, but was potentially extremely dangerous. Sympathy had to be sympathy for the community in general, and not for a particular group united in sinister interest. Having said that, Ferraro is correct to point out that sympathy (of the right sort) was a quality that Bentham wished to encourage. I might go further and say that antipathy (of the right sort) was also a quality that Bentham wished to encourage – for instance antipathy towards money-grabbing lawyers. Rather than saying that Bentham wanted to encourage certain sorts of sympathy and antipathy, that is where those sensations were allied with the general interest, it would be less ambiguous to say that Bentham wanted to promote benevolence. But the point remains, that moral aptitude was essential for good government, and moral aptitude, as Ferraro agrees, was not benevolence. Rather, it was a form of prudence.

[2] J. Bentham, *First Principles preparatory to Constitutional Code*, edited by P. Schofield, Oxford 1989, pp. 1-122.

[3] P. Schofield, "Bentham on the Identification of Interests", *Utilitas*, VIII, 1996, pp. 223-234.

[4] Postema has accepted my account: see G.J. Postema, "Interests, Universal and Particular: Bentham's Utilitarian Theory of Value", *Utilitas*, XVIII, 2006, 109-133. As I pointed out in "Identification of Interests", the revised view of moral aptitude that I put forward did not have any serious consequences for Postema's overall account in *Bentham and the Common Law Tradition*.

[5] For sympathetic fellow-feeling amongst monarchs, for instance, see "Supreme Operative", in *First Principles*, pp. 162-163; and for the various branches of aristocracy, and their sinister alliance with monarchy, see ibid., pp. 189-198.

Bentham advocated the maximization of moral aptitude on the part of functionaries, and not the maximization of sympathy. Moral aptitude, and hence that part of self-interest that was allied with the general interest, was central to Bentham's constitutional theory. Ferraro is, however, perfectly correct when he states that a much fuller account of Bentham's theory of motives and sanctions is needed. As a final tantalising comment, I am, when other business permits, working on transcripts of Bentham's religious writings in the Grote Papers deposited in the British Library. This virtually unknown material, written mainly in the mid-1810s, contains a very extensive discussion of the various sanctions, and will be a critical resource for any scholar willing to take on the task.

Quinn on political radicalism

Quinn agrees with the approach adopted in *Utility and Democracy* in terms of accepting Bentham's theory of real and fictitious entities, more broadly expressed as his theory of logic and language, as the appropriate starting-point for his thought, and, as a consequence of that, accepting that his ethics had a naturalistic basis. Within this framework, Quinn discusses two major issues, which, he notes, constitute lacunae in *Utility and Democracy:* the first concerns the question of the relationship between the principle of utility and the four subordinate ends of legislation, namely subsistence, abundance, security, and equality, and more particularly whether Bentham's approach is best understood in terms of direct or indirect utilitarianism; the second concerns Bentham's worry that the ignorance of the mass of the people made them unfit to be given the vote. Quinn argues that Bentham's overcoming of his fear of the ignorance of the people was as important as the discovery of sinister interest in explaining his eventual advocacy of political radicalism.

In relation to the first point, this was, as Quinn points out, one of the areas of Bentham's thought that, in *Utility and Democracy*, I did not explore in the depth that it deserves. Hence, Quinn's commentary is aimed rather at the reconstruction of Bentham's moral and political philosophy offered by P.J. Kelly,[6] rather than at any discussion in *Utility and Democracy*, but is nonetheless valuable for that. Quinn himself is doing some extremely insightful work in this area, and presents some of his conclusions here. There is little more for me to say except that I endorse Quinn's views, and find them perfectly compatible with the discussion of the principle of utility contained in *Utility and Democracy*, and perfectly consonant with my own more inchoate views.

[6] P.J. Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*, Clarendon Press, Oxford, 1990.

On the second point, I am not convinced that Bentham's commitment to political radicalism was related in any significant way to a changing appreciation of the fitness of the people in general to make appropriate choices in the election of their representatives. I should first of all express my gratitude to Quinn for pointing out the earliest occasion yet discovered of Bentham's use of the phrase "sinister interest." (In fact, this is the second time that Quinn has made a discovery in this respect. Not that any one will have noticed, but the hardback edition of *Utility and Democracy* states that the earliest published use of the phrase took place in *Scotch Reform*, whereas the paperback version has been amended to take account of the appearance of the phrase, first noticed by Quinn, in Outline of a work entitled "Pauper Management Improved" published in *Annals of Agriculture* in 1798.)[7] This new manuscript reference alters the detail of the history of the phrase "sinister interest", but does not – nor does Quinn suggest that it does – alter the fact that the significant development of the notion of sinister interest took place in the writings on judicial evidence and procedure on which Bentham started work after the effective collapse of the panopticon prison scheme in 1803.

Quinn's main point, of course, is that, in concentrating on sinister interest, I failed to take sufficient account of Bentham's fear "that democratic systems placed power in the hands of ignorance". Quinn quotes at length a passage from *A Fragment on Government* that purports to argue that "in the members of a Democracy [...] there is likely to be a want of wisdom."[8] This, however, was not Bentham's argument, but a highly ironic mimicking of the arguments of those who, in support of the mixed constitution of Britain, claimed that wisdom was a necessary property of the members of the House of Lords. Insofar as it points in any direction, this passage suggests that Bentham rejected this argument, rather than endorsed it. Indeed, the quotation that Quinn then reproduces from *Defence of Usury* stating that the poor man knew his interest as well as the rich man, does not suggest that Bentham was overly worried about the lack of knowledge on the part of the people, given his view that the right thing to do when voting was to vote for that candidate whom you believed would best promote your interest. And again, at the time of the French Revolution, in *Projet of a Constitutional Code for France* written in the early autumn of 1789, Bentham advocated universal (including women's) suffrage.[9] Bentham's attitude to the intellectual capacities of the common man (and woman) was, on the whole, not a particularly significant barrier to his own development as a political

[7] *Utility and Democracy*, as above, p. 111 n.

[8] J. Bentham, *A Comment on the Commentaries and A Fragment on Government*, edited by J.H. Burns and H.L.A. Hart, London, 1977, p. 466.

[9] J. Bentham, *Rights, Representation, and Reform: Nonsense upon Stilts and other writings on the French Revolution*, edited by P. Schofield, C. Pease-Watkin, and C. Blamires, Clarendon Press, Oxford 2002, pp. 246-249.

radical and advocate of representative democracy and republicanism. There is, certainly, a case to be made that Bentham was more worried about a lack of property, rather than a lack of knowledge, as a barrier to democracy. I have, however, modified one aspect of my account of the development of Bentham's political thought. I would now argue more strongly than I did in *Utility and Democracy* that the impact of the French Revolution was not merely to make Bentham oppose political reform in Britain for the time being, but converted him into a political conservative.[10] It was in the 1790s that he was most worried about the combination of the ignorant and the indigent as a threat to political stability. On this view, Bentham's transition to political radicalism appears even more dramatic.

Zhai on Legal Positivism

Zhai's concern is not so much with themes advanced in *Utility and Democracy*, but rather with an argument I first outlined in *Jeremy Bentham, the Principle of Utility, and Legal Positivism* published in 2003,[11] and developed in more detail, and in a stronger form, in *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"* published in 2010.[12] In both articles I relied on the distinction, outlined by Stephen Perry,[13] between the doctrines of methodological legal positivism (that there is no necessary connection between morality and legal theory, and interpreted more specifically here as the view that legal theory should be conducted in morally neutral terms) and substantive legal positivism (that there is no necessary connection between morality and the content of law, and interpreted here as the view that law as it is should be distinguished from law as it ought to be). The distinction helps to explain Hart's interpretation of Bentham, in that Hart attributed both doctrines to Bentham, even though Hart did not himself distinguish them explicitly. In my first article I concluded that Bentham was not a methodological legal positivist, but could be described as a substantive legal positivist. In my second article I argued that Bentham was not best understood either as a methodological legal positivist or as a substantive legal positivist. It seems to me that substantive legal positivism divides the subject of jurisprudence into two branches, "law as it is" and "law as it ought to be", and that methodological legal positivism is thereupon concerned with the

[10] P. Schofield, "Bentham et la réaction britannique à la Révolution française", trans. E. de Champs, in *Bentham et la France: fortune et infortunes de l'utilitarisme*, edited by E. de Champs and J.-P. Cléro, Voltaire Foundation, Oxford 2009, pp. 67-82.

[11] P. Schofield, "Jeremy Bentham, the Principle of Utility, and Legal Positivism", in M.D.A. Freeman (ed.), *Current Legal Problems 2003*, vol. 56, Oxford 2004, pp. 1-39.

[12] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, «Jurisprudence», I, 2010, pp. 147-167.

[13] See S.R. Perry, "Hart's Methodological Positivism", in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Oxford University Press, Oxford 2001, pp. 311-354.

approach that should be adopted when describing "law as it is", and in particular those "concepts" that are supposed to exist in each and every legal system – in other words, the starting-point of legal positivism is a division between what is (fact) and what ought to be (value), and then, within the field of fact, the explanatory task is undertaken in morally neutral terms.

While partially accepting my account, Zhai maintains that Bentham can be viewed, in a meaningful sense, as a legal positivist, in that he retained a commitment to substantive legal positivism – that is to a distinction between fact and value in his distinction between expository and censorial jurisprudence (in other words in his distinction between law as it is and law as it ought to be). Zhai, however, agrees with me in rejecting Hart's claim that Bentham aimed to develop a morally neutral vocabulary for explicating key terms in law (for instance right, power, duty, privilege, immunity). In other words, Zhai agrees broadly with my first article, but rejects the stronger claim advanced in the second. In relation to substantive legal positivism, Zhai argues (extrapolating on a comment made by Hart) that my mistake is to assume that because Bentham would have rejected non-cognitivism in ethics (that is the view that statements of moral rightness and wrongness cannot be said to be true or false), he would also have rejected the separation of fact and value. In other words, I wrongly assume that the distinction between what the law is and what the law ought to be is merely a special case of a more general distinction between what is and what ought to be, and because Bentham, in his moral theory, treated both statements of the "what is" variety and statements of the "what ought to be" variety as statements of fact, and thus collapsed any sharp division between fact and value, that he did so in his legal theory. I am not persuaded by Zhai's arguments that my view is mistaken. Even if the "causal connection" is mistaken, and one view does not logically entail the other, there is no reason to think that Bentham did not hold both views. A general point is that Bentham put forward a unified theory: there was only one physical world, and hence only one source of knowledge; there were not competing domains of fact and value, or of brain and mind, or of matter and spirit.[14] The tendency of contemporary philosophy is to contrast fact with value; Bentham would have contrasted fact with fiction.

Allow me to look in more detail at Zhai's argument. Hart was correct, according to Zhai, to state that the adoption of either cognitivism or non-cognitivism in moral theory was irrelevant to the legal positivist's insistence on the conceptual distinction between statements of what the law is and what the law ought to be. What this seems to be saying is as follows: having made the prior distinction between is and ought (as per substantive legal positivism), the debate between cognitivists and non-cognitivists is carried on within the sphere of what ought to be, while legal theory is carried on

[14] See, for instance, Bentham's "Encyclopedical Table, or Art and Science Table", in *Chrestomathia*, edited by M.J. Smith and W.H. Burston, Clarendon Press, Oxford 1983, between pp. 178 and 179.

with the sphere of what is (as per methodological legal positivism). The thrust of Hart's argument in the quotation reproduced by Zhai[15] was directed against those proponents of natural law who claimed that evil or unjust law was not law. Bentham, of course, likewise attacked the natural law theorists on this ground: law could be good or evil, just or unjust. The point, however, is that, for Bentham, the law necessarily had some value, and the very identification of what the law was had some value. I am prepared to concede that there may be trivial statements that may be statements of fact (that are true) but are not valuable in that they have no impact on utility – Bentham himself said that such statements were both rare and did not matter.[16] But statements about the law would certainly not fall into this non-trivial category. For Bentham, a non-trivial statement of fact was valuable for what it told us about the physical world, while a statement of value, as a species of factual statement, was also valuable for the same reason. Fact and value were not separable, but represented two different ways of speaking about the same physical world – it was more a case of whether it was useful to emphasize the past, present, or future physical reality without explicit reference to pleasure and pain (statement of fact), or with such explicit reference (statement of value).

Bentham's utilitarian ethics, which according to modern lights falls into the category of cognitivism, did not allow for the carving up of experience into a physical world of fact and a mental world of concepts in the way that Hart, and following him Zhai, assume is feasible. Hence I maintain, contrary to Hart, that, for Bentham, if fact and value have one meaning in one part of the field of thought and action, they have the same meaning in every other part of the field of thought and action. If the distinction between fact and value does not make sense in the field of ethics as a whole, then it does not make sense in that division of the field occupied by jurisprudence. To put this another way: Zhai allows that, for Bentham, the domain of fact enters into the domain of value (that is statements of value are a special sort of statement of fact); if, as I argue, the relationship is mutual, then the domain of value enters into the domain of fact, and Zhai's argument collapses.

It is worth drawing attention to two short passages that I have not referred to in my previous discussions, but which, if nothing else, at least suggest that the interpretation of Bentham as a Hartian legal positivist needs to be seriously re-examined. First, in *Letters to Count Toreno*, having discussed the principles on which a penal code ought to be grounded, Bentham stated: "Thus, not only in a direct way, by the application made of it to each particular case, but in an additional way by means of the method to which it gives birth, does the principle of the greatest

[15] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford 1983, pp. 83-84.

[16] Such statements would concern apathematic sensations: see *Utility and Democracy*, as above, pp. 29-30.

happiness of the greatest number, cover the whole field of legislation with its salutary influence". In short, "the whole field", understood in terms of both content of the law and the method by which it is organized, was subject to the principle of utility.[17] Second, in the marginal summary paragraphs for "Table of the Springs of Action", Bentham noted: "Principles of utility two, or if but one, it is understood in two senses – viz. the *censorial* and the *expositive* or *exhibitive*. (Censorial, what. Expository, what.)"[18] Expository jurisprudence (the identification of what the law is) and censorial jurisprudence (recommendation of what the law ought to be) were both governed by the principle of utility. I am inclined to think that a serious re-examination of Bentham's legal theory will show that the gloss put upon his distinction between what the law is and what the law ought to be by Hart and his twentieth-century followers is a product of their commitment to the conceptual separation of fact and value, and that such a separation would not have made sense to Bentham, because fact and value were inseparably associated.

Zhai goes on to say that Bentham's naturalism "seems perfectly compatible with the is/ought distinction." This is not the issue. The issue is whether the "ought" is dependent on the "is", that is to say some physically existing property or thing, or whether the "ought" is independent of the physical (natural) world. Zhai draws on the not inconsiderable authority of Ross Harrison[19] who, he says, has "demonstrated" that the distinction between fact and value was central to Bentham's thought (more precisely, Zhai states that, according to Harrison, it was central to the tradition of thought from Bacon to Hume with which Bentham identified). Harrison certainly attempts to interpret Bentham as though he accepted the separation of fact and value, but this is a philosophical reconstruction (from the same mould, in this particular, as the important reconstructions of Postema and Kelly)[20] and therefore a different enterprise to my own. I would, however, like to try to cast a little doubt on the assumption that there was a tradition of thought that adhered to something akin to the twentieth-century's understanding of the separation of fact and value on which Bentham was drawing. The *locus classicus* for this "tradition" is Hume, who is often said to have been the first philosopher to identify the so-called naturalistic fallacy, that is the fallacy of deriving an "ought" from an "is". Hume wrote:

[17] "Letters to Count Toreno", in *The Works of Jeremy Bentham*, edited by J. Bowring, 11 vols, Tait, Edinburgh 1838-1843, VIII, 526.

[18] J. Bentham, *Deontology together with A Table of the Springs of Action and Article on Utilitarianism*, edited by A. Goldworth, Oxford University Press, Oxford 1983, p. 9.

[19] R. Harrison, *Bentham*, Routledge, London 1983.

[20] G.J. Postema, *Bentham and the Common Law Tradition*, as above; P.J. Kelly, *Utilitarianism and Distributive Justice*, as above.

> In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation of affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this relation can be a deduction from others, which are entirely different from it.[21]

The problem identified by Hume was not, as is usually assumed, the move from the "is" to the "ought" as such, but the lack of any explanation as to how it was done. Bentham learnt this lesson from Hume: he explained clearly how the "ought" (the principle of utility) was derived from the "is" (the experience of pleasure and pain).

Zhai agrees with me in rejecting Hart's claim that Bentham aimed to develop a jurisprudential vocabulary of morally neutral terms. Hart's claim has some initial plausibility due to Bentham's desire to avoid eulogistic and dyslogistic terms, that is terms that carried associations of praise and blame. However, as Zhai rightly points out, while Bentham advocated a vocabulary that did not carry such associations, he did so not because such a vocabulary would be morally neutral, but because it would be conducive to utility. The eulogistic and dyslogistic associations of certain terms made them morally pernicious because they led to a begging of the question – the approval or disapproval of a particular practice, for instance, would depend on the associations of the term by which it was described, rather than on its substantive utility. Indeed, Zhai goes beyond my account in that he explains Hart's attribution of a morally neutral vocabulary to Bentham in terms of what he takes to be Hart's moral non-cognitivism. I do not, on the surface, see why Zhai thinks that the adoption of either a cognitivist or a non-congitivist moral theory is completely independent of substantive legal positivism (the grounds on which he criticizes my account), but is the explanation for Hart's mis-attribution of methodological legal positivism to Bentham.

It may be that Zhai is simply adopting a different approach to my own, and that he is putting forward a philosophical reconstruction, rather than a historical account, of Bentham's thought. I have tried to explain in the two articles, as well as in *Utility and Democracy*, that I am attempting to give an account of Bentham as a historical figure – my enterprise, in Bentham's terminology, is "expository", but at the same time, I hope, not without value. If Zhai's approach is that of the contemporary legal philosopher, who is trying to understand Bentham according to the lights of

[21] D. Hume, *A Treatise of Human Nature: A Critical Edition*, edited by D.F. Norton and M.J. Norton, 2 vols., Clarendon Press, Oxford 2007, I, 302.

contemporary philosophy, there is no real dispute between us. Whatever the case, there is no doubt that Bentham was a significant influence on the development of Hart's legal positivism, and hence on contemporary jurisprudence. It is regrettable that contemporary legal philosophers, at least in the Anglophone world, do not take the history of their subject more seriously – a criticism from which Zhai is clearly immune. There is more discussion needed around these areas, and I am grateful to Zhai for raising some important issues in such a stimulating and insightful way.

Conclusion

It is kind of Quinn to say that my work on Bentham has led to a better world than would have existed if I had followed my youthful ambitions and become a railway porter in my birthplace. I suspect that I would have been happy enough tending the Voltairean garden that is Preston station. Jeremy Bentham, of course, loved to tend his not inconsiderable garden at Queen's Square Place, Westminster, but he had much wider ambitions. He would have been disappointed at the dominance of human rights discourse in today's world, and of the continuing prevalence of religion and religious modes of thinking. But all that means is that his ideas retain tremendous relevance and, indeed, provide a powerful tool for the critique of contemporary society.

SYMPOSIUM

GLOBAL JUSTICE, PRIVATE MORALITY, AND UTILITARIAN PERSPECTIVE

JEREMY BENTHAM:

PROPHET OF SECULARISM

PHILIP SCHOFIELD

© 2011 – *Philosophy and Public Issues*, Vol. 1, No. 1 (Fall 2011): pp. 50-74.
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

Jeremy Bentham: Prophet of Secularism

Philip Schofield

I

A Secular Prophet?

To speak of a 'prophet of secularism' appears at first glance to be a contradiction in terms. A prophet is usually said to be a person who, inspired by some supernatural agency, speaks on behalf of that supernatural agent, and, in some instances at least, predicts the future. Secularism is the view that what is morally right should be based on whatever promotes the well-being of sentient creatures in the physical world, to the exclusion of all considerations derived from a belief in the supernatural. A prophet is inspired by the supernatural; secularism declares the supernatural to be irrelevant; hence the contradiction in terms. According to Jeremy Bentham (1748–1832), the utilitarian philosopher and reformer, the contradiction lay in 'a source of illusion which pervades the whole system of technical religion, and by which the conceptive and judicial faculties of mankind have in a most deplorable degree been distorted and debilitated'. The Greek word from which the English word 'to prophesy' had been derived had two distinct meanings. The first and more extensive meaning was 'to speak out', or more generally 'to discourse in an open manner', whether in speech or in writing, and whether addressing a single person or a large crowd. The second and more limited sense was 'to predict' or 'to foretell', either in the sense of what the speaker thought would be likely to happen in the future, or what the speaker wished his hearers to believe would be likely to happen. 'Religionists', as Bentham termed believers in a supernatural supreme being, assigned to the word that one of the two meanings—either to speak out or to predict—that suited their purpose. Bentham pointed out that in 'the Church-of-England translation of the Bible'—that is in the Authorized King James Version—the verb 'to prophesy' did in fact appear in relation to both past and future events. An example of the former was where the blindfolded Jesus is mocked with the

words: 'Prophesy who is it that smote thee',[1] that is speak out and say who it was that hit you.

The 'plain truth', noted Bentham, was that the word 'prophet' as it appeared throughout the Bible was the equivalent of the modern word 'statesman'.

> Now in the character of a Statesman it is scarce possible that, for any continuance, a man should discourse in either way without making reference, in some way or other, to time future as well as to time present and time past: nor can he speak of time future, that is of such events as to his eyes present themselves as likely to have place in time future, without being as to so much a predictor of future events, and, in that other and narrower sense, a prophet.

A statesman who proposed or opposed a measure would necessarily refer to its probable effects and consequences, and so could not avoid being a predictor of future events, and hence a prophet. Leaving inspiration aside, none of the authors of the so-called prophecies that appeared in the English translation of the Bible had any better title to the name of 'prophet' than 'almost every modern Statesman whose name appears in the Parliamentary Debates'. In fact, the advantage lay very much the modern statesmen, and even with the 'most insignificant writer' of a newspaper article or pamphlet.

> Why? Because in the discourses of the most ordinary writer of the present day scarcely will you find any one of a length equal to that of the shortest of those of the so called Jewish Prophets, in which there exists not something distinct and specific, something that is presented in a shape more or less tangible, something that presents a determinate import of some sort or other, good or bad: whereas in those Jewish prophets may be seen page after page in which no determinate import is presented—nothing to which the appellation of reasoning can, with any tolerable approach to propriety, be applied. Lamentation, vituperation, with or without prediction—all of them floating in the air, scarce in any of them any thing by which any thing in the shape of information—deliberate information—true or false, good or bad, is conveyed.

Bentham complained that translations of the Bible had confounded the two senses of the word 'prophesy', that is the sense of 'speaking out' and the sense of 'prediction', and that modern religious commentators had interpreted as many propositions as possible as predictions. These predictions, it was then assumed, had emanated 'in a supernatural, unexplained and inexplicable manner' from God himself, and the person who had spoken or written down the prediction in question had been

[1] Luke 22: 64.

'dignified ... with the title of prophet'.[2] Hence, to refer to Bentham as the 'prophet of secularism' is to refer to him in the sense of one who speaks out as an advocate of secularism—that theology should have no influence over morals and legislation. 'In point of utility', wrote Bentham, 'a book of Cookery might as well be interlarded with ejaculations, as a book of Jurisprudence with theological speculations. It might indeed better: for the devotions in a book of Cookery would only be useless: In a book of Jurisprudence it can certainly do no good, and it is a thousand to one but ... it does mischief.'[3]

Bentham turned against religion in his early teenage years, in the early 1760s, while a student at the University of Oxford. His anti-religious views had either been formed by the time that, in 1764 and aged 16, he was required to subscribe to the Thirty-nine Articles of the Church of England in order to take his degree, or were formed by that experience. However, it was not until the 1810s that Bentham devoted a large proportion of his time and effort to producing a sustained attack on religion.[4] We are only now beginning to appreciate the full extent of Bentham's religious views, in that we are in the midst of producing for the first time accurate transcripts of Bentham's voluminous manuscript writings on the subject.[5] The passage I have discussed on prophecy is taken from unpublished material headed 'Not Paul, but Jesus', which is currently being edited as part of the new authoritative edition of *The Collected Works of Jeremy Bentham*. Bentham's *Not Paul, but Jesus* was published pseudonymously in 1823,[6] but this constituted only the first part of a much larger work. The remainder of the work exists in manuscript in the Bentham Papers in University College London Library, and it is on this material that much of the present lecture is based. Bentham

[2] University College London Library, Bentham Papers [hereafter UC], Box clxi, fos. 77–8, 80–3 (9 March 1818).
[3] UC lxix. 139 (*c.* 1776).
[4] See Philip Schofield, *Utility and Democracy: the Political Thought of Jeremy Bentham*, Oxford, 2006, pp. 171–6.
[5] For earlier treatments of Bentham's religious views see James Steintrager, 'Language and Politics: Bentham on Religion', *The Bentham Newsletter*, IV (1980), 4–20; James E. Crimmins, *Secular Utilitarianism: Social Science and the Critique of Religion in the Thought of Jeremy Bentham*, Oxford, 1990; and Delos B. McKown, *Behold the Antichrist: Bentham on Religion*, Amherst, NY, 2004.
[6] Gamaliel Smith, *Not Paul, but Jesus*, London, 1823. This work, like Bentham's other writings on religion, was excluded from the nineteenth-century edition of his works edited by his literary executor John Bowring: see *The Works of Jeremy Bentham*, ed. John Bowring, 11 vols., Edinburgh, 1838–43 (reissued as a whole in 1843).

comments on the enduring influence of what he termed the principle of asceticism, and presents extraordinarily outspoken views—as one would expect from a prophet—on religion and sexual morality. Bentham believed that attitudes to the gratification of the sexual appetite in his own time were rooted in the Mosaic law and, more importantly, in the teachings of St Paul. Bentham's aim was to throw off the grip of religion from all areas of public life, and he regarded sexual morality as one of the fields in which a critical battle would need to be fought.

II

Four Stories

From a historical point of view, Bentham's writings for 'Not Paul, but Jesus' have an important place in at least four narratives that can be told about the emergence of a secular view of the world. The first is the place that Bentham in general, and this material in particular, might have in the transmission of the philosophy of the Enlightenment, as interpreted by Jonathan Israel in his monumental three-volume study of the philosophy of the Enlightenment,[7] into demands for political, legal, and social reform. Israel distinguishes between the thought of the moderate, anti-democratic Enlightenment and that of the radical, democratic Enlightenment. The Radical Enlightenment was inspired by the philosophy of Spinoza: 'On Spinoza's principles, society would become more resistant to being manipulated by religious authority, autocracy, powerful oligarchies and dictatorship, and more democratic, libertarian and egalitarian.'[8] The Radical Enlightenment, according to Israel, aimed to separate philosophy, science, and morality from theology, looked to ground morality on secular criteria alone and especially on the notion of equality, supported freedom of thought, expression, and the press, and advocated democracy as the best form of government.[9] A 'revolution of the mind' took place in the 1770s and

[7] Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650–1750*, Oxford, 2001; *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man 1670–1752*, Oxford, 2006; and *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750–1790*, Oxford, 2011. For a helpful summary see Jonathan Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy*, Princeton and Oxford, 2010.

[8] Israel, *Revolution of the Mind*, p. 2.

[9] Ibid., pp. 20–1.

1780s, when the radical *philosophes* gained the intellectual ascendancy over the moderates, and paved the way for the 'revolution of fact' that was most momentously exemplified in the French Revolution.[10] Israel's interpretation helps to make sense of Bentham's emergence as a radical thinker who was opposed to the influence of the Church, and of theology more generally, in public affairs, and who came to support democracy based on a theory of equality.[11] The first narrative, therefore, that might be told about the material discussed here concerns Bentham's role in converting the agenda of the Radical Enlightenment into a mainstream programme for practical reform.

The second narrative concerns the place of this material in the emergence of a philosophy of sexual liberty. As Louis Crompton points out, the law against homosexuality, which had been a capital offence since 1533, was increasingly enforced in eighteenth-century England. Despite high standards of proof demanded by the courts (penetration and emission), there was an average of two executions per year in the thirty years following 1806. For those who avoided being charged with the capital offence, there was the lesser offence of 'assault with attempt to commit sodomy', which was punished by the pillory. Given the popular wrath displayed against homosexuals, the pillory could itself be a sentence of death. This was at a time when, in Europe more generally, penal laws against sodomy were being relaxed, and executions becoming more rare. In France, for instance, sodomy was decriminalized in 1791.[12] The tone for English persecution was set by William Blackstone in *Commentaries on the Laws of England*, first published in 1765–9, based on lectures delivered at the University of Oxford, which quickly established itself as the standard guide to English law. Blackstone referred to 'the infamous *crime against nature*, committed either with man or beast', an offence of 'still deeper malignity' than rape, 'the very mention of which is a disgrace to human nature', and therefore best treated as 'a crime not fit to be named'. It was a crime that 'the voice of nature and of reason, and the express law of God, determine to be capital'. The express law of God was revealed in Leviticus 20: 13, 15. The destruction of Sodom and Gomorrah, moreover, which took place 'long before the Jewish dispensation', proved that 'this is an universal, not merely a provincial

[10] Ibid., pp. 37–9.
[11] See Schofield, *Utility and Democracy*, pp. 137–70.
[12] Louis Crompton, *Byron and Greek Love: Homophobia in 19th-Century England*, London, 1985, pp. 14–18.

precept'.[13] 'The hard fact was', notes Crompton, 'that both learned and popular opinion in England was overwhelmingly on Blackstone's side.'[14]

In Crompton's account, Bentham emerges as the 'spokesman of a silent and invisible minority', a minority that Crompton estimates at several hundreds of thousands. Bentham argued that no action should be established as a criminal offence unless it caused harm. Homosexuality, where there was consent, caused no harm, and should, therefore, be decriminalized. 'Nowhere did utilitarian ethics', states Crompton, 'yield more devastating results than in its application to sexual morality.'[15] Bentham was the one significant systematic philosopher who was prepared to defend the decriminalization of homosexuality. Crompton's interpretation links with Faramerz Dabhoiwala's account of the emergence in England of an intellectual case for sexual freedom between 1660 and 1800. For centuries sex outside marriage (fornication) had been illegal, and individuals had been punished accordingly. From the later seventeenth century and through the eighteenth century, the balance began to shift towards sexual freedom, so that the view that 'sexual activity outside marriage should be regarded as a private matter, not subject to public regulation or punishment' came to be articulated in a manner that was increasingly 'sophisticated, public, and influential'.[16] Dabhoiwala draws attention to Bentham's significance as an advocate of sexual freedom, and comments that it is 'remarkable how little notice' Bentham's work has received, and how scholars have failed to relate it to the wider intellectual currents of the age.[17] Hence, the second narrative concerns the increasing demand for sexual freedom in relation to heterosexual activity, and Bentham's even more radical demand that such freedom be extended to all forms of sexual activity at a time when homosexuals were facing more stringent persecution than ever before.

The third narrative concerns the place of this material in the development of Biblical criticism. Bentham explained that he had adopted the method of

[13] William Blackstone, *Commentaries on the Laws of England*, 4 vols., Oxford, 1765–9, iv. 215–16.
[14] Crompton, *Byron and Greek Love*, pp. 18–19, 21–2.
[15] Ibid., pp. 26–9.
[16] Faramerz Dabhoiwala, 'Lust and Liberty', *Past and Present*, CCVII (2010), 89–179, at 88–92.
[17] Ibid. 168. Dabhoiwala's view (ibid. 175) that Israel's attribution of the emergence of sexual liberty to the radical strand of the Enlightenment is problematic, since the historical process was not the outcome of a coherent, philosophical programme, presumably needs modifying in relation to Bentham, since he did develop such a coherent, philosophical programme.

'historical criticism', which, 'like every other branch of the art and science of logic', had been 'a plant of tardy growth'. The earliest compilers of historical materials, whether sacred or profane, had given 'an undiscriminating and equal acceptance' to 'materials of all kinds and qualities'. It had not been until recently that attention had been paid to the credibility of historical sources through consideration of such factors as whether the authors had been eye-witnesses, whether they had written contemporaneously with the events they related, and where in terms of geographical location they had written in relation to those events.[18] Bentham announced that he would treat the Bible as he would any other historical document, and bring the same sort of historical criticism to bear on it as might be applied to any other text. Hence,

> Throughout the whole course of the present examination, the men in question will, all of them, be alike considered as actuated by human interests, human desires, [and] human motives—actuated by such interests, desires and motives as all men in general are actuated by.[19]

Bentham was writing in the 1810s at a time when Biblical criticism had made some headway in Germany, but was virtually unknown in England.[20] Bentham's approach amounted to a forensic examination of the Biblical accounts: he tried to explain the actions of the historical persons portrayed in them according to the observed principles of human behaviour and regularities of the natural world, and to distinguish the reality from what we would today call the 'spin'. Furthermore, part of his purpose was to show not only the inconsistencies within the texts themselves, but the inconsistencies between the texts on the hand, and the beliefs and practices of religionists of his own day on the other.

The fourth narrative concerns the place of this material in the emergence of atheism, or rather of agnosticism.[21] Bentham has often been described as an atheist, but such a label misrepresents his position. Perhaps the main evidence for the view that Bentham was an atheist is derived from the arguments developed in *Analysis of the Influence of Natural Religion*, published

[18] UC cxlix. 216 (21 September 1815).
[19] UC cxlix. 219 (10 September 1817).
[20] See, for instance, Thomas Albert Howard, *Religion and the Rise of Historicism: W.M.L. de Wette, Jacob Burckhardt, and the Theological Origins of Nineteenth-Century Historical Consciousness*, Cambridge, 2000; and David M. Thompson, *Cambridge Theology in the Nineteenth Century: Enquiry, Controversy and Truth*, Aldershot, 2008.
[21] For a general account see David Berman, *A History of Atheism in Britain: from Hobbes to Russell*, London, 1988.

pseudonymously in 1822.[22] This work was written by George Grote, using Bentham's manuscripts. Grote was a closet atheist, and, insofar as there are any atheistic tendencies in *Analysis*, it might plausibly be suggested that they be attributed to Grote rather than to Bentham.[23] Bentham's view was that, since all knowledge was founded on our experience of the natural world derived from our sense-perception, there could, by definition, be no knowledge of anything supernatural. Hence, to speak about God, his attributes, or his activities, was to speak nonsense. The term God was merely a sound, for there was no known thing to which it related. It was just as nonsensical to say that God existed as it was to say that God did not exist. Bentham saw religion as a great instrument of terror, oppression, and human misery. He believed that religion promoted unhappiness in the present life, and since human beings could have no knowledge of any future life, or indeed of anything supernatural, any talk of reward in such a future life was also nonsensical.[24] Hence, the fourth narrative relates Bentham's 'Not Paul, but Jesus' to the emergence of atheism and agnosticism.

III

Principles of Morals and Legislation

Before proceeding to examine Bentham's interpretation of St Paul's doctrines and motives, it will be helpful to give a brief account of his exposition of the principle of utility and its opposite, the principle of asceticism. In Bentham's view, the desire for pleasure and the aversion to pain were the sole motives to conduct. In other words, every action performed by a sentient creature was motivated by either a desire to experience some pleasure or to avoid some pain. In the field of human psychology, terms such as happiness and suffering did not make sense unless they were related to sensations of pain and pleasure: a person was happy when he or she was experiencing a balance of pleasure over pain, and

[22] Philip Beauchamp, *Analysis of the Influence of Natural Religion on the Temporal Happiness of Mankind*, London, 1822.

[23] See Berman, *History of Atheism*, pp. 192–4; and Catherine Fuller, 'Bentham, Mill, Grote, and an Analysis of the Influence of Natural Religion on the Temporal Happiness of Mankind', *Journal of Bentham Studies*, X (2008), at http://discovery.ucl.ac.uk/1322983/

[24] See Philip Schofield, 'Political and Religious Radicalism in the Thought of Jeremy Bentham', *History of Political Thought*, XX (1999), 272–91).

in a state of misery or suffering when experiencing a balance of pain over pleasure. In the field of ethics or morality, terms such as good and evil did not make sense unless they were also explained in terms of pleasure and pain: hence, good consisted in pleasure and exemption from pain, and in nothing else, while evil consisted in pain and loss of pleasure, and in nothing else. An action was right and proper if it produced a balance on the side of pleasure or happiness, and wrong if it produced a balance on the side of pain or suffering. If a person believed that he or she would gain pleasure from performing some action or seeing some state of affairs brought about, he or she was said to have an interest in performing that action or bringing about that state of affairs.

Each person, then, was motivated to pursue his or her own happiness. Yet many actions affected not only the person or persons acting, but other persons as well. When judging whether an action was right or wrong, one had to account for all the pleasures and pains produced by the action in question. This meant not merely taking into account the pleasures and pains of the actor or actors, but every single person affected by the action. The right and proper course of action was that which promoted the most pleasure in the most people—in other words 'the greatest happiness of the greatest number'. To accept this standard of right and wrong was to be an adherent of the principle of utility. Bentham later became dissatisfied with the term 'utility' because it did not easily bring to mind the idea of happiness, and so came to prefer the term 'greatest happiness principle'—but the principle of utility, and utilitarianism, are the terms that have stuck. In summary, an adherent of the principle of utility was a person who approved of those actions that increased pleasure and diminished pain.[25]

In contrast to an adherent of the principle of utility, an adherent of the principle of asceticism approved of those actions that increased pain and diminished pleasure. Bentham noted that if one tenth of the inhabitants of the world pursued the principle of asceticism consistently, 'in a day's time they will have turned it into a hell'. It had nevertheless been pursued by two classes of people. The first were the Stoic philosophers, who had pursued the principle in the hope of furthering their reputation, which was in fact a source of pleasure. The second were religionists, who had 'frequently gone so far as to make it a matter of merit and of duty to court pain', and who had been motivated by 'the fear of future punishment at the hands of a

[25] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J.H. Burns and H.L.A. Hart, London, 1970, pp. 11–16.

splenetic and revengeful Deity'. There was, therefore, a contradiction in the practice of those who adhered to the principle of asceticism: they took the view that by experiencing pain in the short term, they would either experience pleasure or avoid greater pain in the longer term or in the hereafter.[26]

There was a third principle—the principle of sympathy and antipathy. All other moral principles, whether called, for instance, natural law, right reason, common sense, or justice, were variants of this principle. The adherent of the principle of sympathy and antipathy raised his own likes and dislikes—his or her own desires and aversions—into a moral standard, in order to achieve his or her own ends, or the ends of the party or group to which he or she belonged, whatever the consequence for the greatest happiness of the greatest number. While the adherent of the principle of utility took into account the interests of all the persons affected by the action under consideration, the adherent of the principle of sympathy and antipathy took into account no more than his or her own interest, or at most the interests of some group or class smaller than that of the whole number of persons affected.[27] As we shall see, Bentham argued that Paul had advocated the principle of asceticism in order to promote his own selfish interests—Paul was really a disguised adherent of the principle of sympathy and antipathy.

IV

Paul's Doctrines

The key figure in the promotion of the principle of asceticism, and therefore the person whose influence Bentham was most keen to undermine, was Paul. Bentham's strategy for doing this was to show that Paul's religion was not the religion of Jesus. By showing the ways in which Paul's teachings differed from and contradicted those of Jesus, he hoped to persuade Christians to reject Paul's teachings—hence the title 'Not Paul, but Jesus'. Having done that, he would turn his attention to Jesus, and show how Jesus was not the Son of God (whatever that might mean), but rather a revolutionary who hoped to establish himself as King of Judaea, and whose kingdom, after his failure and death, was 'spiritualized' by his followers into

[26] Ibid., pp. 17–21.
[27] Ibid., pp. 21–31.

a heavenly kingdom. Jesus's teachings, imbued as they were with Epicureanism, had some value, but not nearly so much as those of the modern Epicurean, Bentham.[28]

In that part of *Not Paul, but Jesus* published in 1823, Bentham argued that Paul was a fraud—his so-called conversion on the road to Damascus was a stratagem designed to establish his authority to speak on behalf of Jesus. Paul had then done a deal—entered into a partition treaty—with the Disciples: the latter would confine themselves to the Jews, while Paul would be left free to proselytize the Gentiles.[29] Paul's object was personal advancement—to obtain as much wealth, power, and reputation for himself as possible. Paul saw an opportunity to achieve his ambition by exploiting the religion already established by the adherents of Jesus. He recognized that the existing eleven Disciples of Jesus did not have the capacity to extend their influence beyond the Jewish community, whereas he, being 'not simply a Jew', but also a Greek, and well versed in both divinity and law, was capable of taking the religion of Jesus to the Gentiles. The problem, in Bentham's view, did not lie in Paul's ambition as such, but in the pernicious effects of the doctrines that he advanced. Bentham identified four main doctrines in Paul's Epistles:

> 1. Magnification of *faith* absolutely considered.
>
> 2. Magnification of faith in contradistinction to *works*: viz. ... the peculiar points of the Jewish law.
>
> 3. Cacodæmonism: i.e. holding up to view the Almighty in a terrific character.
>
> 4 Asceticism. Enjoining, under the notion of their being offensive to the Almighty, the sacrifice of gratifications in themselves innoxious.[30]

In relation to the magnification of faith, Bentham explained that, by faith, what Paul meant was 'persuasion of the truth of the doctrines which he was occupied in the delivery of', and in particular the persuasion that they in fact expressed the will of Jesus.[31] In relation to Paul's strategy of promoting faith at the expense of works, Bentham pointed out that by 'works' Paul meant the ceremonies and rites required by Jewish law and religion, not good works in general as it had come to be interpreted in the Christian tradition.[32] Bentham summarized Paul's strategy as follows: 'Works nothing; faith every

[28] UC clxi. 227 (19 October 1817).
[29] See Schofield, *Utility and Democracy*, pp. 193–8.
[30] UC clxi. 143–4, 155–6 (23 August 1817).
[31] UC clxi. 157–9 (23 August 1817).
[32] UC clxi. 160 (August 1817).

thing. Such, from beginning to end, is the burthen of his song.' Paul recognized that if men put their trust in works, their trust was not in him. The ostensible object of the faith was Jesus, but the real object was Paul.[33]

Paul needed to make his followers have faith in him, in order to instil obedience in them. He could not, however, pretend to be himself the author of 'the system of reward and punishment on the eventual expectation of which his influence was dependent'. Paul had to present God as the author, and Jesus 'either as specially commissioned from God', or better still 'as himself God or part and parcel of God', with himself as Jesus's 'specially commissioned emissary'.[34] In presenting an image of God, it suited Paul's purpose to promote the doctrine of cacodæmonism, that is to emphasize the attributes of '*formidableness* and *incomprehensibility*'.

> On the degree of formidableness depended the force of the instrument of influence he was occupied in the application of: on the degree of incomprehensibility, the assurance of working that instrument in such manner as to turn it to the best account in and for the furtherance of his own personal and carnal ends.

In short, God would distribute rewards and punishments in an afterlife. Paul was the interpreter of God's will. In order to enjoy the rewards and avoid the punishments, men had to do as Paul told them.[35] Paul's aim was to preach faith without a basis in evidence—in other words to instil 'credulity'. Paul wanted his followers to develop 'a proneness to believe extraordinary things', and that simply because he himself asserted them to be true.[36]

> Faith in the abstract—abstraction made of the adequacy of the grounds on which it is built—is neither more nor less than credulity: in so far, then, as by hopes or fears, by exhortations which are but invitations, [and by] commands with threatenings and promises in the back-ground, a man can be engaged to nourish in himself a disposition to credulity—to take extraordinary things upon trust upon the mere word of him by whom they are delivered, although a stranger—the general object—this part of the object—is accomplished.

Hence, the inculcation of credulity, or 'faith in the abstract', was the central feature of Paul's teachings. Once Paul had instilled credulity into his followers, they would give 'indiscriminate acceptance to truth and imposture'. Truth did not need to be supported by credulity, and so all that such preaching as Paul's did was 'to procure acceptance for imposture: to

[33] UC clxi. 162 (27 August 1817).
[34] UC cxli. 145–6 (11 September 1817).
[35] UC clxi. 151–2 (12 September 1817).
[36] UC cxli. 146 (11 September 1817).

deliver men's minds bound into the hands of interested and prædatory impostors'.[37]

Bentham did not simply reject the notion of faith as nonsense, but presented a secular exposition of the term. He argued that faith, properly understood, was belief founded on an evidence-based assessment of probabilities:

> What is meant by faith is belief, persuasion: the quantity of the faith is in the intensity of the persuasion, and of the intensity of persuasion, if any determinate measure, or so much as any precise and determinate idea, be to be found, it will be found in what is called the doctrine of chances: an event or state of things being given, the intensity of the persuasion of its existence will be as the number of chances in favour of its existence to the number of chances in favour of its non-existence, according to the estimate made on the subject by him whose persuasion is in question.[38]

Belief, therefore, was 'an act of the judgment'. Belief based on 'good grounds' was both the result of and proof of 'the soundness of the judgment', but

> pronounced on bad or inadequate grounds, it is the result of weakness in that same part of the mental frame: pronounced on no grounds at all, it is the result of still greater—of still more prostrate—weakness, and the more prostrate he [i.e. the person believing] has been, the fitter and more likely he is to be made an instrument of evil—of mischief not only to himself, but to others—in the hands of knaves and impostors—more especially of that class who take the field of religion for the field of their imposture....

The inculcation of credulity—of belief on false or on no grounds—led to the perversion of the judgment by the will. The influence of the will on the judgment was beneficial insofar as it impartially directed attention towards all the considerations relevant to a particular issue, but in the case of religion, where the attention was typically directed to the considerations on one side of the question alone, with those on the opposite side being ignored, its influence was pernicious.[39]

Paul's strategy undermined the 'unbiased operation of the understanding', that is the judgment, by the linking of merit to faith: the greater the faith, the greater the praise received. Faith, in Paul's sense, became 'belief either against evidence or at best without evidence': there was no merit in believing in accord with the appropriate evidence. Yet to judge against or without evidence, remarked Bentham, was plain folly. The strength of a man's faith

[37] UC cxli. 147, 149 (13 September 1817).
[38] UC cxli. 181 (25 October 1817).
[39] UC cxli. 150 (13 September 1817), 182 (25 October 1817).

was proportional to the strength of the command obtained by his will over his judgment. The only measure of the degree to which such control existed was the absurdity of his belief, and there was nothing more absurd than a self-contradictory proposition: 'This, therefore, is the point to which, on the part of the believer in the merit of faith, all exertions—all efforts—tend.' Two examples of self-contradictory propositions were the proposition that one God was made up of three Gods (Trinitarianism), and the proposition that one and the same object was eaten and not eaten at the same time (transubstantiation). 'Fitter propositions for a man to die for, rather than contradict them,' remarked Bentham, 'the power of imagination can not frame to itself.' The apparent paradox, noted Bentham, that the human mind could be brought to the condition in which the greater the absurdity of a proposition, the more easily and eagerly it would be accepted, and more obstinately maintained and defended, was 'no more than the natural, and not only the natural but the necessary, consequence of a steady and consistent belief in the maxim, notion or persuasion of the meritoriousness of faith'.[40]

Hence, the strength of religious faith was '[p]roportioned not to the reasonableness' of the proposition, but to the intensity with which the preacher appeared to believe it, and then maintained by its nonsensicalness. Paul's success during his lifetime had been due 'to the energy, seconded by the nonsensicalness, of his discourses', and the same qualities had maintained his influence down to the present. These were the qualities that had produced his 'triumph', namely 'the having supplanted, on pretence of supporting, the religion of Jesus'.[41]

V

Paul's Asceticism

Paul, like the preacher of any new religion, saw 'in every pursuit in which his wished-for disciples are engaged or liable to be engaged, a source of rivalry, opposition, and competition'. The ferocity of the competition was proportional to the strength of the propensity.[42] There were two main 'rival pursuits' against which Paul had to contend—one spiritual and one carnal.

[40] UC clxi. 181–6 (25–6 October 1817), 137 (8 September 1817).
[41] UC clxi. 137–9 (8, 13 September 1817).
[42] UC cxli. 187 (1 September 1817).

The spiritual consisted in the fulfilment of the duties imposed by the Mosaic law, and the carnal in pleasures of all sorts.[43] The propensity that Paul feared the most, because it was the strongest, was 'the sexual appetite', and it was against this that 'his hostile endeavours' were 'pushed with greatest force and energy'. [44] Paul found no support in the acts or sayings of Jesus for his condemnation of the sexual appetite, but he did find support in a 'counter-propensity' that had been 'established to a certain degree in men's breasts', namely 'the love of distinction'. Bentham had in mind the philosophy of the Stoics, by whom both pleasures and pains had been held in equal contempt. The more valuable the sacrifice made, the greater the distinction bestowed on the individual who had made it. 'For the sake of this brilliant acquisition,' remarked Bentham, 'how numerous the instances in which life itself—life the field within which pleasures of all sorts and sizes are included—had been sacrificed!'[45]

A second factor worked in Paul's favour. Jesus had promised, as a reward, a future life full of happiness without end. At the time, in both the Jewish and the Greek mind, the idea of sacrifice was associated with the Almighty, and hence it was assumed that, without sacrifice, such a benefit could not be obtained. It was further assumed that the greater the sacrifice, the greater the chance of obtaining the benefit, and so, for even the smallest chance of obtaining such a benefit, no sacrifice could be too great. There could be no greater sacrifice than '[t]he gratification belonging to the sexual appetite'. Total abstinence from food or drink would be suicide, and so there was no plausible rival to the sacrifice of sexual gratification. Hence, it was sexual gratification that was prohibited, and sanctioned 'by a punishment the magnitude of which was to be proportioned to the value of the sacrifice'.[46]

Bentham ranked the violence of Paul's attack on various sexual practices as follows:

> In the order of vituperation and proscription, first accordingly, under the name of uncleanness,[47] came the gratification when obtained either without the help of any co-operator, or when obtained with a co-operator of the same sex:[48] next comes the gratification in the case when obtained in the more generally preferred mode with the

[43] UC clxi. 152 (12 September 1817).
[44] UC clxi. 187 (1 September 1817).
[45] UC cxli. 189 (1 September 1817).
[46] UC clxi. 190 (1 September 1817).
[47] Bentham had in mind Ephesians 5: 3.
[48] Bentham had in mind Romans 1: 26–32.

> co-operation of a person of the correspondent and opposite sex, but without the sanction of marriage….[49]

Paul told the Corinthians that 'it is good for a man not to touch a woman'.[50] This was as much as to say that it was 'Good that no man should be born: better still had none been ever born.'[51] This proposition did not merely refer to fornication, but to 'the union of the sexes under any circumstances'.[52] 'Generally and radically bad, therefore, according to Paul, is all union of the sexes. A thing ever to be desired is, therefore, that every where there shall be as little of it as possible.'[53] Paul's advice, where individuals had not married or were widowed, was that they should abstain from sex, so long as they could manage to do so. If they could not abstain—'if they cannot contain'—they would be permitted to marry, on the grounds that it was 'better' (that is less bad, glossed Bentham) 'to marry than to burn'. Where married couples were concerned, not content to leave the 'peace of the marriage bed' undisturbed, Paul advised them to abstain from sexual gratification unless one or other of them insisted on it, and to devote themselves to fasting and praying. In order to prevent them from being tempted by Satan, Paul gave them his permission to 'come together again'.[54] One consequence of Paul's doctrine—'this really unnatural doctrine'—was 'the forced celibacy of the Romish clergy'. Bentham was indignant: 'Behold the spawn of Paul—all these men of chastity, whether real or pretended, with which the Catholic part of the world is infested: in the male votaries behold the instruments and accomplices of his successors, in the females the victims.'[55]

VI

Jesus's Sexuality

Bentham claimed that, unlike Paul, Jesus did not, according to any account that appeared in the four Gospels, condemn either the pleasures of

[49] UC cxli. 188 (1 September 1817).
[50] I Corinthians 7: 1.
[51] UC cxli. 192 (2 September 1817).
[52] UC cxli. 195 (2 September 1817).
[53] UC cxli. 196 (2 September 1817).
[54] UC cxli. 191 (1 September 1817), 196–7 (2 September 1817). See I Corinthians 7: 5–9.
[55] UC clxi. 199 (15 September 1817).

the table or the pleasures of the bed.[56] On the contrary, Jesus's opposition to asceticism was shown in his condemnation of the Mosaic law in Matthew 9: 9–17. Disciples of John the Baptist came to Jesus, and asked: 'Why do we and the Pharisees fast oft, but thy disciples fast not?' Jesus replied with two parables: first, that no one put a piece of new cloth into an old garment; and second, that no one should put new wine into old bottles, since the bottles break and the wine runs out. In the first parable, argued Bentham, Jesus drew attention to the badness of the Mosaic law, the old garment. John the Baptist's attempt to perfect the Mosaic law by abstaining from food was to put a patch on the old garment, and thus only made it worse. In the second parable, Jesus introduced what he regarded as the true doctrine. The old bottle represented the Mosaic law. By adding more asceticism to the old law—by putting new wine into old bottles (or rather skins, as Bentham pointed out, since the 'bottles' in question were not made of glass)—the whole system would be 'blown to pieces'—the old bottles would burst—and any good that it contained would be 'scattered and lost'. Put new wine—the new doctrine—into new bottles, and nothing was lost. The new bottle represented the religion of Jesus, and the new wine was the abolition of asceticism. Hence, while John the Baptist attempted to strain the old asceticism 'still tighter than before', Jesus condemned it. Yet in Bentham's own day, he complained, the 'hypocrisy of the Pharisees', despite the condemnation of Jesus, was 'held in honour, ... pursued and imitated'.[57]

'We come now', remarked Bentham, 'to a ground of extreme delicacy.'[58] As noted above, Bentham pointed out that Paul's most forceful condemnation was directed towards homosexuality. Bentham responded that not only had Jesus never condemned homosexuality, but that he had probably engaged in it. There were, moreover, many females in Jesus's immediate circle, and again Bentham saw no reason why Jesus might not have engaged in heterosexual activity as well. Not accepting that there was any sense in the proposition that Jesus was God, or part of God, Bentham saw Jesus as a historical figure. Given that, in the Greco-Roman classical world, sex between males was not condemned as such, but under certain circumstances accepted as normal, Bentham saw no reason why Jesus might not have taken the same view. According to Christian teaching, the story of the destruction of Sodom and Gomorrah showed that God condemned homosexual activity. Bentham argued that what the Bible condemned was

[56] UC cxli. 342 (19 November 1817).
[57] UC cxli. 348–50 (29 December 1817).
[58] UC cxli. 475 (20 November 1817).

the force that was used and the number of people involved—it was not homosexuality that was condemned, but gang rape. Bentham, moreover, pointed to positive, or at least non-condemnatory, accounts of homosexuals in the Old Testament.

The most prominent example was that of David and Jonathan.[59] Bentham laid particular stress on I Samuel 1: 26: 'I am distressed for thee, my brother Jonathan; very pleasant hast thou been unto me: thy love to me was wonderful passing the love of women.' Bentham argued that the love of body to body was stronger than the love of mind to mind. Physical love between a man and a woman was stronger than any love of mind between one man and another. But Jonathan's love to David was stated as being stronger than the love of women. Hence, Jonathan's love to David must have been both the love of mind to mind and the love of body to body.

> But at the very outset of the story, the clearest exclusion is put upon any such notion as that the love of mind to mind, or in one word *friendship*, was in the case in question clear of all admixture of the love of body for body—in a word, of sexual love. Love at first sight? in the words of the title to the play[60]—few incidents are more frequent: nothing can be more natural. But friendship at first sight—and friendship equal in ardency to the most ardent sexual love! At the very first interview, scarce had the first words that Jonathan ever heard of [David's] issued from his lips, when the soul of Jonathan was knit with the soul of David, and Jonathan loved him as his own soul. In a country in which the concupiscence of the whole male population of a considerable town is kindled to madness by a transient glimpse of a single man, what eye can refuse to see the love by which the young warriors Nisus and Euryalus were bound together in Virgil's fable,[61] and Harmodius and Aristogiton in Grecian history?[62]

Bentham commented that it should not be matter of surprise that while, under certain circumstances in the classical world, the propensity was made capitally punishable, under other circumstances it was admired:

[59] Bentham picked out passages at I Samuel 17: 56–8, 18: 1–4; I Samuel 20: 17; and I Samuel 1: 17, 19, 26, as evidence that their relationship was homosexual.

[60] There were at least two eighteenth-century plays with that title: David Craufurd, 'Love at First Sight. A Comedy', London, [1704]; and Anon., 'Love at First Sight: A Ballad Farce', London, 1763.

[61] The allusion is to Virgil's account of the Greek attack on the Rutulians in *Aeneid*, IX. 176–458.

[62] Harmodius and Aristogiton plotted to kill the tyrant Hippias in 514 BC. The plan miscarried, leading to the death of Hipparchus, brother of Hippias, and the execution of the 'tyrannicides'. Following the removal of Hippias, Harmodius and Aristogiton were celebrated as heroes. The story of the plot is recounted in Thucydides, *History of the Peloponnesian War*, VI. 56–9.

> considered as mere sensuality, it would be regarded with disapprobation, especially if running to excess—leading to excess in *quantity* as well as to aberration in respect of *shape* and *quality*: considered as a bond of attachment between two persons jointly engaged in a course of life regarded as meritorious, it might nevertheless be respected and applauded.

Harmodius and Aristogiton, bound together by their homosexual relationship, had been celebrated in Athens as liberators from tyranny. The fortitude that the same sort of relationship had inspired amongst members of the Theban band had been the subject of 'universal admiration and elogium among the Greeks'.[63] Relationships between Achilles and Patroclus and between Nisus and Euryalus, heroes of the Trojan War, had likewise been viewed with admiration.[64]

In relation to Jesus's homosexuality, in the first place, there was, amongst Jesus's followers, the youth with the 'linen cloth cast around his naked body' mentioned in Mark 14: 51–2 in the account of Jesus's arrest in the Garden of Gethsemane. According to Bentham, the youth was a male prostitute, and given his loyalty to Jesus when all the other followers had fled, there must have existed a particularly strong bond of attachment between Jesus and the youth.[65] In the second place there was Jesus's relationship with his disciple John, as portrayed in John's Gospel.

> If in the love which, in and by these passages, Jesus was intended to be represented as bearing towards this John was not the same sort of love as that which appears to have had place between King David and Jonathan, the son of Saul, it seems not easy to conceive what can have been the object in bringing it to view in so pointed a manner, accompanied with such circumstances of fondness. That the sort of love of which, in the bosom of Jesus, Saint John is here meant to be represented as the object was of a different sort from any of which any other of the Apostles was the object is altogether incontestable: for of this sort of love, whatsoever it was, he and he alone is, in these so frequently recurring terms, mentioned as being the object.

It might be objected that an attachment of this sort would not have been tolerated in Jesus's time when it was ranked among capital crimes by the law of the land, and more especially by the law of God, and moreover had produced the destruction of Sodom and Gomorrah by supernatural means.

[63] According to Plutarch, the Sacred Band of Thebes, the elite force of the fourth-century BC Theban army, was formed of 150 homosexual pairs, whose mutual love led them to fight all the more fiercely.

[64] UC clxi. 457–60 (21, 24 December 1817).

[65] British Library, Grote Papers, Add. MS 29,808, fos. 6–11 (3 October 1811). For a more detailed account see Philip Schofield, *Bentham: A Guide for the Perplexed*, London, 2009, pp. 132–3.

In relation to the law of Moses, Bentham's view, as noted above, was that Jesus held the law of Moses in scorn, thinking it merely a human law and ill-adapted to the welfare of society. The relevance of the story of Sodom and Gomorrah to Jesus's relationship with John was at best superficial. The act which attracted supernatural punishment was not 'the act of those who by mutual consent partake of the sort of gratification in question', but rape, aggravated by the large number of persons who intended to partake in it, and thereby breaching the law of hospitality that was regarded as so important at that time. In actual fact, noted Bentham, the cities were probably set alight by lightening strikes, and the imagination of the priest who later wrote down the story had gone to work and fabricated the cause in a way that suited his purpose at the time.[66]

VII

The Principles of Asceticism

Bentham believed that Paul's teaching remained central to the sexual morality of his own age. Paul's modern followers, the adherents of the principle of asceticism, made 'war' against both sexual gratification and the enjoyment of food and drink—referred to by Bentham as the pleasures of the bed and the pleasures of the table respectively. They could not exclude altogether the pleasures of the table since this would lead to the death of every individual. The ascetic did not want to exterminate the human race, since there would then be no 'receptacle' for pain. Indeed, once all pleasure had been removed, the ascetic was most anxious to preserve life, and the 'parting with life to obtain deliverance in one and the same moment from all pains' was 'the most flagitious and unpardonable' of sins. Unable to strike out completely the pleasures of the table, the ascetic had more room for manoeuvre in relation to the pleasures of the bed. An individual could be deprived of all pleasures of the bed, and yet continue to live. However, if the pleasures of the bed were totally forbidden, the human race would eventually become extinct, and once again pain, the only object that the ascetic valued, would disappear at the same time. 'Therefore, to keep on foot so many receptacles of pain,' noted Bentham, 'the population must be kept up: and to the number of those in whose instance life is purified of all pleasure in this shape, limits must somehow or other be set.' The problem

[66] UC cxli. 475–82 (28 November 1817).

for the ascetic was to work out how many breeders were necessary to keep up the greatest number of non-breeders, so that the greatest number possible could be denied the pleasures of the bed. At first glance it might appear that castration would be an appropriate means of producing the proper number of non-breeders, but this solution did not appeal to the ascetic, since 'along with the pleasures, are excluded certain pains—the pains of unsatisfied desire'.[67]

The 'dæmon of asceticism' had reserved its greatest hostility for sexual gratification 'by that modification in which the sex is on both sides the male'. If asceticism were consistent, noted Bentham, it would have been equally critical where the sex was female on both sides, but asceticism had never been much concerned with consistency. The greater '*physical* impurity' in the case of sexual activity between males compared with that between females had produced, in the imagination of the ascetic, a greater sense of '*moral* impurity', and hence a greater demand for punishment.[68] There were, however, two arguments, based on apparently reasonable (utilitarian) considerations, that were deployed to condemn homosexuality. The first objection was that homosexuality led to a decrease in population, and the second that it harmed the female sex. Both objections, in Bentham's view, were groundless.[69]

In relation to the diminution of population, this was an argument, noted Bentham, that, no matter how widely accepted it had been in the past, would be unlikely to be used again in the future. The whole question had been transformed by the publication in 1798 of Thomas Malthus's *Essay on the Principle of Population*,[70] which had warned of the tendency of population growth to outstrip subsistence:

> Ever since the great work of Malthus on this subject has had time to produce its effect, so far as concerns population, a truth which every thinking and even every influential mind without exception seems sufficiently possessed of is that every where it is from excess in this article that general human happiness has every thing to fear; from deficiency, nothing.

Even so, homosexuality did not produce a 'deficiency in population'. It only needed one out of the whole number of 'sexual operations' that the male was capable of performing in a year to create the maximum addition

[67] UC cxli. 266–7 (1 January 1818).
[68] UC clxi. 273–4 (2 January 1818).
[69] UC clxi. 275 (2 January 1818).
[70] T.R. Malthus, *An Essay on the Principle of Population*, ed. Donald Winch, Cambridge, 1992.

possible to the mass of population. However pleasurable the remaining three hundred or so operations (assuming the male capable of performing the operation once a day, and allowing for sickness and absence in the course of the year), in terms of increasing the population, they were so much waste. In order to lead to a reduction in the population, 'the propensity of this appetite to the same sex would have to be three hundred times as great as towards the correspondent and opposite sex'. This was evident nonsense, and if it were true, the term '*eccentric*' would apply to the heterosexual rather than to the homosexual 'conjunction'. Bentham made a further point. If all sexual activity was in the 'eccentric modes', then the species, at the end of a certain period, would be extinct. Yet the same result would ensue if males expended their whole sexual activity on females beyond the age of child-bearing. In other words, if homosexual conjunctions were condemned because of their purported effect on population, so should heterosexual conjunctions where pregnancy could not result.[71]

In the post-Malthusian age, homosexual relationships, insofar as they operated as a check on population, argued Bentham, were not an evil, but rather a remedy. Wherever there was a tolerable degree of security provided by government, the provision of subsistence would be overtaken by population growth. For the indigent, over-population resulted in 'premature death preceded by lingering disease'; for the opulent, it resulted in the pain of privation to the extent that they provided relief for the indigent. But the very provision of relief in turn acted as a stimulant to the increase of population, and thence to the amount of indigence. Malthus had suggested that population was in fact checked by three causes: the first was '*misery*', consisting in premature death through starvation; the second was '*vice*', consisting in sexual gratification in an unprolific mode; and the third was '*moral restraint*', whereby persons abstained from sexual gratification. Malthus, as was to be expected from a Church of England clergyman, noted Bentham, had recommended 'moral restraint'. Now, both the ascetic and the utilitarian agreed that the first check, premature death, was an evil. In regard to the second check, 'vice', the ascetic regarded it not only as an evil, but as a 'remedy' that was worse than the 'disease'—over-population—itself. In contrast, the utilitarian regarded the so-called 'vice' not as an evil but as a good to the extent that it operated as a check upon population. The utilitarian, moreover, did not approve of 'moral restraint', since it involved two evils:

[71] UC clxi. 276–7, 279 (2 January 1818).

> 1. loss of pleasure, by the amount of the capacity of gratification thus prevented from coming into act. 2. actual pain, viz. pain of unsatisfied desire, as measured by [i] the number of individuals in whose instance the desire, having existence, remains unsatisfied: ii. its intensity: and iii. its duration in the instance of each of them.

Bentham concluded by stating that the means by which, according to the principle of utility, the evil of population growth might be checked was a subject well worth enquiring into, and he would do so in an Appendix. The Appendix has not been identified amongst Bentham's surviving manuscripts—it may never have been written—but he may have intended to discuss either contraception or infanticide, or both.[72]

The second objection that had an apparently reasonable (utilitarian) basis was that homosexuality produced a deterioration in the condition of females. This objection, argued Bentham, seemed to have the same untenable basis as the first: namely that the desire in its eccentric shape predominated over the desire in its ordinary shape to the extent that males would prefer to have sex with other males on three hundred occasions rather than to have sex with a female on one occasion. There was no evidence, from any part of the world at any time, that this was the case. In the East, where the eccentric propensity was condemned neither by law nor by opinion, 'the value set upon the charms of the female sex, and the importance attached to the possession of them, so far from falling short, exceeds any thing that is found exemplified in these western and northern regions. In an European, jealousy is as ice to fire in comparison of what it is in an oriental breast.' The wretched state of females in the East was due to the despotism of the government, and not to the practice of homosexuality. In Italy and France, where homosexuality was much more common, the female sex had much greater authority than in Britain, 'where the propensity is so rare', and in Ireland, 'where it is scarce known'. The married female had much more to fear from other females as rivals for the affection of her husband than from other males. Relying on the accounts of sexual practices in the classical world, Bentham argued that men ceased to be interested in other males when the latter had reached the age of twenty. Hence, the

[72] UC cxli. 280–3 (2–3 January 1818). Bentham was an advocate of contraception, and encouraged his friend Francis Place in his 'over-population-stopping expedient', but the details remain obscure: see Bentham to Place, 24 April 1831, British Library, Add. MS 35,149, fos. 73–4; Lea Campos Boralevi, *Bentham and the Oppressed*, Berlin, 1984, pp. 109–12; and Dudley Miles, *Francis Place 1771–1854: the Life of a Remarkable Radical*, Brighton, 1988, pp. 145–8. For Bentham on infanticide see 'Sex', in *Selected Writings: Jeremy Bentham*, ed. Stephen G. Engelmann, New Haven and London, 2011, pp. 33–100, at 50–2, 83–5.

attractions of another male would tend to be 'ephemeral' to the husband, whereas those of another female had, as every one was aware, 'no bounds'. It was the prostitute who had most to fear from the eccentric appetite.[73]

VIII

Conclusion

If reason and consistency, in other words the principle of utility, rather than the principle of asceticism, were the guide, argued Bentham, the pleasures of the bed would be treated with the same 'indifference' as the pleasures of the table. Just as with the table, individuals were left free to choose not only the 'crude material' that they ate but 'the mode of cooking, seasoning and serving up', so with the bed they would be left free to choose: 'with or without a partner—if with a partner, whether with a partner of the same species or with a partner of another species: if of the same species, whether of the correspondent and opposite sex or of the same sex: number of partners, two only or more than two'. In every instance, the 'portions and parts of the body employed' should be left to the free choice of the individuals concerned.[74] Just as morality and religion did not interfere in the methods of cookery, so they should not interfere in the modes of sexual gratification.

> Thus it is that, according to the principle of utility, the pleasure, whatsoever it be, that may be capable of being derived from the pleasures of the bed—from the use of the sixth sense—from gratification afforded to the sexual appetite—belongs not either to the field of religion or to the field of morality by any other title than does the pleasure of scratching where it itches.[75]

As Crompton points out, Bentham's insight was to think that what needed explanation was not same-sex relationships, but the hostility that the thought of such relationships produced in mainstream society.[76] That led

[73] UC clxi. 284–7 (3 January 1818). While Bentham's view seems to have been that certain men at least would, if public opinion were neutral on the matter, prefer to gratify their sexual appetites with other men rather than with female prostitutes, other contemporaries of Bentham saw some merit in prostitution in that it saved young men from sodomy: see E.C. Denlinger, 'The Garment and the Man: Masculine Desire in *Harris's List of Covent-Garden Ladies*, 1764–1793', *Journal of the History of Sexuality*, XI (2002), 357–94, at 375–6.
[74] UC cxli. 268 (January 1818).
[75] UC cxli. 271 (8 January 1818).
[76] Crompton, *Byron and Greek Love*, p. 38.

Bentham to point the finger at religion and the interest of religious leaders in promoting asceticism. Bentham's views—and he would have been saddened by this—still have massive relevance nearly two hundred years after he wrote, whether in relation to the stoning of men and women for adultery in Afghanistan and Iran or the legal persecution of homosexuals in Africa. Perhaps he would not have been so surprised that the one attitude share by evangelical Christians and fundamental Moslems was homophobia.

Acknowledgments

Thanks are due to the Leverhulme Trust for its support for the research on which the bulk of this lecture is based. The author is grateful to colleagues at the Bentham Project for their help and support, and particularly to Catherine Pease-Watkin, who undertook the initial transcription of Bentham's manuscripts relating to 'Not Paul, but Jesus' and supplied elucidations for several of the passages quoted above.

University College London

SYMPOSIUM

GLOBAL JUSTICE, PRIVATE MORALITY, AND UTILITARIAN PERSPECTIVE

PROPHETS OF SECULARISM: HUME BEFORE BENTHAM?

REPLY TO SCHOFIELD

LORENZO GRECO

© 2011 – *Philosophy and Public Issues*, Vol. 1, No. 1 (Fall 2011): pp. 75-78.
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

Prophets of Secularism: Hume Before Bentham?
Reply to Schofield

Lorenzo Greco

Professor Schofield argues that Bentham can be considered an outright 'prophet of secularism' – *i.e.*, a prophet of that conception whereby 'what is morally right should be based on whatever promotes the well-being of sentient creatures in the physical world, to the exclusion of all considerations derived from a belief in the supernatural' (p. 1). He examines in detail the arguments Bentham offered in his writings on religion. What emerges is a systematic project by Bentham, in line with the tradition of radical Enlightenment, the aim of which is to unmask the Christian religion as solely a form of political power, and thus to oppose its influence in public life, starting from sexual morality. As Professor Schofield clearly shows, Bentham demolished piece by piece the grounds for the authority of Christian religion. In his work *Not Paul, but Jesus*, which Professor Schofield discusses, Bentham attacked the doctrine of the Church as it appears in Paul's teachings, maintaining that it doesn't correspond at all to the teachings of Jesus – who, far from being the son of God, was rather for Bentham a revolutionary politician. According to Bentham, Paul's strategy is based on four doctrines: the 'magnification of faith,' its opposition to Jewish law, the portrayal of God as a terrifying being, and the doctrine of asceticism. Bentham believed that such deceptions have the sole purpose of exploiting the weaknesses of human nature. They represent the backbone of the political designs of Paul, whose goal was to set himself up as the leader of the newborn Christian church and to turn its followers into obedient minions. By revealing Paul's concealed intentions, Bentham proved to be a relentless critic of the Christian religion; by denouncing its intrinsic evil, he can rightly be called 'prophet of secularism.'

This is surely so; but Bentham wasn't the only, nor the first one. Before him, in fact, David Hume had embarked on a very similar philosophical project to the one Professor Schofield attributes to Bentham. Hume's philosophy also can be read as an organic and structured criticism of Christian religion and of its false dogmas – a 'moral atheism' which Hume developed along the whole of his philosophical production, from *A Treatise of Human Nature* and the two *Enquiries*, through the *Essays*, up to the works specifically devoted to religious themes such as *The Natural History of Religion* and the *Dialogues concerning Natural Religion*. (see Holden 2010; O'Connor 2001; Phillipson 2011; Russell 2008.) The points of contact between Hume and Bentham, and the correspondences in the ways they proceeded in their arguments, are numerous, so much so that it seems that Bentham was directly influenced by Hume. I would like to further explore these similarities, by referring to some examples from Professor Schofield's discussion.

When he argues that for Bentham, given his rigorously empirical approach, 'to speak about God, his attributes, or his activities, was to speak nonsense' (p. 8), one seems to hear the echo of Hume's *Treatise*, where it is said that 'We in reality affirm, that there is no such thing in the universe as a cause or productive principle, not even the deity himself; since our idea of that supreme Being is deriv'd from particular impressions, none of which contain any efficacy, nor seem to have any connexion with any other existence,' with the result that 'we have no idea of a being endow'd with any power, much less of one endow'd with infinite power' (Hume 2007, bk. 1, pt. 4, sect. 5, par. 31). Moreover, when Bentham mentions the 'doctrine of chances' to show how faith relies on belief and persuasion, what comes to mind is Hume's attack on the belief in miracles and in a future state as presented in sections 10 and 11 of *An Enquiry concerning Human Understanding* (Hume 1999). For Hume too, in fact, by reasoning in terms of the 'probability' that such beliefs correspond to something real, given the null empirical evidences we have in their favour, it was possible to show that they are just superstitions. Further, like Bentham, Hume believed that, precisely because human beings don't have any evidence in their hands, they keep on *believing* such absurdities, and end up being controlled and subjugated by priests, divines, or other 'enthusiasts', solely for political purposes. (See also 'Of Superstition and Enthusiasm,' Hume 1987.) Both Hume and Bentham believed that this can be explained by examining the deficiencies internal to the mechanisms of human mind; faith denies judgement, and can affirm itself by counting on those aspects of human

mind such as credulity, love for distinction, the need to be praised. Furthermore, what Bentham said about the principle of asceticism – the obsession for sacrifice, the desire to pursue a life of pain – closely recalls Hume's criticism of the so-called 'monkish virtues.' 'Celibacy, fasting, penance, mortification, self-denial, humility, silence, solitude, and the whole train of monkish virtues; for what reason are they every where rejected by men of sense,' Hume asks, and then replies: 'because they serve to no manner or purpose; neither advance a man's fortune in the world, nor render him a more valuable member of society; neither qualify him for the entertainment of company, nor increase his power of self-enjoyment?' (Hume 1998, sect. 9, par. 3.) Monkish virtues reveal themselves to be vicious for Hume because they are neither agreeable nor useful either to those who have them, or to those who are connected to them. Given Hume's four criteria for singling out virtues and vices, monkish virtues end up being considered negatively; they are 'artificial' forms of life which represent only a source of pain, which are promoted with the sole aim of curbing the will of individuals and morally degenerating their characters, so that they can be made obedient to the dictates of the church. (See "A Dialogue" in Hume 1998, par. 57; see also the description given in "On the National Characters," Hume 1987, of the corrupted character of the priest.) To conclude, one last point on the acceptability of homosexuality. Just like Bentham, Hume too regarded it as admissible. It is true that there are passages in the texts – though very few, in all truth – which suggest Hume might have disapproved of homosexuality as a vice (Hume 1998, sect. 5, footnote 17; sect. 8, par. 12);[1] nonetheless, I believe they ought to be dismissed marginal, though infelicitous, lapses of style. Conversely, the Humean ethical perspective taken as a whole cannot fail but push in the direction of the full recognition of the naturalness of one's being homosexual, and of the fact's insignificance in terms of morality. One thinks specifically of the considerations he made in "A Dialogue" about the fact that in highly refined societies like classical Greece and ancient Rome homosexuality was considered a normal practice. Human nature, Hume observed, can express itself in many ways, all morally acceptable. From a moral point of view, sexual preferences in themselves don't have any importance at all; what counts morally is only to have characters which are useful or agreeable to ourselves or to others.

[1] I would like to thank Gianfranco Pellegrino for having brought my attention to these two passages.

The philosophical projects of Hume and Bentham, therefore, resemble each other in many aspects. I wonder if Bentham was aware of this, and, if so, how much he effectively learned from Hume's teachings. I would be interested to hear what Professor Schofield thinks about this. Be as it may, Bentham surely remains – together with Hume – one of the greatest prophets of secularism, and it is the merit of Professor Schofield to have shown us this so well.

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SYMPOSIUM

GLOBAL JUSTICE, PRIVATE MORALITY, AND UTILITARIAN PERSPECTIVE

COMMENTS ON PHILIP SCHOFIELD'S *JEREMY BENTHAM: PROPHET OF SECULARISM*

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© 2011 – *Philosophy and Public Issues*, Vol. 1, No. 1 (Fall 2011): pp. 78-81.
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

Comments on Philip Schofield's *Jeremy Bentham: Prophet of Secularism*

Domenico Melidoro

I

Beyond decriminalization of homosexual conduct

> Bentham argued that no action should be established as a criminal offence unless it caused harm. Homosexuality, where there was consent, caused no harm, and should, therefore, be decriminalized.

> The pleasures of the bed would be treated with the same 'indifference' as the pleasures of the table (p. 24)

> Just as morality and religion did not interfere in the methods of cookery, so they should not interfere in the modes of sexual gratification (p. 24).

These three quotations are very effective in showing the liberal effects of an utilitarian ethics such as Bentham's in dealing with decriminalization of homosexual acts among consenting individuals. When sexual acts concern adult and consenting people there is no harm and, when this occurs, morality, religion, and law should not interfere.

To be more precise, one should say that in Bentham's approach we find that non-interference is joined with indifference. In other words, a negative understanding of freedom coexists with a strongly non-judgmental attitude towards homosexual acts.

Bentham's approach has perfectly worked in favour of the decriminalization of homosexual behaviour. But how does it work when contemporary controversial issues involving some form of public visibility of sexual identities are at stake? The gay marriage goes beyond a simple decriminalization of homosexuality in so far as it seems to demand a fuller inclusion of gays and lesbians in the public domain, the recognition of different ways of understanding emotional ties, and a consequent transformation of the concept of family itself.

Bentham's approach would seem to be victim of the same weakness of a certain understanding of liberal toleration that has received objections by *recognition* theorists: "From the standpoint of liberal toleration, once homosexual sex has been legalized, gays and lesbians become full citizens on an equal footing with heterosexuals, even if they still face difficulties and humiliation in their private and social life."[1]

II

Secularism and freedom of conscience.

> Secularism is the view that what is morally right should be based on whatever promotes the well-being of sentient creatures in the physical world, to the exclusion of all considerations derived from a belief in the supernatural (p. 1).

> Bentham wanted to throw off the grip of religion from all areas of public life: he regarded sexual morality as the field in which the critical battle would be fought (p. 4).

This quotations show that Bentham's conception of secularism is very strong and that, if it is realized, religion is completely banned from public life. This ban seems in contrast with the emphasis on the protection freedom of conscience, which is a central concern in the contemporary discourse about secularism in liberal democracies.

[1] A. E. Galeotti, *Toleration as Recognition* (Cambridge: Cambridge University Press, 2002, p. 171).

The deep divergences about how everyone has to lead her life is the starting point when freedom of conscience is at stake. Conceptions of the good have historically been the object of deep disagreements. This is not a contingent but a structural aspect of contemporary liberal democratic societies. Charles Taylor and Jocelyn Maclure argue that "the secular State respects [individuals'] freedom of conscience or their moral autonomy, namely their right to lead their life in light of their own choices of conscience" (*Laïcité et Liberté de Conscience*, Boreal, 2010, p. 31). Differently stated, in a secular State individuals are sovereign when they decide about the conception of the good they want to pursue. When people take their fundamental decisions, majorities of whatever kind should not exert coercive pressures. This means that a secular State respect individual conscience. But, what exactly is conscience?

As Martha Nussbaum has written, conscience is a peculiar human capability. To be more precise, it is the "faculty of inquiring and searching" (*Liberty of Conscience*, Basic Books, 2008, p. 169) for the ultimate meaning of life. Convictions of conscience, either religious or secular, are so relevant for the discourse about secularism and deserve special political and juridical protection because they concern fundamental individual commitments. Convictions of conscience, differently from other beliefs or preferences, are related to the moral identity of persons, to the ways in which they shape their life in those special circumstances in which the overall meaning of life is concerned. Further, as Taylor and Maclure maintain, convictions of conscience are connected to the notion of moral integrity. As it is used in this context, moral integrity "depends form the degree of fit between, from one side, what a person perceives as her duties and her axiological overriding commitments and, from the other side, her actions" (p. 97). Thus the special protection and status that a secular State confers to the convictions of conscience is a measure that permits to obtain a certain consistency between some very important moral commitments and the actions effectively performed.

My second comment concerns the way in which an approach to secularism derived from Bentham could deal with freedom of conscience. For instance, what is to be done when a woman decides as a matter of conscience (thus without coercion) to wear an Islamic veil? This decision brings in some way religion in public life. So what is the right attitude of a secular State grounded in Bentham's views in similar cases?

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