

Bentham on the Nature and Method of Law

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THE PUBLICATION for the first time in 1945 of a book on the nature and method of the law written in 1782 by Jeremy Bentham is an important event to everyone who is interested in the life and work of that great English law reformer and legal philosopher. Bentham had a greater influence than any other one man in bringing about the principal English law reforms of the nineteenth century. His prodigious writings on the structure and method of legislation, and his faith in the ability of men to frame a complete code that would supersede the obscurities, conflicts and anachronisms of case law and customary law, had a significant influence upon the movement for codification in the United States which produced, among others, the California codes. The hitherto neglected portion of his writings which is published in this volume¹ is a continuation of, and a supplement to, his greatest work, *An Introduction to the Principles of Morals and Legislation*,² one of the most important books of the nineteenth century. The newly published work contains in itself many valuable ideas about analytical jurisprudence, the art of legislation, and the means by which law may attain its objectives. While it is primarily addressed to the members of the legal profession, it should find many readers among students of philosophy and of the social sciences.

First, how did it happen that this book was written and then laid aside? Encouraged by the reception accorded his *A Fragment of Government* in 1776, a vigorous attack on a portion of Blackstone's famous *Commentaries on the Laws of England*, Bentham began the

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¹ BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED*. Introduction by Charles Warren Everett, Columbia University Press, New York, 1945. In present article will be referred to as "The Limits."

² BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1st ed., 1789. Rev. ed., 1823). Citations to "The Principles" refer to the 1892 edition, Clarendon Press, Oxford.

composition of an introduction to a penal code. So confident was he of the structure and content of this work that as he wrote it he sent it to the printer in short installments. Through Lord Shelburne, an English Tory Democrat who favored conciliation with the American colonies, and who saw in the young man Bentham a useful foil to the conservative Blackstone, Bentham became acquainted with two other "liberal" political leaders of the time, Lord Camden and Lord Ashburton, who were shown the proof-sheets of *The Principles*. The former professed his inability to understand the work, while the latter thought Bentham's principle of utility—that the end of government is to promote the greatest happiness of the greatest number—a "dangerous" notion. Discouraged by this cool reception, Bentham in 1780 stopped the printing of this work at the seventeenth chapter, leaving it obviously incomplete. Fortunately, Bentham had friends with more faith in his genius who persuaded him to publish the printed portion of the book in 1789. Meanwhile, in 1782, he had written *The Limits* as a continuation of *The Principles*. He had come to a point in *The Principles* where he thought it necessary to draw the distinction between civil law and penal law. Accordingly, Chapter 18 of the original project (which is chapter one of *The Limits*) is headed "Distinction between Penal Law and Civil." He found this task more difficult than he had supposed, and was led into an excursus on the nature and method of law which became the present work. The public indifference to *The Principles*, when first published at the beginning of the French Revolution, doubtless led him to abandon the publication of this second part; and when in 1823 he brought out, with profuse apology, a second edition of *The Principles*, he made no mention in his lengthy Preface of the unpublished manuscript of the second part. The story of the high hopes and apparent failures, of the ranging imagination, prodigious industry and searching self-criticism of this man of genius is fascinatingly told by Professor Everett in his introduction to the present volume.

Throughout both parts, *The Principles* and *The Limits*, runs a common thread, the principle of utility, which "approves or disapproves of every action whatsoever (of an individual or of a government) according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question."³ In *The Principles* this doctrine is stated, justified and ana-

³ *Ibid.*, 2.

lyzed; the various qualities of pains and pleasures—their intensity, extent, duration, etc.—are broken down, and the analysis is applied to the classification of offenses as dealt with by the law. In *The Limits*, the focus is shifted to the law itself: the parts of a law, the generality and duration of a law, the powers which a law confers, and the sanctions by which a law operates. *The Principles* outlines the objectives of law; *The Limits* develops the means of attaining those objectives. *The Principles* presents a general theory of ethics, primarily a theory of what may be called, for want of a better term (since “legal ethics” has come to have a specialized meaning), “legal axiology.” *The Limits* is primarily a work on legal analysis and legal method, on the terminology and semantics of the law. Bentham seems to have thought that the relation of the present work to *The Principles* was that of form to substance.⁴ He might better have called it the relation of means to ends.

Bentham’s originality and insight are attested in the present volume by numerous instances in which he anticipated the ideas of later writers on jurisprudence and legal philosophy, some of whom consciously adopted his ideas while others were unaware of the resemblance. One is not surprised to find here two pillars of John Austin’s positivism, the conception of the sovereign as grounded on the “disposition to obedience” of the members of a political community,⁵ and the conception of a law as a command of the sovereign.⁶ Austin was an avowed disciple of Bentham, and made a tighter synthesis of some of Bentham’s ideas than Bentham ever bothered to do. Rudolph von Ihering, the distinguished German jurist of the late nineteenth century, broke away from the dominant German influences of Hegel and Kant to become a social utilitarian. Bentham’s basic doctrine, “no effect without a cause; no act, no law, without a motive,”⁷ became the corner-stone of Ihering’s principal work on “purpose in the law.”⁸ In the broader context of philosophy, Bentham adumbrated two important positions of Professor John Dewey’s instrumental logic. One was Bentham’s insistence that the classifications of acts into genera and species for legal purposes are man-made “contriv-

⁴ BENTHAM, *op. cit. supra* note 1, at 330.

⁵ *Ibid.*, 101.

⁶ *Ibid.*, 88.

⁷ *Ibid.*, 140.

⁸ IHERING, *THE LAW AS A MEANS TO AN END* (1914) 5 *Modern Legal Philosophy* Series, c. 1, especially p. 9.

ances", rather than eternal verities existing in the nature of things. The other was Bentham's reiterated division of terms into "fictitious entities," such as power, right, duty,⁹ and the "real entities" of our senses, which foreshadowed Dewey's division into symbolic and existential levels of reference.¹⁰ Bentham was thus a forerunner of that typically American group of philosophers known as the pragmatists.

More striking still are Bentham's anticipations of the Hohfeld-Corbin legal analysis and of some of the recent American legal realists. Bentham wrestled with the elusive legal concept of possession¹¹ in much the same way that Bingham did a generation ago.¹² Again, Bentham just missed the Hohfeld-Corbin conception of "operative facts"; Bentham's notion of "investitive" and "divestitive" facts was one of the analogies from which Hohfeld derived "operative facts."¹³ Bentham's analysis of "power" conferred by the law (along with "right" and "duty") fails to clarify that concept as well as did Corbin many years later.¹⁴ Bentham's insistence that we must seek the "real entities" behind such "fictitious entities" as "right," "duty," "obligation,"¹⁵ has significant resemblances to Llewellyn's demand for a "realistic jurisprudence" which would eliminate "right" and "duty" as unnecessary links in the relation between human interests and legal consequences.¹⁶ Thus Bentham had much in common with the group of writers who, in the twenties and thirties of this century, became known as the American legal realists. Yet Bentham differed from most of them in his unabashed zeal to reform the law, to make the law what it ought to be in accordance with the principle of utility.

The conception of the law as a body of predictions of what courts will do, which Oliver Wendell Holmes, Jr., writing in 1897, dramatized in his "bad man" parable,¹⁷ appears in the present volume in a

⁹ BENTHAM, *op. cit. supra* note 1, at 57-59.

¹⁰ DEWEY, *LOGIC: THE THEORY OF INQUIRY* (1938) 15.

¹¹ BENTHAM, *op. cit. supra* note 1, at 75-82, 322.

¹² Bingham, *The Nature and Importance of Legal Possession* (1915) 13 MICH. L. REV. 535.

¹³ Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16, 25, n. 20 cites HOLLAND'S *JURISPRUDENCE* (10th ed., 1906) 151) reference to Bentham's use, in a later work, of the distinction between "investitive fact" and "divestitive fact." 3 WORKS OF JEREMY BENTHAM (Bowling ed., 1843) 189.

¹⁴ Corbin, *Legal Analysis and Terminology* (1919) 29 YALE L. J. 163, 168.

¹⁵ BENTHAM, *op. cit. supra* note 1, at 58.

¹⁶ Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431, 439.

¹⁷ HOLMES, *COLLECTED LEGAL PAPERS* (1920) 167.

more moderate form. Every complete law, says Bentham, has two parts: a directive of the legislature to its subjects, and a prediction of what will happen in case of disobedience, a prediction which the judge is to fulfill.¹⁸ Bentham had more faith in the deterrent effect of legal directives than Holmes was willing to avow.¹⁹ Bentham was less concerned with the judicial process than were the American jurists of the past three decades, because Bentham believed that a well-drawn code would greatly reduce the judge's opportunity to "make law," to determine questions of policy. Hence he was somewhat cavalier in his treatment of the law of judicial precedents, which he discussed under the heading of "customary law." Yet he throws out a comment on case law which is, for him, a singular recognition of its flexibility and adaptability. Whenever a judicial precedent is brought forward "in the character of law" to govern the proposed decision in the instant case, two maxims point different ways and press for opposite determinations: *Stare decisis*, and "*salus res publicae* or something like it"; the one stands for the general utility of following precedent; the other, the particular utility of bringing back the current of decision into the channel of original utility from which the force of precedent had diverted it. The one stands for uniformity, "the mother of security and peace"; the other, for natural justice or equity.²⁰ Here the eighteenth century, the Age of Reason, speaks through Bentham. In the nineteenth century, or at least in the latter half of it, it would scarcely have been respectable to say that the following of precedents was merely a matter of expediency, of weighing competing policies or values.²¹ In the twentieth century this conception of the judicial process was brought to fruition in Pound's theory of social interests,²² and in Cardozo's four methods of the judicial process;²³ not that Pound or Cardozo borrowed from Bentham, but that the twentieth century ushered in another and different Age of Reason.

¹⁸ BENTHAM, *op. cit. supra* note 1, at 228.

¹⁹ "What have we better than a blind guess to show that the criminal law in its present form does more good than harm? . . . Does punishment deter?" HOLMES, COLLECTED LEGAL PAPERS (1920) 188-189.

²⁰ BENTHAM, *op. cit. supra* note 1, at 281.

²¹ Note, for instance, Holmes' "very eminent judge" who said that "he never let a decision go until he was absolutely sure it was right." HOLMES, *op. cit. supra* note 17, at 180.

²² Pound, *A Survey of Social Interests* (1943) 57 HARV. L. REV. 1.

But the framing of legislation lies nearest to Bentham's heart, and on this he has much to say in the present volume. The opponents of bureaucracy in modern governments may take comfort from Bentham's fling at vague legislation, too vague for the subjects to understand, but not too vague for the executive to enforce: "A tyranny of man is that which is established by permission to command, or what is equivalent, by vague mandates."²⁴ He therefore advocates the teaching of legislation as a part of legal instruction: "a school, of which the business should be to teach, not the art of forensic disputation for the emolument of individuals, but the art of legislation for the benefit of empires."²⁵ In the last few decades, American legal education has given increasing attention to the interpretation of statutes, if not to draftsmanship.

These examples will suffice to show how the reader can find in this book fresh and vital suggestions for the legal problems of a century and a half after it was written. While this book is not the best of Bentham's work, it bears striking testimony to the fertility and originality of his insight.

Since one of Bentham's primary objects is to develop the conception of "law" and to provide a clear and uniform terminology, we may fairly question his view that a command of a private powerholder, if authorized by the sovereign legislative power, is itself a "law."²⁶ Thus he says that the mandates of a father to his minor children, of a master to his servant, of a guardian to his ward, are mandates of the sovereign, since if they are not "illegal," the sovereign will ultimately enforce them and thus "adopt" them.²⁷ "To deny it," he says, "is as much as to say that it is God Almighty indeed that keeps up the race of elephants, but it is somebody else that keeps up the race of mites."²⁸ This bit of rhetoric may persuade one that the issuance and enforcement of such mandates are important consequences of the law, but it does not justify saying that they *are* laws, in a work purporting to employ an exact terminology. At other points,

²³ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 30-31; CARDOZO, *GROWTH OF THE LAW* (1924) 62, 73.

²⁴ BENTHAM, *op. cit. supra* note 1, at 335, n. 12.

²⁵ *Ibid.*, 340.

²⁶ *Ibid.*, 73, 104.

²⁷ *Ibid.*, 91, 105.

²⁸ *Ibid.*, 105.

Bentham likewise refers to a conveyance of land by the owner,²⁹ the rules of a private club,³⁰ and the by-laws of a corporation,³¹ as "laws." Here Bentham's "realism" has led him into a fundamental error, that the political sovereign "adopts" these acts of volition and makes them its own.³²

This view is not correct, if one looks at either the form or the substance of what has occurred. The mandate of the private power-holder does not formally emanate from a political official, from one having the political authority of the state. The distinction between the officials of a political society and its non-official members is a basic characteristic of the organization of a modern state. From the standpoint of substance, the purposes of the private power-holder are not the same as those of the sovereign. Bentham recognizes this difference when he says that the "end or external motive" (*i.e.*, the justification), which the sovereign has in view in adopting a law can be "upon the principle of utility," "no other than the greatest good of the community"; whereas in the case of the private power-holder, "in many instances it may happen, and properly enough, that the end which he has in view is no other than his own particular benefit or satisfaction."³³ The state, acting through its governmental organs, provides a sanction for a contractual promise made by *B* to *A*; yet the state does not thereby take as its own the purposes of either *A* or *B* in making the contract. To take another example, a rule of a private club might limit membership to the adherents of a particular church; the officials of the club would be backed by the state in excluding from the premises those who did not qualify under this rule, and yet the legislature (of the state) would not dare to enact this rule as a limitation upon facilities afforded by the state. The problem thus presented has troubled other analytical jurists. Gray, for example, rejects the suggestion that the by-laws of a private corporation are law by saying that while the state allows the company to carry out its objects, it does not make those objects its own.³⁴ The state makes laws through its officials, who approve the purpose and con-

²⁹ *Ibid.*, 108-109.

³⁰ *Ibid.*, 97.

³¹ *Ibid.*, 111.

³² *Ibid.*, 73, 104-105.

³³ *Ibid.*, 113-114.

³⁴ GRAY, *THE NATURE AND SOURCES OF LAW* (1909) §§ 332-338, giving other examples.

tent of those laws as conforming to the ends of the state. A state in which the individual citizen's act of volition would be legally protected only if it be approved, as to purpose and content, by state officials, would be a state permitting very little individual liberty, a totalitarian state. We have evidence elsewhere that Bentham would not have liked such a state.

With respect to some of these mandates of private power-holders Bentham's characterization of them as having the quality of law is objectionable on another ground. He includes conveyances and the transient commands of parents to their children,³⁵ along with particular judicial and executive orders³⁶ in the class of "laws." Yet all of these lack the quality of generality, of applying by their terms to a class of persons or acts or objects and not merely to named or specified individuals. Bentham appears, indeed, to recognize this deficiency, for he says:

"The mandate of a subordinate powerholder, when it has the requisite degree of permanency and generality, to constitute it according to common speech *a law* is, in the language of the English jurisprudence, in many cases termed a *by-law*."³⁷ He has some good comments on the ways in which laws may vary in generality;³⁸ and he asserts at one point that a legislative command "can do no less than extend to a class of persons."³⁹ And case law, as well as legislation, must have generality. In speaking of the law of judicial precedents, he says that a judicial act or order (*e.g.*, a judgment) is not a law because it is confined to the particular persons to whom it is addressed; "whereas what there is of law in the case must be general, applicable to an indefinite multitude of individuals not then assignable."⁴⁰ Bentham's analysis of law would have been clearer and more orderly had he recognized that individual acts of volition (the making of a conveyance or a contract) are operative facts of legal propositions but not laws. If he had stopped to revise this manuscript and to explain its contradictions he would have made it a better analysis of the nature of law.

A more pervasive defect in Bentham's method of analysis is to

³⁵ BENTHAM, *op. cit. supra* note 1, at 162-163.

³⁶ *Ibid.*, 90, 162-163.

³⁷ *Ibid.*, 111.

³⁸ *Ibid.*, c. 11.

³⁹ *Ibid.*, 255.

⁴⁰ *Ibid.*, 243.

be found in his basic metaphysical or epistemological assumptions. At the outset he says:

"The ideas annexed to the words person and thing are ideas copied immediately from the impressions made by real entities."⁴¹ This notion, which he probably derived from John Locke, is open to grave objections which cannot be fully presented here.⁴² One can perhaps sum them up in Dewey's statement that the "data" of a problematic situation are not "given" but "taken"⁴³ as signs of something beyond themselves. Our ideas, then, are not copies of sense impressions, but rather the result of an interaction between the antecedently given (conceptions) and the presently taken. If these objections were merely competitions for the use of words, if they were merely justifiable in the cloisters of professional philosophers, they might be safely ignored in such a practical discipline as law. However, they serve to explain some genuine difficulties into which Bentham falls. Thus he calls right, duty, etc., "fictitious entities," and then calls fiction "the bane of science."⁴⁴ But he does not scruple to use these fictitious entities among the chief analytical tools of his beloved science of legislation. Again, in treating a generic term such as "stealing" as merely a descriptive name for a set of circumstances, he seems to overlook the connotations of a common noun, and he would have saved himself and the reader a good deal of tedious analysis⁴⁵ had he recognized the dual nature of meaning, connotative and denotative. Thus, Bentham's basic notions as to the relations between words, ideas and sense impressions seriously affect his mode of expression and to some extent the substance of his thought. That the latter is not more affected is due to the restraining effect of Bentham's strong common sense. He borrowed his epistemology from Locke and his ethical criterion (pain-pleasure) chiefly from Helvetius,⁴⁶ yet the kernel of his thought is Jeremy Bentham's. His insistence upon staying close to the "facts," to the behavior of people in a seeable world, gives pungency and vitality to his analysis of the nature of law.

⁴¹ *Ibid.*, 57.

⁴² The Lockean version is criticized in DEWEY, *op. cit. supra* note 10, at 146.

⁴³ *Ibid.*, 124.

⁴⁴ BENTHAM, *op. cit. supra* note 1, at 105.

⁴⁵ *E.g., ibid.*, 126-130. "Theft" in a penal statute is not merely (if at all) a description of acts that have happened but a term connotative of characteristics by which we can identify acts that will hereafter happen as falling or not falling within the meaning of the term.

⁴⁶ *Ibid.*, 18, 116.

How thoroughly did Bentham know his English law? This book affords a better way to answer that question than do some of his other works which were re-translated from the French of Dumont. This book is Bentham undefiled. Yet it is not Bentham pruned and corrected for publication. On the whole, Bentham's illustrations and his use of them give the impression that he had a thorough knowledge of the English law of his day, and that he understood it fundamentally better than most contemporary lawyers. Professor Everett's biography of Bentham's early life⁴⁷ reveals that, while he became a barrister and resided in a barrister's chambers, he had but few clients and little practice. This may explain a certain vagueness, bordering on inaccuracy, in his allusions to judicial procedure. His discussion of a civil judgment⁴⁸ could hardly have been written as it was, had he been aware of the differences between a common law judgment and an equity decree. In his discussion of possession he neglects the influence of the possessory actions on the concept of possession in English law, and seems to confuse possession and title.⁴⁹ The only egregious error in the book is his reference to the "action of novel decision,"⁵⁰ evidently meaning the assize of novel disseisin.⁵¹ Such peccadilloes do not mar the essential values of one of the most lively and stimulating law books published in recent years.

The profession of law and of law teaching owes a debt to Professor Everett for having discovered this manuscript among some 50,000 sheets of Bentham manuscript preserved at the University of London, for having recognized its significance, for having photographed the manuscript on 35 mm. film, and even more for having patiently transcribed Bentham's nearly illegible scrawl. The story is told in Professor Everett's Introduction, which also gives a valuable epitome of Bentham's principal ideas.

The reader who takes this book seriously, as it should be taken, will have some rough going. If he enjoys following a first-rate mind in its struggles with some perennial problems of modern law, he will be rewarded for his labor.

⁴⁷ EVERETT, *THE EDUCATION OF JEREMY BENTHAM* (1931).

⁴⁸ BENTHAM, *op. cit. supra* note 1, at 305.

⁴⁹ *Ibid.*, 83.

⁵⁰ *Ibid.*, 308, n. 5.

⁵¹ When this error was called to Professor Everett's attention by the present writer, he re-read the film of the manuscript and now gives the correct reading, as near as he can make it out, as "action of novel disseisin." The change in the last word indicates that Bentham was not unaware of the historical origin of this old remedy for the recovery of real property.