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JEREMY BENTHAM AND THE CODIFICATION OF LAW

Dean Alfange, Jr.†

I

Young Jeremy Bentham was a most precocious lad. He learned the alphabet before he could speak; at the age of three he was discovered reading Rapin's *History of England* with great interest; he began his study of Latin and Greek at the age of four, and by eight was turning out a considerable quantity of respectable poetry in both these languages, a habit which earned him quite a reputation in the boarding school he entered at that age.¹ In 1760, when he was twelve, he was ready to enter Oxford, and three years later he received his bachelor's degree from that institution.²

Bentham's father, a prosperous attorney, had great hopes of a successful legal career for his brilliant son, and, at his father's urging, Jeremy, at fifteen, upon receipt of his first degree, began the study of law. He proved particularly unsuited for a career as a practicing lawyer, however, although for a brief period in 1767, immediately following his final departure from Oxford, he dutifully endeavored to use his legal training professionally. But his distaste for this profession was manifest from the outset; many years later, he declared that "I went to the bar as the bear to the stake."³ His first client asked him to institute a suit to recover the sum of fifty pounds, but Bentham advised him not to waste his money attempting to sue and sent him away. The remainder of his cases met with roughly the same degree of success.⁴

Bentham's utter failure at the bar was not due to a lack of interest in the law but rather to a completely negative attitude toward its practice, which was occasioned by his contempt for judges and lawyers

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1 10 J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 1-32 (J. Bowring ed. 1843) [hereinafter cited as *WORKS*]. Volumes 10 and 11 of the *Works* contain a biography of Bentham by J. Bowring, which has been described by Leslie Stephen, not altogether undeservedly, as "one of the worst biographies in the language." 1 L. STEPHEN, *THE ENGLISH UTILITARIANS* 225 (1902). See also C.W. EVERETT, *THE EDUCATION OF JEREMY BENTHAM* 1-22 (1931).

2 10 *WORKS* 35-45; EVERETT, *supra* note 1, at 27-36.

3 10 *WORKS* 78.

4 *Id.* 51, 78; EVERETT, *supra* note 1, at 48-49.

who steadfastly opposed any reform of the obsolete features of eighteenth-century English law, and who preferred, instead, to take lucrative advantage of the opportunities for exorbitant fees afforded by an archaic legal system. His recognition of the unsatisfactory nature of existing law had come at an early age, and, at sixteen, on hearing lectures given by William Blackstone, first Vinerian Professor of English Law at Oxford, which were to become the basis of the famous *Commentaries on the Laws of England*, he was greatly repelled. His instant dislike for Blackstone, in fact, prompted his first published work, *Fragment on Government*, which appeared in 1776 and was an attack on one part of the Introduction to the *Commentaries*. The *Fragment on Government* was initially published anonymously, but a second edition appeared in 1828, and in the Historical Preface to that edition Bentham explained his reaction to his professor:

The lecturer, as *any body* may see, *shewed* the King how Majesty is God upon earth: Majesty could do no less than make him a Judge for it. Blasphemy is—saying any thing a Judge can gratify himself, or thinks he can recommend himself, by punishing a man for. If tailoring a man out with God's *attributes*, and under that very name, is blasphemy, none was ever so rank as Blackstone's. The *Commentaries* remain unprosecuted; the poison still injected into all eyes: piety is never offended by it: it *may be* perhaps, should piety in high places ever cease to be a tool of despotism.

I, too, heard the lectures; age, sixteen; and even then, no small part of them with rebel ears. The *attributes*, I remember, in particular, stuck in my stomach. No such audacity, however, as that of publishing my rebellion, was at that time in my thoughts.⁵

Bentham's aversion toward the *Commentaries*, and toward the lectures from which that work was drawn, arose largely from the rapturous praise with which Blackstone depicted English law and from Blackstone's almost total unwillingness to notice any defect in the English legal system. When, in the concluding passage of the *Commentaries*, Blackstone admitted the existence of certain faults in the law, he surrounded this admission with paeans of adulation, as if to emphasize the minor and easily forgivable nature of these defects. It was this concluding passage that best expressed the tone of the work which served to infuriate Bentham:

Of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due:—the thorough and attentive contemplation

⁵ Bentham, *Preface* to J. BENTHAM, *FRAGMENT ON GOVERNMENT*, in 1 *WORKS* at 249 (Unless otherwise noted, all emphasis in quotations appears in the source.)

of it will furnish its best panegyric. It hath been the endeavour of these commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts, to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure; defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.⁶

Yet the eighteenth century was not the appropriate time for lavish praise of English law. As Professor R. H. Graveson has noted, "The eighteenth century is notably conspicuous for its almost complete lack of legal reform and legal development."⁷ Satisfaction with the law had led to its stagnation, and as society changed through the course of the century the law simply failed to keep pace. The general optimism and complacency which pervaded England in the years following the constitutional settlement of 1689, together with a system of parliamentary representation based on rotten boroughs and, at the end of the century, revulsion with the excesses of the Jacobins, had effectively obstructed any systematic reform of the law, particularly since the ruling classes maintained a vested interest in the preservation of the existing legal rules. As Sir Roland K. Wilson has observed:

During the first forty years of the reign of George III it would be hard to point out a single statute, within the domain of private law, which with our present lights we can unhesitatingly set down as an improvement; very few indeed of which it can be said that they were even honestly intended by their authors to promote the well-being of the people at large as distinguished from the immediate interest of the Government of the day, or, at most, of the limited class which alone had an appreciable share of political power.⁸

⁶ 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442-43 (8th ed. 1778).

⁷ Graveson, *The Restless Spirit of English Law*, in JEREMY BENTHAM AND THE LAW 101-02 (G. Keeton & G. Schwarzenberger eds. 1948).

⁸ R. WILSON, HISTORY OF MODERN ENGLISH LAW 157 (1875). This work contains a careful and detailed description of the status of English law in the 18th century. *Id.* at 1-132.

In eighteenth-century England, criminal law did not extend to cover many antisocial acts; yet capital punishment was required for relatively trivial offenses. Law taxes placed undue burdens on litigants; extremely complicated rules of procedure delayed decisions and made justice costly; and obsolete rules of evidence made informed judgments far more difficult. Moreover, throughout the century a constantly increasing demand was placed on the courts to deal with cases that did not fit within the archaic categories established by the existing law. These new and complex cases were dealt with by the expedient of forcing them into the old categories through the use of elaborate and cumbersome legal fictions. These fictions were both "noxious" and "useless," as they have been described by one of Blackstone's successors in the Vinerian Chair at Oxford,⁹ and the asinine complacency which sustained them thrived on Blackstone's adulatory phrases, even though a legal system built on such fictions could hardly be other than chaotic.

It was in recognition of this acute state of disorder that Jeremy Bentham chose to devote his life to the cause of law reform. He was dedicated to the belief that justice, order, certainty, and simple procedure could be implanted permanently into any legal system through the adoption of a comprehensive but concise legal code. However, he realized that it was necessary to shatter the smug satisfaction with which English law was then viewed before a demand could be created for the adoption of such a code. Consequently, he took for himself the role of censor rather than expositor of the law and undertook to observe what the law "ought to be" rather than merely to observe what it is.¹⁰ As he wrote:

From the view of these abominations resulted a passionate desire of seeing them cleared away. It soon appeared that to cleanse the Augean stables to any purpose there was no other way than to pour in a body of severe and steady criticism and to spread it over the whole extent of the subject in one comprehensive unbroken tide. This I determined to attempt: and whatever might be the success, it seemed that the labor of a life, as of a thousand more if I had them would not be ill-bestowed in the endeavor.¹¹

II

In 1768 Jeremy Bentham, then twenty years old, read Joseph Priestley's *Essay on Government*, and there he found a mention of the

⁹ A.V. DICEY, *LAW AND PUBLIC OPINION IN ENGLAND* 91 (1905).

¹⁰ Bentham, *supra* note 5, at 229.

¹¹ Unpublished manuscript, quoted in C.W. Everett, *Introduction to J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED* 4 (1945).

concept of "the greatest happiness of the greatest number." Bentham reports that upon seeing those words he exclaimed "Eureka," for, like Archimedes, he had made a monumental discovery.¹² Helvetius's *De l'Esprit* also had a profound effect on Bentham when he read it shortly after his experience with Priestley's work. Bowring relates that upon reading Helvetius, Bentham began to consider seriously his future career:

"Have I a *genius* for anything? What can I produce? That was the first inquiry he [Bentham] made of himself. Then came another: "What of all earthly pursuits is the most important?" Legislation, was the answer Helvetius gave. "Have I a genius for legislation?" Again and again was the question put to himself. He turned it over in his thoughts: he sought every symptom he could discover in his natural disposition or acquired habits. "And have I indeed a genius for legislation? I gave myself the answer, fearfully and tremblingly—Yes!"¹³

Bentham was to live for sixty-four years after his exposure to Priestley and Helvetius in 1768, and in those years he was to strive to advance by his multitudinous writings the principle of utility—the principle by which actions are judged according to the likelihood of their bringing about "the greatest happiness of the greatest number," "happiness" being defined as the maximization of pleasure and the minimization of pain. This principle served him as a standard by which legislation and legal rules could be judged. Did a rule of law, either substantive or procedural, operate to bring about the greatest happiness of the greatest number? If so, it was a wise rule; if not, it was indefensible, and it was the task of the legislature to replace it immediately with a new rule which met the requirements of this principle.

His most important work, *Introduction to the Principles of Morals and Legislation*, published in 1789, begins with his most famous words in defense of the principle of utility:

¹² Bowring, *History of the Greatest-Happiness Principle*, in 1 J. BENTHAM, *DEONTOLOGY* 300 (1834). The phrase was, of course, not original with Priestley. Bentham himself had encountered it earlier, for he had read Beccaria's *Dei delitti e delle pene* in the original Italian soon after it appeared in 1764, and Beccaria had used it. EVERETT, *supra* note 1, at 47. Moreover, as early as 1725 Francis Hutcheson had stated, in his *Enquiry Concerning Moral Good and Evil*, that "that action is best which secures the greatest happiness of the greatest number." See 1 STEPHEN, *supra* note 1, at 178 n.3. And Helvetius in 1758, in *De l'Esprit*, had declared that the greatest happiness for the greatest number was the proper basis for legislation. See E. HALÉVY, *THE GROWTH OF PHILOSOPHIC RADICALISM* 20-21 (M. Morris transl. 1952).

¹³ 10 WORKS 27.

Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The *principle of utility* recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.¹⁴

Each individual naturally follows the course of action that will maximize his own pleasure and minimize his own pain—and thereby insures the greatest possible happiness for himself. There is, of course, no assurance that the sum of these selfish actions will automatically total “the greatest happiness of the greatest number,” since an act which may bring its initiator a small amount of pleasure could conceivably spread misery and, therefore, pain among large numbers. The “fabric of felicity,” Bentham realized, would have to be reared “by the hands of reason and of law.” Reason would be used to acquaint men with the principle of utility and to persuade them that it would ultimately be in their interest to act in accordance with the dictates of that principle. Law would be used to coerce those who remained recalcitrant, by offsetting the personal pleasure that might be obtainable from an act contrary to the principle of utility through the imposition of pain in the form of punishment.

However, if the purpose of law was to be the furtherance of the principle of utility, it was essential that each individual law be designed in strict accordance with that principle. How this could be done Bentham, with his “genius for legislation,” sought to demonstrate. Above all, he was convinced that since legislation was a science, laws should be drawn up by scientists like himself, who understood the principle of utility and who could determine what laws would do most to provide the greatest happiness of the greatest number. There could be no room for haphazard legal development. Laws drawn up by scientists would be placed in the form of a code, and nothing that did not appear in the code would be law. This would, of course, exclude all judge-made law, and at this point Bentham’s theory came into direct conflict with the traditions of the English common law.

¹⁴ J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, in 1 WORKS I.

According to Bentham, there were four principal objects of civil law, which were subordinate only to the principle of utility; these were subsistence, abundance, equality, and security.¹⁵ Of these, by far the most important was the principle of security. Law can do nothing directly to serve the aim of subsistence; the pleasure of enjoyment and the pain of want provide the motives for men to obtain subsistence for themselves, and there is no need for the sanction of law to augment the physical sanctions already present.¹⁶ Similarly, no laws are necessary to coerce men to seek abundance to serve as a protection against famines, wars, and accidents; the pleasure of enjoyment is again enough.¹⁷ However, if men do not require the sanction of law in order to seek to obtain for themselves subsistence and abundance, they do require the sanction of law to insure that they will be free to enjoy the materials of subsistence and abundance for which they have labored. This is the principle of security, and Bentham declares that the law must be especially concerned with the attainment of this object:

The Law does not say to a man, "*Work and I will reward you;*" but it says to him, "*Work, and by stopping the hand that would take them from you, I will ensure to you the fruits of your labour, its natural and sufficient reward, which, without me, you could not preserve.*" If industry creates, it is the law which preserves: if, at the first moment, we owe every thing to labour, at the second, and every succeeding moment, we owe every thing to the law.¹⁸

The principle of security, therefore, has been termed the "*disappointment preventing principle.*"¹⁹ Life is based on a series of expectations and hopes—"it is by means of this that the successive moments which compose the duration of life are not like insulated and independent points, but become parts of a continuous whole."²⁰ "The principle of security comprehends the maintenance of all these hopes;"²¹ therefore, the chief purpose of law is to guard against their disturbance, for the disappointment of settled expectations produces a particularly intense pain. So important is the principle of security that the fourth object of law, the principle of equality, must always yield before it. Bentham states this unequivocally:

15 J. BENTHAM, PRINCIPLES OF THE CIVIL CODE, in 1 WORKS 302.

16 *Id.* at 303.

17 *Id.* at 304.

18 *Id.* at 308.

19 HALÉVY, *supra* note 12, at 46.

20 1 WORKS 308.

21 *Id.*

When security and equality are in opposition, there should be no hesitation: equality should give way. The first is the foundation of life—of subsistence—of abundance—of happiness; every thing depends on it. Equality only produces a certain portion of happiness: besides, though it may be created, it will always be imperfect; if it could exist for a day, the revolutions of the next day would disturb it. The establishment of equality is a chimera: the only thing which can be done is to diminish inequality.²²

Although Bentham believed that the law could work toward the elimination of inequality, he stipulated that this process could only be undertaken gradually, so that nothing be done to unsettle immediate expectations. He declared that the law might do this by intervening in the distribution of estates to prevent unnecessarily large inheritances and by removing artificial barriers to equality, such as state-maintained monopolies and entails.²³ His principle of equality, therefore, referred not to an equality of status or wealth, but only to an equality of opportunity.²⁴

Since the single most important object of law is the protection of individual expectations, it is imperative that all law exhibit two characteristics—cognoscibility and accessibility.²⁵ Unless the law were cognoscible, that is, in a form in which it could be understood by everyone, and accessible, that is, readily available to everyone, no one except a small coterie of judges and lawyers would be justified in maintaining any expectations at all, for only this small group would be able to know whether the law would support their expectations. To obtain cognoscibility and accessibility in the law, Bentham constantly insisted upon the necessity of codification. Judge-made law, he asserted, was “dog-law”:

Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk; common law by its very essence. It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he

²² *Id.* at 311.

²³ *Id.* at 312-13.

²⁴ See F.C. Montague, *Introduction to J. BENTHAM, FRAGMENT ON GOVERNMENT* 41 (1891).

²⁵ See J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 287-88 (1946).

has done something which they say he should not *have done*, and then they hang him for it. What way, then, has any man of coming at this dog-law? Only by watching their proceedings: by observing in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth. These proceedings they won't publish themselves, and if anybody else publishes them, it is what they call a contempt of court, and a man may be sent to jail for it.²⁶

This attack was leveled at William Henry Ashhurst, a puisne judge of the Court of King's Bench, who in 1792 delivered a well-publicized charge to a Middlesex grand jury, in which he condemned the French Revolution, and, by comparison, heaped exorbitant praise on English government and English law. The title of the brief tract containing Bentham's attack was *Truth v. Ashhurst*, a particularly vicious title for a work criticizing a judge. Bentham's chief adversary in the area of the common law; however, was hardly Ashhurst, but was, instead, Blackstone. In the *Commentaries*, Blackstone had spoken of common law and statute law together as making up the rules "prescribed to the inhabitants of this kingdom."²⁷ Bentham replied to this in his *Comment on the Commentaries*²⁸ in the pungent and vivacious style that characterized his early writings:

As to Common Law, where is it prescribed? What is there in it to prescribe? Who made it? Who expressed it? Of whom is it the Will? Questions all these to which he should have had an answer ready before he spoke of Common Law as real Law, . . . and . . . as being a Law prescribed.²⁹

With regard to accessibility, Blackstone unhappily stated that the manner in which the law was "notified" to the citizens was a "matter of very great indifference." However, he quickly stated that the law might be notified by proclamation, or "by universal tradition and long

²⁶ J. BENTHAM, *TRUTH V. ASHHURST*, in 5 *WORKS* 235. It should be noted that Bentham's remarks regarding the inability of reporters to publish judicial decisions was less than fair. Up to the middle of the 18th century, the permission of the judges was usually obtained before reports were made public, but after that time reporters no longer sought formal permission, although judicial pressure was sometimes employed to cause a case to be omitted from the published reports. See 12 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 110-13 (1938).

²⁷ 1 BLACKSTONE, *supra* note 6, at 63.

²⁸ *Comment on the Commentaries*, written in 1775, is a more general attack on Blackstone than the *Fragment on Government*. Bentham did not bother to have it published, and it was not brought to light until 1928, when it was discovered by Charles Warren Everett in the course of a comprehensive inspection of Bentham's manuscripts at University College, London. A great deal of the *Comment on the Commentaries* was taken up with Bentham's rebuttal of the views expressed by Blackstone on the common law.

²⁹ J. BENTHAM, *COMMENT ON THE COMMENTARIES* 65 (1928).

practice, which supposes a previous publication, and is the case of the common law of England," and ought to be notified "in the most public and perspicuous manner; not like Caligula who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people."³⁰

Bentham found this totally unsatisfactory:

This Common Law of England then is "notified" sufficiently, the "tradition" of it is as "universal" as he would wish it. If he means this, one may believe him. In the meantime, who is there that knows it? nobody but a few Lawyers. It is well if *they* do. But whether it is made known in any more effective manner, is to him "matter of great indifference." This may be: tho to a Lawyer it is charity to suppose it: but to the people, that it is not better notified is a "matter of great" and well-merited complaint. . . .

. . . He tells us of Caligula the Roman Tyrant, who "hung up" his Laws "in a small character" (but who *hung them up*—remember this ye Legislators and ye hoarders-up of unpublished judgments—but *he hung them up*).³¹

In his *General View of a Complete Code of Laws*, Bentham summarized his arguments against judge-made law, which, he stated, must always be *ex post facto* in that it is made by judges to apply to particular cases after they have arisen, and he explained why members of the legal profession maintained their high regard for this type of law:

The grand utility of the law is certainty: unwritten law does not—it cannot—possess this quality; the citizen can find no part of it, cannot take it for his guide; he is reduced to consultations—he assembles the lawyers—he collects as many opinions as his fortune will permit; and all this ruinous procedure often serves only to create new doubts.

Nothing but the greatest integrity in a tribunal can prevent the judges from making an unwritten law a continual instrument of favour and corruption.

But wherever it exists, lawyers will be its defenders, and, perhaps innocently, its admirers. They love the source of their power, of their reputation, of their fortune: they love unwritten law for the same reason that the Egyptian priest loved hieroglyphics, for the same reason that the priests of all religions have loved their peculiar dogmas and mysteries.³²

Bentham's contempt for the practicing lawyer knew almost no

³⁰ 1 BLACKSTONE, *supra* note 6, at 45-46.

³¹ BENTHAM, *supra* note 29, at 68-69.

³² 3 WORKS 206.

bounds. He spoke of the going concern of "Judge & Co.," whose thriving business consisted of relieving litigants of as much money as possible through court and attorneys' fees. It was in the interest of "Judge & Co." to make the law as confusing as possible, to delay the administration of justice, and to establish large numbers of technical barriers to final judgments.³³

To lessen the power of the grasping breed who made up "Judge & Co.," to add certainty—"the grand utility of the law"—to the legal system by promoting the cognoscibility and accessibility of legal rules, and thereby to advance the principle of security by preventing the disappointment of settled expectations, Bentham insisted on the necessity of a code of laws. But in the formulation of this code the sole criterion to be considered was to be the principle of utility. Therefore, all other possible criteria which in themselves might allow the establishment of law would have to be rejected. Among these other criteria the most prominent was that of natural rights, and Bentham did not hesitate in attacking it. The concept of natural rights, he declared, was "nonsense upon stilts."³⁴ A right should be looked upon as impermissible only if granting it that status would provide for the greatest happiness of the greatest number. However, if that were the case the right would be protected solely because it accorded with the principle of utility, and not because it could be looked upon as inalienable on the basis of some other standard.

In 1791, Bentham wrote an essay entitled *Anarchical Fallacies*, which was prudently allowed to go unpublished until 1816. This was a critical analysis of the French Declaration of the Rights of Man, in which Bentham vigorously exposed the logical weaknesses inherent in a theory of natural rights. Taking each article of the Declaration in turn, Bentham pointed to the errors and ambiguities it contained. Article I of the Declaration began: "Men are born and remain free, and equal in respect of rights." Bentham's reply: "Absurd and miserable nonsense! When the great complaint . . . is—that so many men are born slaves."³⁵ Moreover, with respect to equality of rights, Bentham sarcastically added: "The apprentice, then, is equal in rights to his master."³⁶ Perhaps, he conceded, the authors of the Declaration intended to abolish all master-servant relationships, but such a prospect was so contrary to the principle of utility that he could not refrain from attacking it. What a declaration that liberty was incompatible with servitude actually meant, he asserted, was: "Better a man should

³³ See J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, in 7 WORKS 226-311.

³⁴ J. BENTHAM, ANARCHICAL FALLACIES, in 2 WORKS 501.

³⁵ *Id.* at 498.

³⁶ *Id.*

starve than hire himself;—better half the species starve, than hire itself out to service.”³⁷

A theory of natural rights necessarily implies the existence of rights granted by a source outside the state and completely independent of it. Bentham rejected such a concept categorically. Natural rights was to him an anarchical doctrine, for it invited disregard and disobedience of positive law, and as such was entirely contradictory to the principle of utility. The grand utility of the law was certainty and the prevention of disappointment, but if one could declare that existing positive law was void because it conflicted with natural law and could, therefore, violate positive law with impunity, certainty and security would vanish, leading inevitably to the very widespread dissemination of pain. Nor could natural rights be called into play if existing law was contrary to the principle of utility; the remedy for such a situation was new legislation, not an appeal to nebulous rights outside of government. Bentham declared:

In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights;—a reason for wishing that a certain right were established, is not the right—want is not supply—hunger is not bread.³⁸

The crisis of the French Revolution provides an interesting commentary on Bentham’s driving passion for law reform. He was little interested in the cause of the revolution, or in political reform, as such.³⁹ However, he quickly saw in the French Revolution an exceptional opportunity to advance the cause of utilitarianism. Allowing his attack on the Declaration of the Rights of Man to remain unpublished, he instead dispatched to the States General two essays on parliamentary procedure and judicial reorganization, and also offered to the French his plan for a “Panopticon,” a humane prison based entirely on utilitarian principles. He even indicated his willingness to go to France, if the “Panopticon” plan were adopted, in order to become “gratuitously the gaoler thereof.”⁴⁰

³⁷ *Id.* at 499.

³⁸ *Id.* at 501.

³⁹ He was originally quite diffident regarding forms of government; in Great Britain, his espousal of the cause of parliamentary reform came only after he was convinced that the aristocracy, to protect their own interests, were unalterably opposed to utilitarian legislative reform, and after he found that his most devoted adherents were democrats. HALÉVY, *supra* note 12, at 251-59.

⁴⁰ 1 STEPHEN, *supra* note 1, at 197. Stephen comments that Bentham’s “proposal to become a gaoler during the revolution reaches the pathetic by its amiable innocence.” *Id.* at 198.

Bentham's writings, of course, had no effect whatever on the National Assembly, although that body subsequently conferred upon him the honorary title of citizen.⁴¹ However, his effort was typical of his constant endeavor to secure the adoption, in some nation, of his codification proposals. Ironically, although the bulk of his attack on existing law was directed at the English legal system, England was the least likely of any of the nations of Europe to adopt a code. The English were exceedingly proud of their liberty, particularly in view of the conspicuous lack of liberty extant elsewhere in eighteenth-century Europe, and were willing to attribute to the common law a large share of the reason for their freedom.⁴² On the other hand, the continent appeared to be very fertile ground for the development of legal codes and, as utilitarianism was politically neutral, Bentham strove to impress upon the monarchs of Europe the wisdom of adherence to the principle of utility in their formulation. He was especially anxious to gain the attention and approval of Catherine of Russia,⁴³ but, as Professor Halévy has stated, his one overpowering desire was "to secure the drawing up and the promulgation of his entire Code, everywhere, somewhere, no matter where."⁴⁴

III

A legal code being an indispensable requirement of the principle of utility, it was, of course, essential that Bentham consider the content of such a code and the criteria to be employed in order to insure that every provision of the code would be in strict conformity with utility. To this problem Bentham addressed himself at great length, and a great deal of his writing was devoted to explicating the principles underlying the formulation of the perfect utilitarian code.

It was, first of all, to be assumed that all law would be contained within the covers of the volume containing the code. Nothing that was not explicitly stated in the code was to be permitted to have

⁴¹ HALÉVY, *supra* note 12, at 173.

⁴² DICEY, *supra* note 9, at 146.

⁴³ In 1779, when his brother Samuel traveled to Russia, Bentham hoped that he could put his proposals before the Empress. In a letter to his brother, written in French, Bentham called upon him to do everything he could to win Catherine over. He wrote, in part: "Plutôt que de la manquer, tu la guetteras dans les rues, tu te prosternerás devant elle, et, après avoir mangé autant de poussière que tu as envie, tu lui jetteras mon billet au nez, ou bien a la gorge, si elle veut bien que tes mains soient là." *quoted in* Everett, *supra* note 11, at 10.

⁴⁴ HALÉVY, *supra* note 12, at 149.

the force of law. This was entirely in accordance with the necessity for the cognoscibility and accessibility of all law which he stressed, for, if the code could be supplemented by judge-made law as the need arose, its certainty would be correspondingly diminished. Bentham conceded that cases would arise for which no clear statement of the law could be found in the code. However, even here the judge was not to be permitted to interpret the law and arrive at a decision. Instead, if the code were obscure on a subject of controversy, it was to be up to the judge to refer the matter to the legislature for solution.

The only power of interpretation left to the judge would be in cases in which the will of the legislature was clear, but in which it had "failed to express [its will], either through haste or inaccuracy of language."⁴⁵ Thus the task of the judge was to be largely mechanical or clerical. He was to occupy a very minor position in the government, but his workload could be expected to be quite small since the code would be available and clear to all men, who would, therefore, settle their disputes on the basis of its provisions without resorting to futile litigation. Moreover, the clarity of the law made it entirely unnecessary for judges to have had legal training; consequently, to guard against the reactivation of "Judge & Co." and to insure that judges and lawyers would not conspire to increase fees by the introduction of false obscurity or unnecessary delay into the legal system, Bentham would have barred lawyers from serving as judges.⁴⁶

Needless to say, the style and language of the code was, for Bentham, a matter of prime importance—the clarity and precision on which he insisted was not to be obtained by careless drafting. With regard to precision, each provision of the code was to be worded in such a way as to convey one and only one idea. A statute prohibiting murder, for example, should not provide punishment for "whosoever draws blood," for, if it did, a surgeon would be liable to punishment under it, while a murderer who did not draw the blood of his victim would not.⁴⁷ With regard to style, brevity was the most important factor, and was to apply to both sentences and paragraphs. Commenting that "[i]n the English statutes, sentences may be found which would make a small volume," Bentham argued for shorter sentences to provide greater rest for the mind of the reader and greater ease of

⁴⁵ J. BENTHAM, *GENERAL VIEW OF A COMPLETE CODE OF LAWS*, in 3 WORKS 210.

⁴⁶ J. BENTHAM, *CONSTITUTIONAL CODE*, in 9 WORKS 592.

⁴⁷ BENTHAM, *supra* note 45, at 207.

understanding.⁴⁸ He also offered four positive stylistic rules to be observed by the legislator drafting the code: (1) Avoid all technical or legal terms wherever possible; (2) if technical terms must be used, define them carefully in the body of the law; (3) define technical terms in "common and known words"; and (4) if the same idea is to be expressed more than once, express it in exactly the same words.⁴⁹ If these rules were observed, Bentham felt certain that

A code formed upon these principles would not require schools for its explanation, would not require casuists to unravel its subtilities. It would speak a language familiar to everybody: each one might consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness. The father of a family, without assistance, might take it in his hand and teach it to his children, and give to the precepts of private morality the force and dignity of public morals.⁵⁰

If solidly grounded on the principle of utility, the code, once formulated, would express the law in terms that would rarely need to be amended. Such amendments as would take place from time to time would only infrequently be of a substantive nature and would largely be concerned with points of obscurity or stylistic deficiencies. General amendments would only have to be considered once in each century:

[O]nce in a hundred years, let the laws be revised for the sake of changing such terms and expressions as by that time may have become obsolete—remembering that this will be more needful in regard to the language of the legal formularies in use, than that of the text of the laws themselves.⁵¹

Bentham, however, did not claim that observance of the principle of utility would yield eternal verities, or that a code suitable for one country at one time would be suitable for all countries at all times. In this regard he was influenced by the thinking of Montesquieu, and he acknowledged this in his essay on the *Influence of Time and Place in Matters of Legislation*:

Before Montesquieu, a man who had a distant country given him to make laws for, would have made short work of it. "Name to me the people," he would have said; "reach me down my Bible, and the business is done at once. The laws they have been used to, no matter what they are, mine shall supersede them: manners, they shall have mine, which are the best in nature; religion, they shall

⁴⁸ *Id.* at 208.

⁴⁹ *Id.* at 209.

⁵⁰ *Id.*

⁵¹ *Id.* at 210.

have mine too, which is all of it true, and the only one that is so." Since Montesquieu, the number of documents which a legislator would require is considerably enlarged. "Send the people," he will say, "to me, or me to the people; lay open to me the whole tenor of their life and conversation; paint to me the face and geography of the country; give me as close and minute a view as possible of their present laws, their manners, and their religion."⁵²

Nevertheless, Bentham by no means accepted Montesquieu wholeheartedly. Climatic conditions, which were of such predominant importance for Montesquieu, were relegated to a subordinate position by Bentham,⁵³ and he declared that alterations in the ideal code to meet local conditions need be only slight.⁵⁴ Above all, the code should be drawn up to maximize pleasure and minimize pain, and Bentham refused to concede that "different countries [had] different catalogues of pleasures and of pains," for, he stated, "human nature may be pronounced to be every where the same."⁵⁵ What might differ from country to country was the type of action that might induce pleasure or pain, and Bentham provided several examples of situations in which special laws might be needed in particular nations or regions to take account of climatic or topographical peculiarities,⁵⁶ but the changes he allowed for in his examples were largely trivial. As Sir William Holdsworth observed, "[h]is real belief is that laws grounded on the true principle of utility are suited to all times and places. He 'reaches down' the principle of utility, and uses it in much the same way as a man, before Montesquieu, used his Bible."⁵⁷ It was because of this that he felt himself competent to draw up a code that could be put into practice "everywhere, somewhere, no matter where."

IV

The culminating work of Bentham's life was the unfinished *Constitutional Code*, to which he turned in earnest about 1820, and on which he continued to work until his death in 1832. A primary impetus for the creation of the *Code* was the request of his followers

⁵² J. BENTHAM, *INFLUENCE OF TIME AND PLACE IN MATTERS OF LEGISLATION*, in 1 WORKS 173 n.†.

⁵³ See HALÉVY, *supra* note 12, at 67-68.

⁵⁴ 13 HOLDSWORTH, *supra* note 26, at 76-78.

⁵⁵ BENTHAM, *supra* note 52, at 172.

⁵⁶ See, e.g., *id.* at 175.

⁵⁷ 13 HOLDSWORTH, *supra* note 26, at 77.

in Spain and Portugal who hoped to secure its adoption there, but, of course, as Professor Halévy noted, the *Constitutional Code* "was addressed not only to the two States of the Iberian peninsula, but to all the nations of the earth."⁵⁸ The *Code* has been described by Charles Warren Everett as Bentham's "greatest work,"⁵⁹ and it demonstrates, as Professor Everett puts it, that "Bentham's government is a positive government, not a negative one. It touches man at all points from the cradle to the grave."⁶⁰ The nature of this work, in fact, raises serious questions as to the validity of the traditional view of Bentham as a committed advocate of *laissez faire*.

To be sure, Bentham in his earlier works (prior to 1810) espoused the doctrine of *laissez faire*, and treated it essentially as the natural outcome of observing the principle of utility. In the *Defence of Usury*,⁶¹ written in 1787, he mounted a classic attack on laws restricting the lending of money at interest and in 1793, in *A Manual of Political Economy*, he was able to write:

With few exceptions, and those not very considerable ones, the attainment of the maximum of enjoyment will be most effectually secured by leaving each individual to pursue his own maximum of enjoyment, in proportion as he is in possession of the means.⁶²

He opposed excessive—in the sense of unnecessary—legislation of all varieties, declaring, "[e]very law is an evil, for every law is an infraction of liberty."⁶³ Since legislation involved the imposition of evil on society, it could only be justified as a means of reducing or eliminating other evils of greater magnitude. And because examples of noxious and useless restraints abounded in English law, he condemned them with vigor and acerbity. In an acid passage in *Truth v. Ashhurst*, in 1792, he wrote:

I sow corn: partridges eat it, and if I attempt to defend it against the partridges, I am fined or sent to jail: all this, for fear a great man, who is above sowing corn, should be in want of partridges.

The trade I was born to is overstocked: hands are wanting in

⁵⁸ HALÉVY, *supra* note 12, at 404.

⁵⁹ C. W. EVERETT, JEREMY BENTHAM 82 (1966). Professor Everett there notes that this judgment was shared by "men as different from each other as Graham Wallas and Harold Laski." *Id.* An excellent summary of the *Constitutional Code* may be found *id.* at 84-109, and excerpts *id.* at 232-56. The *Code* appears in 9 WORKS. It comprises the entire volume.

⁶⁰ EVERETT, *supra* note 59, at 89.

⁶¹ 3 WORKS 1.

⁶² J. BENTHAM, A MANUAL OF POLITICAL ECONOMY, in 3 WORKS 35.

⁶³ J. BENTHAM, THEORY OF LEGISLATION 48 (2d ed. R. Hildreth transl. 1871).

another. If I offer to work at that other, I may be sent to jail for it. Why? Because I have not been working at it as an apprentice for seven years. What's the consequence? That, as there is no work for me in my original trade, I must either come upon the parish or starve.

. . . At this rate, how is work ever to get done? If a man is not poor, he won't work; and if he is poor, the laws won't let him. How then is it that so much is done as is done? As pockets are picked—by stealth, and because the law is so wicked that it is only here and there that a man can be found wicked enough to think of executing it.

Pray, Mr. Justice [Ashhurst], how is the community you speak of the better for any of these *restraints*? and where is the necessity of *them*? and how is *safety* strengthened or *good order* benefited by them?⁶⁴

These attacks upon the archaic restrictions upon individual liberty in the common law comported well with the basic tenets of *laissez-faire* ideology that was dominant in the nineteenth century, and in that age of liberalism Bentham was acclaimed, and the influence of his thinking widespread. Reforms, however, that were originally intended as a means of enhancing liberty by the removal of legal restraints often ended as expansions of governmental power.⁶⁵

There is no reason to believe that the separation of *laissez faire* and utility was a source of concern to Bentham. His interest was wholly in the latter, and he supported *laissez faire* in his early work because he firmly believed it to be the policy most congenial to the principle of utility. But the greatest happiness of the greatest

⁶⁴ BENTHAM, *supra* note 26, at 234.

⁶⁵ The irony of this was well noted by A. V. Dicey:

The guides of English legislation during the era of individualism, by whatever party name they were known, accepted the fundamental ideas of Benthamism. The ultimate end, therefore, of these men was to promote legislation in accordance with the principle of utility; but their immediate and practical object was the extension of individual liberty as the proper means for ensuring the greatest happiness of the greatest number. Their policy, however, was at every turn thwarted by the opposition or inertness of classes biassed by some sinister interest. Hence sincere believers in *laissez faire* found that for the attainment of their ends the improvement and the strengthening of governmental machinery was an absolute necessity. In this work they were seconded by practical men who, though utterly indifferent to any political theory, saw the need of administrative changes suited to meet the multifarious and complex requirements of a modern and industrial community. The formation of an effective police force for London (1829)—the rigorous and scientific administration of the Poor Law (1834) under the control of the central government—the creation of authorities for the enforcement of laws to promote the public health and the increasing application of a new system of centralisation, the invention of Bentham himself—were favoured by Benthamites and promoted utilitarian reforms; but they were measures which in fact limited the area of individual freedom.

DICEY, *supra* note 9, at 305-06.

number meant to him just exactly that, and his superficial economic theory was clearly subordinate to his theory of legislation. It is significant to recall Bentham's categorical rejection of the natural rights theories upon which the French Declaration of the Rights of Man and the American Declaration of Independence, as well as much of *laissez-faire* economics, were grounded. For, if there can be no natural rights, then liberty cannot be among them, and it may be swept aside by legislation when utility demands. Utilitarianism and *laissez faire* were tentatively united by circumstance, not logical necessity, and, although the march of individualism "from status to contract," in Maine's phrase, took place in the nineteenth century behind the banner of utilitarianism, Bentham's doctrine of scientific legislation was ultimately influential in the discrediting of the economic theory with which it has been commonly associated. For, when the point was reached that the gross inequalities and acute poverty resulting from the unregulated industrial economic system came to be generally recognized, the requirement of the principle of utility that law achieve the greatest happiness of the greatest number obviously called for drastic restrictions on individual liberty to alleviate the plight of the majority.

V

Law reform was Bentham's aim, and the success of Bentham and his followers in bringing about reform is nothing short of remarkable. As early as 1843, in the advertisement to his introduction to Bowring's edition of Bentham's works, John Hill Burton was able to list some twenty-six reforms in the law that were traceable to Bentham's arguments for their adoption and to count some ten others that had acquired substantial support.⁶⁶ In 1875, after more comprehensive legal reform had taken place, Sir Henry Maine declared, "I do not know a single law-reform effected since Bentham's day which cannot be traced to his influence."⁶⁷ Of the *Constitutional Code*, which he described as "the mine from which a whole new system of English Government and of the relation between English central and local government was extracted in the years that followed the Reform Bill of 1832,"⁶⁸ Graham Wallas wrote:

⁶⁶ See Advertisement, in 1 WORKS 3 n.*.

⁶⁷ H. MAINE, EARLY HISTORY OF INSTITUTIONS 397 (1875).

⁶⁸ Wallas, *Jeremy Bentham*, 38 POL. SCI. Q. 45, 54 (1925).

The whole book was at last printed in 1841, and contained, mixed with some details which seem to us fanciful, schemes which have since then been carried out for a logical division of work between the government departments, for Ministries of Health, and Education, and Police, and Transport, in connection with corresponding municipal committees and expert municipal officials, and—most wonderful of all when one thinks of the patronage arrangements of the time—a Civil Service recruited by competitive examination, access to which was to be made possible to the poorest boy of talent by a great system of educational scholarships.⁶⁹

Perhaps the single change that would have pleased Bentham the most, however, is the codification (the word, it should be noted, was even coined by him⁷⁰) that has been effected since his day in various segments of English law.⁷¹

⁶⁹ *Id.*

⁷⁰ See C. K. ALLEN, *The Young Bentham*, in *LEGAL DUTIES* 135 (1931).

⁷¹ See 13 HOLDSWORTH, *supra* note 26, at 134.