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**Political and Philosophical Radicalism:  
The place of the utility principle in Jeremy Bentham's  
Early writings on critical jurisprudence.**

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**Abstract:** In manuscript materials intended to form part of his 'magnum opus' the Elements of Critical Jurisprudence, Jeremy Bentham defined jurisprudence as the study of the art and science (i.e. the practices and principles) of government. Some of his earliest discussions of utility and of the idea of a principle of utility occur in these manuscripts – years before he coined the term 'utilitarian'. Specifically, Bentham argues there that 'public utility' is a better phrase than 'natural justice' by which to assess the excellence either of a legal theory or of a set of governmental practices. My presentation will use these early manuscripts to throw light on the impact of Bentham's developing understanding of utility (prior to his coining of the term 'utilitarian') on his critique of contemporary legal institutions and theories. The idea of a "principle of utility" was the conceptual 'glue' which held together Bentham's Neo-Newtonian system of critical jurisprudence. His theory of jurisprudence, in turn, was *ipso facto* a full-scale theory of politics and government. Many commentators have characterized Bentham as a philosopher who eventually found his way to politics. I read him in this paper as a political radical who crafted his 'utilitarian' philosophical stance as a vehicle for a radical political programme.

**I. Bentham's Censorial Jurisprudence: form and function**

**"If ... I explain these matters clearly I may be a means of giving  
perpetuity to the constitution of my country, I may stifle in embryo  
or rather prevent the conception of all manner of political disputes,  
prevent civil wars, and save the lives of millions  
[ms. alternative: fix the peace of Empires]."**<sup>1</sup>

These words appeared in a body of manuscripts, comprising 661 sheets and about 1250 consecutively numbered but discontinuous and fragmentary sections, in which Bentham tried to work out the "preparatory principles" which he would

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<sup>1</sup> University College London Bentham Mss., Box LXIX, p. 156: "Preparatory Principles Inserenda" heading 271"; the marginal heading is "Prefat. Utility of these speculations". The "Preparatory Principles Inserenda" ["PPI"] manuscripts can now be viewed at the Bentham Project's web site: [http://www.ucl.ac.uk/Bentham-Project/online\\_pub/ppi\\_ind.htm](http://www.ucl.ac.uk/Bentham-Project/online_pub/ppi_ind.htm).

employ in shaping - and when appropriate explicitly insert into - his *magnum opus*: the envisioned great work which would bring his radically innovative ideas on jurisprudence and politics to the attention of the European intellectual community of his day. This Magnum Opus was never published, and only draft portions of it and blocs of raw material for inclusion in it are available to us today. Most scholars interested in utilitarianism, Never having seen any of the unpublished manuscript portions of it which reside mainly at University College London (UK), use as the basis for their understanding of Bentham's thought his Introduction to the Principles of Morals and Legislation, a work hastily prepared in the and reluctantly committed to print in 1781 – a work which in Bentham's view was little more than a selective sketch of the massive system of jurisprudence which he attempted to deploy in his manuscripts of the 1770s. I believe that IPML is better read as a *product* of Bentham's theorizing about utility and critical jurisprudence than as its *foundation* - that is, as symptomatic rather than causal. A careful study of Bentham's early manuscripts can provide us with a much more nuanced and comprehensive account of Bentham's original (and lasting) intellectual position as a jurisprudential radical and as an utilitarian than a reading, even a careful one, of IPML can reasonably be expected to generate.

For a very long time I have been exploring Bentham's early manuscripts, searching for more indications of the character of the intellectual project which he pursued, though its guises and proximate goals changed with the contexts in which he worked, with extraordinarily single-mindedness through an exceptionally long working life. I believe that he saw his work and his life as being 'all of a piece'. The

influence on him of Newton and Bacon, of Helvetius and Beccaria, of the *philosophes* and the *encyclopedistes* made him a perfectionist, not a pluralist. He spent his life trying to get one very big thing right. It would be a mistake, however, to leap from this characterization, insofar as it seems plausible, to the conclusion that Bentham had only one idea – that of utility: that he was monomaniacal utilitarian who simply looked to the law as an instrumentality for the advancement of a preconceived utilitarian project. There is a significant sense in which Jeremy Bentham was radicalized as a legal theorist, by his experience of Blackstone’s lectures at Oxford and by his enthusiasm for the works of Helvetius and Beccaria, years before he coined the term ‘utilitarian’. The Appendix to the Elements of Critical Jurisprudence dealing with “Obstacles” to the advancement of a science of legislation (which I examine below) shows that in the mid-1770s Bentham was already very conscious that he was pitted in a *political* battle against lawyers, politicians, ‘divines’ and others – the very groups in relation to whom he was later to coin the term ‘sinister interests’. A certain kind of radicalization, then, and a certain kind of politicization too, preceded the adoption of the principle of utility itself. The idea of ‘utility’ and even a ‘principle of utility’ Bentham inherited from David Hume and Adam Smith and Helvetius.<sup>2</sup> It was the prominent use of the term utility in a theological context by William Paley that precipitated the publication of Bentham’s IPML. But the idea that a person – or a ‘sect’ – could be ‘utilitarian’ only occurred to him (in a dream) when

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<sup>2</sup> See my “‘Utility’ and the ‘Utility Principle’: Hume, Smith, Bentham, Mill”, in Utilitas, Vol. II, No. 1, May/June 1990, pp. 12 - 39.

all of the work I am surveying – and much more – had already been done.<sup>3</sup> This essay seeks to throw some light on the process by which Bentham the censorial jurist became a utilitarian. It will do so by examining two complementary aspects of this process:

- 1) **The context of Bentham’s adoption of the principle of utility:** the early manuscripts have much to tell us about two of the major strategic considerations which induced Bentham to choose utility and the utility principle: first, the desire to bind his system of critical jurisprudence into a tight unity, a unity both in theory and in practice; and second, to express the superior consistency and practicality of that system when compared to the other systems Bentham saw as his rivals. Bentham chose utility for reasons that were to a significant degree contextual and strategic, not exclusively intrinsic.
- 2) **Bentham’s own accounts of the nature and value of the utility principle:** both its genealogy (as Bentham understood it) and its application to politics and morals are given their first (and in some respects clearest) statements in the early manuscripts.

**Context: how did a principle of utility ‘fit into’ Bentham’s larger project intellectually and politically?**

In all, Bentham produced a ‘comment’, a ‘fragment’ and an ‘introduction’ in the 1770s, but each of these was a mere ‘spin-off’, as we might now say, of the intended *magnum opus*. In my opinion, we shall never know exactly what the great book would have looked like. Its title, size and components changed rapidly and repeatedly in Bentham’s imagination as the focal points of his writing and thinking shifted depending on the strategy he adopted for making an impact on the worlds of letters, law and politics. After an extensive (though, it must be said, not exhaustive)

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<sup>3</sup> It may also be salutary to recall at this point that Bentham’s adherence to the term ‘utilitarian’ was not unconditional or unwavering. Between 1800 and 1810 he reached the conclusion that ‘felicitarian’ would in fact serve better than ‘utilitarian’ to direct one’s attention to the priority of human happiness as the goal of morals and legislation. FULL REFERENCE NEEDED.

search of Bentham's early manuscripts, I here suggest that there is one manuscript excerpt which indicates more fully than any other what The Elements of Critical Jurisprudence<sup>4</sup> would have looked like had Bentham ever finished preparing for it and actually generated it. The outline in question takes up only a single manuscript page:

**UCL Mss Box xcvi, p. 72:**

**“General Contents of the Work – as divided into Books.”**

[ed's note: “the Work” is not in fact named]

Preface: UCL xxvii, 1 – 12

Introduction: [a sample is at UCL vvxii, 13 – 23]

[i] Of Happiness, the End of Legislation

[ii] Laws, its Subject

[iii] Division of Laws

[Notes: UCL xcvi.74 headed “Introduction. Contents” gives ten ‘Heads’ roughly following this three-part plan;

UCL xcvi.74 (side ...?) gives 41 ‘Heads’, still roughly conforming to this plan;

UCL xcvi. 102-127 deal in part with the idea of **happiness**

UCL lxx (a). 1 – 35 headed “INTROD.” deal in part with the **principle of utility**

UCL lxx (a) 1 – 35 and lxxii. 1-2 deal with the **idea of a law**

UCL xcvi. 102-27 deal in part with the **division of laws**

Book I: Of Offences in General

1. Of Aestimation
2. Classification
3. Graduation
4. Tabulation
5. Exemptions from Criminality
6. Offences in Concatenation
7. Accomplices
8. Offences Radical and Excretitious
9. Offences Local & Universal
10. Offences Temporary and Perpetual
11. Definition of Offences

[Note: UCL xcvi.76, “Book I: Offences in General. Heads of the Book.” follows this plan closely]

Book II: Of Punishments in General

1. Their End.

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<sup>4</sup> Other titles, and other projects, were considered. But such evidence as I have seen suggests that all of these were – or at least could all be - subsumed under this one.

2. The right of prescribing Punishment
3. Their object.
4. Quantity.
5. Quality.
6. Species.

[Note” UCL xcvi.154 “Punishment. Contents of the Book.” Follows this plan closely.

Book III: Of Offences in Particular: The several sorts of offences commonly called Crimes, with the punishments to each.

1<sup>st</sup> Of Offences against persons certain determined individually, offences against individuals.

2<sup>dly</sup> Of Offences against persons certain determined by place, offences against the Neighbourhood.

3<sup>d</sup>. Offences against persons uncertain – against the State.

[Note: Little manuscript material for this Book has been found – unless the text headed “Crit. Jur. Crim.” is considered an analysis of ”crimes”. The three headings above are followed in UCLlxiii.101-4]

Book IV: Of the Composition of Laws – or the manner of describing Offences and Punishments

[Note: UCL xcvi.85 is headed ”COMPOSITION. Analysis of the Book” at the top of the page, and “COMPOSITION. Contents of the Book” at the bottom.

UCL xcvi.85-95 contain ‘Heads’ and ‘Brouillons’ concerning “Composition”]

Book V: Of the Promulgation of Laws

[Note: UCL xcvi.243 is headed “Promulg. Heads.” It yields 8 sketchy headings and several aphorisms such as “Composition fits the Law for men’s apprehensions. Promulgation conveys it to their organs.”]

Appendices:

1. Of the Obstacles to a reform in legislation.

[Note: The most interesting single body of untranscribed manuscript material related to the Elements is UCL xcvi.1 – 116. This very substantial body of writing (over 450 sheets) is almost all headed ”Obstacles”. xcvi.31 is headed “Advancement – Premiums”. “Obstacles” include the professional prejudices of Divines (16), Parliamentary privilege (23), party “interest’s” (sic – 24) and “indolence” (27ff).]

2. Of the Advancement of the Science.

This paper will attempt to throw some new light on the question of whether or not “The Work” is the Elements of Critical Jurisprudence, the project referred to in a

letter from Bentham to his father on October 1<sup>st</sup> 1776 as “my capital work”.<sup>5</sup>

Whether or not this is in fact a Table of Contents of the Elements, “the work” as outlined here is a broad and inclusive project, dealing with laws in general, laws in particular and the goal of happiness. Its introduction includes both an analysis of the nature of law and an account of utility and the principle of utility as the linch-pin connecting laws to their ultimate end. The preface and introduction to ‘the work’ also stake out strong positions for Bentham in relation to rival systems based on rhetorical, sentimental or natural ideas of justice as the object of morals and legislation. Its two very interesting appendices, especially the first, place Bentham’s critical jurisprudence emphatically in a political context in which established groups manufacture specious reasons for resisting the changes entailed in the introduction of a system of morals and legislation directly and invariably aimed at producing the greatest happiness of the greatest of those whose interest are in question in the political contests of the day.

The largest single identifiable body of manuscript material that could possibly give us an indication of the actual line-by-line text of the Elements comprises Bentham’s “Preparatory Principles Inserenda” manuscripts (over 650 sheets)<sup>6</sup> which contain explications of at least some of the principles on which the Elements was to be based, along with comments and reflections on issues, events, personalities and other ‘preparatory’ material. I have made use of them in my recent ‘archaeological’

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<sup>5</sup> See Long, D., Bentham on Liberty, U. of Toronto Press, 1977, p. 98.

<sup>6</sup> As indicated above in fn. 1, these pages were published (ed. D. Long & O. Harris) in the Summer of 2007 at the web site of the Bentham Project [the agency charged with the production of the definitive Collected Works] at University College London UK where the bulk of the Bentham manuscripts are housed: go to [www.ucl.ac.uk/bentham-project/online\\_pub/ppi\\_tit.htm](http://www.ucl.ac.uk/bentham-project/online_pub/ppi_tit.htm)



work as though they were meant to be inserted into the Elements. But there is no reason to suppose *ab origine* that they are connected to any particular incarnation of Bentham's moral and jurisprudential project.<sup>7</sup> There is, moreover, another possible explanation of their place in Bentham's enterprise. As I observed many years ago<sup>8</sup>, the project of completing a book on the theory of punishments competed for Bentham's attention in the 1770s. It may be that the exceptionally eloquent draft letter to Voltaire composed in November of 1776 was never sent because the "Theory of Punishments", a copy of which was to accompany it, was not at that date complete. In fact, however, there is little to be gained by attempting to prove conclusively that the self-contained nuggets of thought that make up the "P.P.I." material were intended exclusively for one or another of the embodiments with which Bentham toyed during this period of intellectual gestation. These kinds of manuscript materials are interesting and useful as indicators of the process by which Bentham worked out his ideas. Their relationship to his published works is complex and unalterably hypothetical, but nevertheless illuminating.

Why focus, then, on "the Work" or on the Elements of Critical Jurisprudence?

The table of contents shown above for "the Work" is unique, in my experience, among the book outlines which appear in the early manuscripts because of its exceptionally comprehensive scope and because it gives such substantial attention to happiness and the utility principle while at the same time covering offences, crimes, punishments and political opposition to radical change. It deals, in sum, with utility,

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<sup>7</sup> In fact the title "Preparatory *Principles Inserenda*" [my emph.] might suggest a connection to the imagined work "Principles of Legal Policy" discussed below in the context of the "Crit. Jur. Crim." Mss. rather than to the Elements.

<sup>8</sup> Bentham on Liberty, p. 98-9.

jurisprudence, morals and legislation in a balanced and interconnected way which enables us to see how Bentham understood that balance and interconnectedness. UCL mss. Box 96, sheet 74 contains what I believe to be an outline of the contents of the Introduction to the Elements.<sup>9</sup> Its first three headings situate Jurisprudence in the context of science in general, and in relation to morality and religion. The next four introduce and justify happiness and the utility principle as the ultimate criteria for evaluating the ends and the merits of laws in general. The 8<sup>th</sup> and 9<sup>th</sup> headings deal with the approaches to law which Bentham saw as the major alternatives and rivals to his own: divine law and natural law theories. The final (somewhat obscure) heading would seem to be aimed at subordinating the idea of distributive law to the more fundamental modalities of civil and penal law.

UCL 96, sheets 74: headed “Introduction. Contents. At top and “Introduction. {Contents of the } Heads”” at the bottom

	1
Encyclopedical Sketch. Station of Jurisprudence on the Map of Science.	
	2
Jurisprudence Speculative and Practical	
	3
Distinction between {Law} Jurisprudence, Morality and Religion	
	4
End of Law under its most general description, the maximum of Happiness in Society	
	5
Dimensions of Happiness and Unhappiness.	
	6
Principle of Utility vindicated	
	7
Principle of Utility the standard of merit in a Law.	
	8

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<sup>9</sup> It appears at least to be the introduction to “the Work”. To scrutinize this claim, the reader may compare the brief outline of the Introduction given above at p. 4 with this one.

Division of Law from its origin into Divine Natural Law of Nations & Municipal Law, reprobated.

9

Law – its different sense collated. (To trace errors to their source is to refute them)

10

Law – according to its 3fold operation [Marg.: “exerted in 3 ways”] upon the instruments of enjoyment and causes of happiness divided into Distributive

[ms. breaks off:

[Marg.: The function of Distribution subservient to the 2 others.]

[Marg.: Distribution is only a Function of Law. Each of the others is both a Function & an end.]

By piecing together about 40,000 words of manuscript material cross-referenced to these headings, I have gained at least a partial picture of Bentham’s thought on these heads. They are extensively referenced in what follows.

In the present paper I also make extensive use of another group of manuscript sheets (about 260 in total) entitled “Crit. Jur. Crim” [“Critical Jurisprudence Criminal”?]. These manuscripts comprise materials which **may have been** intended for inclusion in the Book “Of Offences in Particular: The several sorts of offences commonly called Crimes” in the Elements of Critical Jurisprudence [see above Table of Contents]. At page 172 of the “Crit. Jur. Crim.” mss.<sup>10</sup> we find a list of possible “title(s) of the work” which suggest something broader than a theory of punishments, something closer to the Elements:

“Principles of legal Policy.

Philosophy of Jurisprudence

Law as it ought to be

The Policy of Jurisprudence

Principles of legal Policy [sic]

Adapted to the Jurisprudence of all nations [nations

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<sup>10</sup> UCL Bentham Mss Box 140 page 14.

in general] but more particularly to the English.

Part the 1<sup>st</sup> Comprehending /Containing/ /Relating to/ so much of the Penal law as relates to Offences against Individuals.

With an Introduction in which is contained what is thought necessary to be premised [to the whole] concerning /relating to/ Law in General.<sup>11</sup>

If the characterization of “Part the 1<sup>st</sup>” and of the “Introduction” of this work are complete as written here, this is not a ‘re-packaging’ of the Elements but a hiving off of Book III:

Book III: Of Offences in Particular: The several sorts of offences commonly called Crimes, with the punishments to each.

1<sup>st</sup> Of Offences against persons certain determined individually, offences against individuals.

2<sup>dly</sup> Of Offences against persons certain determined by place, offences against the Neighbourhood.

3<sup>d</sup>. Offences against persons uncertain – against the State.

One would expect a work on “Critical Jurisprudence Criminal” to cover just such ground. Moreover, at page 182 of the “Crit. Jur. Crim.” mss. we find a “Plan” of a work (a “Book”?) comprising nine chapters, each focusing on a different class of offences:

[Marginal heading “Plan.”]

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<sup>11</sup> A third group of early Bentham manuscripts headed “”Key” (83 sheets) is referred to in the pages of “Crit. Jur. Crim.”<sup>11</sup> as a “chapter” to be entitled “Exposition of certain fundamental terms of Universal Jurisprudence”. There is no apparent place for such a chapter in the Table of Contents of “the work” as outlined above. Given that the envisioned work on “Principles of Legal Policy” was to be “adapted to the Jurisprudence of all nations”, an exposition of some of the fundamental terms of ‘Universal Jurisprudence’ could have a place there. In my view, however, the only reasonable conclusion following from a reading of the “Key” manuscripts” is that portions of their contents could be inserted in any of the several locations where Bentham discussed laws in general (see for example Appendix B to Of Laws in General in the Collected Works).

Main text:

“Off.	Ch.	1	Of Offences against internal Government
	Ch.	2	Of Offences against the National Interest to the profit of Rival Nations. Tending to diminish the [relative] force of the Nation relatively to that of rival nations
	Ch.	3	Of Offences endangering the National Peace. viz:
against the Law			Of Nations.
	Ch.	4	Of Offences against Justice [wherein of usurpations by Judges]
	Ch.	5	Of Offences against the external National Force
/Strength/.			
	Ch.	6	Of Offences against the Revenue.
	Ch.	7	Of Offences against Trade. i.e.: done in impedece of
the ?view?			the Public has in promoting Trade: viz: Accumulation
of Property.			
	Ch.	8	Of Offences against Morality. V. Nuisances.
	Ch.	9	Of Offences against Religion. Burglary 1 case of.
Battery one case			of Praemunire cases1, 2,

A crude analysis of the marginal headings which delineate the numerous and sometimes fragmentary textual sections of Crit. Jur. Crim. reveals that the most common marginal headings include the terms “Crimes”, “Offences”, “Punishments”, “Theft” and “Property” and “Sanctions”. When these topics are separated out, little is left unclassified. There is one further grouping of heads, however, and it is the one which offers the best material for my present purposes. These headings share the term “Prefat.” Internal evidence suggests that this is not an employment of the French term for a “Preface”, but an abbreviation of “Prefatoria” – Bentham collected in these sections ‘opening statements’ so to speak for his case for his new jurisprudence. In “Prefat.” material he rehearsed apologies for the new

vocabulary he would have to employ for the sake of clarity (UCL 140, f. 12), addressed the issue of the “unpopularity of new truths” (UCL 69, f. 1), inveighed against the “Abuse of sentimental language” (UCL 69, f. 12) and “disclaimed” both the pursuit of “popularity” and the use of “ornament” (UCL 69, f. 38). A taste of the nature and quality of these textual fragments may be gleaned from a passage at Crit. Jur. Crim. 360 [UCL Box 69, f. 38] accompanied by the notation “To come in at the end of Chap. 1 – On the Principle of utility.”:

In founding a system of Jurisprudence upon the principle of utility I do no more than found it upon a set of rules [a principle the dictates of] which men are already in most cases disposed to follow, and which they can in no case give any reason for not following. In the principle itself there is nothing new: no more can there be in any system founded on that principle, except the degree of consistency with which it is [endeavoured to pursue it] ... adhered to. Nevertheless we shall hardly have travelled far under this guidance without coming to conclusions, which to most men will appear new, and to some men, notwithstanding every thing that can be said ... will probably appear paradoxical and insupportable. For of all qualities in men’s conduct and opinions, perhaps the rarest is consistency.

At “Crit. Jur. Crim.” p. 346 (UCL Box 69, f. 37) Bentham took up this theme again, arguing that a consistent adherence to the utility principle would put the adherent in an “unassailable position” in relation to hostile assertions of the “dangerous”-ness of the principle of utility:

[Marg.: “Prefat: Princ. of Utility unassailable”]  
Those who think they can have any thing to urge against the principle of utility will find upon trial like Archimedes that in order to move this earth they want another earth to stand on. While they press against it with one hand they will find they support it with the other. This is the case with those who think they have found a certain danger in resting every thing upon the foundations of utility: a certain inexpedience in resting every thing on expediency. This is as much as

to say [they are afraid] there is a danger that it may [ed.: be?] inexpedient upon the whole to do that which is expedient upon the whole.

Such a notion can only arise from the giving at different times different senses to the term utility, principle of utility: at one time a narrower, at another a more extensive one.

[Marg.: "But every argument which attacks the principle of utility upon a /under the/ notion of it's being dangerous will be found to involve an insuperable contradiction."]

We can get our bearings amid the confusing reshuffling and 'repackaging' of the components of Bentham's system of thought which we find in the early manuscripts if we bear in mind the exact meaning of one of the more frequently quoted passages from those very pages:

'The present work **as well as every other work of mine that has been or will be published on the subject of legislation or any other branch of moral science** is an attempt to extend the experimental method of reasoning from the physical branch<sup>12</sup> to the moral. What Bacon was to the physical world, Helvetius was to the moral. The moral world has therefore had its Bacon, but its Newton is yet to come,' UC clvii.32<sup>13</sup>

Bentham was, in my opinion, true to this claim throughout his career. His understanding of 'the experimental method' drew heavily upon the ambitious and transformative impetus of Bacon, not the scepticism which coloured Hume's account of experimental thinking. And Bentham's Neo-Newtonianism was avowedly inspired by that of Helvetius, who in De L'Esprit wrote as follows:

'If the physical universe be subject to the laws of motion, the moral universe is equally so to those of interest.'<sup>14</sup>

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<sup>12</sup>Ms. alternatives: 'department' and 'world'.

<sup>13</sup>I pointed out in my 'Censorial Jurisprudence and Political Radicalism', in The Bentham Newsletter June 1988, No. 12 esp. at p. 8-9 that Helvetius was explicitly **Newtonian** in his claims.

<sup>14</sup>Claude Adrien Helvetius, De L'Esprit, or Essays on the Mind and its Several Faculties, New York, 1810, reprinted 1970; Essay II, Chapter ii, p. 42.

Bentham's 'project', however entitled and generated in whatever proximate context, always bore the neo-Newtonian and Helvetian characteristics suggested here. Bentham was always trying to link philosophical and legal analysis in a single enterprise. The decisive advantage for him of utility as a principle was that, as developed by Helvetius and Beccaria (and as Bentham seems to have **thought** it was developed in Hume), it would do just this job. The Elements of Critical Jurisprudence was Bentham's first, and perhaps his clearest and best, attempt to explain how 'law' in a broad Newtonian sense and 'moral science' as understood by Helvetius might be conjoined.

On a manuscript page headed "Crit. Jurisp. 65" [UCL Box 69, f. 17] beside the marginal heading "Prefat. One Principle Should Serve for all", he wrote:

The way in which /means by which/ morality and censorial Jurisprudence like other sciences are brought /conducted/ [towards] perfection is the reducing the number of its principles to a few. The fewer principles that are independent of one another a science can be reduced to, the nearer is that science advanced to its perfection. The principles which in morality and censorial Jurisprudence have hitherto been appealed to are many and unconnected. I know not who has undertaken so much as to number them.

Happily this is now the case no longer. Beccaria has with an applause that in this country seems to be universal, Beccaria has established for censorial Jurisprudence, as Helvetius for morality in general as an all-commanding principle the principle of utility. To this then all other principles that can be proposed, if legitimate are subordinate /stand in subordination/: any one which cannot is to be cast out as spurious.

At age 157 of "Crit. Jur. Crim." He resumed this theme [Marg.: "Prefat. Princ. Of Utility"], this time giving clear priority to Helvetius over Beccaria as the seminal author:



Honoured for ever [above all men] be the man who first had discernment and courage to set up the principle of utility as the sole and universal standard of right & wrong in matters of [Government] Legislation. This man was Helvetius: at least I know of none [who advanced such a position] before him. Helvetius in the most original and instructive work by far that has ever yet appeared in the Moral branch of Science gave it the most extensive application applying it as well to Morals as to Legislation. After him the Marquis Beccaria treating particularly of Legislation, applied it particularly to that subject, but without mentioning anything of Helvetius.

[CJC 158 UCL 159, 270] In the work of Helvetius, along with the admirable principle just mentioned, are blended some singular and perhaps untenable opinions /positions/. These opinions which have no necessary connexion whatever with the above principle seem to have given an invincible disgust to many classes of men, particularly to those of the religious class: and seem to have co-operated pretty powerfully with a cause of a very different but more irresistible nature in preventing the work from gaining /acquiring/ much popularity in this country.

These together with others which would be ?as due recommendations? To it in this free country, procured it as might have been expected the censure of the ruling powers in the country in which it made it's first appearance /which gave it birth/. This circumstance could not but be a conclusive reason with a man of prudence in M. Beccaria's situation not to cite it.

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Helvetius, Bentham is saying here, has made a great discovery – an act, we know, which Bentham saw as a stroke of genius. Beccaria, disappointingly in Bentham's view, has not acknowledged him. In the same passage Bentham also professed shock and surprise that Joseph Priestley had failed to acknowledge Helvetius's brilliance:

In the eyes of a philosopher so zealous in behalf of the interest of mankind a principle of this importance in which is contained implicitly every /political/ truth in Legislation by which society can be the better,

might have atoned [CJC 159 UCL 159, 270] one should have hoped, for /defaced one should have hoped the demerits of/ almost any errors which a man could fall into.

Clearly Bentham saw before him an opportunity to embrace a radically new set of ideas knitted together by a single all-comprehending principle and perhaps to make a name for himself by boldly going where Beccaria, Priestley and Voltaire had not, for one reason or another, gone before him. Thus when Bentham wrote to Jeremiah Bentham in 1776 that he was now 'at work upon my capital work: I mean the Critical Elements of Jurisprudence'<sup>15</sup>, it was not only for the purpose of coaxing continued financial support out of his father that he described the work in this way. Earlier (1774-5), in the chapter of the Comment on the Commentaries devoted to natural law, Bentham had contrasted with Blackstonian law his own notion of 'Critical Law or Critical Jurisprudence'<sup>16</sup>. In the process of preparing the Comment for publication, he also prepared an 'Advertisement' which read, in part, as follows:

Upon the Anvil  
By a hand concerned in the present publication  
Elements of Critical Jurisprudence<sup>17</sup>

## **II. Jurisprudence, Government and Utility:**

Bentham used his "Preparatory Principles' manuscripts as a sort of sourcebook of ideas, definitions, illustrations and and rhetorical *bon mots* for use in his campaign to promote his views at the expense of Blackstone and others. In those pages he

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<sup>15</sup>CW Correspondence, I, #186, J. B. to Jeremiah Bentham, 1 October 1776, pp. 358-9.

<sup>16</sup> See CW Burns, J.H. & H.L.A. Hart (eds.), A Comment on the Commentaries and a Fragment on Government, London, Athlone Press, 1977, p. 20.

<sup>17</sup>Ibid, editors' introduction, p. xlvi.

explained clearly and emphatically the relationship between the 'science' of jurisprudence and the 'art' or 'business' of government. It was in his view a relationship so close as to be symbiotic. Government was not only the locus but the original source (as opposed to 'Nature' or 'the Divine') of law:

The term Law ... was invented it should seem to denote a general Commend of Public Government ... [which] was observed to produce a certain degree of uniformity among the human acts that were the objects of it. [UC lxix, p. 142 "PPI"]

By taking this position Bentham meant to undermine the positions (as he saw them) of both. Blackstonian Whiggism and Natural Jurisprudence. The validity of Law was not rooted in a natural or divine order of things, but simply in the basic reciprocal political relations of commend and obedience. Equity and justice were for Bentham the offspring, not the parents, of the habits of political conduct exhibited by rulers and ruled. The appropriate stance of jurisprudence in relation to these basic power relations was a critical one, not an apologetic one. Thus his pejorative label for the jurisprudence of his opponents was "expository" or "conjectural jurisprudence", and he denounced it as a basis for lawless government:

There are in the world two ways of carrying on the business of Government. The one is that of governing by Laws. The other is that of governing without laws. When the business is carried on without Laws, it is either by particular transient commands, or by punishment: by punishment alone, without any commands general or particular to announce it. Of these three methods, the two first may be comprehended under the common denomination of enuntiative; for under [both] ... the mode of conduct which it is the will of the governing power to have observed is announced a time before a man is punished for not observing it. The last may be indicated by the epithet silent; For by this nothing is in words announced ... The process in the first two is, first a word, then a blow: in the last it is pure blows without a word.... [UC lxix, p.195, 'PPI']

On the three objects thus distinguished shall we now stamp their current appellations? The first two are Statute; the last is Common Law - Lawyers, behold your idol." [Ib.]

The only genuine law was thus Statute Law: civic life in a common law-based community was

but a series of 'blows without a word'. The only legitimate jurisprudence, by extension, was the jurisprudence of Statute Law. Bentham defined Jurisprudence generically as "the science of / art of knowing / what has actually been done in the way of internal Government". [Ib.] The "Jurisprudence of Common Law" was, predictably, characterized as "the art of knowing what has been done in the way of Government according to the silent method", while that of Statute Law expounded government by the "enuntiative method". [Ib.] Common Law jurisprudence could only enable its practitioners, on the basis of past cases, to "conjecture what will probably be done in future ones supposed similar". In Statute Law jurisprudence the publicly declared intent of government proceeding by the enuntiative method could be known with "certainty". [Ib.] But all of this was, as Bentham put it, mere "words and blows". The "censorial" element essential to a true science of jurisprudence was entirely absent. A *politically* critical jurisprudence was what was needed, but none as yet existed:

A Science which might be conceived is, the art of knowing what ought to be done in the way of internal government. Now the fact is no such science as yet existeth. No wonder therefore there should be no name for it ... no such book hath as yet appeared as professes to contain a body of any such science, or any regular branch of such a body. ... Bodies of Jurisprudence we have several: For our own state and for most others (that are tolerably civilized). Body of this art that I am speaking of, we have none. The science (the art, it matters not which) is not born. Montesquieu and Beccaria have made large advances

toward it's [sic] production. - Our Author [i.e. Blackstone] has done what he could to prevent it's [sic] birth ....

What name shall we find for it? Shall we call it the Art of Legislation? Shall we call it critical Jurisprudence? Shall we call it the Science of Internal Politics? Shall we call it the science of Legal Politics? Shall we call it the science of Jurisprudential Politics? [See "PPI" sections 432 & 438, on UC lxix pp. 195 & 197]

The completion of such a work about politics and law, Bentham thought, would presuppose the completion of a work on the 'Metaphysics of Jurisprudence', a 'Novum Organon Juris', a 'Key to the Nomenclature of Universal Jurisprudence'.<sup>18</sup> At a more practical level, there would have to be a work on the 'Policy of [Penal] Jurisprudence' (UCIxi.13) or more broadly the 'Principles of Legal Policy'.<sup>19</sup> All of these marginally differing formulations combine the same basic elements: on one hand, the work must be 'principled' - it must be philosophical; on the other hand, it must deal with practice: it must provide a plausible and practical approach to law reform and a guide to policy. But all of this remains hypothetical: a matter of intention, not of record. Did Bentham never succeed in putting on paper any sustained exposition of the nature of his new moral and political science?

It is widely assumed, as was observed earlier in this essay, that scholars in search of texts which articulate the essential features of Bentham's critical jurisprudence must content themselves with reading the first few pages of IPML. Yet nowhere in Bentham's works, including in those famous opening pages, will scholars find a clearer, more reflective, crisper exposition of Bentham's intellectual enterprise

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<sup>18</sup>UCIxi.214, 'PPI' #506.

<sup>19</sup>UCIxi.14 and see Bentham's draft letter to Voltaire in CW Correspondence, I, 367.

than is provided in the opening pages of the Elements. A direct look at the text of the 'preface' and the 'introduction' to the Elements will provide grounds for this claim.

'Beccaria ... may be styled the father of *Censorial Jurisprudence*... Before Montesquieu all was unmixed barbarism. Grotius and Puffendorf were to Censorial Jurisprudence what the Schoolmen were to Natural Philosophy.'<sup>20</sup>

The text of the preface and introduction to the Elements of Critical Jurisprudence make it perfectly clear that Bentham saw his system of critical jurisprudence as an unique and harmonious marriage of complementary conceptions of philosophy and law. In the Comment on the Commentaries and the Fragment on Government, he had tried to give some indications of the superiority of this system over the more rhetorical and (Whiggishly) historical approach to law of Sir William Blackstone. But he had closed his preface to the Fragment by reminding the reader that 'the chief employment of this Essay' [and he might as well have included the Comment] was 'to *overthrow*'. It had, he wrote, done little in the way of '*setting up*'.<sup>21</sup> Moreover, Blackstone was not the only antagonist he had in mind as he worked on his own system. He also rejected the philosophy of the Scottish moral sense and common sense schools, dismissing them en masse as 'a host of Scotch Sophists' whose moral philosophy amounted to a form of 'sentimentalism'.<sup>22</sup> This repudiation was conveyed

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<sup>20</sup>Fragment on Government, CW edition ed. J.H. Burns & H.L.A. Hart, London, Athlone Press, 1977, 'preface', p. 403 fn. g.

<sup>21</sup>Fragment, preface, CW edition ed. Burns & Hart, p. 421.

<sup>22</sup>See my "'Utility" and the "Utility Principle": Hume, Smith, Bentham, Mill', in Utilitas, Vol. 2, No. 1, May 1990, pp. 16, 17.

in part in the opening chapters of IPML<sup>23</sup>; it was also to be quite noticeable in the pages of the later Deontology.<sup>24</sup> But when Blackstone's Jurisprudence and Scottish Moral Philosophy had in Bentham eyes been discredited, there still remained one extremely influential school of philosophy and jurisprudence with which he knew he must deal. This was of course the school of Natural Jurisprudence associated with the names of Grotius and Pufendorf.

In a draft letter to Voltaire of November 1776, Bentham represented the fathers of natural jurisprudence as forgotten men: 'The repose of Grotius and Puffendorf and Barbeyrac and Burlamaqui I would never wish to see disturbed.'<sup>25</sup> But in fact he knew better than this. He saw the influence of natural jurisprudence, for example, on Blackstone's concept of the Law of Nature, putting the following words in Blackstone's mouth in the Comment:

'This Law of Nature ... (or, to give it some signification he should have said, 'these conceits of *Grotius, Puffendorf, Woolaston, Burlamaqui* and *my own*') 'being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other'.<sup>26</sup>

Aside from an isolated reference to Pufendorf's Of the Law of Nature and Nations in Of Laws in General - a reference which shows that Bentham had indeed read Pufendorf's work<sup>27</sup> - the published works show Bentham dismissing natural

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<sup>23</sup>See IPML, ed. Burns & Hart, Methuen, 1982, Chap. II, 'Of Principles Adverse to that of Utility', Para. 14 & notes.

<sup>24</sup>For examples, see *Ibid*, pp. 15-8.

<sup>25</sup>CW Correspondence, Vol. I, ed. T.L.S. Sprigge, #192, p. 367.

<sup>26</sup>Comment, CW Edition ed. Burns & Hart, I.2, p. 20.

<sup>27</sup>'Whosoever draweth blood in the streets shall be severely punished', was 'given as a law of Bologna, by Puffendorf, B. V.Ch. 12 Sec'n 8' [De Jure Naturae et

jurisprudence without engaging in any substantial discussion of its arguments. But in the preface and introduction to the Elements, natural jurisprudence is the primary target of Bentham's polemics - and this despite the fact that Bentham's own enterprise as outlined in the Elements bore some surprising similarities to theirs.

When Samuel Pufendorf set out to provide a concise guide to the principles of natural jurisprudence in On the Duty of Man and Citizen (1673), he defined the nature and scope of natural jurisprudence by 'demarcat[ing] the study and practice of natural law from civil jurisprudence and the institution of civil law on one side and from moral theology and divine law on the other'.<sup>28</sup> In so doing, James Tully tells us, Pufendorf made natural jurisprudence a 'field of study ... independent of the disciplines of legal studies and theology and possess[ing] its own specific vocabulary, organized around Pufendorf's original concept of sociality (*socialitas*) and its cognates'.<sup>29</sup> Is it simply a coincidence that in the opening paragraphs of the preface to the Elements, Bentham situates his 'master science' between the intellectual poles of 'Moral philosophy above and ... Practical Law<sup>30</sup> beneath'?

'The great Bacon, in a passage of his works, a part of which stands as a motto in my title page, takes notice of the uncultivated state of that important but hitherto nameless master-science which I have here ventured to speak of under the new appellation of Critical Jurisprudence. The field of it lies on the declivity of a mountain between two busy spots, both in a high state of

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Gentium (1672)]. See CW Of Laws in General, ed. H.L.A. Hart, Athlone Press, 1970, chap. 14, para. 7, notes d & 1, p. 161.

<sup>28</sup>Tully, J. (ed.), Pufendorf: On the Duty of Man and Citizen, Cambridge, 1991, ed's introduction, p. xxii.

<sup>29</sup>Ibid. I take Tully's spelling of Pufendorf's name to be correct, and Bentham's (with three f's) to be incorrect.

<sup>30</sup>Ms. alt. deleted 'Jurisprudence'.



population if not of culture, that of Moral Philosophy above and that of Practical [Jurisprudence] Law beneath. Between these two lies a dreary waste: trackless except where marked by the short and irregular excursions of the inhabitants of those two bounding regions. It is this waste I propose to put in a state of culture ....<sup>31</sup>

Bentham uses Bacon's words to characterize the practitioner of critical jurisprudence neither as a pure philosopher nor as a simple lawyer, but instead as 'statesman' ['law giver' might have been more appropriate]:

'...all those which have written of laws, have written either as philosophers or as lawyers, and not as Statesmen. As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light because they are so high. For the Lawyers, they write according to the states where they live, what is received Law, and not what ought to be law: for the wisdom of a law-maker is one, and of a lawyer is another.<sup>32</sup>

Philosophers and Lawyers, Bentham went on to say, saw their professions as separated by a 'great gulph': the lawyer immersed in 'the ditch [ms. orig. 'slimy /muddy/ ocean'] of his particulars' and 'the Philosopher delighted and captivated by his generals.' The 'first architect' to attempt to bridge this 'gulph' was Montesquieu:

But his structure neither having any solid foundation on the shore of Philosophy nor reaching hence to that of Law, nor being built of any other than light & crumbling materials, is unable, as men begin already to perceive and to acknowledge, to stem the tide of time.<sup>33</sup>

Bentham saw philosophy [his own of course excepted] as 'for want of more substantial stuff spinning with Cob-webs' while Jurisprudence on the other hand was engaged in 'piling up upon one another a huge heap of odds and ends for want of

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<sup>31</sup>UC xxvii.12; Footer: 'PREFACE. Beginning.'

<sup>32</sup>Ibid. Bentham gives this reference: 'See p. V and VI Advancem't of Learn'g B. II. Works V.II p. 539 Ed. Mellet. Folio.'

<sup>33</sup>UC xxvii.6 Headed 'Prefat. [V]'

spinning.' '[U]nassisted Jurisprudence', he asserted, 'has done her part - she has furnished Her assortment of raw materials: an assortment which, to regard the quantity alone, nobody can well think less than competent.'<sup>34</sup> Like Pufendorf, Bentham sought to position a new moral science between the extremes of pure philosophy on one hand and legal practice on the other. But where Pufendorf's natural jurisprudence was meant to co-exist with existing theological morals and legal conventions, Bentham's critical jurisprudence was clearly meant to transform and ultimately supersede both. Like Pufendorf, Bentham felt it essential to identify a new and distinctive principle of social action as the focal point for his system. Pufendorf chose *socialitas*. Bentham chose utility.

Was Bentham's paired rejection, in the pages of PPI, of the 'law of nations' and the 'law of nature' not a critical response to the title of Pufendorf's great and influential work De Jure Naturae et Gentium Libri Octo (1672)?<sup>35</sup> A few pages farther along in the PPI manuscripts Bentham resumed his dismissive comments on the Law of Nature, observing that no rational argument can 'prevail on some men to throw away this rattle'. Natural Law doctrine is 'soothing to ... indolence' and 'flattering to ... pride'. It is 'a sort of conjuring trick, by which any man that pleases may turn himself into a Legislator: and opposition to his notions, into an act of rebellion.' To this way of thinking, 'every man has the sceptre of Nature in his own keeping. The law then that grieves him becomes illegal. For inexpedient will not

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<sup>34</sup>UC xxvii.7 Headed 'Prefat. [VI]'.

<sup>35</sup>See 'PPI' headings 369 - 380 in UC lxix.122-3. Note that Bentham focussed, as he was to do in the introduction to the Elements, on how '**expectation** may be generated by such an usage' [Uc lxix.122 Heading 374].

serve him. Inexpedient is too cold a term.' The comes an attack on Grotius and Puffendorf:

'As good a way to the full as this is the old sober method of Grotius and Puffendorf who without talking either of a sense or of an understanding, without form or ceremony, without justification or apology, without troubling themselves about privilege or patent, but with all the composure and self-satisfaction imaginable, make as many Laws of Nature at a minute's warning as they have occasion for.'<sup>36</sup>

Bentham continues the discussion in this vein at some length, concluding that the idea of a Law of Nature is 'mischievous' and 'not reconcilable to utility'. Thus

'I can not help concluding upon the whole, that till the Law of Nature is erased from the vocabulary of Jurisprudence, and banished to the land of second intentions, and quiddities and quoddities and substantial forms, it will be in vain to expect precision or perspicuity among the first principles of the science.'<sup>37</sup>

The last of the linked series of attacks on natural jurisprudence found in the PPI manuscripts prepares the way for the discussion of 'Utility VS. Natural Justice' that figures prominently in the introduction to the Elements. Just as Bentham had held, in his disagreement with the Scots, that their philosophy was too subjective and abstract to provide rigorous and testable standards of behaviour<sup>38</sup>, he now held vis a vis natural jurisprudence that its principle of sociality and its use of the fiction of a state of nature made it useless as a source of principles for a 'master-science' of legislation and morals:

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<sup>36</sup>UC lxix.124, 'PPI' Headings 386-8. Marginal headings: 'Law of Nature - Obstinate Attachment to.'; '--- Subserviency to impatient tempers'; 'Grotius & Puffendorf etc.'

<sup>37</sup>UC lxix.124-5, PPI Headings 389-94; marginal [inter alia] 'Law of Nature - Mischief of - not reconcileable to Utility'.

<sup>38</sup>See my "'Utility" and the "Utility Principle" in Utilitas, II, No.1, May 1990, pp. 15, 17.

'Grotius and Puffendorf, and Heineccius and Vattel[,] Burlamaqui and the many others who have hitherto professed to give treatises on Natural Law, or on Universal Law, or on Public Law, not having settled with themselves which of ...several objects they had in view, have written large books that have contained everything and nothing. There they tell us what men have done or do or would do in an ungoverned state [ms. orig.: 'the state of nature']; next of something men ought to do, as they are pleased to say, without telling us why or wherefore; then of something men do actually do in all governed states: then of something men do in the governed state in which the writer lives; then of something they ought to do in all states; then of something they ought to do in that particular state. No notice perhaps given all this while, or but seldom given of the transition from one of these very different objects to another.'<sup>39</sup>

The source of difficulties for natural jurisprudence in this context, Bentham believed, was the plasticity, the malleability of its central principle of sociality (in combination with the illusory nature of the fiction of a 'state of nature'). The answer to all such difficulties lay in a careful working out of Bentham's alternative to that principle: the principle of utility. In the introduction to the Elements, Bentham undertook the longest, most reflective, the clearest and perhaps the most persuasive analysis of pleasures, pains, happiness, utility and the principle of utility that I have found in any one location in his writings, published or unpublished. I think that I have shown why and to what end he did so. It is now time to look at some of the key arguments he employed in 'setting up' his system now that the work of 'overthrowing' was complete.<sup>40</sup>

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<sup>39</sup>UC kxix.127, PPI heading #414, marginal heading 'Grotius etc. their object "unsettled".'

<sup>40</sup>Here I echo the language Bentham had used in his Comment on Blackstone: see above at fn. 12.

### **III. The Jurisprudence of Happiness: Politics, Utility and Justice in the Elements:**

In the ‘Plan of the Work’ shown above, Bentham divided its introduction into three sections: “[i] Of Happiness, the end of Legislation; [ii] Laws, its Subject; [iii] Division of Laws”. The 40,000 words of text which I have so far recovered from their scattered locations in Bentham’s manuscripts include discrete parcels of material covering each of these headings. A very high proportion of this material is in some degree original: i.e. either it addresses points with which Bentham scholars are already familiar in novel ways, or it raises points of evaluation or methodology which Bentham was not known to have addressed at all on the basis of his published works. There is a great deal here that is both intrinsically interesting and historically and analytically important. But time and space do not permit anything like a full and contextualized discussion of these materials in this essay.

I shall begin with a few observations about the nature of laws ([ii]) and the division of laws into civil and penal ([iii]), reserving one special feature of section [iii] for additional comment farther along in my argument.<sup>41</sup> It would require a complex feat of collation to clarify the relationship between the treatment of laws in this Introduction and their analysis in the work eventually (1971) published as Of Laws in General under the editorship of H. L. A. Hart.<sup>42</sup> It is noteworthy, however, that the division of laws into civil and penal was the problematic topic which caused

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<sup>41</sup> Specific locations in the Bentham manuscripts for quoted material are given in the following form: U[niversity] C[ollege] lxx (a) [Box 70(a)] .3 [page 3].

<sup>42</sup> UC Mss Box lxx (a), page 56, dealing with the requirements for a complete analysis of a law, was originally entitled “Of Law in general”, but that title was deleted and the page was identified instead as being part of the Introduction [Head 23 Page 21] to the Elements of Critical Jurisprudence.

Bentham to delay the publication of Of Laws in General's better known sister volume, An Introduction to the Principles of Morals and Legislation (hereinafter IPML), a work which was in print by 1780 but was finally published only in 1789.<sup>43</sup> The civil – penal distinction was so problematic in large part because Bentham found that he could not get to the bottom of it without settling the larger question of the relationship between the co-dependent realms of legislation and ethics. The long final chapter of IPML, 'Of the Limits of the Penal Branch of Jurisprudence', consists of two sections and a "Concluding Note". It is the chapter in which the methodological tidiness of IPML begins to unravel – in which it appears that Bentham realized that he could not do within the covers of this Introduction what he had planned to do so carefully in the Elements as a much more extended work. Some of the identifiable connections between the two texts throw new light on this problem.

The "Concluding Note" to which I have referred attempts to fill the gap in the argument of IPML left by the absence, in its early chapters, of a discussion of the nature of Law. Lamenting the "deplorable state of the science of legislation ... in respect of its form"<sup>44</sup>, it calls for a new (and of course scientific) approach to philosophy of law, and an aggressive movement toward the codification of civil, penal and constitutional law: thus it gestures in the direction of Of Laws in General and the various codification projects domestic and international in which Bentham engaged decade after decade until he died, as he put it, still "codifying like any dragon". The second section of the cumbersome concluding chapter of IPML is

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<sup>43</sup> Bentham, Jeremy, An Introduction to the Principles of Morals and Legislation, ed. J. H. Burns and H. L. A. Hart, Methuen, London and New York, 1982; Eds' Introduction, p. xxxiii.

<sup>44</sup> IML, ed. Burns & Hart, p. 308.

entitled "Jurisprudence, its Branches". Its structure is symptomatic of Bentham's fondness for what he called "exhaustive bifurcation". The section is a sequence of pairings: "ancient" and "living" jurisprudence, "'statutory" and "customary", "international" (Bentham is said by the OED to have coined this term in English in Essays penned in 1782) and "internal"; "internal" is in turn divided into "national" and "provincial, local or particular". "Local" jurisprudence in a different sense is contrasted with "Universal". But the chapter begins with Bentham's most important distinction: the one between "expository" and "censorial" [or critical] jurisprudence.<sup>45</sup> An Introduction to the Principles of Morals and Legislation was, in fact, an incomplete introduction to the principles of Critical Jurisprudence. Section I of IPML's closing chapter is concerned with the issue discussed above, one that arose for Bentham as part of the construction of a scientific system of critical jurisprudence: the matter of the "Limits between private ethics and the art of legislation".

Bentham began the first section of the Introduction to the Elements of Critical Jurisprudence [see UC xxvii, p. 15] with an "Encyclopaedical Sketch" of the relationship of a long list of sciences to human happiness. The last two sciences in that list are legislation and ethics. He begins by asserting that "[h]appiness" is the end of every human action, of every human thought, [sic] how can it, or why ought [sic] to be otherwise?' Moreover, "To Happiness, or Well-being, Being is in the 1st place necessary". He then provides a one-paragraph statement of how each of the following contributes to happiness or well-being: husbandry, medicine, Architecture, "the miscellaneous tribe of Mechanical Arts", Natural History, Natural Philosophy

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<sup>45</sup> IPML, ed. Burns & Hart, p. xxx.

(including ‘Chymistry’), Geography, Navigation, Astronomy, Mathematics, and ‘Musick’. He completes this sketch of broad Baconian intellectual context of his science of legislation by inviting the reader to join the dots, as it were:

I have done, the imagination of the reader may compleat the draught – Poetry, Painting in all their various branches History, Grammar, Logic Metaphysics, all the remaining arts or sciences which have or ever will have a name, may in the like manner be connected ... with Happiness their ground work, and with each other. [UC xxvii, 15]

“What then”, he next asks [UC xxvii, p. 16<sup>46</sup>], “is the Province of Legislation? In what way does it lend its aid to happiness? What is its aspect to the other arts?” And beside the marginal heading “LEGISLATION” [caps Bentham’s] he writes:

Legislation contributes to Happiness by securing men [sic] in their possession, directing them to their use and disposing them to the accumulation of the instruments of enjoyment, fruits of all other arts, as well as of those which lie so near at hand as not to stand in need of it. And this is done [by] bringing men to concur in a conformity to these purposes by means of specific allotments of pain and pleasure (of pain to those who impede the above purposes or of pleasure to those who forward them) to accrue in virtue of the will of particular persons appropriated or suffered for the purpose. [Ib.]

Legislation may hold the penultimate position in this catalogue of the hedonistic arts, but the final position is allocated to Ethics, which is characterized as legislation’s complementary sister – a strange formal echoing of Aristotle’s classification of politics and ethics as symbiotic human sciences in Book V of the Nichomachean

#### Ethics:

Ethics as it respects a man’s conduct to others contributes to happiness by teaching how to demean himself in the use of the several instruments of enjoyment, as not to impede but forward the enjoyments of those around him, in the instance as well ... of such actions of his as Legislation can reach, as of those it cannot: And this it does, bringing him to act in conformity to its purposes, by pointing out

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<sup>46</sup> “Elements of Critical Jurisprudence – Introduction – Head 1 page 10.



the copious but unliquidated allotments of pain & pleasure likely to accrue to him from the spontaneous dispositions of men at large according as he pursues this or that plan of conduct. [Ib.]

The second of the three sections which make up the introduction to the Elements was concerned with the nature of law, and in many respects reads like a ‘dry run’ for the writing of Of Laws in General. But of course one section of an introduction to a large and comprehensive work on law, politics and ethics is not as self-contained an entity as a stand-alone volume on the subject of Law. Bentham begins the section by connecting the philosophical analysis of Law with his extended analysis of Happiness in the preceding section: “happiness is man’s end: Law is an instrument he has for compassing it [UC lxx (a) p. 2]. The ensuing taxonomy of law focuses on three aspects: ‘origination’, ‘matter’ and ‘form’ [Ibid p.3]. The different ‘senses’ of Law are examined through the unusual device of a fictional dialogue on property law between two Egyptians, Chemmis and Philonomus [Ib. p. 9-10]. The parts of a law, the distinction between ‘Substantive’ and ‘Adjective’ laws [UC lxiii p. 51-2] and the idea of a ‘complete’ Law [UC lxx (a) p. 8] are all briefly discussed. The long passage in which Bentham lays out in exhaustive arithmetical detail a calculation of the net pleasure or pain produced by a law as a basis for the assessment of its ‘expediency’ [UC lxix, p. 98-101] echoes the long passages in section [i] of the introduction to the Elements in which he examines the qualities and values of pleasures and pains [and asserts the indispensability of money as the best – the only – measure of social pain and pleasure!<sup>47</sup>]. In another passage he states in what he

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<sup>47</sup> The analysis of the use of money as a measure and source of pleasures and pains is lengthy [UC xxvii pp. 35-7], but its flavour is captured in the following excerpt at p. 36: “If then, speaking of the respective quantities of various pains and pleasures and

considers to be the simplest possible terms the basic criterion for assessing the validity of a law in the context of a system of critical jurisprudence – a criterion which underlines the subsidiary role of law and legislation in relation to the larger enterprise of maximizing human happiness in the form of an optimal accumulation of discrete and measurable net pleasures: “A LAW is good, according to the more or less of clear Happiness which it produces”. [UC lxix, p. 98 side 2] On the basis of this principle he then draws a picture of an enlightened legislator which is meant to contrast sharply with the confusion he had attributed to Grotius, Pufendorf and others in these matters:

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I am a Legislator – I have a State to govern. What I have to do is to produce Happiness in it. I set to work. I look around me. I see a sort of act done which appears to me to produce unhappiness ... I will that it be not done. This is the first scene in the drama. It lies within my breast.

2

... If my will is to have any consequence, if men are to desist from the act in consequence of their understanding that my will is so, I must enable them to understand it ... I must express it.

Our present concern is with the different sorts of wills which it can happen to the Legislator to form and to express ...

[UC lxx(a) p. 3]

The simplicity of this picture and the (surprisingly) succinct and unembellished style in which it is presented reflect Bentham’s continual effort to demonstrate the superior rigour and clarity of his scientific jurisprudence in comparison to the systems of his competitors.

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agreeing in [sic] the same propositions concerning them we would annex the same ideas to these propositions, that is if we would understand one another, we must make use of some common measure. The only common measure the nature of things affords is money.”

I pass now to section [i] of the introduction to the Elements, the section dealing with the nature of happiness and its status as the end or goal of legislation. Those who have subscribed to the 'conventional wisdom' that Bentham's utilitarian premises are simplistic on the basis of a reading of the first few pages of the Introduction to the Principles of Morals and Legislation will find here a corrective to the common caricature of Bentham as a monomaniac who did not think the foundations of utilitarianism through with any thoroughness or discernment. Fully 80 sheets of manuscript work are devoted to the topic of the anatomy of happiness. Bentham observes in these pages that he got "the idea considering happiness as resolvable into a number of individual pleasures" from Helvetius, whose De L'Esprit he contrasts with the works of Cicero ('a heap of nonsense') and the French philosophe / moralist Maupertuis, whose "false and melancholy conclusions" reflected "the wrong turn he gave to his definition of the word pleasure" and have resulted in "his book's"<sup>48</sup> having been still less noticed than it deserves". [UC xxvii, p. 34]. Many more sheets of text in this section are taken up with an analysis of the "Dimensions of Happiness", by which Bentham means the dimension of pleasure: intensity, duration, proximity or remoteness and degree of certainty [e.g. UC xxvii, p. 38]. This approach, Bentham says, he took from Beccaria's Dei delitti et dele pene [Ib. p. 34]. There is also a long and interesting section on money, which Bentham sees as "the only current instrument of pleasure" (alluding to its role as currency?) [Ib. 35] and perhaps more importantly as

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<sup>48</sup> Maupertuis was well known for his Systeme de la Nature and his Essai de Cosmologie, but the work to which Bentham probably refers here is his Essai de Philosophie Morale (Berlin, 1749)

"... the only original measure of such pleasure as it belongs to the Legislator to bestow, and of such pain as is derivable from the same source." [Ib. 36]

Many of the features of Bentham's famous calculus of pleasures and pains are laid out here as clearly, fully and reasonably as one could wish. But the most important feature of this section of the Introduction for my present purposes is Bentham's statement that he derived the essential "foundation" for his "compleat system of moral science" from Beccaria's analysis of crimes and punishments in terms of pleasures and pains:

Considering that punishment is but pain applied to a certain purpose, that the value of a pleasure is composed of the same articles, and *that pains and pleasures, and actions in so far as they had a tendency to produce or prevent the one and the other were all that morals and politics or so much as was of any use or meaning [in] those sciences had in view*, it seemed to me that such an analysis was the very thing that was wanted as the foundation for a compleat system of moral science. [UC xxvii, p. 34 emphasis added]

In short, Bentham's analysis of happiness, understood as an aggregation of discrete pleasures and pains, inspired by Helvetius and Beccaria, was the very core of his science of Critical Jurisprudence – a 'compleat' and rigorous hedonistic systematization of morals and legislation capable of supplanting with ease – or so Bentham hoped – the woolly-minded efforts of his competitors, if only divines, politicians, lawyers and citizens would listen to the voice of practical reason.

I alluded above to one 'special' feature section [iii] of the Introduction to the Elements, and I now return to that feature to bring my investigation of the text of the Introduction to a close. This section on "The Division of Laws" may at first blush appear to be less significant and more technical than the sections of Happiness or on the nature of Law. This is a misleading impression, however, for the section deals

with more than one division. The one to which I now turn is not that between civil and penal laws, but the tripartite division of laws into “Divine, Natural and Municipal” [UC xcvi.110]. This division, characteristic of theories of jurisprudence from Aristotle to Grotius, is in Bentham’s view the source of the ‘erroneous’ idea that laws differ not only in their ‘subjects’ but in their ‘origins’ [Ib.]. As a result,

... instead of one consistent System of Laws whose end therefore is consistent and the same, we have three different though if one may say so not always distinct Systems jarring and crossing each other at every turn: whose ends ... may be different, and contradictory and inconsistent. [UC xcvi, pp. 108-9]

Almost all of the (so far discovered ) text of this discussion is continuous, and is contained in one block of manuscripts – UC lxx (a), pp. 14-30. The argument is too complex to be conveyed here in full, but its essential features are as follows: Bentham rejects both theological and naturalistic foundations for legal and political justice, and asserts that justice properly understood cannot be anything more or other than a function of “public utility”. What is commonly referred to as “natural justice”, as distinct from public utility, is nothing but an articulation of the established “expectations ‘ of political society as to the consequences (in terms of happiness) flowing from public or private actions occurring within it: ”*Natural Justice is nothing but conformity to General Expectation*” [UC lxx(a), 19 emphasis added], which Bentham sometimes calls “natural expectation” [See UC lxx(a), 20 marginal heading]. But natural jurisprudence offers no better foundation for its ideas of “natural expectation” than “general opinion” or “an universal opinion (supposing there is such a thing in the world as an universal opinion on any question)”. But, says Bentham, “opinion is what I am not satisfied with”. “Truth”, he asserts, “cannot rest

upon an eternal circle of opinions”. His scientific approach to politics, morals and justice is “founded upon sensation – that is certain – and sensation is the highest evidence – that is also certain. [All references from UC lxx(a), p. 22] It gives intrinsic weight to “popular expectation” but only in so far as expectation IS the expectation of utility (i.e. of pleasures and pains “in prospect”):

Where original utility is neuter ... consult popular Expectation. From thence results a derivative Utility – where that Expectation is neuter, Utility follows certainty fixed on either side - [UC lxx(a), p. 20]

“The great advantage” of this scientific approach to the evaluation of expectations is that it offers a single comprehensive, flexible, pragmatic, accessible and clear criterion for the adjudication of every case to which it is applied.

... it presents all along a certain matter [ms. original: ‘fact’] on which the opinion pronounced in any instance that such a thing is right or wrong, is equity or is not equity, is founded.  
Now this matter of fact is no other than this viz. – the state of sensations upon the commission of an act of the persons within the circle of its influence: viz. of sensations ... partly present, partly future in certainty partly future in contingency, oestimated all together at their present value. [UC lxx(a), p. 22]

“The science of Jurisprudence”, Bentham concluded, “(and the same may be said of Morality)

as treated upon this plan, is as strictly and properly a science founded upon experiment, as any branch of Natural Philosophy.” [Ib.] The contrast between this model of scientific explanation

and the speculations of natural law theorists could not possibly, he argued, be more absolute:

Founding our notions of what is politically right & wrong by enquiring what is the will of the Deity in that behalf as it stands in revelation, we build a foundation for our enquiries which is comparatively obscure;

but endeavouring to found them upon something that is not the principle of utility, nor yet of revelation, we have none [ms. original “no foundation”] at all. [UC lxx(a), 16]

So much for justice as the offspring of Divine Law – or, for that matter, of Pufendorf’s *socialitas*. Justice is public utility – nothing more and nothing less. At UC lxx(a), p. 17, Bentham begins a section of manuscript with the marginal heading “Imports of JUSTICE and UTILITY contrasted”.<sup>49</sup> He begins by pointing out that the utility he intends to contrast with justice as the goal of legislation and morals is public utility: “‘Utility’ standing by itself without any epithet (as ‘Private’) to restrict it shall mean public or general utility”:

viz: utility accruing either to many at once, or even to a single person so it be not counterbalanced by a prejudice equal in magnitude (viz: intensity and duration) & number to any others.

Bentham sees the potential for conflict between public utility and traditional ideas of justice, and in a sustained discussion of this issue he attempts argue the problem away. It is only in an ‘erroneous sense’, he says, that public utility is said to be ‘opposed to justice’. The mistake lies in separating categorically, rather than weighing together, the utility of individuals as such on one hand and of the public on the other. Only, to use Bentham’s own example, if the personal utility of A is ‘laid wholly out of the question’ can it be [mistakenly] asserted that public utility is advanced by the confiscation of her property, such that justice must be invoked to

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<sup>49</sup> The Capitals are Bentham’s. It may be noteworthy that alongside this heading he writes “Utility etc. Definiend[a]” – i.e. definitions to be given of utility and related terms or phrases. He then lists a series of such ‘definienda’, beginning with Utility itself, “a neutral term & of the highest abstraction”. The next entry in this list of definienda is “Principle of Utility”. Might this mean that it was just at this exact point that Bentham first undertook to define what eventually became the most familiar and fundamental of his principles? One thing that is clear from this page is that this definition was to be presented in the Elements “After Dimension of Happiness”.

prohibit such confiscation. The trick is, Bentham seems to say, to remember that the distinction between individual and collective utility is not the same as that between private and public utility:

The question lies not between the Public on one part, & himself distinct from the public on the other: but between that part of the public which he is, on the one part, & the remainder of the persons of which the public is composed, on the other. [UC lxx(a), 17]

The utility of the citizen simply IS public utility. Bentham's position seems almost Rousseauian:

The Salus populi consists not in the sacrificing of private or Public interest; but in the union of both [Ib.]

He took a slightly different approach to the problem of private vs. public utility in the manuscripts (referred to above) for the chapter to be called "Key Terms in Universal Jurisprudence"<sup>50</sup>. Here he emphasized the invariably coercive nature of any system of jurisprudence, and in effect addressed the private / public problem in terms similar, *mutatis mutandis*, to those later used by John Stuart Mill in articulating his famous 'harm principle' in his essay On Liberty:

The whole system of Jurisprudence displays itself in the coercing of one party for the benefit of another. It may admitt of controversy whether the Law would do right to coerce a man merely for his own good. But what admitts of no controversy is that it does right in coercing him for the good of others. Under this description there is no operation of Jurisprudence whatsoever but may be comprized. [UC lxix, p. 44]<sup>51</sup>

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<sup>50</sup> These are to be found mainly at UC lxix pp. 44ff.

<sup>51</sup> To speculate: this passage was not hidden away – it is the text of page one, paragraph one, of a key chapter in Bentham's Magnum Opus. The manuscripts are well organized, and the handwriting is exceptionally clear. We know that J. S. Mill read a great deal of Bentham manuscript material. Indeed, he edited some of the most Byzantine, illegible and formidable materials of all, the manuscripts on the laws of evidence. He COULD easily have read this text long before 1859.



The problem which troubles Bentham most in the Elements mss., however, is not that of personal vs. Public utility, but the problem of popular and political prejudice: the notion of justice is “favoured more than utility” because it is “more sublime – obscure – popular –” and in the end simplistic [Ib.]. Devotees of justice are all too likely to develop an “indiscriminate & unqualified admiration of sacrifice of interest”:

... people ... get a notion that the more interest or utility is sacrificed the more justice is promoted – this induces a general prejudice or indisposition against General Utility, which is but the aggregate of particular utilities; not sacrificed but promoted. [Ib.]

Conceding “the difficulty of stating these matters clearly”, Bentham nonetheless succeeded in hinting, in a more fragmentary passage, at perhaps the most fundamental problem he faced in arguing for public utility as a thing superior to and inclusive of justice. Justice, he suggested, has “two senses – a neutral and a favourable” [UC Lxx(a), 17]. The neutral sense of justice is the sense in which it “is an imaginary metaphorical being, raised by abstraction from the aggregate body of the subsisting Laws”. This I take to be the sense in which we speak of or Canadian “system of justice” as a great and beautiful unitary thing, and use this iconic representation of it to deflect criticisms of its very real and visible injustices and inefficiencies. “In its favourable sense”, Bentham continues, “it means that course of legislation or decision ... which in the instance proposed has the speaker’s approbation.” Whether speaking as an interested participant (in a sense suggestive of what Bentham was later to call ‘sinister interest’) in the existing system of justice, or as an individual favoured by one of its decisions or policies, the partisan of ‘justice’, Bentham thought, could all

too easily disguise personal interests contrary to public utility by associating them with justice, a thing held to be “superior in utility to utility itself” [Ib.].

### **Conclusion: scientific jurisprudence and political radicalism**

It is useful to be aware (and a study of these early manuscripts heightens, I think, this awareness) of the fact that the project which enabled Bentham to combine his youthful interests in Law and Science was the project of developing a critical jurisprudence. We have seen that Bentham turned to jurisprudence **before** he coined the term "utilitarian". Before he was a democratic radical or a utilitarian radical he was a philosophical radical in a particular sense – a surprisingly political sense. He defined his project **against Blackstone** - yet Bentham used a rhetoric of his own; **against Natural jurisprudence**: yet the preface to the Elements echoes faintly the beginning of Puffendorf's On the Duties of Man and Citizen; **against "A host of Scotch Sophists"**, though Bentham was in some respects a strong admirer of both Hume and Smith. What concerns me here, however, is a particular question: having rejected Whiggish rhetoric, Natural jurisprudence and sentimentalism as bases for his own project, how did Bentham characterize his censorial [critical] jurisprudence?

Methodologically it was to be 'scientific', which meant to Bentham that it would draw its vocabulary from "the sterling treasury of the sciences".<sup>52</sup> This vocabulary [the early Bentham manuscripts go on at great length about this] was to be

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<sup>52</sup> Bentham used this phrase, either in the Fragment on Government or in the Comment on the Commentaries, in distinguishing his own scientific mode of discourse from the rhetorical ‘cosmetic arts’ of Blackstone. FULL REFERENCE NEEDED XXXXXX

a carefully constructed one - neither colloquial nor rhetorical but authoritatively descriptive. Unlike Hume, however, Bentham would not hesitate to derive a world of 'oughts' from this catalogue of what 'is'. The experimentalism of David Hume - and indeed the naturalism of his friend Adam Smith - was pursued in an interrogative voice, and both men accepted philosophically the contingency of all identifications, prescriptions and systems. If they are to be considered liberals, they must be thought of as liberal pluralists. Bentham, if thought to be classifiable as a liberal, must be considered a liberal perfectionist. One of Bentham's proudest boasts was that his system of thought constituted a "logic of the will" [or of 'imperation'] as comprehensive as Aristotle's logic of the understanding.<sup>53</sup> His empirical studies - initially, to be sure, carried out via a questioning of many established structures of power and knowledge - were to generate both descriptions and prescriptions expressed in the imperative, not the interrogative, voice. In a way the ultimate realization of Bentham's system of jurisprudence in its broadest sense comes not with the publication, of Of Laws in General or An Introduction to the Principles of Morals and Legislation, but with the appearance of his Table of the Springs of Action. This empirical critical science of jurisprudence, this imperational logic of human action, was to use external not internal criteria for the identification and evaluation of "What Things Exist".<sup>54</sup> Only on this basis, Bentham thought, could the study of the law

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<sup>53</sup> See IPML ed. Burns & Hart, preface, p. 8. Cited above.

<sup>54</sup> A substantial part of the "PPI" mss. In UC Box lxix are given this heading and devoted to laying out a Benthamic critique of traditional metaphysics. An excellent example is at p. 52:

"I assume in a word the existence of what is called the material world. ... and that without scruple: notwithstanding it has been the subject of so much controversy. I assume it boldly for this reason: because in point of practise, no bad consequences

cease to be a mere course of familiarization with what the powerful members of the religious and political establishments felt the law ought to be. Finally, Bentham's new science of jurisprudence would be Newtonian - "universal" - in scope: inspired by Helvetius's characterization of Newtonian science in De L'Esprit, Bentham aspired to construct an analysis of law that could be applied to any legal system at any time and in any place. It would account for the impact of law on "the universal system of human actions"<sup>55</sup>; it would narrate the legal development of society and government from a hypothetical temporal point of origin which Bentham at one point in OLIG likened to Genesis: "As yet there is no law in the land. The legislator hath not yet entered upon his office. ... This is the first day of the political creation: the state is without form and void".<sup>56</sup> And its goal was nothing less than "the perfection of the law" combined with the "optimization" of "the condition of mankind as far as depends upon the Law".<sup>57</sup>

All of the above meant to Bentham that his jurisprudence must be 'critical' or 'censorial', not apologetic or merely descriptive, and therein lay its novelty and its peculiar excellence as he saw it. Bentham seems to have despised descriptions (whether political or religious) that were simply meant to evoke awe or deference, and he had no time, enthusiast that he was, for description for its own sake. He was

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can ... arise from supposing it to be true; and the worst consequences can not but arise from supposing it to be false."

<sup>55</sup> See Of Laws in General, Chap. 10, section iv, "Alterative [Laws]", para. 16, p. 120. Cited in Bentham on Liberty at p. 126.

<sup>56</sup> See Of Laws in General, Appendix B, pp. 252-3. Cited in my Bentham on Liberty, U of T Press, 1977, p. 130.

<sup>57</sup> The phrase occurs in an important passage from Bentham's essay "On the Influence of Place and Time on Matters of Legislation", quoted at length in Bentham on Liberty at p. 148-9.

not interested in portraiture where caricature would suffice to produce the appropriate response. Description in his jurisprudence must lead logically and inexorably to prescription.

We have seen that Bentham strove to distinguish his radically new and scientific principles of jurisprudence, politics and ethics from the abstract systems of legal theorists such as Blackstone, philosophical moralists like Hume and Smith, and philosophers of the natural jurisprudence school. But this essay's concern with such competitors might incline the reader to see Bentham, as many in the past have done, as a 'closet philosopher', unengaged in the politics of his day until dragged into involvement by the politically radical James Mill after 1800. Much has been written about Bentham's 'conversion' to political radicalism, apparently based on the understanding that he had no sense of himself as politically radical (as distinct from philosophically radical) in his early works. It is difficult to sustain this perspective in the face of a reading of the manuscript sheets (some 450 of them) which make up the extant text of the Appendices to the Elements of Critical Jurisprudence which deal with the question of how to advance the new science of jurisprudence in the face of the "Obstacles" which are ranged against it. These obstacles are not hostile or competing philosophical system, but plainly political "establishments". They are the groups of powerful and wealthy people whom Bentham will later in his career famously come to identify as "sinister interests" inherently opposed to the utilitarian advancement of the public interest. These sinister interests, *avant le nom*, dominate the "Obstacles" mss because they ARE the obstacles.

In an overview of the intended Appendix on “Obstacles” [UC xcvi, p. 1] Bentham divided obstacles into “interests” and “prejudices”. It almost goes without saying that prejudices were, in his view, largely symptomatic of, protective of, even generative of, counter-progressive interests. His list of examples of entrenched interests is both prophetic (for we know that he will do battle with these interests all his life) and accurate as an indication of the arguments he will deploy in the subsequent lengthy but fragmentary body of text devoted to this topic. He cites the “professional” interests of “lawyers”, “Divines”, “Authors” and “Booksellers”. Legislators” are said to have an interest in “Indolence”. “[P]arty – men as such” have an interest in “opposing a good thing because proposed by their antagonists who would gain credit, besides the bona fide prejudice ... of all profitters by abuses”.

All persons interested in abuses of any kind behove to make common cause against ant extensive plan of inquiry & reformation. The aspect of the eye of scrutiny is malignant to them.

“Prejudices” [sometimes “prejudges”] include the “professional” prejudices of “Divines”, of Lawyers and Legislators who are said to exhibit “prostration to authority”, “an extravagant idea of the excellence of the law” and “indifference to evil”, and specifically the “Aristocraticall” prejudices of members “of the Upper House”. This may be thought a familiar rogues gallery of Bentham’s political foes, but these manuscripts are the only evidence we have that Bentham systematically identified them and critically analyzed the nature of their opposition to reform as early as the 1770s. To the expected list of elite adversaries I have mentioned, he made two curious additions. He identified a popular prejudice “concerning liberty – against repeal of Mag[na] Charta”, and, ironically in view of his eventual elder-statesman

status among reformers and radicals, he listed also the prejudices “Of Age” in “Old men”. [All references are to UC xcvi, p. 1]. But he did not stop at identifying the interests and prejudices which would naturally incline members of the key British “establishments” of Church and State to oppose radical reform. He also attacked a specific problem which so far as I know he has not been thought ever to have addressed anywhere but in these manuscript pages: the problem of the relationship of theory to practice. This was perhaps a moment when the author whom Marx memorably dismissed as “a genius in the way of bourgeois stupidity” showed, even by Marx’s own standards, more of the former than of the latter. Under the heading of “Obstacles Prejudges Professional – against Theory X Practise [which means, according to the conventions of Bentham’s marginal symbols, against the separation of theory from practise], he wrote:

There exists no good foundation for the opposition betwixt Theory and Practise, or for the common saying, “such Proposition has been said to be good in Theory but bad in practise.” – the consequence of this inaccurate and abusive expression has been that the establishment of general principles in practical sciences has been discouraged and considered as useless, not upon the pretense of their being false, but merely because they are general [UC xcvi, p. 5 side 1]

At issue here for Bentham is the question of the “establishment of general principles in practical sciences”. His opponents in this debate are not the proponents of alternative systems of ‘general principles’, but those in power who dismiss theoretical principles as irrelevant to ‘practise’ as a way of undermining all improvement, advancement and reform. Bentham’s radicalism, in this context, is expressed not in the nature of his principles, but in his insistence that practical sciences must be principled – that traditionalism and “prostration to authority” must

not be allowed to govern the moral and political practices of his country – indeed of any country. The unity of theory and practise in Bentham means not only that practise must be principled, but that principles must be practical:

... a proposition people will sometimes ... say is good in theory but it won't do in practise [UC xcvi, p. 5 side 1]

“This inaccuracy of expression [is] the ... source of many important and universal [ms. original ‘real’] mistakes” [Ib., side 2]

The consequence has been drawn that no theory deserves attention because however true it may be in itself, when applied to practise it will be found erroneous. I say, in that case it never was true, but appeared so from the twisted view we took of it & for want of applying it to practise. [Ib.]

Produce a doctrine which you assert to be true in theory and false in practise, and I will engage to show either that it is false in theory, or if true that it is true also in practise. [Ib. side 3]

Bentham's point is that the interpenetration of theory and practice is essential and, when both are correctly understood, inescapable. As he said more famously of the principle of utility<sup>58</sup>, those who attempt to deny this only succeed in confirming it unintentionally:

they think they have found a sure way to escape error by laying down none but particular positions – and yet if they were to take the pains to examine the construction of their arguments they would find that all the foundation their particular positions have lies in their being necessary consequences from some general principles which they recognize without express acknowledge[ment] [ms. original “tacitly refer to], in such a manner that if those general propositions are erroneous, [the] particular positions have no foundation. Thus by not examining and establishing those general positions, by not ?enquiring? they think they escape error – by proving them, they think they should run into Theory, which as being Theory would be useless ... as the safer way therefore, they take them for granted without proving them or even considering whether they are either self-evident or capable of

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<sup>58</sup> In the most famous passage from Chapter 1, parag. 1 of IPML att p. 11.



being proved or what makes them still more unexceptionable, evident to sensation. [Ib.. side 1]

The Elements of Critical Jurisprudence was a work addressed to issues in law, legislation, politics & government, and ethics at the level of a kind of Benthamic *praxis*. It was precisely this quality which gave it its radical character. “Censorial jurisprudence” supplied a reservoir of general practical principles whose truth was “evident to sensation”, and Bentham was willing to subject them all to the same ‘acid test’: do they work – are they true – in practice? It was by this chain of reasoning that he arrived at the single test and the single principle which could unite theory and practice in such a way as to “optimize the condition of mankind” by maximizing human happiness. This was, of course, the test, and the principle, of utility. Readers of the present essay will have to decide whether it is appropriate or not to describe the project that has been laid out here – the project of a scientific, critical jurisprudence that is also a science of government as it ought to be conducted - as an exercise in “bourgeois stupidity”. It is to be hoped that at least some readers may, on the other hand, appreciate the critical and inventive genius that animated that project. We can know with certainty, in any event, that Jeremy Bentham would have thought that Marx’s characterization of him was only 50% correct.<sup>59</sup>

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<sup>59</sup> When Bentham read Helvetius at age 21 (1769) Bentham decided that he himself possessed a “genius” for “legislation”. See Bowring’s Works of Bentham, Vol. X, pp. 26-7, and Mack, Mary P., Jeremy Bentham: an Odyssey of Ideas, 1748-92, London, Heinemann, 1962, pp. 55-6. Helvetius (see De L’Esprit, Essay IV, Chapter 1,) and Bentham (see Bentham on Liberty p. 70) both equated “genius” with the capacity for “invention”.