Jeremy Bentham on Law and Jurisprudence

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JOHN STUART MILL, in assessing the work of Jeremy Bentham, comments:

Bentham always knew his own premises, and made his reader know them: it was not his custom to leave the theoretic grounds of his practical conclusions to conjecture. Few great thinkers have afforded the means of assigning with so much certainty the exact conception which they had formed of man and man's life.¹

With this glowing appraisal by so eminent an authority in mind, we experience a certain sense of intimidation in undertaking a critical review of the very foundations of Bentham's jurisprudence. Nonetheless, it will be our task here to probe Bentham's thought with a view towards determining for ourselves whether or not it represents a clear and original contribution to the philosophy of law. In so doing, we will make a conscientious endeavor not to read things into his statements, as tempting as it may sometimes be. Also, we will not concern ourselves with the semantic problems attendant upon the use of such terms as good, evil, pleasure, happiness, etc. Bentham advises us that he uses such words "in their ordinary signification."²

The central idea of Bentham's thought, which was to serve as a basic premise of utilitarianism in general, is the resurrection of the ancient Greek notion of pleasure and pain being the dominant factors governing human existence. Thus, at the very outset of his most widely heralded work, An Introduction to the Principles of Morals and Legislation, he states: "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do as well as to determine what we shall do."³

The implications of this statement are sweeping and form the basis for most of Bentham's subsequent arguments. For one thing, we are informed that pain and pleasure serve a normative function and will in some manner dictate our moral attitudes. For another, that they will exercise control, in some manner, over our actual behavior.

However, disappointingly, after having postulated the existence of the régime of pain and pleasure, Bentham fails to tell us what the inherent nature of this regime is. That is, in what manner the will of man is related to pain and pleasure so that they may indeed exercise the control over man's behavior attributed to them. In the interest of presenting a relatively complete statement of the utilitarian approach to jurisprudence, we will take the liberty of filling in this gap by supplementing Bentham's argument with that of an earlier advocate of the "pleasure principle." In his Letter to Menoeceus, Epicurus argued:

It is to obtain this end (i.e., the life of blessedness) that we always act, namely to avoid pain and fear. . . . For it is then that we have need of pleasure, when we feel pain owing to the absence of pleasure; but when we do not feel pain, we no longer need pleasure. . . . For we recognize pleasure as the first good innate in us, and from pleasure we begin every act of choice and avoidance, and to pleasure we return again, using the feeling as the standard by which we judge every good.⁴

Bentham gives us good reason to believe that he would subscribe to this psychological pronouncement of the mode of operation of the pleasure principle. "It is true that Epicurus alone of all the ancients had the merit of having known the true source of morals."⁵
Bentham pursues this line of argument in expounding the "principle of self-preference" as an axiom, self-evident and not liable to contradiction or refutation. "By the principle of self-preference, understand that propensity in human nature, by which, on the occasion of every act he exercises, every human being is led to pursue that line of conduct which according to his view of the case, taken by him at the moment, will be in the highest degree contributory to his own greatest happiness, whatsoever be the effect of it, in relation to the happiness of other similar beings, any or all of them taken together."

The principle of utility, which forms the very core of utilitarian thought, is nothing other than the objective approval of those actions undertaken in fulfillment of the dictates of the principle of self-preference. "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question."

Under the operation of this principle, acts which merit approval are those which ought to be pursued. Those acts meeting with disapproval should be refrained from. To these two conditions Bentham attaches the notions of right and wrong, respectively. Thus, according to Bentham, the principle of utility becomes the moral imperative and ethics is defined as "the art of directing men's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view."

In considering Bentham's restatement of the classical conception of egoistic hedonism, it would be a disservice to him to conclude that he was promulgating a "live today for tomorrow we may die" conception of morality. Quite the contrary. In discussing Epicurus, he remarks that "to suppose that his doctrine leads to the consequences that have been imputed to it, is to suppose that happiness may become the enemy of happiness. . . . So use present pleasures as not to lessen those which are to come."

Thus far we have considered man in a theoretical pristine state as an independent and isolated atom undisturbedly pursuing his self-interest. Bentham's more realistic view of man regards his behavior as being subject to the effects of economic conditions. Given ideal conditions, that is, conditions of unlimited abundance, man may pursue his uninhibited self-interest. However, in the real world ideal conditions do not prevail. The fundamental economic condition is that of scarcity, and under conditions of scarcity immediate problems arise in connection with man's unrestricted pursuit of his self-interest.

In the pursuit of his own interests man comes in contact with other men similarly engaged. In their mutual contention for limited resources men inevitably enter into conflict with one another. In a passage strikingly reminiscent of Hobbes, Bentham writes, "it is only necessary to consider the condition of savages. They strive incessantly against famine; . . . Rivalry for subsistence produces among them the most cruel wars; and like beasts of prey, men pursue men, as means of sustenance."
interest of the community then is, what? — the sum of the interests of the several members who compose it."13 By providing security for the interests of the community, the interests of its individual components will automatically be taken into account. And, permitting each member of the community to pursue his self-interest in relative security is, for Bentham, the raison d'etre of law.

Law alone has done that which all the natural sentiments united have not the power to do. Law alone is able to create a fixed and durable possession which merits the name of property. . . . Law does not say to man, Labour and I will reward you; but it says: Labour, and I will assure to you the enjoyment of the fruits of your labour—that natural and sufficient recompense which without me you cannot preserve; I will insure it by arresting the hand which may seek to ravish it from you.14

However, the principle of utility as stated in its egoistic sense can hardly be squared with this view of law serving to limit one self-interest to accommodate another. The principle of utility must therefore be reformulated for application to the interests of man in society. In A Fragment on Government, Bentham states, axiomatically once again, "it is the greatest happiness of the greatest number that is the measure of right and wrong."15 This reformulation of the principle of utility, as necessary as it is to the subsequent development of utilitarian thought, leaves much to be desired. In fact it seems to raise more difficult questions than it answers. Bentham does not inform us by what logical techniques he accomplishes the transition from the egoistic formulation of the principles of utility to the one now offered, the utilitarian. We will see that this difficulty stays with Bentham throughout his efforts to establish the philosophic base for his jurisprudence.

Another problem attendant upon the utilitarian principle is that of its relation to law as such. Here again, Bentham offers us a basis for constructing a relationship that he himself does not rigorously establish. As noted earlier, Bentham relates the principle of utility with morals. This morality found expression through the art of ethics. A similar relationship could be established between politics and the medium by which it finds expression, namely, legislation. Hence it only remains to connect politics with morals and we may then establish the nexus between the principle of utility and law. Bentham does at least formally make this connection for us. "The only difference between politics and morals is, that one directs the operations of governments, and the other the actions of individuals; But their object is common; it is happiness. That which is politically good cannot be morally bad, unless we suppose that the rules of arithmetic, true for large numbers, are false for small ones."16

It would seem to follow from this argument that legislation should bear a comparable relationship to ethics as politics does to morals. However, Bentham does not draw this parallel. Apparently, the relationship between legislation and ethics does not quite follow the "rules of arithmetic." Despite the identification of politics with morals, and Bentham's definition of the community as merely the sum of its parts, legislation may not be construed to be merely the art of ethics applied to a composite body. The reason for this dichotomy is plain. It is simply the incompatibility of the egoistic and utilitarian formulations of the principle of utility. Providing for the greatest happiness of the greatest number will involve the promulgation of restrictive laws that are inherently inimical to the positive ethical command to pursue the "greatest possible quantity of happiness, on the part of those whose interest is in view."

For Bentham, law exists only to satisfy the operational requirements of the principle of utility. "It has been shown that the happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and sole
end which the legislator ought to have in view: the sole standard, in conformity to which each individual ought, as far as depends upon the legislator, to be made to fashion his behaviour."\(^ {17}\) Bentham advises us here of a positive and coercive aspect of law in the enforcement of conformity to a standard derived from the principle of utility. Law, as we are now given to understand, not only serves to restrict the behavior of individuals where such behavior tends to operate at cross-purposes with that of other individuals similarly engaged, but also dictates a pattern of behavior designed to insure that the general self-interest of the community is realized.

Here again, Bentham appears ambivalent, now wavering towards egoism, now towards utilitarianism, and every once in a while to some compromise formula. He writes in one place, “the business of government is to promote the happiness of the society, by punishing and rewarding.”\(^ {18}\) In another, he assigns a more restricted goal to law, namely that of preventing mutual harm. “As a general rule, the greatest possible latitude should be left to individuals, in all cases in which they can injure none but themselves, for they are the best judges of their own interest. . . . The power of the law need interfere only to prevent them from injuring each other.”\(^ {19}\) The dilemma of determining the proper relationship of law and ethics as applied to man in society remains to be resolved. By definition, ethics relates to man under the egoistic principle of utility and law to society under the utilitarian formulation. Considered in the abstract this categorization presents no insurmountable problems. However, when considering the role of man within society, the interrelationship of law and ethics must be clearly defined if law is not merely ethics writ large. As indicated earlier, Bentham informs us explicitly that is not the case.

Bentham attempts to draw the distinctions between law and ethics in the following manner:

Private ethics and the art of legislation go hand in hand. The end they have, or ought to have, in view, is of the same nature. The persons whose happiness they ought to have in view, as also the persons whose conduct they ought to be occupied in directing, are precisely the same. . . . Where then lies the difference? . . . Every act which promises to be beneficial upon the whole to the community (himself included) each individual ought to perform of himself: but it is not every such act that the legislator ought to compel him to perform. Every act which promises to be pernicious upon the whole community (himself included) each individual ought to abstain from of himself: but it is not every such act that the legislator ought to compel him to abstain from.\(^ {20}\)

Where then is the line between law and ethics to be drawn? The distinction is to be drawn on the basis of utility, but of a sort not previously discussed. Bentham argues that if legislation is to promote a pattern of behavior directly, it may do so only through the sanctions that it can bring to bear on the recalcitrant. However there are categories of instances where such sanctions ought not to be applied, namely, where they would be unprofitable or inefficacious.\(^ {21}\) (Bentham distinguishes other categories as well, but these two are by far the most important.) In such cases, although law and ethics would both ostensibly serve an identical function, ethics alone should operate. Only in such circumstances where ethics cannot do so effectively should the power of the law be brought to bear in support.

However, almost immediately after providing what would appear to be an acceptable division of labor between law and ethics, Bentham effectively discards this compromise notion of the role of law and brings us back to the dichotomy of the two formulations of the principle of utility. “Private ethics teaches how each man may dispose himself to pursue the course most
conducive to his own happiness, by means of such motives as offer of themselves: the art of legislation teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conducive to the happiness of the whole community, by means of motives to be applied by the legislator” (emphasis supplied). This last proposition seems to open a veritable Pandora’s box. If the legislator is to apply motives to the conduct of the community, he may well be guided in his choice by motives of his own derived from his private and egoistic ethics. We will return to this point shortly.

Among his many pronouncements on the nature and function of government Bentham produces a statement which casts an interesting light on the problem under discussion. “The only object of government ought to be the greatest possible happiness of the community. The happiness of an individual is increased in proportion as his sufferings are lighter and fewer, and his enjoyments greater and more numerous. The care of his enjoyments ought to be left almost entirely to the individual. The principal function of government is to guard against pains.” This set of propositions, written after the last ones quoted, appears to bring us back to the earlier position holding that the essential difference between law and ethics is that the latter has a positive function whereas the former has merely a restrictive one. However, in view of the many ambiguities to be found in Bentham regarding this problem, it becomes a virtually hopeless task to determine definitively what Bentham’s final position is.

Assuming for the sake of discussion that the realm of law is adequately delineated, we are confronted with another major question. How does government go about fulfilling its legislative function? Bentham answers that it does so by creating rights and obligations. “Rights and obligations, though distinct and opposite in their nature, are simultaneous in their origin, and inseparable in their existence. In the nature of things, the law cannot grant a benefit to one without imposing, at the same time, some burden upon another; or, in other words, it is not possible to create a right in favor of one, except by creating a corresponding obligation imposed upon another.”

It is perhaps here, in the matter of rights, that Bentham’s thought is most significant and of greatest import for jurisprudence. At the same time he also appears to be on rather shaky ground and quite vulnerable. If rights are legal fictions created by the state, which is in itself merely the necessary organizational expression of the utility principle, (it is of interest to note that Bentham does not treat the state itself as a logical fiction), then rights, in effect, are based on and wholly justified by the idea of utility. This view, of course, denies any existence to rights external to or independent of the state. “Rights, are, then, the fruits of the law, and of the law alone. There are no rights without law—no rights contrary to the law—no rights anterior to the law.” And, without the state there is no law.

Armed with his conception of the nature of law, Bentham launches a vitriolic attack on natural law and natural rights.

What is natural to man is sentiments of pleasure or pain, what are called inclinations. But to call these sentiments and these inclinations laws, is to introduce a false and dangerous idea. Natural rights are the creatures of natural law; they are a metaphor which derives its origin from another metaphor. When it is said, for example, that law cannot avail against natural rights, the word rights is employed in a sense above the law; . . . In this anti-legal sense, the word right is the greatest enemy of reason, the most terrible destroyer of governments. There is no reasoning with fanatics, armed with natural rights, which each one understands as he pleases, and applies as he sees fit. . . .
tham places a prodigious burden upon the principle of utility, one which it does not appear fully capable of bearing. For one thing, it must determine how to discover what is in fact the interest of the greatest number and whether it will actually provide for their greatest happiness. Utilitarian ethics is not faced by this problem since each individual is presumed to be the best judge of his own interests. However, for utilitarian law the matter is considerably more complex. It is not only the problem of determining with any degree of certainty what the greatest number actually desire, but also of insuring that the techniques used in making this determination are of such a nature that would preclude an especially articulate minority from usurping the position of the majority and thus causing legislation to be enacted in support of its own limited interests.

Furthermore, even if it were possible to determine with assurance what the greatest number desire, we are still faced by the consideration that the legislators have the responsibility of applying motivation to the community's quest for happiness. Thus in order to carry out the utilitarian program, valid criteria must be established to determine without doubt and without fear of subjective influences what is in fact in the interest of the greatest number. Bentham devotes a considerable body of work to this problem. By establishing a "moral arithmetic" or "hedonistic calculus" he attempts to quantify pleasure and pain. By so doing, he makes proper legislation merely a question of addition. All the legislator need do is list the numerical indicator for any pain or pleasure anticipated as a result of any piece of legislation, insofar as it will touch those concerned. The legislation that produces the highest overall score automatically becomes the legal embodiment of the principle of utility. Needless to say, this aspect of Bentham's work does not merit serious consideration today. Modern psychology has yet to find a reliable means of objectively quantifying pleasure or pain. Certainly this deficiency seriously under- mines Bentham's utilitarian foundation for law.

Natural law, as an alternative concept, has certain advantages denied to utilitarian law. Proponents of natural law argue that the law already exists and that it merely needs to be discovered. Utilitarian law, on the other hand, insists that the law must be consciously created by men striving to legislate in the true interests of the community (i.e., the majority). The presumption of natural law is that it is ipso facto in the interests of the community. Natural law has the further advantage that in the event that a particular discovery of the law is at some time reinterpreted as being in error, natural law itself is not thereby affected or in any way discredited. It merely remains to discover the true expression of the law. This provides for a sense of continuity unavailable to utilitarian law. Under the latter, legislation found to be inimical to the true interests of the majority is discredited per se, possibly undermining the entire legal structure. Utilitarian laws are created by legislators who are, after all, merely men. Regardless of their good intent, they are in effect above the law except insofar as they choose to place themselves under it. This problem does not obtain under natural law, where the knowledge of the true law is available to all men. However, under utilitarian law, the law itself does not exist until it is created by a limited group of men which precludes a general independent knowledge of the law. Consequently, it may be argued that under utilitarian law we have in effect a government of men and not of laws. Each legislator individually is under the regime of egoistic ethics. Yet, he is at the same time expected to legislate in the interests of the majority, of which he may not be a member. In the last analysis, we are left with the consideration that the legislators must of their own volition be willing to violate the dictates of their own self-interest in favor of that of the greatest number. This would involve an element of altruism wholly incompatible with Bentham's conception of private ethics.
What are we to do if what is alluded to above does in fact take place? That is, how shall we react to improper legislation, which would in fact be violative of the principle of utility, and by Bentham's logic not a true law? Bentham himself is very wary on this point and gives a somewhat ambivalent reply:

If the law is not what it ought to be; if it openly combats the principle of utility; ought we to obey it? Ought we to violate it? Ought we to remain neuter between the law which commands an evil, and morality which forbids it? The solution of this question involves considerations both of prudence and benevolence. We ought to examine if it is more dangerous to violate the law than to obey it; we ought to consider whether the probable evils of obedience are less or greater than the probable evils of disobedience.27

Why this approach to the law is viewed by Bentham as less destructive of governments than that of natural rights is less than clear.

The resolution of these problems, on a strictly theoretical level, does not necessarily imply a need for a natural law concept. However, it does seem that some "higher law" concept is required. Hobbes for example, avoids these particular pitfalls without resort to natural law as such. For Hobbes, the lex naturalis is not law in the sense that we use the term. It is rather a sort of moral censor which tends to incline our behavior in certain directions. Law proper, for him, serves a primarily restrictive purpose, that of insuring security. Man, being governed solely by his own reason, has a natural right to anything and everything which ensures that "there can be no security to any man." For the sake of peace and self-survival, man is willing "to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself."28 Man surrenders these natural rights by contract with other men to the sovereign, the Leviathan, who is above the social contract and not a party to it. Consequently, it is now the Leviathan, himself above the law, who dictates what the law shall be. Disregarding for the purpose of our discussion the numerous criticisms directed against this formulation of Hobbes, it has certain distinct advantages. The will of the sovereign now constitutes a sort of "higher law" to which all individual legislation is subordinate; that is, it forms a law unrelated to the particular desires of the individuals subject to it.

Bentham, of course, will have none of this. Yet while vehemently denying any validity whatever to social contract ideas as such, he nevertheless comes perilously close to an actual reassertion of Hobbes' position. In criticizing those who attach qualifying interpretations to the notion of liberty, he writes: "This is the definition they give of liberty: Liberty consists in the right of doing everything which is not injurious to another. But is this the ordinary sense of the word? Is not the liberty to do evil liberty? If not, what is it?" Implying the unrestricted or natural existence of liberty, he argues further, that "the law cannot create rights except by creating corresponding obligations. It cannot create rights and obligations without creating offences. It cannot command nor forbid without restraining the liberty of individuals. It appears, then, that the citizen cannot acquire rights except by sacrificing a part of his liberty."29

Is this not tantamount to arguing that the individual renounces his absolute liberty in return for rights, and that this exchange is in itself contractual in nature? Is this notion not remarkably similar to yet another social contract theory, namely that of Rousseau, where the individual's natural liberty is exchanged through the social contract for civil liberty? What then is left of the principle of utility?

Ultimately, it appears that Bentham, in spite of himself, has need of a "higher law" theory to make utilitarianism meaningful. He is compelled to accept a social contract
in order to find a proper place for law, which is his primary concern. We have seen that Bentham is racked by ambiguity and contradiction in his effort to base utilitarianism on egoistic hedonism. The two can only be resolved by a contract scheme where the individual renounces the dictates of his hedonistic ethics in favor of the security offered by the positive laws of society. By refusing to openly acknowledge this the utilitarian foundation erected by Bentham for his system of jurisprudence becomes extremely fragile. This is evidenced by Bentham's inability to clearly define the role of law as opposed to ethics in regard to man in society.

Interestingly, Bentham's philosophic weaknesses in no way detract from the brilliant work he did in regard to the purification and clarification of the rules of law. However, this was accomplished in spite of his utilitarian philosophy, rather than because of it. For all practical purposes, Bentham's utilitarianism may just as well be another aspect of natural law. The principle of utility can quite easily be conceived as a part of that higher law which is concerned to establish the proper relationship among men in society. Since the dictates of the principle of utility are really no more readily ascertainable than those of natural law the distinction is more ephemeral than real.

In the last analysis it is with practice that Bentham is really concerned. He gives us reason to suspect that as much as he would like to be able to underpin his jurisprudence with a theoretically unassailable utilitarian substructure, it is not really that all important. Thus, in a footnote in his major work he writes:

"But is it never, then, from any other considerations than those of utility, that we derive our notions of right and wrong?" I do not know: I do not care. Whether a moral sentiment can be originally conceived from any other source than a view of utility, is one question: whether upon examination and reflection it can, in point of fact, be actually persisted in and justified on any other ground, by a person reflecting within himself, is another: whether in point of right it can properly be justified on any other ground, by a person addressing himself to the community is a third.30

To return to the purpose we set ourselves at the outset of this paper, we must conclude that despite Bentham's contributions to law as such, he has not contributed a viable alternative to a higher law concept. In regard to the laudatory assessment of the clarity of his thought registered by Mill, we find ourselves in rather complete agreement with John Plamenatz, who wrote, "the truth is that it is not possible to make sense of what Bentham is saying. ... It seems to me that Bentham, without quite knowing what he is doing, is trying to reconcile two couples of irreconcilable doctrines: egoistic hedonism with utilitarianism, on the one hand; and a psychological with an objective theory of morals on the other."31