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Handbook of the History of the Philosophy of Law and Social Philosophy

Volume 2: From Kant to Nietzsche

Springer

Studies in the History of Law and Justice

Volume 23

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Gianfrancesco Zanetti • Mortimer Sellers •
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Editors

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Preface

This *Handbook of the History of the Philosophy of Law* is the product of the global republic of letters and more specifically, the International Association for the Philosophy of Law and Social Philosophy. The Internationale Vereinigung fuer Rechts- und Sozialphilosophie (IVR) has promoted solidarity and the exchange of ideas among the world's philosophers since 1909. This Handbook reflects the efforts of philosophers in every school of legal and social thought and every corner of the world. More specifically, it reflects the leadership of Professor Gianfrancesco Zanetti and his colleagues at the University of Modena and Reggio Emilia: Professor Thomas Casadei and Professor Gianluigi Fioriglio, who both generously supported this project and the rest of the Modena team—Michele Ferrazzano, John Patrick Leech (who helped to polish the English translation of some entries), Rosaria Pirosa, Serena Vantin, and Gianmaria Zamagni. Professor Zanetti is the Section Editor for Legal History in the *Encyclopedia of the Philosophy of Law and Social Philosophy*, published under the auspices of the IVR and the General Editorship of Professor Stephan Kirste and Professor Mortimer Sellers, the authors of this Introduction. The *Handbook of the History of the Philosophy of Law* arises from decades of shared effort that created the *Encyclopedia.*

The global nature of the cooperation that culminated in this *Handbook* and the *Encyclopedia* from which it derives took on a new meaning in the midst of the universal Covid pandemic through which we have suffered for more than 2 years and from which we have not yet fully emerged. The disease that threatened all humanity reminds us of the fundamental unity of human fate and human society that informs—or should inform—the law everywhere. The editors and contributors to this volume took great comfort and pleasure from the solidarity and common purpose of their fellow scholars in other nations, and the constant correspondence with distant and sequestered colleagues, united nonetheless in a common purpose of understanding law and society.

One happy benefit of the growth of computer technology has been the ability of those quarantined at home to reach across the world for knowledge and encouragement. This chance to be enlightened by the insights of others recalls the inspiring

epistolary exchanges of the eighteenth century that produced the great *Encyclopedia* of Denis Diderot. New and fortunate in this emergent era, we have also lectured and spoken directly with one another's students—and our own—from the safety of our libraries at home. This experience more than any other made clear the necessity that a *Handbook of the History of the Philosophy of Law* should accompany the *Encyclopedia.* We must know better the scholars who have gone before, including those of other nations, and different schools of thought or points of view. We, our colleagues, and our students are hungry for such knowledge. This *Handbook* will provide it.

No Handbook can be complete. There is a necessary and inescapable conflict between comprehensive coverage and convenience. Much was omitted from this collection that could have been included, including perhaps some subjects and scholars who ought to have been included, but were not. Here too the advance of technology provides some comfort. This *Handbook* appears in the bound paper volumes you now hold in your hand. These give it the presence and utility that justify its name. But there is also the vastly larger *Encyclopedia*, which exists in an ever-expanding, ever-corrected, ever-existent electronic form. Perhaps, this *Handbook* will turn you also to the broader project, to which you and scholars like you may yourselves contribute, by noticing its failures and omissions.

Above all, this *Handbook* is a tribute to the hard work and persistence of Professor Gianfrancesco Zanetti. As the *Encyclopedia* Section Editor for Legal History, he worked tirelessly for the broadest and most complete coverage. As primary editor of the *Handbook,* he brings it rigor and exactness. As a lifelong member and frequent participant in the scholarly projects of the IVR, he has contributed to the global sense of fellowship and good purpose that brings the consolations of philosophy to those who seek them everywhere. Legal and social philosophy study to understand and improve our relationships with other human beings. Nothing matters more to the value and felicity of our transient humanity.

Baltimore, MD, USA — Mortimer Sellers
Salzburg, Austria — Stephan Kirste

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Brian H. Bix

Introduction

John Austin (1790–1859), an English legal theorist, is considered by many to be the creator of the school of analytical jurisprudence, as well as, more specifically, the approach to law known as "legal positivism." Austin's particular command theory of law has been subject to pervasive criticisms, but it still has its attractions, in part due to its simple model of law, and in part due to how the model's seeming emphasis on power and authority connects it with modern cynical or worldly ("realistic") perspectives.

Overview

Austin's theorizing about law was novel at four different levels of generality. First, he was arguably the first writer to approach the theory of law analytically (as contrasted with approaches to law more grounded in history or sociology, or arguments about law that were secondary to more general moral and political theories).

Second, Austin's work should be seen against a background where most English judges and commentators saw common-law reasoning (the incremental creation or

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modification of law through judicial resolution of particular disputes) as supreme, as declaring existing law, discovering the requirements of "Reason," or uncovering the "immemorial custom." Such (Anglo-American) theories about common law reasoning fit with a larger tradition of theorizing about law (which had strong roots in continental European thought – e.g., the historical jurisprudence of theorists like Karl Friedrich von Savigny (1975)): the idea that generally law did or should reflect community mores, "spirit" (*Geist*), or custom. In general, one might look at many of the theorists prior to Austin as exemplifying an approach that was more "community-oriented" – law as arising from societal values or needs, or expressive of societal customs or morality. By contrast, Austin's is one of the first, and one of the most distinctive, theories that views law as being "imperium-oriented" – viewing law as mostly the rules imposed from above from certain authorized (pedigreed) sources. More "top-down" theories of law, like that of Austin, better fit the more centralized governments (and the political theories about government) of modern times (Cotterrell 2003, pp. 21–77).

Third, within analytical jurisprudence, Austin was the first systematic exponent of a view of law known as "legal positivism." Most of the important theoretical work on law prior to Austin had treated jurisprudence as though it were merely a branch of moral theory or political theory: asking how should the state govern? (and when were governments legitimate?), and under what circumstances did citizens have an obligation to obey the law? Austin specifically, and legal positivism generally, offered a quite different approach to law: as an object of "scientific" study (Austin 1879, pp. 1107–1108), dominated neither by prescription nor by moral evaluation. Austin's efforts to treat law systematically gained popularity in the late nineteenth century among English lawyers who wanted to approach their profession, and their professional training, in a more serious and rigorous manner (Hart 1954, pp. xvi–xviii; Cotterrell 2003, pp. 74–77; Stein 1988, pp. 231–244).

Legal positivism asserts (or assumes) that it is both possible and valuable to have a morally neutral theory of law. Legal positivism does not deny that moral and political criticism of legal systems is important but insists that a descriptive ("analytical" or "conceptual") approach to law is valuable, both on its own terms and as a necessary prelude to criticism. There were theorists prior to Austin who arguably foreshadowed legal positivism in some way. Among these would be Thomas Hobbes (1588–1679), with his amoral view of laws as the product of Leviathan (Hobbes 1996); David Hume (1711–1776), with his argument for separating "is" and "ought" (which worked as a sharp criticism for some forms of natural law theory, those that purported to derive moral truths from statements about human nature) (Hume 2000, Section 3.1.1). However, it is Austin's claim about the separation of is and ought in law that is now widely quoted as a general summary of legal positivism:

"The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation." (Austin 1995: Lecture V, p. 157)

Fourth, Austin's version of legal positivism, his "command theory of law," was for a long time, quite influential. This view is elaborated in the next section.

Austin's View

Austin's basic approach was to ascertain what can be said generally, but still with interest, about all laws. Austin "endeavored to resolve a law (taken with the largest signification which can be given to that term properly) into the necessary and essential elements of which it is composed" (Austin 1995: Lecture V, p. 117). In particular, Austin asserts that laws ("properly so called") are commands of a sovereign. He clarifies the concept of positive law (that is, man-made law) by analyzing the constituent concepts of his definition and by distinguishing law from other concepts that are similar. "Commands" involve an expressed wish that something be done, combined with a willingness and ability to impose "an evil" if that wish is not complied with. Rules are general commands (applying generally to a class), as contrasted with specific or individual commands. Positive law consists of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, like God's general commands, and the general commands of an employer to an employee. The "sovereign" is defined as a person (or determinate body of persons) who receives habitual obedience from the bulk of the population but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign.

Austin delimits law and legal rules from religion, morality, convention, and custom. However, also excluded from the center of "the province of jurisprudence" were "laws by a close analogy" (which includes positive morality, laws of honor, international law, customary law, and constitutional law) (Austin 1995: Lecture I).

Within Austin's approach, whether something is or is not "law" depends on which people have done what: the question turns on an empirical investigation, and it is a matter mostly of power, not of morality. Of course, Austin is not arguing that law should not be moral, nor is he implying that it rarely is. Austin is not playing the nihilist or the skeptic. He is merely pointing out that there is much that is law that is not moral, and what makes something law does nothing to guarantee its moral value. "The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals" (Austin 1995: Lecture V, p. 158).

In contrast to his mentor Bentham, Austin, in his early lectures, accepted judicial lawmaking as "highly beneficial and even absolutely necessary" (Austin 1995: Lecture V, p. 163). Nor did Austin find any difficulty incorporating judicial lawmaking into his command theory: he characterized that form of lawmaking, along with the occasional legal/judicial recognition of customs by judges, as the "tacit commands" of the sovereign, the sovereign's affirming the "orders" by its acquiescence (Austin 1995: Lecture 1, pp. 35–36). However, one of Austin's later lectures

listed the many problems that can come with judicial legislation and recommended codification of the law instead (Austin 1879: vol. 2, Lecture XXXIX, pp. 669–704).

Criticisms

As many readers come to Austin's theory mostly through its criticism by other writers (prominently, that of H.L.A. Hart; see also Kelsen 1941, pp. 54–66), the weaknesses of the theory are almost better known than the theory itself.

First, in many societies, it is hard to identify a "sovereign" in Austin's sense of the word (a difficulty Austin himself experienced, when he was forced to describe the British "sovereign" awkwardly as the combination of the King, the House of Lords, and all the electors of the House of Commons). Additionally, a focus on a "sovereign" makes it difficult to explain the continuity of legal systems: a new ruler will not come in with the kind of "habit of obedience" that Austin sets as a criterion for a system's rule-maker.

A few responses are available to those who would defend Austin. First, some commentators have argued that Austin is here misunderstood, in that he always meant "by the sovereign the office or institution which embodies supreme authority; never the individuals who happen to hold that office or embody that institution at any given time" (Cotterrell 2003, p. 63, footnote omitted); there are certainly parts of Austin's lectures that support this reading (e.g., Austin 1995: Lecture V, pp. 128–29; Lecture VI, p. 218). Secondly, one could argue (see Harris 1977) that the sovereign is best understood as a constructive metaphor: that law should be viewed as if it reflected the view of a single will. Thirdly, one could argue that Austin's reference to a sovereign whom others are in the habit of obeying but who is not in the habit of obeying anyone else, captures what a "realist" or "cynic" would call a basic fact of political life. There is, the claim goes, entities or factions in society that are not effectively constrained, or that could act in an unconstrained way if they so choose.

As regards Austin's command model, it seems to fit some aspects of law poorly (e.g., rules which grant powers to officials and to private citizens – of the latter, the rules for making wills, trusts, and contracts are examples) while excluding other matters (e.g., international law) which we are not inclined to exclude from the category "law." More generally, it seems more distorting than enlightening to reduce all legal rules to one type. For example, rules that empower people to make wills and contracts perhaps can be re-characterized as part of a long chain of reasoning for eventually imposing a sanction (Austin spoke in this context of the sanction of nullity) on those who fail to comply with the relevant provisions. However, such a re-characterization misses the basic purpose of those sorts of laws – they are arguably about granting power and autonomy, not punishing wrongdoing.

One might also note that the constitutive rules that determine who the legal officials are and what procedures must be followed in creating new legal rules, "are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons" (Hart 1958, p. 603). Austin was aware of some of these

lines of attack and had responses ready; it is another matter whether his responses were adequate.

A different criticism of Austin's command theory is that a theory which portrays law solely in terms of power fails to distinguish rules of terror from forms of governance sufficiently just that they are accepted by a significant number of citizens as giving reasons for action.

Finally, Austin says little about methodology, though this may be understandable, given the early stage of jurisprudence at which he was writing. In particular, it is not clear whether Austin is best understood as making empirical claims about all known legal systems or conceptual claims (not a term common in his day) about what is essential to anything that would be called a legal system; elements of each sort of approach can be found in his writings (Lobban 1991, pp. 224–225; Cotterrell 2003, pp. 81–83).

Conclusion

John Austin was an important early figure in analytical legal philosophy and legal positivism. His command theory of law has few supporters today, but criticisms of its deficiencies were central to the development of later theories of law, by H.L.A. Hart and others (Freeman and Mindus 2013).

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Beccaria, Cesare

Philippe Audegean

Introduction

Cesare Beccaria (1738–1794) was an Italian jurist and philosopher. In little over a hundred pages, in 1764, he formulated the basis of modern criminal law.

The explicit aim of his *On crimes and punishments* was that of studying and combatting "the cruelty of punishments and the irregularities of criminal procedures" (Beccaria 2008: 10).

This double objective pushed the author toward redefining penal law: if its primary function is to protect citizens from criminals, it should also, however, protect them from unjust accusations and must protect not only the accused from iniquitous procedures (such as torture) but also the guilty from excessive punishment.

In this overall framework, the chapter "Of the punishment of death" stands out as it includes the first complete, structured argument against the death penalty, in the name of the principle of "mildness of punishments" (Beccaria 2008: 49).

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Utilitarianism

Beccaria arrived at this position by means of penal utilitarianism. But how could this have enabled him to construct a theory which so carefully defended the fundamental rights of the individual from the excessive punishment of the state?

In order to understand this, we must remember that the term "utilitarianism" serves only to describe a theory of human motivation: it is thus to be understood in the strict sense sometimes used about some eighteenth-century doctrines (such as that of Helvétius) and not in the metaethical use which became standard only with Jeremy Bentham, although it is true that Bentham himself identified a source of his own thinking in the convincing motto of Beccaria according to which the only true task of the law was "the greatest happiness shared among the greatest number" (Beccaria 2008: 9).

In this way, unlike "classic" utilitarianism, the *ante litteram* version of Beccaria was perfectly in line with a concept of justice founded on consensus, and thus on the juridical model of the contract (Francioni 1990).

In the contractual models that preceded Beccaria, sentences were considered legitimate as long as they either conformed to the natural right to punish (Locke) or met the criteria of efficiency with respect to deterrence and reparation (Pufendorf). Beccaria aligns himself with the latter, with the difference that in his model of contract, punishments are not left to the discretion of the sovereign but are desired and chosen by the citizens themselves. They are thus legitimate only if they conform, first of all, to the innate human desire for liberty and security. This theoretical starting point itself brings with it a redefinition of penal law, no longer the defense of the sovereign against social disorder but that of the citizen against personal violence, indeed against all violence, including that of the state.

In order to define a legitimate penal law, then, it is necessary to start from what men and women desired when they entered into society: what they wanted was to flee from "a perpetual state of war where the enjoyment of liberty was rendered useless by the uncertainty of its preservation" (Beccaria 2008: 19). In short, they wanted to make their freedom useful. This description implies two things from which all the principles of penal law derive.

The primary objective of society is the usefulness of the individual. Men and women are indeed so interested in their present welfare that it was only the necessity of procuring it which gave rise to the institution of a civil order.

The first consequence of this is the principle of the lesser evil: men and women have been able to accept only minor sacrifices, conceding to the sovereign the least power possible. A penal order is thus just only if it has recourse to the least necessary evil: the punishment must inflict the least restriction and the least suffering possible.

A second consequence is the principle of materiality, which represents the translation, in penal terms, of the general principle of secularism. It is possible to prohibit an action only if it endangers civil life, only if it produces real and materially

observable damage, and not for moral or religious reasons: only real, externalized behavior can be prohibited, not only thoughts or intentions.

A third consequence is the exclusively preventive function of punishment. A punishment is evil and a useless evil is irrational or cruel. And as only the future can be changed, any retributivist justification of punishment should be rejected. Punishment is meted out not because the perpetrator deserves it but so that he or she does not commit further crimes.

Even before Kant, Beccaria figured out the mutually exclusive nature of the two concepts of retribution and prevention, rejecting, however, the first, and provoking fierce criticism on the part of the German philosopher. To decide upon or inflict a punishment in relation to higher ideals (whether moral or religious, retributive or for the purposes of expiation) or to lower passions (anger, revenge) is to go against human reason, entirely oriented toward the legitimate desire for happiness. Still following the utilitarian perspective, the essential principle of the proportionality of the punishment is justified independently of any reference to retribution.

This penal utilitarianism, however, is not in contradiction with the principle of the least evil possible because, following Montesquieu, Beccaria thinks that the deterring force of punishment is not proportional to the pain that it inflicts. The legislator can and must, therefore, follow a principle of parsimony in punishment, and give sentences which are milder when they can be shown to be as deterrent or even more deterrent than harsher ones.

Humanitarianism

The fundamental aim of civil society remains, however, freedom, as this is the very condition of utility. True human freedom can be defined, nonetheless, not by its physical or metaphysical source, but by its real practical application. This depends on the reasonable certainty of being able to undertake any legitimate action without fear of being prevented by the arbitrary will of others. In the permanent uncertainty of the state of nature, in fact, fear inhibits every action: in this case there is independence but not true freedom.

On the level of punishment, the first consequence is the need for the rigid application of the principle of legality, according to which there are no offences or punishments which have not previously been specified in law. If a judge could choose the punishment on the basis of a personal evaluation of its social usefulness, citizens would return to that state of uncertainty that criminal law itself had the task of eliminating.

Another consequence is the principle of the presumption of innocence, which must protect the accused from any violence before the sentence: “No man can be considered guilty before the judge has reached a verdict” (Beccaria 2008: 32).

A third consequence is the principle of the personal nature of the punishment, which must never be inflicted on any other than the guilty person, even if this injustice could be useful as an intimidatory action.

The "humanitarian" emphasis of Beccaria regarding the rights of the individual, then, derives from his "utilitarianism." This is based on a vision of man as a feeling being who desires to suffer as little as possible, to be able to seek happiness, and to use concretely his freedom, understood to mean "belief in one's own security" (Beccaria 2008: 58).

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Bentham, Jeremy

Anne Brunon-Ernst

Introduction

British philosopher Jeremy Bentham (1748–1832) is hailed as the father of utilitarianism. His life spanned from the reign of George II to that of Queen Victoria. Bentham was educated under the *Ancien Régime*, working by candlelight and traveling in horse-drawn coaches, at a time when the ideas of the Enlightenment were spreading all across Europe; he ripened into old age in the Victorian era, in a metropolis lit by gas lamps and connected by steam railways, when J.B. Say and Ricardo's economic theories had become mainstream economics.

Bentham's thought mirrors the times in which it was devised: His early influences include La Motte-Fénelon, Beccaria, Helvetius, Voltaire, and Montesquieu, and his late projects were almost exclusively focused on writing Codes. Therefore, Bentham is both the last thinker of the Enlightenment and the first Victorian.

Bentham was born in an affluent middle-class family. This allowed him to devote himself to intellectual pursuits without the need for a patron or paid employment, especially after his father's death. This financial situation coupled with his precocity – Bentham learnt Latin at the age of 3, played Handel sonatas on his violin at 5, and started Queen's College (Oxford) at 12 – explains why he enjoyed 58 years of uninterrupted career as a writer. It started in 1774 with his translation of Voltaire's French essay *The White Bull* and ended in 1832 with his unfinished *Constitutional Code.*

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Training for the law, Bentham attended Blackstone's lectures on *Commentaries on the Laws of England* in 1763. This triggered Bentham's early engagement with jurisprudence in *Comment on the Commentaries*, as he found fault with Blackstone's indiscriminate praise of the English common law. Blackstone was also criticized for his lack of distinction between a *censor* (critic of a system) and an *expositor* (person who describes its functioning), thus confusing the law as it *is* and the law as it *ought* to be. Bentham was called to the Bar in 1769, and although he never formally practiced, his legal education had exposed the confusion of the common law and its need for reform. Therefore, Bentham set himself a lifetime goal to push for the rationalization of the laws according to the principle of utility and their systematic codification.

Bentham was a very prolific writer who has had a decisive influence on many reforms in Britain and overseas in his time and beyond. In the 1770s and 1780s, Bentham looked into the applications of utilitarianism to law and legislation. He worked out some of his most important theories in *Introduction to the Principles of Morals and Legislation* (*IPML*), which grew out of his wish to write a penal code, followed by *Of the Limits of the Penal Branch of Jurisprudence* (*Limits*, formerly known as *Of Laws in General*) where the search for the distinction between civil and criminal law led him to study the nature of *a* law.

From the mid-1780s to the start of the French Revolution, Bentham became immersed in practical projects such as penology, public administration, social policy, and economics. He began working out his Panopticon ideas at that time. The start of the French Revolution was a golden opportunity to draft reforms, thanks to the help of the Marquis of Lansdowne and his network of reformists in France (such as Mirabeau). While Bentham's projects had little influence on the turn of events in France, he was nonetheless awarded the title of honorary citizen in 1792. From 1795, with the beginning of the Terror, Bentham gave up his French reforms and returned to his Panopticon schemes, before definitely abandoning them in 1803. Academics have been at pains to comment upon Bentham's practical projects. Were they an unproductive interlude, which diverted him from his reformist tasks? Others argue that these years were far from barren, as he worked out most of his ideas on bureaucracy – and developed a mastery of detail – that were to be features of the *Constitutional Code*, his main exercise in substantive codification.

The period 1808–1809 was an important moment in Bentham's thought as it hearkened his transition to political radicalism and a democratic agenda. The turn of the century also marked Bentham's renewed interest in codes. As he needed a nation ready to implement them, he got involved in the Spanish and Portuguese revolutions, and he drafted a new plan of government for Greece when it was emancipating from the Ottoman rule. He was in correspondence with North-American and Spanish-American leaders to push forward his reforms. It was in South America and in Australia that his ideas would find favorable soils to grow. Bentham has truly earned the right to be called the "Legislator of the World."

Most of Bentham's writings – an estimated 75.000 folios (A3-size pages) – have never been properly published, on account of Bentham's lack of time, interest in publication, and sense of completion. When Bentham died, a first edition of his

works was compiled by his secretary John Bowring. Unfortunately, the edition was far from scientific, aggregating parts of manuscripts with others, inserting versions by unapproved editors, publishing English translations from French editions, and omitting the most unpalatable writings on religion and sex. A second edition is now underway at the Bentham Project (University College London), publishing volumes directly from manuscript sources in their care. Since 1968, 34 volumes (of an anticipated 80) of the *Collected Works* have been published.

Utility

Bentham built his radical philosophical system on the concept of utility. In *IPML*, he explains as follows: "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness. I say of every action whatsoever, and therefore not only of every action of a private individual, but of every measure of government" (Chap. I, §2). Happiness or utility is thus the governing principle of utilitarian ethics and government. It has a long history dating back to Antiquity and was also widely used in Bentham's times, be it in the 1776 American Declaration of Independence or in Beccaria's writings. Bentham did not invent utility, and he was not the first to think that the aim of a government is to promote the happiness of its subjects, but he was the first to take it to an unprecedented pitch, systematically applying it to all realms of individual and collective action.

Happiness is measured in terms of pleasure and pain. This universal ability, which is shared by all human beings, cannot be demonstrated nor is demonstrable but results from rudimentary observation of humankind. By arranging acts according to the quantity of pleasure or pain they produce, Bentham arbitrates between conflicting policies or ethical stands and apportions a sentence exactly to any criminal offense. Critics have often pointed to Bentham's aborted attempt to measure pleasures and pains in money-terms, failing to understand how he was exploring techniques for rationalizing policy-making.

Methodology

Utility is the cornerstone of Bentham's philosophy, although some academics have challenged its place in his system. Indeed, there are other key building blocks in Bentham's philosophy, such as the importance of the theory of fictions and an approach built on the scientific method of the Swedish botanist Carl Linneaus. Following Bentham's early interest in chemistry in 1770s, he applied the Linnean binominal nomenclature of division into classes, orders, genera, and species to all his

intellectual endeavors. By applying the method of bifurcation and bipartition, Bentham honed his understanding of reality and subdivided each principle into two subordinate ones. This is reflected in *Chrestomathia* with his classifying all sciences as branches of the all-comprehensive science of *Ontology*.

Bentham's theory of language, called the theory of fictions, rests on entities. These entities are divided into real and fictitious. Real entities designate real objects (like an apple) that one speaker can point out to another, while fictitious entities do not refer to any object having physical existence (like the word "obligation"). Fictitious entities are most treacherous when speakers lend them a reality they do not have for the purpose of promoting sinister interests. If fictitious entities can give rise to ambiguity in discourse, they are nonetheless essential for humans to communicate. In order to avoid ambiguity, Bentham suggested that fictitious entities be defined by means of a paraphrase referring them to a real entity, embedded in sensations of pleasure and pain.

Law as Social Control

While *Limits* was only rediscovered in 1970s, it has had a major influence on legal theory since, especially on account of H.L.A. Hart's analysis. Bentham defines a law as: "A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by *the sovereign* in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question" (Chap. III, §30). The quote presents three founding elements of Bentham's legal theory.

The first is that a law is embedded in language. It is a type of social regulation which does not have any existence other than in words. Laws, which convey the legislator's meaning (he/she being one individual in the case of a monarch or multiple in the case of a parliamentary regime), are made up of words. These words express either the primary will of the legislator when set out in a statute, or his/her delegated will in the case of a decree or any other legal instrument enforceable in court, such as a marriage or employment contract. The second point of note is that a law only applies to those to whom the power to address laws is recognized and accepted, which presupposes habits of obedience. Third, the will of the legislator relies on sanctions. Without sanction, there is no law. However, applying a sanction (fine or imprisonment) will generate pain for the noncompliant party. As utility aims to minimize pain, the rationale of laws cannot be punishment, but promoting any legal or nonlegal instrument that will make people change their behavior so that aggregate pleasure is maximized.

Bentham's legal theory extends the scope of what a law is and, in so doing, gives the tools to trace the manifold ways in which governments, corporations, and individuals exact compliance from each other, not only through legal prohibitions but also thanks to normative prescriptions.

Legacy

Bentham's influence was felt during his lifetime. He maintained a sustained correspondence with many of the prominent figures of his time in all corners of the world, advancing his ideas in the new emancipated countries of Greece and South America, as well as the young Australian colonies. Books and edited editions of his manuscripts circulated his ideas to the elite, while news media such as the *Westminster Review* helped to trickle them down to the educated masses. With disciples at all levels of government, he who was called the Hermit of Queen's Square Place was able to shape some of the major reforms of the nineteenth century: reform of the poor laws system (1834), successive extension of franchise (1832–1867–1928), or even consolidation of criminal legislation (1826–1848), among others. However, Bentham's legacy extends far beyond his lifetime. The present entry offers to investigate a few, without pretending to be exhaustive.

Animal Rights. Although Bentham did not flesh out a separate theory on animals, he did consider that the principles of utility applied to all sentient beings. Indeed, as animals can experience pleasure and pain, the guiding principle of utility – maximizing pleasure and minimizing pain – applies to animals also. According to him: "The question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?" (*IPML*, Chap. XVII, §4n). Bentham offered one of the earliest advocacy of animal rights, and many present advocates of utilitarian ethics, such as Peter Singer, recognize his legacy.

Emancipation of Women. Bentham's philosophy is not rights based but utility based – although both systems of thought seem to achieve similar outcomes – however, historiography has portrayed him as a champion of women's rights (right to vote or rights in marriage). Indeed, in the early *Rights, Representation and Reform* and in the later *Securities Against Misrule,* Bentham clearly includes women in the universal suffrage. However, his advocacy might not have been as prominent as for the male suffrage, since he might have feared a backlash if he went public. Bentham's approach to reform was always incremental, so his stance in relation to women is not unusual.

Bentham's reflection also included the reform of the law of marriage. He drafted a body of law based on the principle of utility. As it relied on the proposition that men and women were equal, he advocated radical ideas on wives and mistresses and proposed a scheme for short-term marriage.

Nonconforming Sexual Practices. When it comes to sexual practice, Bentham does not distinguish morality from legislation. As sex is an activity which produces pleasure for people who consensually take part, the assessment of its utility relies on

determining the ratio of pleasure the act produces for the person who engages in it, and the pain it may cause to the participants, and/or to the wider community. Therefore, Bentham does not think legislators have a case to intervene against such practices.

Bentham expressed his position in manuscripts he did not dare publish in his lifetime. His stance demonstrates how utility can operate as a critical principle when applied to sexual practices ranging from sodomy to zoophilia and necrophila. It is in these writings that Bentham appears so strikingly ahead of his time.

Colonies. Bentham's position toward colonialism was rooted in ambivalence. In *Bentham to the National Convention of France*, *Rid yourself of Ultramaria*, and *Institute of Political Economy*, he displayed real hostility to colonial holdings, on grounds that colonization was costly, and that, contrary to his forebears and successors, Bentham never wanted to civilize those who were then shockingly considered as barbarian or backward peoples. Indeed, he believed that every human being is capable of understanding his own interest, so that no civilizing mission should ever be promoted. Thus, his reforms – even those aimed at the East India Company – sought to define ways in which the population might be involved, even in a limited way, in the process of public decision-making.

Bentham also believed in the need to propose measures adapted to different cultures in "Place and Time." His method would thus be to define general utilitarian codes, then adapt them to local circumstances.

However, in *Colonization Company Proposal*, Bentham advanced a National Colonization Society scheme to colonize South Australia with free white settlers. His position ended being a violation of Aboriginal possession of land and a negation of his basic tenets about the value of Indigenous lives.

Panopticon, Panopticism and Surveillance Society. A circular building from which inmates in cells can be watched by the overseers positioned in a central tower – this is the basic idea of Bentham's asymmetric panoptic power gaze that can be applied to many different users: workers, convicts, paupers, students, and even civil servants.

This principle was taken up by Michel Foucault as exemplifying the era of disciplines. Foucault's engagement with the Panopticon started in 1975 with the publication of *Discipline and Punish* which publicized the Panopticon to a wider audience and coined the concept of panopticism. Panopticism exemplifies a certain number of features: first, the purpose-oriented use of space; second, the isolation and confinement of inmates under the continued gaze of a watchman; third, the maximum extraction of information and work from those who are under surveillance; fourth, a normalizing judgment; and last, the internalization of discipline by inmates, as they do not know when they are being watched. Panopticism needs to be understood as the reinterpretation of the Panopticon project to suit Foucault's strategic narrative.

Alongside Big Brother and privacy, panopticism has now become a central theoretical frame in the growing field of surveillance studies. Although David Lyon believes the Panopticon is no longer a theoretical model suited to the digital age, Bernard Harcourt still acknowledges that there are elements of the classic forms

of the juridical exercise of power that can be brought into the digital age, such as a panoptic-like desire for "total awareness."

Utility and Arts. Bentham's esthetic thought has been given very little attention by scholars. The reason lies in two statements made by J.S. Mill, which have been widely circulated as the final construction of Bentham's utilitarian hedonism. In the first, Mill refers to Bentham's comment that "Prejudice apart, the game of push-pin is of equal value with . . . music and poetry". In the second, Mill accused Bentham of disparaging "all poetry (as) misrepresentation." Mill fully condemned Bentham's critique of taste, reinstating in the process a distinction between higher and lower pleasure, that the latter has eschewed, and claiming that it was better to be a human being dissatisfied than a pig satisfied.

Recent research on the relationship between utilitarianism and the arts makes it possible to reconsider the way in which Bentham's utilitarianism was pitted against romanticism and literature and pave the way for exploring art in Bentham's work. Utility can be used as a motif in artistic representations (Jeni Fagan's novel *Panopticon* exemplifies the genre of panoptic fiction) or become art in its own right, as when Bentham's mummified body, the Auto-Icon, was exhibited at the "Like Life" exhibition at the Metropolitan Museum of Art in New York in 2018.

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Blackstone, William

Jessie Allen

Introduction

Sir William Blackstone (1723–1780) wrote what is probably the most famous English language law book ever published. *Blackstone's Commentaries on the Laws of England* envisions English common law as a humanist cultural achievement at once connected to conservative traditions and open to social change. Published between 1765 and 1769, the four-volume *Commentaries* became an influential authority in the nascent US legal system. Though his work is rarely studied today, Blackstone continues to be cited by American courts. More broadly, in countries throughout the world, Blackstone's vision continues to shape how lawyers and the public at large understand what it means to have a government constituted and limited by law.

Blackstone was an opponent of democracy and a traditionalist supporter of hierarchical society. As a member of English Parliament, he voted to reenact the notorious Stamp Act, which exacted revenue from the American colonists whose demand for independence from British rule Blackstone regarded as treasonous rebellion. It is therefore an irony of history that Blackstone's sympathetic portrait of English law retains only marginal historical interest in England today, while it continues to be cited as an authoritative source in the United States. This odd situation is partly accidental – when the *Commentaries* was published, the US legal system was just taking shape, and few other legal sources were available

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there. But it is also due to the substance of Blackstone's work. Blackstone believed that history tends to advance rational social progress, characterized by expanding individual liberty and correspondingly limited government. Although Blackstone was a supporter of the British Crown, his view that sovereignty is limited by core natural rights resonated with colonists who wished to escape British rule and found an independent nation. Indeed, arguably some of Blackstone's distaste for the project of American independence stemmed from what he regarded as the colonists' hypocritical coupling of a rhetoric of unalienable equal rights with the practice of slavery and the violent appropriation of Native American land.

Blackstone played many roles in his lifetime. He served as a university administrator, a practicing (and rather unsuccessful) attorney, a judge, and a member of British Parliament – in addition to being a husband and the father of eight children. Besides lecturing at Oxford and producing scholarly legal writings, he was a poet and the author of interpretive works on Shakespeare (Prest 2008).

Blackstone's Commentaries on the Laws of England

By far the most enduringly influential of Blackstone's works is his *Commentaries on the Laws of England*. The *Commentaries* begins by identifying core rights and constitutional structures and then proceeds to what Blackstone calls "a general map of the law", describing a sprawling network of legal doctrines, procedures, and institutions, tracing their historical development, and rationalizing this multifarious mix of legal structures developed over centuries with modern liberal rights. He combines historical explanations with policy justifications, assessments of the social effects of various doctrines and statutes, and sometimes approving, sometimes rueful, commentary on the politics and morality of the law being described. Above all Blackstone aims to show that law developed through thousands of independent judicial opinions can and does produce a coherent legal system with a focus on individual liberty.

The *Commentaries* is unabashedly eclectic and synthetic. The referential backbone of the text is English judicial opinions and statutes. But Blackstone draws from a wide array of other sources, including previous surveys of English law – e.g., the medieval treatise known as Bracton, Matthew Hale's analysis, and Coke on Littleton – as well as earlier work by continental jurists like Puffendorf and Grotius (Cairns 1984). His treatment of natural rights and governmental structures that limit arbitrary sovereignty in England relies extensively on Montesquieu's *L'Esprit des Lois*. There are comparisons between English legal structures and those of cannon law, ancient Roman law (with references to *Justinian's Institutes*) and ancient Hebrew law (with references to the Bible), as well as comparisons with contemporary laws of France, Germany, Denmark, and the Ottoman Empire, among other countries. Blackstone offers both historical and conceptual explanations for the development of English law, and law in general, sometimes presenting conflicting theories and declining to endorse one over another. So, for instance, he observes that