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### **Jeremy Bentham (1748-1832)**

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### **Abstract and Keywords**

This chapter discusses the thought and works of Jeremy Bentham (1748-1832). Since the late 1960s Bentham scholarship has been driven by the appearance of volumes in the new authoritative edition of *The Collected Works of Jeremy Bentham*, prepared by the Bentham Project under the supervision of University College London's Bentham Committee. The thirty-third volume in the edition, entitled *Preparatory Principles*, was published in December 2016. Bentham was the pre-eminent representative of the Enlightenment. He was the founder of the doctrine of classical utilitarianism, which remains one of the main strands in liberal moral philosophy; he set the parameters for the modern discipline of jurisprudence by distinguishing law as it is from law as it ought to be; his commentary on the French Declaration of Rights of 1789 constitutes a devastating attack on the philosophy of natural rights, and hence on that of human rights.

Keywords: Jeremy Bentham, legal history, classical utilitarianism, liberal moral philosophy, jurisprudence, French Declaration of Rights of 1789, human rights

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### I.

\*SINCE the late 1960s Bentham scholarship has been driven by the appearance of volumes in the new authoritative edition of *The Collected Works of Jeremy Bentham*, prepared by the Bentham Project under the supervision of University College London's (UCL) Bentham Committee, and the successive General Editorships of J. H. Burns (1961–1979), J. R. Dinwiddy (1978–1983), F. Rosen (1983–2003), and the present author (1995 onwards). The thirty-third volume in the edition, entitled *Preparatory Principles*, was published in December 2016.<sup>1</sup> UCL possesses not only Bentham's physical remains in the form of his auto-icon, but also his literary remains in the form of around 60,000 folios of his manuscripts (a further 12,500 folios are deposited in the British Library). The earliest attempt at a major edition of Bentham's writings had been undertaken within a decade or so of his death by his literary executor John Bowring.<sup>2</sup> By the 1930s the Bowring edition was judged to be unsatisfactory as the basis for modern scholarship, and recognizing the role played in the foundation of the institution by Benthamite utilitarians and accepting (p. 380) its responsibility to do something with Bentham's papers (which Bowring had deposited in its Library), UCL established the first incarnation of the Bentham Committee with a view to producing an authoritative edition. Little progress had been made when the Second World War intervened, and the edition was abandoned. In the meantime Werner Stark, a Czech refugee working under the auspices of John Maynard Keynes, prepared a three-volume edition of Bentham's economic writings which was eventually published in the early 1950s.<sup>3</sup> With the encouragement of A. J. Ayer, the second and current incarnation of the Bentham Committee was established in 1959. Rejecting all previous editions of Bentham's writings, including that of Stark, the Committee made a fresh start, dividing the new edition into two main elements, the correspondence and the works, the latter based on works printed by Bentham himself, as well as the manuscripts. As the 'backbone' to the whole edition, priority was given to the correspondence, with the first two volumes being published in 1968, and the twelfth in 2006, thereby reproducing all known letters both from and to Bentham up to the end of June 1828. One more volume will complete the correspondence through to Bentham's death in 1832, though a further volume of indexes and supplementary letters—that is, those discovered after the appropriate volume had been published—will also be required. In the 'General Preface to the *Collected Works*', published in the first volume of *Correspondence* in 1968 and in *An Introduction to the Principles of Morals and Legislation* (hereafter *I.P.M.L.*), the first volume to appear in the works in 1970, it was cautiously estimated that the edition would run to thirty-eight volumes.<sup>4</sup> Having, as noted above, published the thirty-third volume, one might assume that the edition is close to completion. My conservative estimate, however, is that the edition will require not thirty-eight volumes, but eighty. Significant work has been undertaken on texts that will produce a dozen or so more volumes, namely *Rationale of Judicial Evidence* (5 volumes), *Scotch Reform* (2 or 3 volumes), *Not Paul, but*

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*Jesus* (2 volumes), and *Logic and Language* (1 volume). It is perhaps fair to say that in terms of work done as opposed to volumes published, we are about half-way through.

Why does the Bentham edition matter? The short answer is, because Bentham matters. The nineteenth-century utilitarian philosopher Henry Sidgwick claimed that Bentham was the pre-eminent representative of the Enlightenment and that Benthamism was ‘the legacy left to the nineteenth century by the eighteenth’, being the force against which the new ‘philosophy of Restoration and Reaction has had to struggle continually with varying success’.<sup>5</sup> Richard Whatmore has pointed out to me that many of the leading figures of the eighteenth-century Enlightenment, by the (p. 381) time of their deaths around the turn of the nineteenth century, had come to believe that their revolutionary project for social reformation had failed and that their final works were beset with pessimism. From this perspective, the significance of Sidgwick’s comment begins to emerge. The eighteenth-century Bentham, influenced by the radical Enlightenment of Helvétius, Voltaire, D’Alembert, and Diderot, seeing on the one hand the emergence of stable democracy in America, and on the other hand experiencing mistreatment at the hands of the British establishment over his panopticon prison scheme, developed into the politically radical Bentham of the nineteenth century, advocating at first ‘democratic ascendancy’ within the British Constitution and then a democratic republic, stripped of monarch, aristocracy, and established church. Bentham took the radical programme for parliamentary reform, with its demands for universal suffrage, secret ballot, equal electoral districts, and annual elections, and its traditional basis either in natural rights or the Anglo-Saxon constitution, and gave it a utilitarian justification, which paved the way, if not for the Great Reform Act of 1832, certainly for the People’s Charter of 1848. As J. H. Burns expressed it, Bentham’s career can be characterized as a move from ‘Radical Enlightenment’ to ‘Philosophic Radicalism’.<sup>6</sup> The hopes of the Enlightenment for a rational basis for social organization, which seemed to have been dashed by the excesses of the French Revolution and the conservative reaction that followed, were kept alive and given systematic form, appropriate for a democratic, liberal age, by Bentham’s programme for political, legal, and ecclesiastical reform, which, at the same time that it aimed to promote the interest of the community as a whole, did not threaten the security of property.

As well as its historical significance, Bentham’s thought continues to be of philosophical importance. He was the founder of the doctrine of classical utilitarianism, which remains one of the main strands in liberal moral philosophy; his so-called felicific calculus is the basis for cost-benefit analysis in economics; he set the parameters for the modern discipline of jurisprudence by distinguishing law as it is from law as it ought to be, offering a profound critique of the natural law and the English Common Law, and proposing a whole range of legal reforms; his commentary on the French Declaration of Rights of 1789, with its memorable phrase ‘nonsense upon stilts’,<sup>7</sup> constitutes a devastating attack on the philosophy of natural rights, and hence on that of human rights; and he put forward perhaps the most radical vision of the democratic state ever devised. Furthermore, Bentham looms large in studies of surveillance thanks to Michel Foucault’s account of the panopticon prison as a model for the modern state. Foucault went on to

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state that 'Bentham is more important for our society than Kant and Hegel'.<sup>8</sup> Prominent (p. 382) scholars who have recently recognized Bentham's importance for their respective fields include Judith Resnik, Jon Elster, Faramarz Dabhoiwala, and David Armitage.<sup>9</sup> Over the years, while some have found Benthamism, and even Bentham himself, distasteful, few have dismissed him completely. If one accepts that Bentham deserves a place amongst the great thinkers, or merely the influential thinkers, the provision of authoritative texts is vital, not only for Bentham specialists, but for scholars from a wide variety of disciplines where Bentham's ideas have either been historically influential or have the potential to contribute to present and future debates.

If interest in Bentham is set to increase as more volumes appear in the *Collected Works*, the basis on which work is undertaken on the new edition should be a matter of interest to the scholarly community. The Bentham Committee originally envisaged that editorial work would be carried out on each volume by 'a scholar in the appropriate field',<sup>10</sup> but this model proved unsatisfactory, mainly because of the complexity of the tasks involved and the difficulty of maintaining a consistent approach. Hence, under Frederick Rosen's General Editorship, editorial work was brought 'in-house', with researchers, usually post-doctoral, appointed as editors, being supported by the General Editor. The employment of researchers depends upon the provision of financial resources. UCL's Faculty of Laws currently supports the full-time post of the General Editor, but otherwise the Bentham Project relies upon external funding. As General Editor, I have received generous support from the Economic and Social Research Council, the Arts and Humanities Research Council, and the Leverhulme Trust. I have also received significant grants from the Wellcome Trust, the Mellon Foundation, and the European Research Council, while the British Academy, which recognizes the Bentham Project as one of its sponsored research projects, provides a modest annual grant. I have adopted an opportunistic strategy towards fundraising, in that I attempt to match a particular volume or series of volumes with both the remit of a particular funding organization and the expertise of a member of my research staff. For research staff, a post-doctoral post is a useful stepping stone into a permanent academic position, and so their Benthamic expertise, built up over the course of a grant, is lost at that point to the Bentham Project, though in the meantime the researcher has to endure the anxiety that accompanies a time-limited post and the impending threat of redundancy. As things stand it is impossible to put any long-term strategy in place for progress in the edition because of the reliance on such external funding, which is, in relation to the overall length of time needed to complete the Bentham edition, extremely short-term, with grants being awarded for a maximum of five years and often only (p. 383) for two or three. Contrast this with the recently established Averroes edition at the University of Cologne, which has received funding for four research posts for twenty-five years each, with the intention of seeing the eighteen-volume programme through to completion. The most efficient and most beneficial means of producing the Bentham edition would have been to begin with a guaranteed endowment, thereby allowing work to proceed on a chronological basis (other strategies, such as to focus on the most famous works or on those that were attracting most attention at the time from Bentham specialists or scholars more generally, would not have

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been any less random than the current situation) and General Editors to concentrate on editing rather than on fundraising. The challenge of supporting long-term research projects is one that British academia has failed to meet.

## II.

Returning to the relationship between the new edition and interpretive scholarship, the first volumes of works to appear were concerned with Bentham's early writings on law and legal philosophy, taking advantage of the fact that one of the scholars 'in an appropriate field' to take a serious interest in the editing of Bentham was the prominent Oxford legal philosopher H. L. A. Hart. Three volumes appeared under Hart's editorship or co-editorship with J. H. Burns: *I.P.M.L.* and *Of Laws in General*, both in 1970,<sup>11</sup> and *A Comment on the Commentaries and A Fragment on Government* in 1977.<sup>12</sup> These volumes contained material written between about 1775 and 1782 and were related to Bentham's attempt to draw up a penal code. Hart saw Bentham as the originator of the doctrine of legal positivism, of which he had himself given the standard account in *The Concept of Law* (1961). Over a course of years Hart produced a series of brilliant essays on Bentham, collected in *Essays on Bentham* (1982). Bentham specialists began to explore in detail the three newly edited volumes, and there followed a series of major books,<sup>13</sup> focusing on Bentham's legal philosophy and his critique of the Common Law. These authors also drew on Bentham's correspondence, supplemented where appropriate by texts drawn from the Bowring edition (some of which are English translations from Étienne Dumont's French recensions of Bentham's manuscripts—but that is another story). Much less attention has, on the whole, been paid to Bentham's later writings, though Rosen's (p. 384) writings on the constitutional code are a notable exception, and to comparing Bentham's earlier and later writings, with Oren Ben-Dor's *Constitutional Limits and the Public Sphere* forming the exception here.<sup>14</sup>

No one was much inclined to dispute Hart's view of Bentham as a legal positivist, in that Bentham had distinguished clearly between law as it is and law as it ought to be, and in that this distinction appeared to map onto the twentieth-century distinction between fact and value (or description and prescription). In Hart's view, Bentham had developed a set of morally neutral terms in order to describe the nature of law (law as it is), as he himself had done in *The Concept of Law*, and had distinguished this exercise from that of assessing the goodness of the content of the law (law as it ought to be). I began to have doubts about Hart's approach when working on the manuscripts for Bentham's essay on 'Ontology' and then on Bentham's writings on logic more generally, of which the essay on 'Ontology' formed a part. Bentham's understanding of ontology and epistemology did not seem to be compatible with conceptual analysis, as it was understood by Hart and other twentieth-century philosophers. There was also the related question of the naturalistic fallacy. Many commentators sympathetic to Bentham tried to defend him from the charge that he had based his ethics on facts about the physical world, but it seemed plain to me

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that this was what he had explicitly done, since in his view there was no other meaningful basis. Given that Bentham argued that existence could only be predicated of physical matter, there seemed to be no space for any independent realm of ideas, or in other words for non-natural concepts. The whole enterprise of conceptual analysis would, I thought, have made no sense to Bentham.

Doubts were further raised in my mind by a paper given by the late Amanda Perreau-Saussine, who argued that Bentham was not a legal positivist in the Hartian sense.<sup>15</sup> It also came about that, with a view to producing a paperback edition of *Of Laws in General*, I began to check the accuracy of the transcription of the manuscripts that had been published in the original edition. Having discovered a number of transcription errors that had not been listed in the *Corrigenda* to that edition, I went on to find that serious mistakes had been made in the ordering of the material within some of the chapters. Perhaps understandably, given the disordered state of the manuscripts, the complexity of the subject-matter, the relative inexperience of the researchers who did much of the editorial work, and hence the lack of appreciation of Bentham's working methods, the volume presented a very misleading and confused version of the text. I embarked on the task of establishing a text that was faithful to Bentham's intentions. I discovered three major stages in the drafting of the text and presented the material in such a way that allows the reader to reconstruct them. When I presented these findings to the Bentham (p. 385) Committee, it was decided that the new text should not appear as a second edition of *Of Laws in General*, but should supersede that volume in the *Collected Works*, and appear under Bentham's original title, namely *Of the Limits of the Penal Branch of Jurisprudence*,<sup>16</sup> and thereby reassert its provenance as the seventeenth chapter of a proposed introduction to a penal code, of which the text published as *I.P.M.L.* composed the first sixteen chapters. I wonder whether Hart chose the title *Of Laws in General* (the phrase appears on a related manuscript, but was not intended by Bentham as a new title for *Limits*) because it seemed to link Bentham's work to his own theory of law by presenting it as an exercise in conceptual analysis? If that had been the case, it would have been akin to putting the cart before the horse, in that Hart would have allowed his own philosophical views to influence the way he had edited a historical text.

Having become concerned in the first place by the standard Hartian interpretation of Bentham as a legal positivist and then concerned that this interpretation had played some role in distorting the way in which Hart had approached the editing of *Of Laws in General*, I began to think about the relationship between Bentham's legal theory and more generally the principle of utility on the one hand, and his writings on logic and language (or more generally on ontology and epistemology) on the other hand.<sup>17</sup> I was also perplexed by the fact that the latter were generally referred to as Bentham's 'theory of fictions', a description which appears to have originated with Charles Kay Ogden, who republished Bowring's edition of the relevant manuscripts in the 1930s.<sup>18</sup> The assumption that 'fictions' and what Bentham termed 'fictitious entities' amount to the same thing has produced, and continues to produce, confusion in Bentham scholarship. A fiction, for

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Bentham, was a false statement of fact, while a fictitious entity was an abstraction, as I will explain below.

My confidence that it is appropriate to question Hart's interpretation of Bentham, and to emphasize Bentham's views on logic and language as the basis for this scepticism, has been strengthened by the work I have undertaken on *Preparatory Principles*. This volume had its genesis over forty years ago, when Douglas Long began the process of producing a pioneering, encoded transcript of the manuscripts, using a computer programme developed at the University of Western Ontario, which anticipated much of the work that is now standardly done in textual scholarship in the digital humanities. The material reproduced in *Preparatory Principles* does not form a traditional work, in the sense of a text divided into chapters and sections and following a coherent structure, but consists of a series of numbered passages, probably written over three or four years in the mid-1770s, in which Bentham noted ideas as and when they occurred to him. The work contains (p. 386) multiple passages dealing with ontology and language, from which an illuminating account of Bentham's views can be pieced together, and the centrality of those views to his whole enterprise appreciated. It would have scarcely been possible to piece together such an account without the clarity that has been given to the material by its presentation in a *Collected Works* volume, including a table of contents, indexes, and a wealth of annotation. Bentham had developed a detailed account of his underlying philosophy of language, with its related notions of ontology and epistemology, by the mid-1770s (though that should be no surprise given Bentham's exposition of 'duty' in a well-known footnote in *A Fragment on Government*),<sup>19</sup> and that this gave rise to his distinctive philosophy of law. In short, it explains Bentham's originality. Once the centrality of Bentham's philosophy of language has been recognized, scholars will not only be able to reassess his writings on jurisprudence, but also to develop a more complete understanding of his voluminous later writings on codification in general, on the penal, civil, and constitutional codes in particular, on procedure and evidence, and everything else besides.

### III.

One of the main themes in *Preparatory Principles* is what Bentham termed 'metaphysics', by which he meant the philosophy of language, and which was the subject-matter of universal jurisprudence. 'The business of Metaphysics', remarked Bentham, 'is . . . to examine what ideas we have belonging to the terms we use, and whether they are clear or no'. Every science had its 'leading terms', which were used in order to make other terms understood. The metaphysics of the science of law consisted 'in ascertaining the meaning, in fixing [the] ideas, belonging to the several terms of universal Jurisprudence, through the medium of which the technical terms of the particular Jurisprudence of any country are endeavoured to be explained'.<sup>20</sup> Bentham had in mind such terms as right, duty, and power, which, he claimed, could not be defined by the ordinary Aristotelian

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method *per genus et differentiam*. This in itself was an extraordinary insight, and we shall perhaps never know how Bentham arrived at it (though the answer may lie buried in some as yet untranscribed manuscript). The task of giving expositions of these terms belonged to the field of universal jurisprudence. What, then, was universal jurisprudence, and how were we to make sense of its key terms?

(p. 387) In the second section of *Limits*, Bentham distinguished three branches of jurisprudence. Censorial jurisprudence ascertained what the law 'ought to be'; (local) expository jurisprudence ascertained 'what the *law* is' in a particular nation or group of nations; and universal (expository) jurisprudence, which was relevant to 'all nations whatsoever', dealt with the words 'appropriated to the subject of law', which 'in all languages are pretty exactly correspondent to one another: which comes to the same thing nearly as if they were the same. Of this stamp, for example', continued Bentham, 'are those which correspond to the words *power, right, obligation, liberty*, and many others'. The subject-matter of universal jurisprudence was 'the import of words: to be, strictly speaking, universal, it must confine itself to terminology'.<sup>21</sup> Universal jurisprudence, as Bentham explained in the 'Preface' written for the publication of *I.P.M.L.* in 1789, was concerned with the '*form*' of the law, by which he meant

its method and terminology; including a view of the origination and connexion of the ideas expressed by the short list of terms, the exposition of which contains all that can be said with propriety to belong to the head of *universal jurisprudence*.

In a note, he added: 'Such as obligation, right, power, possession, title, exemption, immunity, franchise, privilege, nullity, validity, and the like.'<sup>22</sup> According to Bentham, each legal system had terms for entities that could be found in every legal system. The task of universal jurisprudence was to provide a sensible exposition for those terms.

*I.P.M.L.* and *Limits* were in effect exercises in universal jurisprudence, but while Bentham's philosophy of language constituted the ground, so to speak, on which these works were built, within them he gave no systematic exposition of his method. Such an exposition, as noted above, does exist in *Preparatory Principles*, where Bentham explained that the key to unlocking the mystery of legal discourse lay in demonstrating its relationship to the physical world. We grasped 'the signification of words, and [the] origination of the ideas which they signify' when 'the idea annex to any one word' was distinguished from 'the idea annex to any other', and when it had been shown 'how all the ideas we have that are complex, arise from, and are made up of, simple ones'.<sup>23</sup> Bentham explicitly followed John Locke in stating that ideas consisted of '[t]he several objects we are said to have in our mind when we are thinking'. Furthermore, he followed David Hume in distinguishing ideas into 'ideas properly so called' and 'impressions'. Taking sight, for instance, an impression of an object was present in the mind at the time that we perceived it, while an idea was a recollection of the object. Our ideas or impressions of, for instance, figure, extension, colour, smell, heat, hardness, space, and time were all derived (p. 388) from perception.<sup>24</sup> Bentham also accepted Locke's distinction between 'simple ideas' and 'mixed modes', to the extent that abstract terms



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(‘mixed modes’) could only be understood by reference to simple ideas, and that simple ideas were derived from bodies, that is physical objects, that had been perceived by our senses.<sup>25</sup> For Bentham, simple ideas consisted of ‘events’ and ‘situations’, both of which impressed ‘sensible images on the mind’, and both of which were dependent on ‘bodies’: events were bodies in motion, while situations were bodies at rest.<sup>26</sup> While matter and motion constituted everything that was perceived by ‘our exterior senses’, these were not ‘two distinct things’, because, ‘The motion is not any thing that exists separately from matter’.<sup>27</sup> The single source of simple ideas, therefore, was matter, distributed into different bodies. It was linguistic usage that suggested that motion and rest existed separately from body: ‘The body that moves, and the motion that it makes, may be spoken of . . . as two things: but in fact they are but one thing. The one thing that exists is the body itself that makes the motion.’<sup>28</sup> As well as sensations generated by external bodies in motion and at rest, simple ideas included internal sensations such as pain, pleasure, and volition, since these were simple ideas, which ‘nobody defines, or if any one defines, nobody makes clearer by defining’: indeed, they could not be defined, because only complex ideas could be defined.<sup>29</sup>

Bentham did not, however, accept Locke’s view that all mixed modes could be explained by showing how they consisted of a combination of simple ideas, since certain abstract terms represented entities that could not be analysed in this way. Abstractions such as golden mountains and diamond billiard balls, for instance, were combinations of simple ideas put together by the imagination. This kind of abstract term represented entities that were quite different from the abstractions that were the subject-matter of universal jurisprudence.<sup>30</sup> Bentham’s insight, as noted above, was that attempts to define abstract terms, such as ‘Power, Possession, Property, &c. in Morals: Ratio, Part, Multiple, &c. in Mathematics’, by means of ‘the old method *per genus et differentiam*’ were doomed to failure because the terms in question had no superior genus to which they could be referred. The terms characteristic of universal jurisprudence, such as power, duty, and right, had no superior genus by which they could be made known. If you heard the word *cacalanthemum* and were told that it was a sort of plant, you would gain some idea of the import of the word. A right or power, however, was not a sort of anything. The expositors who used ‘the old method’ nevertheless clung to their ‘*routine*’, and attempted to find a higher genus: ‘The consequence is they either take up such a definition as is useless, or give up altogether the task of finding one, as being either unnecessary or impracticable.’<sup>31</sup> (p. 389) The failure to explain the meaning of words by definition *per genus et differentiam* did not mean that the attempt to define such words was hopeless. There was, in fact, ‘one way’ that could be successful, though it was a method that ‘never has been attempted yet’.<sup>32</sup>

Bentham explained that, in terms of language, both things with physical existence and abstractions were represented by noun substantives, which he divided into proper and improper, respectively: the former were the names of real entities, and the latter the names of fictitious entities. ‘A proper substantive, the name of a real entity, is understood immediately and of itself it offers a certain image to the conception. An improper substantive offers no such image. Of itself it has no meaning. It means nothing till, with

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other words, it be compounded into some sentence. It then is seen to have a meaning, which is the clearer, the more clearly it is seen to be equivalent to some sentence the terms of which are names of real entities.<sup>33</sup> Bentham's new method, then, was to produce 'a chain of Definitions', where the first definition consisted of 'words expressive of simple ideas'.<sup>34</sup> The chain of definitions had to begin with simple ideas, that is those images in the mind created by bodies that were immediately perceptible and were not themselves definable. Given that '[t]he ideas we have are *all* ultimately derived from substances; that is, from the *several natural bodies that surround us*', it followed that '*The origin of our ideas relative to Law can, therefore, be sought for in no other source.*'<sup>35</sup> Hence, it was only by relating the terms of universal jurisprudence to terms that signified simple ideas that the former would be understood: 'These [simple ideas] are the Capital we have to trade with. These, to speak with the Algebraists, are our known quantities, our *a*'s, *b*'s and *c*'s. 'Tis by reference to these that we are to elicit the import of the *x*'s, *y*'s and *z*'s, whose import there is occasion to make known.'<sup>36</sup>

Paraphrasis was the term that Bentham gave to the technique that he invented in order to expound the terminology of universal jurisprudence: 'To expound an improper substantive by Paraphrasis is to compleat it into a sentence, and for that sentence to find an equivalent sentence consisting of words significative of real entities'; and it is 'by Paraphrasis and Paraphrasis alone that fictitious entities, entities expressed by improper substantives, can be *expounded*'.<sup>37</sup> In order to understand what was meant by the word right, it had to be included in a sentence, and that sentence expounded 'by such another sentence as contains in it words that *are* capable of being defined'.<sup>38</sup> The word right was a noun substantive, but it did not signify a substance, neither a 'real concrete' substance nor a 'fictitious abstract' substance (that is, presumably, a fabulous entity), and hence was no more significant of itself than a preposition. In order to understand the word 'for', for instance, it was necessary to begin with a sentence in which the word appeared, and the same was true in relation to the word 'right'.<sup>39</sup> Take the notion of a legal power, which was not (p. 390) the name of anything that existed and did not have a superior genus. In order to understand the idea, the term had to be placed in a sentence, or more precisely in a proposition: 'This proposition may be translated into another proposition that is equivalent: and that is composed of words which, taken separately, shall either be capable of a definition, or, what is still better, need none.' Hence, instead of saying that a power was a sort of some other thing, one might say that, 'To create a power in a person over a thing, or what is shorter and more familiar, to give a person a power over a thing, is to restrain another person from meddling with that thing, the first person being left unrestrained.'<sup>40</sup>

By the time that Bentham had finished adding to his 'Preparatory Principles' manuscripts, he had settled on the terminology that he would apply throughout the remainder of his career—noun substantives were used to signify entities that were fictitious, fabulous, and real. First, names of real entities represented bodies existing in the physical world: 'The only objects that really exist are *substances*: they are the only real entities.' The names of fictitious entities represented entities that did not actually exist in the physical world, but had to be spoken of as if they did exist.<sup>41</sup> Fabulous entities were the product of the

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imagination: 'such beings as, in the fables of the Poets, for example, have been represented and spoken of as really existing. Such as the Heathen Gods, the Chimæra, the Dragon, the Cockatrice &c.' Names of fabulous entities were words which represented 'assemblages of simple ideas which, though no where co-existing in any real subject, are manifest and determinate'.<sup>42</sup>

Bentham identified several benefits that would result from the creation of a science of universal jurisprudence. A first benefit was that there would be an end to disputes of law, as opposed to questions of fact. 'All Questions of Law are no more than questions concerning the import of words. Questions the solution of which depends upon skill in Metaphysics. As that master science, therefore, advances to it's perfection, this source of litigation will be contracted.'<sup>43</sup> A second benefit was that sensible communication would be established between jurists of different nations: 'By banishing as many as we can spare of the terms peculiar to our own local Jurisprudence, and giving a clear and steady exposition of such as we are obliged to retain in terms of universal jurisprudence, an easy and profitable intercourse may be kept up between the Jurists of the several nations, and an Englishman might read a comment upon his own laws in the languages of Spain or Sweden.'<sup>44</sup> A third benefit was that that, by giving 'paraphrases' of the various names of fictitious legal entities, Bentham would not only be able to use these terms in his own work, but would also clarify their meaning when used by other writers.<sup>45</sup>

Bentham was not involved in some form of conceptual analysis that would give rise to morally neutral legal terms, as Hart suggested. The obvious objection to this claim is that universal jurisprudence consisted in precisely such an enterprise, in (p. 391) that Bentham aimed to produce an exposition of legal terms (and of all abstract terms) that was true for all times and places, and as such was simply a matter of fact. This raises the difficult question of the notion of truth in Bentham's thought and its relationship to utility.<sup>46</sup> Suffice it to say that Bentham linked utility to truth in his argument that the correct (or true) exposition of legal terms, through universal jurisprudence, was a morally valuable endeavour. This point is supported by Bentham's theory of motivation, according to which there could be no morally neutral activity. All actions were motivated by a desire for pleasure and an aversion to pain, and therefore aimed (as far as the actor was concerned) at some morally desirable end. To say that an action was unmotivated was to talk nonsense. To say that something was morally neutral was, for Bentham, to say that it did not matter, because the only things that mattered were pleasure and pain. Whatever involved pleasure and pain involved moral value (whether positive or negative). A person would not embark on the enterprise of universal jurisprudence if they did not anticipate some value from the activity. To put it crudely, there was no point to moral neutrality.

## IV.

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Returning to *Limits*, the text, having expanded to the length of a book, was abandoned by Bentham. He later explained, in the 'Preface' to *I.P.M.L.*, that he had 'found himself unexpectedly entangled in an unsuspected corner of the metaphysical maze'.<sup>47</sup> While he did not state explicitly what the problem was that he had encountered, it was quite possibly that which he had set out to solve in *Limits*—namely that of explaining the distinction between penal and civil law. To make sense of this distinction in terms of universal jurisprudence, Bentham realized that he had to explain what was meant by a single and complete law. Instead of seeing the distinction as being, as in English law, between two different subject-matters of law, where the punishment for the penal or criminal offence was regarded as either more severe or more disreputable than that for the civil, Bentham came to recognize it as a logical distinction: every single and complete law had a penal and a civil element and, furthermore, a procedural element.

Constitutional law was made up of a combination of civil and penal law and so fell into the overall pattern. Hence, a self-standing penal code, without the civil and procedural codes, would make no (p. 392) sense; nor would a self-standing civil code. Bentham seems to have spent a great deal of time reworking his ideas on these fundamental questions when visiting his brother Samuel in Russia in 1785-1788, when he had unfulfilled hopes of presenting a penal code to the Empress Catherine II. It was for this reason that Bentham wrote in French: his manuscripts survive under the headings of 'Projet Forme' and 'Projet Matière', that is form and matter, which appear to relate to universal and censorial jurisprudence, respectively. If we find that it was here that Bentham settled with himself the question of the relationship between the various branches of law, we will have a vital link between Bentham's early concern with the philosophy of law and his later schemes of codification, when his ambition was to write not a penal code only but a complete code, which he termed a 'pannomion'.

As a very brief example of Bentham's later views on codification, take his letter written in 1811 to James Madison, the President of the United States of America, where he noted that 'whatsoever features, whether of excellence or imperfection' were found in his codes would be related either to 'Matter' or to 'Form'. The excellence of the matter would be demonstrated in the rationale, which would consist of a '*perpetual Commentary of Reasons*' that would accompany the 'imperative or regulative matter', and show the connection between the provisions and '*the all-governing principle, viz. the principle of utility*'.<sup>48</sup> Here we have the link to censorial jurisprudence. The form of the law was concerned with not only the terminology of the law, but the arrangement of its matter in such a way as to be 'cognoscible' to those subject to it. Whatever 'practical good effect', noted Bentham, arose from the matter of the law, no matter how excellent in itself, would depend upon the law's 'cognoscibility'. The form of the law, the subject-matter of universal jurisprudence, included not only the proper exposition of key legal terms, but also the way in which the matter of the code would be presented to those subject to it. Hence, proposed securities for cognoscibility included the division of the pannomion into a general code and a series of particular codes; its division into matter of constant and matter of occasional concernment; and its division into main text and expository matter, the latter consisting of explanations of particular words which appeared in the main text.

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The penal code would be characterized by a distinction between each offence described in its '*ordinary state*', and matter which indicated 'the several causes of *justification*, *aggravation*, and *extenuation*, with the grounds of *exemption* from punishment, which apply to it'. Finally, Bentham recommended the use of 'promulgation papers', that is, standard forms for legal transactions such as conveyances and agreements, and instruments of judicial procedure.<sup>49</sup> Securities such as these were presented with modifications in various of Bentham's writings on codification in the final two decades of his life.

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While certain fundamental features appeared early and remained constant in Bentham's thought, such as his ontology and commitment to the principle of utility, there were developments and refinements over time, as he worked out the implications of these foundational principles in the light of changing circumstances. It is important to pay regard to the particular historical context in which Bentham was writing, and in particular to the provenance of, and intended audiences for, the particular writings that are under scrutiny. These factors made a difference to the way in which Bentham presented his arguments. Just to take one example: Bentham is well-known for his attack on the French Declaration of the Rights of Man of 1789,<sup>50</sup> and yet he advocated a similar document for Tripoli in 1822.<sup>51</sup> On the face of it, this appears to be inconsistent and needs explanation. Such things should also serve as a warning against presenting 'Bentham' as a timeless thought-system, and hence to ignore the circumstances in which he was writing and the fact that his views did change over time. If one thing can be said about Bentham, and indeed about anyone who takes utilitarianism seriously, it is that they will adapt their views to changing circumstances, as (hopefully) their knowledge increases and their judgement improves. The most obvious change in Bentham's perspective was his conversion to political radicalism in the first decade of the nineteenth century, through the emergence of the notion of sinister interest as a central feature of his thought. It is anachronistic to explain Bentham's thinking in the 1770s or 1780s by any reference to sinister interest, just as it is impossible to understand his thinking in the 1810s and 1820s without reference to it. Of course, it may be that the commentator wishes to develop the most coherent, complete, and consistent argument possible from Bentham's thought, or more loosely to find inspiration in aspects of his thought, whereupon the particular circumstances in which any particular work was written become less relevant. In that case, the commentator should not attribute his or her own adjusted conception or notion of the subject-matter in question to the historical Bentham.

There is much to be gained, both to historical and to philosophical disciplines, from appreciating Bentham's legal thought in its own context, and in particular by viewing it in relation to his own views on ontology and epistemology. One point of studying the past, and in particular such an original thinker as Bentham, is that such a study has the

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potential to offer us a critical perspective on our own current practices and beliefs. We understand better our present times through a (p. 394) keener understanding of the past. History has a value in its own right, but history, in this case the history of thought, also offers a rich storehouse of materials for the contemporary philosopher. Once we adopt a historically-focused approach to Bentham, the questions will then revolve around the nature of utilitarian jurisprudence, rather than around the nature of legal positivism. This will allow us to look at how Bentham saw the relationship between form and content in his codes, and this approach can then be supplemented by work on the codes themselves. It may also provide new insights for legal philosophy in general.

Apart from the first volume of *Constitutional Code*,<sup>52</sup> none of Bentham's codes, in so far as they exist, have as yet been published in the *Collected Works*. There are thousands of pages of relevant manuscripts, as well as writings (published and unpublished) on other legal topics (I am not considering here writings on other topics such as political economy, panopticon, parliamentary reform, and religion), both from early and late in his career. Eventually this material—perhaps twenty volumes!—will be made available and will give us the most complete picture possible of the thought of arguably our greatest legal philosopher. At present, we have the four volumes from the late 1770s and early 1780s referred to above and a half-dozen or so volumes from the 1810s and 1820s which contribute significantly to our understanding of Bentham's legal theory and particularly his views on codification. The next batch of legal material I would like to see appear in the *Collected Works*, resources permitting, consists of 'Projet Forme' and 'Projet Matière'. Bentham scholarship is highly contingent and will remain so until many more volumes appear in the *Collected Works*. The appearance of the new edition of *Limits*, for instance, has started a process of the re-evaluation of Bentham's jurisprudence,<sup>53</sup> while the new edition of *Preparatory Principles* will fuel this process. When the 'Projet' materials are eventually published, there will be occasion for a further re-evaluation. And there is the promise of an amazing wealth of material still to come.

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<sup>(19)</sup> Bentham (n. 12) 494 n. ff.

<sup>(20)</sup> Bentham (n. 1) 196 ff.

<sup>(21)</sup> Bentham (n. 16) 16 ff.

<sup>(22)</sup> Bentham, *I.P.M.L.* (n. 4) 6 & n. ff.

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<sup>(24)</sup> *Ibid.*, 382. See John Locke, *An Essay Concerning Human Understanding*, P. H. Nidditch (ed.), (1975) 47 ff., and David Hume, *A Treatise of Human Nature: A Critical Edition*, D. F. Norton, M. J. Norton (eds.), 3 vols. (2007) i. 7 ff.

<sup>(25)</sup> Bentham (n. 1) 95. See Locke (n. 24) 292.

<sup>(26)</sup> *Ibid.*, 169.

<sup>(27)</sup> *Ibid.*, 369.

<sup>(28)</sup> *Ibid.*, 169.



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(<sup>29</sup>) Ibid., 102.

(<sup>30</sup>) Ibid., 170 ff.

(<sup>31</sup>) Ibid., 97 ff., 111 ff.

(<sup>32</sup>) Ibid., 157.

(<sup>33</sup>) Ibid., 401.

(<sup>34</sup>) Ibid., 104.

(<sup>35</sup>) Ibid., 200.

(<sup>36</sup>) Ibid., 103.

(<sup>37</sup>) Ibid., 386.

(<sup>38</sup>) Ibid., 247.

(<sup>39</sup>) Ibid., 249.

(<sup>40</sup>) Ibid., 380.

(<sup>41</sup>) Ibid., 424.

(<sup>42</sup>) Ibid., 386 ff.

(<sup>43</sup>) Ibid., 282.

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