

Review: Xiaobo Zhai and Michael Quinn eds., *Bentham's Theory of Law and Public Opinion*, Cambridge: Cambridge University Press, 2014, pp. xi + 254.

This edited volume comprises a collection of papers that evolved out of the International Symposium on Bentham's Legal Philosophy held in 2012 at Zhengzhou University, China. All of the contributors to the volume are accomplished Bentham scholars who have been able to fully utilise Bentham's unpublished manuscripts. Consequently, the volume is both very instructive and rigorous.

As the title of the book indicates, the chapters in the volume focus either on Bentham's legal theory and/or on the role of public opinion in Bentham's theory. They may be categorised within the following three groups: (1) chapters that discuss the role or nature of public opinion in Bentham's work, (2) those focusing on Bentham's codification theory, and (3) those that offer new and corrective interpretations of Bentham's legal theory.

In 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of law', Gerald Postema presents his own concept of the rule of law. According to Postema, the rule of law is not only constituted by legality (the laws themselves and the institutions that are responsible

for their administration), but also by the ethos or fidelity required to sustain the rule of law. He defines fidelity as ‘mutual commitment to hold each other under the law’ (p. 38). According to Postema, citizens can and must challenge unreasonable decisions made by the authorities, and the authorities, including the courts, must be held accountable to citizens. Postema’s point, which seems to be a persuasive one, is that for the rule of law to prevail, both citizens and the authorities have to seek its accomplishment.

In his second chapter entitled ‘The Soul of Justice: Bentham on Publicity, Law, and the Rule of Law’, Postema finds a prototype of his position in Bentham’s writing. Bentham attempted to use his public opinion tribunal with moral sanctions to threaten officials’ reputations and force the authorities to observe the law. The existing literature on Bentham has very rarely discussed his position on the rule of law. However, as Postema argues regarding Bentham’s contributions, while ‘other theorists have contributed greatly to our understanding of the formal and procedural elements of the rule of law’, ‘no major legal theorist before the twentieth century has contributed more to our understanding of its informal infrastructure.’ (p. 56). Here, Postema is pointing to another of Bentham’s significant and enduring contributions.

Bentham’s emphasis on public opinion has frequently invoked criticism centred on the

‘tyranny of majority’. However, as Philip Schofield argues in his chapter entitled ‘Jeremy Bentham on Taste, Sex, and Religion’, Bentham’s point was to demonstrate that the pleasures and pains of any two individuals were of equal value, provided they were of equal measure, and to argue in favour of the greatest number against the ruling few. In his chapter, Schofield analyses *Of Sexual Irregularities and Other Writing on Sexual Morality*, a recently published volume in the *Collected Works of Jeremy Bentham*, and *Not Paul but Jesus*, to show how Bentham responded to the oppression of sexual liberty by ascetics. Schofield also discusses Bentham’s criticism of the Burkean view of good taste and notes that, for Bentham, ‘notions of “good taste” and “bad taste” were employed by the ruling few’, including Christian ascetics and the aristocracy, ‘to delude the subject many’ (p. 97). Furthermore, Schofield suggests that Bentham would have also considered J.S. Mill’s famous distinction between higher and lower pleasure to be founded on a similar basis. Many contemporary political philosophers such as Martha Nussbaum follow Mill and criticise Bentham’s equation of happiness with pleasure.¹ However, they clearly must respond to Bentham’s possible retort that such criticism is anti-democratic.

Turning to the second group of chapters in the volume, those by Emmanuelle de

¹ See M. Nussbaum, ‘Who is the Happy Warrior? Philosophy Poses Questions to Psychology’, *Law and Happiness*, ed. E. Posner & C. Sunstein, Chicago, 2010.

Champs and Michael Quinn focus on Bentham's theory of codification. In 'Utility, Morality, and Reform: Bentham and Eighteenth Century Continental Jurisprudence', de Champs analyses Bentham's *Projet d'un corps de loix complet* which he initiated in the early 1780s. Bentham wrote this work directly in French. It is clearly more important than similar works that he authored such as 'A General View of a Complete Code of Laws' translated by Étienne Dumont and edited by John Bowring. In her comprehensive analysis of the continental context of this work, de Champs points to, for example, the similarity of Bentham's argument that limiting judges' adjudicative power would serve the interests of citizens, to a similar argument made by Beccaria. It would be interesting to examine whether Bentham was in any way influenced by France's *Tribunal de cassation*, where, until 1804, judges were prohibited from interpreting laws and were limited to proposing legal alterations to the legislature. The chapter by de Champs also reveals some interesting findings from *Projet* that are of interest to Bentham scholars. An example is 'the earliest reference from Bentham's pen to public opinion as a "tribunal"' (p. 204).

Michael Quinn's chapter on 'Popular Prejudices, Real Pains: What Is the Legislator to Do When the People Err in Assigning Mischief?' includes an analysis of 'Place and Time' in

which Bentham discussed necessary changes to his codes at the time of transplantation. Quinn insightfully refers to Bentham's distinction between abstract utility, which comes from empirical generalisation about human nature, and net utility. Bentham was aware that net utility would fluctuate with the introduction of his codes based on abstract utility according to the prejudicial biases of natives reacting to his codes. Thus, a scheme grounded in abstract utility may cause considerable pain to natives because it opposes their customs. As Quinn suggests, this leads Jennifer Pitts to argue that in contrast to Mill's universalism, Bentham paid a great deal of attention to religious beliefs or traditional ways of life and considered these to be unchangeable by legislators. However, Quinn notes, with reference to Bentham, that 'no legislator could simply dictate to public opinion, but she was in a position to guide it' (p. 84) by using indirect means of instruction as well as evidences to change the biases of natives. This chapter successfully attempts to show Bentham's highly nuanced approach to cultural diversity.

Turning now to the third category of chapters, the Zhengzhou University Symposium also marked the thirtieth anniversary of the publication of H.L.A. Hart's *Essays on Bentham* in 1982. This volume also, therefore, includes discussions of Hart's interpretations of Bentham.

In 'Bentham's Jurisprudence and Democratic Theory: An Alternative to Hart's Approach', David Lieberman proposes an alternative to Hart's interpretation of Bentham's concept of popular sovereignty, developed in his *Constitutional Code* at the very end of his life, as diverging from his earlier theory of jurisprudence. In his chapter, Lieberman shows that Bentham's theory of codification is the bridge connecting his theory of jurisprudence, which was a base for his more general theory of codification, to his political theory articulated in *Constitutional Code*. To be more precise, Lieberman argues that 'as codification made law legible and cognoscible, the Constitutional Code rendered the state and government power likewise legible and cognoscible' (p. 140). Bentham's more general theory of codification, which was first developed earlier, and the *Constitutional Code* of his later years both enabled the public to monitor and criticise those in power. It has often been suggested that Bentham's principles, reflected in his Panopticon scheme, influenced his theory of the Constitutional Code. Thus, Lieberman's view of continuity gives us new and interesting insights into Bentham's Constitutional Code.

In 'Bentham's Natural Arrangement and the Collapse of the Expositor-Censor Distinction in the General Theory of Law', Xiaobo Zhai analyses Hart's interpretation of

Bentham's universal expository jurisprudence. Following in the footsteps of Postema and Schofield, Zhai engages in a thorough discussion and critique of Hart's interpretation that Bentham's jurisprudence is a project of morally neutral description. In this chapter, Zhai points out that Bentham's enterprise was dissimilar to Hart's ordinary language analysis, because Bentham's project was partially to remake common language by his ontology. As Zhai shows, Bentham's ontology is clearly original and based on pleasure and pain, which are the sources of existence. For example, any discussion about 'natural law' or 'natural rights' would be meaningless given that their relation to pleasure or pain cannot be demonstrated. Likewise, offences that do not inflict pain on other people are excluded from Bentham's penal code. So, Bentham's natural arrangement of offences, which is the cornerstone of his jurisprudence, is also based on pleasure and pain, and his utilitarianism. As summed up by Zhai, Bentham's universal expository jurisprudence 'is guided by, and also serves, Bentham's utilitarian project indirectly, via natural arrangement which aims at abstracting and describing interesting properties of real legal material' (p. 179). This chapter will be of particular interest to legal philosophers as Zhai criticises Hart's interpretation of Bentham's work in the context of recent debates in legal philosophy.

The most influential critique of Bentham may be that of John Rawls. In ‘A Defence of Jeremy Bentham’s Critique of Natural Rights’, which belongs to the third category of chapters that interpret Bentham’s work, Schofield defends Bentham against Rawls’ criticism. Here, Schofield analyses Bentham’s ‘Nonsense upon Stilts’, which is, according to Schofield, ‘arguably the most profound critique of the theory of natural rights ever written’. He adds that ‘its criticisms apply to modern theories of human rights’ (p. 208). Bentham criticised the eighteenth century theories of natural rights for being based on the principle of sympathy and antipathy. Thus, Schofield’s point is that Bentham would regard contemporary human rights theories similarly and would criticise their foundation on intuition as being tenuous. It is well known that R.M. Hare has critiqued Rawls for relying on intuition or disguised subjectivism.² It may, therefore, be argued that Hare is endorsing Bentham’s critique on natural rights. In this chapter, Schofield also shows that Rawls’ notion of the impartial sympathetic spectator, which necessarily sacrifices the minority and is often associated with Bentham’s theory, does not fit with Bentham’s intention. As Schofield further shows, Bentham’s argument is that legislation or policies will, through necessity, seek universal interests, because it is difficult to pursue particular or sinister interests within a representative democracy. Bentham may be too

² See R.M. Hare, *Moral Thinking*, Oxford, 1981, p. 82-83.

optimistic about democracy, but, as Schofield argues, the fact that Bentham was an individualist cannot be denied. Thus, Bentham's universal interests incorporated each member's security of person and of property.

The discussions and interpretations developed in the chapters in this volume are very convincing. However, I would like to present a few points for consideration that may be of interest. Some of the chapters emphasise the liberal and democratic (or republican) nature of Bentham's legal theory. However, I think that there are also some authoritarian elements in Bentham's theory of codification. Bentham seems to justify his system of representative democracy because it allows citizens to pursue universal interests instead of their particular or sinister interests. Moreover, universal interests are regarded as each individual's rights to subsistence, abundance, security and equality, which are promoted by the legislator. In his 'Codification Proposal', by the way, Bentham argues, in relation to his codes, that the greatest happiness of the greatest number requires that every draft be, from beginning to end, the work of a single hand. His underlying rationale was to focus responsibility on one person, while retaining the coherence or the integrity of the codes.³ However, here I would like to suggest that Bentham should have reflected that 'the single hand' would certainly be his own. On the

³ See 'Codification Proposal', *Legislator of the World: Writings on Codification, Law, and Education*, ed. P. Schofield & J. Harris, Oxford, 1998 (*The Collected Works of Jeremy Bentham*), pp. 279-81, 286-87.

other hand, Bentham considered his codes to be complete which would limit discussions and motions of members of the legislature to amend or adjust his codes. Bentham seems to have assumed that his codes would promote universal interests and believed that citizens had no choice but to accept them. Thus, although the contents of his codes are liberal and promote subsistence, abundance, security and equality, his manner of drafting and introducing them is quite authoritarian. It is not unreasonable to suggest that Bentham's legislator bears some similarity to that of Rousseau.

I would also like to consider the nature of Bentham's public opinion.⁴ In *Constitutional Code*, Bentham argues that rulers not only follow public opinion but also 'lead' it.⁵ And in 'A Table of the Springs of Action', Bentham provides a description of 'deontologists' who are expected to lead ordinary citizens, supplying such motives to them that will promote the happiness of society. To be more specific, Bentham expected deontologists, for example, to articulate their opinions and engage others on the same side.⁶ This role of deontologists may be implied in Quinn's discussion of Bentham's indirect means of instructing the biased

⁴ For this discussion, I am indebted to the Japanese Bentham Scholars, namely, Professor Kodama, Dr. Obata and Mr. Takashima for their insights.

⁵ See *Constitutional Code*, vol. I, ed. F. Rosen & J.H. Burns, Oxford, 1983 (*The Collected Works of Jeremy Bentham*), p. 36.

⁶ See *Deontology together with A Table of the Springs of Action and Article on Utilitarianism*, ed. A. Goldworth, Oxford, 1983 (*The Collected Works of Jeremy Bentham*), p. 70.

citizens, and I think it is important to highlight Bentham's paternalistic or authoritarian attitude towards public opinion. Along with the abovementioned authoritarian nature of Bentham's codification scheme, this attitude towards public opinion also distinguishes Bentham sharply from the somewhat irresponsible optimism of the natural rights theorists who seem to have sometimes overly relied on the faculty of natural reason of ordinary citizens.

In the very readable introduction to this volume, Fred Rosen notes that the chapters will be of interest 'to students of law and its history' as well as 'to students of numerous aspects of Bentham's thought and its historical context' (p. 2). I totally agree, as this volume presents very comprehensive and up-to-date studies of Bentham's legal theory as a follow-up to Hart's *Essays on Bentham*.

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