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Counting Pleasures and Pains, and Counting Heads

This book performs an enormous service to Bentham studies, distilling as it does the knowledge and insights accrued in two decades of intimate engagement with Bentham's thought, as presented in both printed works and in the 75,000 manuscript sheets which are preserved in UCL library and the British Library. If he had not written this book, Philip Schofield could still have reflected upon an outstanding contribution in terms of volumes produced, and of method, having effectively invented, refined, and then shared with colleagues, the set of practices and techniques essential for the transformation of a disordered mass of manuscripts into a published volume in the critical edition of Bentham's collected works. With *Utility and Democracy*, however, he has also established himself as a leading interpreter of Bentham's thought, who is just as much at ease in discussing philosophical methods and concepts as in extracting readable and coherent texts at the editorial coalface.

The single greatest virtue of this book is that it begins in the right place, with Bentham's logic, which forms "the foundation upon which the whole account is constructed,"¹ and constitutes the intellectual underpinning for Bentham's entire enterprise. As Schofield has argued consistently since his inaugural lecture,² Bentham was a self-consciously naturalistic philosopher, and it is in his ontology – and specifically in the distinction between real and fictitious entities – that the foundation of his epistemology, and thereby the basis of the superiority of the

¹ P. Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham*, Oxford University Press, Oxford 2006, p. 29.

² "Jeremy Bentham, the Principle of Utility, and Legal Positivism", in M.D.A. Freeman (ed.), *Current Legal Problems 2003*, vol. 56, Oxford University Press, Oxford 2004, pp. 1-39.

principle of utility over its opponents (the principles of asceticism and of sympathy and antipathy) lies. From this indispensable foundation, the discussion in *Utility and Democracy* proceeds logically to the principle of utility itself, and to the major variants of the principle of sympathy and antipathy (now, as then, natural law and natural rights), before assessing the impact of the French Revolution on Bentham's thought, tracing the development of the concept of sinister interest (and all that followed from it in terms of Parliamentary and legal Reform, and Bentham's attitude to the Church of England), and finally turning to final decade of Bentham's life, and to works on which Schofield cut his editorial teeth, with their focus on the best method of uniting official aptitude with frugality.

This brief discussion is obliged to omit many interesting topics, for the sake of raising two issues which seem ripe for further investigation. The first concerns the central question of the extent to which Bentham seriously intended the legislator or rule-maker to apply a felicific calculus in his decision-making. As Schofield notes, "Bentham appears to have believed that the human mind was, so to speak, programmed to operate as a calculating device for pleasure and pain."³ For Bentham, this process of cost benefit analysis was the only rational method for decision-making, or for the evaluation of actions, principles or states of affairs. To resist from calculation was to bid farewell to facts and to real entities, and thereby to the exchange of sense, and to be left with the barren resort of the declamation of one's sympathies and antipathies. Commentators since Halevy have noted Bentham's emphasis on calculation, but recent interpretations of Bentham have downplayed its importance. Indeed, in Paul Kelly's subtle and sympathetic reconstruction of Bentham's project, the legislator, conscious that he cannot know the idiosyncrasies of his subjects, must eschew direct utilitarian calculation, and instead proceed indirectly, by establishing the necessary "conditions of interest satisfaction".⁴ Rather than pursue overall well-being directly, "the legislator's task is the institution of a principle of right which embodies the equal distribution of a sphere of personal inviolability."⁵ The conditions for the formation and pursuit of interest, or, in other words, objective human interests, consist in the subordinate ends of legislation: subsistence, security, abundance and equality.

On this reading, informational constraints oblige the legislator to apply a rationality, a decision procedure, which differs from that used by individuals in ordering their own actions. This rationality derives from empirical generalizations regarding human behaviour, termed by Bentham axioms of mental pathology. Given

³ *Utility and Democracy*, as above, p. 43.

⁴ *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*, Oxford University Press, Oxford, 1990, p. 36.

⁵ *Ibid.*, p. 138.

the role of security of expectations in permitting individuals to form and pursue plans of life,⁶ the legislator secures existing entitlements to property in a way which rules out their invasion in pursuit of marginal gains in overall utility. Indeed, the business of the legislator is not concerned with global utility calculations, since his primary task is precisely to provide the stability within which complex goals may be adopted and pursued. In other words, the legislator's direct calculation of utilities extended only to assessment of the binary opposition between the benefits of order and the mischiefs of chaos.

Schofield notes in passing that "However satisfactory as a reconstruction of Bentham's utilitarianism, the distinction between public and private decision making was expressly rejected by Bentham himself."⁷ The reader might regret the omission of a fuller discussion of this interpretative difference, since it goes to the very heart of Bentham's thought.⁸ Without pretending to possess a resolution of the issue, it might be permissible to raise some issues relating to the option between the direct calculation of utilities – by estimation of the pleasures and pains consequent upon an action or a rule – and the indirect pursuit of overall well-being through the medium of the subordinate ends. Bentham notes explicitly not only that the demands of the competing subordinate ends conflict, but that a single subordinate end can give rise to conflicting injunctions.⁹ In "Institute of Political Economy", Bentham offers the following advice to the legislator faced with these conflicting demands: "he has no other enquiry to make than which of those four subordinate objects it is, the pursuit of which will lead him by the shortest and surest track, and in the most perfect degree, to the attainment of the one supreme and general end abovementioned."¹⁰ Since that general end is the maximum of happiness, it seems that Bentham's protocol for resolving conflicts between the subordinate ends is either meaningless, or does in fact involve the attempt to calculate directly the pains and pleasures consequent upon the adoption of one rule rather than another: how else is the legislator to identify *the degree* to which the maximization of utility is likely to be attained?

Kelly himself recognizes that in cases of approaching social catastrophe, "where some direct action is necessary to prevent the overthrow of the system of secured expectations,"¹¹ the legislator is permitted to breach the inviolability of his utilitarian system of right, and undertake some emergency redistribution of property. In such

⁶ The expression was Benthamic before it was Rawlsian: see "Principles of the Civil Code", Bowring, I, 310.

⁷ *Utility and Democracy*, as above, p. 41.

⁸ Schofield himself identifies a detailed account of the subordinate ends of legislation as one of the lacunae consequent upon the restraints of space: see *ibid.*, p. vi.

⁹ "Principles of the Civil Code", Bowring, I, 302-303.

¹⁰ UC, XVII, 173 (W. Stark (ed.), *Jeremy Bentham's Economic Writings*, 3 vols., Allen & Unwin, London 1952-54, III, 308).

¹¹ *Utilitarianism and Distributive Justice*, as above, p. 187.

circumstances, he must weigh the pains of disappointment arising from the attack on security of property, against the pains of disappointment likely to arise from the destruction of the predictable social order, and all the expectations that go with it. However, for Kelly, the legislator is able to undertake this calculation because “he balances like considerations”; that is, the elements of the calculation are homogenous and commensurable, being all modifications of the single currency of “disappointment”. Now disappointment is simply “expectation thwarted”,¹² but surely simply ignoring all other species of pain and pleasure means that the calculation is likely to be erroneous. In order to homogenize the variables, this calculation omits all pleasures. But, while it is true that the legislator’s primary focus is the avoidance of pains, it seems simply arbitrary to exclude negative pleasures, that is, exemptions from pain (in the shape, for instance, of relief to starvation) from the balance sheet in this way. Likewise, restricting the relevant variables to pains of disappointment omits other sorts of relevant pains, in particular those arising from the secondary mischief of alarm.

In the calculations which Bentham does share with us, there are two trump cards which tend to carry the day. The first of these relates to the variable of extent. When Bentham instructs the legislator in calculating the mischiefs of offences, the primary mischiefs, that is the pains felt by the particular victim and her near connections, tend to be swamped by the secondary mischiefs of danger (i.e. the chance of suffering a similar pain) and alarm (i.e. the subjective pain of apprehension that we might so suffer). However intense the primary mischiefs, they extend only narrowly, whereas a modest degree of alarm, by extending throughout the community, may generate a much bigger pain. The second trump relates to the variable of duration, and allows Bentham to argue that significant short-term gains can be outweighed by permanent costs. Thus in discussing state support for ailing industries, it is the multiplication of the financial costs of such support by an indefinite number of years which leads Bentham to conclude that “Measures of relief taken for the support of branches of industry labouring under a temporary decline ought never to be any other than temporary.”¹³

Further, Kelly cautions that the legislator is only justified in breaching personal entitlements “where the cost of not acting is indisputable,”¹⁴ but how does the legislator, or any else, know that the point of approaching catastrophe has been

¹² *Supply without Burthen; or Escheat vice Taxation*, Debrett, London 1795, p. 28 (*Jeremy Bentham’s Economic Writings*, I, 290).

¹³ UC XVII 17, “Manual of Political Economy” (*Jeremy Bentham’s Economic Writings*, I, 244 n.). See also “Institute of Political Economy”, UC, XVII, 234 (*Jeremy Bentham’s Economic Writings*, III., 333), and “Observations on the Restrictive and Prohibitory Commercial System; especially with a reference to the Decree of the Spanish Cortes of July 1820”, in *Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramarina and other writings on Spain and Spanish America*, edited by P. Schofield, Oxford 1995 (CW), p. 369.

¹⁴ *Utilitarianism and Distributive Justice*, as above, p. 188.

reached, unless a global utility calculation informs him that the costs of not acting have exceeded the costs of acting? Given that the legislator is bound to provide a rationale for his laws, he is going to have to share with the public the justification for the adoption of the subordinate ends of legislation, while that justification itself can only be framed in terms of their contribution to maximizing happiness. In emergency situations, however, the legislator must alter the terms of his argument, and appeal directly to utilitarian calculation, and to the urgent need for action to avoid massive, and immediately impending, pains. Once that rationale enters the public domain, a degree of alarm on the part of all those property holders who have believed themselves secure in possession of inviolable rights would seem inevitable. Indeed, will it not be difficult for the legislator, who up to this point has been mounting an argument concerning the benefits of stability of expectations as the ground of inviolable rights, suddenly to switch his discourse into the direct utilitarian language of expropriating available surpluses to meet acute need?

In 1794, while reviewing the possible sources of funding for government expenditure, Bentham proposed that government engage in the banking trade as a means of raising revenue, and noted that the permanence and longevity of government gave it advantages over private individuals as a banker. Added to these was “the advantage of making use of it [i.e. the depositor’s cash] in an occasion of extreme necessity for the common good of the whole.”¹⁵ In response to a possible objection that such action would constitute a breach of faith, Bentham responded:

this is one of those cases of extreme necessity where it may be of more advantage that an engagement should be departed from for the moment than that it should be adhered to: and as the promise of subjection on the part of the subject to the sovereign may receive its dispensation from the extremity of tyranny, so may the promise of fidelity and protection for the portion of property on the part of the sovereign towards the subject find a dispensation from the extreme of disloyalty on the part of the subject, or the extreme of distress on the part of the whole state. Happiness, it must not be forgotten, is the only ultimate end, as of individual action so of political establishment: fidelity to engagements, justice, in a word, in all its branches, is *but* as a means to that end, how important an article soever in the catalogue of means.¹⁶

Again, in extreme necessity, justice gives way to utility. For a utilitarian, indeed, how could it be otherwise? And also again, how is the legislator to recognize extreme necessity when it arises, unless the potential appeal thereto is constantly available, and unless the global utility calculation, albeit by no means fine-grained, is that which, for the most part, justifies the maintenance of existing rights to property.

¹⁵ “Money Traffic Resource”, UC, CLXVI, 66, (*Jeremy Bentham’s Economic Writings*, II, 127).

¹⁶ *Ibid.*

It seems that Bentham was well aware of the difficulties facing the legislator in any effort to make global utility calculations, and indeed, it is tempting to view the introduction of the subordinate ends as, in part, a response to precisely the difficulties involved in any felicific calculus, and, in particular, a response to his rejection of the notion that money could provide a systematic proxy for the value of pains and pleasures. Bentham was attracted to the stability offered by the subordinate ends, and the buttress they provided against the sacrifice of basic interests for the sake of marginal gains in utility. However, he maintained throughout his life that only utility was relevant, and was also attracted to the flexibility which a direct utilitarianism offered. In the same way, Bentham combined abstract reasoning about human psychology, which issued in the formal security-providing principle, and its logical concomitant, the equalization of property, with sensitivity to the manner in which human beings are born into, and develop conceptions of themselves only in, particular, typically unequal, social contexts, wherein the centrality of established expectations to social stability rendered the legislative pursuit of equality an illegitimate goal. His desire is to combine the historicity of Hume with the criticality of Helvetius, and the tensions between the two approaches, continually threatens to derail his project.

A second lacuna in *Utility and Democracy* relates to the process by which the scales fell progressively from Bentham's eyes in relation to the sinister interest of the legal and political establishment. It has always seemed paradoxical that the Bentham of *Fragment on Government* had assembled all the conceptual tools with which he would later develop the first sustained elaboration of the theory of a representative democratic state, but failed to put them together as he did later to such brilliant effect. Thus the psychological premise on the self-interested nature of human motivation is indeed less developed in *Fragment* than in *IPML*, but it is there. The juncture of resistance is determined by interest: "why, in a word, taking the whole body together, it is their *duty* to obey, just so long as it is their interest, and no longer."¹⁷ Indeed, at one point, what looks very like interest-begotten prejudice makes an appearance: "It is an old observation how Interest smooths the road to Faith."¹⁸ And yet, if men tend to be governed by self-interest, are not governors men? And do they not have means to oppress others, in addition to motive? Bentham admits in a footnote that members of parliament, at least, resemble the rest of us, and drops his future self a hint on the dynamic way in which his constitutional code would seek to harness individual self-interest to the service of public benefit: "The man who would persevere in the toil of Government, without any other reward than the favour of the people, is certainly the man for the people to make choice of. But such men are at best but rare."¹⁹

¹⁷ *A Comment on the Commentaries and a Fragment on Government*, edited by J.H. Burns and H.L.A. Hart, Athlone, London 1977 (CW), p. 444.

¹⁸ *Ibid.*, p. 442.

¹⁹ *Ibid.*, pp. 469-470 n.

In *Fragment*, Bentham presents a summary of the works necessary to codify, and thus clarify, English law, and comments: “works which public necessity cries aloud for, at which *professional interest* shudders, and at which *legislative indolence* stands aghast.”²⁰ Despite the explicit recognition of the professional interest of lawyers in complexity, Bentham did not, in the 1770s, attribute the situation to a systematic conspiracy on their part, but rather to “the ignorance, and allied to that the deference to authority, of English lawyers, together with their interest in maintaining their income.”²¹ In relation to the legislature, Bentham attributes their lack of enthusiasm for reform not to sinister interest, but to the benefits derived by country gentlemen from a quiet life!²² In *Fragment*, Bentham was prepared to admit only rhetorically that a Minister might have designs “inimical to his country”,²³ while his faith in their good intentions in general is unflinching. As Schofield painstakingly sets out, even after Bentham had detected the sinister interest of Judge and Co, he retained a faith in the commitment of legislators to the public welfare until 1809.²⁴

Schofield is surely correct in arguing that one consequence of the French revolution was to delay political reform in Britain “by delaying the creation and propagation of the utilitarian case for democracy.”²⁵ The September massacres turned Bentham into an opponent of any political reform, and two things were necessary to overcome his opposition. First, Bentham had to draw the logical inference from his own premises, and recognize the dangers of misrule. The central part of *Utility and Democracy* provides an original and ground-breaking account of the discovery of sinister interest, the conceptual tool which allowed the inference to be drawn. On a point of detail, recent editorial work has pushed Bentham’s first use of the expression sinister interest back from late 1797 to the autumn of 1794. In proposing that government should engage in profitable money-traffic as a source of revenue, Bentham noted that Adam Smith had criticised governments as inefficient spendthrifts as compared with private individuals, on the basis that the agents of government, the disposers of public money, possessed no direct interest in keeping down costs. Bentham continued:

As a general proposition, I mean not to dispute it: in comparison of individual management on individual account, the interest is weak: the ground favourable to the growth of a sinister and partial interest opposite to that which coincides with duty: the

²⁰ *Ibid.*, p. 499 (emphasis added).

²¹ *Utility and Democracy*, as above, p. 115.

²² In 1822, of course, Bentham added the following note: “Had I seen in those days what every body has seen since, instead of *indolence* I should have put *corruption*.” (*A Comment on the Commentaries and a Fragment on Government*, as above, p. 499 n.)

²³ *Ibid.*, p. 402.

²⁴ *Utility and Democracy*, as above, pp. 114-136.

²⁵ *Ibid.*, p. 108.

business exposed to perplexity and delay in proportion to the number of the persons whose opinions must be heard, and their inclinations queried[?].²⁶

Having pointed out that even Smith admitted that government could handle some business efficiently, Bentham reflects, perhaps with the first germination of that bitterness at the fate of the panopticon penitentiary which would eventually drive the scales from his eyes in regard to sinister interest, that doing business with agents of government was frustrating: “Attend an Agent for Government, and think whether any thing in private life can equal the indifference with which he treats your business, although, or rather because, it is the public business, even when he is best disposed towards it.”²⁷

Schofield pays less attention to the second necessary condition for Bentham’s conversion to democracy. Ironically, at least a part of the explanation for Bentham’s failure in 1776 to draw democratic conclusions from his psychological premises lies in a concern, which Blackstone himself would have echoed, that democratic systems placed power in the hands of ignorance. As Schofield astutely notes, even in 1789, during Bentham’s flirtation with democracy in the first blush of the French Revolution, he remained concerned about this issue,²⁸ while it features prominently in the arguments of the Tory Bentham of the 1790s. Even in *Fragment*, however, the concern was present:

In the members of a Democracy in particular, there is likely to be a want of wisdom – Why? The greater part being poor, are when they begin to take upon them the management of affairs, uneducated: being uneducated, they are illiterate: being illiterate, they are ignorant. Ignorant, therefore, and *unwise*, if that be what is meant by ignorant, they *begin*. Depending for their daily bread on the profits of some petty traffic, or the labour of some manual occupation, they are nailed to the work-board, or the counter.²⁹

Also in *Fragment*, Bentham hints at a Whiggish sympathy for the extension of the franchise, noting in relation to the power of electing the legislature: “The people at any rate, if not so great a share as they might and ought to have, have had, at least, *some* share in chusing it.”³⁰ The making of good legislative decisions, like the making

²⁶ “Money Traffic Resource”, UC, CLXI, 159. The manuscript is undated, but a short brouillon for the essay at UC, CLXVI, 32 is dated 24 October 1794.

²⁷ *Ibid.*, UC, CLXI, 163 (*Jeremy Bentham’s Economic Writings*, II 147).

²⁸ *Utility and Democracy*, as above, p. 83-94.

²⁹ *A Comment on the Commentaries and a Fragment on Government*, p. 466.

³⁰ *Ibid.*, p. 488. Bentham also responds to the absence in his critique of any positive description of, or prescription for the reform of, the British constitution, and the demand that he should present one: “In truth this is more than I have quite settled. I may have settled it with myself, and think it not worth the giving” (*ibid.*, pp. 472-473).

of good decisions in general, depended upon the correct calculation of all the interests at stake. Given Bentham's belief in the power of self-interested motives, the limitation of the franchise entailed the exclusion of some interests from the calculation, in that the interests of those excluded could not be expected to motivate the legislators, since they were not accountable to those so excluded. In 1787, in *Defence of Usury*, Bentham had written of the poor man, in comparison of his more opulent fellows: "He knows what is his interest as well as they do, and is as well disposed and able to pursue it as they are."³¹ What then, was the specific danger which prevented Bentham from embracing democracy?

Schofield notes that in his writings at the time of the French Revolution, Bentham argued that inequality in the franchise "would only be justified if it avoided the dangers which would arise under a system of equality,"³² and that the preservation of the propertied against a majority of non-proprietors constituted such a danger. The fear of the ignorance of the poor, and its exploitation by rabble-rousing agitators goes a long way to explaining Bentham's refusal to endorse democracy before 1809. In answer to the question, "What changed to make democracy not merely acceptable to him, but the necessary precondition for any effective reform?" Schofield offers the discovery of sinister interest. There is much to be said for this argument, and Schofield's analysis is a real advance in our knowledge of Bentham's thought, but an equally critical analysis of Bentham's change of mind on the threat posed by the uninformed or misinformed poor would also have been valuable. Democracy was the only solution to the problem of sinister interest, but democracy, because of the enfranchisement of ignorance, itself presented a threat to social order and established property rights. The conclusion to a brief discussion of an excellent book on Bentham's political thought is hardly the appropriate location for speculation on the factors which reduced Bentham's fear of the mob, but the contribution of his relationship with James Mill, which began in 1808, might go some way to reconciling Schofield's account with that of Dinwiddy.³³ Schofield muses that if he had not begun work at the Bentham Project he would probably be sweeping Preston station:³⁴ railway hygiene's minor loss has been Bentham scholarship's immense gain!

³¹ *Defence of Usury; Shewing the Impolicy of the Present Legal Restraints on the terms of Pecuniary Bargains*, Payne, London 1787, p. 33.

³² *Utility and Democracy*, as above, p. 89.

³³ J.R. Dinwiddy, *Bentham's Transition to Political Radicalism*, "Journal of the History of Ideas", 35, 1975, 683-700.

³⁴ *Utility and Democracy*, as above, p. VII.