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Utility and Democracy: A Comment on the Commentators

It is gratifying that the three commentators, Francesco Ferraro, Michael Quinn, and Xiaobo Zhai, accept the general framework for the development of Bentham's political thought advanced in *Utility and Democracy*, and in particular take seriously the theory of real and fictitious entities that I argue should be placed at the centre of any account of Bentham's philosophy. There is much, much more to be said about Bentham's thought in all sorts of areas, including his political thought, and hopefully more will be said, and said more definitively, as new and better texts come to be made available in the authoritative edition of *The Collected Works of Jeremy Bentham*. In the meantime, I hope that the story I try to outline in *Utility and Democracy* will provide some orientation, both for non-specialists who have a tangential interest in Bentham, and for specialists who will be able both to expand and revise, and also to fill the many gaps in, my account. I will take this opportunity to respond only to those points made by the present commentators that tend to contradict the conclusions reached in *Utility and Democracy*, but which I still hold to be valid.

Ferraro on self-interest and sympathy

Ferraro draws attention to the different accounts offered by Postema and me in relation to the motivations that Bentham relied upon in order to produce good behaviour on the part of government officials or functionaries. The issue centred on the nature of moral aptitude. Postema's account appeared in *Bentham and the Common Law Tradition* published in 1986,[1] and he did not, therefore, have the

[1] G.J. Postema, *Bentham and the Common Law Tradition*, Clarendon Press, Oxford, 1986.

benefit of Bentham's most important exposition of the various branches of aptitude – moral, intellectual, and active – which appeared in the essay *Economy as applied to Office*, first published in 1989.[2] I responded to Postema in an article entitled *Bentham on the Identification of Interests*,[3] in which I showed that, for Bentham, moral aptitude, as a personal quality of the functionary, consisted in the absence of sinister interest, and it this was secured by a number of institutional arrangements.[4] Hence, as Ferraro, points out, I emphasized Bentham's reliance on the functionary's (self-interested) share in the universal interest as his motive for promoting that wider interest. Bentham was not prepared to rely on the social motives to produce good government. The point was that everyone had a share in the universal interest, and so had some motive to promote it; not everyone could be relied on to act out of sympathy for their fellow human beings.

Indeed, sympathy was not, for Bentham, a force that necessarily promoted the universal interest. On the contrary, sympathy was essential for the effective operation of sinister interest. Sinister interest was particularly effective when operating amongst a small class who had the ability to exercise power of various sorts – in other words, an aristocracy. Sympathetic fellow-feeling, for instance amongst Judge and Co., welded together their individual sinister interests into a much stronger combined force.[5] Hence, reliance on sympathy was not only not enough to promote the general interest, but was potentially extremely dangerous. Sympathy had to be sympathy for the community in general, and not for a particular group united in sinister interest. Having said that, Ferraro is correct to point out that sympathy (of the right sort) was a quality that Bentham wished to encourage. I might go further and say that antipathy (of the right sort) was also a quality that Bentham wished to encourage – for instance antipathy towards money-grabbing lawyers. Rather than saying that Bentham wanted to encourage certain sorts of sympathy and antipathy, that is where those sensations were allied with the general interest, it would be less ambiguous to say that Bentham wanted to promote benevolence. But the point remains, that moral aptitude was essential for good government, and moral aptitude, as Ferraro agrees, was not benevolence. Rather, it was a form of prudence.

[2] J. Bentham, *First Principles preparatory to Constitutional Code*, edited by P. Schofield, Oxford 1989, pp. 1-122.

[3] P. Schofield, "Bentham on the Identification of Interests", *Utilitas*, VIII, 1996, pp. 223-234.

[4] Postema has accepted my account: see G.J. Postema, "Interests, Universal and Particular: Bentham's Utilitarian Theory of Value", *Utilitas*, XVIII, 2006, 109-133. As I pointed out in "Identification of Interests", the revised view of moral aptitude that I put forward did not have any serious consequences for Postema's overall account in *Bentham and the Common Law Tradition*.

[5] For sympathetic fellow-feeling amongst monarchs, for instance, see "Supreme Operative", in *First Principles*, pp. 162-163; and for the various branches of aristocracy, and their sinister alliance with monarchy, see ibid., pp. 189-198.

Bentham advocated the maximization of moral aptitude on the part of functionaries, and not the maximization of sympathy. Moral aptitude, and hence that part of self-interest that was allied with the general interest, was central to Bentham's constitutional theory. Ferraro is, however, perfectly correct when he states that a much fuller account of Bentham's theory of motives and sanctions is needed. As a final tantalising comment, I am, when other business permits, working on transcripts of Bentham's religious writings in the Grote Papers deposited in the British Library. This virtually unknown material, written mainly in the mid-1810s, contains a very extensive discussion of the various sanctions, and will be a critical resource for any scholar willing to take on the task.

Quinn on political radicalism

Quinn agrees with the approach adopted in *Utility and Democracy* in terms of accepting Bentham's theory of real and fictitious entities, more broadly expressed as his theory of logic and language, as the appropriate starting-point for his thought, and, as a consequence of that, accepting that his ethics had a naturalistic basis. Within this framework, Quinn discusses two major issues, which, he notes, constitute lacunae in *Utility and Democracy:* the first concerns the question of the relationship between the principle of utility and the four subordinate ends of legislation, namely subsistence, abundance, security, and equality, and more particularly whether Bentham's approach is best understood in terms of direct or indirect utilitarianism; the second concerns Bentham's worry that the ignorance of the mass of the people made them unfit to be given the vote. Quinn argues that Bentham's overcoming of his fear of the ignorance of the people was as important as the discovery of sinister interest in explaining his eventual advocacy of political radicalism.

In relation to the first point, this was, as Quinn points out, one of the areas of Bentham's thought that, in *Utility and Democracy*, I did not explore in the depth that it deserves. Hence, Quinn's commentary is aimed rather at the reconstruction of Bentham's moral and political philosophy offered by P.J. Kelly,[6] rather than at any discussion in *Utility and Democracy*, but is nonetheless valuable for that. Quinn himself is doing some extremely insightful work in this area, and presents some of his conclusions here. There is little more for me to say except that I endorse Quinn's views, and find them perfectly compatible with the discussion of the principle of utility contained in *Utility and Democracy*, and perfectly consonant with my own more inchoate views.

[6] P.J. Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*, Clarendon Press, Oxford, 1990.

On the second point, I am not convinced that Bentham's commitment to political radicalism was related in any significant way to a changing appreciation of the fitness of the people in general to make appropriate choices in the election of their representatives. I should first of all express my gratitude to Quinn for pointing out the earliest occasion yet discovered of Bentham's use of the phrase "sinister interest." (In fact, this is the second time that Quinn has made a discovery in this respect. Not that any one will have noticed, but the hardback edition of *Utility and Democracy* states that the earliest published use of the phrase took place in *Scotch Reform*, whereas the paperback version has been amended to take account of the appearance of the phrase, first noticed by Quinn, in Outline of a work entitled "Pauper Management Improved" published in *Annals of Agriculture* in 1798.)[7] This new manuscript reference alters the detail of the history of the phrase "sinister interest", but does not – nor does Quinn suggest that it does – alter the fact that the significant development of the notion of sinister interest took place in the writings on judicial evidence and procedure on which Bentham started work after the effective collapse of the panopticon prison scheme in 1803.

Quinn's main point, of course, is that, in concentrating on sinister interest, I failed to take sufficient account of Bentham's fear "that democratic systems placed power in the hands of ignorance". Quinn quotes at length a passage from *A Fragment on Government* that purports to argue that "in the members of a Democracy [...] there is likely to be a want of wisdom."[8] This, however, was not Bentham's argument, but a highly ironic mimicking of the arguments of those who, in support of the mixed constitution of Britain, claimed that wisdom was a necessary property of the members of the House of Lords. Insofar as it points in any direction, this passage suggests that Bentham rejected this argument, rather than endorsed it. Indeed, the quotation that Quinn then reproduces from *Defence of Usury* stating that the poor man knew his interest as well as the rich man, does not suggest that Bentham was overly worried about the lack of knowledge on the part of the people, given his view that the right thing to do when voting was to vote for that candidate whom you believed would best promote your interest. And again, at the time of the French Revolution, in *Projet of a Constitutional Code for France* written in the early autumn of 1789, Bentham advocated universal (including women's) suffrage.[9] Bentham's attitude to the intellectual capacities of the common man (and woman) was, on the whole, not a particularly significant barrier to his own development as a political

[7] *Utility and Democracy*, as above, p. 111 n.

[8] J. Bentham, *A Comment on the Commentaries and A Fragment on Government*, edited by J.H. Burns and H.L.A. Hart, London, 1977, p. 466.

[9] J. Bentham, *Rights, Representation, and Reform: Nonsense upon Stilts and other writings on the French Revolution*, edited by P. Schofield, C. Pease-Watkin, and C. Blamires, Clarendon Press, Oxford 2002, pp. 246-249.

radical and advocate of representative democracy and republicanism. There is, certainly, a case to be made that Bentham was more worried about a lack of property, rather than a lack of knowledge, as a barrier to democracy. I have, however, modified one aspect of my account of the development of Bentham's political thought. I would now argue more strongly than I did in *Utility and Democracy* that the impact of the French Revolution was not merely to make Bentham oppose political reform in Britain for the time being, but converted him into a political conservative.[10] It was in the 1790s that he was most worried about the combination of the ignorant and the indigent as a threat to political stability. On this view, Bentham's transition to political radicalism appears even more dramatic.

Zhai on Legal Positivism

Zhai's concern is not so much with themes advanced in *Utility and Democracy*, but rather with an argument I first outlined in *Jeremy Bentham, the Principle of Utility, and Legal Positivism* published in 2003,[11] and developed in more detail, and in a stronger form, in *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"* published in 2010.[12] In both articles I relied on the distinction, outlined by Stephen Perry,[13] between the doctrines of methodological legal positivism (that there is no necessary connection between morality and legal theory, and interpreted more specifically here as the view that legal theory should be conducted in morally neutral terms) and substantive legal positivism (that there is no necessary connection between morality and the content of law, and interpreted here as the view that law as it is should be distinguished from law as it ought to be). The distinction helps to explain Hart's interpretation of Bentham, in that Hart attributed both doctrines to Bentham, even though Hart did not himself distinguish them explicitly. In my first article I concluded that Bentham was not a methodological legal positivist, but could be described as a substantive legal positivist. In my second article I argued that Bentham was not best understood either as a methodological legal positivist or as a substantive legal positivist. It seems to me that substantive legal positivism divides the subject of jurisprudence into two branches, "law as it is" and "law as it ought to be", and that methodological legal positivism is thereupon concerned with the

[10] P. Schofield, "Bentham et la réaction britannique à la Révolution française", trans. E. de Champs, in *Bentham et la France: fortune et infortunes de l'utilitarisme*, edited by E. de Champs and J.-P. Cléro, Voltaire Foundation, Oxford 2009, pp. 67-82.

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

[12] P. Schofield, *Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"*, «Jurisprudence», I, 2010, pp. 147-167.

[13] See S.R. Perry, "Hart's Methodological Positivism", in J. Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Oxford University Press, Oxford 2001, pp. 311-354.

approach that should be adopted when describing "law as it is", and in particular those "concepts" that are supposed to exist in each and every legal system – in other words, the starting-point of legal positivism is a division between what is (fact) and what ought to be (value), and then, within the field of fact, the explanatory task is undertaken in morally neutral terms.

While partially accepting my account, Zhai maintains that Bentham can be viewed, in a meaningful sense, as a legal positivist, in that he retained a commitment to substantive legal positivism – that is to a distinction between fact and value in his distinction between expository and censorial jurisprudence (in other words in his distinction between law as it is and law as it ought to be). Zhai, however, agrees with me in rejecting Hart's claim that Bentham aimed to develop a morally neutral vocabulary for explicating key terms in law (for instance right, power, duty, privilege, immunity). In other words, Zhai agrees broadly with my first article, but rejects the stronger claim advanced in the second. In relation to substantive legal positivism, Zhai argues (extrapolating on a comment made by Hart) that my mistake is to assume that because Bentham would have rejected non-cognitivism in ethics (that is the view that statements of moral rightness and wrongness cannot be said to be true or false), he would also have rejected the separation of fact and value. In other words, I wrongly assume that the distinction between what the law is and what the law ought to be is merely a special case of a more general distinction between what is and what ought to be, and because Bentham, in his moral theory, treated both statements of the "what is" variety and statements of the "what ought to be" variety as statements of fact, and thus collapsed any sharp division between fact and value, that he did so in his legal theory. I am not persuaded by Zhai's arguments that my view is mistaken. Even if the "causal connection" is mistaken, and one view does not logically entail the other, there is no reason to think that Bentham did not hold both views. A general point is that Bentham put forward a unified theory: there was only one physical world, and hence only one source of knowledge; there were not competing domains of fact and value, or of brain and mind, or of matter and spirit.[14] The tendency of contemporary philosophy is to contrast fact with value; Bentham would have contrasted fact with fiction.

Allow me to look in more detail at Zhai's argument. Hart was correct, according to Zhai, to state that the adoption of either cognitivism or non-cognitivism in moral theory was irrelevant to the legal positivist's insistence on the conceptual distinction between statements of what the law is and what the law ought to be. What this seems to be saying is as follows: having made the prior distinction between is and ought (as per substantive legal positivism), the debate between cognitivists and non-cognitivists is carried on within the sphere of what ought to be, while legal theory is carried on

[14] See, for instance, Bentham's "Encyclopedical Table, or Art and Science Table", in *Chrestomathia*, edited by M.J. Smith and W.H. Burston, Clarendon Press, Oxford 1983, between pp. 178 and 179.

with the sphere of what is (as per methodological legal positivism). The thrust of Hart's argument in the quotation reproduced by Zhai[15] was directed against those proponents of natural law who claimed that evil or unjust law was not law. Bentham, of course, likewise attacked the natural law theorists on this ground: law could be good or evil, just or unjust. The point, however, is that, for Bentham, the law necessarily had some value, and the very identification of what the law was had some value. I am prepared to concede that there may be trivial statements that may be statements of fact (that are true) but are not valuable in that they have no impact on utility – Bentham himself said that such statements were both rare and did not matter.[16] But statements about the law would certainly not fall into this non-trivial category. For Bentham, a non-trivial statement of fact was valuable for what it told us about the physical world, while a statement of value, as a species of factual statement, was also valuable for the same reason. Fact and value were not separable, but represented two different ways of speaking about the same physical world – it was more a case of whether it was useful to emphasize the past, present, or future physical reality without explicit reference to pleasure and pain (statement of fact), or with such explicit reference (statement of value).

Bentham's utilitarian ethics, which according to modern lights falls into the category of cognitivism, did not allow for the carving up of experience into a physical world of fact and a mental world of concepts in the way that Hart, and following him Zhai, assume is feasible. Hence I maintain, contrary to Hart, that, for Bentham, if fact and value have one meaning in one part of the field of thought and action, they have the same meaning in every other part of the field of thought and action. If the distinction between fact and value does not make sense in the field of ethics as a whole, then it does not make sense in that division of the field occupied by jurisprudence. To put this another way: Zhai allows that, for Bentham, the domain of fact enters into the domain of value (that is statements of value are a special sort of statement of fact); if, as I argue, the relationship is mutual, then the domain of value enters into the domain of fact, and Zhai's argument collapses.

It is worth drawing attention to two short passages that I have not referred to in my previous discussions, but which, if nothing else, at least suggest that the interpretation of Bentham as a Hartian legal positivist needs to be seriously re-examined. First, in *Letters to Count Toreno*, having discussed the principles on which a penal code ought to be grounded, Bentham stated: "Thus, not only in a direct way, by the application made of it to each particular case, but in an additional way by means of the method to which it gives birth, does the principle of the greatest

[15] H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford 1983, pp. 83-84.

[16] Such statements would concern apathematic sensations: see *Utility and Democracy*, as above, pp. 29-30.

happiness of the greatest number, cover the whole field of legislation with its salutary influence". In short, "the whole field", understood in terms of both content of the law and the method by which it is organized, was subject to the principle of utility.[17] Second, in the marginal summary paragraphs for "Table of the Springs of Action", Bentham noted: "Principles of utility two, or if but one, it is understood in two senses – viz. the *censorial* and the *expositive* or *exhibitive*. (Censorial, what. Expository, what.)"[18] Expository jurisprudence (the identification of what the law is) and censorial jurisprudence (recommendation of what the law ought to be) were both governed by the principle of utility. I am inclined to think that a serious re-examination of Bentham's legal theory will show that the gloss put upon his distinction between what the law is and what the law ought to be by Hart and his twentieth-century followers is a product of their commitment to the conceptual separation of fact and value, and that such a separation would not have made sense to Bentham, because fact and value were inseparably associated.

Zhai goes on to say that Bentham's naturalism "seems perfectly compatible with the is/ought distinction." This is not the issue. The issue is whether the "ought" is dependent on the "is", that is to say some physically existing property or thing, or whether the "ought" is independent of the physical (natural) world. Zhai draws on the not inconsiderable authority of Ross Harrison[19] who, he says, has "demonstrated" that the distinction between fact and value was central to Bentham's thought (more precisely, Zhai states that, according to Harrison, it was central to the tradition of thought from Bacon to Hume with which Bentham identified). Harrison certainly attempts to interpret Bentham as though he accepted the separation of fact and value, but this is a philosophical reconstruction (from the same mould, in this particular, as the important reconstructions of Postema and Kelly)[20] and therefore a different enterprise to my own. I would, however, like to try to cast a little doubt on the assumption that there was a tradition of thought that adhered to something akin to the twentieth-century's understanding of the separation of fact and value on which Bentham was drawing. The *locus classicus* for this "tradition" is Hume, who is often said to have been the first philosopher to identify the so-called naturalistic fallacy, that is the fallacy of deriving an "ought" from an "is". Hume wrote:

[17] "Letters to Count Toreno", in *The Works of Jeremy Bentham*, edited by J. Bowring, 11 vols, Tait, Edinburgh 1838-1843, VIII, 526.

[18] J. Bentham, *Deontology together with A Table of the Springs of Action and Article on Utilitarianism*, edited by A. Goldworth, Oxford University Press, Oxford 1983, p. 9.

[19] R. Harrison, *Bentham*, Routledge, London 1983.

[20] G.J. Postema, *Bentham and the Common Law Tradition*, as above; P.J. Kelly, *Utilitarianism and Distributive Justice*, as above.

> In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation of affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this relation can be a deduction from others, which are entirely different from it.[21]

The problem identified by Hume was not, as is usually assumed, the move from the "is" to the "ought" as such, but the lack of any explanation as to how it was done. Bentham learnt this lesson from Hume: he explained clearly how the "ought" (the principle of utility) was derived from the "is" (the experience of pleasure and pain).

Zhai agrees with me in rejecting Hart's claim that Bentham aimed to develop a jurisprudential vocabulary of morally neutral terms. Hart's claim has some initial plausibility due to Bentham's desire to avoid eulogistic and dyslogistic terms, that is terms that carried associations of praise and blame. However, as Zhai rightly points out, while Bentham advocated a vocabulary that did not carry such associations, he did so not because such a vocabulary would be morally neutral, but because it would be conducive to utility. The eulogistic and dyslogistic associations of certain terms made them morally pernicious because they led to a begging of the question – the approval or disapproval of a particular practice, for instance, would depend on the associations of the term by which it was described, rather than on its substantive utility. Indeed, Zhai goes beyond my account in that he explains Hart's attribution of a morally neutral vocabulary to Bentham in terms of what he takes to be Hart's moral non-cognitivism. I do not, on the surface, see why Zhai thinks that the adoption of either a cognitivist or a non-congitivist moral theory is completely independent of substantive legal positivism (the grounds on which he criticizes my account), but is the explanation for Hart's mis-attribution of methodological legal positivism to Bentham.

It may be that Zhai is simply adopting a different approach to my own, and that he is putting forward a philosophical reconstruction, rather than a historical account, of Bentham's thought. I have tried to explain in the two articles, as well as in *Utility and Democracy*, that I am attempting to give an account of Bentham as a historical figure – my enterprise, in Bentham's terminology, is "expository", but at the same time, I hope, not without value. If Zhai's approach is that of the contemporary legal philosopher, who is trying to understand Bentham according to the lights of

[21] D. Hume, *A Treatise of Human Nature: A Critical Edition*, edited by D.F. Norton and M.J. Norton, 2 vols., Clarendon Press, Oxford 2007, I, 302.

contemporary philosophy, there is no real dispute between us. Whatever the case, there is no doubt that Bentham was a significant influence on the development of Hart's legal positivism, and hence on contemporary jurisprudence. It is regrettable that contemporary legal philosophers, at least in the Anglophone world, do not take the history of their subject more seriously – a criticism from which Zhai is clearly immune. There is more discussion needed around these areas, and I am grateful to Zhai for raising some important issues in such a stimulating and insightful way.

Conclusion

It is kind of Quinn to say that my work on Bentham has led to a better world than would have existed if I had followed my youthful ambitions and become a railway porter in my birthplace. I suspect that I would have been happy enough tending the Voltairean garden that is Preston station. Jeremy Bentham, of course, loved to tend his not inconsiderable garden at Queen's Square Place, Westminster, but he had much wider ambitions. He would have been disappointed at the dominance of human rights discourse in today's world, and of the continuing prevalence of religion and religious modes of thinking. But all that means is that his ideas retain tremendous relevance and, indeed, provide a powerful tool for the critique of contemporary society.