

## Philip Schofield

### *Utility and Democracy: Summary*

The main theme of *Utility and Democracy* is that it was the emergence of sinister interest that eventually produced Bentham's "transition" to political radicalism. Instead of ascribing the problems which, in his youth, he had identified in the law to a lack of knowledge or judgment on the part of legislators and lawyers, he realized that they were the product of deliberate policy. When, for instance, he had written *An Introduction to the Principles of Morals and Legislation*, he had assumed that it was the desire of rulers to promote the happiness of the communities over which they ruled. By the time that he began to draft material on parliamentary reform in 1809, he had come to appreciate that it was the desire of rulers to promote their own interest in whatever way they could, no matter how detrimental to the happiness of the community in general. Having recognized the true nature of the problem, he saw that the only effective solution lay in bringing about an identification of the interest of rulers with that of subjects. This was the task of constitutional law, a task which would be achieved by maximizing official aptitude and minimizing government expense.

The increasingly politicized and radicalized nature of Bentham's later work should not obscure the fact that the fundamental principles of his thought remained constant throughout his career. His starting point, both logically and chronologically, was his understanding of the distinction between the real and the imaginary, and his division of nouns substantive into the names of real entities and the names of fictitious entities. If any proposition, no matter how abstract it appeared, was to make sense, it had ultimately to be related to its "real source", that is to some object or objects – to some "substance" – which existed in the physical world. In this respect there was no distinction between a proposition which

purported to be a factual one about the natural sciences, and a proposition which purported to be an evaluative one about what was valuable or desirable. When properly expounded, the latter proposition was just as much a factual one as the former, and morality was just as much a science as physics or chemistry. The entity represented by the phrase the principle of utility was fictitious, but to talk about the principle of utility made sense because it could be expounded by reference to its “real source” in the physical world – namely feelings of pain and pleasure experienced by sentient creatures. All other pretended foundations for the science of morality were either nonsensical because non-existent, or a camouflage for the selfish desires of the persons who articulated them. It was the mistake of the partisan of natural law, and of other non-utilitarian moral standards, to claim that he had knowledge of right and wrong without any reference to facts.

The principle of utility, as conceived by Bentham, involved a commitment to a form of political equality. Bentham took it as axiomatic that one person’s happiness was worth the same as an equal amount of happiness experienced by any other person. This was not, in itself, decisive in terms of justifying an equal right to participate in the political process – indeed, there were good reasons to the contrary, for instance where a person was incapable of judging for himself what would contribute to his own happiness. What it did justify was the right of everyone to have equal consideration given to their interest. A further argument was needed to justify democracy. Now, Bentham always accepted that the best form of government – and by this he meant that which best promoted the happiness of the community, and that in turn meant taking the interest of each individual in the community into account – was that in which the rulers were dependent on subjects. Hence, when he first turned his attention, albeit fleetingly, to constitutional design at the time of the French Revolution, he rejected the theory of the division of power (a term he used to include the theories both of the balance of powers and the separation of powers) on the grounds that it did not, except accidentally, secure such dependence. Bentham’s proposed constitution for France, put forward in the autumn of 1789, was characterized not by a division of power, but by the dependence of the National Assembly, wielding supreme legislative power, on the people as electors. He rejected the need, in these circumstances, to impose any limitation on the legislative power of the National Assembly. This was, in essence, the structure of government which he would later adopt in the constitutional code. It was when Bentham recognized that the dependence of rulers on subjects, and thence the equal consideration of interests, would not be achieved except under a democratic form of government that the utilitarian justification for democracy was complete.

In the autumn of 1789, and in the wake of the Declaration of Rights which committed the French state to political equality, Bentham did propose a democratic franchise for France, including female suffrage, and was led to consider wide-

ranging electoral reform for Britain. His enthusiasm for reform was short-lived. It was not long afterwards that Bentham was opposing any measure of political reform in Britain, and arguing against popular participation in politics – arguments which he continued to deploy until the late 1790s and possibly beyond. The crucial turning-point in Bentham’s political thought was, as noted above, the emergence in his thought of sinister interest. Bentham became totally disenchanted with the successive ministries of Pitt and Addington following the effective rejection of his panopticon prison scheme in 1803 (the scheme was half-heartedly revived in 1810, but finally laid to rest in 1812). It seems plausible to suggest that his reflection on the causes of the rejection of the scheme – notably the self-interest of landowning aristocrats who did not want their estates blighted by a neighbouring prison – led him to discover the existence of sinister interest. A particular interest which was in opposition to the general interest was a sinister interest. From the perspective of his psychological theory, this discovery led to a deepening of his understanding of the motives of those who wielded power. Rather than possessing a desire to promote the interests of the community in general, rulers in fact possessed a desire to promote their own selfish or particular interests, whatever detriment this might cause to the general interest. Hitherto, Bentham had assumed that he could work within the existing political system in order to introduce the reforms he thought desirable. Henceforward, he recognized that since such reform would undermine the interests of rulers, they would bitterly oppose it, and stoutly defend all existing abuses.

Having given up hope of building the panopticon prison, Bentham had, in the late spring of 1803, turned his attention to the reform of judicial procedure and evidence. By the summer of 1804 he had worked out in detail the way in which sinister interest operated in this context. He argued that the appalling state of the English system of judicial procedure was not, as he had previously tended to assume, the result of intellectual deficiency on the part of lawyers, but the product of a steady and systematic policy on the part of the legal profession, and particularly the judges. The lawyers wished to maximize their income, which they primarily received in the form of fees, whatever the expense to suitors, and thence to the community in general. The lawyers had formed a “law partnership” in order to extract the maximum amount of profit possible from suitors. The law partnership, and in particular the judges, had not only established the existing system of legal procedure in order to benefit themselves, they had also managed to convince legislators and the community generally that the system was excellent in all respects. By their use of technical language, they had prevented non-lawyers from investigating the state of the law, and thereby thwarted any attempts to introduce reform. In short, the existence of the sinister interest of the law partnership explained how things had got into the disastrous state in which they then existed, and why lawyers were adamantly opposed to reform.

Bentham's attribution of a sinister interest to the law partnership first appeared in print in *Scotch Reform* in 1807 (published in 1808), which drew on the more general material on judicial procedure and evidence on which he had been working since 1803. Bentham composed *Scotch Reform* in response to a proposal announced by government for the reform of the law of civil procedure in Scotland, and in the hope that he would be asked to codify for Scotland. In this work he was extremely critical of the law partnership, arguing that no meaningful reform would result if things were left to the lawyers. He did not, as yet, implicate Parliament in the partnership. The politicians, like the people, had been deluded by the lawyers on the question of the desirability and feasibility of law reform. He soon came to think differently. By the first half of 1809, when he composed the text later published as *Elements of the Art of Packing*, he had come to realize that sinister interest was a feature of both the legal and political establishments: it was Parliament which permitted the continuation of the fees which judges had imposed for the benefit of the law partnership. Bentham's immediate concern in the work was with the danger posed to the liberty of the press by prosecutions for libel, and by the appointment in these cases of special juries, which were packed with men subservient to the will of the judge. Both the legal and political establishments had an interest in destroying the liberty of the press, for it offered the greatest threat to their position. By exposing the abuses from which they profited, a free press would provide a check to misrule. So all who benefited from abuse – and this included all members of the legal and political establishments – were united in their desire to destroy the freedom of the press, for in achieving that end, they safeguarded the abuses from which they derived so much profit.

With the insight that every aspect of the state was permeated by sinister interest, Bentham was in a position to launch a sustained and detailed attack on the English establishment – an onslaught which he carried on unremittingly until his death in 1832. It is clearly inappropriate to argue that he was “converted” or underwent a “transition” to political radicalism in 1809. The elements of his political radicalism were already in place when he began to write on parliamentary reform in the middle of 1809, stimulated as he was into doing so by a speech delivered by his step-brother, Charles Abbot, to the House of Commons on 1<sup>st</sup> June 1809. It would not, however, be misleading to say that Bentham underwent a “transition» to political radicalism between 1803 and 1809, as he applied his notion of sinister interest ever more generally to the English establishment. By June 1809, when he began to write on parliamentary reform, he was already a political radical. The work he eventually published as *Plan of Parliamentary Reform* in 1817 contained a “Catechism” written in 1809-10, and a long “Introduction” written in 1816-17. His aim in both was to secure “democratic ascendancy” within the existing institutions of the British polity. The House of Commons would be made genuinely

representative of the people, and it would be freed from any corruptive influence exercised by the King and the House of Lords. This would be achieved in large part by an extensive reform of the electoral system, which would be characterized by universal manhood suffrage, annual elections, equal electoral districts, and the secret ballot. The key proposal was the secret ballot. The secret ballot would enable each man to vote for the candidate whom he considered would best promote his own interest, for the universal interest was no more than the aggregate of the interests of the individuals who composed the community. The secret ballot would exclude the baleful effects of the influence traditionally exercised over voters by the wealthy and privileged within the local community. There would be no point, for instance, in offering a bribe, if the briber had no way of knowing whether the person he had bribed had voted as directed or not. Bentham never wavered from his commitment to the secret ballot, despite pressure on occasion to do so for tactical reasons. Without the secret ballot, the rest of the reforms would, in his view, have been ineffective; on the other hand, the introduction of the secret ballot alone would have paved the way to further reform.

Having recognized the existence of sinister interest in the legal and political establishments, Bentham extended his investigation to the ecclesiastical establishment. He had always argued that theology should not have any influence over morals and legislation, but had not hitherto attacked religious belief on the grounds of its pernicious effects on human happiness. He now saw that religious belief was used to further the sinister interest of the priesthood and those linked with it. As far as constitutional law was concerned, his main recommendation was that there should be no religious establishment. In Britain, the Anglican Church was merely another instrument in the hands of rulers to oppress and extort resources from subjects. The clergy extracted large sums of money from the population generally, in order to provide income for members of the ruling few, without having to provide any service or labour in return. The state supported the Church with its coercive force, while the Church manufactured delusive arguments in support of the state. Indeed, the scale of abuse in the Church was not only greater than that in the political and legal establishments, but acted as a bulwark against reform elsewhere. Bentham was particularly critical of the role of the Church in education, both in schools and in the Universities of Oxford and Cambridge. In relation to the poor, its policy was to exclude from the benefits of education those unwilling to declare their belief in Anglican doctrine, and to pervert the morals and intellects of those who were willing. Bentham never overcame his resentment at being forced to subscribe to the Thirty-nine Articles while a student at Oxford, and it was this experience which led him to insist that the provision of education should not be linked to the profession of belief. As far as the Anglican Church in general was concerned, Bentham recommended its “euthanasia”, whereby, as livings and other

offices became vacant, they would be abolished. The present possessors would retain their incomes and thereby not suffer the pain of disappointment, while the expense of the religious establishment to the state, and thus to the people generally, would gradually diminish, and the additional income derived from the sale of its assets would be used to reduce taxation. Those people who wished to receive religious instruction could continue to do so at their own expense.

Bentham's writings on parliamentary reform, while focusing on the reform of the House of Commons in order to render it dependent on the people, assumed the continuing existence of the King and the House of Lords. It was only in 1818 that Bentham appears to have committed himself to republicanism, by which he meant a representative democracy which did not include a monarchy or an aristocracy. This development in his thought was linked, perhaps, to his experience in attempting to persuade a "constituted authority" to accept his services as a codifier. As we have seen, he had first offered to draw up a code for Scotland in 1808, but his campaign had begun in earnest in 1811 when he had offered to draw up civil and penal codes for the United States of America. He had assumed that penal and civil codes of the sort he advocated might be introduced under any system of constitutional law. By 1818, perhaps because of the rejection of his offer by Alexander I of Russia, he had come to the view that it was only under a representative democracy that rulers would countenance the introduction of an all-comprehensive and rationalized code of law. It was necessary first to introduce a representative democracy in order to achieve utilitarian reform in other areas of law. Political reform was henceforward Bentham's central concern. When at last in April 1822 he received an acceptance of his offer to draw up penal, civil, and constitutional codes from the Portuguese Cortes, it was to the constitutional code that he immediately turned his attention, and which dominated the final decade of his life.

For Bentham the key principle of constitutional design was to ensure the dependence of rulers on subjects, hence his rejection of the division of power, whether in the form of the balance of powers or the separation of powers, on account of its unsuitability in this respect. Instead he proposed chains of superordination and subordination, based on the capacity of the superior to appoint and dismiss (in Bentham's terminology to locate and dislocate) the inferior, and to subject the inferior to punishment and other forms of vexation. The supreme power or sovereignty in the state would be vested in the people, who would hold the constitutive power. Immediately subordinate to the people would be the legislature, elected by universal manhood suffrage, and subordinate to the legislature would be the administrative and judicial powers. The system of representative democracy was not an end in itself – the end was the greatest happiness – but it was an indispensable means to that end, in that it was only under such a system of

government that effective measures could be implemented to secure the appropriate aptitude of officials and minimize the expense of government. The securities for official aptitude – otherwise termed securities against misrule – included the exclusion of factitious dignities (or titles of honour), the economical auction, subjection to punishment at the hands of the legal tribunals of the state, and the need to pass an examination, but the most important was publicity. Bentham went to great lengths to ensure that government would be open to public scrutiny, and thence subject to the force of the moral or popular sanction operating through the public opinion tribunal, which consisted of all those who commented on political matters, and of whom newspaper editors were the most important members. Bentham saw the freedom of the press as a vital bulwark against misrule, and therefore his attempt to encourage the diffusion of literacy by linking a reading and writing qualification to the suffrage. The main difficulty which had to be overcome was the propensity of rulers to make the sinister sacrifice, that is to sacrifice the interest of the community to their own particular and sinister interest. All these measures would ensure that, instead of an opposition of interest between ruler and subject, there would be an identification of interest: in other words, the ruler would be placed in such a situation that the only way of promoting his own interest would be through the promotion of the general interest. Bentham's commitment to democratic government had a further consequence for his thought. The tension between the role of the legislator in promoting the happiness of the community and his insistence that the individual was, in general, the best judge of his own interest, was resolved by a representative democracy. With sovereignty placed in the people, those who were the best judge of their interests were given the power (through their deputies in the legislature) to pursue them effectively.