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Introduction

FREDERICK ROSEN

> The greatest service of all, that for which posterity will award most honour to his name, is one that is his exclusively, and can be shared by no one present or to come; it is the service which can be performed only once for any science, that of pointing out by what method of investigation it may be *made* a science. What Bacon did for physical knowledge, Mr. Bentham has done for philosophical legislation. Before Bacon's time, many physical facts had been ascertained; and previously to Mr. Bentham, mankind were in possession of many just and valuable detached observations on the making of laws.
>
> But he was the first who attempted regularly to deduce all the secondary and intermediate principles of law, by direct and systematic inference from the one great axiom or principle of general utility.[1]

In this brief discussion of Jeremy Bentham's achievements with regard to law and jurisprudence, written shortly after Bentham's death, and published at the beginning of a period of sustained criticism of Bentham's ideas, John Stuart Mill not only seems to have excluded from criticism Bentham's work on law, as opposed, for example, to his moral philosophy, but he also praised Bentham's efforts in this field of science above all others. Besides discrediting existing technical systems of law, according to Mill, Bentham went further:

> But Mr. Bentham, unlike Bacon, did not merely prophesy a science; he made large strides towards the creation of one. He was the first who conceived with anything approaching to precision, the idea of a Code, or complete body of law; and the distinctive characters of its essential parts, – the Civil Law, the Penal Law, and the Law of Procedure.[2]

[1] J.S. Mill, 'Remarks on Bentham's Philosophy', in *Essays on Ethics, Religion and Society* (*The Collected Works of John Stuart Mill*, vol. x), ed. J.M. Robson (Toronto and London: University of Toronto Press/Routledge & Kegan Paul, 1969), 3–18, at 9–10.

[2] Ibid., 10–11.

When Mill discussed Bentham's procedure code, and with it, the conception of judicial organization, he also wrote: 'There is scarcely a question of practical importance in this most important department, which he has not settled. He has left next to nothing for his successors.'[3] For Mill, therefore, law first became a science in the work of Bentham. As if to confirm this opinion, Mill never attempted a major work on law in a long career that included treatises on logic and political economy, topics on which Bentham had also written.

The essays collected in this new volume on Bentham are, in one way or another, concerned with law and the role of public opinion in relation to law, and all of the essays testify to the importance of Bentham's work in these fields. We encounter here discussions of codification (Emmanuelle de Champs and David Lieberman), the idea of the rule of law (Gerald Postema), Bentham on publicity (Postema), legislation and the calculation of pleasures and pains (Michael Quinn), sexual non-conformity and the law (Philip Schofield), and the utilitarian critique of natural rights (Schofield). At least two essays focus on the jurisprudence of H.L.A. Hart, the leading philosopher of law, who was instrumental in the revival of Bentham's theory of law in the twentieth century (Xiaobo Zhai and Lieberman).

The focus of the book on Bentham, law, and public opinion is central to understanding Bentham's thought, but the essays also contribute to different disciplines or areas of expertise (reflecting those of the authors) including philosophy, law, intellectual history, moral and political thought, ethics, and religion. The essays will be of interest not only to students of law and its history but also to students of numerous aspects of Bentham's thought and its historical context.

The volume begins with two elegant essays by Gerald Postema. The first examines the idea of the rule of law in contemporary legal philosophy with only passing reference to Bentham. The second essay, which is concerned with Bentham's idea of publicity, begins by noting that the language associated with the rule of law is more recent than Bentham, and that Bentham never used this language explicitly. As Postema develops his argument, we can see how Bentham regarded publicity as a major critical, moral, and public force that, in a manner foreign to rule of law theory, directly attempted to establish public accountability in the polity. Publicity possesses great power, and through publicity the law can acquire transparency and create accountability. The rulings of the Public Opinion

[3] Ibid., 11.

Tribunal, a major feature of Bentham's later *Constitutional Code*, might well be regarded as the means of establishing the rule of law, or even as an alternative system of law to that emanating from legislators.[4]

Michael Quinn's essay on the calculation of pleasures and pains is original in several respects. Some students of Bentham are content to see his treatment of pleasures and pains in terms of a more elaborate attempt at classification (as in *An Introduction to the Principles of Morals and Legislation*) than one finds in the Epicurean tradition (in Helvétius, for example). Despite some suggestions to the contrary by Bentham himself, one finds little actual evidence of calculation in his writings. However, by seeing public opinion as a potentially malign force in society (as a result of ignorance and prejudice), and by insisting on the importance of calculation, particularly by legislators, as well as by the rest of the population, Quinn presents a scenario where the legislator might be compelled by an erroneous public opinion to pass legislation in violation of the principle of utility. Does the legislator in such circumstances discard the pains caused by this faulty public opinion, or include all of the pains in the calculation? Although Quinn does not entertain the idea that it might be better not to calculate at all, he is fully persuasive that such calculations need to be addressed, and explores various possibilities for working through such problems, not only in Bentham but also in Mill and Sidgwick.

In the final essay in this section on law and public opinion, Philip Schofield provides a valuable account of some of Bentham's writings on human sexuality generally and, particularly, on Bentham's defence of sexual liberty which may well establish him as a greater libertarian than, for example, Mill. The whole of Bentham's writings on sex are soon to be published in the new edition of Bentham's *Collected Works*.[5] In this essay, Schofield tackles three important themes with regard to law and public opinion. The first concerns the significance of taste in society and in legislation, particularly when opposed to utility; the second is devoted to a critique of the role of asceticism in St. Paul in relation to the supposed sexuality of Jesus; and the third assesses the way Bentham advocated sexual liberty in relation to his conception of utility. Schofield's work in bringing this material to public attention in comprehensive and

[4] See F. Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (Oxford: Clarendon Press, 1983), 19–40.

[5] See *Of Sexual Irregularities and Other Writings on Sexual Morality*, ed. P. Schofield, C. Pease-Watkin, and M. Quinn (Oxford: Clarendon Press, 2014 (*CW*)).

fully edited versions is very welcome. His analysis of the scope and depth of Bentham's thought, particularly in relation to public opinion as well as to the problem of legal enforcement of sexual morality, shows that Bentham, even today, is considerably ahead of law and opinion.

An important sub-theme of the volume concerns the contribution of H.L.A. Hart to the philosophy of law. David Lieberman provides an important account, based on Hart's *Essays on Bentham*[6] and other writings, of how Hart's ideas developed from Austin's jurisprudence to Bentham's political theory. The main connecting link, established by Hart, was the idea of sovereignty. Unfortunately, by the time Bentham came to write his *Constitutional Code*, in which sovereignty was located in the people (and dealt with in a few lines),[7] the 'command theory of law' seemed irrelevant to the system Bentham had created. As Lieberman argues, the link between Bentham's jurisprudence and democratic theory might have made more sense if the role of codification had been recognized and appreciated by Hart. Lieberman develops this theme with a brief account of the Constitutional Code, where he concludes by showing how popular sovereignty operated within the system of codification. Lieberman also shows the importance of understanding Hart's ideas in relation to the philosophy of law thirty years ago, and provides a way of reading Hart that enables one to appreciate just how valuable, if misleading, were aspects of his work on Bentham.

Xiaobo Zhai has produced the most ambitious essay in the collection by mounting an elaborate critique of Hart's jurisprudence in relation to Bentham. He delves deeply into the difficult world of Bentham's logic, as well as his jurisprudence, in an attempt to establish the virtues of Bentham's idea of 'natural arrangement' as opposed to Hart's idea of a 'morally neutral description'.

The final two chapters approach Bentham and law with an emphasis on historical context. Emmanuelle de Champs concentrates on Bentham's writings in the 1780s, and his attempts to reach a Continental audience with his ideas and proposals to establish not only a penal code but also a complete code of laws. The larger context is created by Montesquieu's *The Spirit of the Laws* (1748), and the debate over legal and political reform to which Voltaire, Beccaria, and many others contributed. This chapter

[6] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982).

[7] See J. Bentham, *Constitutional Code: Volume I*, eds. F. Rosen and J.H. Burns (Oxford: Clarendon Press, 1983 (*CW*)), 25.

contains a full discussion of the Continental debate in political ideas, and is original in showing both its nature and Bentham's eagerness to participate in it. Just as European academics nowadays feel the need to publish in English, philosophers in Bentham's day needed to address, and succeeded in addressing, a Continental European audience in French.

The starting point for Philip Schofield's essay on Bentham and natural rights is the composition of Bentham's 'Nonsense upon Stilts' in 1795. This work, previously known as 'Anarchical Fallacies', is considered by Schofield to be 'arguably the most profound critique of the theory of natural rights ever written'. Schofield's essay is carefully linked to the new text, published in the *Collected Works* as part of *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*,[8] and provides an excellent analysis of its main themes. Furthermore, Schofield develops a theoretical critique of the advocates of natural or human rights and a defence of utilitarianism. In the eighteenth-century context, he shows how Bentham could defeat Thomas Paine's arguments concerning the rights of man. He points out that both Paine and Bentham were responding in different ways to the Declaration of the Rights of Man and the Citizen of 1789. In relation to contemporary political philosophy, he provides a critique of Rawls's defence of human rights in a way which closely parallels Bentham's critique of Paine's theory of natural rights.

To conclude, this volume is an excellent introduction to Bentham as a philosopher, a legal theorist, and arguably the most important figure in the history of utilitarianism. It adds considerably to our knowledge of Bentham's life and times, as well as to our understanding of utilitarianism then and now. In addition, we can also learn from passing comments by these authors, as when Schofield, for example, notes that John Stuart Mill was present, as a young boy of approximately ten or eleven years of age, at Ford Abbey in Devon when Bentham lived there and was writing on sexual irregularities. Indeed, Mill's father, James Mill, shared the same large room as Bentham, where they would work on their various projects. Schofield believes that John Stuart Mill would have been too young to have had access to the manuscripts (and Mill apparently never subsequently mentioned them), but from his comments on Bentham and taste he would have known something of Bentham's ideas with regard to

[8] J. Bentham, 'Nonsense upon Stilts', in *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, eds. P. Schofield, C. Pease-Watkin, and C. Blamires (Oxford: Clarendon Press, 2002 (*CW*)), 317–401.

liberty generally, and possibly with regard to free sexual expression. The striking image of young John Mill peeping at Bentham's manuscripts on sexual irregularities, then later sharing the irregular, though supposedly Platonic ménage à trois with John and Harriet Taylor, and participating in what appears to have been an unconsummated marriage with Harriet Taylor Mill, makes one wonder whether he was ever aware of these manuscripts and the ideas in them, or if he simply refused to pay such unconventional ideas much attention. One finds no discussion of the liberty of enjoying sexual irregularities, for example, in Mill's *The Subjection of Women*, and no discussion of the pleasures of pederasty elsewhere. Nevertheless, Bentham's overall position as a believer in liberty, particularly of consenting adults acting in private, including liberty for women, is developed by Mill in a legal and social context in the correspondence with Auguste Comte, *On Liberty*, *The Subjection of Women*, and elsewhere, and plays an important role in later social and legal thought concerning women and their rights.[9]

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[9] See F. Rosen, *Mill* (Oxford University Press, 2013), 231–60, 281–5.

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Law's Rule

Reflexivity, Mutual Accountability, and the Rule of Law

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'We are going to be a community of the rule of law',[1] announced C.H. Tung, the Chinese official appointed to govern Hong Kong, prior to China's assuming jurisdiction over the city. Tung's publicly uttered reassurance appealed to an ancient ideal. Already in the fifth century BCE, the core idea of the rule of law was captured on stone columns in the Cretan city of Gortyn. The first sentence of the Gortyn Law Code asserts the supremacy of the legal process, declaring 'if anyone wishes to contest the status of a free man or a slave, he is not to seize him before a trial'.[2] Law and the legal process were to rule the actions and interactions of citizens of Gortyn; but equally, they were to govern the exercise of power by officials and by those who acted under colour of law. Officials, even the city's highest official, the *kosmos*, were held accountable to the law. They could be fined if they failed to enforce the law properly.[3] Law was not to be merely an instrument of governance; law was meant to rule governors and citizens alike. This is the simple, central idea of the rule of law. 'If the law does not rule', Martin Krygier observed, 'we don't have the rule of law'.[4] The rule of law is first of all about *ruling* – the *law's* ruling.

This ancient ideal of *law's rule* is our subject. More precisely, this chapter focuses on the conditions for the realization of law's rule. Philosophical explorations of the rule of law ideal largely focus on principles of *legality* – the formal, procedural, and institutional aspects of the ideal – but I believe that these discussions are seriously incomplete. I argue that *fidelity* – the

[1] 'We Are Going to be a Community of the Rule of Law', *Business Week International Edition,* 23 December 1996, 20, quoted in B. Tamanaha, 'The Rule of Law for Everyone', *Current Legal Problems* 55 (2002), 97–122, at 100.

[2] F.D. Miller, Jr., 'The Rule of Law in Ancient Greek Thought', in *The Rule of Law in Comparative Perspective*, eds. M. Sellers and T. Tomaszewski (Dordrecht: Springer, 2010), 11–18, at 11.

[3] Ibid., 12.

[4] M. Krygier, 'Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?', in *Getting to the Rule of Law: Nomos 50*, ed. J.E. Fleming (New York University Press, 2011), 64–104, at 68.

ethos of law – is essential to law's rule. Fidelity underwrites and makes possible law's rule. The rule of law is robust in a polity only when it is characterized by widespread fidelity, that is, only when its members, and not merely the legal or ruling elite, take responsibility for holding each other – and especially law's officials – to account under the law. This is the thought I explore and defend. To get our subject clearly in view, I begin with a vivid and troubling example of *in*fidelity.

Infidelity

Between 2003 and 2008, the presiding judge of the juvenile court in Luzerne County, Pennsylvania, summarily sentenced several thousand young people to extended detention in private facilities far from the young defendants' homes.[5] In hearings that lasted an average of four minutes, Judge Mark Ciavarella handed down harsh sentences for minor infractions or even innocent actions – for example, for throwing a steak at the defendant's mother's boyfriend, for calling the police when the defendant's mother locked him out of the house – with scarce attention to the evidence in the case, let alone any special features of the defendants' circumstances. In the U.S. juvenile justice system, the legally mandated aim is restorative rather than punitive. Court officials are charged with securing 'the best interest of the child'. This charge leaves a degree of discretion to judges to fashion arrangements to suit the needs and special circumstances of each defendant. Ignoring the law, however, Judge Ciavarella imposed sentences at his pleasure, in proceedings that mocked federal and state constitutional and statutory guarantees of due process. Although guaranteed the right to counsel through the whole process, defendants were systematically and illegally urged to waive their rights and to plead guilty. More than 50 per cent of defendants appearing before Judge Ciavarella waived their rights to counsel, and 60 per cent of those who did were placed in extended detention, whereas only 20 per cent of those who were represented by counsel were so placed. 'The judge's whim is all that mattered in that courtroom', said the legal director of the Juvenile Law Center (which was instrumental in finally exposing the practices of Ciavarella's court). 'The law was basically irrelevant.'[6]

[5] W. Ecenbarger, *Kids for Cash* (New York: The New Press, 2012). All facts about this scandal discussed in this section are drawn from Ecenbarger's extended account, unless otherwise indicated.

[6] Quoted in I. Urbina, 'Despite Red Flags about Judges, a Kickback Scheme Flourished', *New York Times*, 27 March 2009.

In early 2009, the public learned that Ciavarella's 'zero tolerance' policy was motivated by nothing more than venal sinister interest. Ciavarella and his fellow judge, Michael Conahan, had been paid handsomely – $2.6 million during this period – to send juveniles to two private detention centres, while working to eliminate the public detention centre run by the county. The judges were indicted and later convicted on a number of federal charges including conspiracy, money laundering, racketeering, and tax evasion. Judge Ciavarella denied that the money he received for juveniles he sent to the private detention centres in any way influenced his judgment. The Pennsylvania Supreme Court disagreed. In October 2009, the court expunged all the convictions, some 3,000, handed down by Ciavarella between 2003 and 2008.

Although the venal motive was not uncovered until 2009, the practices of systematic denial of constitutional due process rights, excessively harsh and arbitrarily imposed sentences, and utter disregard for the law went entirely unquestioned by hosts of people – other judges, district attorneys, public defenders, court officers and staff, police, probation officers, school administrators, teachers, counsellors, and the like – who saw and heard but did nothing to challenge them. The Interbranch Commission on Juvenile Justice, established by the state legislature to investigate the scandal, opened its proceedings in October 2009 with these words:

> This morning our Commission begins its public hearings to assess the breath-taking collapse of the juvenile justice system in Luzerne County. Two judges stand criminally charged for conduct that had the unmistakable effect of harming children . . . there is little doubt that their conduct, whether criminal or not, had disastrous consequences for the juvenile justice system. . . . Our concern, however, is not only the action of two Luzerne County judges. Our concern is also the inaction of others. Inaction by judges, prosecutors, public defenders, the defense bar, public officials and private citizens – those who knew but failed to speak; those who saw but failed to act.[7]

Many people personally witnessed hundreds of occasions on which the constitutional rights of children were violated; clear dictates of the law protecting children from abuse by adults and the state were ignored in their presence. For six years, no one spoke up or spoke out – or nearly no one. In 2004, the Wilkes-Barre *Times Leader* ran a series of stories on apparent irregularities in Ciavarella's court, but it fell on deaf ears in the public. Many in the community, especially school administrators,

[7] Opening statement of the Commission, quoted in Ecenbarger, 232.

liked the zero-tolerance stance of Judge Ciavarella; many others regarded irregularities as par for the course in Luzerne County, which had a long history of corruption, nepotism, and mob-influenced politics. Perhaps it was fear, uncertainty, indifference to familiar moral corruption, or approval of the end result that silenced their judgment and anaesthetized their will to challenge.

The list of wrongs done and evils inflicted on the children and families of Luzerne County is long and disgusting, but, without denying or minimizing any of the other wrongs, I want to draw attention to just one, not because it is the most important from a moral point of view, but because it is easily overlooked. In Luzerne County, there was not only a breakdown of justice and a failure of fairness, but also a collapse of law, a failure of law's rule. In crucial respects, for a significant stretch of time, for the children of the county, the law offered no protection. Law did not matter. It did not count.[8] In the words of the prophet Habakkuk, the law became slack, the wicked surrounded the righteous, and judgment came forth perverted.[9] The protections promised by the rule of law were not realized. The rule of law failed due to a failure of fidelity.

The Rule of Law: Core Idea

The rule of law is a powerful political idea and ideal. It supplies the architectural frame of a just and decent society and the infrastructure of democracy. It is the foundation stone of economic and political development, and establishing a robust rule of law is widely thought to be the first task in rebuilding nations shaken by civil wars or oppressed by authoritarian rule. Political ideals with this kind of scope, power, and visibility cannot escape controversy, and some believe, with Jeremy Waldron, that the rule of law is an essentially contested concept.[10]

Yet, it seems to me that the core of the idea, acknowledged from the time of its inception in ancient times, is simple and straightforward. Throughout its long history, the idea has been rooted in the thought that the law promises protection and recourse against the arbitrary exercise of power. This twofold orienting thought is that (a) a polity is well ordered,

[8] For another extended example of the failure of fidelity in the Jim Crow era in the South of the United States, see G.J. Postema, 'Fidelity in Law's Commonwealth', in *Private Law and the Rule of Law*, ed. D. Klimchuck (Oxford University Press, in press).

[9] Habakkuk 1: 4.

[10] J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', *Law and Philosophy* 21 (2002), 137–64.